

May 28, 2015

## FINRA Approves Use of Related Performance in Mutual Fund Marketing Materials to Institutional Investors

On May 12, 2015, the FINRA staff published an [interpretive letter](#) (the “Letter”) permitting FINRA members to include Related Performance Information (defined below) in mutual fund marketing materials directed at institutional investors (“institutional communications”). Previously, FINRA’s position was that, except in limited circumstances not applicable here, related performance information in marketing materials would violate the content standards of FINRA Rule 2210(d). Therefore, the Letter is important because mutual fund marketers now may use Related Performance Information when marketing mutual funds to institutional investors, including financial intermediaries, who may recommend these mutual funds to their customers. This is particularly important in cases where an investment adviser has been employing an investment strategy that will be used for a new mutual fund that lacks its own performance history. Several conditions, described below, apply.

According to the Letter, “Related Performance Information” means the actual performance of all separate or private accounts or funds that have: “(i) substantially similar investment policies, objectives, and strategies, and (ii) are currently managed or were previously managed by the same adviser or sub-adviser that manages the mutual fund that is the subject of an institutional communication” (“Related Accounts”). “Institutional investors” include broker-dealers, SEC- or state-registered investment advisers, banks, insurance companies, governmental entities, certain qualified plans, and any person (whether a natural person or otherwise) with total assets of at least \$50 million (this list is non-exhaustive).

The Letter’s principal conditions to using Related Performance Information in marketing mutual funds to institutional investors are as follows:

- The presentation of Related Performance Information must include all Related Accounts. If there are multiple Related Accounts, the performance of the Related Accounts must be presented in a composite or a list.
- Any institutional communications containing Related Performance Information must be clearly labeled “For use with institutions only, not for use with retail investors.”
- The presentation of Related Performance Information must disclose performance information that is net of fees and expenses of Related Accounts, or net of a model fee that is the highest fee charged to any account managed in the strategy. The fees and expenses of the mutual fund that is the subject of the institutional communication must be prominently disclosed.
- Related Performance Information must include the performance of each Related Account, must be for a period of at least one year and since the inception of the investment strategy, and must be current as of the most recent completed calendar quarter.
- Related Performance Information must be clearly labeled as such and must disclose the applicable dates of the performance.
- For a mutual fund in existence for more than one year, its actual performance must be displayed more prominently than the Related Performance Information.
- The institutional communication must disclose any material differences between the mutual fund and the Related Accounts for which Related Performance Information is provided.

- All institutional communications that contain Related Performance Information must comply with all other applicable FINRA rules and federal securities laws and remain subject to the same supervisory requirements that the FINRA member applies to all other communications.

We believe that the Letter will be useful to FINRA members in marketing new mutual funds to financial intermediaries, who may sell or recommend these mutual funds to their customers and to other institutional investors.

The Letter underscores that FINRA's approach with respect to Related Performance Information continues to be inconsistent with the approach countenanced by the SEC. The SEC's approach, as stated in various no-action letters, continues to be that Related Performance Information may be presented in a mutual fund's prospectus. In contrast, the Letter states that FINRA's "longstanding position" – that the presentation of Related Performance Information in communications subject to FINRA's jurisdiction that are used with retail investors is inconsistent with FINRA Rule 2210(d) – is unaffected by the Letter.

The Letter also is noteworthy because it may be at odds with the 2004 guidance of the NASD (FINRA's predecessor), rejecting a two-tiered approach to the use of Related Performance Information based on investor status. While the Letter's applicants appear to have requested FINRA's guidance only with respect to institutional investors that are financial intermediaries, the Letter applies to all institutional investors, which would include any person (natural person or otherwise) with total assets of at least \$50 million. Accordingly, the Letter seems to permit the use of Related Performance Information in marketing materials to potential investors with total assets of at least \$50 million, but continues to prohibit the use of Related Performance information in communications with retail investors. In contrast, in 2004 interpretive guidance, the NASD effectively barred the use of Related Performance Information in marketing materials to potential private fund investors that were "qualified institutional buyers" (as defined in Rule 144A under Securities Act of 1933) ("QIBs"). The NASD justified its position in part on its concern about different treatment of potential investors – potential investors that were QIBs would have access to information that would be unavailable to potential investors that were not QIBs.

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