MONEY MANAGEMENT INSTITUTE

October 1, 2021

Submitted electronically through http://www.regulations.gov

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology To Develop and Provide Investment Advice [File No. S7–10–21]

Dear Ms. Countryman:

The Money Management Institute ("MMI") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") in response to its request for information and public comment on broker-dealer and investment adviser use of digital engagement practices or "DEPs," including investment adviser use of technology to develop and provide investment advice.[1]

MMI is the national organization for the advisory solutions industry, representing a broad spectrum of investment advisers that manage separate accounts, as well as sponsors of investment consulting programs. MMI was organized in 1997 to serve as a forum for the industry's leaders to address common concerns, discuss industry issues, and work together to better serve investors. Our membership comprises firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

As a general matter, we agree with the Commission that advances in technology over the years have helped investment advisers – including investment advisers that sponsor or manage client accounts in managed account programs – develop and provide investment advice in new ways or ways that complements existing methods or tools for developing and providing advice. Indeed, increasingly, the use of advanced technology has become ubiquitous within the managed account area as firms seek to innovate in the manner in which they make investment decisions, manage accounts, seek new clients and deliver value-added managed account solutions to clients, including retail clients, in an accessible way. We encourage the

[1] *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology To Develop and Provide Investment Advice*, 86 Fed. Reg. 49067 (Sept. 1, 2021) (the "Request").

Commission to explore ways to enable broader use of technology in the delivery of financial services consistent with investor protection principles that are important to our members.

We would welcome the opportunity to meet with the Commission or its staff to provide information on the various ways in which our members use technology in developing and providing investment advice. However, given the time constraints of the comment period, we did want to focus our formal comments on a handful of important questions raised by the Commission. Below we present the Commission's questions to which we would like to respond followed by our comments.

Request 4.26: To what extent do robo-advisers (as well as other sponsors of investment advisory programs) rely on Rule 3a-4 to determine that they are not sponsoring or otherwise operating investment companies under the Investment Company Act of 1940 (the "Investment Company Act")?

MMI Answer: Rule 3a-4 is, as the Commission recognizes, a nonexclusive safe harbor. In our experience, investment advisers rely on or look to the principles under Rule 3a-4 to inform their approach to delivering personalized investment advice in a way that does not involve the operation of an investment company or the issuance of securities in such an investment company. Insofar as prevailing modes of doing business have changed substantially with the evolution of technology, including digital engagement practices, over the 27 years since Rule 3a-4 was adopted, firms have in some cases had to look to Rule 3a-4 and the principles underlying it to inform how they offer services within the spirit of the safe harbor. That said, as the Commission noted in adopting Rule 3a-4, the rule "describe[s] basic attributes of an investment advisory program that differ from those of an investment company that is required to register under the Investment Company Act."[2] As a non-exclusive save harbor, each of the conditions of Rule 3a-4 should not necessarily be relevant in all circumstances to the determination of whether the operation of a discretionary investment advisory program involves the operation of an investment company, or the issuance of securities in any such investment company, including as discussed below. It is important that the Commission and its staff understand that the operation of a discretionary investment advisory program outside the framework of the safe harbor does not create a presumption that the program is an investment company subject to regulation as such under the provisions of the Investment Company Act. Indeed, to the Commission and its staff should appreciate the kinds of tailoring and personalization required by Rule 3a-4 would not be permitted within the framework of Investment Company Act regulation.

Request 4.27: To satisfy the conditions of Rule 3a-4, among other things, a sponsor and personnel of the manager of the client's account who are knowledgeable about the account and its management must be reasonably available to the client for consultation. The rule does not dictate the manner in which such consultation with clients should occur. How do sponsors and other advisers satisfy this condition? Should we consider amending Rule 3a-4 to address technological developments, such as chatbots and/or other responsive technologies providing novel ways of interacting with clients? Should the Commission address

[2] Status of Investment Advisory Programs Under the Investment Company Act of 1940, 62 Fed. Reg. 15098, 15099 (Mar. 31, 1997).

these developments in some other way? Should the Commission provide additional guidance about this condition? If yes, what specifically should this guidance address?

MMI Answer: Inasmuch as the Rule does not dictate the specific manner of consultation, it does not – and should not – foreclose the use of digital engagement tools for that purpose. Moreover, we find that younger clients often want flexibility in the ways they interact with investment professionals, including sometimes preferring the accessibility of electronic interactions (including chatbots and/or other responsive technologies) to more traditional in-person or telephonic communications and interactions. The Commission should avoid amending Rule 3a-4 or providing additional guidance that would inhibit further ingenuity in offering discretionary investment advisory programs.

Request 4.28: To satisfy the conditions of Rule 3a-4, among other things, each client's account must be managed on the basis of the client's financial situation and investment objectives. Sponsors must obtain information from each client about their financial situation and investment objectives at account opening and must contact each client at least annually thereafter to determine whether there have been any changes in the client's financial situation or investment objectives. The Commission stated that the receipt of individualized advice is "one of the key differences between clients of investment advisers and investors in investment companies." How do sponsors ensure that they have sufficient information about a client's financial situation and investment objectives to provide investment advice that is in the best interest of the client, including advice that is suitable for the client? Given the availability of new technology for developing and providing investment advice, does a sponsor's reliance on Rule 3a-4 heighten the risk of clients receiving unsuitable advice? If so, are there other requirements or conditions that might address this risk?

MMI Answer: The requirement to obtain information from each client about the client's financial situation and investment objectives was designed to ensure individualized management of client accounts consistent with an adviser's fiduciary duty under Section 206(1) and (2) of the Advisers Act.[3] Principle-based guidance provided by the Commission and its staff over the years, including in its 2019 Fiduciary Interpretation,[4] has informed investment advisers when deciding what information about a client's financial situation and investment objectives is necessary or appropriate to provide investment advice that is in the best interest of the client (including advice that is suitable for the client). These decisions are also properly driven by the scope of the investment adviser's relationship with its clients, the nature of the advisory program and offered alternatives and other factors.

We view the principle-based guidance provided by the Commission and its staff on these matters as compatible with the approach taken by Rule 3a-4. Specifically, we do not view the availability of new technology for developing and providing investment advice as affecting this analysis. Nor do we view a

[3] *Id.* at 15102 ("Investment advisers under the Advisers Act owe their clients the duty to provide only suitable investment advice, whether or not the advice is provided to clients through an investment advisory program. To fulfill this suitability obligation, an investment adviser must make a reasonable determination that the investment advice provided is suitable for the client based on the client's financial situation and investment objectives." (footnote omitted)).

[4] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019), 84 Fed. Reg. 33669 (July 12, 2019).

sponsor's reliance on Rule 3a-4 as heightening the risk of clients receiving unsuitable advice, with one possible exception discussed below in response to Request 4.29.

Request 4.29: One of the conditions of Rule 3a-4 is that investment advisory programs relying on the rule be managed in accordance with any reasonable restrictions imposed by the client on the management of the client's account. In addition, the client must have the opportunity to impose reasonable restrictions at the time the account is opened and must be asked at least annually whether the client might wish to impose any reasonable restrictions or reasonably modify existing restrictions. The Commission explained that the ability of a client to impose reasonable restrictions on the management of a client account is a critical difference between a client receiving investment advisory services and an investor in an investment company. Since the rule was adopted, enhanced technological capabilities and industry practices may have made it practical for sponsors to provide clients with other means of receiving meaningful individualized treatment regarding the management of their accounts. Do sponsors of investment advisory programs currently provide their clients with ways of customizing or personalizing their accounts other than through the imposition of reasonable restrictions? If yes, please provide examples of such practices. To what extent do clients avail themselves of those options for individualized treatment and do they find them to be valuable or important? Should we consider amending Rule 3a-4 to address these developments or should we address them in some other way, such as by providing additional guidance about this condition?

MMI Answer: The requirement under Rule 3a-4 that has created the greatest challenge for investment advisers offering managed account programs has been the requirement that "[e]ach client has the ability to impose reasonable restrictions on the management of the client's account, including the designation of particular securities or types of securities that should not be purchased for the account, or that should be sold if held in the account." Guidance offered by the Commission in the Rule 3a-4 adopting release on this requirement and the analysis of when a restriction would be reasonable or unreasonable under the Rule is relatively high-level and brief but has largely informed investment advisers, which have been able to extrapolate from the Commission's reasoning – and the investment adviser's own understanding of their fiduciary duty of care – as necessary to reflect changing circumstances.

That said, consideration of client-requested restrictions can sometimes raise significant questions in terms of whether a requested restriction is prudent or is operationally compatible with a given investment adviser's investment strategy or program. In particular, an investment adviser's unrestricted or unconstrained approach – that is, following the investment adviser's standard approach without regard to client-requested restrictions – typically reflects the investment adviser's "best thinking," such that it might reasonably expect the performance of accounts subject to client-requested restrictions to underperform relative to unconstrained client accounts in a manner that would not be in clients' best interests. While many investment advisers include disclosures or cautions to this effect in client onboarding materials, investment advisory agreements or Form ADV Part 2 disclosures, it is important to recognize the tension created by the Rule 3a-4 condition.

Moreover, considerations of whether a requested restriction is prudent or is operationally compatible with a given investment adviser's investment strategy or program may differ depending upon the strategy,

number and type of covered investments, anticipated level of trading (e.g., buy-and-hold versus active trading), and numerous other factors, such that a requested restriction may be appropriate in one context but not in others. Some investment advisers grapple with the tension created by this Rule 3a-4 condition by accommodating certain standard types of client restrictions (e.g., restrictions on so-called "sin" stocks by applying screening based on Standard Industrial Classification (or "SIC") codes) or by developing a separate version of a strategy intended to serve the same aims (e.g., an Environmental, Social, and Corporate Governance (or "ESG") version of the strategy).

However, over the years, our members' experience with the staff of Commission's Division of Examinations is that some examination staff sometimes are highly skeptical, if not critical, in circumstances were investment advisers do not accept or accommodate client-requested restrictions. In this regard, Commission examination staff sometimes have viewed a small percentage of client accounts being managed subject to client-requested restrictions as reflecting some improper effort by the given investment adviser to create barriers to clients requesting reasonable restrictions on their accounts – rather than the preference on the part of those clients to benefit from the investment adviser's "best thinking" in managing their accounts.

Ultimately, while clients certainly have the right to request restrictions given the principal-agent relationship that exists between clients and an investment adviser, an investment adviser's judgment on whether a requested restriction is prudent or is operationally compatible with the investment adviser's investment strategy or program should be given deference, especially given the investment adviser's fiduciary responsibilities to its clients. In this regard, the Commission and its staff also should recognize, and give credence to, the deliberative or governance processes that investment advisers follow for evaluating restriction requests that investment advisers follow.

Request 4.30: In view of the variety and increasing availability of technologies used by investment advisers to develop and provide investment advice, are there other regulatory matters that the Commission should consider? If so, what are they, and why? To the extent commenters recommend any modifications to existing regulations or additional regulations, what economic costs and benefits do commenters believe would result from their recommendations? Please provide or identify any relevant data and other information.

MMI Answer: We encourage the Commission to refresh its guidance on electronic delivery[5] in a way that recognizes and permits use of electronic delivery by investment advisers and broker-dealers on an "access equals delivery" basis – at least for clients that sign up for online account access or provide their email addresses address for communication purposes – recognizing that electronic communications are

[5] Use of Electronic Media for Delivery Purposes, Exchange Act Release No. 36345 (Oct. 6, 1995), 60 Fed. Reg. 53458 (Oct. 13, 1995); Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Exchange Act Release No. 37182 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996); Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000), 65 Fed. Reg. 25843 (May 4, 2000) ("2000 Release").

more prompt and have surpassed the utility of written communications for the vast majority of our population. For many Americans, traditional postal mail (or "snail mail") is analogous to wired telephone lines, which many Americans are foregoing in favor of smart mobile devices. As part of this, we encourage the Commission to address the inconsistencies in its own guidance with the preemptive framework established by Congress when enacting the Electronic Signatures in Global and National Commerce Act ("E-SIGN").

There are several ways in which the Commission's guidance on electronic delivery has been inconsistent with E-SIGN. For example, the Commission has required notice of the availability of electronic communications, whereas E-SIGN does not require such notice (and simply requires consumer disclosure of any notice that may be provided), something that the Commission has apparently recognized in certain instances.[6] Similarly, the Commission stated in its 2000 Release that global consent to electronic delivery "would not be informed . . . if the opening of a brokerage account were conditioned upon providing the consent," with exceptions made for purely electronic brokerage relationships. However, E-SIGN does not foreclose requiring consent to electronic delivery as a condition to opening an account or establishing a relationship.

We hope that our comments are helpful to the Commission and its staff. We would be glad to answer any questions or provide further assistance. Please feel free to contact me at [redacted] or contact Samantha Lustig at [redacted].

Very truly yours,

Craig Pfeiffer
President and CEO
Money Management Institute

[6] *See* SEC, The American Separate Account 5 of the American Life Insurance Company of New York, Order Pursuant to Section 8(a) of the Securities Act of 1933, as amended, Declaring the Registration Statement Effective, Securities Act Release No. 8027 (Oct. 25, 2001), available at https://www.sec.gov/rules/other/33-8027.htm; The American Separate Account 5, Registration Statement on Form N-4 (October 22, 2001), available at https://www.sec.gov/Archives/edgar/data/1142222/000091205701536191/a2061612zn-4a.txt; SEC, Statements Concerning the Order Declaring Effective the Registration Statement of The American Life Separate Account 5 of The American Life Insurance Company of New York (Oct. 25, 2001), available at https://www.sec.gov/rules/other/33-8028.htm; *see also* Paul F. Roye, Practicing Law Institute Understanding Securities Products of Insurance Companies 2002 Conference (Jan. 10, 2002) (discussing the matter).