



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION
2415 A Wilcox Drive | Norman, OK 73069
Toll Free (888) 621-7484 | Fax (405) 360-2063
www.piaba.org

by email to pubcom@finra.org

March 27, 2017

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-06 – Proposed Amendments to Rules Governing Communications with the Public

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitration proceedings. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (hereinafter “FINRA”) related to investor protection.

FINRA Regulatory Notice 17-06 seeks comments on proposed amendments to FINRA Rule 2210, which currently prohibits, *inter alia*, communications with the public that predict or project performance, or imply that past performance will recur. The proposed amendments would provide a limited exception to this prohibition, permitting customized hypothetical investment planning illustrations that may project returns for a given “asset allocation or other investment strategy”, but not the performance of an individual security. Under the proposed amendments, the exception would be applicable to all firms (including those with only an online platform) and may be used to provide specific current (and prospective) customers with such illustrations.

There would of course be requirements that must be met before a firm could use a customized hypothetical illustration pursuant to the exception. First, there must be a “*reasonable basis* for all assumptions, conclusions, and recommendations” contained in the illustration (emphasis added). Second, the illustration must “clearly and prominently disclose the fact that [it] is hypothetical and that there is no assurance that any described investment performance or event will occur.” Third, a registered principal must pre-approve the template to be used (such as one provided by a reliable off-the-shelf software package) to generate the illustration to be provided to the customer(s) or, if not using a template, must pre-approve each illustration before it is used or distributed.

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PIABA generally supports changes to the communications rule that enhance investor education and inform customers of the need for (and potential results of) proper asset allocation, sector concentration, diversification, and other investment strategies. But PIABA is concerned with some key aspects of the proposed amendments for reasons set forth below:

First, FINRA's stated rationale that permitting registered representatives who are not dually-registered to use the same kind of illustrations investment advisers have been using with advisory clients will "better harmonize regulatory standards" just is not true. The fact remains that until FINRA, the Securities and Exchange Commission, Congress, the President or the Department of Labor establishes a uniform fiduciary standard to govern both broker-dealers and registered investment advisers, the "regulatory standards" cannot be harmonized. Only a uniform fiduciary standard can ensure that registered representatives act in investors' best interests and alleviate the confusion and financial harm caused by the current regulatory environment. Simply changing one rule, of many, to allow a broker-dealer/registered representative to provide a customer with a hypothetical illustration that a dually-registered firm/broker can already provide does not "even the playing field" for registered representatives (or make things less complicated for investors¹). There remains a patch work of statutory and common law across the country under which some brokers are held to fiduciary standard and others are not. Indeed, if anything, the proposed amendments will only further confuse customers as to what duty of care the person handing them the illustration projecting the performance of their investment strategy owes them. If it is an illustration for a discretionary investment advisory account, the advisor will be held to a fiduciary standard, whereas if the illustration is in a traditional brokerage account, the broker may only be held to a suitability standard (or whatever standard is applied in that particular jurisdiction). Will the "reasonable basis" factors be applied differently (using the lower suitability standard) for the registered representative's illustration than for an investment advisor's illustration? If so, a customer with more than one type of account and/or financial representative/firm will probably not know on which illustration(s) to rely in making investment decisions. PIABA believes investor confusion should be minimized rather than made worse, which is what it seems likely the proposed amendments will do.

Second, PIABA is concerned that illustrations projecting hypothetical returns for future time periods may confuse unsophisticated retail investors by creating the impression that the projected returns are more certain than they actually are. The experience of PIABA members is that a projection of future performance based on, for example, *historic returns of 8-9%* for a given asset allocation or other investment strategy, is too often viewed by the average investor as a forecast or prediction of how their investments will perform going forward (regardless of the disclaimers and limitations that may be clearly stated on the illustration). It is PIABA members' experience that boilerplate statements that the illustrations are hypothetical or that "past performance is not indicative of future results," as contemplated by the proposed amendments are not enough. Unfortunately, financial professionals

¹ Under the current regulatory structure, investors can be faced with varying standards covering the same financial advisor depending on "which hat" a dually-registered advisor may be wearing at any given point in time. Three out of four investors don't understand that the current laws and rules impose different duties on brokers and investment advisers according to a 2010 survey conducted for the Consumer Federation of America (CFA), AARP, and the North American Securities Administrators Association (NASAA), among others. See <http://bit.ly/1Npodra> (last accessed March 26, 2017). A 2015 study also confirmed that most retail investors think their financial advisor – regardless of which type of advisor he or she is – is a fiduciary. Further, according to a February, 2015 report by the Council of Economic Advisers, investors suffer \$17 billion in losses annually due to conflicted advice they receive from financial advisors under the existing regulatory system. See "Fiduciary – Do Investors Know What It Means" accessible at <http://349ab54c3b58919c6638-ff70f51d4942f2bbd11ba0e41cfec577.r51.cf2.rackcdn.com/Fiduciary%20Whitepaper.pdf> (last accessed March 26, 2017).

too often convince customers to ignore the written warnings as “just something the company has to say” and tell them that the principal in their investment account, insurance policy or annuity will grow at the reflected historical rate for the foreseeable future. We have seen many instances of people making life-altering decisions, like taking early retirement or taking large systematic withdrawals, based on someone they trust telling them that their principal will grow at a certain rate and they can “afford” to do so. Given that some financial professionals advising customers on how to manage and grow their savings sometimes paint too rosy of a picture for customers, PIABA strongly prefers not creating a new opportunity for brokers to tell investors whatever it takes to get the assets under management or invested in a particular manner.

Third, as noted in FINRA Regulatory Notice (Request for Comment issue no. 5), PIABA is concerned about the lack of more specific guidance as to how the firm/broker should determine what assumptions or factors are appropriate to for any given illustration (beyond that a “reasonable basis” might be established by using certain factors, as long “unreasonable emphasis” is not put on any one of the factors). FINRA Regulatory Notice 17-06 provides examples of what might establish “reasonable basis” such as:

... [R]eference to the historical performance and performance volatility of asset classes, the duration of fixed income investments, the effects of macroeconomic factors such as inflation and changes in currency valuation, the impact of fees, costs and taxes, and expected contribution and withdrawal rates by the customer.

It appears that the firm/broker would have a lot of latitude in deciding what factors are considered for any given illustration. PIABA is alarmed by that prospect because an illustration is only as good as the assumptions on which it is based. For example, if the historical performance of a given investment strategy is not taken back far enough, the resulting illustration may not include certain adverse market conditions in the past. The result is that an investor receiving such an illustration may be unprepared for volatility in returns. Thus, that investor may end up making investment decisions, like concentrating in equities for maximum growth, without regard for the potential of a significant correction in the stock market. There would simply be no realistic acknowledgement of the potential risks of such a strategy.

Fourth, as noted in FINRA’s Regulatory Notice (Request for Comment issue no. 7), PIABA strongly believes FINRA must add specific language that identifies certain uniform factors that must be considered for certain types of illustrations, if the proposed amendments are going to be implemented. Moreover, FINRA needs to specify that more than one projection may be reasonable under certain circumstances. PIABA is not suggesting that customers be handed a dozen projections that only serve to confuse them, but there could be circumstances in which it may be appropriate to use more than one illustration to paint the most complete (and accurate) picture for an investor. At a minimum, the firm/broker should be required to provide a specified *range* of market conditions to demonstrate possible widely varying performance results. FINRA may also want to consider including language such as that used in FINRA Rule 2211(b)(5) (Hypothetical illustrations of rates of return in variable life insurance retail communications and correspondence) which, for example, allows combinations of assumed investment returns with some limitations, including requiring that one of the returns is a 0% gross rate. Rule 2211(b)(5) explains the purpose of this “is to demonstrate how a lack of growth in the underlying investment accounts may affect policy values and to reinforce the hypothetical nature of the illustration.”

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In summary, PIABA supports the proposed amendments to FINRA Rule 2210 set forth in Regulatory Notice 17-06 as they may benefit the investing public, but urges FINRA to consider refining the proposed language and issuing guidance to minimize investor confusion. PIABA thanks you for the opportunity to comment on this important topic.

Very truly yours,



Marnie C. Lambert
PIABA President