ACA
COMPLIANCE GROUP

March 27, 2017

Via email

Ms. Marcia E. Asquith
Executive Vice President, Board and External Relations
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506

Re: Communications with the Public, FINRA Regulatory Notice 17-06

Dear Ms. Asquith,

ACA Compliance Group ("ACA") appreciates the opportunity to comment on FINRA's proposed amendments to FINRA Rule 2210 (Communications with the Public) as described in FINRA Regulatory Notice 17-06, which, if adopted, would create an exception to the Rule's prohibition on the inclusion of performance projections in certain communications. ACA is a leading provider of regulatory compliance products and solutions, cybersecurity and risk assessments, performance services, and technology solutions to regional, national, and global firms in the financial services industry. With offices worldwide, ACA clients include leading investment advisers, private fund managers, commodity trading advisors, investment companies, and broker-dealers. ACA regularly assists our clients with designing and implementing policies and procedures to comply with rules governing communications with the public. The issue of performance advertising, and in particular the differences in performance advertising standards among different regulators, has been a continuing challenge to our clients, many of which are registered in multiple capacities.

FINRA's proposal notes that "[t]he general prohibition against performance projections is largely intended to protect retail investors from performance projections of individual investments, which often prove to be spurious, inaccurate or otherwise misleading." We agree that the use of performance projections should be used only in limited circumstances and with clear and appropriate disclosures and supervisory procedures, particularly with respect to retail customers and investors. We support the proposed amendments and believe that they will help to align the regulatory approaches taken with respect to broker-dealers and investment advisers. However, we suggest that FINRA also consider permitting its members to use projected performance in communications that relate to private offerings that are provided only to institutional investor customers.[1]

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[1] Private offerings include, but are not limited to, private investment funds excluded from the definition of investment company under Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, as amended.

In our experience, private fund managers that are dually-registered, or that engage broker-dealers to assist in fundraising activities on behalf of the private funds they manage, often struggle with the disparate regulatory approaches to marketing materials applied to broker-dealers and investment advisers.[2] The difference in requirements is particularly notable with respect to projected returns.

As an example, an SEC-registered investment adviser that is raising capital for a new private equity fund may include projected performance returns for existing investments in the new fund's pitch book and other sales-related materials ("Marketing Materials"), provided that the assumptions and risks related to those returns are fully and accurately disclosed.[3] There is no SEC rule applicable to investment advisers that expressly prohibits projected performance returns. However, if that same adviser were to hire a broker-dealer to help sell interests in the fund, the broker-dealer could not use Marketing Materials that include projected investment returns without running afoul of existing FINRA content standards, such as FINRA Rule 2210(d)(1)(F). As a result, the investment adviser in this example would need to either cease using the projected performance returns, which many institutional private fund investors expect to see, or, alternatively, create separate Marketing Materials for use by the broker-dealer. The first option could put the adviser at a disadvantage compared to its peers, and the second could result in prospective investors receiving materially different information.

Similarly, a real estate fund offering interests in properties with existing leases may be able to provide highly material information about projected returns (for example, how existing lease payments are scheduled to escalate and when those leases expire) – but a broker-dealer selling that fund would not be able to provide that same information.

Our experience is that institutional investors routinely request performance estimates, including projected performance returns. These investors expect to receive such information from fund managers when evaluating potential and existing private fund investments. When forward-looking performance returns are accompanied by sufficient disclosures regarding the risks, assumptions, and bases for such projections, institutional investors are capable of evaluating the information and understanding the risks associated with such investments. Therefore, allowing broker-dealers to provide projected performance returns to their institutional investor customers would not, as a matter of course, result in inaccurate or misleading information. This approach also would be consistent with FINRA's approach to certain other advertising issues, where it has allowed communications to institutional investors that would not be permitted with respect to

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[2] The SEC Staff Study on Investment Advisers and Broker-Dealers (January 2011) (available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf), produced in response to Section 913 of the Dodd-Frank Act, noted the difference in broker-dealer and investment adviser advertising standards, and recommended that they be harmonized.

[3] For purposes of this example, we assume that the adviser is complying with all applicable SEC rules and regulatory guidance with respect to the inclusion of projected performance returns in its Marketing Materials.

individual investors.[4] In addition, as we have noted, it would be consistent with the existing SEC approach to investment adviser regulation.

ACA recommends that FINRA consider expanding the current proposal, or offering separate additional amendments to Rule 2210, to allow for the use of projected performance in communications with institutional investor customers with respect to private offerings. We would expect that any additional amendments would include the "reasonable basis" and disclosure requirements outlined in FINRA's current proposal.[5]

Sincerely,

Robert L Stype Jr

Robert L. Stype, Jr.
Managing Partner

[4] *See, e.g.*, Interpretive Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015) (provision of related performance information to institutional investors) (available at http://www.finra.org/industry/interpretive-letters/may-12-2015-1200am); Interpretive Letter to Bradley J. Swenson, ALPS Distributors, Inc. (April 22, 2013) (use of pre-inception index performance information in institutional communications) (available at http://www.finra.org/industry/interpretive-letters/april-22-2013-1200am).

[5] The proposal requires "that there be a reasonable basis for all assumptions, conclusions and recommendations, and that the illustration clearly and prominently disclose the fact that the illustration is hypothetical and there is no assurance that any described investment performance or event will occur. All material assumptions and limitations applicable to the illustration would have to be disclosed."