BY ELECTRONIC TRANSMISSION

February 7, 2020

Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: SEC File No. S7-21-19: SBIA Comments on Proposed Rule on Investment Advisor Advertisements and Solicitations

Dear Ms. Countryman:

The Small Business Investor Alliance ("SBIA") appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's ("SEC") proposed amendments to rules governing certain investment advisor advertisement and payments to solicitors under the Investment Advisors Act of 1940 (the "1940 Advisors Act").[1]

The SBIA is the leading national association that develops, supports, and advocates on behalf of policies that benefit private equity investment funds that finance small and mid-size domestic businesses in the middle market and lower middle market, as well as the investors that provide capital to those funds.

At the outset, we would like to thank the SEC for investing its limited resources to refresh these rules that were first instituted in 1961 and 1979, respectively.[2] We applaud this comprehensive initiative because it brings each rule into alignment with current developments in technologies, application, and administration.

SBIA is generally supportive of many provisions in the proposed amendments, but we note that investors and regulated entities alike could benefit from additional clarity in a few specific areas discussed below. Additionally, the SBIA commends the American Investment Council for its comprehensive analysis submitted to the SEC about these proposed rules.

1. The Proposed Definition of "Advertisement" Generally Captures the Ever-Changing Array of Communications Media.

We believe that the SEC has crafted a proposed definition that will be evergreen and sustainable over time because its scope and terms anticipate changed conditions. We support the shift to principles-based oversight envisioned by the proposed amendments because communications technologies continue to evolve rapidly. The proposed rule excludes business development companies ("BDC") from the new definition of "advertisement" because it is consistent with existing rules already governing marketing and advertisement by BDCs under the Securities Act of 1933.[3] SBIA appreciates this prudential

[1] SEC, *Investment Advisor Advertisements; Compensation for Solicitations*, Rel. No. IA-5407; SEC File No. S7-21-19 (December 10, 2019) (the "*Proposing Release*").
[2] 17 C.F.R §275.206(4)-1 and 17 C.F.R. §275.206(4)-3, respectively, of the Investment Advisors Act of 1940, 15 U.S.C. §80b-1, *et seq*. (2019).
[3] 17 CFR §230.156 (Investment Company Sales Literature) and 17 CFR §230.482 (Advertising by an Investment Company) (2019).

acknowledgement of current practice, and we offer several recommendations to components of the proposed rule.

Under the proposed definition, "advertisement" includes communications "by or on behalf of an" investment advisor. This raises interpretation questions regarding its application for third-party materials. We believe that exercising *sufficient control* is an appropriate test to determine whether third-party content is an "advertisement" for which the investment advisor is responsible and when it is not. While it is reasonable to classify content that an investment adviser has paid for or drafted as an "advertisement", other proposed descriptors of "by or on behalf of" such as "submits or is otherwise involved substantially" are subjective. SBIA encourages the SEC to include specific hypotheticals in the final rule that provide a bright line for practitioners to follow.

The SEC also proposes to exclude certain non-broadcast live oral communications by investment advisors. For instance, the SEC proposes to exclude investor advisor participation in panel talks and extemporaneous remarks from the proposed "advertisement" definition provided such remarks satisfy the test for a non-broadcast live oral communication. This is a practical exclusion, but again it requires clear and specific examples to frame the appropriate boundaries for compliance (e.g., unscripted and extemporaneous questions to an investment advisor in a public setting).

SBIA supports the SEC's proposal to lift the current broad restrictions against the use of client testimonials and third-party endorsements by investment advisors in advertisements, subject to required disclosures and other tailored conditions. In order not to mislead or deceive investors, SBIA supports the recommended requirements for investment advisors to disclose in advertisements that use testimonials or endorsements that clients or third-party endorsers were paid cash or non-cash compensation.[4]

We also encourage the SEC to remove the proposed "designated employee" provision because we believe there are sufficient incentives currently in place to ensure compliance with the advertisement rule.[5]

This provision would require only that investment advisor advertisements are reviewed and approved for consistency under the rule by a designated employee before the advertisement is released. It directs the firm to maintain a written record of its review and approval steps. These steps are likely already in place because existing compliance obligations and SEC enforcement under rule 206(4)-7 of the 1940 Advisors Act, for instance, would still apply to investment advisor advertisements made pursuant to the proposed rule. Compliance officers of private fund sponsors already develop and implement policies and procedures necessary to evaluate materials for conformity under the advertising rule.

The "designated employee" provision does not contain separate policy or procedural obligations other than this review-and-approval with documentation requirement, which could lead to unnecessary recordkeeping and compliance burdens.

[4] Compensated testimonials and endorsements would generally be "by or on behalf of an" investment advisor and would make the statement subject to the "advertisement" definition and possibly deem the speaker a "solicitor" if any cash or non-cash compensation exceeded the proposed *de minimis* threshold (i.e., $100 or less - or an equivalent-valued non-cash benefit - during any 12-month period) under the amended solicitation rule.

[5] Proposed rule 206(4)-1(d).

2. Proposed Amendments to the Solicitation Rule Build on the Current Rule's Foundation and Generally Improve its Application for Practitioners.

The current rule on solicitation governs the relationship between an investment advisor and a solicitor who, by definition is "any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser," generally under some form of compensation arrangement.[6]

The SEC proposes to: (i) retain, with certain revisions, the current rule's definition of "solicitor"; (ii) expand the rule to cover all forms of solicitation arrangements, not just cash compensation; and, (iii) expand the scope of an investment advisor's client to include both existing and prospective ones. SBIA believes that this rule promotes transparency and consumer protection by noticing investors up front about the relationship, financial and otherwise, between a solicitor and investment advisor.

The SEC has also proposed a new *de minimis* exception whereby the solicitation rule, which is applied on a facts-and-circumstances basis, is not triggered if consideration paid by an investment advisor to a solicitor during any 12-month period is either less than $100, or an equivalent-valued non-cash benefit.

It seems, however, that the exception, as drafted, may only offer a superficial benefit to investment advisors because the SEC acknowledges that any compensation paid to a solicitor triggers required disclosure under the advertisement rule since solicitor referrals often involve testimonials or endorsements.[7]

Without full information quantifying the benefits to investment advisors from either a dollar-based or principles-based *de minimis* exception from the solicitation rule, it is difficult to assess whether those benefits exceed potential costs to investors in the form of weakened consumer protections or unnecessary exposure to unfair and deception sales practices. The current solicitation rule does not include a *de minimis* exception and SBIA recommends that the SEC reconsider whether one is warranted.

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SBIA is happy to provide continued feedback on this important issue to our membership. *Please contact SBIA's Executive Director, Government Relations, Tonnie Wybensinger, at (202) 628-5055 or tonnie@sbia.org* if we can provide additional assistance on this issue.

Sincerely,

Brett Palmer
President
Small Business Investor Alliance

[6] 17 C.F.R. §275.206(4)-3(d)(1).
[7] *See* 84 Fed Reg 67584 (Dec. 10, 2019).