

CLIENT ALERT

FINRA Proposes Greater Flexibility to Show Target and Projected Performance in Communications with the Public

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On February 10, 2026, FINRA filed a proposed rule change with the SEC to allow broker-dealers to show target and projected performance regarding securities, securities portfolios, asset allocations, and other investment strategies if three conditions discussed below are satisfied.¹ The proposed rule change is a welcome expansion from FINRA's 2023 proposed rule change, which would have limited the ability of broker-dealers to show target and projected performance in communications directed to institutional investors and qualified purchasers in funds that were only available to qualified purchasers.² However, while the proposed rule change moves closer to Rule 206(4)-1 under the Advisers Act ("Marketing Rule"), as discussed below, the amended FINRA Rule 2210 would continue

¹ Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) (SR-FINRA-2026-004), <https://www.finra.org/sites/default/files/2026-02/SR-FINRA-2026-004.pdf>.

² 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, Exchange Act Release No. 98977 (Nov. 17, 2023), 88 Fed. Reg. 82482 (Nov. 24, 2023) (SR-FINRA-2023-2016).

to diverge from the Marketing Rule in meaningful ways. Comments on the proposed rule change are due 21 days from publication in the Federal Register.

Permitted Use of Target and Projected Performance

Proposed FINRA Rule 2210(d)(1)(F)(iv) would permit a communication that projects the performance or provides a targeted return with respect to a security, a securities portfolio, or an asset allocation or other investment strategy, provided that the member:

1. adopts and implements written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the intended audience of the communication;
2. has a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retains written records supporting the basis for such criteria and assumptions; and
3. provides sufficient information to enable the intended audience to understand (i) the criteria used and assumptions made in calculating the projected performance or targeted return, including whether the projected performance or targeted return is net of anticipated fees and expenses; and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions, including reasons why the projected performance or targeted return might differ from actual performance.

Written Policies and Procedures

The proposed rule change does not prescribe the ways in which a member may satisfy the policies and procedures requirement, including how the member will establish that the policies and procedures are reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the intended audience of the communication. Instead, the release stated that this condition is intended to provide members with the flexibility to develop policies and procedures that best suit their investor base and the business in which they engage. FINRA stated that, for example, a broker-dealer could adopt and implement written policies and procedures that are based in part on the member's past experiences with particular types of investors who seek this information, such as those that have expressed interest in particular types of securities, or who have invested in similar securities in the past.

FINRA also stated that reasonably designed policies and procedures need not address each recipient's particular circumstances. Rather, a member's policies and procedures may account for the grouping of investors into categories or types based on the member's reasonable judgment as to the likely investment objectives and financial situation of that investor category that is the intended audience of a communication.

In the release, FINRA cautioned that a communication that contains projections of performance or targeted returns should only be distributed where the member reasonably believes the investors for whom that communication is intended have the financial expertise and resources to understand the risks and limitations of such presentations.

FINRA also stated that members generally would not be able to include projections of performance or targeted returns in communications directed to a mass audience or intended for general circulation, including to a general retail investor audience. In the case of communications available to mass audiences, the release stated that a member generally could not form any expectation that the communication is relevant to the likely financial situation and investment objectives of the intended audience.

Reasonable Basis Requirement

FINRA notes that the proposed rule change does not prescribe the manner in which the member forms its reasonable basis, nor does it require members, or third parties whose projections or targeted returns appear in member communications, to adopt a prescribed methodology in creating these projections. Instead, the factors a member considers when forming its reasonable basis for the criteria used and assumptions made in calculating projected performance or targeted returns would depend on the facts and circumstances. The release noted that factors may include, for example, such considerations as: global, regional, and country macroeconomic conditions; in the case of a single security issued by an operating company, the issuing company's operating and financial history; the industry's and sector's current conditions and the stage of the business cycle; the quality of the assets included in a securitization; and the appropriateness of selected peer group comparisons.

The release further provided that FINRA expects members to establish and maintain a supervisory system to achieve compliance with the reasonable basis standard. Before presenting projected performance or a targeted return, a member should determine whether its existing written supervisory procedures are reasonably designed to ensure that the criteria used and assumptions made in calculating the projected performance or targeted return have a reasonable basis.

Disclosure Requirements

Under the proposed rule, members would be expected to provide a general description of the methodology used sufficient to enable the investors to understand the basis of the methodology, as well as the assumptions underlying the projection or targeted return. FINRA stated that the disclosure requirement is not intended to prescribe any particular methodology or calculation of target or projected performance, and that FINRA does not expect a firm to disclose proprietary or confidential information regarding the firm's methodology and criteria.

General Standards and Supervision Under Rule 2210

FINRA reminded members that, as with all communications with the public, member communications that contain projected performance or targeted returns must meet Rule 2210's general standards. This includes the requirements that communications be fair and balanced, provide a sound basis for evaluating the facts in regard to any particular security or type of security, and not contain false, exaggerated, unwarranted, promissory or misleading content.

FINRA also discussed its expectations of members relying on third-party models or software to create a projection or targeted return. The member would be expected to establish and maintain a supervisory system reasonably

designed to ensure that any projections or targeted returns created by a third-party vendor are used consistently with the proposed rule change's requirements. For example, FINRA noted that the member would need to obtain enough information to form a reasonable basis as to the third party's assumptions and the underlying criteria and would need to retain written records supporting the basis for such criteria and assumptions.

FINRA stated that members should make reasonable efforts to determine whether the model or software is sound and should make reasonable inquiries into the source and accuracy of the data used to create the projection or targeted return. If the member has reason to suspect that the third-party model or software lacks a sound basis, the member should investigate the matter and, if it cannot be reasonably assured that the model or software is sound, must not use it. Among factors that a member may wish to employ to evaluate the third-party model or software are the assumptions used to create the projection or target, the rigor of its analysis, the date and timeliness of any research used to create the model or software, and the objectivity and independence of the entity that created the model or software.

Comparison to the Marketing Rule

The requirements of the Marketing Rule in many ways overlap with the proposed rule change's requirements. FINRA stated that it anticipates it would interpret requirements in the proposed rule change to align with similar requirements in the Marketing Rule and consistently with how the SEC has interpreted those Marketing Rule requirements.

FINRA also acknowledged that, while it endeavored to align the proposed rule change to the Marketing Rule, differences remain, highlighting what it views as three such differences in the release. First, the scope of the type of performance covered in the proposed rule change is narrower than the relevant Marketing Rule provisions. In this regard, the relevant provision of the Marketing Rule addresses "hypothetical performance," while the proposed rule change only applies to target and projected performance. Second, as noted above, the proposed rule change expressly requires a member to have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return and requires that the member retains written records supporting the basis for such criteria and assumptions. Third, the proposed rule change requires a member to disclose, as part of a projection's or targeted return's risks and limitations, the reasons why the projected performance or targeted return might differ from actual performance. Another difference from the Marketing Rule that FINRA did not discuss is that the Marketing Rule allows an investment adviser to provide or offer to provide promptly to private fund investors disclosure about the risks and limitations of using the hypothetical performance.

Conclusion

The proposed rule change is a welcome acknowledgment by FINRA of the divergence between FINRA Rule 2210 and the Marketing Rule, as well as the disparity of information that can be provided to prospective investors depending on whether marketing materials are distributed by a FINRA member or an investment adviser. This is particularly relevant in the case of private funds, where prospective investors who are solicited without the involvement of a full-service FINRA member are permitted, subject to the conditions in the Marketing Rule, to receive performance information, including related, extracted, predecessor, and hypothetical performance, that a full-

service FINRA member might not be able to include in its marketing materials for the same products. While the proposed rule change is a helpful step in the right direction, FINRA again declined to fully harmonize FINRA Rule 2210 with the Marketing Rule with respect to overlapping requirements.

The reasonable basis requirement could prove to be the most significant difference between relevant provisions of the Marketing Rule and the proposed changes to FINRA Rule 2210. It is unclear to what extent the SEC's expectations for investment advisers in their compliance with the Marketing Rule will align with FINRA's expectations for members in their compliance with the proposed rule change, notwithstanding FINRA's stated desire to create uniformity between the two standards. In addition, the reasonable basis requirement appears to potentially pose distinct challenges for a member that is distributing projected performance and targeted return information to a large customer base or with respect to information that is calculated by the sponsor or manager of a private fund or another third party.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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