

MEMO# 35641

March 11, 2024

Draft ICI Comment Letter on Proposed Amendments to FINRA Rule 2210; Comments Due to ICI by March 13

[35641]

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

Small Funds Committee RE: Draft ICI Comment Letter on Proposed Amendments to FINRA Rule 2210; Comments Due to ICI by March 13

In February, FINRA proposed to further amend Rule 2210 (Communications with the Public) (the "rule"). The amended proposal would permit a FINRA member to project 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 or "knowledgeable employees" that promotes or recommends specified non-public offerings), subject to several investor protection-oriented conditions.

ICI's draft comment letter reiterates comments made in our December letter and supports the amended proposal. Please provide any comments you may have on this draft letter to ICI (matt.thornton@ici.org) by March 13, COB. Comments are due to the SEC by March 20.

Background

In November 2023, FINRA filed with the SEC proposed amendments to Rule 2210.^[1] These 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.

In December, ICI filed a comment letter in response.^[2] In it, we maintained that performance projections and targets, 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 November 2023 proposal would modestly improve the status quo. To further extend the informational benefits of performance projections and targets, we urged FINRA to align more fully any final amendments with the performance standards that the SEC adopted in its 2020 marketing rule for investment advisers. Specifically, we recommended that FINRA (i) broaden the reach of any final rule amendments to include retail investors, and (ii) further streamline the rule's related conditions.

In February, FINRA proposed to further amend its November 2023 proposal to slightly expand it.^[3] Specifically, this latest proposed amendment also would permit inclusion of performance projections or targets in communications to "knowledgeable employees" (as defined in Rule 3c-5 under the Investment Company Act) involving certain private placements. FINRA did not otherwise propose further changes to its November 2023 proposal based on comments from ICI or others.

Summary of ICI's Latest Draft Comment Letter

Linked below is a follow-up draft comment letter. In it, we reiterate the comments made in our December 2023 letter and fully incorporate them by reference. We state that we have no objection to permitting inclusion of performance projections or targets in communications to "knowledgeable employees" involving certain private placements. While our long-term policy preference remains greater alignment of Rule 2210's provisions related to performance projections and targets with the analogous provisions in the SEC's marketing rule for investment advisers, this amended proposal is a welcome step in that direction. And overall, because the amended proposal is sound and beneficial policy that would protect investors and the public interest, we support its prompt approval by the SEC.

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 "November 2023 proposal"), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf>. See ICI Memo No. 35516 for additional background and a more comprehensive summary of the November 2023 proposal.

^[2] Available at: <https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314280-819322.pdf>.

^[3] Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, 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. 34-99588, 89 Fed. Reg. 14728 (Feb. 28, 2024) (the "amended proposal"), available at www.govinfo.gov/content/pkg/FR-2024-02-28/pdf/2024-04072.pdf.

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