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February 10, 2020

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

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

Re: **Investment Adviser Advertisements; Compensation for Solicitations: File Number S7-21-19**

Dear Ms. Countryman,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") on its proposed amendments to the rules under the Investment Advisers Act of 1940 (the "Advisers Act") regarding investment adviser advertisements and payments to solicitors, respectively (the "Proposal").[2]

Fidelity commends the SEC for undertaking to modernize the advertising and solicitation rules to reflect business methods and technologies that have evolved since the rules were adopted decades ago. In particular, we appreciate that the SEC has recognized that electronic media, including social media and other internet communications, play an important role in how communication is disseminated today and has endeavored to make certain aspects of the Proposal "evergreen" in anticipation of ever-changing technologies.

We also appreciate the tremendous undertaking by the SEC to streamline and update decades old rules which are subject to a patchwork of existing SEC staff no-action letters and guidance into a single comprehensive rule. While several of the Proposal's requirements strike the right balance, our comments below reflect our concerns with certain aspects of the Proposal that we believe constitute an outsized expansion of the existing requirements applicable to advisers, with an unintended result of creating a more burdensome framework than the one that exists today, with no commensurate benefit to investors.

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[1] Fidelity is one of the world's largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 30 million individuals and institutions, as well as through 13,500 financial intermediary firms. Fidelity submits this letter on behalf of Fidelity Management & Research Company LLC, the investment adviser to the Fidelity family of mutual funds, and FIAM LLC, Fidelity's institutional adviser.

[2] *See* Investment Adviser Advertisements; Compensation for Solicitation, Release No. IA-5407, RIN 3235-AM08 (November 4, 2019) ("Release"), available at https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.

I. EXECUTIVE SUMMARY

Fidelity offers the following modifications to improve the effectiveness of the Proposal, as described in more detail below:

- The SEC should revise the broad definition of an "advertisement" that, as proposed, would have the effect of capturing ordinary course communications, to: (i) exclude materials provided to existing clients and materials provided to no more than one investor, (ii) expand the proposed exclusion for "non-broadcast" live oral communications by harmonizing it with FINRA's approach to public appearances, (iii) reconsider the expansion to pooled investments funds that are subject to FINRA rules to avoid a duplicative regulatory regime, and (iv) broaden the exclusion for "unsolicited" requests for proposals or specified information;
- Consistent with its past views supporting layered disclosures, the SEC should permit the use of hyperlinked disclosures to meet both the "clear and prominent" standard for a disclosure not to be misleading and for relevant disclosures relating to testimonials, endorsements and third-party ratings;
- The SEC should exclude targeted returns from the definition of hypothetical performance, or alternatively allow advisers to specify how targeted returns could be presented in all communications through existing policies and procedures;
- The SEC should replace the proposed prescriptive pre-review and approval requirements with a requirement that advisers implement a "system of review" as part of their existing Rule 206(4)-7 compliance program, which would address the types of materials that are reviewed, how and when they are reviewed, and the employees or supervised persons who would be responsible for that review;
- The SEC should also narrow the scope of the pre-review and approval requirement by excluding advertisements provided to non-retail persons and explicitly permitting the use of a template communication that eliminates the need to review and approve each and every advertisement; and
- With respect to the proposed changes to the solicitation rule, the SEC should: (i) exclude the activities of broker-dealers selling shares in private funds which are already regulated by FINRA rules, (ii) reconsider the types of compensation addressed by the rule, and (iii) remove duplicative reporting requirements relating to a solicitor's potential material conflicts of interest.

II. RECOMMENDATIONS TO THE ADVERTISING RULE PROPOSAL

A. The Proposed Definition of an "Advertisement"

The Proposal broadly defines an "advertisement" to mean "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 or investors in any pooled investment vehicle advised by the investment adviser." We are concerned that the scope of the proposed definition is so overly broad, and the exceptions so narrowly focused, that in practice, it would cover nearly all forms of written or recorded communication an adviser may make. For example, as proposed, an "advertisement" could include routine communications such as an email to a client discussing asset allocation options or certain significant client holdings. Similarly, common methods of in-branch communications with clients, such as handwritten notes from an investment advisory representative to a client or an adviser illustrating an investment concept on a whiteboard, could also be considered an advertisement, absent a *de minimis* standard.

The wide scope of the proposed definition of advertisement makes the Proposal more akin to a "communications rule" and advisers, especially in the course of daily implementation, would be hard pressed to find forms of communication that would not be subject to the advertisement rule regime. The unintended consequence of this is likely a reduction in candid interactions between investors and their investment professionals, as it would require that the investment professional halt any impromptu written or whiteboard discussion and seek review and approval in advance for their communications. This could create cumbersome or stilted interactions with investors and require that compliance personnel be on-the-ready to review and approve communications, broadly defined as advertisements, upon each investor interaction. It would also effectively prevent what could be valuable information from being shared with a client on a real-time basis, consistent with a client's service expectations.

Further, if the definition of an advertisement was to encompass traditional communications, including in person conversations, firms would be subjected to significant operational, legal and compliance burdens to seek to comply with the Proposal in the course of day-to-day and time-sensitive communications with clients and prospects, potentially leading to increased costs and a diminution of services, without a commensurate benefit to investors. Subjecting such materials to additional regulatory requirements beyond the applicable anti-fraud standard, which we believe adequately addresses and mitigates risk, does not seem to be warranted, nor does the Proposal provide any compelling reason to alter the existing paradigm in these regards. With these concerns in mind, we offer the following suggestions to narrow the Proposal's definition to recognize certain low risk communications and allow for normal and routine client and adviser interactions.

1. *Materials Used with Existing Clients Should Be Excluded From the Definition of Advertisement*

The Proposal's definition of an advertisement includes communications designed to "retain" existing clients. Arguably, every communication sent to a client is designed, in part, to retain them, thereby sweeping a substantial amount of materials into the Proposal. These materials, which traditionally have been subject to an adviser's anti-fraud duty, historically were not subject to the prohibitions and protocols of an advertisement since these materials presumably did not carry the same risk that advertisements did. It is unclear to us why such client materials would now be deemed advertisements and subject to heightened standards or why the general anti-fraud standard, to which advisers are subject for all forms of communications, is not adequate.

Institutional advisers provide numerous types of routine reporting to existing clients that would unintentionally be included in this new definition of an advertisement. Although the Release confirms that account statements would not be considered advertisements,[3] Fidelity, like many firms in our industry, produces thousands of routine and industry-standard client communications that exceed what would be considered a mere account statement and that would be considered advertisements under the Proposal. For example, Fidelity's institutional adviser sends hundreds of "Quarterly Investment Reviews" to existing clients every quarter, some of which include highly customized material and client data, along with standard market and portfolio commentary. Every year, we provide over 2,000 additional custom reports to clients, with many being subject to strict timing requirements based on service level agreements or investment management agreements. Fidelity's institutional adviser also provides existing client reporting in the form of periodic investment reviews, bespoke discussions, and other materials in both standard and custom formats, on tight timeframes to clients, that would all be swept into the new definition of an advertisement.[4]

Including such client communications as advertisements could impact relationships with clients, who expect timely delivery of materials and investment insights as part of our communications, and which are all directly related to the existing advisory relationship. If such materials were deemed to be advertisements and required pre-review before distribution, our current systems of compliance review would be unable to handle the volumes effectively, leading to client dissatisfaction for the sake of a review that does not seem to be needed or beneficial to such clients. This also raises practical considerations for communications that are automatically updated, such as on an adviser's website, which contain information that would now be considered advertisements. Under the Proposal, this valuable information could no longer be updated automatically, but would be subject to a delay due to the pre-review and approval requirements.

Due to the onerous review and approval requirements imposed by the Proposal which would inhibit prompt, open, and valuable client communications, we believe the SEC should exclude communications designed to "retain" existing clients from the scope of the Proposal.

2. Defining Advertisements to Include Pooled Investment Funds Is Unnecessary

The Proposal seeks to capture communications directed to investors in pooled investment vehicles, with a carve-out for any marketing materials about a registered investment company that is within the scope of Rule 482 of the Securities Act of 1933. We believe that this expansion is unnecessary and duplicative of FINRA principles, including FINRA Rule 2210, that already

[3] Release at 31.

[4] Based on these volumes, we anticipate inclusion of these materials alone will result in an annual increase of approximately 5,200 pieces submitted for review and pre-approval should the definition of an advertisement remain unchanged.

apply to communications relating to the sale of interests in private funds distributed by a broker-dealer. This also conflates fund advertising and adviser advertising with no appreciable benefits to a reader or investor.

For example, in the case of products required to be distributed by a registered broker-dealer, such as registered funds and most privately offered funds, the Proposal would in effect transform all broker-dealer advertising into investment adviser advertising, imposing an overlapping regulatory regime. Since the highest standard would likely take precedence, this would make redundant broker-dealer advertising rules. It is not clear to us why the SEC is seeking to bring traditional FINRA materials into their regulatory purview, nor does the Release identify any abuses or problems with pooled investment fund advertising that justifies increased examination. Should the SEC believe FINRA rules are inadequate, it should seek to work to change FINRA standards rather than subject this material to a double regulatory regime which will create unnecessary costs and burdens on broker-dealers.

In our view, the broker-dealer regime applicable to these materials is sufficient and we recommend the SEC consider harmonization with FINRA rules rather than creating a duplicative regulatory regime or remove the inclusion of pooled investment funds under the Proposal.

3. *Broaden the Exclusion from the Definition of Advertisement for Unsolicited Requests for Specified Information*

The Proposal provides a limited exception from the definition of an advertisement for certain responses to "unsolicited" requests for specified information about the adviser or its services, also known as "RFPs" or requests for proposals and which may be part of due diligence questionnaires (DDQs). To meet this exclusion, a response to an unsolicited RFP or DDQ must be limited to only information in response to what was specifically requested.[5]

While this exclusion could potentially cover some responses to RFPs and DDQs, in practice, firms would likely need to consider all RFPs and DDQs to be advertisements because of the difficulty in implementing a review and monitoring system that only applies to certain responses, and not to others. More specifically, determining whether a response is a minimum answer to a question versus an "unsolicited" but thorough explanation is not an easy distinction to make, and therefore basing review requirements on that analysis is uncertain and not scalable for large volumes of such communications. Based on our extensive experience responding to RFPs and DDQs, these requests rarely entail simple *yes* or *no* answers, but require us to provide additional detail, some of which may not be "unsolicited" but which may nevertheless be helpful to a prospect or client, and/or make the response more complete and, potentially, in some cases, not misleading. In a typical year, Fidelity's advisers collectively will respond to more than 10,000 RFPs and DDQs. Although some of our responses to these RFPs are customized to a particular prospect or client, the vast majority of our responses use templated language, drawn from a database that Fidelity maintains for the purpose of efficiently responding in a timely manner to a high volume of communications.

[5] Release at 47.

We believe that treating these voluminous materials as advertisements, and thus subjecting them to additional advertising and recordkeeping requirements would be onerous, demand greater resources, and potentially impact an adviser's ability to provide detailed and useful information within mandated client timeframes. Further, as discussed below, including all of these communications in the definition of an advertisement, absent any identification of past abuses in this area, would subject a significant volume of time-sensitive communications to the proposal's pre-review and approval requirement – communications which today are not subject to these onerous requirements.[6]

To address our concerns, we suggest that a *de minimis* and client materials exception be put in place at a minimum. We believe that the current rule's "more than one person" standard has worked well for decades and should continue to be the standard for when a communication is considered an "advertisement." Further, the SEC could acknowledge the low risk of materials such as RFPs and DDQs, which are typically directed to non-retail persons, and provide an exception for all these materials from the definition of an advertisement. Alternatively, if the SEC remains concerned that advisers are not complying with the general anti-fraud standard that they are subject to for all their communications, rather than bluntly prescribing that nearly all materials be advertisements, it could require advisers to adopt policies and procedures governing specific types of communications under Rule 206(4)-7, as may be appropriate. As the SEC is aware, Advisers Act Rule 206(4)-7 already requires advisers to implement policies and procedures that are reasonably designed to prevent violations of the securities laws as part of their compliance programs. The SEC could simply make explicit its requirement that not just advertisements, but other types of communications, require policies and procedures to avoid violations of law. Building upon the successful history of Rule 206(4)-7 compliance programs in addressing risk in an adviser's business would more clearly be a true "principles-based" approach and provide a proportionate measure to address the risk of fraud.

4. The Exclusion for Non-Broadcast Live Oral Communication is Too Limited

The Proposal also excludes from the definition of an advertisement "non-broadcast" live oral communications. The Release acknowledges that this proposed definition is broader than the current rule's definition because it would capture oral communications that are widely disseminated, not just via radio or television (as under the current rule), but also through the internet or "similar medium."[7] We agree that "live oral" communications should be excluded from the scope of the definition, but believe the further limitation of "non-broadcasted" communications is too restrictive and would capture routine communications between advisers and their clients merely because of the medium in which they are being conducted. Today, advisers may use a host of technology to communicate with clients, such as webchats or videos. For example, an adviser might provide a live webinar for a group of invited clients that would be

[6] Our figures clearly and substantially exceed the Proposal's economic analysis that estimates, due to the expanded definition of "advertisement" relative to the current rule, investment advisers that are "heavy advertisers" would create new advertisements approximately 50 times per year and update existing advertisements approximately 250 times per year. *See* Release at 403.

[7] Release at 40.

similar to and as effective as a live "non-broadcasted" presentation in a conference room.[8] Further, advisers may appear live on a public broadcast such as CNBC to discuss an investment topic or the markets in general. Under the Proposal, each of these communications would be treated as an advertisement.

The Release asks whether commenters agree "that our approach to oral communications is conceptually similar to FINRA's approach to 'public appearances' in Rule 2210, which generally subjects members' unscripted public appearances to only the rule's general content standards, and requires members to comply with all applicable provisions of the rule for any scripts, slides, handouts or other written materials used in connection with the public appearance." The approach taken by the SEC is dissimilar from FINRA's in one important respect - it does not provide an exception for live broadcasts. The Release states that the "live oral communication exclusion is designed to address situations where advisers are communicating to investors directly and where employee review and other provisions of the proposed rule cannot be practically applied." Live public broadcasts by adviser personnel such as unscripted appearances on cable or television networks or live webinars over the internet present the same obstacles of employee review as live non-broadcast situations. In fact, they may present even greater obstacles, as the presenter is often off-site at a media outlet or working with a third-party broadcasting company. In these cases it would be difficult, if not impossible, to pre-review the live interaction and/or provide the required disclosures delivered proximate to the live broadcast. Accordingly, we recommend that the SEC harmonize its requirement with that of FINRA and adopt the concept of a public appearance for both non-broadcast and broadcast live events.[9]

B. <u>Hyperlinks for Disclosures</u>

The Proposal generally prohibits advertisements that discuss or imply any potential benefits without "clearly and prominently" discussing associated material risks or other limitations with the potential benefits. However, the Release states that it would not be consistent with the "clear and prominent" standard to merely include a hyperlink to disclosures available elsewhere.[10] This prohibition against hyperlinking is contrary to the SEC's otherwise forward-looking approach to modernize the advertising rule by expanding it to new and evolving forms of social media, and is inconsistent with the Commission's prior positioning permitting the use of hyperlinks and layered disclosure in other contexts. As the SEC's Adopting Release for Form CRS recognized, investors prefer condensed disclosure and layered disclosure, rather than

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[8] The Release indicates that an "advisor that engages in a 'Facebook Live' Q-and-A session that is available to the general public would be 'broadcasting' the communication on the internet and that communication would not qualify for the proposed exclusion." We fail to see why that type of live presentation should be singled out and covered under the Proposal because it is broadcasted rather than presented in a room full of individuals. Live events through channels such as social media, the internet or television should be provided with equal regulatory treatment as live events among individuals.

[9] As the Release notes, any such communication to a client or prospective client would remain subject to the general anti-fraud provisions of Section 206.

[10] Release at 60.

receiving a significant amount of information at once.[11] Other regulatory guidance similarly supports the use of hyperlinking and layered disclosure.[12] We do not see why this approach should not be followed with respect to advertisements, especially those on mobile devices and other space-limited electronic media where hyperlinking is particularly well-suited.

The Proposal offers one limited carve out from this prohibition: if the adviser had reasonable assurance that the investor would access or view the disclosures, such as by providing the disclosure "before the relevant content and requiring the investor to acknowledge their review before accessing the substance of the advertisement."[13] We disagree with this approach. Any mechanism that requires a potential client to acknowledge receipt of disclosure *prior to accessing the advertisement*, such as a click-through page or other online acknowledgement, is likely to render the advertisement wholly ineffective, as few internet savvy investors would tolerate such an intrusive client experience. Likewise, this approach would be difficult to monitor with most types of internet communications, particularly social media posts.

Should the SEC require additional safeguards to allow advisers to hyperlink disclosures, we suggest the SEC set out conditions and guidelines to support a layered approach to disclosures consistent with its guidance on Form CRS, or consider other regulatory guidance, including the Federal Trade Commission guidance noted in the Release.[14]

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[11] "We designed the final disclosure requirements in light of comments, input from individual investors through roundtables and on Feedback Forms, and observations reported in the RAND 2018 report and other surveys and studies, that suggest retail investors benefit from receiving certain information about a firm before the beginning of a relationship with that firm, but they prefer condensed disclosure so that they may focus on information that they perceive as salient to their needs and circumstances, and prefer having access to other "layers" of additional information rather than receiving a significant amount of information at once." https://www.sec.gov/rules/final/2019/34-86032.pdf; *see also* Stanford Law School Design Principles, "Use visual design and interactive experiences, to transform how you present legal info to lay people," available at http://www.legaltechdesign.com/communication-design ("design a document to be less of a "text-dump" — just putting all the detailed information out there for a person to read — and more of a designed experience, that helps the reader make sense of the information, relate it to their own situation, and figure out how best to act in response to it").

[12] *See* FINRA Notice to Members 06-48 (September 2006), *available at* https://www.finra.org/sites/default/files/NoticeDocument/p017302.pdf (permitting members to hyperlink to the SEC's required standard mutual fund performance to meet the disclosure and prominence requirements of SEC Rule 482); Use of Electronic Media for Delivery Purposes, Release No. 33-7233; IC-21399 (Oct. 1995), *available at* https://www.sec.gov/rules/interp/33-7233.txt (permitting use of hyperlinking to fund prospectus in supplemental sales literature and hyperlinking to research report noting that the "hyperlink function provides the ability to access information located on another Web site almost instantaneously. This direct and quick access … would be similar to the Company including the paper version of the research report in the same envelope that it is using to mail the paper version of the preliminary prospectus to potential investors); FINRA Notice to Members 17-18 (April 2017), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-18.pdf (permitting hyperlinks to social media pages for disclosures, including for testimonials).

[13] Release at 60, footnote 128.

[14] *See* Release at 61, footnote 129, *citing* Federal Trade Commission, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," press release (March 2013), *available at* https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertisingdisclosure-guidelines/130312dotcomdisclosures.pdf; which provide that if a hyperlink: (i) is obvious; (ii) is labeled to

C. Testimonials, Endorsements, and Third-Party Ratings

We strongly support the Proposal permitting advisers to use testimonials and endorsements in advertisements, subject to the Proposal's general prohibitions on certain advertising practices and certain disclosure requirements. We agree that the types of information required to be disclosed is important for an investor to understand the context for which the testimonial and/or rating is provided. However, the Proposal does not currently support an adviser delivering these disclosures using a layered disclosure approach or permit the use of hyperlinking.

As discussed above, we recommend the SEC permit hyperlinking and layered disclosure for disclosures regarding testimonials, endorsements, and third-party ratings, consistent with its other technological expansion and recognition of how this information is digested by investors, namely on mobile devices, social media platforms, and other space-limited electronic media. Importantly, in the current environment, many testimonials appear through electronic media channels, including social media, where space is constrained and layered disclosure is particularly necessary to allow for the communication to exist.

D. Performance Advertising – Targeted Returns

The Proposal adds several tailored requirements for the presentation of performance results, based on an advertisement's intended audience, and the type of information presented. It also sets out new definitions for "related," "extracted," and "hypothetical" performance, defining "hypothetical performance" as "performance results that were not actually achieved by any portfolio of any client of the investment adviser" and would explicitly include, but not be limited to, backtested performance, representative performance, and targeted or projected performance returns. We believe the inclusion of "targeted" returns in the definition of "hypothetical" performance is misplaced.

Targeted returns are a very common strategy metric that may be helpful in understanding expectations for a given product, similar to other forward-looking strategy characteristics such as "expected tracking error" or "target number of holdings." These measures are meant to indicate expectations or possibly goals around a product's construction or management and are not performance measures in and of themselves. Imposing the proposed hypothetical performance protocols on a simple targeted return characteristic, which is already subject to current anti-fraud requirements, is unnecessary. Certainly to a non-retail client, a targeted return is just that – a target. Current anti-fraud guidance would direct that any such targeted return be reasonable and relevant. In our view there is no additional risk inherent in this type of information that justifies

appropriately convey the importance, nature, and relevance of the disclosures it leads to; (iii) is placed as close as possible to the relevant information it qualifies; and (iv) takes investors directly to the relevant disclosures on the click-through page, that such hyperlinked disclosures may be effective.

Additionally, should the SEC permit hyperlinked disclosures, it should also confirm that firms may use "directive icons" and other shortened form indicators – understood by a vast majority of investors today - to indicate additional disclosures are available.

it being subject to the same restrictions as other types of "hypothetical" information. It is not actual performance or even a statement of any performance at all, but an expectation. From a risk perspective, it does not seem to present the same concerns as various species of hypothetical performance that implies a track record or some additional degree of assurance, through back-testing, of the strategy's prospects.

Due to its limited risk profile, we suggest that the SEC exclude targeted returns from the definition of hypothetical performance. Alternatively, the SEC could require advisers to specify how targeted returns could be presented in all communications, for example, by working through the flexible regime provided by Rule 206(4)-7 rather than through burdensome prohibitions associated with other hypothetical performance.

E. <u>Review and Approval Requirements</u>

1. The SEC Should Not Require Pre-Review and Approval of All Advertisements

In a significant change from existing requirements, the Proposal would require that virtually all advertisements, subject to limited exclusions, be reviewed and approved by a designated employee before being disseminated. This requirement raises operational concerns and would be extremely burdensome and impracticable in light of the high volume of materials that would be included under the new advertising definition.

We suggest that, similar to other compliance requirements, the SEC take a more principles based approach and require that advisers, pursuant to their existing responsibilities under Rule 206(4)-7, develop standards for review for various communications and advertisements as may be appropriate to address the potential risk of fraud, rather than mandating pre-review and approval for virtually all advertisements. For example, an adviser could determine, or the SEC could mandate, that any performance presented to a non-retail person in any manner should be pre-reviewed before distribution if not already approved as a "form." Performance for standard strategies is often updated quarterly and once reviewed and approved, it would not need to be reviewed and approved again if no changes have been made, for example. We do not believe this type of low risk and fairly static information needs to be subject to pre-review and approval each time it is used. This flexible and tailored approach would not amount to "no review" but instead permits a level of review and approval on a periodic basis appropriate to the risk presented by the information that is commensurate with efficient business operations designed to meet client expectations.

We suggest that this system of review also incorporate and replace the SEC's prescriptive requirement for pre-review and approval by a "designated employee." The Proposal's requirement for a "designated employee" to review and approve advertisements is inconsistent with how this information is reviewed and approved today at large firms like Fidelity. In our experience, no one person (or persons) reviews *all* advertisements or communications in a firm. Moreover, the requirement for the designated employee to be an *employee of the adviser* is also not consistent with how many large firms are structured. At large firms, numerous employees, who have knowledge of the underlying business and are supported by a common compliance function, participate in this review and oversight process. Although the SEC's proposed approach may work for a very small adviser in a simple corporate structure, this concept does not work for larger firms which may have multiple investment advisers and broker-dealers. While we understand the SEC may be seeking to curtail an adviser's ability to outsource advertising review and compliance functions to unaffiliated parties, it would unnecessarily burden larger firms with overly cumbersome requirements that require allocation of resources that exceed the risk it is intended to mitigate.

As discussed above, we suggest a more tailored, principles-based approach that requires advisers, as part of an existing Rule 206(4)-7 compliance program, to have policies and procedures which address the types of materials that are reviewed, how they are reviewed (including whether a subset of materials should be subject to pre-review and approval), and the employees who would be responsible for that review. The advisers would be able to design the specifics of this review system, including determining when, how, and who performs the review.

2. Additional Exclusions from the Pre-Review and Approval Requirement

In addition to our recommendations above, we also suggest that the SEC exclude advertisements to non-retail persons from the pre-review and approval requirements altogether, as non-retail persons are more sophisticated and capable of evaluating information as presented or requesting additional information. The investors most in need of protection are presumably retail investors; this approach would be consistent with that guiding principle and provide advisers relief from unnecessary regulatory burdens.

At a minimum, the SEC should permit firms to review and approve a template communication that allows some level of variation for the audience, and so long as the communication conforms to the template contours, not every communication that flows from it needs to be pre-reviewed and approved. This is an explicitly permitted approach for FINRA materials that we believe the SEC should adopt.

III. RECOMMENDATIONS TO THE SOLICITATION RULE PROPOSAL

A. The Rule Should Not Be Expanded To Solicitors Of Private Funds

The Proposal would expand the scope of the current rule to the solicitation of existing and prospective private fund investors. As noted in the Release[15], *Mayer Brown LLP*, SEC Staff No-Action Letter (Jul. 28, 2008), currently clarifies that the solicitation rule does not apply solely to compensating a solicitor for soliciting investors in a private fund. Private funds often will retain a broker-dealer to promote or distribute shares in its fund as provided for under the Securities Exchange Act of 1934 and *Mayer Brown* provides much needed regulatory clarity to these common relationships. These include responsibilities for fully understanding and describing the specifics of the private fund, ensuring appropriateness for the customer and on-going service, all of which would not typically be the responsibilities of a solicitor.

[15] Release at 210, footnote 362.

By expanding the scope of the rule to include the solicitation of private funds, the SEC would bring these relationships into scope for application of the solicitation rule unnecessarily. This would result in additional regulatory requirements for the adviser and the broker-dealer, as well as potentially leading to investor confusion as to the capacity in which each entity is acting.

We suggest that the SEC provide a clear carve out in the final rule for the activities of broker-dealers selling shares in private funds. Additionally, and for these same reasons, we do not believe that the solicitation rule should be expanded to include the referral of investors in registered investment companies and/or business development companies.

B. The Rule Should Not Include All Forms of Compensation

While we support the Commission's view that investors should be made aware of a solicitor's conflict of interest regardless of the form of compensation, the scope of the types of compensation, including both direct and indirect compensation, is overly broad resulting in potential confusion over the types of compensation that would be considered compensation from solicitation activities. For example, under the proposed approach, an adviser may be left with trying to defend what would be standard bona fide transactions with a broker-dealer for execution services, with what would be considered solicitation under the rule. At a minimum, we propose the SEC exclude from the definition of non-cash compensation such routine and ordinary brokerage non-cash compensation that is unrelated to a solicitation agreement between the adviser and the broker-dealer.

Additionally, we do not believe the Commission should impose any parameters on the compensation to be paid such as a cap on the percentage of assets under management or length of time over which they are paid. Rather, the adviser and solicitor should be able to determine the business terms for the scope of the solicitation activities and the compensation to be paid.

C. Solicitor Disclosure Statement – Conflicts of Interest

The Proposal's requirement to include in the disclosure statement "any potential material conflict of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement" we believe would be duplicative of existing disclosure obligations and may call into question the adequacy of such requirements unless they were essentially identical. As noted in the Proposal, Form ADV Part 2A already requires the disclosure of referral arrangements, compensation and associated conflicts. The adviser's Form CRS would be an additional place where investors may find similar information. Indeed, the enhancements the SEC has made to Form ADV over the years appropriately provide the information necessary to allow an investor to evaluate any potential and actual conflicts. It is unclear why additional disclosure of essentially the same information should be required. This requirement would place additional compliance burdens on an adviser to ensure there is consistency of disclosures across several different documents without any clear corresponding benefit to investors.

If required, given the existing disclosure obligations for advisers registered with the Commission, we think an exception to the Proposal's disclosure statement requirement should be considered for registered investment advisers when acting as solicitors.

D. Additional Comments

In addition to our comments above, we commend the SEC for streamlining certain elements of the current solicitation rule and we are supportive of the Proposal eliminating delivery of the adviser's brochure by the solicitor and allowing delivery to be determined by agreement between the adviser and the solicitor.

We are further supportive of the Proposal's requirement that a written agreement no longer be required for an adviser's in-house personnel and expanding it to include affiliated persons controlled by or under common control. We would suggest that additionally, in such a circumstance, there should be a presumption that such an affiliation is apparent to an investor provided the adviser has satisfied its existing disclosure obligations of such affiliations in Form ADV Part 2A.

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Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,

Cynthia

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Allison H. Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner

Dalia Blass, Director, Division of Investment Management

Fidelity INVESTMENTS