December 15, 2023

By email to: rule-comments@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: File Number SR-FINRA-2023-016: Nelson Kuiper PLLC Comment Letter Regarding Proposed Amendments to FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications

Dear Ms. Countryman:

On behalf of Nelson Kuiper PLLC[1], I am writing in response to the U.S. Securities and Exchange Commission (the "SEC" or "Commission") Release No. 34-98977, Self-Regulatory Organizations; Financial Industry Regulatory Authority Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 2210 (Communications With the Public) to Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications.

On November 17, 2023, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder, FINRA filed with the SEC notice of its proposal to amend FINRA Rule 2210 to allow a member to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in an institutional communication or a communication distributed solely to qualified purchasers as defined in the Investment Company Act, subject to stringent conditions to ensure these projections are carefully derived from a sound basis (the "Rule Proposal").

The Rule Proposal would make a significant material revision to Rule 2210 in permitting performance projections. Nelson Kuiper PLLC supports the Rule Proposal and encourages its

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[1] Nelson Kuiper PLLC is a boutique securities law firm specializing in private fund offering documents and regulatory compliance support.

adoption. We offer comments in this letter to address specific issues raised by the Rule Proposal's proposed revision.

Background

Rule 2210 is rooted in antifraud concerns and serves an important purpose: fostering communications with investors based on principles of fair dealing and good faith, ensuring communications are fair and balanced, and providing a sound basis for evaluating facts in regard to any particular security or type of security, industry, or service. Further, the rule functions to ensure that no member omits any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.

Communications must provide a balanced treatment of risks and potential benefits and reflect the uncertainty inherent to investments. Ultimately, the rule is about fostering investors' understanding of the communication and ensuring investors are not making investment decisions based on false, exaggerated, unwarranted, promissory, or misleading statements or claims in any communication.

Rule 2210(d)(1)(F) currently prohibits communications that predict or project performance or imply that past performance will recur (the "Performance Prohibition"). However, (d)(1)(F) does not prohibit a hypothetical illustration of mathematical principles, provided it does not predict or project the performance of an investment or investment strategy, nor does it prohibit an investment analysis tool or a written report produced by an investment analysis tool. It also does not prohibit a price target contained in a research report on securities, provided the target has a reasonable basis, the report discloses the valuation methods used to determine the target, and the price target is accompanied by disclosure containing the risks that may impede the achievement of the price target. These round-about, impliedly permissible or "allowed" items function to cause confusion with full compliance with (d)(1)(F), and erode important investor protection measures.

The Need for Amendments to the Performance Prohibition

Broker-dealers can avoid the performance prohibitions of Rule 2210(d)(1)(F) by simply using the permissible workarounds, which of course opens a potential disclosure gap wherein material information may go undisclosed, and investors could be potentially misled or confused by the presentation of, say, a hypothetical illustration of mathematical principles that is instead understood to be a projection of project performance.

Generally speaking, retail investors often want and request some sort of financial model showing project viability. For many investors, it may be unthinkable or at least unreasonable to invest significant dollars in an investment without seeing some sort of pro forma or alternate demonstration that a financial model has been prepared, a financial analysis has been completed, and "the numbers make sense." Provided that any financial model assumptions are disclosed, and retail investors are given adequate disclosures surrounding projected performance, the Rule Proposal actually has the potential of furthering the goal of fostering investor understanding and ensuring investors are not making investment decisions based on misinformation, promises, or exaggerated or false claims.

Additionally, we have had several clients in the past year ask us for guidance around maintaining compliance with rule 2210. One such client develops real estate investment projects and has even considered retaining us on an indefinite basis simply to help them provide a path for compliance in showing a spectrum of potential outcomes given a full sensitivity analysis based on their financial modeling. While we appreciate the work, such services are additional costs to investment managers, which in turn can erode fund performance and investor returns, all due to lack of clarity around rule 2210.

The rules otherwise inherently require disclosures sufficient to ensure communications are fair and balanced and not misleading, and allowing performance projections does nothing to alter the overarching mandate of ensuring investors receive information that is not false, exaggerated, unwarranted, or promissory. Due diligence requirements still apply. REG BI still applies. Issuers must still be fair and balanced, and target returns must be supported by reasonable economic assumptions.

Finally, adopting the Rule Proposal will allow FINRA to more closely align with the SEC's new marketing rule (2022) applicable to investor advisors and permitting hypothetical performance so long as certain assumptions are disclosed and other requirements are met.

Conclusion

For the foregoing reasons, Nelson Kuiper PLLC supports the Rule Proposal and encourages its adoption. The Rule Proposal will provide needed clarity to 2210 and will have a positive long-term impact on the structure and operations of the retail securities market.

Thank you for considering our views. We look forward to working with you in our shared mission to protect investors and foster clarity in communications and in the rules governing them. Should you have questions, please contact either the undersigned or Nelson Kuiper PLLC Co-Founder and Partner Andrew Nelson at 213-590-3200.

Sincerely,

Jacqueline Kuiper
Co-Founder and Partner
Nelson Kuiper PLLC