The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
1401 H Street, NW, Washington, DC 20005 USA

June 10, 2025

By Electronic Transmission

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

Re: FINRA Regulatory Notice 25-04

Dear Ms. Mitchell:

The Investment Company Institute[1] appreciates the opportunity to comment on FINRA's review of its rules and guidance.[2] We commend FINRA for undertaking this broad and timely review in pursuit of "vibrant capital markets where everyone can invest with confidence."

As part of this project, we recommend that FINRA modernize Rule 2210 (Communications with the Public), related rules and guidance, and their administration by:

- Aligning its requirements with those of the SEC's 2020 marketing rule for investment advisers,[3] including with respect to the use of performance information;
- Modernizing social media guidance;
- Engaging with members to understand how firms are using artificial intelligence before determining whether additional guidance would be beneficial;
- Permitting members to present data regarding a fund's average credit quality in certain communications with the public;
- Improving the review process to enhance timeliness and consistency; and
- Revisiting the requirement to include a member's full name in communications.

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $37.7 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional $9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] *FINRA Regulatory Notice 25-04, Rule Modernization: FINRA Launches Broad Review to Modernize Rules Regarding Member Firms and Associated Persons* ("Regulatory Notice"), FINRA (Mar. 12, 2025), available at https://www.finra.org/sites/default/files/2025-03/Regulatory-Notice-25-04.pdf.

[3] *See* 17 CFR § 275.206(4)-1 ("Marketing Rule").

Section 1: FINRA Should Modernize Rules and Guidance Governing Communications with the Public

The Regulatory Notice identifies as benefits of engagement between FINRA and its member firms "better understand[ing] and address[ing] risks to investors and markets; better adapt[ing] its oversight to changing business practices and markets; [and] better support[ing] innovation and the deployment of new technologies and services that benefit markets and investors…" We believe FINRA's communications with the public rules are especially ripe for this kind of engagement and review. FINRA last reviewed that ruleset beginning in 2014, and that process yielded sensible rule amendments and guidance. Since then, however, the SEC comprehensively overhauled its Marketing Rule for investment advisers, and FINRA's parallel ruleset has not kept pace. ICI members' communications with the public—*e.g.*, registered investment company ("fund") marketing materials—are frequently subject to the content standards and filing requirements of FINRA Rule 2210, and we offer several recommendations to improve the rule and its administration below.

1.1 FINRA Should Align Rule 2210 with the SEC Marketing Rule

ICI has long supported harmonization of the FINRA and SEC marketing standards (the former apply to broker-dealers, and by extension funds, while the latter apply to registered investment advisers). Having differing regulatory frameworks applicable to funds and advisers creates a compliance challenge for our members. Even slight differences in applicable standards are difficult to operationalize and potentially confusing to investors. We believe that FINRA should follow the SEC's lead here.

Specifically, FINRA should align its performance reporting standards with those of the Marketing Rule. Subject to appropriate investor protections, the SEC permits investment advisers to show related performance, extracted performance, hypothetical performance, and predecessor performance, including to certain retail customers.[4] In permitting these types of performance information, the SEC explained that "related performance can be a valuable tool to assist an investor in evaluating a particular investment adviser or investment strategy, and that its use is consistent with industry practice."[5] With respect to hypothetical performance, the SEC acknowledged certain risks but ultimately stated that it "understand[s] that . . . hypothetical performance may be useful to prospective investors who have the resources and financial expertise" and that "the information may allow an investor to evaluate an adviser's investment

[4] The Marketing Rule includes the following definitions of these terms:

- "***Extracted Performance*** means the performance results of a subset of investments extracted from a portfolio." Rule 206(4)-1(e)(6);
- "***Hypothetical Performance*** means performance results that were not actually achieved by any portfolio of the investment adviser," which includes performance derived from model portfolios, performance that is back tested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods, and targeted or projected performance returns. Rule 206(4)-1(e)(8);
- "***Predecessor Performance*** means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance." Rule 206(4)-1(e)(12); and
- "***Related Performance*** means the performance results of one or more related portfolios," which in turn is defined to mean "a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement." Rule 206(4)-1(e)(14)-(15).

[5] Investment Adviser Marketing, Investment Advisers Act Release No. 5653, 86 Fed. Reg. 13024, 13074 (Mar. 5, 2021).

process over a wide range of periods and market environments or form reasonable expectations about how the investment process might perform under different conditions."[6]

Harmonization is easiest in those areas where FINRA already has taken steps toward a more permissive approach. For instance, in 2023, FINRA proposed rule amendments related to performance projections and targeted returns,[7] which ICI supported but found unduly modest.[8] We viewed this proposal as a step in the right direction toward harmonization, and it was never clear to us why such a modest and broadly supported proposal was not adopted by the SEC.[9]

FINRA has also laid groundwork for further harmonization through various letters, which permit the inclusion of related performance and hypothetical back-tested performance in certain institutional communications, but not retail communications, subject to certain conditions.[10] Indeed, the case for broader permitted use of related performance information (including for retail investors) is especially strong, given that the adviser has achieved the stated performance for other similar accounts and funds that it manages. These forms of performance information, when presented with appropriate disclosures and subject to safeguards, are potentially informative and helpful to retail investors making investment decisions.[11]

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[6] *Id.* at 13078. The SEC also specifically declined to impose separate requirements for performance advertising in retail and non-retail advertisements.

[7] Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications, SEC Release No. 34–98977, 88 Fed. Reg. 82482 (Nov. 24, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf. This proposal would have permitted the use of targets or projections in communications subject to certain conditions, including that the use of targets or projections would have been limited to (i) institutional communications or (ii) communications that are distributed or made available only to qualified purchasers ("QPs") and that promote or recommend specified non-public offerings.

[8] *Letter from ICI to the SEC*, ICI (Dec. 15, 2023), available at https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314280-819322.pdf. We continue to believe that the current rule's near-prohibition on projected performance is unduly restrictive and prevents FINRA members from communicating in ways that help investors better understand the risk and return characteristics of investment portfolios. Unlike the Marketing Rule, the proposal would have limited the use of projections and targets to institutional and certain QP communications, and we recommended that FINRA broaden the reach of any final rule amendments to include retail investors, consistent with the Marketing Rule.

[9] In July 2024, the SEC stayed an order that had been issued by its Division of Trading and Markets just one week earlier approving the proposal. To our knowledge, there have been no further developments.

[10] *See, e.g., Interpretive Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC*, FINRA (May 12, 2015), available at https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-edward-p-macdonald-hartford-funds-distributors-llc; and *Interpretive Letter to Bradley J. Swenson, ALPS Distributors, Inc.*, FINRA (Apr. 22, 2013), available at https://www.finra.org/rules-guidance/guidance/interpretive-letters/bradley-j-swenson-alps-distributors-inc. As discussed below, FINRA's reliance on various informal notices and no-action letters to communicate FINRA's position on these topics may lead to confusion and inconsistent practices in the industry, and we encourage FINRA to clearly address them in Rule 2210 itself.

[11] For example, we understand that certain retirement plan fiduciaries have requested related performance and, in some cases, have requested to share it with plan participants. This is an example where the current FINRA rule may restrict the provision of potentially helpful information to investors.

We also urge FINRA to incorporate long-standing FINRA guidance and positions into the text of Rule 2210 itself, much as the SEC did when it amended its Marketing Rule. FINRA has historically issued guidance through regulatory notices and letters, many of which substantively alter obligations and/or permitted activities under the rule, and this retrospective review provides an opportunity for FINRA to codify certain guidance in the rule itself. We believe this would increase transparency, aid interpretation and compliance, and decrease uncertainty regarding members' obligations.

1.2 FINRA Should Clarify and Provide Additional Guidance Relating to the Use of Social Media

ICI members' use of social media to advertise their services and provide educational and other investor materials continues to grow and evolve with respect to both content (*e.g.*, use of "finfluencers") and medium, and we encourage FINRA to review and clarify its existing guidance on this topic. In addition to written social media posts, member firms now frequently use audio and/or video social media. We encourage FINRA to engage with industry participants regarding their use of social media and what additional guidance may be helpful. We also encourage FINRA to consider consolidating and codifying its approach to the use of social media within Rule 2210 itself (or other appropriate rules).

For instance, Question 2 and its answer in FINRA Regulatory Notice 17-18 provide examples of social media posts that are *not* subject to Rule 2210.[12] We request that FINRA provide additional examples of content that similarly would not be subject to Rule 2210, including general educational content promoting account types (*e.g.*, IRAs or 401(k) plans), general approaches to investing, and/or financial literacy.[13] Member firms frequently prepare educational materials that do not pertain to a firm's specific products or services, but the current guidance's failure to specifically address these materials has created uncertainty and impeded creation and dissemination of these investor-friendly materials. These types of materials,

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Another difference between the FINRA and SEC performance-related requirements is that FINRA Rule 2210 (by reference to SEC Rule 482) requires that performance be shown as of the most recent 1, 5, and 10 years and the most recent quarter end, while the Marketing Rule requires that performance be shown as of the most recent 1, 5, and 10 year periods and permits the inclusion of more recent performance. Members have expressed frustration that, even if they have more recent performance information available, under the FINRA rule, they must show performance as of the most recent quarter-end. We encourage FINRA to consider coordinating with the SEC to align the Rule 2210/Rule 482 approach with the Marketing Rule approach.

There are also non-performance-related differences between Rule 2210 and the Marketing Rule that FINRA should address. For example, members report challenges regarding the different definitions and requirements with respect to testimonials under the separate regulatory frameworks.

[12] *FINRA Regulatory Notice 17-18, Guidance on Social Networking Websites and Business Communications*, FINRA (Apr. 25, 2017), available at https://www.finra.org/rules-guidance/notices/17-18. The guidance states that, if an associated person of a firm in a personal communication shares or links to content that the firm makes available in its communications that does not concern the firm's products or services, the associated person's communication would *not* be subject to Rule 2210. The guidance provides examples of such content, including information about the firm's sponsorship of a charitable event, a human-interest article, an employment opportunity, or employer information covered by state and federal fair employment laws.

[13] Additional clarity regarding certain communications by dually registered firms may also be helpful. For example, such a firm may issue communications on behalf of the investment advisory business, which may include references to underlying holdings (*e.g.*, mutual funds, ETFs, or individual stocks or bonds). FINRA should clarify that, despite these references, these materials are not subject to Rule 2210 content or filing requirements for retail communications, because they do not make any financial or investment recommendation or otherwise promote a product or service of the member.

like the other examples already included in the FINRA guidance, do not raise investor protection concerns and should be considered outside the scope of Rule 2210.

1.3 FINRA Should Engage with Industry Participants on the Use of Artificial Intelligence Before Considering Additional Guidance on This Topic

ICI members use technology to identify and engage with investors in a variety of ways, including: disseminating educational information about products and services; providing analytical tools and research (including tools that facilitate planning and saving for retirement, buying a home, education, and other important financial goals); and offering advisory services, including both full-service advice with a dedicated financial adviser and online robo-advisory platforms. To date, ICI member firms have not indicated that AI technology is used on a standalone basis and have stressed that AI should be viewed as an augmentative technology that can enhance human decision-making processes without replacing human expertise and oversight. Further, member firms have strong compliance and governance structures around the use (or potential use) of AI and, at this time, do not use AI technology without human oversight and responsibility over the final output.

However, technology continues to develop rapidly, and members continue to explore ways to enhance their AI processes. FINRA has issued two FAQs on the use of AI-generated communications,[14] and we appreciate that FINRA has applied the existing regulatory framework to the use of AI. Those FAQs provide high-level confirmation that the content standards of Rule 2210 apply whether member firms' communications are generated by a human or technology tool and that firms are responsible for supervising chatbot communications in accordance with applicable FINRA rules. We encourage FINRA to engage with members to understand how firms are using AI before determining whether additional guidance would be beneficial.

1.4 FINRA Should Permit Members to Present a Fund's Average Credit Quality in Communications with the Public

FINRA has taken the position that fund advertising materials may not present the fund's average credit quality (*i.e.*, a single average or composite of the credit quality ratings of the fund's portfolio holdings, which may take into account ratings by multiple rating agencies) as calculated by the fund, rather than by a nationally recognized statistical ratings organization ("NRSRO"). We understand that FINRA is concerned about the utility or effectiveness of this information as a risk metric, non-standardization in calculation methodologies, and the treatment of unrated securities, as well as firms potentially presenting the data in misleading ways.

We understand FINRA's concerns and acknowledge that there are other valid and more comprehensive ways to present information about a fund's credit quality. Still, we believe that permitting firms to include fund-calculated average credit quality ratings in their communications, when accompanied by appropriate disclosure, could provide investors with a helpful summary metric. Such an average credit quality rating may be easier for investors to understand and would provide funds with greater latitude to showcase their managers' credit quality assessments. Accordingly, we request that FINRA permit the inclusion of this information, subject to appropriate disclosures (*e.g.*, highlighting key methodological choices and the

[14] *Frequently Asked Questions About Advertising Regulation, Questions B.4 and D.8*, FINRA (May 10, 2024), available at https://www.finra.org/rules-guidance/guidance/faqs/advertising-regulation#b4.

limits of this metric) and other conditions (*e.g.*, allowing inclusion only in institutional communications, or imposing certain methodological requirements).

1.5 FINRA Should Consider Ways to Improve the Rule 2210 Review Process

We greatly appreciate that FINRA has taken steps to promote consistency and timeliness of its reviews of, and comments on, member communications, and many ICI members report improved turnaround times. Nevertheless, this experience is not universal, and we encourage FINRA to continue to improve its review process to ensure that comments are both consistent across firms and timely. Some members report that they have received comments raising issues with certain practices or approaches that other FINRA members utilize. Members have also raised concerns that the comment process itself occasionally creates new substantive requirements outside existing rules or guidance. Many members have also continued to express frustration with the timeliness of FINRA reviews, including the inconsistency and unpredictability of the review timelines. We recognize the challenges of this work and encourage FINRA to explore ways to streamline or modernize the filing review process.

Additionally, ICI understands that in cases where a firm receives comments on advertising materials, it has become common industry practice for that firm to *refile* those materials after addressing FINRA's comments in order to obtain a so-called "clean" letter from FINRA. We understand that this is not due to any FINRA requirement, but is done in response to third-party broker-dealer requirements. This practice not only increases the burdens on FINRA staff and resources but also delays members' use of materials and increases costs. FINRA has previously acknowledged this practice and its contribution to the number of "voluntary" filings that FINRA staff reviews each year.[15]

We believe that this practice has grown, at least in part, as a result of Rule 2210(b)(1)(C), which exempts retail communications from the registered principal review and approval requirement of Rule 2210(b)(1)(A) if another member has previously filed the communication with FINRA and "has received a letter from [FINRA] stating that [the communication] appears to be consistent with applicable standards." Accordingly, we encourage FINRA to amend this portion of the rule, or provide applicable guidance, to clarify that it is unnecessary to refile materials and obtain a "clean" letter before using such materials without registered principal review and approval. For example, FINRA could consider broadening the provision to exempt retail communications if another member has received a clean letter *or* has attested to having appropriately addressed and resolved any FINRA comments received on the communication. Clear guidance that advertising materials may be used even without a clean letter may provide comfort to third parties and decrease voluntary filings.

1.6 FINRA Should Modernize the Requirement to Include a Member's Full Name in Communications with the Public

Rule 2210(d)(3) requires retail communications to prominently disclose the FINRA member's name. Despite significant changes in technology and how investors consume information, this requirement has not been changed since it was adopted in 2014. Today, many electronic advertisements must fit into small spaces (*e.g.*, on mobile or wearable devices) and use few characters (*e.g.*, social media posts on X

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[15] *Retrospective Rule Review Report, Communications with the Public*, FINRA (Dec. 2014), available at https://www.finra.org/sites/default/files/p602011.pdf ("Approximately 21 percent of the responding member firms filed communications on a voluntary basis last year. Voluntary filings were more prevalent among larger firms. For example, 70 percent of the large responding firms filed on a voluntary basis. The most common reason reported for voluntary filings was to obtain FINRA review prior to launching a marketing campaign (60 percent of the voluntary filers), *followed by filing to obtain "clean" letters for downstream broker-dealers (50 percent)*") (emphasis added).

(formerly Twitter)). In these and similar circumstances, it may not be possible or practicable to include a member's full name. Hyperlinks may allow a firm to include an abbreviated (but still generally recognizable) name and provide investors with ready access to more information about the FINRA member. Accordingly, we encourage FINRA to make this provision more flexible, allowing firms to develop a reasonable approach to providing their names in communications more efficiently without compromising investor protections.

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We would be happy to discuss our recommendations further. If we can be of assistance in any way, please contact me (erica.evans@ici.org) or Matt Thornton (matt.thornton@ici.org).

Sincerely,

/s/ Erica L. Evans
Erica L. Evans
Assistant General Counsel

cc: Ira Gluck
Vice President, Advertising Regulation, FINRA

Meredith Cordisco
Associate General Counsel, FINRA