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February 10, 2020

Ms. Vanessa Countryman,

Secretary, Office of the Secretary

US Securities and Exchange Commission

100 F Street NE

Washington, DC 20549

Re: Comments on SEC Release No. IA-5407; File No. S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations (Nov. 4, 2019)

On November 4, 2019, the US Securities and Exchange Commission (SEC or Commission) published proposed amendments (Proposal) to its solicitation and advertising rules promulgated under the Investment Advisers Act of 1940.[1] The Proposal seeks to modernize existing rules and, where practicable, it seeks to codify existing interpretive guidance.[2] National Regulatory Services (NRS) appreciates the opportunity to comment on this important proposal and commends the SEC for taking steps to align its rule with existing firm practices, as well as its steps to introduce clarity into the its regulatory framework.

In conjunction with this rulemaking initiative, the SEC is reviewing other, applicable interpretive guidance to determine whether that guidance should be rescinded, clarified or codified. NRS commends the SEC for undertaking these additional efforts and views them as a tremendously positive step towards responding to industry concern regarding rulemaking by guidance.

In general, NRS supports the Proposal, subject to the comments below.

[1] *See* SEC Release No. IA-5407; File No. S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations (Nov. 4, 2019) (SEC Release).
[2] *See* SEC Release at p. 1.

Background on NRS and NRS Clients

NRS serves 6,000 broker-dealers, investment advisers, and investment companies ranging from small institutions to the largest global investment management complexes, private fund managers as well as other financial firms. Many of these firms provide retirement and financial planning advice to retail investors to help them meet their financial planning goals.

Since 1983, NRS has provided its clients with exceptional compliance and consulting services, compliance technology solutions, national conferences, seminars and the NRS Certified Compliance Professional certificate program. NRS is a division of Accuity, the leading provider of global payment routing data, AML screening software, and services that allow organizations, across multiple industries, to maximize efficiency and facilitate compliance of their transactions. For more than 150 years, Accuity has provided its worldwide clients, including banks, corporations and government organizations located in over 150 countries, with solutions and services packaged in multiple formats to serve their diverse needs.

As the proposing release contains a great many requests for comment, NRS has divided our comments into four sections; Advertising, Solicitation, Books and Records, and Collaboration with State Regulators. Specific requests for comment found in the proposal are underlined.

SECTION 1: ADVERTISING

Section II.A.2: Scope of the Rule: Definition of "Advertisement"

Should we provide that editing the presentation of third-party comments pursuant to a set of neutral pre-established policies and procedures would not make such content "by or on behalf of the adviser"? For example, should we allow an adviser to determine in advance that it will delete all comments that are older than five years, or that include spam, threats, personally identifiable information, or demonstrably factually incorrect information? If so, should we require advisers to publically disclose the pre-established criteria for editing such comments?

NRS has reviewed websites and social media platforms for its clients, and is acutely aware that some comments may be incompatible with common standards of civil discourse, compromise privacy, include spam, or otherwise be readily determined to be outside the bounds of what an adviser should include on a website or social media platform. We agree that a certain amount and/or type of editing that is done pursuant to unbiased criteria that does not change the meaning of the content and does not make it more favorable to the adviser should be allowed without deeming such content to be "by or on behalf of the adviser." Such editing would not sufficiently entangle the adviser in the creation of the material being edited. The Commission could either provide a set criteria for advisers to follow or make the concept more risk- or principles-based such as allowing edits based on objective criteria. In either case, we recommend requiring advisers to maintain a log of all such edits.

We request comment on the proposed definition of "advertisement" expressly including communications that are disseminated to obtain or retain "investors in pooled investment vehicles."

Having worked with many advisers who provide advice to both accredited and non-accredited investors, NRS has found that the accredited status of investors in pooled investment vehicles does not alone provide them with sufficient acumen to digest all communications provided to investors by managers of

such pooled investment vehicles. Consequently, we do believe that such communications should be treated generally as advertisements, subject to similar rules and protections as those applicable to clients to separately managed accounts. Based on our experience, we also believe that the majority of pooled investment vehicle managers already treat their communications to investors as advertisements subject to the Advisers Act and, therefore, the impact of the proposed rule should be limited. However, we do believe that the definitional threshold of non-retail client should be lowered to the accredited status to allow for the presentation of gross performance to investors in pooled investment vehicles, as is customary in this segment of the industry.

We request comment on [the exclusion from the definition of "advertisement" any information required to be contained in a statutory or regulatory notice, filing, or other communication – for example, information required by Part 2 of Form ADV or Form CRS]

Over the past 30 + years NRS has created and amended thousands of regulatory filings, including Form ADV Parts 1 and 2. We work closely with our clients to make sure that all information on regulatory filings is always complete, current, and accurate. NRS agrees that excluding information required to be contained in a statutory or regulatory notice, filing, or other communication from the definition of "advertisement" is prudent and will have the effect of encouraging fuller, more detailed and frequent disclosures to benefit client and investors. Moreover, we believe that such an exclusion would encourage advisers to amend their documents more frequently without fear of an advertising rule violation.

Do the proposed exclusions sufficiently describe the types of communications that should not be subject to the requirements of the proposed rule? Are there types of communications that should not be subject to the requirements of the proposed rule but do not satisfy the conditions of any of the proposed exclusions? For example, should we provide an exclusion for all one-on-one communications made by an adviser to its clients, including communications in writing? Conversely, do the listed exclusions exclude communications that should be subject to the requirements of the proposed rule?

Throughout the SEC Release, the Commission properly emphasizes the need for advertisements to be appropriate to the needs and level of financial knowledge of the persons to whom the advertisements are disseminated.[3] This being the case, it is also crucial that one-on-one communications with a client be in language the client will readily understand and that clearly and plainly address the client's needs and concerns.

Advisers are not now required to review every communication sent to and received by the adviser. It is hard to see how an adviser could comply with a rule subjecting one-on-one client communications to the advertising rules unless that adviser instituted a procedure that required that all written communications be reviewed prior to dissemination.

Section 206(4) of the Advisers Act already prohibits fraud, deceptive, or manipulative conduct by investment advisers. NRS sees this standard as continuing to be appropriate for one-on-one communications.

[3] See, e.g., SEC Release at 15: "Accordingly, rather than the one-size-fits-all' approach of the current rule, we believe it is appropriate for the rule to reflect the intended audience of the advertisement..."

Section II.A.4: General Prohibitions

Should the proposed rule include specific presentation requirements, such as requiring advertisements with references to specific investment advice to include an equal number of best- and worst-performing holdings, or use an objective, nonperformance based criterion, such as the largest dollar amount of purchases or sales? Are there additional presentation requirements we should consider? Should the presentation requirements be the same for advertisements for which an adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisements are disseminated solely to "qualified purchasers" and certain "knowledgeable employees" (defined as "Non-Retail Advertisements" in paragraph (e)(7) of the proposed rule) and all other advertisements (defined as "Retail Advertisements" in paragraph (e)(13) of the proposed rule)?

NRS' decades of experience in working with investment advisers leads us to conclude that the fair and balanced approach to advertisements that reference specific investment advice as described in the adopting release is sufficient to prevent cherry-picking yet flexible enough to allow advisers to relate valuable security performance and portfolio attribution to clients and prospective clients. We believe that the previous approach of requiring an equal number of best and worst performing securities[4] was unnecessarily inflexible and difficult to apply in certain situations.

We also request comment on other approaches to the regulation of advertising by advisers. For example, we are proposing an approach where, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, and courses of business, we would amend rule 206(4)-1 generally to prohibit certain conduct, as discussed above, *and* restrict certain specific identified advertising practices, as discussed below. Instead, we could not identify any specific restricted practices and rely on the general prohibitions against fraud or deceit in section 206 of the Advisers Act and certain rules thereunder.

NRS has reviewed the approach taken in by the Commission and has concluded that it strikes the right balance between certain specific restrictions, thus providing sufficient guidance to investment advisers, yet, allowing sufficient risk- and principle-based flexibility that has always been a distinguishing element of the Advisers Act and rules adopted thereunder.

Section II.A.4: Testimonials, Endorsements, and Third-Party Ratings

NRS supports the proposed revisions to the rules regarding testimonials, endorsements and third-party ratings. Our experience reviewing advertisements for advisers has made NRS very familiar with the confusing and often counterintuitive prohibitions in the current rules, and we applaud the Commission for proposing these revisions.

[4] *The TCW Group*, SEC Staff No-Action Letter (Nov. 7, 2008)

NRS does suggest clarification on one point. Current rule 206(4)-1(a)1 prohibits the use of an advertisement:

> which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser. (Emphasis added.)

NRS recommends that the Commission make it abundantly clear in any adopting release or subsequent FAQs about an adviser's use of "indirect testimonials." To be sure, the proposed rule prohibits any advertisement that makes a material claim or statement that is unsubstantiated or that is likely to create a misleading implication about a material fact. (Proposed rule 206(4)-1(a)). That said, an adviser may want to include in an advertisement substantiated claims based on its client records, such as "Over 90% of our clients have been with us for more than five years." That claim could well be a prohibited indirect testimonial under the current rule, as it could be seen as implying a positive investment experience. Under the proposed rules, could simply referring to a provable fact about an adviser's clients be, in and of itself, misleading? Or would the adviser need to lead clients to an unprovable inference, such as "Over 90% of our clients have been with us for more than five years because of our superior client service", in order for the advertisement to be misleading?

Section II.A.5: Performance Advertising

The proposed rule addresses some disclosures by reference to the prohibitions in paragraph (a). As an alternative, should we require in rule text any specific disclosures or other information to be included in performance advertising? Why or why not? Should we require any of the disclosures described above? For example, should we require disclosure of the material conditions, objectives, and investment strategies used to obtain the results portrayed; whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; the effect of material market or economic conditions on the results portrayed; the possibility of loss; or the material facts relevant to any comparison made to the results of an index or other benchmark? Why or why not? Should our disclosure requirements differ based on the intended audience for the performance advertising?

Are there specific disclosures that we should require to prevent performance advertising from being misleading – *e.g.*, how material market conditions, advisory fee expenses, brokerage commissions, and the reinvestment of dividends affect the advertised performance results? If so, should we identify those and specifically require their disclosure?

Are there specific disclosures that we should require to prevent prospective investors from placing too much importance on performance advertising? Should we require disclosures similar to or different from those required in RIC advertisements, such as a disclosure that past performance neither guarantees nor predicts future results, or a disclosure that past performance may not be an accurate indication of the investment adviser's competence or experience?

NRS was founded in 1983 – three years prior to the release of the initial *Clover Capital* no-action letter.[5] Since the release of *Clover*, et. al., we have reviewed thousands of performance advertisements from advisers of all sizes, with all types of clients, offering all types of investment strategies. During that time, we have rarely, if ever, seen a performance advertisement intended for a retail audience in which the *Clover*-required disclosures were "of limited utility to investors".[6]

While NRS agrees strongly with the Commission in its adoption of risk- or principles-based regulations, sometimes it helps advisers when the Commission establishes a set of base rules; in other words, to have the Commission create a "floor" of required disclosure, while leaving the adviser free to determine if additional disclosure is needed based on the Commission's guidance and the adviser's fiduciary duty. To this end, NRS recommends that the Commission codify the disclosure requirements of *Clover,* et. al. for advertisements directed to retail investors.

In defining "Non-Retail Advertisement," should we consider an approach other than requiring the adoption and implementation of policies and procedures? What other approach should we consider and why? Is there an alternative approach we should consider to address the dissemination of Non-Retail Advertisements to an investor that an investment adviser may not know with certainty to be a qualified purchaser or knowledgeable employee? If we retain the proposed rule's approach, should the proposed rule specify any policies and procedures that investment advisers should adopt and implement in order to disseminate Non-Retail Advertisements? If so, what should be included in such policies and procedures and why?

NRS has developed and/or tested written policies and procedures for many firms that are required to limit their products or services to accredited investors, qualified investors, knowledgeable employees, and a variety of other categories. It has been our experience that well-designed and regularly enforced written policies and procedures are highly effective at preventing dissemination of inappropriate materials to investors outside of the various specified categories. As to the nature of those policies and procedures, NRS has found that the best procedures are those that are specifically tailored to the business of the firm. It is our view that in this situation the Commission should provide risk- or principles-based requirements and give the adviser latitude to find a solution – which may one day include applying technology that does not yet exist – that fit's each firm's business.

Would the "reasonable belief" prong of rule 2a51-1(h) be useful for purposes of determining whether an investor is a Non-Retail Person under the proposed rule? Do commenters agree that investment advisers to Section 3(c)(7) Companies already have policies and procedures necessary to implement the "reasonable belief" prong? Are there compliance or other challenges that investment advisers or others have faced in applying this "reasonable belief" prong under rule 2a51-1(h)? What steps do advisers and others associated with Section 3(c)(7) Companies take to obtain a "reasonable belief" for purposes of rule 2a51-1(h), and would such steps be feasible in the context of ensuring that Non-Retail Advertisements are disseminated only to qualified purchasers and knowledgeable employees?

In NRS' experience in providing consulting services to advisers of 3(c)(7) companies, we have found few instances in which effective procedures had not been developed and implemented to obtain

[5] *Clover Capital Mgmt., Inc.*, SEC Staff No-Action Letter (Oct. 28, 1986)
[6] The SEC Release at 105

"reasonable belief." We are convinced that all advisers can readily develop written policies and procedures which, if thoughtfully created and vigorously enforced, can effectively determine and document "reasonable belief".

Should we provide further guidance or specify requirements in the proposed rule on how to calculate gross performance or net performance? If so, what guidance or requirements should we provide? Should we look to the Global Investment Performance Standards adopted by the CFA Institute ("GIPS") or other standards? Should we require investment advisers to adopt policies and procedures prescribing specific methodologies for calculating gross performance and net performance? Why or why not?

As noted earlier in these comments, NRS has been consulting with advisers on performance advertising for well over 30 years. While we have seen a few instances in which an adviser has not clearly described the method of calculating performance or any limitations associated with that method, we have not seen performance calculation methods that, in and of themselves and when accompanied by appropriate disclosure, were inherently misleading either to retail or institutional advisers. As many advisers have compiled, tested, and marketed performance data for decades using a particular calculation methodology, we believe that requiring all advisers to adopt a single methodology would impose tremendous costs in time and labor for these advisers without a significant benefit for investors.

Should we prohibit hypothetical performance in advertisements? Should performance results of portfolios that are managed by an investment adviser, but without investing actual money, be treated differently than other types of performance results under the proposed rule?

In 1986 *Clover Capital* provided no-action relief for what it called "model" performance ("representative" performance in the proposing release) – the performance of investment decisions made in real time by an adviser that did not involve investing actual money. In the years since, NRS has reviewed thousands of performance presentations using model performance – many of which were addressed to retail investors – and rarely found instances in which it was unclear that a model portfolio was being used even to the most inexperienced retail investors. Not only does *Clover* require detailed disclosure about the nature and limits of model performance, it also requires disclosure of the effect of material market or economic conditions on the results portrayed, giving even unsophisticated investors the ability to see an adviser's best efforts in the context of the times.

NRS recommends that the proposed rule distinguish model performance from the other types of hypothetical performance, and codify the *Clover* requirements for performance advertisements to be disseminated to retail investors.

Should we require, as proposed, that advisers adopt and implement policies and procedures designed to ensure that hypothetical performance is relevant to a recipient's financial situation and investment objectives? Would such policies and procedures ensure that hypothetical performance is only provided to those for whom it is relevant? Would providing hypothetical performance only to those for whom it is relevant help prevent such performance from being misleading? Would advisers be able to make the determination that hypothetical performance is relevant?

We agree with the Commission that backtested performance and targeted and projected returns have the potential to be misunderstood by the general investment public and should not be allowed without condition. However, in our long experience working with investment advisers to retail clients, we have

learned that there are situations in which retail clients may benefit from such presentations. Consequently, NRS suggests that the Commission should adopt a rebuttable presumption that backtested performance and targeted and projected returns are only relevant to non-retail clients and prospects. Advisers wishing to rebut such a presumption should be required to document their reasoning, subject to the Commission's review.

That said, NRS suggests that the Commission provide guidance on three situations in which backtested performance and/or targeted and projected returns may be presented to clients and prospective clients.

1. NRS has found that many advisers who use backtested performance do so in order to inform clients and prospective clients about their research and investment processes and changes made to those processes. This is of particular importance to advisers using timing, technical and/or charting strategies. NRS recommends specific guidance, in an adopting release or FAQs, that addresses the types of disclosure that the Commission would consider important in determining whether backtested performance is used to illustrate research and investment processes.
2. Similarly, it has been NRS' experience that many advisers will present a prospective client with a report showing the performance of the prospect's current portfolio and comparing it to a portfolio proposed by the adviser, and showing the performance of the investments in the proposed portfolio. Under current rules, many advisers have seen this as a communication with one person, and therefore outside the scope of the advertising rules (while making sure to prominently disclose that the performance presented was not necessarily that of the adviser's clients). The proposed definition of "advertisement" would bring this type of presentation under the performance advertising rules. NRS suggests specific guidance, in an adopting release or FAQs, that addresses the types of disclosure that the Commission would consider important when using backtested performance of the investments in a recommended portfolio.
3. NRS has reviewed many advertisements that provide a targeted return for a particular strategy. NRS suggests specific guidance, in an adopting release or FAQs, as to (a) whether a simple statement of a strategy's target return would be considered a "performance advertisement" and (b) what disclosures, beyond simply stating that past performance is no guarantee of future results, the Commission would consider important when advertising a strategy's target return.

Section II.A.7: Review and Approval of Advertisements

As proposed, should we require a designated employee of an investment adviser to review and approve advertisements? Should we require that this review be conducted by only legal or compliance personnel of the adviser? Should we require that only employees of an adviser that are senior management be eligible to be designated as reviewers? Should we permit outside third parties, such as law firms or compliance consultants, to conduct these reviews?

NRS agrees with the Commission that designating an individual or a number of individuals to review and approve advertisements would promote compliance with advertising rules and best practices and is consistent with practices already adopted by most advisory firms. However, we do not believe that the Commission should strictly dictate which individuals should be designated as reviewers and/or approvers. This determination will vary based on each adviser's size and structure, as well as the nature

of the material being reviewed at any given time. Certain materials may be most effectively reviewed by legal and/or compliance personnel, while other materials such as performance calculations may be better understood by select advisory personnel or senior management.

We are also strong proponents of leveraging technical resources and third-party professionals to facilitate the review and approval process. We know from experience that many advisers already rely on this type of help to meet their crucial compliance obligations. As new regulations arise, many firms, out of necessity, will reach out to third parties for such assistance.

Should the rule prohibit the same individual who created the advertisement from reviewing and approving it? If so, how would small advisers, which may only have one individual qualified to create and review advertisements, comply with this requirement? Should the rule except them from the approval requirement, similar to the exception under rule 204A-1(d) of the Advisers Act for small advisers with only one access person from having that person approve his or her own personal security investments, provided they keep sufficient records?

NRS agrees with the general premise that self-review is not desirable when an alternative exists. Even if a firm employs more than one person, however, other employees of the firm may not have the knowledge or expertise need to conduct an advertising review. NRS recommends that advisers have policies and procedures in place to address the conflict inherent in self-review (if applicable).

Should we include the proposed one-on-one communications exception to the requirement to review and approve advertisements? Is this necessary for advisers to communicate freely with investors? Is there another way to reduce the burden of reviewing individual communications before dissemination while reducing the likelihood that advisers may violate the proposed rule? Should the exception apply to communications with more than one investor? If so, how many?

Throughout the proposing release, the Commission properly emphasizes the need for advertisements to be appropriate to the needs of the persons to whom the advertisements are disseminated. This being the case, it also crucial that one-on-one communications with a client be in language the client will readily understand and that clearly and plainly address the client's needs and concerns.

As the Commission notes in its comments on this proposal, advisers are not now required to review every communication sent to and received by the adviser. It is hard to see how an adviser could comply with a rule subjecting one-on-one client communications to review unless that adviser instituted a procedure that required that all written communications be reviewed prior to dissemination.

Section 206(4) of the Advisers Act already prohibits fraud, deceptive, or manipulative conduct by investment advisers. NRS sees minimal, if any, benefit to having persons who communicate with clients required to have every written client communication reviewed to determine if that communication is consistent with the advertising rules.

In addition, NRS has difficulty imagining an effective system for previewing advertisements directed to two persons that does not include a review of all written communications prior to dissemination. NRS suggests establishing a threshold of ten intended recipients for any advertisement to be reviewed and approved prior to dissemination.

Section II.A.8: Proposed Amendments to Form ADV

The Commission has proposed that Item 5 of Part 1A be amended to include a subsection L ("Advertising Activities") under which an adviser would be required to disclose the adviser's use of performance results, testimonials, endorsements, third-party ratings, and its previous investment advice.

Every year, NRS assists hundreds of advisers in making their annual updating amendments to Form ADV. In addition, we prepare initial ADV filings, review the ADVs of investment advisers, and provide educational offerings on Form ADV preparation and disclosure requirements to beginning and highly experienced compliance professionals alike.

NRS agrees with the Commission that requiring advisers to report their advertising practices will result in more focused and efficient examinations, and therefore supports the Proposal (with caveats noted in our comments).

Before addressing the specific questions posed in the adopting release, NRS wants to share our experience with the most recent significant change to the ADV reporting requirements: the requirement that certain types of third-party asset transfers be included in Form ADV Part 1A Item 9 when an adviser reports whether or not the firm has custody. In the years since this requirement was announced, it has been NRS' experience that many advisers remain uncertain as to when and how the requirement should be applied. If this uncertainty is the result of one change to SEC guidance on custody, one can readily imagine the uncertainty that the proposed sweeping changes to the advertising rules will engender. NRS therefore recommends that, should new rules be adopted, the Division of Investment Management provide robust and continuing assistance to advisers in understanding these rules through FAQs, Risk Alerts, and any other means at its disposal.

The proposed Form ADV amendments may pose an issue for state-registered advisers. The various states may adopt the final version of the final rules, may adopt part of the amended rules, or may reject them entirely. Putting a new Item 5 subsection L in Part 1A would require state-registered advisers to answer these questions during a time when the advertising rules in the various states may be in flux. NRS suggests that, if Item 5 subsection L is adopted, the Commission adopt instructions providing that state-registered advisers not be required to complete it unless and until each state has determined that it wants state-registered advisers to complete that subsection.

In addition, the Proposal is silent on the frequency with which Item 5, subsection L is to be updated. NRS recommends that this be addressed in any adopting release.

Should we require more or less detailed information about advisers' advertising practices? If so, what additional information should we require, or what should we remove from the disclosure requirement, and why?

The proposed definition of "advertisement" reads:

> 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.

This definition encompasses a wide range of communications, and, even allowing for the various proposed exemptions, even an adviser with a reasonably designed compliance program may fail to capture every communication that falls into this definition. NRS recommends amending proposed Item 5 subsection L to exclude those advertisements disseminated to a single person, household, or investor, as allowed under the prior review provision of the proposed rule. Advisers are required to sign Form ADV under penalty of perjury. Requiring advisers to disclose on Form ADV that they have not used a particular advertising practice (even for advertisements not subject to review) appears to NRS to be counterintuitive and counterproductive.

Should we require advisers to disclose that they provide hypothetical performance to investors? If so, should we require advisers to provide descriptions of such hypothetical performance or any information about how they calculate hypothetical performance?

In reviewing thousands of performance advertisements since *Clover Capital* was released, NRS has found that advertisements including backtested performance in particular were confusing, difficult to understand, and most in need of substantial revision and additional disclosure. At the same time, NRS has found advertisements using model performance to be clear and well disclosed. Rather than asking advisers to disclose all hypothetical performance, NRS suggests that Item 5 subsection L ask specifically about advertisements that include backtested performance and targeted and projected returns.

Should we require advisers to state whether their use of performance, testimonials, endorsements, third-party ratings, or specific investment advice includes information from predecessor or other firms? If so, should we require any additional information about the predecessor or other firm, such as a name and contact, and an affirmation that such firm permits the adviser's use of the performance results (if applicable) and affirms its accuracy?

NRS recognizes that information about predecessor firms is important in helping an investor understand performance data in an advertisement. However, an adviser should not need permission to use a predecessor's or third party's performance data if the adviser has the ability to prove the information is correct.

That said, disclosure about predecessor firms appears to be of less value in other types of advertisements. Because determining whether this additional information is being properly used is likely to be determined on a case-by-case basis, it is better addressed during the Commission's examination process.

Should we require advisers to state how they advertise performance results (*e.g.*, on social media, through testimonials, endorsements or third-party ratings, seminars, television advertisements, private placement materials, or through periodic client updates)? Why or why not, and if so, should we require advisers to provide more detail about the methods they use to advertise performance results, such as the name of the website or social media platform, or the name of the endorser? Why or why not?

As having this information readily available on the Form ADV Part 1A allows the Commission to more effectively target its examination efforts, NRS believes that providing this additional information will be beneficial. However, as names of websites used by the adviser are already available on Form ADV Part 1A Schedule D Section 1.I, and the name of any endorser can be found by contacting the adviser, NRS does not think the additional information serves a useful purpose.

Should we require advisers to state how they advertise testimonials, endorsements, third-party ratings, or specific investment advice (*e.g.*, on social media, through seminars, television advertisements, or through periodic client updates)? Why or why not, and if so, should we require advisers to provide more detail about the methods they use to advertise testimonials, endorsements, third-party ratings, or specific investment advice such as the name of the website or social media platform? Why or why not? Should we require any other information, and if so, what types of information should we require?

NRS supports disclosure of the methods used to advertise performance data because advertising misleading or fraudulent performance data is a more immediate and significant threat to investors than testimonials, third-party ratings, etc. Names of websites used by the adviser are already available on Form ADV Part 1A Schedule D Section 1.I, and the name of any endorser, or information about any third-party rating, can be found by contacting the adviser.

Is it clear what "specific investment advice" means in the context of the proposed amendment to Form ADV?

Yes, but NRS recommends including the definition of this term in Item 5, subsection L.

Even though Part 1A of Form ADV currently requires advisers to report information about client referrals, including the existence of cash and non-cash compensation that the adviser or a related person gives to or receives from any person in exchange for a client referral, should we also require additional information about client referrals and solicitation, as discussed *infra* Section II.B [the new proposed solicitor rules]? If so, what additional information should we require, and why? For example, should we require all registered investment advisers to include the names of, and other specified information about, their current solicitors on a separate schedule, similar to our requirements for advisers to private funds to provide information about their marketers (including solicitors)? Should we require advisers to report the amount of compensation paid for referrals (on an aggregate basis, per referral, or based on another metric)? If a firm employs several solicitors, should we only require information about the firm's top 5 (or 10, or another number) solicitors, measured by number of client referrals made in the past year or some other measure, such as assets under management the referrals generate for the adviser? Please explain. Should we require advisers to private funds to provide additional information in Section 7.B of Schedule D of Form ADV about their private fund marketing arrangements? If yes, what additional information should we require, and why?

Form ADV Part 1.A Item 5.B.6. already requires advisers to disclose the number of third-party solicitors it uses. NRS agrees that listing a firm's top 5 or 10 third-party solicitors (on a separate schedule or otherwise) would assist the Commission in identifying "problem" solicitors. The rest of the information listed above, however, appears to NRS to be of less value to the Commission, and therefore we believe the burden of collecting and updating it outweighs the value it would bring.

Should we require advisers to describe their advertising practices in their Form ADV brochure in addition to, or instead of, the proposed Part 1A subsection L ("Advertising Activities")? Why or why not, and if so, what information should we require advisers to describe in their brochure about their advertising activities.

NRS does not think that an adviser's advertising practices represent material conflicts of interest that need to be disclosed to a client or prospective client, and so we do not think advertising practices need to be disclosed in Form ADV Part 2A.

SECTION TWO: SOLICITATION

I. Overview

The Proposal constitutes a positive step forward. It modernizes the solicitation rule by permitting solicitor disclosures to be delivered by recorded or electronic means subject, of course, to certain conditions.[7] The Proposal also recognizes that it would be a burden for advisers to obtain certain foreign orders.[8] Therefore, in an attempt to eliminate that burden, the Commission, intentionally, excluded those foreign orders from the list of events that would disqualify a person from acting as a solicitor.[9] The Proposal would require that advisers have a reasonable basis to believe that the solicitors they compensate are not ineligible solicitors.[10] By imposing a reasonable basis standard on advisers, the Commission is mitigating investor risk in a manner that is fair and administratively manageable for advisers.[11]

NRS recognizes the Commission's goal in proposing to extend the solicitation rule to solicitors for private funds. That said, as these are sophisticated investors who are capable of performing reasonable due diligence, and as Form ADV Part 1A is publicly available on the IAPD system, NRS suggests that this goal may also be accomplished by amending Form ADV Part 1A as described below.

II. Amendments to the Solicitation Rule

a. Compensation for the Solicitation of Existing and Prospective Investors in Pooled Investment Vehicles

Section 206(4) and rule 206 (4)-8 of the Advisers Act prohibits advisers to pooled investment vehicles from engaging in conduct, practices and transactions that would constitute fraud, manipulation or deceit.[12] Private fund investors are also afforded protection pursuant to section 17 (a) of the Securities Act and section 10(b) of the Securities Exchange Act of 1934, and rule 10(b) thereunder. Additionally,

[7] *See* Proposed rule 206(4)-3(a)(1)(iii).
[8] *See* SEC Release at p. 272.
[9] *Id.*
[10] *See* Proposed rule 206(4)-3(a)(3)(i).
[11] *See* Proposed rule 206(4)-3(a)(3)(i).
[12] *See* Rule 206(4) of the Advisers Act.

investment advisers are required to disclose information regarding private fund solicitors. [13] However, as the SEC notes, that information does not include compensation information.[14] To close this gap, NRS proposes that, instead of expanding the entire solicitation rule to include pooled investment vehicles, that the SEC update Schedule D to Form ADV Part 1A to include the following question:

> 28 (b): Where the marketer is a solicitor, is the solicitor paid cash or non-cash compensation for the referral?

In light of the investors' sophistication, and the heightened investor protection efforts with respect to private fund investors, this additional disclosure that compensation has been paid, without additional specificity, should be sufficient.

SECTION 3: RECORDKEEPING

a. Retention of Advertisements Submitted to One or More Persons

As the Commission notes in its comments on requiring the review of advertisements, advisers are not now required to review every communication sent to and received by the adviser. Given the breadth of the proposed definition of "advertisement", it is hard to see how an adviser could comply with a rule requiring retention of all advertisements unless that adviser instituted a procedure that required that all written communications be reviewed either before or after dissemination to determine if that communication could be considered an "advertisement."

Rule 204(2)-a(7) already requires:

> Originals of all written communications received and copies of all written communications sent by such investment adviser relating to:
>
> (i) Any recommendation made or proposed to be made and any advice given or proposed to be given;
>
> (ii) Any receipt, disbursement or delivery of funds or securities;
>
> (iii) The placing or execution of any order to purchase or sell any security.

It has been NRS' experience that most advisers have developed procedures requiring the retention of all written communications, so that individuals within the firm do not have the discretion to determine whether or not a particular communication is required under rule 204-a(7). This being the case, NRS expects that virtually all advertisements to one person, or to a handful of persons, will be captured by these policies. NRS therefore suggests the Commission exclude from this rule any adviser whose procedures require the retention of all written communications, and limit the specific recordkeeping requirement to only those advertisements that have been reviewed prior to dissemination.

b. Other Records To Be Maintained, Including Materials Substantiating The Policies And Procedures Reasonably Designed To Ensure That A Non-Retail Advertisement Is Only Disseminated To Non-Retail Persons

NRS believes that existing rules incorporate a *de facto* requirement that firms have material substantiating that firms have policies and procedures in place to ensure that non-retail advertisements are not disseminated to non-retail persons. Rule 206(4)7 of the Advisers Act requires that investment advisers have written policies and procedures in place reasonably designed to prevent violations of the Advisers Acts. Firms subject to the Advisers Act are periodically examined for compliance. Thus, inherent in existing regulatory framework is a requirement that advisers are able to demonstrate to examining authorities that they have taken steps to comply with their policies and procedures.

c. Unique Identifiers on Advertisements

NRS does not believe that requiring firms to affix unique identifiers, such as CRD numbers is necessary or that it serves a regulatory objective. Advertisements are designed to promote the firm. Thus, tracking an advertisement to the firm manufacturing it should be simple. With respect to demonstrating that the advertisement was reviewed, as noted above, rule 206(4)7 of the Advisers Act requires that investment advisers have written policies and procedures in place reasonably designed to prevent violations of the Advisers Act. For some firms, identifiers may be reasonable, but others may utilize different means that are equally reasonable. Firms should have discretion in that regard.

SECTION 4: COLLABORATION WITH STATE REGULATORS

NRS notes that the proposed definition of "investment adviser" may be inconsistent with the definition used by many states. NRS is concerned that the dissonance between two definitions of "advertisement" could be the source of confusion and inadvertent errors by state-registered advisers and by those transitioning from SEC to state registration and vice versa. Given that these advisers tend to have a predominantly retail client base, and as this is the group of clients on which the SEC is interested in protecting, NRS urges the Commission to work closely with state regulators in educating all advisers as to the regulations that will apply directly to them.

As noted earlier in this comment letter, the proposed Form ADV amendments may pose an issue for state-registered advisers. The various states may adopt the final version of the final rules, may adopt part of the amended rules, or may reject them entirely. Putting a new Item 5 subsection L in Part 1A would require state-registered advisers to answer these questions during a time when the advertising rules in the various states may be in flux. NRS suggests that, if Item 5 subsection L is adopted, the Commission adopt instructions providing that state-registered advisers not be required to complete it unless and until each state has determined that it wants state-registered advisers to complete that subsection.

Conclusion

NRS continually interacts with investment advisers of all sizes through our client relationships and national conferences. NRS applauds the Commission's decision to revisit the advertising and solicitor rules, and strongly agrees that a risk- or principles-based approach to these rules will benefit investors and advisers alike. We urge the Commission to consider our comments in the spirit in which they were intended.

NRS appreciates the opportunity to comment on this proposal. If we may assist further or provide additional information or background on our comments, please let me know.

Respectfully,

John Gebauer

President