FINRA MEETS THE MARKETING RULE—MOSTLY: PERFORMANCE PROJECTIONS AND TARGETED RETURNS UNDER PROPOSED AMENDMENTS TO RULE 2210

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US Asset Management and Investment Funds Alert

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For years, broker-dealers have operated under a regulatory regime that has sharply constrained their ability to discuss future performance—even as investment advisers have enjoyed broader latitude under Rule 206(4)-1 under the Investment Advisers Act of 1940 (the Marketing Rule). That imbalance may finally be narrowing. The Financial Industry Regulatory Authority (FINRA) has proposed amendments to FINRA Rule 2210 "Communications with the Public" that would—at long last—provide broker-dealers with flexibility to show projected performance and targeted returns to institutional and retail customers (the FINRA Proposal).[1]

The FINRA Proposal would permit broker-dealers to show projected performance and targeted returns for a security, a securities portfolio, an asset allocation, or other investment strategy, provided that the broker-dealer:

- 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.
- Has a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and the broker-dealer retains written records supporting the basis for such criteria and assumptions.
- Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the projected performance or targeted return and 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.

Although the ability to show targeted returns is most relevant to private funds, which have lobbied for additional flexibility, the FINRA Proposal is not limited to certain types of funds or securities, nor is it limited to institutional investors or qualified purchasers. Broker-dealers would be able to show projections and targeted returns in materials promoting mutual funds and exchange-traded funds, as well as individual securities. The FINRA Proposal also covers securities portfolios, asset allocation, and other investment strategies that may be offered through a broker-dealer.

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KEY TAKEAWAYS

The FINRA Proposal would align broker-dealers' use of projections and targeted returns more closely to the Securities and Exchange Commission's (SEC) framework for hypothetical performance under the Marketing Rule and the policies and procedures and disclosure obligations would be largely the same. But harmonization does not mean uniformity. The FINRA Proposal differs from the Marketing Rule in that it:

- Adds the requirement that broker-dealers have a "reasonable basis" for the criteria used and the assumptions made in calculating projected performance and targeted returns.
- Would not extend to all hypothetical performance. The FINRA Proposal would only cover forward-looking projections and targeted returns, not backtested performance or model portfolios.

The FINRA Proposal also departs from certain long-standing views under Rule 2210. For example, the FINRA Proposal would permit:

- Projections and targeted returns for all customers and would not differentiate between institutional and retail communications.
- General projections outside of the investment analysis tool exception under FINRA Rule 2214.
- Broker-dealers to show the internal rate of return (IRR) for funds with unrealized investments.

THE MARKETING RULE AND FINRA PROJECTIONS

The clear intent of the FINRA Proposal is to harmonize, as much as FINRA feels possible, the broker-dealer and investment adviser marketing regimes with respect to projections and targeted returns. While the Marketing Rule does not restrict an adviser from showing other types of hypothetical performance, FINRA clearly is not comfortable going that far. Other than that, and a few notable differences discussed below, the FINRA Proposal effectively imports the provisions related to hypothetical performance from the Marketing Rule into the FINRA regime. In the release relating to the FINRA Proposal (the Proposing Release), FINRA even says that it will "interpret requirements in the proposed rule change that align with similar requirements in the Marketing Rule consistently with how the [SEC] has interpreted those Marketing Rule requirements."[2] This will come as a relief to many, as the SEC staff has issued a variety of FAQs related to the Marketing Rule,[3] and they are likely to issue more.

Like the Marketing Rule, the FINRA Proposal would allow the distribution of projections and targeted returns to any investor—including retail investors, but only if the broker-dealer has 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.[4] This condition has the effect of limiting broad public distribution of such performance information because a broker-dealer must have a process to distribute projections and targeted returns only to investors or classes of investors that will find it relevant to their situation.[5] While these groups may be broadly defined based on the broker-dealer's past experience, this performance information may not be distributed through mass-market circulation publications or unrestricted website access.[6]

Also like the Marketing Rule, the FINRA Proposal requires the broker-dealer to provide (i) sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the projected

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performance or targeted return, and (ii) the risks and limitations of using the projected performance or targeted return in making investment decisions.

Limits to Harmonization

The Reasonable Basis Requirement

While the disclosure requirements noted above mirror those in the Marketing Rule, the FINRA Proposal adds a few more bells and whistles. For the first disclosure requirement, the FINRA Proposal would, if adopted as proposed, also require broker-dealers to include "whether the projected performance or targeted return is net of anticipated fees and expenses." This requirement is not explicitly stated in the hypothetical provisions of the Marketing Rule, but other requirements of the Marketing Rule require that any presentation of gross performance be accompanied by net performance. For the second disclosure requirement, the FINRA Proposal further requires "reasons why the projected performance or targeted return might differ from actual performance." Again, while this is not explicit in the Marketing Rule provisions, the adopting release relating to the Marketing Rule states that such disclosure should also include any "known reasons why the hypothetical performance might differ from actual performance of a portfolio."[7] Accordingly, these additional terms resemble clarifications instead of substantive differences.

However, FINRA does add a new substantive requirement that is arguably a departure from the Marketing Rule. The FINRA Proposal requires broker-dealers to have "a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return" and to retain "written records supporting the basis for such criteria and assumptions." FINRA views this reasonable basis requirement as "foundational" because "without forming a reasonable basis, a member's projections of performance and targeted returns could be based on guesswork, invalid presumptions, and misleading reasoning."[8] While FINRA points to the Marketing Rule's general prohibitions as containing overall principles that align with this concept, this specific reasonable basis requirement and accompanying recordkeeping requirement will likely require enhancements to any dual registrant's existing policies and procedures.

The concept of a reasonable basis is contained elsewhere in FINRA rules,[9] and it is already in Rule 2210's requirements related to research report price targets. FINRA is not prescribing a specific manner or methodology for broker-dealers to form this reasonable basis. Instead, FINRA suggests that firms follow a principles-based process that is dependent on the specific facts and circumstances. FINRA does offer helpful guidance that may assist firms to develop and substantiate a reasonable basis, including by noting a specific nonexhaustive list of factors that a firm may consider in developing this reasonable basis.[10] Finally, the FINRA Proposal requires broker-dealers to develop an appropriate supervisory system designed to ensure compliance with the reasonable basis condition and accompanying recordkeeping provisions. Firms will need to retain contemporaneous records evidencing methodology, data inputs/sources, assumptions (including fees/expenses treatment), and key limitations as they develop this reasonable basis.

As broker-dealers consider these proposed new requirements, they should evaluate the extent to which they need to make changes to existing policies and procedures, how they would be appropriately documented, and the burdens of the divergent requirements on providing such projections and targets under the two marketing regimes.

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Only Forward-Looking Hypothetical Performance Permitted

One of the most significant deviations from the Marketing Rule is the FINRA Proposal's narrow application to forward-looking performance. The Marketing Rule permits (subject to certain conditions) backward-looking hypothetical performance (e.g., model performance, backtested performance) in addition to forward-looking hypothetical performance (e.g., targeted performance, projected performance). FINRA acknowledged this distinction and noted in the Proposing Release that model performance and backtested performance were intentionally omitted from the proposed rule changes. Ultimately, this disconnect between the Marketing Rule and the FINRA Proposal would continue to provide a competitive advantage for investment advisers and private fund sponsors that do not offer funds through a broker-dealer. Despite embracing many SEC constructs in the FINRA Proposal, FINRA is holding fast to its views on backtested performance, which would continue to be prohibited, except in connection with pre-inception index performance data in institutional communications.

As threshold matter, whether target returns should be considered hypothetical performance at all has been hotly debated in the industry. Target returns are often viewed as fundamental characteristics of an investment strategy and are often used as a benchmark to describe an investment strategy or objective, or to measure the risk/return profile of a strategy. FINRA acknowledges this in the Proposing Release, and the SEC staff has also recognized that target returns may not involve all or any of the inputs and assumptions that go into projected returns. Ultimately, the SEC determined the difference between targeted and projected returns is not always readily apparent, and therefore, they require the same treatment under the Marketing Rule. FINRA essentially takes the same view, noting that that because the intended audience of a communication may not always understand or appreciate the differences between targeted returns and projections, FINRA would subject both targeted returns and projections to the same conditions in the FINRA Proposal. While adoption of the FINRA Proposal would further cement treatment of targeted returns as a restricted type of hypothetical performance, perhaps in the future this recognized distinction between targets and projections can open the door for more flexibility in the presentation of target returns.

FINRA DEPARTS FROM CERTAIN LONG-STANDING VIEWS

As noted above, the FINRA Proposal departs from certain historical positions.

No Distinction Between Retail and Institutional Investors

The FINRA Proposal would permit the use of projections and targeted returns for all customers, subject to the limitations described above. This is a significant departure for FINRA, which historically has been careful to limit the use of hypothetical performance to institutional investors. It is also a departure from FINRA's prior proposals relating to projections and targeted returns. For example, FINRA previously filed proposed amendments to Rule 2210 in 2023 (2023 Proposal)[11] that would have permitted broker-dealers to project performance or provide a targeted return with respect to a security, asset allocation, or other investment strategy in (i) an “institutional communication,” or (ii) a communication that is distributed or made available only to “qualified purchasers” (as defined under the Investment Company Act of 1940) and that promotes or recommends either a private offering or private placement exempt from certain FINRA requirements. Accordingly, the text of the 2023 Proposal imposed a clear distinction regarding the type of audience that could receive a communication containing performance projections or targeted returns. This explicit distinction was not included in the FINRA Proposal in order to harmonize its requirements with the Marketing Rule.

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Instead of prohibiting a broker-dealer from distributing a communication with projections or targeted returns to retail investors, FINRA takes the same approach as the Marketing Rule in requiring policies and procedures designed to ensure that the performance is relevant to the likely financial situation and investment objectives of a retail audience. FINRA also points to other controls. Specifically, FINRA noted that, to the extent a member determines that the communication is relevant to the likely financial situation and investment objectives of a retail investor to whom it is recommending a securities transaction or investment strategy, Regulation Best Interest, which generally requires broker-dealers to act in a retail customer's best interest when making certain recommendations involving securities, would provide additional protection to the retail investor.

General Projections Outside of an Investment Analysis Tool

The FINRA Proposal does not eliminate the existing exception from Rule 2210(d)(1)(F) for investment analysis tools and written reports produced by investment analysis tools that satisfy the requirements of FINRA Rule 2214. Rather, the FINRA Proposal creates another exception for projections that is broader than Rule 2214. Rule 2214 was originally adopted to permit broker-dealers to use technological tools to calculate the probability that investment outcomes such as reaching a particular financial goal would occur.[12] An investment analysis tool provides individual results to each user based on the customer's interaction with the tool directly or with a representative's assistance. The FINRA Proposal does not require this interactive element for the delivery of a projection, nor does it require firms to conduct any type of statistical analysis (e.g., Monte Carlo simulation) to determine the likelihood of a particular outcome under various scenarios or the probability of success of any particular scenario.

The disclosure required under the FINRA Proposal similarly differs from that currently required under Rule 2214 in recognition of the different types of communications. For example, the disclosure under Rule 2214 that relates to the universe of investments considered in the analysis and how the tool determines which securities to select is important in the case of an investment analysis tool that might recommend a different investment or portfolio composition to improve the probability of a particular outcome. However, it is less relevant in the case of projections and targeted returns that forecast the future performance of a particular security, securities portfolio, asset allocation, or other investment strategy. Similarly, the more onerous requirement to have a reasonable basis for the criteria and assumptions made in calculating projections or targeted returns and to retain the associated records supporting the basis for the criteria and assumptions do not apply to investment analysis tools.

IRR for Unrealized Investments

The FINRA Proposal also represents a departure from prior guidance on the performance of unrealized holdings. Previously, FINRA has stated that the performance of unrealized holdings are prohibited projections under Rule 2210, and therefore, the use of IRR for funds with unrealized investments would be prohibited in retail communications.[13] In guidance to its members, FINRA did provide limited relief to permit IRR for funds with incomplete investment programs if the IRR was calculated in accordance with the Global Investment Performance Standards. The FINRA Proposal could allow broker-dealers additional flexibility in presenting IRR calculated according to different methodologies, so long as the broker-dealer complies with the conditions of the proposal.

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FURTHER ENGAGEMENT

This is the third bite at the apple by FINRA on this topic, with previous proposals in 2017[14] (around the time the Marketing Rule was being considered) and in the 2023 Proposal. We expect that the third time will be the charm, and after considering feedback, FINRA will obtain approval for the rule change. Comments will be due 21 days after publication in the *Federal Register* (potentially as early as mid-March). Industry participants seeking further harmonization should consider submitting comments.

FOOTNOTES

[1] SR-FINRA-2026-004 Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) (Feb. 10, 2026), https://www.finra.org/sites/default/files/2026-02/SR-FINRA-2026-004.pdf.

[2] FINRA goes on to state: "Thus, member firms should be able to comply with these proposed requirements in a manner similar to how investment advisers must comply with similar requirements applicable to the use of hypothetical performance under the IA Marketing Rule."

[3] *See Marketing Compliance – Frequently Asked Questions* (most recent update Jan. 15, 2026), https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/marketing-compliance-frequently-asked-questions.

[4] The FINRA Proposal cautions that such a communication should only be distributed when the member reasonably believes that the investor for whom the communication is intended has the "financial expertise and resources to understand the risks and limitations of such presentations."

[5] Importantly, under the Marketing Rule, and presumably under the FINRA Proposal, this does not require an individualized analysis of the situation of each investor. Instead, a broker-dealer or investment adviser may create policies and procedures identifying groups or types of investors where this performance information may fit their likely financial situation and investment objectives.

[6] FINRA noted its doubt that broker-dealers would be able to form any expectation that communications sent on an unrestricted basis, including to a general retail audience, would be relevant to the likely financial situation and investment objectives of the intended audience.

[7] *See Investment Adviser Marketing*, Final Rule, Advisers Act Release No. 5653 (Dec. 22, 2020).

[8] FINRA Proposal.

[9] *See* FINRA Rule 2241.

[10] FINRA notes that these 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."

[11] SR-FINRA-2023-016 Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) to Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified

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Purchasers (Nov. 17, 2023), https://www.finra.org/rules-guidance/rule-filings/sr-finra-2023-016.

[12] An "investment analysis tool" is defined in FINRA Rule 2214(b) as an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.

[13] *See* FINRA Regulatory Notice 20-21 (July 2020).

[14] *See* Regulatory Notice 17-06 (Feb. 2017).

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