(the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: Andalusian Credit Company, LLC, Andalusian Senior Credit Fund I, LP, and Andalusian Credit Partners, LLC.

FILING DATES: The application was filed on July 28, 2023, and amended on January 29, 2024 and April 17, 2024.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on August 13, 2024, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Terrence W. Olson, Andalusian Credit Company, LLC, at *terry@andalusiancredit.com;* and Richard Horowitz, Esq., Dechert LLP, at *richard.horowitz@dechert.com.*

FOR FURTHER INFORMATION CONTACT: Matthew Cook, Senior Counsel, or Kyle R. Ahlgren, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated April 17, 2024, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024–16276 Filed 7–24–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100561; File No. SR–FINRA–2023–016]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend FINRA Rule 2210 (Communications with the Public) To Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified Purchasers and Knowledgeable Employees

July 19, 2024.

I. Introduction

On November 13, 2023, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 2210 (Communications with the Public) (hereinafter, the ''proposed rule change'' unless otherwise specified). The proposed rule change, as subsequently amended by Amendment No. 1, would allow a member firm to project performance [3] or provide a targeted return [4] with respect to a security, asset allocation, or other investment strategy in limited circumstances and subject to certain conditions. Specifically, the proposed rule change would permit a member firm to project performance or provide a targeted return in: (1) an institutional communication; [5] or (2) a communication that is distributed or made available only to: (A) persons meeting the definition of ''qualified purchaser'' (''QP'') under the Investment Company Act of 1940 (''Investment Company Act''),[6] and is a communication that promotes or recommends a member firm's own unregistered securities or those of a control entity that is exempt from the requirements of FINRA Rule 5122 (Private Placements of Securities Issued by Members) pursuant to FINRA Rule 5122(c)(1)(B) (''Member Private

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''Projections of performance reflect an estimate of the future performance of an investment or investment strategy, which is often based on historical data and assumptions. Projections of performance are commonly established through mathematical modeling.'' *See* Exchange Act Release No. 98977 (Nov. 17, 2023), 88 FR 82482, 82482 n.3 (Nov. 24, 2023), File No. SR–FINRA–2023–016 (''Notice''), *https://www.govinfo.gov/content/pkg/FR-2023-11-24/pdf/2023-25881.pdf.*

[4] ''Targeted returns reflect the aspirational performance goals for an investment or investment strategy.'' Notice at 82482 n.3.

[5] An ''institutional communication'' means ''any written (including electronic) communication that is distributed or made available only to institutional investors[ ] but does not include a member's internal communications.'' FINRA Rule 2210(a)(3). An ''institutional investor'' means any: ''(A) person described in [FINRA] 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.'' FINRA Rule 2210(a)(4). FINRA Rule 4512(c) states that for purposes of Rule 4512, the term ''institutional account'' shall 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 Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.''

[6] Section 2(a)(51)(A) of the Investment Company Act defines the term ''qualified purchaser'' as: (i) any natural person who owns not less than $5 million in investments (as defined by the SEC); (ii) a family-owned company that owns not less than $5 million in investments; (iii) a trust not formed for the purpose of acquiring the securities offered, as to which each trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clauses (i), (ii), or (iv); and (iv) any other person, acting for its own account or the account of other QPs, who in the aggregate owns and invests on a discretionary basis not less than $25 million in investments. *See* 15 U.S.C. 80a–2(a)(51)(A).

Offerings'');[7] or (B) QPs or persons meeting the definition of ''knowledgeable employee'' under Investment Company Act Rule 3c–5 (a ''knowledgeable employee''),[8] and is a communication that promotes or recommends a private placement that is exempt from the requirements of FINRA Rule 5123 (Private Placements of Securities) pursuant to FINRA Rule 5123(b)(1)(B) or FINRA Rule 5123(b)(1)(H), respectively (''Exempted Private Placement'').[9] The investors who would be eligible to receive communications that include such performance projections or targeted returns under the proposed rule change are hereinafter collectively referred to as ''Projection-Eligible Investors.'' The proposed rule change also would impose conditions to help ensure that such performance projections or targeted returns have a reasonable basis, are accompanied by certain disclosures, and that member firms communicating such information have written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of their audience.[10]

The proposed rule change was published for public comment in the **Federal Register** on November 24, 2023.[11] The comment period closed on December 15, 2023. The Commission received comment letters in response to the Notice.[12] On January 5, 2024, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to February 22, 2024.[13] On February 22, 2024, FINRA responded to the comment letters received in response to the Notice and filed an amendment to modify the proposed rule change (''Amendment No. 1'').[14] Also on February 22, 2024, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[15] The Commission received additional comment letters in response to the OIP.[16] On May 17, 2024, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to July 21, 2024.[17] On July 17, 2024, FINRA responded to the comment letters received in response to the OIP.[18] This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

FINRA Rule 2210 generally prohibits a member firm's communications from predicting or projecting performance, implying that past performance will recur, or making any exaggerated or unwarranted claim, opinion, or forecast.[19] As discussed below, there are three exceptions to this general prohibition; the proposed rule change would create a fourth exception to permit the communication of projected performance or targeted returns in certain narrowly-defined circumstances.[20] After summarizing the current regulatory framework, the Commission describes the proposed rule change.

A. Background

1. FINRA Rule 2210 (Communications With the Public)

FINRA Rule 2210 imposes obligations related to, among other things, the approval, review, recordkeeping, filing, and content of member firms' communications with the public.[21] FINRA Rule 2210(d)(1) imposes six general standards for the content of a member firm's communications with the public.[22] For example, member firms' communications must ''be based on principles of fair dealing and good faith, . . . be fair and balanced, and . . . provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.'' [23] Member firms may not ''omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.'' [24] The standards prohibit ''any false, exaggerated, unwarranted, promissory[,] or misleading statement or claim in any communication.'' [25] Member firms also must consider ''the nature of the audience to which the communication will be directed'' and provide ''details and explanations appropriate to the audience.'' [26]

These standards also include a general prohibition on ''predict[ing] or project[ing] performance, imply[ing] that past performance will recur[,] or mak[ing] any exaggerated or unwarranted claim, opinion[,] or forecast.'' [27] This general prohibition does not apply to three types of communications: hypothetical illustrations of mathematical

[7] A ''member private offering'' means ''a private placement of unregistered securities issued by a member or a control entity.'' FINRA Rule 5122(a)(1). FINRA Rule 5122 (Private Placements of Securities Issued by Members) governs, among other things, the disclosure and filing requirements applicable to member private offerings. FINRA Rule 5122(c)(1)(B) states that member private offerings sold solely to QPs, as defined in Section 2(a)(51)(A) of the Investment Company Act, are exempt from the requirements of FINRA Rule 5122.

[8] For purposes of the proposed rule change, a ''knowledgeable employee'' includes any natural person who is an executive officer, director, trustee, general partner, advisory board member, or person serving in similar capacity of the fund excluded from the definition of ''investment company'' pursuant to Investment Company Act Section 3(c)(7) or certain of its affiliates, and other employees, under certain conditions, who participate in the investment activities of the fund or certain of the fund's affiliates. *See* Exchange Act Release No. 99588 (Feb. 22, 2024), 89 FR 14728, 14729 n.26 (Feb. 28, 2024), File No. SR–FINRA–2023–016, *https://www.govinfo.gov/content/pkg/FR-2024-02-28/pdf/2024-04072.pdf* (citing Investment Company Act Rule 3c–5 (17 CFR 270.3c–5(a)(2), (4)) (''OIP'').

[9] *See* Notice; OIP. FINRA Rule 5123 governs, among other things, the filing requirements applicable to members that sell a security in a non-public offering in reliance on an available exemption from registration under the Securities Act (''private placement''). FINRA Rule 5123(b)(1)(B) exempts private placements sold solely to QPs from the requirements of FINRA Rule 5123. FINRA Rule 5123(b)(1)(H) exempts private placements sold solely to knowledgeable employees from the requirements of FINRA Rule 5123.

[10] *See* Notice; OIP.

[11] *See* Notice.

[12] The comment letters received in response to the Notice are available at *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016.htm.*

[13] *See* letter from Meredith Cordisco, Associate General Counsel, Office of General Counsel, FINRA, to Craig Slivka, Division of Trading and Markets, Commission, dated Jan. 5, 2024, *https://www.finra.org/sites/default/files/2024-01/SR-FINRA-2023-016-extension1.pdf.*

[14] *See* letter from Meredith Cordisco, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated Feb. 22, 2024, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-433139-1075042.pdf* (''FINRA Response Letter I''); Amendment No. 1.

[15] *See* OIP.

[16] The comment letters received in response to the OIP are available at *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016.htm.*

[17] *See* letter from Meredith Cordisco, Associate General Counsel, Office of General Counsel, FINRA, to Craig Slivka, Division of Trading and Markets, Commission, dated May 17, 2024, *https://www.finra.org/sites/default/files/2024-05/FINRA-2023-016-Extension-2.pdf.*

[18] *See* letter from Meredith Cordisco, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated July 17, 2024 (''FINRA Response Letter II''), *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016.htm.*

[19] FINRA Rule 2210(d)(1)(F); *see* Notice at 82482.

[20] Notice at 82483.

[21] *See* FINRA Rule 2210.

[22] FINRA Rule 2210(d)(1).

[23] FINRA Rule 2210(d)(1)(A).

[24] *Id.*

[25] FINRA Rule 2210(d)(1)(B) (''No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.'').

[26] FINRA Rule 2210(d)(1)(E).

[27] FINRA Rule 2210(d)(1)(F).

principles;[28] investment analysis tools;[29] and price targets in research reports on debt or equity securities.[30] Unless one of these three exceptions applies, member communications may not predict or project performance.[31]

2. FINRA's Stated Reasons for the Proposed Rule Change

As stated above, the proposed rule change would permit the presentation of projected performance or targeted returns in institutional communications about a security, asset allocation, or other investment strategy or in communications to QPs and knowledgeable employees about certain private placements. The proposed rule change also would impose conditions to help ensure that such performance projections or targeted returns have a reasonable basis, are accompanied by certain disclosures, and require member firms communicating such information have written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of their audience.

FINRA stated that some of its member firms' customers, especially institutional investors, request projected performance or targeted returns concerning investment opportunities to help them make informed investment decisions.[32] FINRA explained that institutional investors and QPs ''often test their own opinions against performance projections they receive from other sources, including issuers and investment advisers.'' [33] FINRA stated that for this reason projected performance information ''may be useful for [investors] that either have the financial expertise to evaluate investments and to understand the assumptions and limitations associated with such projections, or that have resources that provide them with access to financial professionals who possess this expertise.'' [34] However, because FINRA Rule 2210 ''generally precludes a member from providing projected performance or targeted returns in marketing communications distributed to institutional investors and QPs, these investors cannot obtain a member's potentially different and valuable perspective.'' [35]

Under these circumstances, FINRA stated that FINRA Rule 2210's general prohibition ''creates an incentive for issuers to avoid the registered broker-dealer channel to offer securities and instead either use an unregistered firm[ ] or market securities directly to potential investors.'' [36] FINRA explained that the proposed rule change ''would allow members to provide the same or similar information regarding projected performance or targeted returns that investors are receiving from issuers or other unregistered intermediaries'' but would impose on the member firm ''substantial requirements that enhance investor protections.'' [37] FINRA also stated that member firms dually registered as investment advisers or those that employ dually registered persons already may provide performance projections to their customers.[38]

FINRA stated that any proposal to permit the use of projected performance or targeted returns in member firms' communications ''must not increase the risk of potential harm to retail investors.'' [39] For that reason, according to FINRA, the proposed rule change would ''create a new, narrowly tailored[ ] exception'' to FINRA Rule 2210's general prohibition applicable only to institutional communications and to communications to QPs and knowledgeable employees about certain private placements.[40] FINRA explained that, in its experience with broker-dealer communications, institutional investors, QPs, and knowledgeable employees are more likely to understand the risks and limitations of projections or targeted returns.[41] Indeed, according to FINRA, the proposed rule change ''would not alter the current prohibitions on including projections of performance or targeted returns in most types of retail communications.'' [42] In addition, FINRA stated that ''no member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to a retail investor.'' [43]

FINRA also stated that the proposed rule change is ''in many respects consistent with'' the Commission's Investment Adviser Marketing Rule [44] (''IA Marketing Rule'').[45] That rule makes it unlawful for any SEC-registered investment adviser to disseminate any advertisement [46] that violates the rule's specified general prohibitions.[47] The IA Marketing Rule's provisions address, among other things, the inclusion of performance in an

[28] A member firm may communicate a ''hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy.'' FINRA Rule 2210(d)(1)(F)(i). This exception ''applies to tools that serve the function of a calculator that computes the mathematical outcome of certain assumed variables without predicting the likelihood of either the assumed variables or the outcome. For example, this exception applies to a calculator that computes a net amount of savings that an investor would earn over an assumed period of time with assumed variables of rates of returns, frequency of compounding, and tax rates.'' Notice at 82482.

[29] A member firm may publish ''[a]n investment analysis tool, or a written report produced by an investment analysis tool, that includes projections of performance provided it meets the requirements of FINRA Rule 2214 [(Requirements for the Use of Investment Analysis Tools)].'' FINRA Rule 2210(d)(1)(F)(ii). An ''investment analysis tool'' is ''an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.'' Notice at 82482–83 (citing FINRA Rule 2214(b)).

[30] A member firm may communicate ''[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.'' FINRA Rule 2210(d)(1)(F)(iii).

[31] *See* FINRA Rule 2210(d)(1)(F).

[32] *See* Notice at 82483.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 82488.

[37] *Id.*

[38] *See id.* at 82489 (''Some of these members may have Projection-Eligible Investor customers that already have access to or are receiving projections-related communications from a member that is dually registered, a member's advisory affiliate, or an investment adviser owned by an associated person of the member, as part of the clients' investment advisory relationship. For example, some dually registered members and dually registered representatives communicate information regarding projected performance to their investment advisory clients already.'').

[39] *Id.* at 82483.

[40] *Id.*; OIP at 14729.

[41] FINRA Response Letter I at 5–6.

[42] Notice at 82483.

[43] *Id.* at 82483 n.18 (citing FINRA Rule 2210(a)(4)).

[44] *See* Investment Advisers Act Release No. 5653 (Dec. 22, 2020), 86 FR 13024 (Mar. 5, 2021) (hereinafter; ''IA Marketing Rule Adopting Release''), *https://www.govinfo.gov/content/pkg/FR-2021-03-05/pdf/2020-28868.pdf*; SEC Staff, Investment Adviser Marketing: A Small Entity Compliance Guide, *https://www.sec.gov/investment/investment-adviser-marketing.*

[45] Notice at 82487, 82490.

[46] For purposes of the IA Marketing Rule, an ''advertisement'' includes ''[a]ny direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser.'' 17 CFR 275.206(4)–l(e)(1)(i). This general definition is subject to three exceptions, 17 CFR 275.206(4)–1(e)(i)(A)–(C), and ''advertisement'' also includes certain endorsements and testimonials, 17 CFR 275.206(4)–1(e)(1)(ii).

[47] 17 CFR 275.206(4)–1.

advertisement, including a general prohibition on the presentation of hypothetical performance information unless certain conditions are met.[48] These conditions are ''designed to address the potential for hypothetical performance to mislead investors.'' [49] These conditions require investment advisers to: (1) adopt policies and procedures reasonably designed to ensure the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience; (2) provide sufficient information to enable the investor to understand the criteria and assumptions made in calculating such hypothetical performance; and (3) provide (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions.[50]

B. The Proposed Rule Change

The proposed rule change would create a fourth exception to FINRA Rule 2210's general prohibition on the communication of projected performance or targeted returns. As stated above, this proposed exception would permit the presentation of such information in: (1) institutional communications; and (2) communications to QPs and knowledgeable employees about certain private placements.[51] This exception would be available for these communications so long as the member firm: (1) 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 audience; (2) has a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return; and (3) provides certain disclosures.[52] The Commission describes each aspect of the proposed rule change in turn.

1. Scope Limited to Institutional and Certain Private-Placement Communications

The proposed rule change, as modified by Amendment No. 1, would permit a member firm to project performance or provide a targeted return with respect to a security, asset allocation, or other investment strategy in: (1) an institutional communication; or (2) a communication that is distributed or made available only to (A) QPs and is a communication that promotes or recommends a Member Private Offering, or (B) QPs or knowledgeable employees and is a communication that promotes or recommends an Exempted Private Placement.[53]

FINRA explained that the proposed rule change ''must not increase the risk of potential harm to retail investors,'' so it limited Projection-Eligible Investors to those who it believes are more likely to have the expertise or resources to understand the risks and limitations of projected performance or targeted returns.[54] FINRA stated that Projection-Eligible Investors are ''well-established categories of persons that have been previously determined to be financially sophisticated or able to engage expertise for purposes of the securities laws.'' [55] These categories of investors, FINRA stated, ''are more likely to understand the risks and limitations of projections or targeted returns.'' [56]

2. Written Policies and Procedures

The proposed rule change would require any member firm that communicates projected performance or targeted returns to Projection-Eligible Investors to ''adopt[ ] and implement[ ] 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.'' [57] To meet this obligation, FINRA urged member firms to consider including in their written policies and procedures ''content that requires the member to consider the audience that receives a communication presenting projected performance or a targeted return.[58] FINRA stated that communications pursuant to this proposed rule change ''should only be distributed where the member reasonably believes the investors have access to resources to independently analyze this information or have the financial expertise to understand the risks and limitations of such presentations.'' [59]

FINRA explained that these written policies and procedures could permit a member firm to ''rely[ ] on its past experiences with particular types'' of investors and consider whether particular investors have previously expressed interest or invested in similar securities.[60] However, FINRA stated that ''the mere fact that an investor would be interested in high returns'' would not—standing alone—mean that the projected performance or targeted returns ''is relevant to the likely financial situation and investment objectives of the intended audience.'' [61]

3. Reasonable Basis Requirement

The proposed rule change would require any member firm that communicates projected performance or targeted returns pursuant to this exception to have ''a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return, and retain[ ] written records supporting the basis for such criteria and assumptions.'' [62] FINRA stated that this

[48] 17 CFR 275.206(4)–l(d)(6). For purposes of the IA Marketing Rule, ''hypothetical performance'' means ''performance results that were not actually achieved by any portfolio of the investment adviser.'' 17 CFR 275.206(4)–l(e)(8). It includes, but is not limited to, performance derived from model portfolios, performance that is backtested 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 with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement. 17 CFR 275.206(4)–l(e)(8)(i). However, ''hypothetical performance'' does not include certain interactive analysis tools or predecessor performance. 17 CFR 275.206(4)–l(e)(8)(ii).

[49] IA Marketing Rule Adopting Release at 13083.

[50] 17 CFR 275.206(4)–l(d)(6). Collectively, these conditions help to ensure that: (1) advertisements with hypothetical performance information are distributed only to ''investors who have access to the resources to independently analyze this information and who have the financial expertise to understand the risk and limitations of these types of presentations;'' and (2) the intended audience receives ''tailored'' information that is sufficient for the intended audience ''to understand the criteria, assumptions, risks, and limitations'' of the hypothetical performance information. IA Marketing Rule Adopting Release at 13078.

[51] Proposed Rule 2210(d)(1)(F)(iv).

[52] *Id.; see* Notice at 82483.

[53] Proposed Rule 2210(d)(1)(F)(iv)(a).

[54] *See* Notice at 82483; *see also* FINRA Response Letter I at 6.

[55] Notice at 82483; *see* Amendment No. 1 at 5 (''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.'').

[56] OIP at 14729.

[57] Proposed Rule 2210(d)(1)(F)(iv)(b).

[58] Notice at 82484.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 82484 n.22.

[62] Proposed Rule 2210(d)(1)(F)(iv)(c). Because ''targeted returns are aspirational and may be used as a benchmark or to describe an investment strategy or objective to measure the success of a strategy,'' FINRA acknowledged that they ''may not involve all (or any) of the assumptions and criteria applied to generate a projection.'' Notice at 82484 n.21. However, FINRA ''does not believe that the difference between targeted returns and projections of performance is always readily apparent to the recipient of a communication,'' so ''the presentation of both projections of performance and targeted returns would be subject to the same conditions, including that both must have a reasonable basis.'' Notice at 82484 n.21.

proposed obligation ''follows well-established precedents.'' [63] Specifically, FINRA stated that FINRA Rules 2210 and 2241 (Research Analysts and Research Reports) require a price target in a research report to have a ''reasonable basis,'' [64] and SEC rules require certain projections of future economic performance ''to be based on good faith and have a reasonable basis.'' [65]

FINRA stated that it ''believes that it is important for members to consider appropriate factors in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or targeted returns.'' [66] Accordingly, to help guide member firms' reasonable basis determination, the proposed rule change also would include a non-exhaustive list of factors that ''members should consider'' when meeting this obligation.[67] These factors—no one of which is determinative—include: (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.[68] FINRA explained that these factors ''incorporate[ ] some of the relevant factors that members of the financial research and analysis industry use when considering the basis for a recommendation to a customer.'' [69]

The proposed rule change also would prohibit member firms from basing projected performance or targeted returns upon: (1) ''hypothetical, back-tested performance;'' or (2) ''the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record.'' [70] FINRA explained that ''back[-]tested performance may pose an increased risk for misleading investors, as it allows hypothetical investment decisions to be optimized by hindsight.'' [71]

4. Disclosure Requirements

The proposed rule change would impose three disclosure requirements on member firms that communicate projected performance or targeted returns pursuant to this exception. First, any communication of projected performance or targeted returns to a Projection-Eligible Investor must ''prominently disclose[ ] 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.'' [72]

Second, the proposed rule change would require any member firm communicating projected performance or targeted returns to a Projection-Eligible Investor to ''provide[ ] sufficient information to enable the investor to understand . . . 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.'' [73] FINRA explained that this requirement ''is not intended to prescribe any particular methodology or calculation of such performance,'' and it does not ''expect a firm to disclose proprietary or confidential information regarding the firm's methodology and criteria.'' [74] FINRA stated, however, that firms ''would be expected . . . to provide a general description of the methodology used sufficient to enable the investors to understand the basis of the methodology, as well as the assumptions underlying the projection or targeted return.'' [75] Absent these required disclosures, FINRA explained, ''it is more likely that a projection or targeted return would mislead a potential investor.'' [76]

Third, the proposed rule change would require any member firm communicating projected performance or targeted returns to a Projection-Eligible Investor to ''provide[ ] sufficient information to enable the investor to understand . . . 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.'' [77] FINRA explained that this requirement ''is intended to help ensure that such investors do not unreasonably rely on a projection or targeted return given its uncertainty and risks.'' [78]

III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's response to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[79] Specifically, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[80]

Specifically, the proposed rule change would create a reasonably tailored exception from FINRA Rule 2210's general prohibition on the dissemination of performance projections or targeted returns in a member firm's communications. The proposed rule change would allow member firms to provide the same or similar information regarding projected

[63] *Id.* at 82484.

[64] *Id.* (citing FINRA Rules 2210(d)(1)(F)(iii), 2241(c)(1)(B)).

[65] *Id.* (citing Securities Act Regulation S–K, 17 CFR 229.10(b)).

[66] *Id.*

[67] Proposed Rule 2210.01(a).

[68] *Id.*

[69] Notice at 82485 (citing CFA Institute, Standards of Practice Handbook, 155–56 (11th ed. 2014)).

[70] Proposed Rule 2210.01(b).

[71] FINRA Response Letter I at 14.

[72] Proposed Rule 2210(d)(1)(F)(iv)(d).

[73] Proposed Rule 2210(d)(1)(F)(iv)(e).

[74] Notice at 82485.

[75] *Id.*

[76] *Id.*

[77] Proposed Rule 2210(d)(1)(F)(iv)(e).

[78] Notice at 82485.

[79] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[80] 15 U.S.C. 78*o*–3(b)(6).

performance or targeted returns that are provided to investors by issuers and other intermediaries, subject to requirements reasonably designed to protect investors and the public interest. It would limit the scope of the permissible audience to certain categories of investors that FINRA believes have the expertise or resources necessary to understand the risks and limitations of projected performance or targeted returns. It also would permit communication of projected performance or targeted returns only where the member firm complies with certain conditions reasonably designed to protect investors. In particular, the proposed rule change would require member firms to: (1) adopt and implement written policies and procedures reasonably designed to ensure that the communication is relevant to the likely financial situation and investment objectives of the audience; (2) have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return; and (3) provide certain disclosures. Accordingly, and as explained in more detail below, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act. The Commission addresses the proposed rule change's specific provisions, and any related comments, in turn.

A. Scope of the Exception

As originally proposed in the Notice, the proposed rule change would have permitted a member firm to project performance or provide a targeted return with respect to a security, asset allocation, or other investment strategy in: (1) an institutional communication; or (2) a communication that is distributed or made available only to QPs, and is a communication that promotes or recommends a Member Private Offering or a private placement that is exempt from the requirements of FINRA Rule 5123 pursuant to FINRA Rule 5123(b)(1)(B).[81] In response to commenters, and as discussed below, Amendment No. 1 would also permit knowledgeable employees to receive performance projections or targeted returns about Exempted Private Placements (that is, specified private placements that are sold solely to QPs and knowledgeable employees).[82]

Multiple commenters asked that FINRA expand the scope of the proposed rule change to include a broader set of investors, a broader set of investments, and a broader set of performance information.[83] One commenter took no position on the proposed rule change but urged caution in the implementation and enforcement of the proposed rule change.[84] Another commenter, on the other hand, opposed the provision of projected performance or targeted returns to any investor.[85] The Commission addresses each of these issues in turn.

1. Scope of Permissible Investors

Many commenters requested that the proposed rule change be expanded to permit the communication of projected performance to: all investors;[86] accredited investors;[87] or knowledgeable employees.[88] One commenter opposed the communication of projected performance or targeted returns altogether.[89]

With respect to expanding the scope of the exclusion to all investors, and not just a subset of investors, one commenter stated that broker-dealers should be permitted to communicate projected performance and targeted returns equally to all investors, ''subject to the same conditions as the IA Marketing Rule, which requires investment advisers to consider the intended audience for the communications.'' [90] A second commenter stated that the protections provided by Regulation Best Interest and FINRA Rule 2210's general content standards justify the extension of the proposed rule change's scope to retail communications.[91] This commenter stated that, in lieu of limitations on the scope of Projection-Eligible Investors, FINRA could protect retail investors by publishing guidance, similar to that provided by the Commission in the IA Marketing Rule release, that it ''intend[s] for advertisements including hypothetical performance information to only be distributed to investors who have access to the resources to independently analyze this information and who have the financial expertise to understand the risks and limitations of these types of presentations.'' [92]

With respect to expanding to accredited investors, one commenter stated that accredited investors ''are also likely to have the sophistication and resources to assess performance projections and targeted returns properly.'' [93] A second commenter requested that the proposed rule change extend to accredited investors under Regulation D where the broker-dealer recommends (and does not merely promote) private placements offered only to accredited investors, in light of the obligations that apply under Regulation Best Interest, the regulatory filing and review procedures of FINRA Rules 5122 and 5123,[94] and the due diligence requirements of Regulation D.[95] A third commenter, however, urged caution about extending the communication of projected

[81] Notice at 82483–84; proposed Rule 2210(d)(1)(F)(iv)(a).

[82] Proposed Rule 2210(d)(1)(F)(iv)(a).

[83] *See, e.g.,* letters from Bernard Canepa, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated Dec. 15, 2023, at 2–3, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314759-820242.pdf* (''SIFMA Letter''); Dorothy Donohue, Deputy General Counsel, and Matthew Thornton, Associate General Counsel, Investment Company Institute, dated Dec. 15, 2023, at 5–7, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314280-819322.pdf* (''ICI Letter I''); Anya Coverman, President and CEO, Institute for Portfolio Alternatives, dated Dec. 15, 2023, at 5, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314439-819782.pdf* (''IPA Letter''); Jack O'Brien, Morgan, Lewis & Bockius LLP, dated Mar. 25, 2024, at 3, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-450559-1152522.pdf* (''Morgan Lewis Letter''); Dechert LLP, dated Dec. 15, 2023, at 2–8, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-314499-819902.pdf* (''Dechert Letter''); Jay Knight, Federal Regulation of Securities Committee, ABA Business Law Section, dated Jan. 8, 2024, at 3, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-368259-893862.pdf* (''ABA Letter''); Molly Diggins, Partner & General Counsel, Monument Group, Inc., dated Jan. 31, 2024, at 3, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-418839-996922.pdf (''Monument Group Letter II'').*

[84] *See* letter from Joseph Peiffer, President, Public Investors Advocate Bar Associations, dated Dec. 15, 2023, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-313899-818504.pdf* (''PIABA Letter'').

[85] *See* letter from the Center for American Progress, dated Apr. 12, 2024, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-458213-1173034.pdf* (''CAP Letter'').

[86] *See* SIFMA Letter at 2; ICI Letter I at 5–6.

[87] *See* SIFMA Letter at 2–3; IPA Letter at 5; Morgan Lewis Letter at 3.

[88] *See, e.g.,* SIFMA Letter at 2–3; Dechert Letter at 8.

[89] CAP Letter.

[90] SIFMA Letter at 2.

[91] *See* ICI Letter I at 5–6.

[92] ICI Letter I at 6. Indicating that the IA Marketing Rule does not restrict the scope of investors eligible to receive hypothetical performance, a third commenter stated that FINRA should eliminate any such restrictions from the proposed rule change. Morgan Lewis Letter at 2–3. This commenter explained that this asymmetry would result in a lack of ''any meaningful harmonization between the [IA] Marketing Rule and FINRA Rule 2210 with respect to hypothetical performance and will only enhance information asymmetries that already exist in the market.'' *Id.* at 2.

[93] SIFMA Letter at 2–3; *see* Morgan Lewis Letter at 3 (asserting that FINRA should expand the scope of Projection-Eligible Investors to include accredited investors if FINRA insisted on limiting the scope to certain investors).

[94] This commenter explained that FINRA's Corporate Financing Department reviews private placement memoranda and retail communications under FINRA Rules 5122 and 5123 and considers ''whether the member [firm] appears to have conducted a reasonable investigation of the issuer.'' IPA Letter at 5–6.

[95] *See* IPA Letter at 5–6.

performance and targeted returns to accredited investors, explaining that the number of accredited investors has substantially increased since the Commission first established the category in 1982 and expressing concern that it ''contains an increasing amount of investors [who] do not have the sophistication or financial wherewithal to adequately ascertain the risks'' associated with projected performance and targeted returns.[96]

With respect to expanding to knowledgeable employees, one commenter requested that the proposed rule change extend to knowledgeable employees of private funds that are excluded from the definition of investment company pursuant to Investment Company Act Section 3(c)(1) and 3(c)(7) (referred to as Section 3(c)(1) or Section 3(c)(7) funds, respectively),[97] explaining that such employees ''are also likely to have the sophistication and resources to assess performance projections and targeted returns properly.'' [98] A second commenter requested that the proposed rule change extend to knowledgeable employees of Section 3(c)(7) funds because Section 3(c)(7) permits the sale of those funds' securities to both QPs and knowledgeable employees who are not QPs.[99] This commenter explained that ''executive officers and investment professionals with intimate knowledge of the operations of private funds marketed in member communications to the public'' are not the intended beneficiaries of the proposed rule change's investor-protection conditions.[100]

Another commenter, however, urged the Commission to disapprove the proposed rule change.[101] This commenter stated that FINRA Rule 2210 provides the only ''meaningful protection'' to investors—regardless of their expertise and resources—in securities exempted from registration and the public disclosure framework.[102] Without registration and public disclosures, the commenter stated, it is difficult to reliably project performance or provide targeted returns for these investments.[103]

FINRA disagreed with the commenter opposing the proposed rule change, stating that the proposed rule change ''will benefit investors without sacrificing investor protection, similar to the benefits that the Commission outlined in its adoption of the IA Marketing Rule related to investment advisers' presentation of hypothetical performance.'' [104] Further, FINRA reiterated that ''broker-dealers are generally prohibited from using projections of performance and targeted returns in their communications'' and that the proposed rule change would allow such projections and targeted returns ''under narrow circumstances and only when the safeguarding conditions are met.'' [105] Importantly, FINRA stated that one such condition is the requirement that the member firm have a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return.[106] What is more, FINRA stated that FINRA Rule 2210's general content standards would continue to apply, and projected performance and targeted returns that are ''misleading or lack a sound basis will continue to be prohibited'' under the proposed rule change.[107]

FINRA also disagreed with the commenter's assertion that the absence of public disclosure obligations makes it practically impossible to reliably project performance for private placements.[108] FINRA stated that even without public disclosure obligations, private placements are subject to antifraud provisions of the federal securities laws, they typically do provide disclosures,[109] and there are generally accepted methods to assess private company valuation [110] and forecasts.[111] In any event, FINRA stated that the proposed rule change would prohibit the communication of projected performance or targeted returns where the member firm ''is not satisfied that it can form a reasonable basis [for such information] because of what it perceives as unreliable or unsubstantiated information on the issuer.'' [112]

[96] PIABA Letter at 2. PIABA indicated that the number of investors who qualified as ''accredited'' rose from approximately 1.8% of U.S. households in 1983 to approximately 9.9% of U.S. households in 2013. *Id.* (citing Commissioner Luis Aguilar, Statement on Revisiting ''Accredited Investor'' Definition to Better Protect Investors, n.3 (Dec. 17, 2014), *https://www.sec.gov/news/statement/spch121714laa* (figures not adjusted for inflation)).

[97] Investment Company Act Rule 3c–5 generally defines a ''knowledgeable employee'' as certain persons associated with private funds that would be investment companies but for the exclusions provided in Section 3(c)(1) or (c)(7) funds. *See* Investment Company Act Rule 3c–5 (17 CFR 270.3c–5(a)(2), (a)(4)–(6)). Investment Company Act Section 3(c)(1) generally excludes from the definition of ''investment company'' ''[a]ny issuer whose outstanding securities . . . are beneficially owned by not more than one hundred persons . . . and which is not making and does not presently propose to make a public offering of its securities,'' and Section 3(c)(7) generally excludes ''[a]ny issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are [QPs], and which is not making and does not at that time propose to make a public offering of such securities.'' 15 U.S.C. 80a–3(c)(1) and (c)(7).

[98] SIFMA Letter at 2–3.

[99] Dechert Letter at 8.

[100] *Id.*

[101] *See* CAP Letter; *see also* PIABA Letter at 2 (urging FINRA to ''be mindful of the challenges accompanying this proposal and devote adequate resources to policing all communications,'' keeping in mind that any weakening of communication standards ''will only serve to harm individual investors.''). CAP stated that—as a general matter—FINRA has failed to articulate the basis for the proposed rule change. *See* CAP Letter at 3, 6. FINRA disagreed, explaining that its stakeholder engagement led to repeated requests for more permissive use of projected performance and targeted returns and greater regulatory harmonization with the IA Marketing Rule. FINRA Response Letter II at 11–14. Through this engagement, FINRA also learned that institutional investors often request this information from broker-dealers and that ''institutional investors and QPs often test their own opinions against performance projections they receive from other sources, including from issuers and investment advisers.'' *Id.* at 13–14. As discussed in this order, FINRA reasonably articulated a basis for approval of the proposed rule change consistent with the Exchange Act. The proposed rule change would permit the communication of projected performance or targeted returns only in narrow circumstances and when certain conditions reasonably designed to protect investors are met.

[102] CAP Letter at 3–4 (explaining that investors of any level may be ''misled by cherry-picked or inaccurate information and dubious projections or predictions'').

[103] *See id.* (citing Tyler Gellasch et al., ''How Exemptions From Securities Laws Put Investors and the Economy at Risk,'' Center for American Progress (Mar. 22, 2023), *https://www.americanprogress.org/article/how-exemptions-from-securities-laws-put-investors-and-the-economy-at-risk/*). CAP also stated that the proposed rule change would be inconsistent with the Commission's recently finalized Private Fund Advisers rule's ''express purpose'' to promote the standardization of information disclosures. CAP Letter at 6 (citing Investment Advisers Act Release No. 6383 (Aug. 23, 2023), 88 FR 63206 (Sep. 14, 2023)). In early June 2024, the Fifth Circuit issued a ruling that vacated the Private Fund Advisers rules. *See Nat'l Ass'n of Priv. Fund Managers* v. *SEC*, No. 23–60471, 2024 U.S. App. LEXIS 13645 (5th Cir. June 5, 2024). In any event, as FINRA explained, the proposed rule change serves a different purpose from and is not inconsistent with the Private Fund Advisers rules. *See* FINRA Response Letter II at 16.

[104] FINRA Response Letter II at 11. FINRA explained that investors may benefit from projected performance and targeted returns ''when presented in a context that helps investors to better understand the information.'' *Id.* Toward this end, FINRA noted that the proposed rule change imposes multiple disclosure-related obligations. *Id.*

[105] *Id.*

[106] *Id.* at 15.

[107] *Id.* at 14–15.

[108] *Id.* at 15–16.

[109] *Id.* (citing Andrew N. Vollmer, *Evidence of the Use of Disclosure Documents in Private Securities Offerings to Accredited Investors,* Mercatus Working Paper, Mercatus Center at George Mason University (Oct. 2020)).

[110] *Id.* at 16 (citing CFA Institute, Private Company Valuation, *https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/private-company-valuation*).

[111] *Id.* (citing CFA Institute, Company Analysis, Forecasting, *https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/Company-Analysis-Forecasting*).

[112] *Id.* at 15.

FINRA acknowledged that the proposed rule change would impose restrictions not present in the IA Marketing Rule, but it stated that the proposed rule change was an incremental amendment that ''would nevertheless be beneficial in furthering regulatory harmonization.'' [113] With this in mind, FINRA also declined to amend the proposed rule change to permit the use of projected performance or targeted returns in communications with any investor or more narrowly to accredited investors, as requested by some commenters.[114] FINRA stated that FINRA Rule 2210's general prohibition against performance projections ''is intended to protect investors who may lack the capacity to understand the risks and limitations of using projected performance in making investment decisions.'' [115] FINRA stated that it is appropriate to limit the scope of Projection-Eligible Investors to ''specified, well-established categories of persons that have been previously determined to be financially sophisticated or able to engage expertise for purposes of the securities laws'' because they ''are most capable to understand the risks and limitations of using projected performance.'' [116] More specifically, with respect to accredited investors, FINRA stated that the percentage of U.S. households that qualified as ''accredited investors'' has increased from approximately 1.8% in 1983 to approximately 18.5% in 2022.[117] Unlike the Projection-Eligible Investors covered by the proposed rule change, FINRA stated that accredited investors—as a class—''may not possess the same level of financial expertise to evaluate investments and to understand the assumptions and limitations associated with such projections and targeted returns (or have resources that provide them with access to financial professionals who possess this expertise).'' [118] FINRA further stated that it ''anticipates monitoring how projections of performance and targeted returns are used for the limited categories of investors, as well as the SEC's experience with hypothetical performance in its recently adopted IA Marketing Rule, in considering whether to further expand the use of projections and targeted returns in the future.'' [119]

However, in response to comments requesting expansion to include knowledgeable employees, FINRA expanded the proposed rule change to permit the communication of projected performance or targeted returns about Exempted Private Placements to knowledgeable employees.[120] FINRA explained that knowledgeable employees, such as executive officers, directors, trustees, general partners, and advisory board members, ''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.'' [121] FINRA also concluded that this amendment would appropriately align the scope of Projection-Eligible Investors with the scope of investors permitted to invest in Section 3(c)(7) funds: both QPs and knowledgeable employees who are not QPs.[122] FINRA explained that the proposed rule change's limitation to Projection-Eligible Investors would render it ''highly unlikely'' that a knowledgeable employee of a Section 3(c)(1) or 3(c)(5) fund would be eligible to receive projected performance or targeted returns.[123] Although ''it is theoretically possible'' that a member firm could sell shares of a Section 3(c)(1) or 3(c)(5) fund only to QPs or knowledgeable employees, FINRA reasoned that such a circumstance would be unlikely because those funds are structured ''to allow sales to a wider range of investors.'' [124] In limiting the use of projected performance or targeted returns to QPs and knowledgeable employees in communications that relate to offerings that are sold solely to these types of sophisticated investors, FINRA stated that it ''may be limiting the risk that communications that contain projections or targeted returns would be provided erroneously to less sophisticated investors, including retail investors, in contravention of the rule.'' [125]

One commenter offered ''no objection'' to Partial Amendment No. 1.[126]

The scope of the proposed rule change is reasonably limited to communications with Projection-Eligible Investors.[127] Because FINRA Rule 2210's general prohibition of projected performance is designed to protect investors who may lack the expertise or resources to understand its risks and limitations, it is reasonable for FINRA to limit the proposed rule change to certain categories of investors. Moreover, the purpose of the proposed rule change is not furthering regulatory harmonization, but incrementally expanding FINRA Rule 2210's exceptions to the general prohibition against member firms' communicating projected performance or targeted returns.[128]

FINRA further reasonably determined to decline requests to extend the scope of the proposed rule change to include any accredited investor. A person may qualify as an accredited investor by falling within one of 13 separate qualification categories.[129] These categories include a broader range of investors than QPs, including ''[a]ny natural person whose individual net worth, or joint net worth with that person's spouse or spousal equivalent, exceeds $1,000,000'' [130] and ''[a]ny natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint

[113] *Id.* at 12.

[114] FINRA Response Letter I at 5–7.

[115] *Id.* at 5–6.

[116] *Id.* at 5.

[117] *Id.* at 7 n.28 (citing SEC Staff, Review of the ''Accredited Investor'' Definition (Dec. 14, 2023), *https://www.sec.gov/files/review-definition-accredited-investor-2023.pdf*).

[118] *Id.* at 7.

[119] *Id.* at 8.

[120] *Id.* at 6; *see* proposed Rule 2210(d)(1)(F)(iv)(a).

[121] FINRA Response Letter I at 6.

[122] *See id.* Section 3(c)(7) of the Investment Company Act excludes from the definition of ''investment company'' any issuer whose outstanding securities ''are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers.'' 15 U.S.C. 80a–3(c)(7)(A). For purposes of determining its eligibility for the exclusion provided by Section 3(c)(7), a private fund need not consider any securities beneficially owned by a knowledgeable employee. Investment Company Act Rule 3c–5 (17 CFR 270.3c–5(b)). Notwithstanding this eligibility rule, the proposed rule change—as originally proposed—would not have permitted communications of projected performance or targeted returns to QPs about a Section 3(c)(7) fund if that fund was sold to both QPs *and* knowledgeable employees.

[123] FINRA Response Letter II at 6 n.17 (citing FINRA Response Letter I at n.30). Section 3(c)(5) of the Investment Company Act excludes from the definition of investment company ''[a]ny person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interest in real estate.'' 15 U.S.C. 80a–3(c)(5). Unlike securities offerings made pursuant to Sections 3(c)(1) and 3(c)(7) which are required to be made privately, offerings pursuant to Section 3(c)(5) may be made either publicly (either listed on an exchange or unlisted) or privately.

[124] FINRA Response Letter II at 6 n.17 (citing FINRA Response Letter I at n.30).

[125] *Id.* at 7.

[126] Letter from Dorothy Donohue, Deputy General Counsel, and Matthew Thornton, Associate General Counsel, Investment Company Institute, dated Mar. 15, 2024, at 2, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-447019-1142723.pdf* (''ICI Letter II'').

[127] FINRA Response Letter I at 8.

[128] FINRA Response Letter II at 7, 12.

[129] 17 CFR 230.501(a).

[130] 17 CFR 230.501(a)(5).

income with that person's spouse or spousal equivalent in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.'' [131] SEC Staff indicated in 2023 that ''[l]imited information is available on the financial sophistication of accredited investors, which makes it challenging to assess the effectiveness of the definition's financial thresholds as a proxy for such sophistication.'' [132] For these reasons, it is reasonable for FINRA to decline requests to extend the scope of the proposed rule change to include any accredited investor.

The potential application of Regulation Best Interest does not justify an extension of the proposed rule change to accredited investors or, more broadly, to all investors. Regulation Best Interest would provide additional protections to retail customers where a member firm's communication of projected performance or targeted returns involves a recommendation. The proposed rule change, however, would permit the communication of projected performance or targeted returns to Projection-Eligible Investors in communications that do not involve recommendations (and thus do not trigger Regulation Best Interest's protections).[133] Moreover, Regulation Best Interest and the proposed rule change serve different ends—Regulation Best Interest regulates the conduct of member firms and their associated persons in making recommendations to retail customers,[134] whereas the proposed rule change is designed, among other things, to help equip Projection-Eligible Investors with the information necessary to understand the risks and limitations of projected performance and targeted returns.[135]

For these same reasons, the proposed rule change reasonably expands the scope of Projection-Eligible Investors to cover knowledgeable employees receiving projected performance or targeted returns about Exempted Private Placements. As stated above, FINRA originally limited the proposed rule change to institutional communications and communications promoting Member Private Offerings and Exempted Private Placements that are sold only to QPs.[136] However, so-called ''knowledgeable employees,'' such as executive officers, directors, trustees, general partners, and advisory board members of private funds, should have—because of their positions—knowledge that would equip them to understand the risks and limitations of projected performance or targeted returns.[137] Indeed, FINRA recognized that ''knowledgeable employees typically have intimate knowledge of the operations of private funds, and thus are less likely'' to misunderstand ''the risk and limitations of projections or targeted returns associated with such funds.'' [138] Based on the nature of knowledgeable employees' positions, Amendment No. 1's extension of Projection-Eligible Investors to include such knowledgeable employees is reasonable and may also limit the risk of inadvertent disclosure of projections or targeted returns to investors who may lack the resources to understand the risks limitations of such projection information.

2. Scope of Permissible Investments

The proposed rule change would permit the communication of projected performance and targeted returns to QPs so long as the communication promotes or recommends a Member Private Offering or an Exempted Private Placement.[139] The proposed rule change also would permit the communication of projected performance and targeted returns to knowledgeable employees so long as the communication promotes or recommends an Exempted Private Placement.[140] Member Private Offerings are private placements sold solely to QPs,[141] and Exempted Private Placements are private placements sold solely to QPs or knowledgeable employees.[142]

Three commenters stated that the proposed rule change should permit the communication of projected performance and targeted returns to QPs, regardless of the type of investment.[143] For example, one of these commenters asked that the proposed rule change be ''product agnostic,'' allowing QPs to receive projected performance and targeted returns for private funds that are exempt from the definition of investment company under Investment Company Act Sections 3(c)(1) and 3(c)(5) (and other non-3(c)(7) funds) even where those funds are available to non-QPs.[144] This commenter explained that FINRA could mitigate the risk of indirect distribution of projected performance or targeted returns to non-QP investors by labeling covered materials as ''for QPs only'' or instructing QP recipients not to disseminate the material to non-QPs.[145] Two other commenters stated that QP-status alone—regardless of the type of investment—should be sufficient for eligibility to receive projected performance and targeted returns.[146]

[131] 17 CFR 230.501(a)(6); *see also* FINRA Response Letter I at 7 n.25 (noting these categories of accredited investors).

[132] Review of the ''Accredited Investor'' Definition at 35, *supra* note 117. This is a report by the staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or recommendations contained herein.

[133] *See* FINRA Response Letter I at 12 (''FINRA Rule 2210 is broader and governs *any* communications that a member distributes or makes available to investors, regardless of whether the communications contain a *recommendation* that would also trigger Rule 2111 or Regulation Best Interest.'' (emphasis in original)).

[134] *See* 17 CFR 240.15l–1.

[135] *See* Notice at 82488.

[136] FINRA Response Letter I at 5–6.

[137] *See* Notice at 82483; FINRA Response Letter I at 7; Amendment No. 1 at 5 (''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.'').

[138] FINRA Response Letter I at 6.

[139] Proposed Rule 2210(d)(1)(F)(iv)(a). As noted above, as originally proposed, the proposed rule change would have permitted the communication of projected performance and targeted returns to QPs so long as the communication promotes or recommends a Member Private Offering or a private placement that is exempt from the requirements of FINRA Rule 5123 pursuant to Rule 5123(b)(1)(B) (that is, a private placement sold solely to QPs). As a result of Amendment No. 1, the proposed rule change would permit such communications to QPs so long as the communication promotes or recommends: (1) a Member Private Offering; or (2) a private placement that is exempt from the requirements of FINRA Rule 5123 pursuant to FINRA Rules 5123(b)(1)(B) or 5123(b)(1)(H) (as noted, referred to herein as an ''Exempted Private Placement'').

[140] Proposed Rule 2210(d)(1)(F)(iv)(a).

[141] *Id.* (''that promotes or recommends a Member Private Offering that is exempt from the requirements of Rule 5122 pursuant to Rule 5122(c)(1)(B)''); FINRA Rule 5122(c)(1)(B) (exempting private placements ''sold solely to . . . qualified purchasers'').

[142] Proposed Rule 2210(d)(1)(F)(iv)(a) (''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.''); FINRA Rule 5123(b)(1)(B) (exempting ''offerings sold by the member or person associated with the member solely to . . . qualified purchasers''); 5123(b)(1)(H) (exempting ''offerings sold by the member or person associated with the member solely to . . . knowledgeable employees'').

[143] *See* SIFMA Letter at 3; ICI Letter I at 6–7; ABA Letter at 3.

[144] SIFMA Letter at 3.

[145] *Id.*

[146] ICI Letter I at 6–7 (''If QP status is meant to be a proxy for financial sophistication and resources, it makes no sense to prohibit QPs from receiving performance projections or targets for more highly regulated investments available to retail investors (*e.g.,* mutual funds and ETFs) when they would be permitted for private placements.''); ABA Letter at 3 (''[T]he Committee believes that QPs can generally be expected to have the requisite degree of sophistication and resources available to them to benefit, rather than be susceptible to harm, from receiving targeted returns and projections. The Committee believes that this is the case regardless of whether the relevant broker-dealer communication is in relation to an offering in which only QPs can invest (*e.g.,* a 3(c)(7) Fund offering) or an offering in which non-QPs can also invest (*e.g.,* a fund offering that is exempt from

Continued

In response, FINRA declined to amend the proposed rule change to permit communication of projected performance or targeted returns of any type of investment to QPs.[147] FINRA explained that—by limiting the use of projected performance and targeted returns to certain private placements available only to Projection-Eligible Investors—it may limit the risk that the performance information erroneously reaches ''less sophisticated investors, including retail investors, in contravention of the rule.'' [148]

The proposed rule change reasonably limits the scope of investments eligible for projected performance and targeted returns in communications with QPs and knowledgeable employees. As discussed above, the proposed rule change is intended to restrict the audience of communications including such performance information to certain categories of investors who FINRA believes have the expertise or resources to understand their risks and limitations. This limitation in scope is reasonably designed to further that goal. Because communications to QPs that include projected performance or targeted returns would only relate to certain private placements made available only to QPs and knowledgeable employees, the proposed rule change may reduce the risk that the inadvertent disclosure of such communications would harm a wider range of investors. In this way, the proposed rule change is reasonably designed to protect investors and the public interest.

Furthermore, the proposed rule change incrementally expands the exceptions to the general prohibition against member firms' communicating projected performance or targeted returns to investors. It builds upon FINRA's regulatory experience with rules addressing communications with the public and registration exemptions.

3. Scope of Performance Information

The proposed rule change would prohibit member firms from basing projected performance or a targeted return upon: (1) hypothetical, back-tested performance (herein, ''back-tested performance''); or (2) the prior performance of a portfolio or model that was created solely for the purpose of establishing a track record (herein, ''prior performance of a seed account'').[149]

Two commenters requested that FINRA permit the use of back-tested performance or the prior performance of a seed account to generate performance projections or targeted returns, stating that not doing so would limit the utility of the proposed rule change.[150] Both commenters criticized FINRA's divergence from the IA Marketing Rule, asserting that the IA Marketing Rule permits the use of such information. To address any concern that a member firm would misrepresent hypothetical, back-tested performance as actual performance, one of these commenters recommended that FINRA require ''prominent identification of targets and projections based on back[-]tests and disclosures regarding the reliability of such information.'' [151]

In response, FINRA declined to permit member firms to base projected performance or targeted returns upon back-tested performance or the prior performance of a seed account.[152] FINRA expressed its belief that they ''are not sound bases'' for projected performance or targeted returns.[153] In addition, FINRA stated that, based on its experience, ''back[-]tested performance may pose an increased risk for misleading investors, as it allows hypothetical investment decisions to be optimized by hindsight.'' [154] Accordingly, FINRA has interpreted FINRA Rule 2210(d) to prohibit the presentation of hypothetical back-tested performance in communications used with retail investors.[155] This existing interpretation remains unchanged, and FINRA stated that it ''sees little difference between allowing members to use back[-]tested performance as a basis for a projection or targeted return and allowing members to present back[-]tested performance on its own.'' [156]

With respect to comments requesting alignment with the IA Marketing Rule's treatment of back-tested performance, FINRA stated that the proposed rule change was not intended to be identical to that rule.[157] FINRA recognized that commenters ''continue to advocate for greater regulatory harmony'' with the IA Marketing Rule, but it stated that the proposed rule change ''is nevertheless a step towards regulatory harmonization.'' [158]

The proposed rule change reasonably maintains the prohibition on the use of back-tested performance and the prior performance of a seed account in projected performance or targeted returns. Citing studies of back-tested performance and the prior performance of seed accounts,[159] FINRA explained its belief that such information is not a sound basis for projected performance or targeted returns under the proposed rule change. This is a reasonable interpretation that is consistent with FINRA's position that the presentation of hypothetical back-tested performance may pose a heightened risk of misleading brokerage customers and would violate the content standards in FINRA Rule 2210(d).[160] For these reasons, FINRA reasonably chose to continue the prohibition on the use of back-tested performance and the prior performance of a seed account in projected performance or targeted returns.

B. Written Policies and Procedures

The proposed rule change would require any member firm that communicates projected performance or targeted returns to ''adopt[ ] and implement[ ] 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.'' [161]

registration pursuant to Section 3(c)(1) of the 1940 Act or a registered offering).'').

[147] FINRA Response Letter I at 8.

[148] FINRA Response Letter II at 7.

[149] Proposed Rule 2210.01(b). The proposed rule change leaves undisturbed pre-existing guidance on the use of extracted performance, which constitutes performance results of a subset of investments extracted from a portfolio. FINRA, Frequently Asked Questions About Advertising Regulation, FAQ D.6.2, D.6.3 (Sept. 30, 2021), *https://www.finra.org/rules-guidance/guidance/faqs/advertising-regulation*. One commenter asked FINRA to rescind and replace this guidance, asserting that it is inconsistent with the Commission's IA Marketing Rule. Dechert Letter at 6–7. In response, FINRA stated that the proposed rule change does not address extracted performance, and it declined to modify pre-existing guidance that is peripheral to the proposed rule change. FINRA Response Letter II at 10. The Commission does not address this issue, as it agrees that it is outside the scope of the proposed rule change.

[150] Dechert Letter at 2–4; Monument Group Letter II at 3.

[151] Dechert Letter at 4.

[152] FINRA Response Letter I at 13–14.

[153] FINRA Response Letter II at 10 (citing Joel M. Dickson, Sachin Padmawar & Sarah Hammer, *Joined at the hip: ETF and index development,* Vanguard Research, at 6 (July 2012); Carl Ackerman & Tim Loughran, *Mutual Fund Incubation and the Role of the Securities and Exchange Commission,* 70 Journal of Business Ethics 33–37 (2007)).

[154] FINRA Response Letter I at 14.

[155] *Id.* at 13 n.48; FINRA, Interpretive Letter to Meredith F. Henning, Foreside (Jan. 31, 2019), *https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-meredith-f-henning-foreside;* Interpretive Letter to Bradley J. Swenson, ALPS Distributors, Inc. (Apr. 22, 2013), *https://www.finra.org/rules-guidance/guidance/interpretive-letters/bradley-j-swenson-alps-distributors-inc.*

[156] FINRA Response Letter I at 13.

[157] *Id.* at 14.

[158] FINRA Response Letter II at 13.

[159] *See supra* note 153.

[160] *See* FINRA Response Letter II at 10.

[161] Proposed Rule 2210(d)(1)(F)(iv)(b).

One commenter asked FINRA to clarify that broker-dealers ''can consider the category of investor, rather than an investor's individual characteristics, when ensuring that the communication is relevant to the investor.'' [162] This commenter explained that such an interpretation would ''better align'' this obligation with that of the IA Marketing Rule, which requires that the communication be relevant to the intended audience, not the individual investor.[163]

Other commenters asked FINRA to eliminate or modify this proposed condition, asserting that it is unnecessary or redundant.[164] Two commenters stated that the separate determination that the performance is relevant to the intended audience is redundant because the proposed rule change—as originally proposed—already would limit the communication of projected performance and targeted returns to institutional investors and QPs.[165] In addition, two commenters stated that member firms' independent obligations under FINRA Rule 2111(b) [166] and Regulation Best Interest also render this condition redundant.[167]

In response, FINRA declined to amend or eliminate this provision. FINRA explained that the provision is important, as it would help to ensure that member firms focus on the relevance of their communications to their intended audience, and not simply whether or not the audience is a Projection-Eligible Investor.[168] In addition, FINRA stated that FINRA Rules 2210 and 2111 are ''distinct rules with different scopes and objectives,'' and it stated FINRA Rule 2111 and Regulation Best Interest only apply when a broker-dealer makes a recommendation of a security or investment strategy.[169] FINRA Rule 2210, on the other hand, ''is broader and governs *any* communications that a member distributes or makes available to retail customers, regardless of whether the communications contain a *recommendation* that would also trigger [FINRA] Rule 2111 or Regulation Best Interest.'' [170] Therefore, in response to requests for guidance on whether the proposed rule change would require member firms to limit the use of performance projections and targeted returns to prospective fund investors who pass the suitability requirements of FINRA Rule 2111 or the standards set forth in Regulation Best Interest, FINRA stated that the proposed rule change would not require member firms to assess their audience under a suitability or Regulation Best Interest standard to determine whether the projected performance or targeted return is relevant to the audience's likely financial situation and investment objectives.[171]

However, FINRA clarified that it would interpret this condition ''consistently with the substantially similar provision in the IA Marketing Rule.'' [172] Because the proposed rule change requires the adoption and implementation of 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, FINRA explained that a member firm ''is not required to know the actual financial situation or investment objectives of each investor that receives the communication.'' [173] Instead, the proposed rule change ''permits members to comply with this condition by grouping investors into categories or types.'' [174]

FINRA reasonably determined to require member firms communicating projected performance or targeted returns to Projection-Eligible Investors to ''adopt[ ] and implement[ ] 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.'' [175] The adoption and implementation of such written policies and procedures would help ensure that member firms focus not only on whether the intended audience is a Projection-Eligible Investor but also that the communication is relevant to that audience's likely financial situation and investment objectives. FINRA also reasonably determined to permit member firms to comply with this obligation by relying upon the member firms' past experiences with specific investors or types of investors to group them into categories of investors, as appropriate.[176] Moreover, this proposed condition is not redundant of preexisting obligations under FINRA Rule 2111 and Regulation Best Interest, as the proposed rule change applies more broadly to any communications of projected performance or targeted returns, whether or not they contain recommendations.[177] Finally, FINRA Rule 2111, Regulation Best Interest, and the proposed rule change serve different ends. FINRA Rule 2111 and Regulation Best Interest regulate the conduct of member firms and their associated persons in making recommendations to retail investors, whereas this provision of the proposed rule change would require policies and procedures reasonably designed to help ensure that the communication is relevant to the likely financial situation and investment objectives of the intended audience. Consequently, as FINRA has clarified, the proposed rule change would not require a separate assessment under the suitability or Regulation Best Interest standard.

C. Reasonable Basis Requirement

As stated above, the proposed rule change would require any member firm that communicates projected performance or targeted returns to Projection-Eligible Investors to have ''a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted

[162] SIFMA Letter at 3–4.

[163] *Id.* at 3.

[164] *See* Monument Group Letter II at 5; Dechert Letter at 4–5; ABA Letter at 4–5. In the alternative, the ABA's Federal Regulation of Securities Committee requested that FINRA issue guidance ''that explains what broker-dealers acting as placement agents should do in circumstances where they determine that projections or targeted returns are appropriate for some potential investors in the prescribed nonpublic offerings, but not others, including whether broker-dealers should limit the use of projection and targeted return information to prospective fund investors who pass the independent suitability requirements of FINRA Rule 2111 and Regulation Best Interest.'' ABA Letter at 4–5.

[165] Dechert Letter at 4–5 (acknowledging that the separate requirement ''that FINRA members develop policies and procedures that are reasonably designed to ensure compliance with [FINRA] Rule 2210 . . . is reasonable''); ABA Letter at 4–5.

[166] FINRA Rule 2111(b) addresses a member firm's ''customer-specific suitability obligation for an institutional account.''

[167] ABA Letter at 4; *see* Monument Group Letter II at 5. Monument Group indicated that proposed Rule 2210(d)(1)(F)(iv)(b) would impose an affirmative obligation upon any member firm communicating projected performance or targeted returns to a Projection-Eligible Investor ''to collect information concerning the financial objectives/financial situation of institutional investors—solely for the purpose of providing marketing material containing investment projections and targets.'' Monument Group Letter II at 5 n.3. In response, FINRA explained that the proposed rule change would not impose an ''express document or data collection requirement and would not require firms to assess individual investors'' under suitability or Regulation Best Interest standards. FINRA Response Letter II at 9.

[168] FINRA Response Letter II at 9.

[169] FINRA Response Letter I at 12.

[170] *Id.*

[171] FINRA Response Letter II at 9.

[172] *See* FINRA Response Letter I at 12–13.

[173] *Id.* at 13.

[174] *Id.*

[175] Proposed Rule 2210(d)(1)(F)(iv)(b).

[176] *See* Notice at 82484; FINRA Response Letter I at 13.

[177] *See supra* Part III(A)(1).

return[ ] and retain[ ] written records supporting the basis for such criteria and assumptions.'' [178] The proposed rule change states that ''members should consider multiple factors, with no one factor being determinative,'' in forming a reasonable basis for the criteria used and assumptions made in calculating projected performance or a targeted return.[179] Proposed Supplementary Material .01 includes a non-exhaustive list of factors that member firms may consider in forming a reasonable basis.[180]

One commenter stressed the importance of this provision—and compliance with it—to FINRA's stated goal of helping to ensure that the proposed rule change would not increase risk to retail investors.[181] A second commenter suggested removal of this provision to align with the IA Marketing Rule, ''which imposes no such requirement.'' [182]

Commenters also identified compliance challenges associated with a member firm's use of third-party information to comply with the reasonable basis requirement.[183] Specifically, one commenter asked whether the proposed rule change would require member firms to make their own reasonable-basis determinations about third-party projections.[184] Other commenters stated that member firms may struggle to comply with this condition—especially its document-retention requirement—as it relates to third-party projections or targeted returns because firms are usually uninvolved in their creation and lack access to the underlying materials.[185] One of these commenters also questioned the investor-protection benefit associated with a member firm's retention of third-party records about a third-party projection or targeted return.[186]

In light of these compliance challenges, one commenter asked FINRA to clarify (if it declines to remove the condition) what it expects with respect to third-party performance projections and targeted returns.[187] This commenter stated that member firms should be able to ''rely upon the certification or representations of the sponsor, manager[,] or party calculating this information (who has far greater access to information than the broker-dealer does), absent information to the contrary.'' [188] Another commenter suggested further streamlining of the condition to ''avoid potentially overlapping, ambiguous, and onerous requirements.'' [189]

As an alternative to FINRA's proposed condition, another commenter recommended that member firms be required to establish a reasonable basis to believe that the criteria used and assumptions made in calculating targeted returns or projected performance are appropriate and not misleading, and to retain records supporting that determination.[190] This commenter explained that this alternative approach would better address the use of third-party projections, as it would require the retention of records demonstrating the member firms' testing processes.[191]

One commenter recognized the potential utility of the factors enumerated in the proposed Supplementary Material in making a reasonable basis determination, but asked that FINRA clarify that the consideration of any such factors would depend on the facts and circumstances.[192] Another commenter, however, stated that the factors could ''create potentially overlapping, ambiguous[,] and onerous requirements'' that might dissuade member firms from using projected performance or targeted returns.[193] Another commenter asked FINRA to confirm that a member firm could include projected performance or provide a targeted return relevant to the time horizon of an investment.[194]

In response, FINRA declined to modify the proposed rule change to eliminate or otherwise amend a member firm's obligation to form a reasonable basis for either its own or a third-party generated projected performance or targeted returns.[195] Absent this condition, FINRA stated that projected performance or targeted returns ''could be based on guesswork, dubious presumptions, and wildly inaccurate or inherently misleading reasoning.'' [196] This requirement, FINRA stated, would help to ensure that member firms act ''with reasonable diligence and good faith'' when communicating performance information pursuant to this proposed rule change.[197]

FINRA stated that the proposed rule change ''does not prescribe the manner in which the member forms its reasonable basis'' and member firms retain the ''flexibility to determine what is reasonable based upon the particular facts and circumstances.'' [198] Further, FINRA stated that the factors it identified in the proposed Supplementary Material ''are meant to be a helpful guide'' and ''not all factors may be relevant'' in every instance. FINRA further stated that it would monitor the implementation of this proposed condition and issue guidance, as necessary, ''once FINRA and members have experience with these factors over time.''

With regard to concerns about its interactions with other requirements, FINRA stated the condition's consistency with other requirements.[199] For example, FINRA Rules 2210 and 2241 (Research Analysts and Research Reports) require price targets in research reports to have a reasonable basis.[200] In addition, FINRA stated that SEC rules require issuers to have a good faith and reasonable basis for performance projections contained in certain documents,[201] and that the IA

[178] Proposed Rule 2210(d)(1)(F)(iv)(c).

[179] Proposed Rule 2210.01(a).

[180] *Id.*

[181] PIABA Letter at 2 (''PIABA strongly believes the 'sound basis' requirement should be strictly adhered to and not just be window dressing to further a more liberal standard for communications.'').

[182] SIFMA Letter at 2.

[183] *See* Monument Group Letter II at 4; ICI Letter I at 7; SIFMA Letter at 3; Dechert Letter at 7.

[184] Monument Group Letter II at 4.

[185] ICI Letter I at 7; SIFMA Letter at 3; Dechert Letter at 7; Monument Group Letter II at 4.

[186] Dechert Letter at 7.

[187] SIFMA Letter at 3.

[188] *Id.*

[189] ICI Letter I at 7 (''For instance, if registered fund materials are created by the fund (or its distributor) and a third-party broker wishes to use them, it could be difficult for the third-party broker to establish that it ''has a reasonable basis for the criteria used and assumptions made in calculating the projected performance or targeted return'' and ''retain . . . written records supporting the basis for such criteria and assumptions.'').

[190] *See* Dechert Letter at 7–8.

[191] *Id.* at 8.

[192] ICI Letter I at 7.

[193] Monument Group Letter II at 4. In a subsequent letter, Monument Group stated that FINRA Rule 2210 already has general content standards, and proposed Rule 2210.01(a)'s guidelines ''would overlap with those of private fund managers.'' *See* letter from Molly Diggins, Partner & General Counsel, Monument Group, Inc., dated Mar. 29, 2024, at 2–3, *https://www.sec.gov/comments/sr-finra-2023-016/srfinra2023016-452579-1160882.pdf (''Monument Group Letter III').*

[194] *See* SIFMA Letter at 4.

[195] FINRA Response Letter I at 10–11.

[196] FINRA Response Letter II at 4.

[197] *Id.*

[198] FINRA Response Letter I at 10.

[199] *Id.* (indicating that the reasonable-basis requirement ''follows well-established precedents'').

[200] *Id.*

[201] *Id.* (citing Securities Act Regulation S–K, 17 CFR 229.10(b)). Regulation S–K's ''policy on projections'' provides guidelines on the factors to be considered in formulating and disclosing certain projections. It states ''that management must have the option to present . . . its good faith assessment of a registrant's future performance'' in documents specified in Securities Act Rule 175 (17 CFR 230.175) and Exchange Act Rule 3b–6 (17 CFR 240.3b–6)). 17 CFR 229.10(b), (b)(1). Any such projection, however, must have a reasonable basis.

Marketing Rule's general prohibitions would have the effect of prohibiting the advertisement of hypothetical performance for which the adviser lacks a reasonable basis.[202]

Moreover, FINRA explained that FINRA Rule 2210's content standards apply to all member communications ''distributed or made available'' to investors, whether or not the firm ''created the communication.'' [203] For that reason, FINRA Rule 2210 and the proposed rule change would apply to a member firm's communication of third-party generated projected performance or targeted returns.[204] Accordingly, FINRA explained that a member wishing to use a third-party projection or targeted return would need to ''obtain enough information to form a reasonable basis as to the issuer's assumptions and the underlying criteria.'' [205] If the member firm is unable to secure that information, FINRA stated ''it should refrain from using the communications.'' [206] FINRA concluded that modifying this condition for third-party projections would ''increase[ ] the risk that ''unreasonable, issuer-created projections would be distributed to investors, which is contrary to the public interest.'' [207]

Finally, with respect to the comment requesting whether a member could provide a performance projection or targeted return based on a time horizon of investment, FINRA stated that this determination will always depend on the facts and circumstances of the projection or targeted return, which may or may not be consistent with an investment's time horizon, or in the case of a debt security, its maturity date.[208] In addition, FINRA explained that an investment's time horizon may be an unreliable criterion for calculating a projection or targeted return of the investment because it is often uncertain at the time a security is issued and may change due to subsequent events.[209] FINRA also explained that ''a time horizon could be of such a length that it would be unreasonable'' to project performance or provide a targeted return for that same period of time.[210] For these reasons, FINRA stated that there should not be an exception from the reasonable-basis requirement ''based solely on an investment's estimated time horizon.'' [211]

The proposed rule change reasonably requires member firms to have a reasonable basis for the criteria used and assumptions made and to retain relevant records. Projected performance and targeted returns about private placements often rely on unique criteria and assumptions, including the time horizon of the investment.[212] Under these circumstances, the proposed rule change reasonably requires member firms to have a reasonable basis for such projections and returns; the substance and reasonableness of this determination will depend on the facts and circumstances of the projection or targeted return. Further, in response to concerns that the factors identified in the proposed Supplementary Material would create onerous, ambiguous, and overlapping requirements, the proposed rule change does not mandate the consideration of each factor in every instance, and it only indicates that a member firm should consider multiple factors in its reasonable-basis determination. In light of this flexibility, the proposed rule change would aid member firms in identifying relevant factors for consideration in making the reasonable-basis determination, which should assist firms in compliance.

To eliminate this reasonable basis requirement would allow a member firm to disseminate information without forming a view as to its content. This result would be inconsistent with FINRA Rule 2210's general content standards, which apply broadly to any of a firm's communications with investors, regardless of the source of information in the communication, and would risk—as FINRA states—communications of projected performance or targeted returns ''based on guesswork, dubious presumptions, and wildly inaccurate or inherently misleading reasoning.'' [213]

With regard to third-party information, the reasonable-basis condition also contemplates a principles-based approach and does not mandate a specific method for establishing that the member firm has a reasonable basis for the criteria used and assumptions made regarding such information. Indeed, as FINRA emphasizes, member firms retain the flexibility to determine whether, depending on the facts and circumstances, they have received sufficient information from a third-party to conclude that its projected performance or targeted returns has a reasonable basis; this flexibility should alleviate some of the compliance challenges identified by commenters regarding third-party information.[214] By extending the reasonable basis obligation to a member firm's use of third-party projected performance or targeted returns, FINRA has reasonably sought to extend the proposed rule change's investor protection benefits to all communications with investors, regardless of the source of information, and to ensure consistency with FINRA Rule 2210, whose general content standards apply broadly to any of a firm's communications with investors, regardless of the source of information in the communication.

In support of this principles-based approach, the proposed rule change requires member firms to ''retain[ ] written records supporting'' their reasonable-basis determination and does not per se mandate that the firm obtain and maintain third-party records.[215] Although the records supporting a member firm's determination may, in some circumstances, be third-party records, member firms retain the flexibility to determine whether the circumstances of a particular performance projection or targeted return would require the acquisition and retention of third-party records to support its determination. As a result, the proposed rule change's document-retention provision reasonably helps to ensure that firms substantiate their reasonable basis determinations while simultaneously providing them with the flexibility to determine what the circumstances of a particular case would require. In this way, the proposed rule change is reasonably designed to prevent fraudulent and manipulative acts and practices.

D. Disclosure Requirements

The proposed rule change would impose three disclosure-related

17 CFR 229.10(b)(1). The documents specified in this policy include documents filed with the Commission, Part I of quarterly reports on Form 10–Q, and certain annual reports to security holders. *See* 17 CFR 230.175(b)(1); 17 CFR 240.3b–6(b)(1).

[202] FINRA Response Letter I at 10.

[203] *Id.* at 11.

[204] *Id.*

[205] *Id.* at 10–11.

[206] *Id.* at 11. FINRA stated that the proposed rule change would not require member firms to ''obtain trade secrets from third parties,'' but it would require member firms to consider whether the information at its disposal is sufficient to form a reasonable basis for the projected performance or targeted returns. FINRA Response Letter II at 4; *see* FINRA Response Letter I at 10–11.

[207] FINRA Response Letter I at 11.

[208] FINRA Response Letter II at 9.

[209] FINRA Response Letter I at 16.

[210] FINRA Response Letter II at 9.

[211] *See* FINRA Response Letter I at 16.

[212] SIFMA Letter at 4; FINRA Response Letter I at 16.

[213] FINRA Response Letter II at 4. Moreover, as FINRA notes, the IA Marketing Rule's general prohibitions would prohibit the advertisement of hypothetical performance for which the adviser lacks a reasonable basis, even if that rule lacks a requirement identical to that of the proposed rule change. FINRA Response Letter I at 10.

[214] *Id.* at 10–11.

[215] Proposed Rule 2210(d)(1)(F)(iv)(c); *see* FINRA Response Letter II at 4 (''there is no requirement to obtain trade secrets from third parties'').

requirements on any member firm communicating projected performance or targeted returns to a Projection-Eligible Investor. First, a communication would be required to ''prominently disclose[ ] 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.'' [216] Second, member firms would be required to ''provide[ ] sufficient information to enable the investor to understand . . . 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.'' [217] Third, member firms would be required to ''provide[ ] sufficient information to enable the investor to understand . . . 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.'' [218]

No commenter offered a substantive comment related to these disclosure provisions.

The proposed rule change's disclosure provisions are reasonably designed to provide investors with information that will help them to understand the assumptions, methodologies, risks, and limitations associated with the projected performance or targeted returns.[219] The disclosures would help to inform Projection-Eligible Investors that projected performance and targeted returns are hypothetical in nature. The disclosures also provide information to Projection-Eligible Investors regarding the criteria and assumptions associated with the calculation of the projected performance or targeted returns. The disclosures would emphasize to Projection-Eligible Investors that such information has inherent risks and limitations. In sum, the disclosure-related provisions are reasonably designed to help Projection-Eligible Investors understand the risks and limitations of relying on projected performance or targeted returns.

[216] Proposed Rule 2210(d)(1)(F)(iv)(d).

[217] Proposed Rule 2210(d)(1)(F)(iv)(e).

[218] *Id.*

[219] *See* Notice at 82485 (absent the disclosure of criteria and assumptions, ''it is more likely that a projection or targeted return would mislead a potential investor''; disclosures about risks and limitations help ensure that investors ''do not unreasonably rely on a projection or targeted return given its uncertainty and risks'').

IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.[220]

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act [221] that the proposed rule change (SR–FINRA–2023–016), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[222]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2024–16304 Filed 7–24–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100562; File No. SR–GEMX–2024–21]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand Its Co-Location Services

July 19, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 5, 2024, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to expand its co-location services.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to expand its co-location services by offering new cabinet, power, and power distribution unit options in the Exchange's expanded data center.

The Exchange's current data center (''NY11'') in Carteret, NJ is undergoing an expansion (''NY11–4'') in response to demand for power and cabinets. NY11–4 is not a new or distinct co-location facility. Instead, NY11–4 is simply an expansion of the existing NY11 data center,[3] and the Exchange intends to operate it generally in the same manner as existing aspects of NY11.[4] Client connections to the matching engine will be equal across the board, within and among NY11 and NY11–4.

The Exchange submits this filing to propose offering new services in NY11–4, as described below, and to the extent the Exchange offers additional new services, whether in the existing NY11 data halls or in the new NY11–4 data hall, the Exchange will submit additional filings with the Commission.

[220] 15 U.S.C. 78*o*–3(b)(6).

[221] 15 U.S.C. 78s(b)(2).

[222] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NY11–4 is not a standalone facility. Equinix considers the site as NY11 with three expansions: NY11–2, NY11–3, and NY11–4.

[4] One aspect of the data center that will be treated differently in NY11–4 as compared to NY11 at its outset is telecommunications access and inter-client connectivity. In NY11–4, connections between colocated client cabinets and the carrier cage will be of equal length. Inter-client connectivity will also be equalized in NY11–4. The Exchange believes that equalizing telecommunications access and inter-client connectivity in NY11–4 will provide a fair solution and avoid market disruption by avoiding both a race for real estate adjacent to NY11–4 and for particular space in NY11–4. The Exchange believes that these actions would facilitate a fair and orderly market and protect investors and the public interest, consistent with its obligations under the Act.