October 1, 2021

Via E-Mail
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

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

Dear Secretary Countryman:

Envestnet Asset Management, Inc. ("Envestnet") submits this comment letter in response to the request (the "Request") issued by the Securities and Exchange Commission (the "Commission") soliciting information and public comment on matters related to: (1) broker-dealer and investment adviser use of digital engagement practices ("DEPs") to engage with retail investors on digital platforms (e.g., websites, portals and applications or "apps"), as well as the analytical and technological tools and methods used in connection with these digital engagement practices; and (2) investment adviser use of technology to develop and provide investment advice.[1] Envestnet appreciates the opportunity to submit these comments to the Commission in response to the Request.

BACKGROUND

According to the Request, broker-dealers and investment advisers employ a variety of digital engagement practices when interacting with retail investors through digital platforms. The Commission published the Request to: assist the Commission in better understanding and assessing the market practices associated with the use of DEPs by firms; provide a forum for market participants and other interested parties to share their perspectives on the use of DEPs; and facilitate an assessment by the Commission and its staff of existing regulations and consideration of whether regulatory action may be needed to further the SEC's mission in connection with firms' use of DEPs. The Commission also is publishing the Request to better understand the nature of analytical tools and other technology used by investment advisers to develop and provide investment advice to clients.

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[1] The Request is posted at https://www.sec.gov/rules/other/2021/34-92766.pdf.

Envestnet has commented on particular questions raised in the Request. We first identify the questions raised in the Request and then respond with our comments.

ENVESTNET COMMENTS ON DIGITAL ENGAGEMENT PRACTICES, RELATED TOOLS AND METHODS, AND REGULATORY CONSIDERATIONS AND POTENTIAL APPROACHES

Question 2.1
"To what extent, and how, do firms use (or in the future expect to use) tools based on AI/ML (including deep learning, supervised learning, unsupervised learning, and reinforcement learning) and NLP and NLG, to develop and evolve DEPs? . . . "

Response
Envestnet plans to use tools based on AI to interact with clients digitally, including in providing educational material. As an overall guiding principle, we believe that the content of a communication with clients should determine how the Commission treats the communication; the form of the communication should not matter from a regulatory perspective. The Commission has long recognized in other contexts that the method of communication is not nearly as important as the content of what is communicated.[2] Accordingly, the use of technology, such as chatbots, should not be subject to greater regulation than other forms of communication merely because it is an evolving technology. As an example, if a communication from an investment adviser contains investment advice, then the Commission's fiduciary guidance would apply regardless of whether the communication is made via a phone call, email or chatbot – and such guidance should apply in the same manner regardless of the form of communication that is used. If a rule of the Commission is implicated by a communication made via chatbot, then the communication should be treated no differently than if the same content appeared in an email, text message or some other form of communication. We believe that this principle should be explicitly noted in any guidance or rule adopted by the Commission.

Question 1.8
"Are firms seeking to use DEPs specifically to increase investor education. . . ."

Response
We envision that our client portal will use AI, as well as behavior preferences, to deliver content for client education purposes. The AI used in this manner will collect information regarding interest and engagement. The intention of the AI is to perpetuate material that is similar in tone, length, subject, and perhaps sentiment to other material to which the client

[2] *See Use of Electronic Media for Delivery Purposes,* Release No. 36345 (Oct. 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*, Release No. 37182 (May 1996); *Use of Electronic Media,* Exchange Act, Release No. 42728 (Apr. 2000). *See also Investment Adviser Marketing,* Release No. IA-5653 (Dec. 22, 2020).

has shown previous interest. Using AI in this manner increases the likelihood that the content will be consumed by the individual.

Question 1.3
"What types of firms use DEPs on their digital platforms, and on what types of platforms? . . ."

Response
Envestnet employs DEPs on its digital advice platform used by third party investment advisers, broker-dealers and banks. We strongly believe that DEPs created by (or for) investment advisers and broker-dealers that are used solely by other investment advisers, broker-dealers and financial institutions, such as banks, savings and loans, credit unions, and insurance companies ("B2B DEPs") generally should not be subject to restrictions the Commission adopts in the future. Financial institutions do not need the same protections as retail investors. They have their own financial professionals to assess DEPs and do not need to be protected from DEPs used by broker-dealers and investment advisers, beyond the application of the anti-fraud provisions of the federal securities laws. The anti-fraud provisions generally are sufficient to protect financial institutions from the harms DEPs can cause, such as material conflicts of interest on the part of the broker-dealers or investment advisers using them. Imposing stringent standards on the use of B2B DEPs that are used solely by other financial institutions will drive up costs and thereby restrict access to research, tools, due diligence information, recommendations, product solutions, and market and account information. We think that generally carving out B2B DEPs from rulemaking or regulatory guidance adopted by the Commission properly balances investor protection and cost and access considerations. We therefore ask that regulations or restrictions imposed by the Commission regarding the use of DEPs by broker-dealers and investment advisers generally not cover B2B DEPs.

Envestnet also believes that if (but only if) a broker-dealer or investment adviser encourages its customers or clients to share their account or trading information with third parties via social media, the broker-dealer or investment adviser should include a disclaimer in communications to investors regarding the potential adverse effects (e.g., increased risk of identify theft) that accompany sharing personal information to the public and any incentive or conflict of interest the firm has for such information to be shared. At the same time, however, because it is up to each individual brokerage customer or advisory client to determine whether and to what extent to share personal information, a customer's or client's decision to share such information should not reverberate back to the broker-dealer or investment adviser in the form of increased regulation.

Question 3.13
"What additions or modifications to existing regulations, including, but not limited to, those identified above, or new regulations or guidance might be warranted to address investor protection concerns identified in connection with the use by broker-dealers and investment advisers of DEPs, the related tools and methods, and the use of retail investor data gathered

in connection with DEPs? What types of requirements, limitations, or prohibitions would be most appropriate to address any such identified investor protection concerns?"

Response
Envestnet believes that a broker-dealer using DEPs to encourage more frequent trading by its customers in self-directed brokerage accounts should be required to provide the following to its customers:

- Disclosure that: the DEPs are intended to result in more frequent trading by customers; the firm has a conflict of interest in using DEPs in this manner since the firm benefits economically, in the form of increased commissions, mark-ups, mark-downs, ticket charges and other transaction-based compensation, if customers trade more; increased trading will benefit the firm and will increase trading costs to customers (which will hurt the performance of their account).

- Performance information regarding the return of their account and as compared to a standard market benchmark;

- A customer account risk assessment measurement (e.g., standard deviation); and

- The amount of compensation the firm received over the past 12 months in the form of payment for order flow (i) from all customers and (ii) attributable to the particular customer.

When a broker-dealer uses DEPs to encourage customers to trade more in self-directed brokerage accounts, the investors should be educated about the impacts of their trading behavior as well as any incentives their broker-dealer has to encourage such trading activity. Envestnet also believes that it is possible that DEPs could be used in such a way as to constitute a recommendation for purposes of Regulation Best Interest.

ENVESTNET COMMENTS ON USE OF TECHNOLOGY BY INVESTMENT ADVISERS TO DEVELOP AND PROVIDE INVESTMENT ADVICE

Question 4.1
"How do investment advisers currently use technology in developing and providing investment advice? What types of technology do advisers use for these purposes? . . ."

Response
Envestnet uses algorithmic management and rules-based algorithms together with professional human oversight - we do not rely on algorithms as the sole basis for portfolio management decisions. In this respect, we view algorithms as an important tool and have professional portfolio managers make all investment management decisions. It is our philosophy that qualified and experienced money managers should be responsible for the management of client accounts.

<u>Question 4.2</u>
"Are our descriptions of the potential benefits and risks of investment advisers' use of technology in developing and providing investment advice accurate and comprehensive? If not, what additional benefits or risks to advisory clients are there from such use? What additional benefits or risks does using these types of technology provide to investment advisers? How do investment advisers weigh these benefits and risks in using technology to develop and provide investment advice? Does technology enable investment advisers to develop investment advice in a more cost-effective way and are clients able to receive less expensive advice as a result? Does technology increase access to investment advice for some clients who would otherwise not afford it or mitigate (or have the potential to mitigate) biases in the market that may have prevented access to some clients or prospective clients? . . . "

<u>Response</u>
Digitally provided investment advice often costs clients less than investment advice that is not provided digitally. In addition, digital investment advice is more accessible and available to underserved communities. In part, this is because digital investment advisers can competently service clients who do not have six or seven figure account balances. The evolution of technology has enabled digital investment advisers to economically advise small accounts. Moreover, with the spread of the Internet in recent years,[3] a person living in a rural community no longer needs to be in close proximity to an investment adviser's office in order to communicate, send or receive documents or build a relationship. As is the case with other industries, the cost savings of not having a physical office, combined with the reduced cost of transmitting and receiving documents and communicating with clients, custodians, sub-advisers, model providers and vendors located far away has allowed digital investment advisers to serve an increasing number of clients in an efficient manner. Digital investment advisers are thus able to serve populations that have historically been ignored or underserved by traditional investment advisers.

Envestnet believes that there are few, if any, households that would not benefit from receiving investment management services from professional money managers that work for an investment adviser and who do nothing else other than manage client portfolios. We believe that such services are on the whole a virtue to clients and that the large majority of retail investors would have better financial outcomes if they hired discretionary investment advisers as opposed to seeking to manage their own assets.

<u>Question 4.27</u>
"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

[3] *See* https://www.sec.gov/comments/265-33/26533-7964920-224992.pdf.

address technological developments, such as chatbots and/or other responsive technologies providing novel ways of interacting with clients? Should the Commission address these developments in some other way? Should the Commission provide additional guidance about this condition? If yes, what specifically should this guidance address?"

Response

Investment advisers utilize various means to communicate with clients and the Commission has noted the importance of being technology neutral in applying its rules.[4] We believe the same principle should apply to the application of Rule 3a-4 and that the Commission should explicitly adopt this principle, with the result being that a chatbot or other responsive technologies should be treated no differently than a chat or e-mail sent by a natural person. The way in which a communication is created (i.e., by a human being as opposed to a responsive technology programmed by a human being) should have no relevance for purposes of Rule 3a-4. The content of the communication is what should matter.[5]

With respect to the requirement in Rule 3a-4(a)(2)(iv) that the sponsor and personnel of the manager of the client's account who are knowledgeable about the account and its management be reasonably available to the client for consultation, this provision is intended to provide for reasonable client access to the sponsor and the manager to ask questions or to seek additional information about an investment advisory program. Whether a sponsor or manager is "reasonably available" depends upon the facts and circumstances.[6]

The Commission has stated that a program's sponsor may serve as the primary contact for clients in the program and that it is permissible for a program to deny direct client contact with the manager until after the sponsor and others have attempted to address the client's questions or concerns.[7] Moreover, in interpreting the rule language, the Commission has noted, "the contact person need not be the individual primarily responsible for managing the account, but must be sufficiently knowledgeable to discuss and explain investment decisions that were made."[8]

It may be difficult for a robo-adviser to make a traditional portfolio manager or someone similar available to clients in the program.[9] Personnel who are knowledgeable about the

[4] *See Use of Electronic Media for Delivery Purposes,* Release No. 36345 (Oct. 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*, Release No. 37182 (May 1996); *Use of Electronic Media,* Exchange Act, Release No. 42728 (Apr. 2000). *See also Investment Adviser Marketing,* Release No. IA-5653 (Dec. 22, 2020).
[5] *Id.*
[6] Status of Investment Advisory Programs Under the Investment Company Act of 1940, Company Act Release No. 21260, 60 FR 39574 (Aug. 2, 1995) (reproposing Rule 3a-4) ("Reproposing Release").
[7] *Id.*
[8] Status of Investment Advisory Programs Under the Investment Company Act of 1940, Company Act Release No. 22579 (Mar. 24, 1997), 62 Fed. Reg.15,098, 15,099 (Mar. 31, 1997) (adopting Rule 3a-4) ("Adopting Release").
[9] In IM Guidance Statement 2017-02, located at https://www.sec.gov/investment/im-guidance-2017-02.pdf, the Commission staff issued guidance on the compliance of robo-advisers with the Advisers Act and the rules

operations of the algorithm and how it manages client accounts and able to explain investment decisions made for such accounts typically may not regularly be available to clients for consultation. However, such personnel ("Algorithm Personnel") of the robo-adviser might be able to post information on the robo-adviser's website about how the algorithm operates and manages clients' assets. Or such personnel might be able to speak to persons located in a call center that a robo-adviser creates in order to serve clients. In addition, such personnel might be able to post Frequently Asked Questions about the algorithm and the management of client accounts. As noted, the purpose of this provision in Rule 3a-4 is to be able to provide a mechanism by which clients can ask questions or to seek additional information about an investment advisory program. If clients can submit questions via the robo-adviser's digital platform and receive answers to their questions (whether through an FAQ, a custom e-mail, chat or chatbot response or a call center), then the public policy purpose underlying Rule 3a-4(a)(2)(iv) has been fulfilled. We ask that the Commission concur with this conclusion.

Question 4.25
". . . Are there concerns with respect to these [wrap fee] programs for clients with minimal or no trading activity as commissions for trade execution have moved toward zero? . . ."

Response
In our view, cost typically is an important consideration when judging whether a wrap fee program, as opposed to a non-wrap fee investment advisory program, is appropriate for a given client. However, it is not necessarily the most significant factor, as the Commission has recognized.[10] In particular, the Commission has said the following about cost:

> The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.
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> Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client's best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or

thereunder. Among other things, this Guidance Statement stated "[w]hile this guidance focuses on the obligations of robo-advisers under the Advisers Act, robo-advisers should consider whether the organization and operation of their programs raise any issues under the other federal securities laws, including the [Company Act], and in particular Rule 3a-4 under that Act. To the extent that a robo-adviser believes that its organization and operation raise unique facts or circumstances not addressed by Rule 3a-4, such adviser may wish to consider contacting the Staff for further guidance."

[10] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669, 33671 (July 12, 2019).

> strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client's objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client's objectives. For example, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client's best interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.[11]

As the Commission correctly notes, a more expensive strategy is consistent with an adviser's fiduciary duty if there are other factors that outweigh the costs and make the strategy in the best interest of the client, in light of the client's investment objective. Accordingly, the Commission should consider a number of factors in this analysis including, but not limited to, the level of services and support provided under the wrap fee program, the selection of third party sub-managers, model providers and investment strategies that are available, the pricing of such sub-managers, model providers and strategies, ancillary services provided in connection with the program such as rebalancing, performance attribution and reporting, the availability of ESG and tax sensitive strategies as well as overlay management services, the ability to receive automated fee debiting and account reconciliation, the performance of the strategies that are available, and the level of due diligence and monitoring provided by the sponsor or a third party under the program.

At the same time, Envestnet is sensitive to the Commission's concern and suggests that investment advisers responsible for managing accounts should actively monitor the accounts and review those that are on extended 'trade hold' or otherwise idle. However, there should not be an assumption by the Commission that by itself, a "buy and hold" strategy is an indication that a non-wrap account advisory relationship is more appropriate or that a wrap fee account is longer in the client's best interest.

<u>Question 4.28</u>
" . . . How do sponsors ensure that they sufficient information about a client's financial situation and investment objectives to provide investment advice that is in the best interests 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? . . ."

<u>Response</u>
In our experience, obtaining information about a client's financial situation and investment objectives in a digital environment is feasible and note that digital investment advice may be the best option for clients, particularly those with smaller account sizes that would not

[11] *Id.*

otherwise be managed or advised. We believe that not all clients and situations require the investment adviser to receive the same data set and that different situations call for different sets of data. We urge the Commission not to treat all advisory relationships and contexts the same and instead recognize that the data points needed to act in the best interests of the client depend on the relevant facts and circumstances.

With technology driven solutions where there is a lack of personal engagement, we expect retail clients to be forthright and complete in answering all questions posed, to carefully consider suggested allocations or strategies and to update information previously provided as their circumstances change. Such expectations are reasonable in our view given the nature of the advisory program. While the Commission may have concerns about the lack of personal interaction with clients in the digital environment, we note that digital investment advisory programs are an option which clients must opt into. So long as a digital investment adviser provides accurate, clear, easy to comprehend disclosure regarding the parameters, limits and restrictions associated with the digital advisory program, then clients are not harmed by the lack of personal interaction, as it is their informed choice to receive investment advice from the digital investment adviser.

There also are important benefits to clients when investment advice is provided digitally, including enhanced reporting and account access for clients, the ability to change assumptions and provide instructions in real-time and reduced cost for obtaining investment advisory services. With respect to this last point, requiring digital advisers to obtain or verify additional information about clients will drive up costs and therefore reduce access to investment advice. It is imperative that the Commission seek to balance investor protection concerns with ensuring access to quality investment advice. Increasingly, we find that investment advice can only be provided economically to small accounts in a digital environment. It is thus important to recognize that adjusting the regulatory framework will have a significant impact on the ability of many Americans to obtain competent investment advice.

Question 4.29

". . . 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?"

Response

Clarification regarding the scope of the reasonable restriction requirement is long overdue. As the Commission acknowledges in the Request, technology has evolved to the point where investment advisers have other means to provide individualized treatment of client accounts, such as by permitting clients to transfer in and "tag" assets so that they will not be sold (to avoid triggering adverse tax impacts or for client sentimental reasons, for example). We think the staff's historical reading of Rule 3a-4(a)(3), which at times appears to rest on whether an adviser gives clients the ability to designate securities or types of securities that will not be purchased by the adviser, is too narrow and inconsistent with the rule text and the history of the rule's adoption.

When Rule 3a-4 was first proposed in 1980, Rule 3a-4 would have required, among other things, that "each client of the investment manager ha[ve] the opportunity and authority to instruct the adviser to refrain from purchasing particular securities which otherwise might be purchased."[12] The Commission explained "the client would have to be given the opportunity and authority to determine whether to refrain from purchasing particular securities otherwise generally purchased by the investment manager."[13] This condition was thus rather narrow and specific. To satisfy the rule, as originally proposed, the client had to, in all cases, be given the opportunity to say "no" to the purchase of particular securities.

When Rule 3a-4 was again proposed in 1995, however, this condition was significantly modified. Under the reproposal, the rule would have stated, "[e]ach client has the ability to impose reasonable restrictions on the management of its 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"[14] (Emphasis added). In explaining the meaning of this language and the scope of the reasonable restriction obligation, the Commission stated as follows:

> Paragraph (a)(3) would have required each client to have the ability to impose reasonable restrictions on the management of its account. These restrictions **could include**, **for example**, the designation of particular securities or types of securities that should not be purchased for the client's account. The originally proposed rule would have required that each client have the ability to instruct its portfolio manager to refrain from purchasing particular securities that otherwise might be purchased. Under the revised proposal, the client must be able to impose reasonable restrictions on the management of its account. The revised proposal specifically states that restrictions **may include** prohibitions with respect to the purchase or sale of particular securities or types of securities.

[12] Individualized Inv. Mgmt. Servs., Company Act Release No. 11391, [1980 Transfer Binder] Fed. Sec. L Rep. (CCH) ¶ 82,662, at 83,571, 83,573 (Oct. 10, 1980) (proposing Rule 3a-4) ("Proposing Release").
[13] Proposing Release. A footnote in the Proposing Release explained "For example, the client would have to be able to elect whether to exclude securities such as liquor, drug and tobacco company stocks from his account, or to decide whether his account should invest in fewer numbers of securities than the number the investment manager typically invests in for his clients." Id.
[14] Reproposing Release.

> . . .
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> The ability of clients of a program to place restrictions is a critical factor in determining whether individualized treatment is provided under that program. This ability is a crucial difference between a client receiving investment advisory services and an investor in an investment company.[15] (Emphasis added)

The foregoing language from the Reproposing Release is important since it makes clear that compliance with the words following the word "including" in the reproposed rule is **not** necessary to satisfy the reasonable restriction requirement; instead, the words following the word "including" in the reproposed rule merely describe an example of a restriction that would satisfy the reasonable restriction requirement. Accordingly, to satisfy the reasonable restriction requirement it is sufficient, but **not** necessary, to give clients the ability to designate particular securities or types of securities that should not be purchased for the client's account. In this sense, the Commission moved away from the narrow requirement in the Proposing Release that clients have the ability to designate particular securities or types of securities that should not be purchased for the client's account. The concept of reasonable restrictions thus includes, but is broader than, the narrow obligation that appeared in the Proposing Release.

When the Commission adopted Rule 3a-4, it said the following regarding the scope of the reasonable restriction requirement:

> The Commission stated in the July Release that the ability of a client in an investment advisory program to place reasonable restrictions on the management of his or her account is a critical factor in determining whether individualized treatment is provided under the program. Paragraph (a)(3) of the revised proposed rule, therefore, would have provided that a program relying on the rule must include a requirement that each client have the ability to impose reasonable restrictions on the management of his or her account. Such restrictions were described to **include**, **for example**, prohibitions with respect to the purchase of particular securities or types of securities. This provision of the rule is being adopted as reproposed, except that language has been added to the provision to clarify that a program relying on rule 3a-4 need not provide clients with the right to direct the manager to purchase specific securities or types of securities.[16] (Emphasis added)

The above language in the Adopting Release as well as its citation to the "for example" language in the Reproposing Release, together with the observation

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[15] Reproposing Release.
[16] Adopting Release.

that the Commission adopted the Rule as reproposed (except to clarify that a client does not need to have the ability to direct the manager to purchase specific securities or types of securities), make clear that the Commission's views in the Reproposing Release regarding the scope of the reasonable restriction requirement continued to represent its view as to what Rule 3a-4 requires. Accordingly, while the Commission said that investment advisers have to provide clients with the ability to impose reasonable restrictions on the management of their account to meet the reasonable restriction element of the safe harbor, it is clear from the rulemaking history that the ability to impose reasonable restrictions can take various forms and does not have to include the ability of clients to specify securities or types of securities they do not want in their account.

Given the foregoing, we request that the Commission explicitly note that compliance with Rule 3a-4(a)(3) hinges on the ability to provide meaningful individualized treatment to client accounts and that designating securities not to be purchased is one, but only one, way to impose reasonable restrictions and satisfy this requirement. Other possible ways of satisfying this requirement include, but are not limited to, giving clients the ability to: designate securities not to sell; transfer in securities in kind; specify a security to buy; receive overlay management services; have their portfolio managed pursuant to a particular sensitivity (such as tax sensitivity); choose from several rebalancing options; select tax loss harvesting; choose, within a range, the amount of cash to keep in the account; and define, within a range, "small trades" and prevent such trades from occurring in the account. As the Commission seems to have recognized, the ability to impose reasonable restrictions is but a proxy for individualized treatment of client accounts. Accordingly, we ask the Commission to modify Rule 3a-4 to acknowledge this basic principle.

CONCLUSION

If the Commission determines that further action regarding DEPs or the digital provision of investment advice by investment advisers is warranted, Envestnet hopes the Commission will thoughtfully consider the impacts of any new or amended regulations, requirements or restrictions. In regulating financial activity that is driven by rapidly evolving changes in technology, the possibility of adverse unintended or unforeseen consequences is significant. Accordingly, we ask that the Commission proceed cautiously and only when there a clear and present danger to investors. We also ask that the Commission tailor any future regulatory action to the nature and size of the harm it is seeking to address in order to reduce the chance of such action eliminating industry practices that are beneficial to investors.

Finally, we believe it is appropriate to modernize certain rules and guidance (e.g., Rule 3a-4 under the Investment Company Act of 1940 and the Commission's guidance to broker-dealers and investment advisers for delivering documents and information under the Federal Securities Laws[17]) that were adopted at the dawn of the Internet in order to reflect

[17] *See* note 2, supra.

today's digital world and the various forms of communication that did not exist when the Commission adopted these rules and guidance.

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Envestnet appreciates the opportunity to provide these comments on the Notice. Please do not hesitate to contact Patrick Marr at [redacted] with any questions regarding these comments.

Respectfully submitted,

Envestnet Asset Management, Inc.