



February 10, 2020

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

Re: File Number S7-21-19—Proposed Rule on Investment Adviser Advertisements

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit comments in conjunction with the Securities and Exchange Commission’s (the “SEC” or the “Commission”) December 10, 2019 request for comment regarding the Commission’s proposed rule,¹ which would allow investment advisers to use testimonials and endorsements in marketing materials.²

I. INTRODUCTION

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing and false advertising. To further its mission, TINA.org investigates deceptive marketing practices and, when necessary, advocates before federal and state government agencies to halt specific marketing campaigns. TINA.org also regularly participates as amicus curiae in cases involving deceptive marketing, both at the district court level (typically to alert courts of proposed settlements that are not “fair, reasonable, and adequate,”) as well as the appellate level. Further, TINA.org often offers its expertise and input to government agencies with regard to truth in advertising laws. In addition, TINA.org works to educate consumers through, among other platforms, its website, www.tina.org, which provides consumers with information about common deceptive advertising techniques and applicable consumer protection laws, as well as broadcasts alerts about specific deceptive marketing campaigns.

With respect to testimonials, TINA.org has exposed numerous companies that deceptively use testimonials and endorsements to market their products and services. TINA.org has collected thousands of examples of deceptive testimonials on its website – testimonials used by supplement marketers, multilevel marketing companies, financial newsletter publishers, cancer treatment centers, and a pillow manufacturer, among many others.³

Moreover, preventing deceptive advertising relating to financial services has been a focus of the organization. In 2017, TINA.org investigated every multilevel marketing company that was a member of the Direct Selling Association (the “DSA”), amassing more than 3,000 examples of deceptive income claims, and notified the DSA and each company of our findings.⁴ As a result, hundreds of deceptive testimonials were removed from the internet. And in 2014, TINA.org investigated Stansberry & Associates Investment Research, LLC “and found that it was using hundreds of deceptive testimonials in order to sell its investment newsletters.”⁵ The organization also regularly tracks financial deception and makes the information available to its followers.⁶

II. THE SEC’S PROPOSED RULE ON INVESTMENT ADVISER ADVERTISEMENTS

TINA.org agrees that “testimonials, endorsements, and third-party ratings can be useful and important for investors when evaluating investment advisers.”⁷ Among other benefits, testimonials can educate consumers, provide comparisons for consumers to better evaluate products or services, and allow consumers to evaluate quality prior to purchasing a product or service.

Testimonials also drive sales. As former New York Attorney General Eric Schneiderman observed, “[c]onsumers rely on reviews and other endorsements on the Internet to inform themselves in making daily purchasing decisions.”⁸ Indeed, data supports the notion that consumers are swayed by endorsements.⁹ As a result, testimonials have become prevalent in the marketplace. Unfortunately, so have deceptive testimonials.

Examples abound. A 2014 TINA.org investigation into Stansberry & Associates Investment Research, LLC (“Stansberry”), a subsidiary of Agora, Inc., found that the company was using hundreds of deceptive testimonials in order to sell its investment newsletters.¹⁰ Specifically, TINA.org found that many of Stansberry’s testimonials did not appear to report results that were typical or achievable for ordinary subscribers, many omitted vital information (such as the rate of return on investment and when the claimed successes occurred), none of them warned of the substantial risks associated with investing money (nor did the company clearly disclose such risks), and some contained false information.¹¹ In short, Stansberry not only used deceptive testimonials, but also took advantage of the fact that it operated in a sophisticated and complicated industry that markets itself to everyday people, some of whom may be in vulnerable financial situations. For example:

“My wife and I have made roughly \$22,000 in extra income in three months.”

“I’ve been harvesting between \$1,500 and \$3,000 per month in income...I’ll be quitting by current job, and I’ll enjoy a full retirement at age 43.”

“I bagged a quick \$20,000... one helluva call.”

Such testimonials promoted by Stansberry deceived hundreds, if not thousands, of consumers to their financial detriment. Fortunately, after TINA.org alerted the company to these findings and requested that it remove all deceptive testimonials from its website and promotional materials,¹² Stansberry ultimately complied, negating the need to file complaint letters with state and federal regulators.¹³

A more recent example of the use of deceptive testimonials comes from a different industry, but one that also takes advantage of the fact that it is operating in a sophisticated and complicated industry that markets itself to everyday people in vulnerable circumstances. In 2018, TINA.org undertook a review of patient testimonials used to promote the 50 cancer treatment centers in the U.S. that spent the most money on advertising in 2017. Our results revealed that, of the cancer centers still in business in 2018, 43 out of 48 – or 90% – used deceptive patient testimonials in their marketing materials by promoting anecdotal, atypical patient results without clearly and conspicuously disclosing what the generally expected results for a patient in a similar situation would be. Specifically, TINA.org’s investigation found, among other things, hundreds of testimonials featuring patients with cancer types that have a less than 50 percent five-year survival rate, being used in direct-to-consumer marketing materials and leading potential patients to believe that treatment at a specific cancer center would provide them with a therapeutic advantage, allowing them to beat the odds and live beyond five years.¹⁴

Such testimonials deceive countless terminally-ill patients and their families, many of whom spend their life savings in the search for survival. This investigation prompted TINA.org to notify each of the centers at issue and to file a complaint with the FTC against Cancer Treatment Centers of America (CTCA) for not only deceiving consumers, but also repeating the acts that were the subject of a previous FTC consent order that prohibited it from, among other things, using patient testimonials that misrepresent the typical experience of its patients.¹⁵

The above examples illustrate how the untempered use of testimonials can harm consumers and lead to a misallocation of resources within our economy. Fortunately, permitting investment advisers to use testimonials does not have to open Pandora’s box. While the SEC’s proposal already includes several prophylactic measures, TINA.org believes that additional safeguards are necessary to further shore up the rule and combat the proliferation of deception testimonials.

a. Advisers Should Be Required to Disclose All “Material Connections,” Not Simply “Compensation”

The SEC’s proposed rule requiring disclosure of compensation in exchange for a testimonial is too narrow.

The proposed rule states that an investment adviser must “clearly and prominently” disclose if “cash or non-cash compensation has been provided by or on behalf of the adviser in connection with obtaining or using the testimonial or endorsement.”¹⁶ Though

TINA.org agrees that such compensation should be disclosed, there are other types of material connections between the advertising company/adviser and endorser that may also materially affect the weight or credibility of the endorsement and thus should also be disclosed. This is consistent with the position of the FTC, which states, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”¹⁷ In the context of testimonials, the FTC has provided examples of the types of material connections that must be clearly and conspicuously disclosed, including:¹⁸

- Monetary payments or gift cards,
- Employee or business relationship,
- Friendships,
- Family relationships,
- Arms-length business deals,
- Receiving free or discounted products or services,
- Chance to win a significant prize or sweepstakes, and
- Chance to appear in a TV commercial.

To ensure consumers are able to effectively assess the credibility of a testimonial, TINA.org urges the SEC to implement a requirement that all “material connections” be disclosed, and not simply the disclosure of “cash or non-cash compensation.”

b. The Rule Should Require That Investment Advisers Using Testimonials Must Clearly and Conspicuously Disclose All Material Information

As TINA.org’s investigation into Stansberry made clear, it is critically important that investment advisers using testimonials clearly and conspicuously disclose material information so that consumers can make informed decisions. Such material information includes:

- **The rate of return on investment.** In order for consumers to be able to make an informed decision about whether or not to hire an investment adviser, the SEC should require investment advisers using testimonials to clearly and conspicuously disclose in each testimonial touting a financial gain either the rate of return on investment or enough information for the consumer to be able to calculate the rate (e.g., the amount of the endorser’s initial investment and how long it took him/her to achieve the touted gain). Such information is necessary for consumers to accurately assess the likelihood of achieving similar results.
- **The date of the claimed successes.** Investment success is enormously dependent on timing. By allowing investment advisers to omit key dates from testimonials, investment advisers will be permitted to use stale or out-of-date testimonials in present marketing materials to imply that old endorsements based on old investment advice are actually current testimonials based on current investment advice.

TINA.org urges the SEC to include a requirement that testimonials must clearly and conspicuously disclose all material investment information in order to avoid consumer deception.

c. The Rule Should Define What Constitutes an Atypical Testimonial

The proposed regulations should include a provision to specifically define and prohibit “atypical” consumer testimonials.

TINA.org agrees with the substance of the SEC’s prohibition on atypical testimonials, but believes the implementation could be improved. Instead of an explicit rule, the SEC relies on a vague, general prohibition that “[a]n advertisement may not . . . [i]nclude an untrue or misleading implication about, or reasonably be likely to cause an untrue or misleading inference to be drawn concerning, a material fact relating to the investment adviser.”¹⁹ From this, the Notice concludes that an “example of an untrue or misleading inference would be an advertisement that includes a single investor testimonial stating that investor’s account was profitable, which is factually true for that particular investor but nonetheless atypical among all the adviser’s investors.”²⁰ The term “atypical” is not used in the proposed rulemaking and what constitutes an “atypical” testimonial is not immediately clear. Only much later does the Notice finally explain that “an advertisement [i]s unlikely to be presented in a manner that is fair and balanced under the proposed rule if the testimonial, endorsement, or third-party rating references performance information or specific investment advice provided by the investment adviser that was profitable that is not representative of the experience of the adviser’s investors.”²¹

The FTC provides a more detailed approach worth consideration. FTC guidelines state that the advertiser must have adequate substantiation to support the implication that the “endorser’s experience [as depicted in the testimonial] is representative of what consumers *will generally achieve* with the advertised product or service,” or clearly and conspicuously disclose the generally expected outcome in the depicted circumstances.²²

TINA.org has investigated numerous multilevel marketing companies, many of which market their business opportunities, either directly or through the use of their distributors, by touting atypical financial gains.²³ Some of these companies have taken the position that reporting the median (or average) income of their distributors is sufficient. However, disclosing the midpoint earning (or average) among all distributors does not necessarily change an otherwise deceptive testimonial. For example, if a company has 100 distributors or, in this context, 100 clients it advises, and five of them made \$1 million while 95 made only \$1, disclosing that the mean (or average) income of clients or distributors is \$50,000 does not change an otherwise deceptive testimonial touting extraordinary or atypical gains.²⁴

In short, TINA.org’s experience in this area has shown that marketers like to use influencers that can present a company’s best results. However, doing so can create an unrealistic expectation among consumers. Atypical consumer testimony occurs at an

unsettling high rate and regulating such testimonials should not be done by nebulous rules. To help guard against this pitfall and prevent advisers from attempting to take advantage of perceived ambiguities in the rule, the SEC should require that testimonials used by investment advisers either depict or clearly and conspicuously disclose generally achievable, that is typical, results.

d. *The Proposed Rule Should Require Additional Disclosures for Consumer Testimonials*

The Notice asks whether the rule should incorporate a similar disclosure to that found in FINRA's Rule 2210(d)(6).²⁵ That rule provides, *inter alia*, that retail testimonials must disclose "[t]he fact that the testimonial may not be representative of the experience of other customers."

The disclosures in FINRA's rule are meaningful and should be required. Such disclosures convey the additional message that even the typical experience is not guaranteed and that risk is involved. This information is particularly important in testimonials conveying objective data ("I made \$100 by using Adviser X,"), as opposed to subjective attestations ("Adviser X was really nice.").

The Notice references an FTC finding that certain disclosures – like "results not typical" or "[t]hese testimonials are based on the experiences of a few people and you are not likely to have similar results" – failed to "adequately reduce[] the communication that the experiences depicted are generally representative."²⁶ And the Notice makes clear that a general disclaimer, such as "these results may not be typical of all investors," would not save an otherwise atypical testimonial from the proposed rule's general prohibitions.²⁷ But those details are inapposite to the question asked: that a disclosure fails to overcome a false impression of typicality does not mean that the language fails to provide important information to consumers. Indeed, it is materially important for consumers to understand that they might not achieve even the typical consumer experience.

Accordingly, a disclosure similar to that required in FINRA's rule should accompany any testimonial containing objective data.

e. *The SEC Should Offer Guidance for Social Media*

The Notice asks whether the proposed definition's approach would be evergreen and whether the proposed rule's restrictions should distinguish between print advertisements and social media.²⁸

As drafted, the proposed rule is evergreen precisely because it does not distinguish between advertising media. Instead, the focus of the proposed rule is on the substance of the advertisements: what type of information is deceptive. To remain evergreen, the rule itself should not distinguish between print advertisements and social media.

Nevertheless, the SEC should issue guidance that specifically addresses how advertisements on certain media – social media in particular – can remain compliant with the proposed rule. Again, the FTC is instructive. In November 2019, that agency issued updated guidance for social media endorsements entitled, “Disclosures 101 for Social Media Influencers.”²⁹ That guide, as well as its other related publications, provides, among other things, examples of social media disclosures that would and would not sufficiently disclose a material connection between an endorser and a brand.

Examples of clear disclosure language include, according to the FTC:

- #ad or Ad:
- Advertisement
- Sponsored
- Promotion
- Paid ad
- Thanks [COMPANY NAME] for the free product
- Thanks [COMPANY NAME] for the gift of [NAME] product
- #[COMPANY NAME]Ambassador
- #[COMPANY NAME]Partner

Examples of unclear disclosures include, according to the FTC:

- #[COMPANY NAME]ad (such as #cirocad, where Ciroc is the name of the company)
- #sp
- #spon
- #ambassador
- #partner
- #collab
- Thank you [COMPANY NAME] (without specifically saying what they are thanking the company for)

Thus, to achieve the SEC’s goal of establishing an evergreen rule that is applicable across all advertising media, the SEC should keep a medium agnostic rule but issue guidance specific to individual media that takes into account the specific issues presented by different advertising platforms.

f. *Consumer Experience with Testimonials*

The proposed regulations should not be premised on an underlying assumption that consumers are skilled at evaluating testimonials. The Notice states that “[c]onsumers that make purchases in online marketplaces may be experienced in reading reviews and evaluating any accompanying qualifications.”³⁰ Although consumers may have read reviews while online shopping, TINA.org’s experience is that many of consumers are not

adept at filtering out deceptive testimonials. Indeed, as the abundance of consumer complaints stemming from deceptive consumer testimonials demonstrates, a not insubstantial number of consumers are prey to deceptive schemes. Accordingly, the SEC should reconsider any parts of the proposed rule relying on that presumption.

* * *

TINA.org supports the SEC's efforts to inform consumer choice of investment adviser by allowing for advertisements containing testimonials, endorsements and third-party ratings. That said, TINA.org strongly urges the SEC to implement the aforementioned modifications to the proposed rule in order to minimize consumer deception.

Very truly yours,



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¹ Investment Adviser Advertisements; Compensation for Solicitations, 84 Fed. Reg. 237, at 67518 (Dec. 10, 2019) [hereinafter, "Notice"].

² Unless context dictates otherwise, the term "testimonials" shall encompass testimonials, endorsements, and third-party ratings.

³ See e.g., Stansberry and Associates, "Summary of Action," TINA.org, <https://www.truthinadvertising.org/stansberry-and-associates/>; Cancer Treatment Center of America, "Summary of Action," TINA.org, <https://www.truthinadvertising.org/cancer-centers-summary-action/>; "Cancer Treatment Center of America Database," TINA.org, <https://www.truthinadvertising.org/cancer-treatment-center-america-database/>; MyPillow, "Summary of Action," TINA.org, <https://www.truthinadvertising.org/mypillow-summary-of-action/>; NourishLife, "Summary of Action," TINA.org, <https://www.truthinadvertising.org/complaint-filed-against-nourishlife/>.

⁴ "DSA Companies' Income Claims Database," TINA.org, <https://www.truthinadvertising.org/mlm-income-claims-database/>.

⁵ Stansberry and Associates, "Summary of Action," TINA.org, <https://www.truthinadvertising.org/stansberry-and-associates/>.

⁶ See, e.g., “What You Should Know About iMarketsLive,” TINA.org, <https://www.truthinadvertising.org/what-you-should-know-about-imarketslive/>.

⁷ Notice, *supra* note 1, at 67538.

⁸ “A.G. Schneiderman Announces Settlement with Machinima and Three Other Companies for False Endorsement,” New York State Office of the Attorney General, Press Release, (Feb. 11, 2016) [hereinafter, “NYAG”], <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-machinima-and-three-other-companies-false>.

⁹ A Twitter and Annelect study found that nearly 40% of Twitter users claimed to have made a purchase as a direct result of a tweet from an influencer. “New Research: The Value of Influencers on Twitter,” Twitter (May 10, 2016), https://blog.twitter.com/en_us/a/2016/new-research-the-value-of-influencers-on-twitter.html. That study also identified a 2.7x increase in purchase intent when users are exposed to tweets from brands, but a 5.2x increase when users are exposed to tweets from brands and influencers. *Id.*; see also “Peers Have Influence Over Consumers, Celebrities Don’t,” Collective Bias (Mar. 29, 2016), <https://www.collectivebias.com/post/blog-2016-03-non-celebrity-influencers-drive-store-purchases> (finding that only 3% of consumers would consider purchasing a celebrity-endorsed product, while 30% would buy a product endorsed by a non-celebrity influencer.). This is, at least in part, because influencers rival friends in building user trust: 49% of twitter users rely on recommendations from influencers while 56% rely on recommendations from friends. *Id.*

Companies are not blind to these statistics and the influencer marketing industry is expected to grow from \$8 billion in 2019 to \$15 billion in 2022. See Schomer, Audrey, Influencer Marketing: State of the Social Media Influencer Market in 2020, Business Insider, (Dec. 17, 2019), <https://www.businessinsider.com/influencer-marketing-report>.

The same is true of consumer reviews and testimonials. A consumer survey by Bright Local found that 82% of consumers read online reviews for local businesses, with 52% of 18–54 year-olds saying they “always” read reviews, and the average consumer reads ten reviews before feeling able to trust a business. See Local Consumer Review Survey 2019, BrightLocal (Dec. 11, 2019), <https://www.brightlocal.com/research/local-consumer-review-survey/>. Importantly, the survey found that 89% of 35–54 year-olds trust online reviews *as much* as they trust personal recommendations. *Id.* Similarly, in the 2015 Nielsen Global Trust in Advertising Report, 66% of survey respondents indicated that they trust consumer opinions posted online. See “Recommendations from Friends Remain Most Credible Form of Advertising Among Consumers,” Nielsen (Sept. 28, 2015), <https://www.nielsen.com/eu/en/pressreleases/2015/recommendations-from-friends-remain-most-credible-form-of-advertising/>. A report by Podium found that 3.3 is the minimum star rating of a business that consumers would consider engaging in. See “State of Online Reviews,” Podium, <https://www.podium.com/resources/podium-state-of-online-reviews/>. And a Harvard Business School study estimated that a one-star rating increase on Yelp translated to an increase of 5%–9% in revenues for a restaurant. See NYAG, *supra* note 8. A separate study determined that restaurants “have stronger incentives to submit fake reviews when they have relatively few reviews” or has negative reviews. See Michael Luca and Georgios Zervas, “Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud,” *Management Science* Vol 62, No. 12, at 3409 (Dec. 2016).

¹⁰ Stansberry and Associates, “Summary of Action,” TINA.org, <https://www.truthinadvertising.org/stansberry-and-associates/>.

¹¹ See TINA.org’s List of Problematic Testimonials, <https://www.truthinadvertising.org/wp-content/uploads/2014/03/TINA.orgs-List-of-Problematic-Testimonials-used-to-Promote-Stansberry-Associates.pdf>.

¹² See Letter dated Mar. 11, 2014, https://www.truthinadvertising.org/wpcontent/uploads/2016/02/3.11.14-ltr-to-Stansberry_Redacted.pdf.

¹³ Of note, the FTC recently brought suit against Agora Financial, LLC for deceptively marketing the financial newsletter, *Lifetime Income Report*, and the book, *Congress’ Secret \$1.17 Trillion Giveaway*, by making false claims that their consumers are entitled to hundreds to thousands of dollars per month in “Republican Checks.” See Complaint, *FTC v. Agora Financial, LLC, et al.*, 13-CV-3100, Dkt. No. 1, (D. Md. 2019). Consumers can obtain the book and purportedly learn how to capitalize on this scheme by subscribing to the newsletter for \$49. As part of the marketing of their product, Agora Financial includes consumer testimonials, such as:

- “Kevin Larry, from Chicago.... [is] set to collect a massive check for \$44,577 this month. Imagine if that happened to you.”
- “Harry F., an 88 year old retiree from San Francisco, says: ‘I’ve collected close to \$12,000. I’m using the extra income to pay my bills.’”

¹⁴ Within this sampling of deceptive testimonials, many also promoted clinical trials (i.e., research endeavors with no guarantee of therapeutic benefit), as well as novel treatments, such as immunotherapy and/or experimental procedures, without clearly and conspicuously disclosing their limitations, risks and relative rarity.

¹⁵ See “Cancer Care: The Deceptive Marketing of Hope,” TINA.org, <https://www.truthinadvertising.org/cancer-care-the-deceptive-marketing-of-hope/>.

¹⁶ Proposed Rule 206(4)-1(b)(1)(ii).

¹⁷ 16 C.F.R. § 255.5.

¹⁸ “The FTC’s Endorsement Guides: What People Are Asking,” FTC.gov, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>; “Disclosures 101 for Social Media Influencers,” FTC.gov, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

¹⁹ Proposed rule 206(4)-1(a).

²⁰ Notice, *supra* note 1, at 67533.

²¹ Notice, *supra* note 1, at 67540.

²² See 16 C.F.R. 255.2(b).

²³ See, e.g., DSA Companies’ Income Claims, “Summary of Action,” TINA.org, <https://www.truthinadvertising.org/mlm-income-claims-summary-action/>; Nerium, “Summary of Action,” TINA.org, <https://www.truthinadvertising.org/nerium-summary-of-action/>; Team National, “Summary of Action,” TINA.org, <https://www.truthinadvertising.org/team-national-summary-action/>.

²⁴ Other companies have taken the position that linking to their annual financial disclosure statement is sufficient. However, simply hyperlinking to a detailed and dense document does change an otherwise deceptive testimonial.

²⁵ Notice, *supra* note 1, at 67543.

²⁶ Notice, *supra* note 1, at 67543 n.180.

²⁷ Notice, *supra* note 1, at 67540 n.167.

²⁸ Notice, *supra* note 1, at 67523.

²⁹ “Disclosures 101 for Social Media Influencers,” https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

³⁰ Notice, *supra* note 1, at 67538.