Institute for Portfolio Alternatives

January 26, 2021

Vanessa Countryman
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street
Washington, D.C. 20549

Re: Release No. 34-90302; File No. SR-FINRA-2020-038 (the "Release")

Dear Ms. Countryman:

The Institute for Portfolio Alternatives ("IPA")[1] welcomes the opportunity to submit this letter in response to the request of the Release concerning the filing of retail communications for private placement offerings with the Financial Industry Regulatory Authority ("FINRA").

The IPA strongly urges FINRA, before making any substantive changes to the filing requirements under FINRA Rules 5122 and 5123, to clarify the application of its principles-based advertising rules to retail communications concerning private placement offerings. We believe this will significantly decrease the number of non-compliant filings cited in the Release.

FINRA Rule 2210 imposes a variety of requirements for retail communications, which FINRA amplified in its Regulatory Notice 20–21 (the "Regulatory Notice") concerning retail communications distributed in private placements.[2] Under Rule 2210(d)(1)(A), all member communications must "be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service." Rule 2210(d)(1)(A) provides that no member may make "any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication."

[1] For over 30 years, the Institute for Portfolio Alternatives ("IPA")[1] has raised awareness of portfolio diversifying investment ("PDI") products among stakeholders and market participants, including investment professionals, policymakers, and the investing public. The IPA regularly provides substantive input to regulators such as the U.S. Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), and it has developed best practice guidelines to standardize industry practice, enhance transparency and performance, and provide consistent metrics.[1] IPA is pleased to have provided meaningful input to both the SEC and FINRA regarding previous rule proposals and initiatives. Furthermore, the IPA is committed to ensuring that all investors have access to real assets and the opportunity to diversify their investment portfolios with PDI products, based on appropriate standards of financial and personal suitability and consistent with the investment goals of the investors. IPA's membership consists of PDI product sponsors, financial intermediaries such as registered investment advisers and broker-dealers, and industry services providers such as consultants, auditors, and law firms. IPA's mission is to promote PDI products among the investing public, conduct research and provide industry data to its membership, and advocate for their interests to policymakers.

[2] In addition, several other Regulatory Notices regarding the subject have been issued, including Regulatory Notice 12-29, Regulatory Notice 13-18 and Regulatory Notice 19-31.

These principles protect the investing public and the vast majority of FINRA members, including IPA members, have built compliance systems and supervisory structures to ensure compliance. Nevertheless, these broad principles raise interpretive questions. Before imposing a new filing requirement, FINRA should help to ensure that the industry understands FINRA's various interpretations of Rule 2210.

The Release indicates that FINRA has found that from 41% to 76% of private placement retail communications do not comply with Rule 2210. Even conceding that some members had failed to apply well-known interpetations of Rule 2210, it is unlikely that this failure alone explains the difference. Rule 2210 imposes a set of principles that are subject to various reasonable interpretations. IPA members have explained to us, and to FINRA staff, that ambiguities in the guiding principles of Rule 2210 and the absence of clear guidance from the FINRA staff have impeded their ability to understand what the staff expects of them.

For example, a significant issue where FINRA could provide greater clarity on retail communications involves the meaning of "projections." The misuse of projections can be a powerful inducement to retail customers and must be of paramount concern to regulators. Rule 2210(d)(1)(F) thus warns, "Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." The rule does not define a "prediction or projection" of performance, and the staff's interpetation for investment companies may be unhelpful for private placements.

Our members understand that the staff has taken the position that the description of a program's net profit based upon the difference between revenue from a signed lease agreement and program expenses, would constitute an unlawful "projection." IPA members thus understand that in a Delaware statutory trust ("DST") offering with a 10-year fixed lease, the sponsor could describe the lease terms but not the DST's associated expenses. If a DST's lease will provide annual rent of $1 million and the DST is expected to incur $200,000 in annual operating expenses, our members understand that a retail communication may include the lease revenue of $1 million per year to the DST, but not the net profit of $800,000. In other words, the disclosure of associated expenses and thus net profit would be considered an unlawful "projection."

This example illustrates the ambiguities with which the staff has applied the advertising rule. For example, is not a description of a signed lease, including its rent with associated expenses, merely a statement of fact and not a projection? If the staff does not consider this description of a signed lease to be a statement of fact, then would it not be a "hypothetical illustration of mathematical principles" that is excluded from the prohibition of forecasts? We believe that net revenue is a critical data point for investors to understand the impact of expenses offseting the lease revenue in an offering, and to be able to effectively compare one offering to another.

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The IPA respectfully encourages FINRA to provide interpretive guidance to the industry before implementing any new filing or regulatory requirements. More specifically, we encourage greater guidance on the difference between "mathematical principles" compared to communications that predict or project performance, between a communication that predicts or projects performance and an issuer operating metric which can include a forecast, as well as whether the description of a lease term and the contracted revenue pursuant to the lease is a projection, factual information or issuer operating metric.

Doing so will better ensure that FINRA members understand the manner in which FINRA staff applies the broad principles of Rule 2210 to private placement sales material. We look forward to working with FINRA staff to provide additional input on its private placement disclosures while maintaining important investor protections.

If the IPA may be of any assistance, please do not hesitate to contact me or Anya Coverman, IPA's Senior Vice President, Government Affairs and General Counsel, at (202) 548-7190.

Sincerely,

Anthony Chereso
President & CEO, Institute for Portfolio Alternatives

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