

February 10, 2020

Via E-mail

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-21-19

Dear Ms. Countryman:

We are submitting this correspondence in response to the proposed rule and request for comment referenced above (the “**Rule**”), as published by the Securities and Exchange Commission (the “**Commission**”) in the Federal Register on December 10, 2019. We are limiting our specific comments to that component of the Rule pertaining to the second condition to the presentation of hypothetical performance in advertisements (the “**Calculation Information**”), as discussed in detail below.

General

We are legal counsel to a global investment firm whose specialty is quantitative growth investing using data-driven methodologies (our “**Client**,” “**it**” or “**its**”). These methodologies are designed to combine analytical technology with mathematical principles to identify investment opportunities. Our Client services corporate and public pension plans, 401(k) programs, sovereign wealth funds, religious institutions, and individual investors.

Our Client is a recognized leader in the field of quantitative growth style investing research. It employs a team of quantitative researchers and data scientists who work in coordination with portfolio managers. Our Client's team is engaged in, among other things, socially responsible investing (commonly referred to as ESG), quantitative factor investing, portfolio construction and optimization, transaction cost analysis, and the application of global quantitative strategies to emerging markets. In addition to traditional portfolio management, it provides custom products and private investment opportunities; it also offers clients the opportunity to purchase our Client's analytical tools, to enable them to manage their own assets. Under certain circumstances, frequently at the request of its existing customers, our Client will compare actual performance data for existing portfolios to hypothetical performance data generated by, for example, changing the weighting of certain geographies or industries in the portfolio, to demonstrate the impact of such changes.

Our Concerns about the Rule

In conjunction with our Client, we have analyzed the Rule at length, particularly the proposed amendments to Rule 206(4)-1 of the Investment Advisers Act of 1940 (“**Rule 206(4)-1**”) that relate to investment adviser advertisements. While we have no quarrel with the Commission's overall efforts to modernize Rule 206(4)-1, including the definitions of hypothetical performance and the first and third conditions to its use, we believe the Commission's proposed requirement to include Calculation Information as a further condition is misguided. It will cause competitive harm to investment advisers such as our Client, who use sophisticated, proprietary models in the hypothetical performance information included in their advertisements, while at the same time imparting no useful information to prospective investors.

Direct Competitive Harm and the Impact on our Client's Market

The Rule as proposed requires investment advisers to include the methodology used in calculating and generating hypothetical performance, with this methodology to include any assumptions on which the hypothetical performance rests (see pps. 172-173). As noted above, our Client utilizes data-driven methodologies that incorporate analytical technology. Much of this technology has been developed by our Client and is highly commercially sensitive. Were our Client to make complete disclosure of all of these methodologies, including the assumptions it makes, which are determined in whole or in part through the use of our Client's technology, the competitive harm it would experience would be severe. Our Client has positioned itself as a market innovator based largely on the methodologies the Commission is proposing to force it to reveal if it is to continue to use hypothetical performance metrics as part of its future advertisements. Our Client's methodologies would quickly be absorbed by other firms and the competitive advantages it has built over multiple decades would be permanently damaged. That is an untenable position for our Client.

We note that the Smaller Adviser Feedback Flier the Commission has included with the Rule as Appendix C asks advisers to state, among other things, whether, if the Rule is adopted, hypothetical performance results would be presented in their advertisements. Our Client's response to this question appears at this juncture to be a categorical "no." It will have no choice but to discontinue its use of hypothetical performance in order to comply with the requirements as proposed. We believe this would also result in potentially severe competitive harm. Having to forego its established use of hypothetical performance would weaken our Client's marketing efforts and its ability to distinguish itself from other investment advisory firms. Our Client will have to significantly alter its entire approach toward business development and we believe it likely that any next generation of marketing our Client attempts that does not incorporate hypothetical performance will be far less effective than its historical efforts have been. In addition, the demand for our Client's custom products will by definition fall, since these products are based on the investment goals its clients articulate, which in turn are illustrated through the hypothetical performance models our Client utilizes; under the Rule, it will no longer be able to fully satisfy customer needs in this area.

Moreover, we feel that implementation of the Rule as proposed will have both a significant and negative effect on the investment advisory market in general. The open circulation of information is a key element in capital formation. If investment advisers such as

our Client and similarly situated firms are in effect forced to stop providing potential investors with an important source of data such as hypothetical performance metrics, this will almost certainly have a chilling effect on the market as a whole. The ability to provide those metrics at present, we believe, often tips the capital allocation balance in favor of sophisticated investment advisers such as our Client and others like it. Should this change, not only will our Client be harmed, but the registered investment advisory market will likely also suffer, as capital that would otherwise flow toward the investment advisers with the most highly developed portfolio management platforms will either go to less sophisticated advisers, or perhaps not be invested at all. This will harm not only our Client and its peers, but Retail and Non-Retail Persons alike.

The requirement to provide the Calculation Information will ultimately result in the denial of valuable information to the investor community, which has historically had a deleterious impact on the capital markets.

No Material Benefit to Investors

We note that, in the Rule, the Commission states that the Calculation Information will enable recipients to assign value to hypothetical performance, including the identification of underlying criteria and assumptions. Further, the Rule aspires to afford recipients with the ability to replicate the hypothetical performance using their own analytical tools and resources. Finally, the Rule states that, without the provision of Calculation Information, hypothetical performance would be misleading to even sophisticated investors. We respectfully submit that all of these assertions are erroneous and that, in addition to inflicting competitive harm on our Client and other similarly situated investment advisory firms, neither Retail nor Non-Retail Persons will materially benefit from the Calculation Information.

Our Client's methodologies are advanced to the point where we believe it would be very difficult for even a Non-Retail Person to readily identify its criteria and assumptions. The mathematical principles relied on in developing them are based on strong well-proven analytical doctrines. However, the breadth and content of the data utilized would challenge any lay reader without a strong background in mathematics and statistics. Nor do they easily lend themselves to providing condensed or simplified reproducible records for inclusion with all "advertising." The time and resources our Client would have to devote to this effort would be considerable and would not, in our opinion, markedly enhance an investor's grasp of its Calculation Information. At the same time, we feel strongly that replication of this information without our Client's proprietary analytical tools, which, as indicated, are marketed for sale, would be extremely difficult. We respectfully dispute the Commission's contention that, without Calculation Information, hypothetical performance included in advertisements is *de facto* misleading. Hypothetical performance is only misleading when it is inherently so, i.e. when it relies on flawed assumptions or incorrect data, or both. Retail and Non-Retail Persons can assign whatever value they believe appropriate to hypothetical performance information, and that value will take into account the possibility that the information is incomplete or inaccurate. This is particularly so when the risk information that the Commission is proposing as a separate condition is provided. Requiring firms like our Client to go so much further, as the Calculation Information condition contemplates, is excessive and unnecessary.

Conclusion

In short, we believe if the Commission moves forward with the condition that Calculation Information be part of any hypothetical performance in an advertisement, the principal result will be significant and irreparable competitive harm to our Client, as well as to other investment advisory firms who rely on advanced quantitative research and data, with no corollary benefit to the investor. We express no concern with any of the other proposed amendments to Rule 206(4)-1, including the other two conditions to the use of hypothetical performance the Commission wishes to introduce. However, if the second condition survives into the final Rule, it will likely overwhelm its other aspects, as the use of hypothetical performance will likely decline to the point where it may cease being a meaningful part of advertisements by registered investment advisory firms.

Very truly yours,



David Guin
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