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VIA EMAIL TO pubcom@finra.org

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

Re: Proposed Amendments to FINRA Regulatory Notice 17-06, Proposed Changes to Rule 2210 Governing Communications with the Public

Dear Ms. Asquith,

Thank you for the opportunity to comment on FINRA's proposal to amend its Rule 2210, allowing brokers to communicate hypothetical performance projections of investment strategies to individual investors. The Georgia State University College of Law Investor Advocacy Clinic represents individual investors who have suffered losses resulting from broker misconduct but are unable to obtain a lawyer due to the relatively modest sizes of their claims. While most of our clients excel at their jobs, their expertise rarely extends to investing; in fact, most of them have very limited investment experience. As a result, our clients tend to place great trust in their brokers and rely significantly on their representations when making investment decisions. This reliance makes our clients particularly susceptible to misleading communications by their brokers. An investment professional's lack of communication or failure to disclose critical information, often benefitting the broker at the investor's expense, stands at the center of many of our clients' claims. It is critical that any attempt to change the current rules governing communications with the public take this reality into account.

Brokers should not be allowed to communicate hypothetical performance projections to their clients without owing to them the duties of a fiduciary. If FINRA chooses to allow this amendment without holding brokers to the fiduciary standard, several changes to the proposed rule are required to protect individual investors. First, broader disclosures are necessary to ensure that investors understand precisely the nature of the communications with which they are presented. Second, all projection-related communications and the means used to generate them must be subject to strict document retention guidelines and automatically discoverable in any subsequent dispute.

1. Brokers and Investment Advisers Must First be Placed on Equal Fiduciary Footing.

An expansion of a broker's fiduciary responsibilities to match those of investment advisers must accompany any proposed expansion of their ability to present projection-based communications. The current duality of treatment of projections-related communications between investment advisers and brokers reflects the difference in fiduciary standards that apply to each. Oversimplified projections-related communications presented by brokers to their clients present a high risk of misleading small investors who place great trust in their brokers' representations. If brokers are to have the same ability as investment advisers to present hypothetical performance projections to their clients, they must also be subject to the same fiduciary duties and responsibilities.

2. Broader Disclosures, Including a Range of Projections, are Necessary to Prevent Individual Investors from Being Misled.

Because projections-related communications present a high risk of misleading small investors, the illustration disclosures must be not only clear and prominent but also both comprehensive and specific. While we fully endorse FINRA's underlying goal to "better inform investors about recommended investment strategies, including the underlying assumptions upon which the recommendations are based,"¹ our concern is that the proposed presentation of a "customized hypothetical investment planning illustration that projects performance"² may mislead small investors instead. A mere statement that the illustration is hypothetical and that no assurance can be made that a particular projection will occur³ does little to actually prevent misleading the individual investor. Including a broad range of projections, both positive and negative, can help mediate any oversimplification and present a more realistic picture to the individual investor by communicating variation and uncertainty. Presenting a range rather than a single figure visually emphasizes the hypothetical nature of the projections.

Furthermore, in order for the hypothetical illustration to actually "disclose[] . . . all material assumptions and limitations applicable,"⁴ it is imperative that the illustration unambiguously and specifically disclose all information used to generate it. This includes both the method used to generate the illustration and the specific factors used to arrive at the projection, in particular the factors that render the particular illustration "custom."⁵ For this purpose, it is also important that the disclosures include an explanation of the "reasonable basis"⁶ behind the projections. In order to protect the investors and prevent unnecessary litigation, this reasonableness standard must be stringent and its boundaries clearly delineated. Moreover, all disclosures should be written in an

¹ See FINRA Regulatory Notice 17-06 at 4, available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf (February 10 2017).

² See FINRA Regulatory Notice 17-06 Attachment A at 8.

³ See FINRA Regulatory Notice 17-06 at 3.

⁴ See FINRA Regulatory Notice 17-06 Attachment A at 10.

⁵ See FINRA Regulatory Notice 17-06 at 6 n.4 ("A 'customized' investment planning illustration is one designed for a particular client or multiple clients who share an account.")

⁶ See FINRA Regulatory Notice 17-06 Attachment A at 10.

investor-friendly fashion to ensure they are well understood by the target, lay audience.

3. All Projections-Related Communications and Means by Which These are Generated Must be Subject to Stringent Retention Guidelines and Automatically Discoverable.

Projections-related communications, it and the means by which they are generated, including any documents regarding their reasonableness, must be subject to stringent document retention guidelines. Similarly, as such documents directly reflect the suitability analysis conducted by the broker and communicated to the individual investor, it is equally important that any projections-related communications be presumptively discoverable in case of a dispute and explicitly included in FINRA's Discovery List 1. This automatic discoverability should extend to the methods used to generate the illustrations and any factors considered as well as any related supervisory activity.

In conclusion, we do not believe that brokers should be allowed to communicate hypothetical performance projections to their clients without owing to them the duties of a fiduciary. The carrot of communicating projections must come with the stick of a fiduciary relationship and its attendant responsibilities. In case FINRA does choose to implement this rule, more comprehensive and specific disclosures are necessary to prevent misleading investors, and automatic discoverability of all projections-related communications must be required to protect investors in case of a dispute.

Thank you for the opportunity to comment, and we welcome any questions FINRA may have regarding this letter.

Best regards,



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