

**MEMO# 35525**

December 7, 2023

# **Draft Comment Letter on Proposed Amendments to FINRA Rule 2210; Comments Due to ICI by Tuesday, December 12**

[35525]

December 07, 2023

TO: Accounting/Treasurers Committee  
Advertising Compliance Advisory Committee  
Investment Advisers Committee  
Sales and Marketing Committee  
SEC Rules Committee

Small Funds Committee RE: Draft Comment Letter on Proposed Amendments to FINRA Rule 2210; Comments Due to ICI by Tuesday, December 12

Last month, FINRA filed with the SEC proposed amendments to Rule 2210 (Communications with the Public) (the "rule").<sup>[1]</sup> If adopted, the amendments would permit a FINRA member to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in an institutional communication (or a communication distributed solely to qualified purchasers that promotes or recommends specified non-public offerings), subject to several investor protection-oriented conditions.

Attached is ICI's draft comment letter. Please provide any comments ([matt.thornton@ici.org](mailto:matt.thornton@ici.org)) by **Tuesday, December 12, COB**. Comments are due to the SEC by December 15.

## **Summary of ICI's Draft Comment Letter**

Notwithstanding the rule's general prohibition on communications that predict or project performance,<sup>[2]</sup> the proposal would create "a new, narrowly tailored, exception" to this prohibition.<sup>[3]</sup>

Generally speaking, we believe that performance projections, subject to proper investor protection guardrails, can help inform investors'—including retail investors'—decision-making process. Because the current rule largely proscribes the use of performance projections in communications, adoption of the proposal would modestly improve the status quo. However, we regard this proposal as inferior to the hypothetical performance

standards that the SEC adopted in its 2020 marketing rule for investment advisers. We therefore recommend that the SEC instead adopt final amendments more comprehensively harmonized with these SEC standards, to permit retail communications to include performance projections in appropriate circumstances.

Matthew Thornton  
Associate General Counsel

#### Notes

[1] Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications; SEC Release No. 34-98977, 88 Fed. Reg. 82482 (Nov. 24, 2023) (the "proposal"), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf>. See ICI Memo No. 35516 for background and a more comprehensive summary of the proposal.

[2] FINRA Rule 2210(d)(1)(F) prohibits communications that "predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast," subject to specific exceptions for: a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy; an investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; and a price target contained in a research report on debt or equity securities, subject to certain conditions.

[3] More specifically, this proposal would permit "[a] communication that projects the performance or provides a targeted return with respect to a security or asset allocation or other investment strategy." This new exception would be limited to: (i) institutional communications, or (ii) communications that are distributed or made available only to "qualified purchasers" and that promote or recommend specified non-public offerings. This new exception also would require either the member or the communication itself to satisfy several conditions. And in connection with the proposed "reasonable basis" requirement, proposed Supplementary Material 2210.01 would require members to consider multiple enumerated factors.