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Compliance**

# Why Are We Still Talking About Communications Rule 2210?

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# Meet the Panelists



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1. Brief Overview of Consolidated FINRA Rule 2210
2. Content: General Standards
3. Content: Performance
4. Content: Recommendations
5. Enforcement (or lack thereof)
6. Examples

# Overview of Rule 2210



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- **Definitions**

- (2) – Correspondence – 25 or fewer retail investors in 30 day period.
- (4) – Institutional Investor – Rule 4512, Government Entity, 403(b) or Section 457 of IRS, Qualified Plan Under Section 3(a)(12)(C) of Exchange Act.
- (6) – Retail Investor – anyone other than Institutional Investor *regardless* of whether they have an account with a member.

- **Approval, Review, and Record Keeping**

- Retail
- Correspondence
- Institutional Communications
- Recordkeeping

- **Filing Requirements**

- What type of Member?
- When communications are planned to be used?
- What type of communication?

# Overview of Rule 2210 (Cont)



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- **Content Standards**
  - **General Standards** – apply to all members 2210(d)(1)
  - Comparisons – Retail
  - Disclosure of Member’s Name – Retail
  - Tax considerations- de facto Retail
  - Disclosure of fees, expenses, and standardized performance – Retail
  - Testimonials – de facto Retail (not allowed under Investment Advisor Act)
  - **Recommendations 2210(d)(7)**
- **Public Appearances**
  - Treat them like any other communication
- **“Violation of Other Rules”**
  - Double Jeopardy

## As detailed in rule 2210(d)(1):

- A. Principles of fair dealing and good faith.
- B. No false exaggerated, unwarranted, promissory, or misleading statement.
- C. Information may be placed in a legend.
- D. Statements are clear and not misleading and must provide balance.
- E. Consider nature of the audience (appropriate detail and explanations).
- F. May not predict or project performance or imply that past performance will recur.

## Exceptions:

- Hypothetical illustration of mathematical model is okay.
- Investment Analysis Tool.
- Research Report.

- Projected or Targeted Returns are prohibited 2210(d)(1)F.
- Projected performance is limited to industry or asset class allocation.
- Individual stock performance will most likely be considered research and be governed by Rule 2241 & 2242.
- Performance is largely a concern of:
  - Investment Advisor Act 206(4)-1
  - Securities Act Rule 482
  - Rule 34b-1 under Investment Company Act

## **This May be a Trap for the Unwary**

## **From SEC:**

“...An advertisement using performance data must disclose all material facts necessary to avoid any unwarranted inference. Among other things, an investment adviser may not advertise its performance data if the adviser:

- (1) fails to disclose the effect of material market or economic conditions on the results advertised;
- (2) fails to disclose whether and to what extent the advertised results reflect the reinvestment of dividends or other earnings; or
- (3) suggests or makes claims about the potential for profit without also disclosing the potential for loss.”



## Recommendations

- Reasonable basis
- Supporting documentation
- Referring to a past recommendation that would have been a benefit to everyone (I suggested Netflix in 2015)

## Best Viewed in Hindsight

- Would you rather ask permission or beg forgiveness:
  - From your Client?
  - From FINRA Enforcement?

## Not Many Cases in the Prior 2 years

- Does That Mean Member's Are Adhering? For the most part.
- Does FINRA not care? Not likely.
- Is this a Tempest in a Teapot?
  - To borrow a phrase: Past performance does not imply future returns.
  - FINRA is looking closely.

- Capital One – inaccurate historical performance (January 2017)
- Advertising for an OBA does not fall under 2210 (KCD)
  - NAC push back on Enforcement
- Altegris Investments 2003 Fined \$175,000
  - Did “not provide a sound basis for evaluating an investment”
- CitiGroup Global Markets 2004 Fined \$250,000
  - “...seeks to earn...” and “...targets a 12-14% annual return...”
- Hedge Fund Capital Partners 2011
- Bruce Meyer of Meyer & Associates LP

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## Remarkably Close to a Proposed Advertisement:



**Ideas Are Like Picking Fruit.**

# Questions



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