Sep. 25, 2025

Performance Advertising

The Potential Impact of Proposed Amendments to FINRA's Rule 2210 on Performance Projections

By Michael Washburn, *Hedge Fund Law Report*

During its June 4-5, 2025, meeting, FINRA's Board of Governors approved a rule proposal that would amend Rule 2210 (Rule) regarding communications with the public. The amendments aim to provide an exemption to the prohibition that has kept broker-dealers from making performance projections in written communications with investors. Such a change aims, in theory, to lessen a misalignment between current FINRA regulations and the SEC's Marketing Rule.

Although broker-dealers may welcome the amendments, their potential impact is somewhat limited, legal experts told the Hedge Fund Law Report. They apply more to the institutional side of the market – well-heeled qualified purchasers – than to accredited investors and may not swing the pendulum far in favor of the "retailization" that SEC Chair Paul S. Atkins and others have called for publicly.

This article explores why the Rule in its current form has been a source of frustration for many registered entities, explains how the proposed amendments would alter the Rule and discusses what those changes would mean in practice, with commentary from legal and accounting experts.

For discussion of a prior proposal to revise the Rule, see "FINRA Proposes to Permit Use of Performance Projections and Target Returns in Marketing" (Jan. 18, 2024).

Thrust of the Current Rule

The Rule's text currently defines "communications" as "correspondence, retail communications and institutional communications," including any written communication – even those that are electronic – distributed or made available to 25 or fewer retail investors within a 30-day calendar period. Rule 2210(d)(1)(f) explicitly states, "Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." However, the Rule clarifies that this restriction does not prohibit:

- a hypothetical illustration of mathematical principles, provided that illustration does not involve any prediction or projection of how an investment or investment strategy will perform;

- an "investment analysis tool," or a written report produced by one, meeting Rule 2214's requirements; or
- a price target in a research report concerning debt or equity securities, subject to three conditions:
  1. there is a "reasonable basis" for that target;
  2. the report shares the methodology behind it; and
  3. the target comes with a disclosure regarding the risks involved in trying to reach it.

Notwithstanding those allowances, many firms have been vocal about what they see as the operational limitations they are subject to under the Rule as written and what they view as an overly vindictive stance on FINRA's part.

See "FINRA Report Highlights Common Broker-Dealer Compliance Shortcomings" (Jan. 24, 2019).

Frustrations With the Rule

Inadequate Exemptions

The Rule, as written, does not impose a blanket prohibition on the use of any and all data that might factor into a decision about whether to pursue a given investment opportunity, noted Katten partner Susan Light, former FINRA chief counsel and senior vice president. It is important to have a nuanced understanding of what the Rule does and does not permit, she said.

As it stands now, the Rule explicitly allows a "hypothetical illustration of mathematical principles" regarding a fund's performance. That is not the same thing as a projection, although it could lead investors to expect similar performance going forward, Light clarified, illustrating her point with a theoretical example. "You could always say, 'Our fund had a five-percent return last year. So, if you had invested $10,000, you would have gotten a return of $500.' This is permitted under the Rule," she confirmed.

Nevertheless, the Rule does not permit a broker-dealer to issue a straight-out projection in marketing materials even if it has what it believes to be a reasonable basis for that projection, noted Light. Also, the regulators do not make material concessions to those firms that try to clarify that figures are targets rather than mathematically certain outcomes.

Failure to Distinguish

FINRA's unwillingness to distinguish between targeted objectives and projections has been particularly problematic for some registered entities when reaching out to institutional customers, pension funds and other qualified purchasers, observed Jennifer A. Connors, co-head of the broker-dealer and compliance practice at Holland & Knight. What FINRA has often insisted on viewing as a projection – when, in fact, the information incorporated elements of historical performance and investment objective – is typically a material element of the pitch crafted to bring such investors aboard, she argued. "Particularly for new managers and new fund launches, evaluating the investment objectives and the returns that a manager expects to achieve is a key element of an investor's decision-making process," she noted.

Although investors might have access to data rooms and sophisticated methodologies for evaluating possible investments, they still expect, and may require, a targeted return to be included in any manager's investment pitch, added Connors. "So, for many fund managers using either their affiliated broker-dealers or registered placement agents to offer their funds, the Rule is particularly problematic," she observed. "They ask, 'How are we going to be able to satisfy the standards our investors are looking for? They have to have some sort of a rationale as to why they're investing in our fund.'"

Backlash From the Institutional Side

Demand from institutional investors for more data, including projected performance explicitly identified as such, has been strong, Light acknowledged. "Qualified purchasers have lots of options. They can go to an investment adviser or to broker-dealers to assess opportunities," she observed. "The investment adviser is giving them more information, so they feel as if their hands are tied if they can't compare apples to apples" by receiving similar information from broker-dealers.

The perception is widespread that the current Rule gives an unfair advantage to investment advisers compared to broker-dealers, concurred Bao Nguyen, head of the broker-dealer and investment management practice at compliance advisory firm Kaufman Rossin.

Much of the pressure in favor of amending the Rule has come from the institutional side of the private funds realm, concurred Connors. The restrictions barring broker-dealers from making projections about a fund's performance has fostered broad concerns on the part of institutional investors and the fund managers that worked with them, she observed.

"Many of the institutionally focused fund managers, in my observation, were attempting to follow all applicable SEC guidance in terms of both registering as investment advisers with respect to their funds and separately forming broker-dealers to engage in fund distribution and sales activity," Connors said. "There is a concern that, to the extent that distributions of the interest in the funds are made through the auspices of the broker-dealers (as opposed to directly through the fund managers), such broker-dealers would be subject to limitations imposed by FINRA rules on what information they can provide to investors." She added, "This could have the unintended impact of reducing the role of broker-dealers in 'effecting' securities transactions."

Regulatory Convergence

In theory, the proposed amendments to the Rule will bring it somewhat more in line with May 2021 updates to the SEC's Advertising Rule, which is now called the Marketing Rule. Although the SEC's approval is by no means a "fait accompli," legal experts who spoke to the Hedge Fund Law Report agreed that the amendments stand a better chance now than during last year's discussion and debate of potential Rule amendments.

Under the Marketing Rule, codified in Section 206(4)-1 under the Investment Advisers Act of 1940, investment advisers may take advantage of certain exemptions. The Marketing Rule bars the statement of any hypothetical performance but offers exceptions when an investment adviser:

- adopts policies and procedures "reasonably designed" to ensure the hypothetical performance's relevance to the intended audience's "likely financial situation" and investment goals;
- provides enough information to help the intended audience understand the methodology behind the hypothetical performance as stated in the marketing materials; and
- provides adequate data to help the intended audience grasp the risks involved in trying to meet that stated target.

See "SEC FAQs Clarify Marketing Rule Treatment of Extracted Performance and Portfolio Characteristics" (Apr. 24, 2025).

Limits of the Proposed Reforms

Although the full text of the Rule proposal is not yet available, a memo summarizing the governors meeting states that the board approved a proposal to amend the Rule to allow members to include projections of performance or targeted returns in their written communications with investors. Specifically, the memo explains that the proposal would amend the Rule "to allow projections to individuals on specific securities, such as target-date funds, subject to several investor-related conditions. The amendments would better align the regulatory requirements related to written communications about performance projections for broker-dealers and investment advisors, thus increasing regulatory harmonization while maintaining investor protection safeguards." In addition, the memo notes that the previously proposed amendments to the Rule would be withdrawn.

Although some might herald the proposed amendments to the Rule as one of the latest steps in ongoing efforts to broaden access to private funds – or, in short, the "retailization" of the private funds universe – it is important to keep the amendments in proper perspective and understand their severe limitations, warned Nguyen. For example, it is unclear whether the amendment will address marketing pitches aimed at accredited investors as well as institutional investors, qualified purchasers and knowledgeable employees, he clarified.

"Institutional investors include entities such as registered investment advisers, insurance companies and other broker-dealers. Qualified purchasers are individuals with at least $5 million of investable assets," Nguyen explained. "By contrast, accredited investors are people who make at least $200,000 a year and have a $1-million net worth (adjusted for inflation)."

"The FINRA exception that would permit projections in those circumstances applies to that narrow group – qualified purchasers who are eligible to purchase private placements that are sold only to qualified purchasers," concurred Connors. "So it presumably would not capture communications related to Section 3(c)(1) funds."

Complying With the "Reasonable" Basis Standard

Full Disclosure of Methodology

Broker-dealers wondering how they would tailor their operations to be in compliance with a revised Rule, if the amendments become a reality, should be keenly aware of the reasonableness standard that FINRA

will apply to any performance projections, Connors cautioned. Those drafting pitches will need to take pains to be clear about their methodology, historical precedent and – importantly – the sources of their data. "In addition, broker-dealers need to be careful about appearing to 'guarantee' results or represent that past performance is indicative of future results," she advised.

"You can't pull a projection out of thin air. It must be based on the manner in which funds of this nature have performed. Let's take, for example, a long-only equity growth fund. There's data out there on such funds you can pull, and you would have to cite your sources," Connors explained. "You would also need to ensure your policies and procedures and recordkeeping processes are able to address retention of support for the projections." A broker-dealer that performs such diligence will be well-positioned to provide an evidentiary and methodological basis for the projections it includes in its pitch, she concluded.

Continuing Vigilance

A properly crafted pitch can convince investors – and regulators – that it is not based on assumptions but has a reasonable basis under the Rule, if amended. But given the SEC's past behavior, it is not wise to be complacent, no matter how much diligence and care have gone into research and methodology, Connors cautioned. "In my experience, the regulator – whether it's FINRA or the SEC – will pass a rule and say, 'You must have such and such policies and procedures and do X, Y and Z,'" she recounted. "So everybody adopts those policies and procedures, and they start operating under the new rule. But then FINRA and the SEC go out and say, 'We're going to do targeted exams to see how people are complying with the rule.'"

"The regulators tend to do that maybe a year after a rule is adopted and implemented. Then they get some feedback, and they see some practices that they think are good and some that they think are bad," continued Connors. "The regulators may not initially take action against firms they believe have not complied with the rule and instead may issue guidance to the industry." However, she added that "after that initial warning, if firms don't follow the guidance at that point, they may be asking for trouble and may be faced with a subsequent SEC or FINRA enforcement action."

Given those regulatory tendencies, broker-dealers concerned about falling afoul of the theoretically loosened Rule are well-advised to exercise care when crafting their pitches and disclosures and should be aware that operational changes in no way shield them from the possibility of surprise exams or enforcement actions.

Although the proposed amendments may have a somewhat better chance of making it through SEC scrutiny now than last year, Light posited, it is still likely that dually registered firms with both retail and institutional clients will need to keep communications channels separate.

See "SEC, CFTC and FINRA Division Heads Discuss Enforcement Outlook" (Apr. 24, 2025); and "A Look at FINRA's 2025 Oversight Report" (Mar. 13, 2025).