

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 016

Amendment No. (req. for Amendments \*) 1

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Meredith Last Name \* Cordisco

Title \* Associate General Counsel

E-mail \* meredith.cordisco@finra.org

Telephone \* (202) 728-8018 Fax

### Signature

Pursuant to the requirements of the Securities Exchange of 1934, Financial Industry Regulatory Authority has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 02/22/2024

(Title \*)

By Philip Shaikun

Vice President & Associate General Counsel

(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Philip Shaikun

Digitally signed by Philip Shaikun  
Date: 2024.02.22 09:46:08 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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FINRA-2023-016 Partial A-1 Exhibit 4.

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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FINRA-2023-016 Partial A-1 Exhibit 5.

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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FINRA-2023-016 Partial Amendment N

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

On November 13, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change, SR-FINRA-2023-016 (“Proposal” or “proposed rule change”), that would amend FINRA Rule 2210 (Communications with the Public) to allow a 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 persons meeting the definition of “qualified purchaser” (“QP”) as defined in the Investment Company Act of 1940 (“Investment Company Act” or “ICA”)<sup>1</sup> and that promotes or recommends specified non-public offerings, subject to stringent conditions to ensure these projections are carefully derived from a sound basis.<sup>2</sup> The Commission published the Proposal for public comment in the Federal Register on November 24, 2023, and received ten comments in response.<sup>3</sup>

FINRA is submitting by separate letter its response to comments on the Proposal contemporaneously with this Partial Amendment No. 1. In light of the comments received, FINRA proposes to amend the proposed rule change to marginally expand the proposed allowance for the use of projections of performance and targeted returns, when the Proposal’s conditions are met, to include a communication that is distributed or made available only to QPs or persons meeting the definition of “knowledgeable employee” under ICA Rule 3c-5, and that promotes or recommends specified non-public offerings.

With this Partial Amendment No. 1, FINRA is including Exhibit 4, which reflects changes to the text of the proposed rule change pursuant to this Partial Amendment No. 1, marked to show the changes to the text as proposed in the Proposal, and Exhibit 5, which reflects all proposed changes to the current rule text, as amended by this Partial Amendment No. 1.

As discussed in the rule filing, the Proposal would create a new exception from Rule 2210’s general prohibition on performance projections<sup>4</sup> to allow a member, when conditions are met, to project the performance or provide a targeted return in

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<sup>1</sup> See 15 U.S.C. 80a-2(a)(51)(A) (defining “qualified purchaser”).

<sup>2</sup> See Securities Exchange Act Release No. 98977 (November 17, 2023), 88 FR 82482 (November 24, 2023) (Notice of Filing of File No. SR-FINRA-2023-016).

<sup>3</sup> See Attachment A: Alphabetical List of Commenters to File No. SR-FINRA-2023-016.

<sup>4</sup> See FINRA Rule 2210(d)(1)(F) (generally providing that member communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast).

communications distributed or made available only to: (1) institutional investors;<sup>5</sup> or (2) QPs when the communication promotes or recommends either a Member Private Offering that is exempt from the requirements of FINRA Rule 5122 (Private Placements of Securities Issued by Members) pursuant to Rule 5122(c)(1)(B), or a private placement exempt from the requirements of FINRA Rule 5123 (Private Placements of Securities) pursuant to Rule 5123(b)(1)(B). Both Rule 5122(c)(1)(B) and Rule 5123(b)(1)(B) exempt from those rules' requirements private offerings sold solely to QPs, as defined in Section 2(a)(51)(A) of the Investment Company Act.<sup>6</sup>

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<sup>5</sup> Rule 2210(a)(4) provides that "institutional investor" means any:

- (A) person described in Rule 4512(c), regardless of whether the person has an account with a member;
- (B) governmental entity or subdivision thereof;
- (C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (D) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (E) member or registered person of such a member; and
- (F) person acting solely on behalf of any such institutional investor.

Rule 4512(c) defines "institutional account" to mean the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Advisers Act or with a state securities commission; or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

<sup>6</sup> Rule 5123(b)(1)(H) also exempts from that rule's requirements private offerings sold solely to knowledgeable employees as defined in ICA Rule 3c-5.

In general, private placements sold only to QPs are private funds that are exempt from the ICA pursuant to section 3(c)(7) (“3(c)(7) funds”).<sup>7</sup> Commenters have pointed out, however, that a 3(c)(7) fund may exclude securities beneficially owned by persons meeting the definition of “knowledgeable employee” under ICA Rule 3c-5 from the determination of whether the fund’s shares are owned exclusively by QPs.<sup>8</sup>

As discussed in FINRA’s Response to Comments, FINRA believes that it is appropriate to amend the proposed rule change to include – along with QPs – knowledgeable employees in connection with specified non-public offerings as among the categories of investors who may receive communications that include projections or targeted returns, when the proposed rule change’s other conditions are met. Knowledgeable employees, as defined in ICA Rule 3c-5, generally include executive officers, directors, trustees, general partners, advisory board members, or persons serving in similar capacities of the fund or certain of its affiliates, and other employees who participate in the investment activities of the fund or certain of the fund’s affiliates.<sup>9</sup> Thus, the inclusion of Rule 3c-5 knowledgeable employees would align the scope of persons who may receive communications with projections or targeted returns with the scope of persons permitted to invest in 3(c)(7) funds under the ICA. FINRA believes that knowledgeable employees typically have intimate knowledge of the operations of private funds, and thus are less likely not to understand the risks and limitations of projections or targeted returns associated with such funds.

Accordingly, the Proposal, as amended, would allow a member, when conditions are met, to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in: (1) an institutional communication; or (2) a communication that is distributed or made available only to: (a) persons meeting the definition of “qualified purchaser” under the Investment Company Act and that promotes or recommends a Member Private Offering that is exempt from the requirements of Rule 5122 pursuant to Rule 5122(c)(1)(B); or (b) persons meeting the definition of “qualified purchaser” under the Investment Company Act or “knowledgeable employee” under Investment Company Act Rule 3c-5 and that promotes or recommends a private placement that is exempt from the requirements of Rule 5123 pursuant to Rule 5123(b)(1)(B) or 5123(b)(1)(H), respectively.

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<sup>7</sup> ICA section 3(c)(7) provides that a private fund whose securities are owned exclusively by QPs and which is not making a public offering of its securities is not an investment company for purposes of the ICA.

<sup>8</sup> See Dechert, SIFMA.

<sup>9</sup> See 17 CFR 270.3c-5(a)(4).

**Attachment A: Alphabetical List of Commenters to File No. SR-FINRA-2023-016**

1. Bernard V. Canepa, Securities Industry and Financial Markets Association (“SIFMA”) (December 15, 2023)
2. Anya Coverman, Institute for Portfolio Alternatives (“IPA”) (December 15, 2023)
3. Molly Diggins, Monument Group, Inc. (“Monument Group 1”) (December 13, 2023)
4. Molly Diggins, Monument Group, Inc. (“Monument Group 2”) (January 31, 2024)
5. Dorothy M. Donohue & Matt Thornton, Investment Company Institute (“ICI”) (December 15, 2023)
6. Jay H. Knight, American Bar Association Business Law Section, Federal Regulation of Securities Committee (“ABA”) (January 8, 2024)
7. Jacqueline Kuiper, Nelson Kuiper PLLC (“Nelson Kuiper”) (December 15, 2023)
8. Michael McGrath & Lindsay Grossman, Dechert LLP (“Dechert”) (December 15, 2023)
9. Joseph C. Peiffer, Public Investors Advocate Bar Association (“PIABA”) (December 15, 2023)
10. Mike Underhill, Alternative & Direct Investment Securities Association (“ADISA”) (December 15, 2023)

**EXHIBIT 4**

Exhibit 4 shows the changes proposed in this Partial Amendment No. 1, with the proposed changes in the original filing shown as if adopted. Proposed new language in this Partial Amendment No. 1 is underlined; proposed deletions in this Partial Amendment No. 1 are in brackets.

\* \* \* \* \*

**2200. COMMUNICATIONS AND DISCLOSURES**

**2210. Communications with the Public**

(a) through (c) No Change.

**(d) Content Standards**

**(1) General Standards**

(A) through (E) No Change.

(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) through (iii) No Change.

(iv) A communication that projects the performance or provides a targeted return with respect to a security or asset allocation or other investment strategy, provided that:

a. The communication is: (i) an institutional communication, or (ii) a communication that is distributed or made available only to: (A) persons meeting the definition of “qualified purchaser” under the Investment Company Act and that promotes or recommends [either] a

Member Private Offering that is exempt from the requirements of Rule 5122 pursuant to Rule 5122(c)(1)(B);[, ] or (B) persons meeting the definition of “qualified purchaser” under the Investment Company Act or “knowledgeable employee” under Investment Company Act Rule 3c-5 and that promotes or recommends a private placement that is exempt from the requirements of Rule 5123 pursuant to Rule 5123(b)(1)(B) or Rule 5123(b)(1)(H), respectively;

b. through e. No Change.

(2) through (9) No Change.

(e) through (g) No Change.

••• **Supplementary Material:-----**

.01 No Change.

\* \* \* \* \*



**EXHIBIT 5**

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

\* \* \* \* \*

**2200. COMMUNICATIONS AND DISCLOSURES**

**2210. Communications with the Public**

(a) through (c) No Change.

**(d) Content Standards**

**(1) General Standards**

(A) through (E) No Change.

(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 an 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 communication that projects the performance or provides a targeted return with respect to a security or asset allocation or other investment strategy, provided that:

a. The communication is: (i) an institutional communication, or (ii) a communication that is distributed or made available only to: (A) persons meeting the definition of “qualified purchaser” under the Investment Company Act and that promotes or recommends a Member Private Offering that is exempt from the requirements of Rule 5122 pursuant to Rule 5122(c)(1)(B); or (B) persons meeting the definition of “qualified purchaser” under the Investment Company Act or “knowledgeable employee” under Investment Company Act Rule 3c-5 and that promotes or recommends a private placement that is exempt from the requirements of Rule 5123 pursuant to Rule 5123(b)(1)(B) or Rule 5123(b)(1)(H), respectively;

b. The member 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 investor

receiving the communication and to ensure compliance with all applicable requirements and obligations;

c. The member 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;

d. The communication prominently discloses that the projected performance or targeted return is hypothetical in nature and that there is no guarantee that the projected or targeted performance will be achieved; and

e. The member provides sufficient information to enable the investor 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.

(2) through (9) No Change.

(e) through (g) No Change.

**••• Supplementary Material:-----**

**.01 Reasonable Basis for Criteria Used and Assumptions Made in Calculating**

**Projected Performance or a Targeted Return**

(a) In forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return pursuant to Rule 2210(d)(1)(F)(iv), members should consider multiple factors, with no one factor being determinative.

Depending on the particular projected performance or targeted return, such factors may include, but are not limited to, the following:

(1) Global, regional, and country macroeconomic conditions;

(2) Documented fact-based assumptions concerning the future performance of capital markets;

(3) In the case of a single security issued by an operating company, the issuing company's operating and financial history;

(4) The industry's and sector's current market conditions and the state of the business cycle;

(5) If available, reliable multi-factor financial models based on macroeconomic, fundamental, quantitative, or statistical inputs, taking into account the assumptions and potential limitations of such models, including the source and time horizon of data inputs;

(6) The quality of the assets included in a securitization;

(7) The appropriateness of selected peer-group comparisons;

(8) The reliability of research sources;

(9) The historical performance and performance volatility of the same or similar asset classes;

(10) For managed accounts or funds, the past performance of other accounts or funds managed by the same investment adviser or sub-adviser, provided such accounts or funds had substantially similar investment objectives, policies, and strategies as the account or fund for which the projected performance or targeted returns are shown;

(11) For fixed income investments and holdings, the average weighted duration and maturity;

(12) The impact of fees, costs, and taxes; and

(13) Expected contribution and withdrawal rates by investors.

(b) Members may not base projected performance or a targeted return upon (i) hypothetical, back-tested performance or (ii) the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record.

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