



Association for Corporate Growth

February 10, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

RE: Comments of the Association for Corporate Growth on “Investment Adviser Advertisements; Compensation for Solicitations,” File Number S7-21-19

Dear Ms. Countryman:

The Association for Corporate Growth (“ACG”) welcomes the opportunity to comment on the Proposed Rule Regarding Investment Adviser Advertisements; Compensation for Solicitations (the “Proposed Rule”)¹ recently issued by the U.S. Securities and Exchange Commission (“SEC” or “Commission”).² ACG represents nearly 2,000 private investment firms that primarily focus their investment activities on the U.S. middle-market. A substantial number of these firms are registered investment advisers subject to regulation by the SEC under the Investment Advisers Act of 1940, as amended (“Advisers Act”)³ and the rules and regulations promulgated thereunder, including Rule 206(4)-1 (the “Advertising Rule”).⁴

Many of ACG’s member firms advise pooled investment vehicles, interests in which are offered to investors by the advisory firm. Uncertainty as to the application of certain provisions of the Advertising Rule to today’s marketplace has long been a source of frustration for our members. ACG agrees that the Advertising Rule, which has not been substantially modified since its adoption in 1961, should be updated.⁵ While we applaud the Commission for undertaking this much-needed rulemaking and support many of the proposals, we are concerned with several aspects of the Commission’s Proposed Rule. Specifically, as described herein, ACG:

- believes the proposed definition of “advertisement” is excessively broad, and should conform to the current definition in retaining two key exclusions from the current definition;
- is concerned about the administrative burdens the Proposed Advertising Rule would place on firms and their chief compliance officers (“CCOs”); and

¹ See Securities and Exchange Commission, Proposed Rule Regarding Investment Adviser Advertisements; Compensation for Solicitations, Release No. IA-5407; File Number S7-21-19.

² 84 Fed. Reg. 67518 (December 10, 2019).

³ 15 U.S.C. § 80b-1 through 15 U.S.C. § 80b-21.

⁴ 17 CFR §275.206(4)-1, “Advertisements by investment advisers.”

⁵ The Proposed Rule also contains proposed changes regarding Rule 206(4)-3 (the “Cash Solicitation Rule”). This comment letter provides ACG’s views on the Proposed Advertising Rule only.

- believes the definition of a “Non-Retail Advertisement” should be based on an “accredited investor” or “qualified client” standard rather than the “qualified purchaser” standard advanced by the Commission.

I. Background on the Association for Corporate Growth and Middle-Market Private Equity

ACG was founded in 1954 and has more than 14,500 members throughout the world, including in 47 U.S. markets. ACG members are people who invest in, own, advise or lend to growing middle-market companies. This includes professionals from middle-market private equity and private debt firms, corporations, banks and other public and private lenders to middle market companies, as well as professionals from law firms, accounting firms, investment banks and other advisors engaged in the process of middle-market deal making.

The mission of ACG is to “drive middle-market growth.” ACG helps to facilitate growth by bringing together middle-market dealmakers and business leaders who build value in companies. ACG accomplishes this by hosting hundreds of chapter events every year, providing online tools for its members, structuring networking opportunities, providing leading-edge market intelligence and thought leadership, and advocating for well-reasoned policies that are clear, appropriately balanced, and reflective of marketplace realities.

A particular focus of ACG is middle-market private investment. ACG’s membership includes nearly 2,000 middle-market private equity (“MMPE”), mezzanine and private debt firms that focus on providing capital to middle-market businesses. ACG’s private investment firm members invest in small and midsize U.S. businesses, providing these companies with vital capital allowing them to expand and grow.

II. Comments of ACG

The Advisers Act was enacted by Congress to monitor and regulate the activities of investment advisers, as defined by the law. Section 206(4) of the Advisers Act makes it unlawful for any investment adviser to directly or indirectly “engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative” and grants the Commission the authority to adopt rules and regulations to “prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”⁶

The Advertising Rule clarifies it is a fraudulent, deceptive, or manipulative act under Section 206(4) of the Advisers Act for any investment adviser registered or required to be registered to distribute any “advertisement” containing certain prohibited characteristics (i.e. refers to testimonials) or “any untrue statement of a material fact, or which is otherwise false or misleading.” The restrictions in the Advertising Rule only describe certain communications that are automatically deemed to be “fraudulent, deceptive, or manipulative” under Section 206(4). However, all communications by investment advisers that are “fraudulent, deceptive, or manipulative” are unlawful under Section 206(4) regardless of whether the communication is an “advertisement.”

⁶ 15 U.S.C. 80b-6(4).

As noted by the Commission, the Advertising Rule was initially adopted in 1961⁷ and has not been modified substantively since its adoption.

In 2015, ACG formed its Private Equity Regulatory Task Force (PERT), consisting of CCOs, chief financial officers and in-house counsel to middle-market private equity firms from around the country. Virtually since the time of its formation, PERT members have expressed concerns and frustration regarding application of the Advertising Rule to today's marketplace. ACG is generally supportive of the Commission's efforts to modernize the Advertising Rule, and would like to provide the following comments on certain aspects of the Proposed Advertising Rule:

A. The Definition of "Advertisement" in the Proposed Advertising Rule is Excessively Broad

We agree the definition of an "advertisement" should be updated to reflect market and technological developments that have occurred over the past five decades. However, we are concerned that the new definition of "advertisement" in the Proposed Advertising Rule is excessively broad and will lead to significant market confusion.

The current definition of "advertisement" in the Advertising Rule is relatively broad, and includes:

*any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.*⁸

While broad, the definition of advertisement is expressly limited to (i) a written communication that is "addressed to more than one person," and (ii) which offers materials or investment advisory services that relate to securities. Notably, both exclusions are eliminated in the Proposed Advertising Rule.

The Proposed Advertising Rule would define an "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 or investors in any pooled investment vehicle advised by the investment adviser.

We are concerned about several aspects of this proposed definition.

⁷ See SEC "Release No. IA-121 (Nov. 1, 1961), "Advertisements by Investment Advisers,"

⁸ Advisers Act, Rule 206(4)-1(b).

i. The Exclusion for Communications to One Person Should be Retained

An important hallmark of the current definition is that it is a written communication *addressed to more than one person*. That is, any written communication addressed to only one person is expressly *not* an advertisement. We strongly believe that in this regard the new definition should remain consistent with the current definition and this exclusion should be retained.

As noted in the Proposed Rule, when the Advertising Rule was first adopted in 1961, the Commission intentionally excluded communications to a single person out of concern an excessively broad definition could have a chilling effect on communications. The Commission had initially considered a much broader definition but rejected this approach in the final version, noting that the definition was not intended to include “a personal conversation with a client or prospective client, or a personal letter sent to only one person.”⁹

Over the past fifty years, the exclusion for communications addressed to one person has become a bedrock of current practice. Investment advisers have come to rely on this provision and have developed long-standing practices and procedures around one-on-one meetings and/or communications. Having the Commission discard this fundamental aspect of the Advertising Rule would be highly disruptive to all registered investment advisers. It would also create a significant administrative burden for compliance personnel, whose workload would already increase significantly under the current proposal. In particular, advisers would need to comply with a newly-expanded Advisers Act Rule 204-2 (“Books and Records Rule”), which would require them to maintain a copy of each advertisement disseminated directly or indirectly to one or more persons.¹⁰

We believe such an expansion of, and fundamental change to, the definition of an advertisement is unnecessary as all communications by investment advisers are already subject to the anti-fraud provisions of Section 206 of the Advisers Act, regardless of whether such communication is considered an advertisement.

ii. The Definition Should Not Include Communications That Merely “Promote” the Adviser’s Services

Another cornerstone of the current definition is that to be an “advertisement,” a communication must contain an “offer” relating to securities – either an offer of certain materials relating to the purchase or sale of securities (i.e. a report or chart), or an offer of the adviser’s investment advisory services (also with regard to securities). We are concerned that the Proposed Advertising Rule would expand the definition significantly by eliminating this limitation and including a communication that merely “promotes” the adviser’s investment advisory services, while at the same time eliminating the requirement that materials or the offer of services being disseminated relate to securities. We are troubled on both fronts.

⁹ See SEC Release No. IA-119 (Aug. 8, 1961) “Prohibited Advertisements,” available at: (<https://www.sec.gov/news/digest/1961/dig080861.pdf>).

¹⁰ See proposed Rule 204-1(11)(1) within the Proposed Rule.

Including materials that merely “promote” investment advisory services in the definition of an advertisement is likely to result in market confusion. Advisers frequently promote their firm for purposes wholly unrelated to securities and/or the solicitation or retention of clients. As an important example, advisers to private equity funds frequently seek to promote their firm to entrepreneurs and intermediaries for the purpose of soliciting deal flow and deploying the capital they have raised. Given the highly competitive market for sourcing and completing private company investment opportunities, advisers to MMPE funds must be able to promote their firm to entrepreneurs and intermediaries seeking capital and distinguish themselves from competitors (i.e. sector or industry expertise, experience working with family founders, etc.). We strongly believe the SEC should clarify that such promotional communications focused on deal flow are not an advertisement.

Advisers may also seek to promote their firms to attract new employees or improve their name brand. Under the current Advertising Rule, it is understood that communications are not advertisements. However, it is possible that these sorts of communications could be interpreted to be directly or indirectly “promoting” the adviser’s advisory services within the meaning of the new definition of advertisement as contained in the Proposed Rule. Indeed, virtually any communication could be read to indirectly “promote” an adviser and its services. The Commission should retain the limitation of an offer related to securities.

iii. The Definition Should Not Include Communications Disseminated “On Behalf of” An Adviser

The proposed definition of advertisement would also apply to communications disseminated “on behalf of” an investment adviser. We believe this language is excessively broad, and believe that it will lead to unintended consequences. Therefore, we do not believe that communications disseminated “on behalf of” an adviser should be included in the definition of an advertisement.

The clear intention of this revised definition is to make the adviser responsible for materials distributed by third parties to the extent that information in such materials can be attributed to the adviser. Although the Proposed Rule describes a number of limitations and qualifications on communications sent on behalf of an adviser being considered an advertisement,¹¹ we are still concerned that this significant expansion of the definition will ultimately lead to advisers being responsible for content or communications disseminated by persons that the adviser does not control and/or did not approve.

The Proposed Rule fails to take into account situations where an adviser’s comments to third-party content are ignored or not accepted, either in part or in full. For example, if a reporter or author inadvertently (or intentionally) misquotes, misrepresents, or ignores comments from an adviser in a newspaper or other published article, the Proposed Rule would appear to attribute the article’s content to the adviser regardless of whether the article was edited to reflect the adviser’s

¹¹ For example, the Proposed Rule clarifies that (i) “on behalf of” is intended to be limited to communications made to prospective clients through intermediaries; (ii) a communication disseminated without the adviser’s authorization is not sent “on behalf” of the adviser; and (iii) the adviser must take affirmative steps for the communication to be deemed disseminated “on behalf of” that adviser. *See* Proposed Rule, Section II.A.2.b.(ii).

comments. This will likely have a chilling effect on advisers communicating with newspapers and other publishers, and have the effect of discouraging advisers from correcting erroneous information in third party publications over which the adviser does not have unfettered control.

B. The Administrative Burdens of The Proposed Advertising Rule on Firms and Chief Compliance Officers are Significant, and Outweigh the Benefits

- i. Requiring the Review and Written Approval of Advertisements is Unnecessary

The Proposed Advertising Rule would require any advertisement to be reviewed and approved in writing by a designated employee of the adviser before such advertisement could directly or indirectly be disseminated.¹² While there are limited exceptions for (i) communications disseminated only to a single person, household, or investor in a pooled investment vehicle, and (ii) live oral communications broadcast on radio, television, the internet, we are very concerned about the additional compliance, administrative and recordkeeping burdens this new requirement would create.

Although the Commission states that any designated employee may conduct the review and provide approval, we believe this responsibility will most likely fall upon the firm's CCO. CCO responsibilities have already increased dramatically since the 2010 passage of the Dodd-Frank Act.¹³ CCOs are now responsible for the adviser's registration with the SEC as an investment adviser,¹⁴ along with the annual reporting required under Form ADV and, for many advisers, Form PF. CCOs must oversee, and in most cases conduct, the firm's mandatory annual compliance review¹⁵ and actively test the firm's compliance policies and procedures throughout the year.¹⁶ In addition, CCOs are responsible for ensuring the firm has implemented increasingly robust and complex information security policies and procedures.¹⁷ They are also tasked with managing firm compliance with the Books and Records Rule, ensuring the firm is prepared for an SEC examination, and keeping track of regulatory changes.

In addition to federal regulations, CCOs must also contend with a growing array of state-level rules and regulations focused largely (although not exclusively) on consumer privacy and data protection. States such as California, Massachusetts, Nevada and many others have adopted stringent yet different regulatory regimes, creating a complicated patchwork of rapidly-changing rules and regulations that the CCO must navigate.

CCOs are also responsible for compliance with an increasing number of broadly applicable non-U.S. laws, including but not limited to the European Union's General Data Protection Regulation (GDPR) and, for alternative investment firms that at all market in the European Union, the AIFMD.

¹² See proposed Rule 204-1(d) within the Proposed Rule.

¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203 (2010)

¹⁴ Advisers Act, Section 203

¹⁵ Advisers Act, Rule 206(4)-7

¹⁶ See Final Rule, "Compliance Programs of Investment Companies and Investment Advisers," Release Nos. IA-2204; IC-26299; File No. S7-03-03, available at <https://www.sec.gov/rules/final/ia-2204.htm>.

¹⁷ See SEC Office of Compliance Inspections and Examinations (OCIE), 2020 Examination Priorities, p. 13.

All of these responsibilities are undertaken by the CCO under the specter of personal liability. It is against this backdrop that one must examine the Proposed Advertising Rule's new requirements.

As a preliminary matter, we believe the written pre-approval of advertisements is unnecessary because all communications are already subject to the anti-fraud provisions of Section 206(4) of the Advisers Act. CCOs, again subject to personal liability for a failing of the compliance function, are already highly incentivized to avoid violations of the Advisers Act due to the threat of personal liability.

The Commission's stated intention in proposing that all advertisements be reviewed and approved in writing before being disseminated is that it "may reduce the likelihood of advisers violating the proposed rule."¹⁸ However, we believe that any benefit in terms of investor protection will be marginal, and outweighed by the additional administrative and compliance burden placed on firm personnel.

The Advertising Rule is a complex, highly nuanced, fact intensive area of the law. It is our experience and belief that many CCOs rely heavily on outside counsel to guide them through the minefield of performance advertising, disclaimers, portability of performance and other aspects of the Advertising Rule. We believe this will continue to hold true if some, all, or none of the changes in the Proposed Advertising Rule are implemented.

As such, we are concerned that requiring written approval of each advertisement will result in CCOs calling upon their outside counsel more frequently in order to get their counsel's sign-off on each advertisement before it is distributed. We are particularly concerned because, as described in Section II.C below, if the Proposed Advertising Rule is adopted we believe many advisers will draft two sets of advertisements – one for Retail Persons and another for Non-Retail Persons. This will increase the bureaucratic and administrative burden on firms, increase costs, and generate a large volume of internal memos, emails and other correspondence, all with minimal corresponding increase in investor protections.

ii. The Proposed Advertising Rule Should Not Require Firms to Adopt Additional Policies and Procedures

We are concerned that the Proposed Advertising Rule would require advisers to adopt multiple new policies and procedures to ensure (i) that any hypothetical performance is disseminated only to persons for which it is relevant to their financial situation and investment objectives, (ii) that Non-Retail Advertisements are disseminated solely to qualified purchasers, and (iii) the reasonable belief that any third-party ratings in advertisements clearly and prominently discloses makes certain disclosures. Moreover, the adviser must periodically review the adequacy and effectiveness of these new policies and procedures.

As described in Section II.B.i above, registered advisers and their CCOs already have 100-plus page compliance manuals overflowing with detailed policies and procedures to address the

¹⁸ See Proposed Rule, p. 192.

many regulatory requirements that continue to expand under the Advisers Act and the rules thereunder. Requiring advisers to add yet more policies and procedures regarding hypothetical performance, Non-Retail Advertisements and third-party ratings will only add to the CCO's burden while, as described above, provide minimal (if any) tangible benefit in terms of investor protections. We believe it would be counterproductive to require advisers to adopt and implement yet more policies and procedures.

iii. **The Burdens of Compliance Will Fall Most Heavily on Small and Mid-Sized Advisers**

The challenge of complying with the above-referenced requirements will be felt most heavily by small and mid-sized advisers ("Smaller Firms"), with limited resources and already suffering from regulatory overload. Most Smaller Firms do not have the resources to hire a full-time compliance professional. In our experience, the CCOs of many Smaller Firms are chief financial officers or controllers who have assumed the responsibilities (and liabilities) of the CCO position on top of their responsibilities in managing and reporting the firm's finances. While larger firms have the resources to hire a full-time CCO, hire expensive compliance consultants and/or purchase software to automate portions of the compliance function, Smaller Firms do not have these options. Instead, low utility regulatory requirements such as those contained in the Proposed Advertising Rule will fall upon their already overtaxed shoulders.

With finite time and resources, along with an ever-increasing list of responsibilities, we are concerned the requirements described in the Proposed Advertising Rule will reduce the attention CCOs are able to devote to high-priority items, such as cybersecurity, conflicts of interest, compliance testing and other issues crucial for investor protection.

C. A "Qualified Purchaser" Standard For a Non-Retail Advertisement" is Inappropriate

The Proposed Advertising Rule would create two categories of advertisements, each subject to differing levels of regulation.

Retail Advertisements are defined as any advertisement other than a Non-Retail Advertisement.¹⁹ Retail Advertisements are subject to content restrictions designed to empower Retail Persons²⁰ with information allowing them "to understand better the presentation of performance results and the limitations inherent in such presentations."²¹ Retail Persons (i.e. those who are deemed to need the protections of the rule's content restrictions) are defined as any person other than a (i) a "qualified person" or (ii) a "knowledgeable person," both under the Investment Company Act of 1940 and the rules promulgated thereunder. Under the Proposed Advertising Rule, Retail Advertisements would face restrictions in some respects comparable to those in existence today – (i.e. net investment performance results must be included side-by-side with gross

¹⁹ See proposed Rule 206(4)-1(e)(13) within Proposed Rule. "Retail advertisement means any advertisement other than a non-retail advertisement."

²⁰ See proposed Rule 206(4)-1(e)(14) within Proposed Rule. "Retail person means any person other than a non-retail person."

²¹ See Proposed Rule, p. 108.

performance results), but in other respects more stringent than are in effect today (i.e. significant restrictions on the use of hypothetical performance).

Non-Retail Advertisements on the other hand are largely free of such requirements. That is, advisers would have wide latitude to present information in Non-Retail Advertisements as they see fit (subject of course to Section 206(4) of the Advisers Act) including, for example, using gross performance results without accompanying net performance results. A Non-Retail Advertisement is an advertisement for which the adviser “has adopted and implemented policies and procedures reasonably designed to ensure that the advertisement is disseminated solely to non-retail persons.”²² A Non-Retail Person is defined as a (i) “qualified purchaser,” as defined in section 2(a)(51) of the Investment Company Act of 1940 (“Investment Company Act”) or a (ii) “knowledgeable employee,” as defined in rule 3c-5 under the Investment Company Act.

The upshot is the only way an adviser may avoid the strict regulatory regime for Retail Advertisements is to adopt policies and procedures designed to ensure such communications are disseminated only to qualified purchasers or knowledgeable employees.

As described below, we are concerned about the potential administrative burdens associated with having two standards for advertisements. That said, while we are not inherently opposed to differing categories of advertisements, we do however believe that the Investment Company Act’s “qualified purchaser” standard is not the appropriate threshold for a Non-Retail Advertisement. We believe this standard is too high, and needlessly inconsistent with current standards already contained in the Advisers Act. We are also concerned that the proposal would require advisers to adopt yet more policies and procedures – creating an additional burden on already-taxed CCOs.

i. An “Accredited Investor” or “Qualified Client” Standard is More Appropriate for a Non-Retail Advertisement

If the Commission wishes to have two different categories of advertisements with differing standards of regulation, we agree that it would be proper and efficient to use existing statutory and regulatory definitions to the extent possible. We do not believe it is in anyone’s interest for the Commission to create a new definition solely for use in distinguishing between a Retail Advertisement and Non-Retail Advertisement.

For the reasons set forth below, we believe either the “accredited investor” standard found under the Securities Act of 1933 (“Securities Act”) or the Advisers Act’s own “qualified client” standard would be a more appropriate threshold than the “qualified purchaser” standard described in the Proposed Advertising Rule.

²² See proposed Rule 206(4)-1(e)(7) within the Proposed Rule. “Non-retail advertisement means any advertisement for which an investment adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisement is disseminated solely to non-retail persons.” A “non-retail person” means a (i) “qualified purchaser,” as defined in section 2(a)(51) of the Investment Company Act of 1940 and taking into account rule 2a51-1 under the Investment Company Act; and (ii) “knowledgeable employee,” as defined in rule 3c-5 under the Investment Company Act of 1940, with respect to a company that would be an investment company but for the exclusion provided by section 3(c)(7) of the Investment Company Act and that is advised by the investment adviser.

a. The “accredited investor” standard

Under the Securities Act, “accredited investors” are deemed to have sufficient knowledge and financial sophistication to make them “capable of evaluating the merits and risks” of a prospective investment without the specific protections afforded by the Securities Act with respect to public offerings of securities. An “accredited investor” generally includes entities with at least \$5 million in total assets, or natural persons with at least \$1 million in net worth or income in excess of \$200,000 (or \$300,000 jointly with a spouse) in each of the two most recent years with a reasonable expectation of reaching the same income level in the current year.²³ Last year, the Commission proposed amendments intended to “update and improve” the definition of an accredited investor to include, among other categories, persons with certain professional certifications or designations.²⁴

Advertisements are frequently disseminated in connection with an offering of securities governed by the Securities Act. Many advisers neither solicit nor accept non-accredited investor clients, and have already put into place robust policies and procedures designed to determine whether a potential new client meets the “accredited investor” threshold. Moreover, the Commission has already established principles-based guidelines for an issuer to conclude it has taken reasonable steps to verify an issuer’s status as an accredited investor, as well as published other guidance relating to the “accredited investor” threshold.

Because dissemination of an advertisement is closely related to an offering of securities, the Securities Act’s “accredited investor” intuitively makes more sense for a threshold to determine Retail Advertisement versus a Non-Retail Advertisement.

b. The “qualified client” standard

If the SEC is concerned that an accredited investor standard would be too low, the Advisers Act already has a standard for determining client sophistication – the “qualified client” standard. The definition of “qualified client” generally includes entities and natural persons having at least \$1 million under the management of an investment adviser, or a net worth (jointly with a spouse in the case of a natural person) of more than \$2.1 million. Qualified clients may enter into an advisory contract with a registered investment adviser that provides for compensation based on a share of capital gains on, or capital appreciation of the funds of a client (also known as performance compensation or performance fees).

Because many registered investment advisers seek a performance fee based on appreciation of client funds, it is common for advisers to have implemented policies and procedures designed to determine whether a potential new client meets the “qualified client” threshold. Moreover, because both the Advertising Rule and the “qualified client” definition fall under the Advisers Act, we believe that a “qualified client” standard is intuitively more appropriate than the “qualified purchaser” standard proposed by the Commission.

²³ 17 CFR 230.501(a)(6).

²⁴ See SEC Proposed Rule “Amending the “Accredited Investor” Definition,” Release Nos. 33-10734; 34-87784; File No. S7-25-19.

ii. A “Qualified Purchaser” Standard is Too High a Threshold for a Non-Retail Advertisement

The “qualified purchaser” standard is notably higher than the prior two standards – generally limited to entities with at least \$25 million in investments²⁵ and natural persons with \$5 million in investments.²⁶ The Commission’s primary justification for adopting the qualified purchaser standard is the Commission’s belief that (i) their “access to analytical and other resources generally provides them with the opportunity to ask questions of, and receive information from, the appropriate advisory personnel,” and (ii) they “are regularly in a position to negotiate the terms of their arrangements with investment advisers.”

The Commission never fully describes the “specialized and extensive analytical and other resources” that qualified purchasers have, but we believe that both accredited investors and certainly qualified clients have access to resources comparable to those accessible by qualified purchasers. In particular, accredited investors and qualified clients have access to paid consultants and investment advisers fully capable of considering and analyzing performance data contained in a Non-Retail Advertisement, even if the information provided is complex and nuanced.

Further, we believe the negotiating leverage a potential client possesses is only tangentially related to the question at hand – i.e. whether the recipient of a communication from an investment adviser should be deemed sophisticated enough (or have access to sufficient resources) to decipher performance data without the protections afforded to recipients of other advertisements under the Advertising Rule. We believe that both accredited investors and qualified clients meet this standard, and that either of these standards could be implemented with significantly less disruption than a qualified purchaser standard.

iii. Having Two Standards of Advertisements Will Create Administrative Burdens and be Difficult to Implement

Although we are not inherently opposed to two different standards of advertisements, we are concerned that this will create a significant administrative burden on advisers, many of whom will as a practical matter need to have two different sets of advertisements. We are also concerned about how this would be implemented as a practical matter, and what penalties would be associated with a Non-Retail Advertisement being inadvertently disseminated to a Retail Person.

We believe that an adviser with both Retail Person and Non-Retail Person clients (for example, a fund manager offering interests in parallel Section 3(c)(1) and Section 3(c)(7) funds) would need to create two sets of advertisements –Retail Advertisements (with both gross and net investment performance) for Retail Person clients and Non-Retail Advertisements (with gross investment performance only) for Non-Retail Person clients. This will increase the compliance burden on the adviser and the CCO (each form of advertisement will presumably need to be approved by the CCO), increase the administrative burden (each form of advertisement will presumably be subject to the Books and Records Rule) and, of course, will increase the legal costs

²⁵ “Investments” here is as defined by Rule 2a51-1 under the Investment Company Act

²⁶ “Knowledgeable employees,” the second category of persons that are Non-Retail Persons, are limited to employees of the adviser or affiliates of the adviser, and as such will not be discussed at length in this letter.

(each form of advertisement will need to be approved by outside counsel). This seems in direct contradiction to the SEC's current efforts to harmonize private offerings of securities.

We are also concerned that requiring an adviser to adopt policies and procedures reasonably designed to ensure a Non-Retail Advertisement is disseminated solely to Non-Retail Persons is burdensome, and will prove difficult to implement. While it may be obvious regarding whether certain clients (particularly institutional clients) meet the "qualified purchaser" threshold, for many clients it will be difficult if not impossible to ascertain their qualified purchaser status at the time an advertisement is being disseminated. Moreover, just because a client or investor in a pooled investment vehicle was a qualified purchaser in the past does not necessarily mean they are still a qualified purchaser at the time the advertisement is being disseminated.

III. Conclusion

ACG applauds the Commission's efforts to update the Advertising Rule, an area that has generated significant frustration for ACG and its middle market private equity investment advisers. We are concerned, however, about the expansive definition of "advertisement," the burdens it would place on compliance professionals, and the high standard for Non-Retail Advertisements. ACG believes that by adopting the relatively modest changes described herein, the Commission can significantly improve its proposal, alleviate uncertainty, provide clarity to the marketplace, and ultimately facilitate additional capital formation involving U.S. middle-market businesses. We welcome the opportunity to further discuss any of the issues addressed in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Bohn', with a long horizontal line extending to the left.

Tom Bohn
President and Chief Executive Officer

Association for Corporate Growth
125 South Wacker Drive
Suite 3100
Chicago, IL 60606