



Via Online Submission

March 27, 2016

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

Re: FINRA Regulatory Notice 17-06: 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/Investment Strategy

Dear Ms. Asquith:

The Money Management Institute¹ appreciates the opportunity to comment on FINRA's Regulatory Notice 17-06² requesting comment on proposed amendments ("Proposal") to the rules governing communications with the public ("Rule 2210") to create an exception to Rule 2210's prohibition on projecting performance by permitting a firm to distribute customized hypothetical investment planning illustration that includes the projected performance of an asset allocation or other investment strategy, but not an individual security. We laud FINRA's Proposal to extend greater flexibility to firms provide to useful and informative hypothetical performance illustrations to customers and prospects. We believe such illustrations can be extraordinarily helpful in conveying basic concepts regarding investments, including risk (including market specific- and investment specific- risks and risk-reward trade-offs), volatility, diversification, compounded growth, market cycles, the potential of loss and the opportunity cost of not adequately preparing for retirement. Narrative and disclosures alone cannot always effectively convey the complexity of the markets or the many potential consequences that could result from disparate investment choices.

In support of the general thrust of the Proposal, we wish to relay the following specific observations and concerns that we have regarding FINRA's Proposal:

¹ MMI is the national organization for the advisory solutions industry. MMI represents a broad spectrum of investment advisers that manage separate accounts, as well as sponsors of investment consulting programs. MMI provides a forum for the advisory solutions industry's leaders to address issues and better serve investors. Through industry advocacy, educational initiatives, regulatory affairs, publications, data reporting and professional networking, MMI supports and advances the growth of advisory solutions. MMI's membership is comprised of firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

² Regulatory Notice 17-06 (Communications with the Public) (February 2017), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf.

1. PROJECTIONS ARE AN IMPORTANT EDUCATIONAL TOOL

FINRA's own experience with investment analysis tools ("IA Tools") should serve as "Exhibit A" in the examination of the utility of dynamic illustrations to help customers and prospects visualize their own investment needs and probabilities.³ Countless studies have shown that a substantial portion of US investors are not saving enough for retirement because they underestimate their retirement needs or overestimate the ability of their current savings to meet those needs.⁴ The probability that a customer or prospect will fail to meet his or her retirement needs can be displayed in striking relief in an IA Tool and can help redirect focus and priorities towards a better prepared financial future. FINRA's permitting IA Tools to co-exist with traditional marketing material ushered in a significant breakthrough in investment education. Similarly, projections can help a customer or prospect envision gaps and unmet needs in their planning. An equally important developmental and educational breakthrough can accompany the responsible use of investment projections.

Robo advisers and the omnipresence of visual interfaces by way of smart phones and other devices should lead us to accept that an entire contingent of our investing demographic wants to receive and processes information differently. They learn differently and are at home with visual analytics. They marshal vast resources, leverage sophisticated data and deploy information from a tablet smaller than a sheet of paper. Such media can enhance the user environment in which projections are delivered, providing a user experience that educates and informs and seeks to meet the needs of a growing digital generation. In the context of digital wealth advice, there is no hindrance (either in analytics, design, data or construction) that would prevent a projection, including a dynamic projection hosted on an electronic platform, from providing a reasonable basis, delivering material disclosures and not omitting material information consistent with FINRA rules. In fact, dynamic (*e.g.*, not on a static sheet of paper) projections developed by digital wealth adviser platforms could also permit the type of more complex, interactive, customizable, educational analytics that would serve digital natives and meet the needs of an increasingly digitally connected demographic.

³ See FINRA Rule 2214.

⁴ See *e.g.*, *Will Americans Ever Become Savers? The 14th Retirement Confidence Survey*, 2004, Employee Benefit Research Institute Issue Brief No. 268 (April 2004) (noting that only about four in ten workers have taken steps to calculate how much they need to save by the time they retire in order to live comfortably in retirement); See also *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparation*, Employee Benefit Research Institute Issue Brief No. 431 (March 2017) (reviewing worker estimates for adequate retirement savings).

2. BASING PROJECTIONS ON PAST EVENTS AND ACTUAL INVESTMENTS

The Proposal states that *“basing a projection upon ...the past performance of particular investments by an asset manager would not be reasonable.”* We suggest FINRA reconsider its position given that capital market assumptions and modeling of potential future performance of asset classes or the components of an asset allocation might in fact be based on thoughtful and detailed analysis of how such assets performed in the past, including during different market cycles. Careful cataloguing of the interrelationship of past market prices, market movements and market events serves to inform (but not predict or guarantee) potential market outcomes in the future. The likelihood that specific securities or asset classes behave in correlation with the market or at variance with it may be analyzed by examining how such security or asset class behaved during similar periods in the past. Otherwise, a projection would be mere speculation and not based on any empirical evidence and would be completely unmoored from any reasonable analytical framework. Prohibiting the use of past (historical) specific security data as a substantial basis (or partial basis) for a projection could reduce projections to mere guesswork. For example, a projection based on the historical performance of an asset managers composite strategy provides information about the correlation and interrelationship between different securities and asset classes with respect to the market and during different market environments as a whole, and is completely different from an illustration that picks one security and extrapolates a future market price.

For the same reason, prohibiting the use of the historical data of specific securities as a basis for a projection forces such projections to rely on other proxies available – such as the use of indices as proxies to model asset classes. Although, in many circumstances, models based index data is educational and illustrative of investment behavior, because of its composition as an amalgam of different data inputs, index data can behave differently than individual security data. Depending on the analysis and the particular investment concept, product or service illustrated, a closer, apples to apples, comparison using specific securities (or composite of securities) may be a better, more faithful illustration of a point sought to be conveyed (*e.g.*, the likelihood of achieving a particular goal, or risk and return characteristics) and meet FINRA’s policy objective of better informing investors.

To be sure, we advocate that any illustration relying on historical analysis would have to be clear that past behavior may not be repeated and that such asset classes or individual securities could perform differently, even in substantially similar market conditions.

3. FINRA SHOULD CLARIFY WHAT IS MEANT BY CUSTOMIZED ILLUSTRATIONS

It is not entirely clear what the Proposal would classify as a *“‘customized’ hypothetical investment planning illustration.”* This concern is particularly true where not all investment allocation programs or strategies are

equally customizable.⁵ Also, the Proposal posits the acceptable use of a “reliable” off-the shelf software package to produce such “customized” illustrations. These two elements separately, and in combination, lead to possibilities that are unclear as to their acceptability under the new Proposal.

A wide spectrum of customizable inputs could be permitted by a particular “reliable” off-the-shelf software package. What is not clear, however, is which such inputs would help meet the appropriate standard of customization. For example, does sufficient customization exist only as to one or more investment allocation(s) being used? Does the customization element relate to the investment objectives and investment profile of the recipients? Does the customization relate to the underlying investments in the asset allocation projection? Or is the customization requirement met if a particular (even if otherwise generic projection) was prepared for a specific customer or prospect? Can several different customers or prospects be provided with the same or substantially similar customized projection? Without clarification, firms will be left to divine what level of customization is required by the Proposal, if adopted.

Further, and more to the point, bespoke illustrations are expected for customizable products. In contrast, investment allocations of broad applicability (and without customization) do not generally produce customized illustrations. FINRA’s suitability rule provides a safe harbor for firms’ use of asset allocation models that are, among other things, based on “generally accepted investment theory.”⁶ These models often take into account the historic returns of different asset classes over defined periods of time, but are very general models, not “customized” to a particular individual or account. It is not clear from the Proposal that a projection of such a general model would meet the correct standard of customization required. Prohibiting a projection of a model based on generally acceptable investment theory would seem an arbitrary and illogical limitation as such as illustration could have value to an investor or prospect.

4. FINRA SHOULD HARMONIZE ITS APPROACH WITH THAT OF THE SEC

As FINRA recognized, the public has, for decades, benefitted from performance projections in illustrations compliant with the Investment Advisers Act of 1940 (“Advisers Act”), as amended, in the context of financial planning or asset allocations, among others. For this reason, we would urge FINRA to consider harmonizing its own position with that of the Securities and Exchange Commission (“SEC”) and its staff in permitting the same latitude permitted by the SEC.

FINRA’s restrictions of the general use by its members of related performance presentations, even under very particularized conditions and with explanatory disclosure, consistent with the guidance and precedent

⁵ We are not referring to investment advisory programs availing themselves of the safe harbor provisions of Rule 3a-4 under the Investment Company Act of 1940, but of brokerage programs not subject to the Advisers Act.

⁶ FINRA Rule 2111 Suitability (FAQ) available at <https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq>. Rule 2111.03 provides a safe harbor for firms’ use of asset allocation models that are, among other things, based on “generally accepted investment theory.”

under the Investment Company Act of 1940, as amended, has not diminished the use of such materials.⁷ Quite the contrary, the accessibility of such illustrations (in non-FINRA materials) has been enhanced by the ubiquity of the Internet. Its pervasive use, in the more than twenty years since the issuance of the SEC staff guidance, has not been deemed *per se* misleading by any venue with competence regarding the subject (provided the related performance illustrations are consistent with SEC guidance). In fact, certain regulators require the presentation of related performance,⁸ fully embracing the standards and limits imposed by the SEC.⁹ Denying customers and prospects insightful information about a FINRA member's competence, investment style, among others, that such clients and prospects can obtain about an industry competitor seems an illusory prohibition, or at least a prohibition that serves to the detriment of FINRA members generally.

Such harmonization should exist within the guardrails imposed by the Advisers Act and Rule 2210, as applicable, prohibiting misleading communications and communications containing material omissions. Not doing so perpetuates dysfunctional regulatory arbitrage; preserves an unlevel playing field, particularly with respect to new market entrants such as robo advisers; and prevents customers and prospects from accessing effective, educational and practical explanatory materials simply because they choose, for cost, convenience or other motives, a self-directed or commission-based brokerage channel over an asset-based advisory channel. The delivery channel should not impose the content standard.

In addition, Proposal appears narrowly tailored to the financial planning context (*e.g.*, preparation and delivery of an investment plan or proposal to financial planning clients). This is a small subset of the broad spectrum of products and services offered by firms, including those that are dually-registered or have affiliated broker-dealers. If firms should be reading the Proposal to only permit performance projections in such a narrow context, the Proposal defeats the concept of better harmonization with the regulatory standards for investment advisers, which broadly permits performance projections largely irrespective of delivery channel or service line.

5. FINRA SHOULD RECOGNIZE AN INSTITUTIONAL CARVE-OUT

⁷ See Interpretive Letter to Yukako Kawata (Dec. 30, 2003) available at <http://www.finra.org/industry/interpretive-letters/december-30-2003-1200am>; see also Interpretive Letter to Michael D. Udoff, Securities Industry Association (October 2, 2003) available at (<http://www.finra.org/industry/interpretive-letters/october-2-2003-1200am>).

⁸ See CFTC Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators (August 12, 2013) available at <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister081213.pdf> (requiring that the commodity pool operator of a registered investment company with less than three years operating history is required to disclose the performance of all accounts that have investment objectives, policies and strategies substantially similar to those of the offered pool).

⁹ See, *e.g.*, ITT Hartford Mutual Funds No Action Letter (Feb. 7, 1997)(fund may include in marketing material for other funds managed by the same adviser with investment objectives, policies and strategies substantially similar to those of the fund); Nicholas Applegate Mutual Funds No Action Letter (Aug. 6, 1996)(fund may include in prospectus information for private accounts managed by the fund's adviser with investment objectives, policies, and strategies substantially similar to those of the fund).

As we advocated in the preceding section, the delivery channel should not impose a different content standard, but the sophistication of the recipient could reasonably do so. FINRA imposes a high bar in its definition of “Institutional Investors,”¹⁰ and such definition recognizes the ability of such parties to fend for themselves in analyzing communications distributed to them. The breadth of analytic resources and the sophistication of market and security analyses for the consumption of sophisticated industry professionals should not be limited by content standards designed, rightfully, to protect retail investors. In fact, SEC guidance recognizes that whether a communication could be deemed misleading or confusing turns on the sophistication of the investor.¹¹ An analyst holding a graduate degree in advanced mathematical modeling who is scrutinizing a projection for his or her firm’s investment hardly needs the cautionary disclosures “indices are not available for direct investment” or “investments may involve risk.” Such elementary cautions have a place in retail materials, but border on the nonsensical in materials directed to Institutional Investors who can avail themselves of analysts, experts and specialists to scrutinize more complex illustrations.

For Institutional Investors to analyze securities offerings and properly conduct due diligence of products they may offer to their clients, a higher order of analysis and analytical tools may be necessary. Limiting projections to the simpler, more digestible illustrations more appropriate for retail investors may correspondingly limit the ability of an Institutional Investor to test the assumptions and limitation of an investment allocation or strategy. Institutional Investors should be able to require and receive projections and performance illustrations either reducing or broadening the analytical focus, positing blended performance, alternate facts, data or market environments, to adequately assess the theoretical underpinnings of an investment allocation or strategy.

We make the above recommendation fully supporting the provisions codified in Rule 2211 prohibiting the dissemination of institutional material to retail investors. We also recommend an institutional carve-out that in no way diminishes the obligation to provide communications that are not misleading and that do not contain material omissions.


We appreciate the opportunity to comment on the Proposal. While we are concerned about several aspects of the Proposal, we believe it is an important step forward in providing meaningful information to customers and prospects in helping them make investment decisions.

¹⁰ See Rule 2210(a)(4).

¹¹ See, e.g., *Triad Asset Management, Inc.* (available April 22, 1993); *Mills-Price & Associates, Inc.* (available July 15, 1992); *Bypass Wall Street, Inc.* (available January 7, 1992); *Clover Capital Management, Inc.* (available July 19, 1991); *Investment Company Institute* (available September 23, 1988); *Covato/Lipsitz, Inc.* (available October 23, 1981); *Edward F. O’Keefe* (available April 13, 1978); *Anametrics Investment Management* (available May 5, 1977).

Please feel free to contact us if we can be of further assistance to FINRA. In particular, in the areas where we have proposed that FINRA considers alternatives to the Proposed Rule, MMI would welcome the opportunity to assist FINRA staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Craig D. Pfeiffer".

Craig D. Pfeiffer
President & CEO
Money Management Institute