

MEMO# 35800

August 2, 2024

SEC Approves, Then Stays, Amendments to FINRA Rule 2210

[35800]

August 02, 2024

TO: ICI Members SUBJECTS: Advertising
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Investment Advisers RE: SEC Approves, Then Stays, Amendments to FINRA Rule 2210

In late July, the SEC approved, then shortly thereafter stayed, amendments to FINRA Rule 2210 (Communications with the Public) (the "rule"). The amendments would allow a FINRA member firm to project investment performance or provide a targeted return in limited circumstances and subject to certain conditions. At this point, the amendments' fate is unclear.

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 February, FINRA proposed to slightly expand its November 2023 proposal.[\[2\]](#) 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 Comment Letters

In our December 2023[\[3\]](#) and March 2024[\[4\]](#) comment letters, we supported the proposed amendments. We believe 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, adopting the proposal would modestly improve the status quo. We noted that while our long-term policy preference remains greater alignment of Rule 2210's provisions related to performance projections and targets with those in SEC Rule 206(4)-1 under the Advisers Act, FINRA's proposal was a welcome step in that direction.

The SEC's Latest Actions

On July 19, the SEC approved the proposed amendments, finding that they were "designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest."^[5] The SEC's Division of Trading and Markets made this order for the Commission, pursuant to delegated authority.

However, one week later, the SEC's Deputy Secretary notified FINRA that "pursuant to Rule 431 of the Commission's Rules of Practice..., the Commission will review the delegated action. In accordance with Rule 431(e), the July 19, 2024 order is stayed until the Commission orders otherwise."^[6]

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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), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf>. See ICI Memo Nos. 35516 and 35641 for additional background and more comprehensive summaries of the proposals.

^[2] 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), available at www.govinfo.gov/content/pkg/FR-2024-02-28/pdf/2024-04072.pdf.

^[3] Available at: www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314280-819322.pdf.

^[4] Available at: www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-447019-1142723.pdf.

^[5] Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend FINRA Rule 2210 (Communications with the Public) to Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified Purchasers and Knowledgeable Employees, SEC Release No. 34- 100561, 89 Fed. Reg. 60461 (July 25,

2024), available at www.govinfo.gov/content/pkg/FR-2024-07-25/pdf/2024-16304.pdf.

[6] Available at:

www.sec.gov/files/rules/sro/finra/2024/letter-regarding-sr-finra-2023-016.pdf. Rule 431(e) states in part: "An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission. Upon filing with the Commission of a notice of intention to petition for review, or upon notice to the Secretary of the vote of a Commissioner that a matter be reviewed, an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise... ."

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