

BlackRock

February 10, 2020

Submitted via electronic filing: <https://www.sec.gov/rules/proposed.shtml>

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

Re: SEC Proposed Amendments to Investment Adviser Advertising (Release No. IA-5407; File No. S7-21-19)

Dear Ms. Countryman,

BlackRock, Inc. (together with its affiliates, “BlackRock”)¹ responds to the request from the Securities and Exchange Commission (the “SEC” or the “Commission”) in SEC Release No. IA-5407 (the “Release”) for comments on proposed changes to rules adopted under the Investment Advisers Act of 1940 (the “Proposed Rule”). Specifically, BlackRock responds to the Commission’s proposed changes to Rule 206(4)-1, which governs investment adviser advertisements (the “Advertising Rule”).

Since the Advertising Rule was adopted, the number and type of individuals who invest in the capital markets have changed substantially. In fact, the St. Louis Federal Reserve estimates that, since 1989, “the share of middle-aged households with direct or indirect stock holdings rose from 40% in 1989 to 61% in 2001”, and has been fluctuating between 57 and 62 percent since then.² Moreover, the past 50 years have witnessed a dramatic increase in the number and prevalence of investment products available to investors, as asset managers have continuously innovated to create increasingly bespoke solutions to meet the growing investor base’s financial needs.

¹ BlackRock is one of the world’s leading asset management firms. We manage assets on behalf of institutional and individual clients worldwide, across equity, fixed income, liquidity, real estate, alternatives, and multi-asset strategies. Our global client base includes pension plans, endowments, foundations, charities, official institutions, insurers, and other financial institutions, as well as individuals.

² See B. Ravikumar, How Has Stock Ownership Trended in the Past Few Decades?, *available at* <https://www.stlouisfed.org/on-the-economy/2018/april/stock-ownership-trended-past-few-decades> (last accessed on 2/3/20).

In light of this shift in the investment landscape, BlackRock fully supports the Commission's efforts to modernize the Advertising Rule, as well the Commission's emphasis on maintaining flexibility rather than a "one-size-fits-all" approach.³ In BlackRock's view, the Commission's more flexible approach will allow investors and potential investors greater and more diverse access to informational and educational tools, ultimately helping to increase their financial literacy. BlackRock appreciates the Commission's efforts and, as invited in the Release, provides the following comments and suggestions on those proposed amendments where we believe our expertise and experience are most relevant.⁴

I. Exclusions to the Definition of "Advertisement"

Generally, the Proposed Rule would define "advertisement" as "any communication, disseminated by any means, by or behalf of an 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."⁵ This definition is subject to exceptions, two of which BlackRock wishes to address: (1) a communication that "does no more than respond to an unsolicited request"; and (2) "any information required to be contained in a statutory or regulatory notice, filing, or other communication."⁶ The Proposed Rule clarifies that these carve-outs would apply only to responses to the "information requested" (in the case of an unsolicited request) and "required under applicable law" (in the case of a regulatory filing).⁷ BlackRock submits that the Commission should expand these carve-outs to include (i) any response reasonably related to a client or prospective client's unsolicited request; and (ii) all information included in regulatory filings.

With respect to the client inquiries, BlackRock believes that the Proposed Rule may have the unintended consequence of undermining efforts to provide clients and potential clients with timely information that is best suited to meet their investment needs and objectives. As a large asset manager, BlackRock receives thousands of formal, unsolicited requests from clients per year. These include

³ See Release at p. 14 ("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, including investors' access to resources for assessing advertising content for advisory services, such as presentations of hypothetical performance.").

⁴ The Release also details and invites comment on the Commission's proposed amendments to Rule 206(4)-3 under the Advisers Act (commonly referred to as the "Cash Solicitation Rule"), which governs the use and compensation of solicitors by investment advisers. BlackRock's comments in this letter are focused solely on the Commission's proposed amendments to the Advertising Rule.

⁵ Release at p. 19-20.

⁶ Release at p. 20.

⁷ See *id.*, see also Release at p. 46, 52-53.

requests for proposal or requests for information from clients seeking to learn more about BlackRock's product offerings; as well as due diligence questionnaires which existing clients typically use to oversee BlackRock as a service provider; and requests for BlackRock to assist clients in meeting their own regulatory obligations. Some of these requests contain dozens of questions, and our responses can be hundreds of pages long. In addition to these formal requests, BlackRock receives a constant stream of ad hoc inquiries from clients and prospective clients.

In BlackRock's experience, while certain of these unsolicited client inquiries are direct and specific, many of them are open-ended or vague, meaning that the "parameters of the information [the client] needs" may not be clear.⁸ Moreover, even when questions are more direct, our client's and prospective client's expectation is that BlackRock will provide comprehensive information in light of our understanding of their financial condition and needs and not merely to limit our response to their explicit inquiry. Consequently, in BlackRock's view, granting advisers the flexibility of providing investors with reasonable additional information (not limited to the specific parameters of the request) will facilitate the timely flow of information and assist investors in making more informed investment choices (e.g., evaluating a more tax-efficient option). Such communications would already be subject to a number of anti-fraud statutes and, in certain instances, suitability restrictions.⁹ Requiring that they conform to an additional layer of advertising-specific standards will hamper these communications while yielding little additional investor protection.¹⁰

Similarly, information contained in regulatory filings should not be considered an "advertisement." BlackRock appreciates the SEC's concern regarding the potential for advisers to use regulatory filings to circumvent the Proposed Rule's proscriptions. However, existing rules impose consequences for incorrect or misleading regulatory submissions, and, consequently, firms already apply rigorous scrutiny to these filings. As such, layering additional advertising-specific standards likely would yield little marginal benefits to investors. Moreover, as with client requests, what is strictly "required" in a regulatory filing can be open to interpretation, making consistent application of this carve-out difficult. Indeed, the type of information that the Release cites as potentially "offering or promoting" an adviser (i.e., "describing how its fee structure compares favorably to the fee

⁸ See Release at p. 46.

⁹ See, e.g., IAA §206. FINRA Rule 2111.

¹⁰ In addition, the rationale for imposing specific rules on advertisements identified in the Release (advertising "presents risks of misleading" clients, in large part, because the "adviser is in control of the design, content, format, media, timing, and placement of its advertisements with a goal of obtaining or retaining business") would be less relevant when a client is making an unsolicited request to an adviser. Release at p. 8.

structure of other investment advisers”)¹¹ is the type of competitive information that a publicly-traded investment adviser may believe to be required to disclose in its Forms 10-K or 10-Q.¹² And, even though such items may not be strictly required by a particular regulatory filing, advisers may include information that it reasonably believes is material, or at least pertinent, to investors. Finally, potentially adding an additional layer of review to ensure all regulatory filings conform to advertising standards would be extremely burdensome to asset managers such as BlackRock, which is overseen by over one hundred regulatory authorities in numerous jurisdictions.

II. Hyperlinking Disclosures

The Proposed Rule would require an adviser to “clearly and prominently” display associated material risks or other limitations when describing the investment adviser’s services or methods of operation.¹³ While, according to the Commission, the material risks would “necessitate formatting and tailoring based on the form of communication”, hyperlinking such disclosures would “not be consistent with the clear and prominent standard.”¹⁴ Instead, the Release suggests that click-through disclosures (interstitial pages), or client acknowledgement of review of the disclosures would be permissible.¹⁵

BlackRock encourages the SEC to reconsider its position with respect to hyperlinking risk disclosures and instead adopt an approach similar to recent FINRA guidance on this topic.¹⁶ The Commission’s prohibition against hyperlinking seems contradictory with the overall goal of the Proposed Rule, which is to modernize the Advertising Rule in order to account for continually evolving technology and how advisers communicate with investors.¹⁷ In BlackRock’s experience, the use of interactive content, such as hyperlinks, alert bars, push notifications and audio/video playback, is a much more effective means of delivering information (including material risks and other disclosures) to clients than traditional content delivery methods. This is especially true in the context of online investor tools that may be considered “advertisements” under the Proposed Rule, and even more so when those tools are accessed through a mobile

¹¹ Release at p. 52 n. 107.

¹² See 17 C.F.R. §229.101(c)(x) (requiring publicly traded companies to disclose “[c]ompetitive conditions in the business involved including . . . principal methods of competition (e.g., price . . .)”).

¹³ See Release at p. 60.

¹⁴ See *id.*

¹⁵ See *id.* at p. 61-62.

¹⁶ See FINRA Regulatory Notice 19-31 (“FINRA encourages members to consider how electronic media and design innovations can help direct investors to the information required for a fair and balanced communication”).

¹⁷ See Release at p. 11.

application. For example, advisers frequently use tooltips (i.e., information bubbles) near defined terms to provide a definition of that term or near calculated figures to describe the methodologies and assumptions used to generate those calculations. These tooltips allow users to easily toggle back and forth between the disclosures and the content so users can understand the context in which those disclosures are provided. Under the Proposed Rule, firms developing such tools would either be required to crowd the limited screen space with disclosures, or have users click through numerous interstitial pages with risk disclosures that are separated from the content they are meant to address, and thus lack relevant context. In BlackRock's view, neither of these alternatives conveys information to potential customers as effectively as appropriately placed hyperlinks.

III. Use of Third-Party Ratings

The Proposed Rule generally permits advisers to use third-party ratings in their advertisements, subject to certain conditions.¹⁸ One such condition is that the adviser “reasonably believe that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined results.”¹⁹ The Release further notes that, in order to meet this requirement, the adviser “would likely need to have access to the questionnaire or survey that was used in preparation of the rating.”²⁰

In BlackRock's view, third-party ratings can be a particularly informative tool for investors in evaluating differences between various investment advisers and products. Accordingly, BlackRock supports the Commission's proposal to allow the use of such ratings in advertisements. However, BlackRock is concerned that requiring advisers to essentially re-underwrite the relevant rating and rating methodology will significantly discourage their use and may even prevent smaller advisers who lack the resources and positioning to undertake such an effort from using them altogether.

BlackRock understands that the Commission views this requirement as necessary to ensure that ratings are not misleading. However, BlackRock believes that other aspects of the Proposed Rule already directly address this concern. Specifically, the Proposed Rule already would require that the entity that provides the rating do so “in the ordinary course of business” in order to ensure that the ratings are conducted by “persons with the experience to develop and promote ratings based on relevant criteria.”²¹ In other words, the Proposed Rule already puts the ratings

¹⁸ See Release at p. 76.

¹⁹ *Id.* at 93.

²⁰ *Id.*

²¹ *Id.* at 80.

in the hands of professional rating services, which have vastly more experience in conducting surveys and questionnaires than advisers. These professional rating services also have a business interest in promoting accurate ratings. In addition, the Proposed Rule addresses potential biases that may exist in the ratings by prohibiting “related persons” from providing the ratings, and by requiring disclosure of any cash or non-cash compensation provided to the rating agency.

This requirement may also prove impractical to satisfy. Professional third-party rating agencies may be reluctant to share with external parties any detailed insight into their proprietary methodologies for arriving at the ratings, let alone allow external parties to maintain such methodologies in their books and records.²² Moreover, third-party rating agencies may not have any incentive to make representations to advisers about their processes. These logistical problems likely would be magnified for smaller advisers, who may not deal with the professional rating agencies on a frequent basis and/or may lack the resources to do so. We support the continued use of third-party ratings but believe that the requirements in the proposal are overly burdensome and not necessary to ensure the ratings are not misleading.

IV. Retail vs. Non-Retail Persons

Under the Proposed Rule, the Commission would subject investment advisers to specific requirements when presenting performance information in advertisements to investors. The applicable performance requirements would depend on whether the advertisement is directed to Non-Retail Persons (defined as “qualified purchasers” and “knowledgeable employees” under the Proposed Rule), or Retail Persons (i.e., those investors who are not Non-Retail Persons).²³ In particular, an investment adviser wishing to present gross performance in an advertisement to a Retail Person would be strictly prohibited from doing so without also presenting net performance with equal prominence. Advisers wishing to show gross performance in an advertisement to a Non-Retail Person would only be able to do so if the adviser also offers to provide a schedule of fee expenses and if the adviser’s policies and procedures are reasonably designed to ensure that the advertisement is disseminated only to Non-Retail Persons.

BlackRock believes that the proposed Retail Person and Non-Retail Person definitions are arbitrary and will only prove ineffective and confusing, both for advisers and investors trying to respectively share and obtain performance information. Indeed, the Commission acknowledges that forcing more sophisticated investors to review net performance information often is excessive

²² *Id.* at 99.

²³ *Id.* at 110.

and irrelevant to their analysis.²⁴ This would be particularly true under the Proposed Rule, which would require net performance be shown using one of three modifications, none of which may ultimately reflect the fees and expenses the investor actually would bear.²⁵ Finally, application of the principles-based approach eliminates the need for additional investor classifications and definitions that could be confused with other classifications and definitions used and applied by FINRA, dual registrants and investors.

Instead, BlackRock submits that investors and advisers would be better served by eliminating the proposed definitions²⁶ and instead applying a more principles-based approach to determine the type of content an investor should receive. Namely, this could consist of: 1) policies and procedures ensuring that gross performance is only given to investors having the requisite expertise and knowledge to understand it; and 2) sufficient disclosure on fund or portfolio fee structures to ensure investors understand the different fees and expenses that would reduce actual performance.

V. Hypothetical Performance and Projections

The Proposed Rule would allow advisers to include hypothetical performance in their advertisements, subject to several conditions that focus on adviser policies, oversight, disclosure and usage. BlackRock agrees with the Commission's view that hypothetical performance information may be useful to investors and supports efforts to expand permitted use of such performance, particularly projected performance, subject to the proposed conditions. However, BlackRock believes that the new Advertising Rule should allow for a safe-harbor from these conditions for investment analysis tools that comply with FINRA Rule 2214.²⁷

Investment analysis tools serve as a critical resource for investor education and help enhance financial literacy. Moreover, the number and types of such tools have expanded tremendously in the past decade, as investors continue to increase their use of technology. Imposing the additional proposed conditions effectively deprives investors of these tools and would not, in BlackRock's view, keep with the spirit of the Commission's goal to modernize the Advertising Rule. And, while the Release states that such tools would not be subject to the restrictions on

²⁴ *Id.* at 123.

²⁵ For example, variables such as the share class, size or timing of the investment into a pooled investment vehicle could significantly impact the fees one Retail Person would pay compared to another.

²⁶ BlackRock's view extends to the Commission's proposed adoption of the related terms "Retail Advertisement" and "Non-Retail Advertisement" as well. See *id.* at 109 and 110.

²⁷ Specifically, Rule 2214 allows members to give investors access to investment analysis tools that generate performance projections so long as the tool provides certain required disclosures and describes the criteria and methodology used, including limitations, key assumptions, and the universe of investments considered. See FINRA Rule 2214(c).

hypothetical performance if an investor can select his or her assumptions, allowing an investor to change the model's assumptions would deprive these tools of much of their utility. The value in these tools is in the assumptions that advisers build into the model, which, at least with respect to the tools BlackRock has developed, are derived from extensive historic and current financial data and powerful analytical engines. BlackRock submits that stripping these models of this critical component would not be in the investor's best interest.

Moreover, the existing FINRA regulatory framework on this topic has proven effective in mitigating potential confusion. We believe this makes it unnecessary and superfluous for the SEC to propose subjecting these tools to additional requirements as proposed in the Release, particularly where that regulatory framework already is heavily relied upon today by the financial services industry.

VI. Approval of Advertisements

Finally, as currently contemplated, the Proposed Rule would require that a designated employee approve almost every advertisement prior to its distribution.²⁸ In addition, the Release suggests that the designated employee "generally should include legal or compliance personnel of the adviser."²⁹ BlackRock respectfully submits that the Commission should grant advisers greater flexibility in implementing a compliance program that is reasonably designed to comply with the Proposed Rule, and greater flexibility designating personnel who can approve advertisements.

While legal and compliance personnel undoubtedly play an integral role in developing and implementing policies and procedures governing the approval of advertisements, BlackRock submits that legal and compliance approval of each advertisement prior to publication is not necessary to ensure compliance with the Proposed Rule. We believe that this responsibility can rest with appropriately-trained business personnel. Indeed, FINRA Rule 2210 already allows for qualified registered principals (Series 24 licensed individuals) to approve broker/dealer advertisements and permits different approval processes based on the distribution of the advertisement.³⁰ Therefore, we support permitting a flexible approval process using principles-based criteria within a supervisory framework.

VII. Conclusion

BlackRock appreciates the opportunity to comment on the Proposed Rule. We support the Commission's efforts to update the Advertising Rule and believe that the Proposed Rule has the potential to substantially modernize the method in

²⁸ *Id.* at 190.

²⁹ *Id.* at 192.

³⁰ See FINRA Rule 2210(b).

which advisers advertise their products and services to investors. We are eager to continue working with the Commission to ensure that the Proposed Rule achieves the goals of increasing investor access to helpful information, maintaining investor protection and modernizing to adapt to the advertising landscape today and well into the future. Please contact the undersigned if you have any questions or comments about BlackRock's views.

Sincerely,

Kate Fulton
Managing Director, Global Public Policy Group

Alisa Lessing
Managing Director, Legal & Compliance

cc:

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission

The Honorable Robert J. Jackson Jr.
Commissioner
Securities and Exchange Commission

The Honorable Hester M. Peirce
Commissioner
Securities and Exchange Commission

The Honorable Elad L. Roisman
Commissioner Securities and Exchange Commission

The Honorable Allison Herren Lee
Commissioner
Securities and Exchange Commission