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WELLINGTON MANAGEMENT®

10 February 2020
Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

VIA E-MAIL: rule-comments@sec.gov

Re: Amendments to Investment Adviser Advertisements; Compensation for Solicitors
File No. S7-21-19

Dear Ms. Countryman:

Wellington Management Company LLP ("**Wellington Management**") appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "**Commission**" or "**SEC**") on the proposed rule regarding investment adviser advertisements (the "**Proposal**"). Wellington Management is a registered investment adviser structured as a private partnership. We provide investment advisory services to institutional clients, serve as a subadviser to over 200 US mutual funds and offer a variety of sponsored private funds. As of December 31, 2019, we were privileged to manage over $1.15 trillion in client assets globally across a wide variety of equity, fixed income and asset allocation strategies.

We support the Commission's review of the rules and regulations governing investment adviser advertising. We believe that consolidating the existing patchwork of formal and informal guidance, no action letters and enforcement actions into a single consolidated rule represents good governance and will provide investment advisers with needed clarity regarding the rules applicable to their communications with clients and prospects. We also appreciate that the Commission has taken a principles-based approach that will allow advisers greater flexibility to adapt their communications to evolving markets and better address client needs.

While we generally support the Proposal, it introduces two significant changes that we believe will adversely impact our ability to communicate effectively with our clients. First, we are concerned that the Proposal's expansion of the definition of "advertisement" will result in substantially all of our communications with clients being deemed to be "advertisements" subject to the amended rule. This would result in the imposition of the advertising framework to communications that occur in the ordinary course of providing advisory services. Second, the proposed pre-use review requirement will impose a significant new operational burden that will hamper our ability to communicate effectively with clients, especially considering the expanded definition of "advertisement."

In addition to these concerns, we offer some technical comments with respect to the Proposal's technical requirements for the presentation of model fees and hypothetical performance.

PROPOSED SCOPE OF "ADVERTISEMENTS" SUBJECT TO THE RULE.

As noted above, we strongly support the Proposal's implementation of a principles-based approach to the regulation of advertising. Investment advisory clients, especially in the institutional space, are increasingly sophisticated and are

requiring more and more information both as clients and as prospects. We believe a principles-based approach will provide investment advisers with the flexibility to respond to these evolving client needs while ensuring that clients and prospects receive fair, clear and balanced presentations. For example, we applaud the Commission replacing the prescriptive prohibitions on the presentation of past specific recommendations and testimonials with a more generic framework to ensure materials that include prior recommendations or testimonials are fair and balanced. These are specific areas where outdated and inflexible regulations prevented advisers from providing helpful information to clients and prospects.

While we appreciate the increased flexibility of a principles-based approach, it necessarily comes with increased compliance overhead. Compliance with principles rather than specific prohibitions requires more frequent case-by-case assessments and applications of judgment. As such, principles-based regulation should be tailored as narrowly as possible to the conduct that presents the greatest risk of harm in order to avoid the imposition of undue burdens. We are concerned that the Proposal is not sufficiently tailored to communications that should be subject to the rule, because the definition of "advertisement" is too broad, and the proposed exclusions from that definition are too narrow.

The Proposal defines "advertisement" as:

> any communication disseminated by any means by or on behalf of an investment adviser that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients

It also includes four exceptions, which are, in sum:

- Non-broadcast live oral communications;
- Responses to certain unsolicited requests;
- Communications regarding registered investment companies and business development companies; and
- Information required by statute.

As discussed in more detail below, we are concerned that including communications intended "to retain" advisory clients unnecessarily extends the scope of the definition beyond those communications typically considered to be "advertisements" and will include communications we have with our clients in the ordinary course of the client relationship. In addition, we believe the exceptions should be broadened or clarified in certain respects to ensure that specific types of communications (e.g., product-agnostic educational pieces, responses to Requests for Proposals and Due Diligence Questionnaires and the provision of data to investment consultants) are not "advertisements" subject to the proposed rule.

Communications that Seek "to Retain" Clients

Our concern that the definition of "advertisement" could apply to communications made in the ordinary course stems from the extension of the definition to communications that: "seek[] to obtain or retain one or more investment advisory clients." Practically every communication we have with our existing clients is in furtherance of deepening our relationship, and in that sense, intended to "retain" that client. These communications include account statements,[1] investment education pieces,[2] market commentary, investment fact sheets and other written materials, in addition to

[1] With respect to account statements, the Proposal partially addresses this concern in noting that "investors account statements or transaction reports that are intended to provide only details of those accounts and investments" would not be communications that "offer" or "promote" advisory services. In practice, many account statements and other periodic communications include information beyond the details of the account, such as investment commentary, so these communications would not "provide only details" regarding those accounts. In addition, the Proposal discusses this potential safe harbor in the context of whether a communication "offers" or "promotes", not whether the communication is intended "to retain" advisory clients.

[2] As discussed in more detail below, we are also proposing that educational materials be specifically excluded from the definition.

periodic client meetings, ad hoc telephone calls and other relationship-building communications. Some of these communications are intended to educate clients about their investments with us, overall investment strategies and solutions or markets generally. Other communications provide contextual investment advice, such as an explanation of a strategy's performance in a specific market environment. In all cases, at least one purpose of these communications is to ensure we provide the highest level of service to our clients and therefore retain them.

As an example, at Wellington Management, a relationship manager may write an email to an existing client updating them about the performance of their account and providing market commentary and insights from their portfolio manager. This communication would be, at least in part, seeking "to retain" the client, and we are concerned that, under the Proposal, this communication becomes an "advertisement." Similarly, we are concerned that the expanded definition could inadvertently apply to the provision of investment advice itself, to the extent that those communications could be considered to be seeking to "retain" clients. This would create the result that the actual business of being an investment adviser would fall into the scope of "advertising."

We do not believe that communications such as these, made in the ordinary course of advisory relationships, should be considered "advertisements" subject to the advertising rule. Once a client has engaged an investment adviser, the investment adviser becomes a fiduciary to that client with respect to that engagement, subject to the duties of care and loyalty. These duties carry with them the obligation to communicate honestly with clients, so additional regulation with respect to these communications is unnecessary. In addition, existing investment advisory clients can independently verify their account performance and investments through custodians and accountants, so there are natural protections against advisers being able to mislead clients in this context.

Further, communications made in the ordinary course of a client relationship are not intended as advertisements and they are not received as such. In fact, our clients are requiring more communication than ever before: additional information about their investments, deeper analysis on markets and sectors, evaluation of investment opportunities, explanations of investment performance, etc. Requiring advisers to evaluate the specific principles set forth in the Proposal on these ordinary course communications would impose new regulatory and compliance overhead on the day-to-day business of being an investment adviser. We fear that this new overhead would discourage the free and open communications our clients have come to expect.

We are not proposing that the existence of a client relationship means that no communications to existing clients can be advertisements. As we seek to build deeper relationships with our existing clients, we engage in discussions with them about new products and services or other ways we can help our clients achieve their goals. These communications, which are offering and promoting new advisory services should be considered "advertisements" subject to the advertising rule; however, the framework suggested in the Proposal seems to go beyond these communications.

We believe the Commission can better balance the definition of "advertisement" with a single targeted revision. Specifically, we propose that the Commission eliminate the phrase: "seeks to obtain or retain one or more investment advisory clients." With this revision, the rule would apply to communications that "offer or promote" advisory services, which is a clear and well understood standard and reflects both the plain meaning of the term as well as expectations of investment advisers and their clients and prospects. The revised definition would not, importantly, extend to communications merely because they are intended, in part, to "retain" advisory clients. This would ensure that the definition does not apply to communications where the protections of a specific rule are not warranted.[3]

[3] We are proposing that the Commission delete the entire clause (as opposed to merely "or retain") because, after deleting "or retain" the remaining clause merely describes communications that "seek[] to obtain" clients. This is effectively synonymous with communications that "offer or promote" advisory services, already described in the preceding clause. Therefore, the "seek to obtain" clause, standing on its own, becomes redundant and introduces uncertainty into the regulation.

Educational Materials

In addition to the specific revision to the definition of "advertisement" proposed above, we also request that the Commission confirm and expand upon the guidance in the Proposal that "general educational materials about investing or markets" are not "offering or promoting" advisory services. Our clients and prospects have come to expect materials that provide a discussion of investing and markets, such as a white paper on an emerging type of bond, a note that describes trends in certain market sectors, an email that discusses the market reaction to current events or a webinar providing thoughts on current market liquidity. In addition, we often host clients to our offices for educational visits where we discuss investments and investment strategies. These materials and events are not intended to offer or promote any specific investment product but still provide valuable educational content for clients and prospects. These communications are also often complex and perhaps less compatible with the specific principles enumerated in the Proposal. For example, in a white paper on the volatility of markets, it is unclear how we should think about ensuring that each statement is substantiated or how we ensure that an academic discussion of historic market volatility includes disclosure of necessary risks. We appreciate the Commission's recognition of this challenge and request that the Commission confirm that materials that do not reference specific investment products or services and that are otherwise educational in nature are not "advertisements" under the proposed rule.

Expand the Exclusions from the "Advertisement" Definition

In addition to the revisions to the definition of "advertisement," we also propose that the Commission broaden the exclusions from the definition to further ensure that the rule applies only to communications that are advertising advisory services.

Exclude "One-on-one, Individualized Communications"

First, we propose that the exclusion for "non-broadcast live oral communications" be extended to include all one-on-one, individualized communications, whether written or oral. For institutional clients, one-on-one and individualized communications are critical components of the relationship. Advisers must be able to speak freely with their clients about their clients' accounts, their investment needs, the investment advisers' capabilities. This is also critical prior to the consummation of an advisory relationship. We often work with prospects for extended periods of time designing investment products that meet their specific needs, whether those needs are a specific mutual fund strategy our clients want to offer, or an investment program designed to meet the specific liability needs of a pension plan. These discussions occur on an individualized basis, with business developers, product managers and investment personnel interacting directly with their counterparts at a client or prospect. It would be impractical and unnecessary to consider these communications to be "advertisements."

On the other hand, communications that are intended for broad distribution are generally understood to be "advertisements." We concur with the Commission's conclusion that communications that appear to be personalized but are widely disseminated should still be subject to the provisions of the rule. We believe that the Commission could ensure that these communications are still considered "advertisements" even under the expanded exclusion because these communications, even if made to seem as if they were one-on-one, are not "individualized."

Unsolicited Client Requests – Provision of Investment Performance

We support the specific exclusion of responses to unsolicited client requests from the definition of advertisements. We agree with the Commission that advisers should be able to freely respond to clients and prospects who are affirmatively seeking information, so long as the adviser has not solicited that inquiry. This position is consistent with long-standing industry practice and client expectations. That said, we do not agree that communications that include performance information (for retail clients) or hypothetical performance (for any client) should be carved out of this exclusion. Our clients and prospects often have specific goals and needs with respect to evaluating an investment advisory engagement, so they often request specific types of performance, including hypothetical performance. By making a

specific request for information, a client or prospect is, by definition, demonstrating a level of sophistication necessary to consume this information without being misled. As a result, we do not see a compelling rationale for imposing a regulatory framework on the ability for an adviser to answer a client/prospect inquiry. That said, we recognize the risks inherent with the presentation of performance and hypothetical performance, and we would support specific regulations that required any such presentations to be fair and balanced, accurate and not misleading.

Unsolicited Client Requests – Requests for Proposals / Due Diligence Questionnaires
We also propose that the Commission confirm that the exclusion for unsolicited client requests applies to responses to Requests for Proposals ("**RFPs**") or Due Diligence Questionnaires ("**DDQs**") even where they include information beyond the specific request. As proposed, this exclusion only applies to the limits of the question asked – "additional information beyond what was specifically asked" would not qualify for the exclusion.

Most advisers responding to RFPs and DDQs utilize a centralized response library that includes pre-drafted responses to the most commonly asked questions. Occasionally, these library responses may contain information that goes beyond the specific questions. For example, an RFP may include a question inquiring about trading processes, and an investment adviser may respond with a response that discusses not only the processes for trading, but also for compliance oversight. We are concerned that the Proposal may imply that such a response would not qualify as in response to an "unsolicited request" and request that the Commission provide guidance confirming that such a response would, in fact, qualify for this exclusion.

Unsolicited Client Requests – Investment Consultant Databases
We also seek confirmation that the exclusion with respect to unsolicited requests includes the provision of data to investment adviser consultant databases. Most, if not all, institutional asset managers seek to have their investment strategies included on consultant databases. These databases typically include factual information about investment advisers and their investment services, such as manager profiles, investment strategies information, assets under management, portfolio holdings and explanatory narratives. This information is provided to consultant by the investment advisers. Institutional investors and their consultants pay for access to these databases and use them as tools in the asset manager selection process as well as in monitoring their existing managers.

The provision of this data itself has not been considered to be providing an "advertisement" to consultants; however, the Proposal seems to suggest that these communications may be "advertisements". Specifically, the Proposal acknowledges that investment advisers provide "intermediaries, such as consultants and solicitors, advertisements for dissemination" and that the proposed rule would consider those communications as "by or on behalf of the investment adviser." We are concerned, however, that this provision, coupled with the guidance in the Proposal, could also apply to investment advisers who provide factual data to consultants for inclusion in their subscription databases. This would then result in consultant database entry potentially being deemed to be an "advertisement" of the investment adviser.

We strongly believe that consultant databases themselves should not be considered investment adviser advertisements. Investment advisers have no control or influence on how the information is presented, and consumers of consultant databases are sophisticated institutions who understand how to consume this information. Further, the institutional investors who subscribe to these services do not consider the information they receive to be promotional materials for any investment adviser or strategy. Therefore, we request the Commission clarify that the provision of performance data to consultants is not providing an advertisement and that the consultant's database entry for an investment adviser is not a communication "on behalf of" the investment adviser.[4]

[4] Please not that we are not suggesting or requesting that the provision of information to a consultant for inclusion in a database is not or should not be subject to the anti-fraud provisions of the Advisers Act.

Investment Company Materials – Expand to all FINRA-Regulated Communications

The definition of "advertisement" in the Proposal would extend the application of the advertising rule to advertisements relating to pooled investment vehicles. Pooled investment vehicles are primarily sold via broker-dealers, registered with the Financial Industry Regulatory Authority ("**FINRA**") and subject to its regulation. We are concerned that the proposed extension of Advisers Act regulation will subject the offering of these securities to an unnecessary duplicative layer of regulation. The Commission has acknowledged this concern in the Proposal to a limited extent by providing an exclusion from the definition of "advertisement" for material related to registered investment companies and business development companies. We support this exclusion, and we request that the Commission apply the same rationale to communications that offer or promote the sale of pooled investment vehicles that are already governed by FINRA regulations. This expanded exclusion would ensure that advisers are not subjected to layered and conflicting regulations regarding their fund or pool-related communications.

Third-Party Content – Correcting Clearly Erroneous Information

The Proposal also provides guidance as to when third-party content becomes an advertisement "on behalf of" the investment adviser. Specifically, the Proposal notes three instances where third-party content would become "on behalf of" the investment adviser, which are, in sum, where the adviser (i) drafts; (ii) edits; or (iii) pays for this content.

We request that the ultimate rule provide a safe harbor for an investment adviser to edit clearly erroneous content without converting the third-party communication into an "advertisement." By way of example, an investment adviser may have an entry in an online openly editable encyclopedia that contains inaccurate facts about the investment adviser (e.g., incorrect founding date or assets under management). We believe investment advisers should be permitted to revise those inaccuracies without subjecting the entire communication to the requirements of the rule, so long as the adviser does not then use that entry in any other marketing capacity.

PRE-USE MARKETING REVIEW SHOULD NOT BE REQUIRED

Our other principal concern with respect to the Proposal is the requirement that all advertisements (except for advertisements sent to a single person[5] or live broadcast communications) are subjected to a review by a designated employee prior to use. The Proposal strongly suggests that the designated employee (or employees) should be legal or compliance professionals.

We strongly oppose this requirement. Advisers should be permitted to develop compliance programs that are tailored to their businesses. With respect to compliance with advertising regulations, reasonable advisers can conclude that not all pieces present the risk of misleading investors based on the content of the piece and its targeted audience. Investment advisers should be permitted the latitude to deploy their legal and compliance resources towards the areas where the risk of non-compliance is the highest. In addition, requiring pre-review in all cases can be counterproductive to a compliance goal, as the business professionals can become reliant on compliance review, rather than exercising their own judgment as to whether a piece is sufficiently balanced.

We also submit that the increased burden on investment advisers associated with pre-review will be substantial. By way of example, we do not currently require a pre-review of all communications that are made with clients and prospects. Instead, we require pre-review only with respect to those pieces that we consider to pose the highest risk of misleading clients and prospects, e.g., advertisements that contain hypothetical performance, investment approach-related pieces intended for broad distribution to prospective clients, and presentations that are modified

5 To the extent this requirement remains in a final rule, we also request guidance confirming that the term "person" includes entities, and that a single entity or group of entities that are considered to be a single client would be considered a single "person".

from the generic form. The Proposal would require us to impose a pre-review requirement for every other advertisement, including a new set of communications that seek to "retain" clients. To meet this requirement, we would be required to impose a pre-review for categories of communications that we have deemed low-risk and currently do not review, e.g., generic research pieces provided to multiple clients and prospects; corporate marketing materials; and responses to RFPs based on our approved language. Based on an initial assessment, we anticipate that this requirement would cause the volume of communications we would have to review to more than triple. Given that our clients have limited risk of being misled by these communications, this requirement creates a significantly increased regulatory burden that will not, in our view, provide substantially greater investor protection.

While the explicit resource commitment to meet this burden would be significant, we are also concerned with the implicit impacts that would result. Requiring a pre-review of communications necessarily introduces a delay in the process of communicating with clients. We are concerned that, in order to avoid this delay, individuals will change the way they communicate, relying more on "live oral communications" that would be excluded from the definition of "advertisement" and therefore the pre-review. In addition, we are concerned that we will not be able to communicate as much or as well with our clients should this broad scope of pre-review be required. As we have noted, this would be a challenging development in a market where our clients and prospects are demanding a higher level of communication.

Should the Commission adopt the modifications to the definition of "advertisement" we propose above, much of this burden is reduced; however, we maintain that investment advisers themselves are best suited to design their own compliance programs. The imposition of a prescriptive pre-review requirement is antithetical to the principles-based approach espoused in the other portions of the rule and undermines the ability for advisers to effectively deploy their compliance resources. However, should the Commission determine to adopt a pre-review requirement in a final rule, the Commission should not go so far as to suggest how advisers should deploy their resources against that requirement or the specific qualifications of the individuals who perform that function. Specifically, we request that the guidance suggesting that the reviewer should be a legal or compliance professional be removed. Investment advisers should be permitted to design supervisory structures that fit their business models, and the Commission should not set forth specific staffing requirements.

FEES AND PERFORMANCE ADVERTISING

Finally, we offer some technical suggestions with respect to the requirements for presenting model fees and performance information under the Proposal. The Proposal includes some prescriptive requirements with respect to the presentation of performance and fees that may not meet industry and investor needs in all cases:

- **Model Fees:** The Proposal would permit the presentation of net-of-fee performance based on the deduction of a model fee based on the highest fee charged to the portfolio giving rise to the performance. While unusual, in certain cases, a client may pay a higher-than-normal fee to account for unique relationship servicing requirements, and it may be misleading to present net of fees results deducting this higher-than-normal fee. In these situations, advisers should be able to apply a model fee based on a fee appropriate for that client, rather than the highest fee charged. The CFA Institute has adopted a similar approach in the Global Investment Performance Standards.

- **Related Performance**: The Proposal permits the use of related performance so long as all related portfolios are included in the performance, or, in the event certain related portfolios are excluded, the resulting related performance is no higher than if those portfolios had been included. We are concerned that the emphasis on multiple portfolios being included in the related performance is incompatible and therefore prohibits advisers from using single representative accounts in advertising materials. The presentation of representative account performance, where the representative account is selected based on how closely it resembles the prospect's intended strategy, provides

prospective investors with important information to consider when evaluating an investment adviser and/or an investment strategy. We therefore request that the Commission consider issuing clarifying guidance that advisers may include single representative account performance as "related performance", so long as the related performance of all accounts is also provided.

- Hypothetical Performance: We appreciate the Commission permitting advisers to include hypothetical performance in advertising. Especially with sophisticated institutional investors, hypothetical performance has become a critical tool for prospective investors use to evaluate investment strategies. While we generally support the Commission's conditions with respect to the dissemination of hypothetical performance, we are concerned with the condition that requires investment advisers assess a potential recipient's financial situation and conclude that the hypothetical performance information is relevant to that financial situation. We believe this is an impractical standard. It is not obvious what characteristics of an investor's financial situation would be relevant to such an evaluation, and investment advisers should not be tasked with screening investors from information they are seeking on the investment advisers' necessarily limited evaluation of the prospect's financial situation. Further, investment advisers may be unable to obtain information necessary to make this evaluation, as prospective investors seek hypothetical performance early in their evaluation of investment strategies before the prospect is willing to provide potential sensitive financial information. Instead of this subjective evaluation, we encourage the Commission to limit the dissemination of hypothetical performance to persons or entities who meet an objective qualification, such as the FINRA "institutional investor" (or conversely, who fall outside of a definition, such as the proposed "Retail Client" definition).

- Performance Targets: The Proposal includes "targeted returns" and "projected returns" as hypothetical performance information. While we agree that "projected returns" have a heighted potential to mislead investors and should be regulated similar to hypothetical performance, we believe "targeted returns" are substantially different. Targeted returns are not hypothetical performance, but rather are fundamental characteristics of an investment strategy. A performance target serves as an indication to prospects and clients as to how aggressive a strategy will be managed. Strategies with higher targeted returns should be expected to be managed more aggressively, using leverage and derivatives to magnify returns, which also increases risk. While we agree with the Commission that targeted performance could be misleading if based on "assumptions that are virtually impossible to occur in reality" (e.g., a 20% target return for a US short-term bond strategy), we do not believe it is necessary to include targeted returns as hypothetical performance; such exaggerated targets would themselves violate the principles established in the rule.

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We appreciate the opportunity to comment on the Proposal. If you have any questions about our comments or would like any additional information, please contact Michele Born or me at the number above.

Very truly yours,

Lance C. Dial
Managing Director and Counsel

Cc:
The Honorable Jay Clayton
The Honorable Robert J. Jackson
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

Dalia 0. Blass
Director, Division of Investment Management