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March 27, 2017

By Electronic Mail (pubcom@finra.org)

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Proposal to Amend Communications with the Public Rule to Permit the Distribution of Customized Hypothetical Investment Planning Illustrations that Include the Projected Performance of an Asset Allocation or Other Investment Strategy (Regulatory Notice 17-06)

Dear Ms. Asquith:

Fidelity Investments[1] appreciates the opportunity to comment on the proposed amendments to the Financial Industry Regulatory Authority's ("FINRA") rules governing communications with the public.[2] The proposed amendments are another step by FINRA in implementing the recommendations of its *Retrospective Rule Review Report*, published in December 2014.[3]

Fidelity supported FINRA's retrospective review of the communications rules and provided extensive comments regarding how certain aspects of the rules (which were first enacted in 1980) could be updated to address current communications preferences of investors.[4] With these proposed amendments, FINRA is attempting to harmonize its rules regarding the use of projections in broker-dealer communications materials with regulations pertaining to registered

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[1] Fidelity is one of the world's largest providers of financial services. The firm is a leading provider of investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 20 million individuals and institutions, as well as through 5,000 financial intermediary firms.

[2] FINRA *Regulatory Notice 17-06* (Feb. 2017), at www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

[3] *FINRA Communications with the Public, Retrospective Rule Review Report* (Dec. 2014), at https://www.finra.org/sites/default/files/p602011.pdf.

[4] *See, e.g., Letter from Alexander C. Gavis, Senior Vice President & Deputy General Counsel, Fidelity Investments, to Ms. Marcia E. Asquith, Office of the Corporate Secretary, FINRA*, dated May 23, 2014; *Letter from Alexander C. Gavis, Fidelity Investments, to Ms. Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated July 2, 2015.*

investment advisors under rules of the Securities and Exchange Commission. Fidelity suggested such a harmonization in its comments to FINRA's retrospective review of communications along with other commenters. For many years, FINRA has prohibited the use of projections by broker-dealers in communications materials, with only a few limited exceptions, and this has served to limit broker-dealers' flexibility in providing useful analyses to their clients and customers.

FINRA Rule 2210(d)(1)(F) currently states that communications may not (1) predict or project performance, (2) imply that past performance will recur, or (3) make any exaggerated or unwarranted claim, opinion or forecast. The current rule does not prohibit the use of (1) hypothetical illustrations of mathematical principles, (2) specific types of investment analysis tools, and (3) price targets contained in research reports. FINRA's proposed rule change provides a further exception to the prohibition on use of projections by allowing for "a *customized* hypothetical investment planning illustration that projects performance of an asset allocation or other investment strategy and not an individual security." [5]

In support of the proposed amendments, FINRA states that "information regarding the expected performance of an asset allocation or other investment strategy that does not project the performance of individual securities could better inform an investor about assumptions upon which the recommendation to pursue such a strategy is based," and it further notes that "investment advisers often present performance projections in communications with their clients, particularly in communications concerning financial planning or asset allocation."[6] We agree and believe that the proposed amendments will greatly inform and benefit investors and further permit FINRA staff to focus its limited resources on categories of communications that may involve greater risks.

Fidelity strongly supports FINRA's efforts in modernizing this rule. While the proposed amendments are a very good step forward, we recommend below several changes to the proposal that will provide additional flexibility in the use of projections by member firms with clients and customers and will clarify ambiguous language.[7]

First, Fidelity recommends that FINRA use a word other than "customized" in the proposed amendments. FINRA indicates that a customized illustration is "one designed for a particular client or multiple clients who share an account."[8] An assumption is that FINRA's proposed use of "customized" was intended to prohibit practices that could include the wide-spread dissemination of hypothetical illustrations of performance for marketing purposes. While

[5] *Regulatory Notice* 17-06, at pp. 9-10.

[6] *Regulatory Notice* 17-06, at pp. 2-3.

[7] Fidelity also supports the comments submitted to FINRA by the Investment Company Institute and the Securities Industry and Financial Markets Association, on March 27, 2017.

[8] *Regulatory Notice* 17-06, at Endnote 4.

Fidelity agrees that these communications should not be widely disseminated solely for promotional purposes, we feel strongly that there are uses for these communications beyond one-to-one *customized* interactions that could provide valuable, educational content to existing and potential clients without an increased risk that the projection will be used inappropriately.

The word "customized" connotes a bespoke quality, meaning each projection is specifically crafted or designed for use with a particular individual. We believe that there are substantial public benefits in allowing firms to disseminate more broadly to investors communications that contain hypothetical illustrations of potential performance that are personalized *and* standardized. For example, customers who are considering retirement will benefit from receiving a personalized communication with an analysis that provides a projection of their retirement assets at retirement and whether there may be a gap in what they anticipate and what is illustrated based upon reasonable modeling. This type of personalized communication provides a very useful catalyst for investors in saving further or in discussing their financial situation with a financial representative.

To address this concern, Fidelity recommends that FINRA instead use already adopted language in Rule 2211(b)(5)(B) that addresses the use of projections with annuity products.[9] That rule allows for hypothetical illustrations "which reflect factors relating to the individual customer's circumstances." Further it states that "[i]n retail communications and correspondence which include hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer's circumstances." This change would clarify the customer specific element of the communication with terms member firms are already familiar with, instead of creating a new standard for customization and potentially driving FINRA to provide further interpretative guidance and supplementary materials on what customization means.

Second, Fidelity recommends that FINRA change the language -- "a specific security" (in the proposed Rule 2210(d)(1)(F)(iv)) and "an investment" (in the language of the existing Rule 2210(d)(1)(F)(i)) to "a specific investment" in both. This change would better align and harmonize the language between the proposed and existing rule, without losing the intended purpose of the prohibition on projections of performance of a specific investment.

FINRA should also delete the reference to "investment strategy" in the existing Rule 2210 (d)(1)(F)(i), so there is no conflict or confusion with this language and the permissive language regarding projections of performance in Proposed Rule 2210 (d)(1)(F)(iv), which provides for the use of such projections in hypothetical planning illustrations based on an asset allocation or other investment strategy.

[9] Rule 2211(a)(5)(B) state: "In retail communications and correspondence which include hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer's circumstances. A personalized illustration may not contain a rate of return greater than 12% and must follow all of the standards set forth in subparagraph (A), above."

We provide a redlined version of these recommended changes below.

Rule 2210(d)(1) (red text indicates the proposed rule):

(F) Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (d)(1)(F) does not prohibit:

(i) A hypothetical illustration of mathematical principles provided that it does not predict or project the performance of a specific investment ~~or investment strategy~~;

(ii) An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; ~~and~~

(iii) A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target; and

(iv) A ~~customized~~ hypothetical investment planning illustration that reflect factors relating to an individual customer's circumstances and projects performance of an asset allocation or other investment strategy and not ~~an individual security~~ a specific investment, provided that:

a. there is a reasonable basis for all assumptions, conclusions and recommendations; and

b. the illustration clearly and prominently discloses:

(I) that the illustration is hypothetical;

(II) that there is no assurance that any described investment performance or event will occur; and

(III) all material assumptions and limitations applicable to the illustration.

* * *

The proposed amendments address longstanding discrepancies between FINRA communications rules and SEC rules regarding investment advisors. While not completely parallel to advisor regulations, the proposed rule changes will provide flexibility to broker-dealers in assisting clients and customers in understanding how their investment strategies may perform in the future, and thus greatly helping with current planning decisions.

Fidelity recommends that FINRA next focus on harmonizing its rules and interpretations regarding the use of related performance in broker-dealer retail communications with SEC interpretations under the Investment Advisers Act of 1940. We also recommend that FINRA address additional communications regulations that have an impact on the delivery of clear and compelling communications to investors. In our previous comment letters, we recommended that FINRA focus on principle based disclosure solutions across all forms of communications including those through social media and mobile and wearable devices, as well as addressing regulations and policies that have affected the amount of disclosure in print advertising.

Fidelity appreciates the opportunity to comment on FINRA's proposed rule amendments.

Sincerely yours,

/s/ Alexander C. Gavis

Alexander C. Gavis
Senior Vice President & Deputy General Counsel

<u>Copies to</u>:
Mr. Robert Cook, CEO and Chairman
Mr. Robert Colby, Chief Legal Officer
Mr. Thomas Selman, Executive Vice President
Mr. Joseph Price, Senior Vice President
Mr. Thomas Pappas, Vice President and Director
Mr. Joseph Savage, Vice President and Counsel
Ms. Amy Sochard, Senior Director
Financial Industry Regulatory Authority