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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, D.C. 20549-1090

Re: Notice of Filing No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend FINRA Rule 2210 (Communications With the Public) To Permit Projections of Performance of Investment Strategies or Single Securities in Institutional Communications (File Number SR-FINRA-2023-016)

Dear Ms. Countryman:

Morgan, Lewis & Bockius LLP ("Morgan Lewis") appreciates the opportunity, on behalf of one of our broker-dealer clients ("we" or "our"),[1] to provide comments on FINRA's proposed rule change to amend FINRA Rule 2210, referenced above (the "Proposal").

Although we think the market generally appreciates FINRA's willingness to modernize Rule 2210, we strongly encourage FINRA to consider more closely aligning its proposal with Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Marketing Rule") with respect to hypothetical performance, so as to avoid perpetuating a disjointed marketplace where products marketed through investment advisers and products marketed through broker-dealers are subject to different rules, thereby confusing investors or potentially even harming investors by needlessly reducing the universe of available information based on the channel through which it is disseminated.

1. **FINRA Rule 2210 should be made consistent with the Marketing Rule and should permit the use of hypothetical projections or targeted returns with any investor as long as the broker-dealer has policies and procedures to determine such information is relevant to the likely financial situation and investment objectives of the investor.**

The Marketing Rule permits investment advisers to include hypothetical performance in advertisements with any current or prospective client or investor, provided that the investment

[1] For ease of reference, the use of "we" our "our" in this comment letter reflects the views of our broker-dealer client and not necessarily the view of Morgan Lewis, its partners, associates or other staff, or the views of its other clients.

adviser (1) adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement; (2) provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and (3) provides (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. There is no uniform investor qualification test in the Marketing Rule regarding the use of hypothetical performance in adviser advertisements. Rather, the Marketing Rule requires investment advisers to make a case-by-case determination as to whether such information is relevant to each intended recipient, but as long as such determination is made, any investor can receive the information.

Like the Marketing Rule, the Proposal would permit members to issue communications that project performance or provide a targeted return with respect to a security or asset allocation or other investment strategy, provided that, among other things, the member 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 investor receiving the communication. Also like the Marketing Rule, the Proposal would require broker-dealers to provide sufficient information to enable investors to understand the criteria used and assumptions made, and the risks and limitations of using such information to make investment decisions. But in a sharp contrast to the Marketing Rule, the Proposal limits the use of such hypothetical performance to only institutional investors or qualified purchasers.

Imposing a uniform investor qualification test creates a sharp and arbitrary incongruity between advisory and brokerage channels. Allowing the Proposal to move forward with this element will not result in any meaningful harmonization between the Marketing Rule and FINRA Rule 2210 with respect to hypothetical performance and will only enhance information asymmetries that already exist in the market.

For example, why should an accredited investor who is not yet an institutional investor or a qualified purchaser, but is nonetheless eligible to invest in a privately offered fund that relies on Section 3(c)(1) under the Investment Company Act of 1940 (the "1940 Act"), be permitted to receive hypothetical performance projections from an investment adviser representative that has made appropriate determinations as to its relevance under the Marketing Rule, but at the same time be prohibited from receiving the same performance projections on the same potential investment if they would be received from a registered representative of a broker-dealer (after having made the same determinations as to the information's relevance to that particular investor)?

Prohibiting broker-dealers from using hypothetical projections or targeted returns with certain investors where their investment adviser peers are not similarly regulated is unnecessarily unfair to broker-dealers and their registered representatives, the issuers who market and distribute their products through brokerage channels and, most importantly, investors – who will now confusingly receive differing information depending on the regulated nature of their intermediary, or will be prohibited from receiving information that could be useful to their investment decision making process.

To harmonize FINRA Rule 2210 with the Marketing Rule, the investor qualification element of the Proposal should be eliminated. This would not represent any harm to investors, because broker-dealers would still be required – like investment advisers – to determine that sharing hypothetical performance is relevant to each recipient. Where a broker-dealer has failed to make such determinations, or where a broker-dealer's process for making such determinations is insufficient or ineffective, they would be in violation of the Rule and subject to enforcement by FINRA.

2. **Even if limited to certain investors, FINRA's Proposal should permit the use of hypothetical projections or targeted returns with more than just institutional investors and qualified purchasers.**

If FINRA, unlike the SEC, feels compelled to impose an investor qualification test on the use of hypothetical projections and targeted returns, then that test should at least be lowered to "accredited investors" and not limited to institutional investors and qualified purchasers. Although we recognize that historical FINRA guidance has differentiated between accredited investors and qualified purchasers with respect to the use of related performance in private fund marketing materials, in the wake of the Marketing Rule that distinction is no longer relevant. Many investment products are privately offered to accredited investors that are not institutional investors or qualified purchasers, including hedge funds, private equity funds or venture capital funds that rely on Section 3(c)(1) of the 1940 Act or real estate funds that rely on Section 3(c)(5)(C) of the 1940 Act, among others. Reducing the investor qualification test in the Proposal to "accredited investors" would create more uniformity in the marketplace among privately offered investments. Adopting the higher investor qualification test as proposed would only perpetuate information asymmetries in the market, thereby harming investors and creating an uneven playing field between advisory and brokerage channels.

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We appreciate FINRA's consideration of our comments. We recognize that similar points were made during the initial round of public comments, but because they did not result in any meaningful changes to the Proposal, we felt compelled to raise them again here. We are happy to answer any questions the Commission or staff may have at (215) 963-4969 or john.obrien@morganlewis.com.

Sincerely,

Jack O'Brien

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