MERCER ADVISORS

February 10, 2020

Via E-Mail to rule-comments@sec.gov

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
Attn: Vanessa Countryman, Secretary

Re: File No. S7-21-19
SEC Proposed Rule: Investment Adviser Advertisements; Compensation for Solicitations

Dear Ms. Countryman,

Thank you for the opportunity to comment on SEC Release No. IA-5407 (November 4, 2019) (the "Proposing Release"), in which the Securities and Exchange Commission ("SEC" or the "Commission") proposed certain amendments to: (i) Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act") and (ii) Rule 206(4)-3 under the Advisers Act. For purposes of the comments, we refer to current Rule 206(4)-1 as the "Advertising Rule" and current Rule 206(4)-3 as the "Cash Solicitation Rule."[1]

Mercer Advisors welcomes the efforts taken by the SEC to enhance the regulations for advertising and solicitation in an effort to further the SEC's three-part mission: to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

I. Introduction

Established in 1985, Mercer Global Advisors Inc. ("Mercer Advisors") is a total wealth management firm that provides comprehensive, fee-based investment management, financial planning, family office services, retirement benefits and distribution planning, estate and tax planning, asset protection expertise, and corporate trustee and trust administration services. Mercer Advisors is one of the largest independent SEC-Registered Investment Advisers and financial planning firms in the U.S. with nearly $18.5 billion in client assets.[2] Headquartered in Denver, Mercer Advisors is privately held, has over 400 employees, and operates nationally through 47 offices across the country.

Mercer Advisors serves as a trusted steward and fiduciary of our clients' wealth, with a focus on being innovative and responsive to developments and trends in the markets and using technology, data analytics, and human capital to improve our performance and manage our internal resources and risks.

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[1] References below to page numbers of the Proposing Release are to the page numbers of the Federal Register version of the Proposing Release: FR Document: 2019-24651, Citation: 84 FR 67518.

[2] Company data as of February 1, 2020. "Client Assets Managed" includes assets gained from recent acquisitions where the advisory agreements have been properly assigned to Mercer Global Advisors Inc., but the custodial accounts have yet to be transferred and/or the accounts have yet to be migrated to our portfolio management system.

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As one of the largest independent SEC-registered Investment Advisers ("Advisers"), Mercer Advisors believes we have a responsibility to add our voice to the regulatory discourse, both for our firm and our clients. We are happy to provide our response to the proposals below.

II. Background

Mercer Advisors wants to stress the importance of the proposed rules. The proposals expand the types of allowable advertisements to be used by Advisers and will change the way solicitations are handled. While we believe several of the proposed revisions are positive, the SEC must remain cognizant that any expansion of the current Advertising Rule and/or Solicitation Rule heightens the risk for misleading existing and prospective investors.

Mercer Advisors agrees with the SEC that Advisers must adhere to a stricter standard of conduct in advertisements than that applicable to other businesses because securities "are intricate merchandise," and investors can be "unskilled and unsophisticated in investment matters."[3] We also agree that while advisory and referral practices of firms have evolved, there needs to be adequate disclosure and protections in place for investors.

III. Policy Considerations

The proposed Advertising and Solicitation Rules present several policy considerations.

a. Technology

The Advertising Rule was adopted in its current form in 1961 and has not been changed substantively since that time. Since the date of adoption, we have seen the creation of the Internet, the widespread use of social media and mobile devices, and an exponential increase of information available to the general public. For example, eight-in-ten adults go online at least daily, including 28% who stated they were online almost constantly.[4]

A December 2018 survey from the Pew Research Center found that more Americans gets news from websites and social media than print newspapers.[5] This is even more pronounced for younger consumers – 76% prefer reading their news online versus only 8% who prefer to get their news from traditional newspapers.[6]

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[3] Investment Advisers Notice of Proposed Rulemaking, Release No. IA–113 (Apr. 4, 1961) [26 FR 3070, 3071 (Apr. 11, 1961)] (''Advertising Rule Proposing Release'').

[4] Pew Research Center, Jul. 2019, "About three-in-ten U.S. adults say they are 'almost constantly' online," https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/.

[5] Pew Research Center, Dec. 2018, "Americans Still Prefer Watching to Reading the News – And Mostly Still Through Television." https://www.journalism.org/wp-content/uploads/sites/8/2018/12/PJ_2018.12.03_read-watch-listen_FINAL1.pdf.

[6] *Id.*

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b. Consumers' Expectations

The Advertising Rule does not meet expectations of the modern consumers. Modern consumers often rely on the Internet for shopping and use a number of available tools to compare and contrasts goods and services. A 2018 study reflected that an estimated 1.8 billion people worldwide purchase goods online,[7] with two thirds (69%) of US online adults shopping online at least monthly.[8]

Consumers today often rely heavily on third-party websites that provide ratings and reviews for goods and services – while there are many websites (TripAdvisor, Angie's List, CitySearch, etc.), likely the most well-known is Yelp.

Reviews and rating can have a demonstrable impact on a consumer's decision whether to purchase a good or service. For example, 93% of people on Yelp compare businesses before making a decision and 97% of people spend money with a business they find on Yelp.[9] Additionally, in a 2013 study, 90 percent of respondents who recalled reading online reviews claimed that positive online reviews influenced buying decisions, while 86 percent said buying decisions were influenced by negative online reviews.[10]

Mercer Advisors believes that any proposed Advertising Rule should align Adviser advertising to match the expectations of the modern investor - with respect to their life savings, investors expect the SEC to protect them from misleading advertising.

c. Implementation Concerns

Mercer Advisors is supportive of a number of the changes in the proposed rules; however, we are aware of the potential harm that could arise from removal of the current prohibitions on activities such as testimonials and expansion of the types of performance data provided to investors. While we support the SEC's efforts to create rules that are more evergreen to match the rapid change in technology, we want to ensure that any final rules that do not lessen investor protections and/or further confuse investors.

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[7] Statista, "E-commerce worldwide – Statistics and Facts," 2018, https://www.statista.com/topics/871/online-shopping/.

[8] Mintel, Online Shopping - US - June 2015, https://www.mintel.com/press-centre/technology-press-centre/nearly-70-of-americans-shop-online-regularly-with-close-to-50-taking-advantage-of-free-shipping.

[9] Yelp Survey, June 2019, Surveymonkey, https://blog.yelp.com/2019/10/study-shows-97-of-people-buy-from-local-businesses-they-discover-on-yelp.

[10] Zendesk, "The business impact of customer service on customer lifetime value," 2013, https://www.zendesk.com/resources/customer-service-and-lifetime-customer-value/.

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IV. Request for Comments

Advertising Rule

Comment #1

Mercer Advisors supports the SEC's proposal that third-party content is "by or on behalf of" an Adviser only when the Adviser takes affirmative steps with respect to the third-party content.

The term "by or on behalf of" the Adviser means in part that the Adviser does not control the content of the advertisement. Statements about the Adviser on a third-party hosted platform, such as social media, other than the Adviser's site, that solicits users to post info about the Adviser, including positive and negative reviews about the Adviser, are not advertisements, provided the Adviser did not take steps to influence the reviews or posts. For example, if the Adviser paid the site to promote certain posts, downrank certain posts, or influence the content of posts, it would qualify as an advertisement.

Mercer Advisors supports this proposal. As noted in the previous section, consumers utilize websites that contain ratings and reviews for many different types of goods and services. Potential investors could find information about Mercer Advisors on multiple websites, none of which Mercer Advisors controls or has the ability to influence. The proposal is also consistent with previous SEC guidance on the issue.[11]

Comment #2

Mercer Advisors believes that the SEC should make clear that educational materials provided to current clients are not considered to be "offering or promoting" the Adviser's services if the commentary does not discuss any specific recommendations, relies upon publicly available information, and is not misleading.

While the proposed Advertising Rule states that the SEC "would not view materials that provide general educational information about investing or the markets as offering or promoting an adviser's services or seeking to obtain or retain investors,"[12] it subsequently states that "a communication to existing investors that includes the adviser's own market commentary ... may be considered to be 'offering or promoting' the adviser's services depending on the facts and circumstances of the relevant communication."[13]

Mercer Advisors believes that educating our clients is an integral part of our fiduciary duty. For example, we educate our clients on a number of topics including, but not limited to financial planning (goal setting, budgeting, etc.), factor-based investing, estate planning, tax planning, and other topics of relevance to our clients.

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[11] SEC Division of Investment Management, Guidance On The Testimonial Rule And Social Media, No. 2014-04, Mar. 2014, *available at* https://www.sec.gov/investment/im-guidance-2014-04.pdf.
[12] 84 FR at 67526.
[13] *Id.*

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We believe that any final rule should not hinder client education and make clear that any materials that rely on publicly available information, are not misleading, and do no more than educate clients should not be considered as "offering or promoting" the Adviser's services.

Comment #3

Mercer Advisors agrees with the SEC that live oral communications that are not broadcast should be excluded from the definition of advertisement.

Mercer Advisors believes that while the definition was expanded with the exclusion of the "addressed to more than one person" criterium, the exclusion will continue to allow Advisers to speak freely with clients and prospective clients. The SEC was clear in the final proposal of the current Advertising Rule that the definition does not include a "personal conversation" with a client or prospective client.[14] We believe that any final rule should continue to make this distinction clear.

Mercer Advisors respectfully requests that the SEC provide more definitive guidance in this area. For example, the proposal states that "a 'Facebook Live' Q-and-A session that is available only to one person or a small group of people invited by the Adviser would not be 'broadcast' and so would qualify for the proposed exclusion."[15] If the Facebook Live session was open to the public, but only a small number of individuals joined, would that session be exempted from the definition of advertisement?

Presumably it is the invite-only nature of the session, because as discussed in the proposal, the definition of advertisement does not regard "the number of people to whom the communication is addressed."[16] However, this is not clear in the proposal. Also, some streaming services may include closed captioning. The SEC should provide guidance on whether this would invalidate the "live oral" component.

Comment #4

Mercer Advisors respectfully requests that providing references and other information in Requests for Proposals (RFPs) and Requests for Information (RFIs) be explicitly included under the "unsolicited request" exclusion and not be considered testimonials.

Mercer Advisors believes that Advisers should be allowed to provide references and other information in response to RFPs and RFIs. Many larger institutional investors and foundations rely on RFPs and RFIs in their business. By not explicitly including responses to RFPs and RFIs, the SEC would be putting Advisers at a distinct disadvantage when completing with other businesses, who have no such restrictions.

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[14] Prohibited Advertisements, Release No. IA-119 (Aug. 8, 1961) [26 FR 7552, 7553 (Nov. 15, 1961)].
[15] 84 FR at 67528.
[16] *Id.* at 67529.

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Mercer Advisors' position is supported by previous SEC no-action guidance. In *Investment Counsel Association of America*, the SEC staff stated that the unsolicited request exception "applies to the provision of client testimonials by an investment adviser in response to an unsolicited request by a client, prospective client or consultant for client testimonials."[17] Mercer Advisors respectfully requests that this guidance be codified in any final rule.

Comment #5

Mercer Advisors supports the SEC proposal to exclude from the definition of "advertisement" any information that an Adviser is required to provide to an investor under any statute or regulation under Federal or state law.

Mercer Advisors believes that since this information is not provided voluntarily and generally is of public record, it should be excluded from the definition.

Comment #6

Mercer Advisors supports the SEC proposal that allows for testimonials and the use of third-party ratings, subject to disclosure and additional conditions. Mercer Advisors respectfully rejects the SEC proposal to allow paid testimonials or endorsements; however, if the SEC does proceed, Mercer Advisors agrees with the current conditions in the proposed Advertising Rule.

Under the proposal, an Adviser must clearly and prominently disclose, or the Adviser reasonably believes that the testimonial or endorsement clearly and prominently discloses, that the testimonial was given by a client or investor or that the endorsement was given by a non-client or non-investor, as applicable.[18]

Mercer Advisors believes that clients of Advisers should be able to speak about their experience and allow Advisers to present these experiences in a fair and balanced manner. As noted previously in the letter, technological advances, including the development of the Internet and social media platforms, have made the use and dissemination of testimonials easier and more widespread, and they continue to be an important resource for investors and businesses. Additionally, for websites like Yelp, third-party ratings provide information to investors to help them evaluate a business relative to its peers or based on certain factors that may be important to the investor.

While we support the use of testimonials, there needs to be guidelines for their use. For example, as provided by the SEC in the proposal, prohibiting cherry picking testimonials, or otherwise only selectively using the most positive testimonials available, while excluding all negative testimonials.

Mercer Advisors agrees that an advertisement is unlikely to be presented in a manner that is fair and balanced if the testimonial, endorsement, or third-party rating references performance information or specific investment advice provided by the Adviser that was profitable that is not

[17] Investment Counsel Association of America, Inc., SEC No-Action Letter (Mar. 1, 2004).
[18] 84 FR at 67622.

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representative of the experience of the Adviser's clients. In this vein, we believe the SEC should require disclosures that mirror FINRA Rule 2210, including disclosing prominently that the testimonial may not be representative of the experience of other clients and that the testimonial is no guarantee of future performance or success.[19]

Mercer Advisors currently advertises third-party ratings consistent with previous SEC guidance.[20] Mercer Advisors believes that the previous no-action guidance should be codified in the final rule. The criteria for assessing third-party ratings should be (1) Whether the advertisement discloses the criteria on which the rating was based; (2) Whether an investment adviser advertises any favorable rating without disclosing any facts that the adviser knows would call into question the validity of the rating or the appropriateness of advertising the rating (e.g., the adviser knows that it has been the subject of numerous client complaints relating to the rating category or in areas not included in the survey); (3) Whether an investment adviser advertises any favorable rating without also disclosing any unfavorable rating of the adviser; (4) Whether the advertisement states or implies that an investment adviser was the top-rated adviser in a category when it was not rated first in that category; (5) Whether, in disclosing an investment adviser's rating, the advertisement clearly and prominently discloses the category for which the rating was calculated or determined, the number of advisers surveyed in that category, and the percentage of advisers that received that rating; (6) Whether the advertisement discloses that the rating may not be representative of any one client's experience because the rating reflects an average of all, or a sample of all, of the experiences of the investment adviser's clients; (7) Whether the advertisement discloses that the rating is not indicative of the investment adviser's future performance; and (8) Whether the advertisement discloses prominently who created and conducted the survey, and that investment advisers paid a fee to participate in the survey.[21]

Mercer Advisors respectfully disagrees with the allowance of endorsements, paid or otherwise. We believe this proposal will lead to a race to the bottom – once the market is opened to these types of endorsements, investor confusion will increase dramatically when firms vie for endorsements from celebrities and popular "financial gurus." The proposal also has the potential to drown out many smaller firms who may not have the budget to obtain paid endorsements. While FINRA currently allows paid testimonials,[22] investors are required to have the "knowledge and experience to form a valid opinion" if the testimonial in a communication concerns a technical aspect of investing.[23] Nothing in the current proposal would require investors to have this level of knowledge and/or experience.

Additionally, we believe there is a distinction between the Adviser fiduciary and trust culture and the broker-dealer sales culture. This distinction has been enshrined in the securities laws and confirmed by the Supreme Court when it cited the relationship of trust and confidence Advisers

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[19] FINRA Rule 2210(d)(6).

[20] DALBAR; Cambiar Investors, Inc., SEC No-Action Letter (Aug. 28, 1997); Investment Adviser Association, SEC No-Action Letter (Dec. 2, 2005).

[21] *Id.*

[22] FINRA Rule 2210(d)(6).

[23] FINRA Rule 2210(d)(6)(A).

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have with their clients and noted the "delicate fiduciary nature of an investment advisory relationship."[24]

To further illustrate the danger of a race to the bottom, TV ads are replete with "real persons, not actors" or just plain testimonials or endorsements from paid actors. These individuals are compensated, yet advertisers still use this technique; if the technique didn't work, advertisers would move to a different sales strategy.

While Mercer Advisors does support the policy behind the clear and prominent disclosures for compensated testimonials, endorsements, and third-party ratings, that it "would provide important context for weighing the relevance of the statement,"[25] we believe regardless of any disclosures, investors may not truly understand the distinction between testimonials and endorsements.

Endorsements are not a good proxy for illustrating the benefits of working with an Adviser – the SEC would be allowing individuals who have no experience with the firm to opine on the firm. The fact that a paid actor is being paid to say something is terrific has zero basis on the merit of that product or service. This cuts against the SEC policy statement that testimonials should be permitted, with restrictions, because they can be useful for evaluating Advisers. To illustrate this point, imagine going to a restaurant based upon 100 Yelp reviews of individuals who had never eaten there, but had been paid to provide their endorsement, or purchasing a car based upon reviews of individuals who had never driven it.

Comment #7

Mercer Advisors respectfully rejects the SEC proposal that would allow an Adviser to provide hypothetical performance in an advertisement. If the SEC proceeds with its current proposal, hypothetical performance should only be disseminated to sophisticated investors who can understand the limitations and disclosures offered.

While Mercer Advisors does not utilize hypothetical back tested performance with its clients, the use of hypothetical performance data is not an uncommon practice with Advisers. Back-tested performance presents hypothetical results based upon the retroactive application of an Adviser's investment strategy over a select market period. There is no real market risk. The goal is to show performance returns that would have been achieved if the investment approach had been in existence during the period shown.

Mercer Advisors notes that the SEC conditions the presentation of hypothetical performance on the Adviser adopting policies and procedures reasonably designed to ensure that it is disseminated only to persons for which it is relevant to their financial situation and investment objectives, and would further require the Adviser to provide additional information about the

[24] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 190–91 (1963) (quotation marks and citation omitted).

[25] 84 FR at 67541.

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hypothetical performance that is tailored to the audience receiving it, such that the recipient has sufficient information to understand the criteria, assumptions, risks, and limitations.[26]

However, the SEC has provided no evidence how providing retail investors with this type of information will mitigate the hypothetical performance from being misleading. We believe it is unlikely that retail investors will develop informed assumptions about the data and insights on how their portfolio will perform over time.

This has been confirmed by investor literacy research.[27] The SEC's Division of Enforcement has been clear that "[i]nvestors must be able to trust that performance advertisements are accurate."[28]

While the use of hypothetical performance must comply with the provisions in the proposed Advertising Rule 206(4)-1(a), that would prohibit Advisers from presenting hypothetical performance in a materially misleading way, we do not believe that the requirements are sufficient.

Mercer Advisors believes that if the proposal becomes final, the use of hypothetical, back-tested results should be reserved for sophisticated investors who can understand the limitations and disclosures offered. Mercer Advisors respectfully requests that the SEC look to Rule 506(b) of Regulation D to determine who is a sophisticated investor and require firms to provide an attestation to this effect.[29]

For disclosure, the statements must be conspicuous. While the SEC has created a more principles-based approach in the proposal, Mercer Advisors believes that, at a minimum, the disclosures should include: (1) a description of the model, its limitations, assumptions and quantitative parameters necessary to interpret the results. If compared to an index, include all material facts for comparison; (2) whether the results were obtained with the benefit of hindsight and if advisory clients had outcomes materially different than model results; (3) a description of how advisory fees, trading costs, reinvestment of dividends, interest, capital gains, and withholding taxes are treated; (4) whether strategies reflected in the model portfolio do not relate, or relate partially, to the services currently offered by the adviser and whether the model has changed materially over the time period presented; and (5) all material economic and market factors that might have impacted the decision-making when using the model to manage actual client accounts.[30]

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[26] 84 FR at 67560.

[27] FINRA, Investors in the United States: A Report of the National Financial Capability Study, Dec. 2019, available at https://www.usfinancialcapability.org/downloads/NFCS_2018_Inv_Survey_Full_Report.pdf.

[28] SEC Press Release, "SEC Charges Investment Manager F-Squared and Former CEO With Making False Performance Claims," Dec. 22, 2014, available at https://www.sec.gov/news/pressrelease/2014-289.html.

[29] 17 C.F.R. § 230.506(b)(ii). Under Rule 506(b), each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

[30] *See generally* Clover Capital Management, Inc., SEC No-Action Letter (Oct. 28, 1986).

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Comment #8

Mercer Advisors agrees with the proposal preventing Advisers from representing that the SEC has approved or reviewed a firm's performance results, even when the Adviser is presenting performance results in accordance with the proposed Advertising Rule.

Mercer Advisors believes that even implying SEC approval could be misleading for investors. The proposal is also aligned with the SEC's current stance where it does not "approve" or "endorse" any particular securities, issuers, products, services, professional credentials, firms, or individuals.

Comment #9

Mercer Advisors supports the proposal that would require an Adviser to have an advertisement reviewed and approved for consistency with the requirements of the proposed Advertising Rule by a designated employee before, directly or indirectly, disseminating the advertisement, except for advertisements that are: (i) communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle; or (ii) live oral communications that are broadcast on radio, television, the internet, or any other similar medium. We also believe that the individual should be legal or compliance personnel and that the individual who creates the advertisement should not be the same person who reviews and approves its use.

We believe that this requirement is simply a codification of the duty that arises under SEC Rule 206(4)-7; in the final 206(4)-7 rulemaking, the SEC stated that investment advisers should adopt policies and procedures that address ". . . the accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements."[31]

Mercer Advisors believes that due to the complexity of these reviews and the interrelationship with various laws and regulations, the reviews should be conducted by a member of the Compliance or Legal staff. Mercer Advisors believes this can include outside consultants and experts for smaller firms who may not have the staff in-house, specifically those firms who utilize a third-party to meet their compliance obligations. We also believe that firms can utilize a pre-approved content library to meet this requirement – this would allow staff to obtain approved and updated materials from a single source. We would caution that the content needs to be locked so that it cannot be altered subsequent to approval.

In addition, even if an advertisement is excepted from pre-approval, it must adhere to the other provisions of the proposed Advertising Rule. For example, even if hypothetical performance is presented to an investor one-on-one, it must adhere to the prohibitions related to hypothetical performance.

[31] Compliance Programs of Investment Companies and Investment Advisers, Release No. IA-2204 (Dec. 17, 2003) [68 FR 74714, 74716 (Dec. 24, 2003)].

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Solicitation Rule

Comment #1

Mercer Advisors supports the proposal to include non-cash compensation under 206(4)-3 with defined limitations.

Mercer Advisors agrees that the provision of non-cash compensation for referrals creates the same conflicts of interest as cash compensation for referrals—the solicitor has an economic interest in steering the investor to the Adviser and may be biased by this interest.

Mercer Advisors respectfully requests the SEC be cognizant that the proposal may have unintended consequences. For example, the proposal cites non-cash compensation examples: directed brokerage, sales awards or other prizes, training or education meetings, outings, tours, or other forms of entertainment, and *free or discounted advisory services*.[32] The proposal also states that compensation provided by the Adviser may occur before or after the solicitor engages in its referral activities, but regardless of when the compensation for solicitation is provided, such compensation would be within the scope of the proposed rule.[33]

The SEC needs to ensure that a reduction in advisory fees for a client who refers individuals to the Adviser is not identified as a referral fee when the two are not related. There is a myriad of reasons why a client's fees could be reduced that are in no way related to a referral the client may provide to the Adviser. Timing can be a critical indicator of a possible *quid pro quo*; for example, a client may negotiate a reduced fee in the beginning of the relationship, but then subsequently refer a client to an Adviser due to the level of service they are provided. Mercer Advisors believes there may be implementation concerns with this proposal because any review will require a fact intensive inquiry.

Comment #2

Mercer Advisors supports the new requirement in the solicitor disclosure document to disclose any potential material conflicts of interest on the part of the solicitor resulting from the Adviser's relationship with the solicitor and/or the compensation arrangement.

Mercer Advisors believes that in seeking to meet the duty of loyalty as a fiduciary, an Adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.[34] We agree with the SEC and the courts that an Adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest that might incline it – consciously or unconsciously – to render advice that is not disinterested.[35]

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[32] 84 FR at 67563.
[33] *Id.*
[34] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963).
[35] *Id.* at 191-92.

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Comment #3

Mercer Advisors supports the proposal to eliminate the current Cash Solicitation Rule's written agreement requirement that the solicitor deliver to clients a copy of the Adviser's Form ADV brochure.

Mercer Advisors agrees with the SEC's rationale that the current requirement is duplicative of an Adviser's delivery requirement under Rule 204-3. We believe that this proposal will provide Advisers and their solicitors the flexibility to determine responsibilities under the contractual agreement between the two parties.

Comment #4

Mercer Advisors supports the proposal to remove the current requirement that the solicitor undertake to perform its duties consistent with the instructions of the Adviser and instead add a requirement that the solicitor would be required to meet the specific requirements of the written agreement, including the solicitor's agreement to perform its solicitation activities in a manner consistent with sections 206(1), (2), and (4) of the Advisers Act.

Mercer Advisors agrees that the new proposal will provide greater consistency across solicitation relationships.

Comment #5

Mercer Advisors believes that the proposal for Advisers to monitor their compensated solicitors for compliance with the Cash Solicitation Rule's written agreement requirements is too broad.

Mercer Advisors believes the proposal could require Advisers to reach out to clients with potentially awkward questions or that Compliance staff would need to reach out to clients, which is potentially even more awkward. Additionally, even if Mercer Advisors were to conduct this type of monitoring and choose a sample size of 10% of clients, we would need to contact thousands of clients each year.

We believe the proposal would require Advisers to effectively determine whether solicitors are conforming with Sections 206(1), (2), and (4) of the Advisers Act – this is a regulatory function, not an advisory function.

Mercer Advisors believes that this appears to be a contract dispute issue, at least with third-party solicitors. Even if the Adviser is aware that a third-party solicitor is not acting in conformance with the written agreement, this is breach of contract issue (and therefore contract law). Not acting in conformance with the agreement does not appear to be a violation of Rule 206(4)-7 because a breach of contract by the solicitor does not suggest that the firm's compliance policies and

procedures are not reasonably designed to prevent violations of the Advisers Act by the Adviser or its supervised persons, since a third-party solicitor is not a supervised person.[36]

Comment #6

Mercer Advisors supports the continuation of the current Cash Solicitation Rule that exempts in-house solicitors from the written disclosure obligations.

Mercer Advisors agrees with the SEC that when an investor is aware that a solicitor is an Adviser's in-house solicitor or its affiliate, the solicitor disclosure is not necessary to inform the investor of the solicitor's bias in recommending the Adviser. With respect to in-house solicitors, an investor is on notice that the solicitor has a stake in soliciting the investor for its own firm.

Mercer Advisors believes that the exemption should be limited to supervised persons of an Adviser, under the Adviser's compliance policies, and where it is clear that they are acting on behalf of the Adviser (business cards, marketing materials, etc.).

Comment #7

Mercer Advisors supports the de minimis exception in the Cash Solicitation Rule.

Mercer Advisors agrees that the Cash Solicitation Rule should not apply if the solicitor performed solicitation activities for the Adviser during the preceding 12 months and the Adviser's compensation to the solicitor for those solicitation activities is $100 or less (or equivalent in non-cash compensation).

There is no *de minimis* exemption in current rule 206(4)-3; payment of *de minimis* cash referral fees to a solicitor is subject to the provisions of the current Cash Solicitation Rule. Mercer Advisors agrees that it would be overly burdensome for Advisers and solicitors that engage in solicitation for *de minimis* compensation to comply with the rule, when analyzing the costs and benefits of such solicitation. We also agree with the SEC that it should be a temporal provision (preceding 12 months) rather than an exception for *de minimis* compensation for each solicitation - a solicitor who is paid even a small amount per referral could potentially receive a significant amount of compensation from an Adviser over time.

Mercer Advisors believes that to the extent a solicitation is also a testimonial or endorsement of the Adviser, disclosure of the compensation to the solicitor would be satisfied by applying the testimonials and endorsements provision of the proposed Advertising Rule.

[36] 15 U.S.C. § 80b-2(a)(25): "Supervised person" means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

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Comment #8

Mercer Advisors requests that the SEC allow Advisers who currently rely on Dougherty and no-action letters to continue relying on previous SEC staff guidance.

The current Cash Solicitation Rule prohibits persons subject to various disqualifications from soliciting advisory clients for compensation for an Adviser. These disqualifications include being subject to an SEC order issued under Section 203(f) of the Advisers Act or being subject to any one of several disqualifications under Section 203(e) of the Advisers Act (though not all actions addressed in Section 203(e) of the Advisers Act are disqualifying for purposes of the Cash Solicitation Rule). Under certain conditions, an otherwise disqualified solicitor can rely on standing no-action relief from the SEC staff to continue to act as a paid solicitor for an Adviser.[37] One condition of this relief includes written disclosure, by the solicitor or the Adviser, of the disciplinary action to solicited persons for ten years from the date of the action.[38]

In the *Dougherty* Letter, SEC staff stated that it would not recommend enforcement action to the SEC under section 206(4) and rule 206(4)-3 if an Adviser pays cash solicitation fees to a solicitor who is subject to an order issued by the SEC under section 203(f) of the Advisers Act, or who is subject to an order issued by the SEC in which the SEC has found that the solicitor: (a) Has been convicted of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Advisers Act; (b) has engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of section 203(e) of the Advisers Act; or (c) was subject to an order, judgment or decree described in section 203(e)(4) of the Advisers Act (for purposes of the *Dougherty* Letter, such SEC orders are collectively referred to as "Rule 206(4)-3 Disqualifying Orders"), provided that certain conditions are met, including that no Rule 206(4)-3 Disqualifying Order bars or suspends the solicitor from acting in any capacity under the Federal securities laws.[39]

Mercer Advisors believes that not allowing the previous exemption to continue would have far-reaching effects on the industry and could potentially interfere with a number of contracts in force today. Mercer Advisors believes, at a minimum, solicitation relationships that are currently permitted under the *Dougherty* no-action letter (i.e. those from the past) be allowed to continue.

Existing Staff Guidance and No-Action Letters

Comment #1

Mercer Advisors supports the removal of previous staff guidance where the previous guidance is moot, superseded, or otherwise inconsistent with the proposed Advertising and Cash Solicitation Rules; however, the SEC should provide additional guidance in these situations.

Mercer Advisors supports the removal of previous inconsistent staff guidance; however, the SEC needs to be cognizant of the consequences of such an action. Firms have relied on this guidance,

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[37] Dougherty & Company LLC, SEC No-Action Letter (July 3, 2003).

[38] *Id.*

[39] *Id.*

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sometimes for several years and decades, to design and implement compliance policies and procedures. While Mercer Advisors believes that the proposals will increase the flexibility for firms to implement new policies and procedures, the SEC should provide guidance in situations where the previous staff guidance would, or would not be, sufficient to meet the requirements of the proposals. We have provided comment above on specific situations where previous staff guidance should be incorporated and/or codified in any final rule.

V. Conclusion

Mercer Advisors sincerely appreciates the opportunity to comment and your consideration of these views. We stand ready to provide any additional information or assistance that the SEC might find useful. Please do not hesitate to contact William Nelson, Chief Compliance Officer, at 720-500-8186 or wnelson@merceradvisors.com with any questions.

Sincerely,

William Nelson, J.D., LL.M.
Chief Compliance Officer
Mercer Advisors

cc: The Honorable Jay Clayton
The Honorable Allison H. Lee
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
Dalia Blass, Director, Division of Investment Management

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