February 10, 2020

Via Electronic Filing

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

Re: Investment Adviser Advertisements; Compensation for Solicitations (SEC Rel. No. IA-5407; File No. S7-21-19)

Dear Ms. Countryman:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the proposed amendments to Rule 206(4)-1 (**Advertising Rule**) and Rule 206(4)-3 (**Solicitation Rule**) under the Investment Advisers Act of 1940 (**Advisers Act**).[2] These rules address investment adviser advertisements and payments to solicitors and have not been materially amended since their adoption in 1961 and 1979, respectively. We appreciate and support the Commission's efforts to modernize these rules to reflect the significant technological changes and market developments that have occurred in the intervening decades.

Our members are investment advisers registered with the Commission under the Advisers Act, and as such, the proposed amendments will have a profound impact on each of them – in most cases on a daily basis. We commend the Commission for taking this very important step towards improving the regulatory framework in these areas. The Commission's proposals would address many themes and issues the IAA has raised over the years with respect to these rules, especially relating to the benefits of a principles-based approach to regulation. We are concerned, however, that certain elements of the proposals would impose significant operational and compliance burdens and unduly impede important communications with investors.

We are committed to working constructively with the Commission as it moves to finalize a regulatory approach that is workable for advisers, allows investors to receive important information, and appropriately addresses investor protection concerns. We respectfully offer our

[1] The IAA is the largest organization dedicated to advancing the interests of SEC-registered investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Investment Adviser Advertisements; Compensation for Solicitations*, 84 Fed. Reg. 237 (proposed Dec. 10, 2019) (**Proposing Release**), https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.

thoughts and perspectives about the proposed rules as well as recommendations intended to assist the Commission as it works to modernize these rules. Following an executive summary of our recommendations, we first provide comments on the proposed Advertising Rule, and then provide comments on the proposed Solicitation Rule. Appendix A to this letter provides a summary of our review of existing SEC staff no-action letters for your consideration.

I. EXECUTIVE SUMMARY

The IAA strongly supports the Commission's retrospective review of existing regulations in light of how technology and the investment advisory profession and the clients it serves have changed.[3] The principles-based regime established under the Advisers Act has proven to be robust and effective in protecting investors while allowing the investment advisory profession to grow to the benefit of investors and the capital markets. Thus, we especially support the Commission's stated objectives of "proposing principles-based rules in order to accommodate the continual evolution and interplay of technology and advice."[4]

We are very concerned, however, that the breadth of the definition of "advertisement" coupled with the onerous new review and pre-approval requirement under the proposed Advertising Rule would make the rule exceedingly difficult to implement and hamper investors' access to information they want and expect. We also have concerns with the proposed expansion of the Solicitation Rule to cover solicitation of private fund investors – which we believe is already subject to appropriate oversight – and to include an extremely broad universe of direct and indirect benefits, that will be hard for firms to identify and administer in practice, without evidence of a nexus between the benefit and the referral.

A. Proposed Advertising Rule

The IAA has long advocated for the Commission to modernize the regulatory framework governing advertising by investment advisers. We have been at the forefront of identifying issues and offering potential solutions under the current framework, which we believe is unnecessarily complex, overly broad in reach, unduly prescriptive, and no longer functions effectively in the real world.[5] We have argued that the Advertising Rule should be amended to make it more effective and flexible. We have suggested that, at a minimum, the rule not be so prescriptive that

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[3] *See, e.g.*, Letter from Karen Barr to Walter J. Clayton on the Regulation of Registered Investment Advisers (May 10, 2017) (**IAA Priorities Letter**).

[4] Proposing Release at 11.

[5] *See* Letter from the Investment Counsel Association of America (**ICAA**) (former name of the IAA) to Paul F. Roye, Director, Division of Investment Management, Securities and Exchange Commission (Aug. 21, 2001) (proposing specific changes to Rule 206(4)-1 under the Advisers Act); ICAA Comment Letter to Proposed Amendments to Investment Company Advertising Rules (IC-25575) (July 31, 2002) (reiterating proposed changes to the Advertising Rule for advisers); ICAA, SEC No-Action Letter (pub. avail. Dec. 2, 2004) (discussing written communications to existing clients and responses to an unsolicited request by a client, prospective client, or consultant for specific information) (**2004 IAA Letter**); IAA Priorities Letter.

the SEC staff must frequently provide relief necessary to accommodate developing industry practices that do not introduce the risks that the rule is intended to prevent. We have also stressed that the general anti-fraud provisions of the Advisers Act,[6] which clearly apply to all communications made by investment advisers, effectively prohibit misleading advertising practices and protect investors from such practices and that the Advertising Rule should be tailored to situations where additional protections may be needed. We are pleased that the proposed Advertising Rule reflects many of these points.

We especially commend the Commission for its efforts to make the rule less prescriptive and more evergreen. Specifically, we appreciate and generally support:

- The proposed ***principles-based general prohibitions*** in lieu of *per se* prohibitions.
- The inclusion of specific disclosure-based guidelines for ***testimonials, endorsements, third-party ratings***, and ***references to specific security recommendations***.
- The provision of sensible guidance on the ***use of performance advertising***.
- The recognition of the ***distinction between retail and sophisticated investors***, including the type and amount of information they each expect and need.
- Efforts to replace the complex web of existing ***SEC staff no-action letters and guidance***.

We have significant concerns regarding two substantial and interrelated provisions of the proposed rule, however: (i) the expansive definition of advertisement that would bring virtually all adviser communications within potential scope of the rule and (ii) a procedural requirement that in practice would likely result in advisers being compelled to review virtually all communications directed at clients and potential clients prior to their use. As discussed below, and noted throughout our letter, the proposed definition of advertisement, coupled with the review and pre-approval requirement, in our view create the single most concerning aspect of the Commission's proposed Advertising Rule and would significantly undermine much of what the Commission is intending to accomplish. We offer specific recommendations to address this concern that we believe are consistent with the Commission's stated objectives.

The proposed definition of advertisement is overly inclusive and would blur the line between client servicing and marketing. We believe that the proposed definition is far too broad and will have the unintended consequence of impeding communications between advisers and investors that do not raise the risks the rule is trying to address. We offer revisions to the proposed definition that we believe will more appropriately balance these concerns. Our recommendations in this regard would, among other things: remove "one or more" from the proposed definition in favor of a workable *de minimis* threshold whereby only communications to ten or more persons would be considered an advertisement; provide more clarity regarding

[6] Section 206(4) of the Advisers Act.

communications with existing clients so as not to impede prompt and open discussion regarding the advisory relationship by removing the ambiguous "or retain" language and providing an exclusion for communications with existing clients that do not explicitly offer or promote additional investment products or advisory services; and remove the "by or on behalf" language because this over-inclusive standard would make advisers responsible for communications by independent third parties that are not in their control.

The list of targeted exclusions should be expanded to further refine the definition. In addition to the proposed exclusions from the definition, we also suggest excluding: (i) materials consisting primarily of educational content, market commentary, or similar communications; (ii) responses to unsolicited requests that are reasonably responsive to the inquiry; and (iii) subsequent due diligence communications between a prospective non-retail client and advisers related to a written inquiry. We also suggest refinements to the proposed exclusion for responses to unsolicited requests relating to hypothetical performance.

The proposed review and pre-approval requirement would impose enormous burdens and constraints. The proposed procedural requirement that designated personnel review and pre-approve certain advertisements prior to use would be extremely onerous and would, in practice, hinder the work of compliance professionals, result in frequent inadvertent foot faults, and not achieve the Commission's stated goals of avoiding significant burdens and delays in individual communications with investors. In practice, designated personnel would need to review virtually all communications to determine whether pre-approval is required, which will cause the actual burden of compliance to be much heavier than the Commission appreciates. We strongly recommend withdrawal of this proposed requirement. As noted in the Proposing Release, advisers are required under the Advisers Act Rule 206(4)-7 (**Compliance Rule**) to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advertising Rule and conduct an annual review of their adequacy and effectiveness. Advisers should be permitted the continued flexibility to tailor their compliance programs to their businesses operations, including with respect to advertising usage and approval processes.

With respect to certain other areas of the proposals,[7] we request clarification and offer recommendations, for example that the Commission:

- Provide greater clarity regarding the ***use of social media*** and ***electronic communications*** (*e.g.*, permitting hyperlinking disclosures).

- Expand the definition of non-retail person to include ***qualified clients*** and sophisticated financial ***intermediaries***.

[7] With respect to the proposed amendments to Form ADV, we appreciate the Commission's goals in requiring advisers to provide certain additional information regarding advertisements. However, we have significant concerns regarding the level of specificity and burdens that would be imposed by the extensive list of potential additional disclosure items on which the Commission seeks comment. Given the breadth and complexity of the proposed amendments to the Advertising Rule and the Solicitation Rule, we strongly urge the Commission not to consider any additional amendments to Form ADV as part of this rulemaking.

- Revise the definition of hypothetical performance to exclude useful ***target, projected***, and certain forms of ***model performance*** that do not present enhanced risk to investors.

- Codify existing guidelines and practices for allowing ***performance portability***.

B. Proposed Solicitation Rule

The IAA supports modernization of the Solicitation Rule. However, we believe that aspects of the proposed amendments would result in redundant regulation of certain solicitors. We also believe that the Commission should narrow the overbroad scope of other aspects of the rule. We offer the following recommendations:

Exclude solicitation of private fund investors from the scope of the proposed rule. Including solicitors of investors in private funds in the rule would subject investment advisers to substantial operational and compliance obligations without a commensurate benefit to such investors. We believe that the Commission's concerns are already addressed through separate, existing laws and regulations.

Cover only those situations where the adviser and solicitor have a mutual understanding as to the purpose of the compensation. The Solicitation Rule should only apply to situations where the adviser and the potential solicitor have established a mutual understanding as to benefits that are or will be provided as compensation for solicitation activities on behalf of the adviser.

Limit the application of the proposed rule to specific types of non-cash compensation. We are concerned that applying the Solicitation Rule to all forms of direct or indirect compensation would be overbroad, and would impose significant burdens on advisers relative to the little discernable extra investor protection. To the extent that the rule covers the payment of non-cash compensation, we recommend that the Commission include a narrow and specific definition that better aligns with situations in which both the compensation and its purpose are clear.

We also offer the following suggestions:

- Further streamline the ***solicitor disclosure*** delivery and timing requirements.

- Tailor the ***disqualification provision*** to avoid imposing vicarious liability merely by virtue of affiliation.

- Exempt compensation of ***intermediaries*** when required by potential clients.

- Address ***"refer-a-friend"*** programs and raise the ***de minimis*** threshold.

We provide our specific comments on each of these and other topics below.

II. PROPOSED ADVERTISING RULE

Advertisements by registered investment advisers are subject to Rule 206(4)-1 under the Advisers Act, which currently provides both a general anti-fraud prohibition as well as specific prohibitions against certain sales practices or advertising by investment advisers that are considered to be *per se* misleading or fraudulent regardless of intent. In the almost 60 years since adoption, the regulatory scheme that has developed under the Advertising Rule has become a complex maze of enforcement actions and staff no-action letters that are difficult to decipher and apply to evolving circumstances. Indeed, an unfortunate consequence of the current rule is that it restricts the ability of an investment adviser to provide complete and accurate information to investors that may be useful in making or evaluating investment decisions.

The Commission is proposing to replace the current Advertising Rule with a rule that is intended to provide a more principles-based approach to regulating communications between investment advisers and investors. We applaud the Commission for its efforts and broadly support many elements of the proposed rule. In particular, we are supportive of the general anti-fraud prohibitions in the proposed rule, the replacement of specific *per se* prohibitions on past specific recommendations and testimonials with disclosure principles, the recognition of distinctions between retail and sophisticated investors – particularly relating to performance, and the sensible guidance regarding the calculation of net performance.

However, we are very concerned that a significant expansion of the scope of the rule coupled with the imposition of a new review and pre-approval requirement will impose significant operational and compliance burdens on investment advisers and materially impede their ability to communicate with existing and prospective investors without a commensurate increase in investor protection. As discussed below, we recommend that the Commission reconsider the breadth of the definition of "advertisements" subject to the rule, as well as the proposed addition of overly complex and, we believe, unnecessary prescriptive rules regarding the presentation and pre-approval of those advertisements.

A. Definition of "Advertisement"

The proposed definition of "advertisement"[8] is intended to be "flexible enough to remain relevant and effective in the face of advances in technology and evolving industry practices."[9]

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[8] The current rule defines "advertisement" to include, in pertinent part, any "notice, circular, letter or other written communication addressed to more than one person, or any notice or other written announcement in any publication or by radio or television, which offers," among other things, "any . . . investment advisory service with regard to securities." 17 CFR § 275.206(4)-1(b).

The proposed rule would greatly expand the definition to include "*any* communication, disseminated by *any means*, *by or on behalf of* an investment adviser, that *offers or promotes* the investment adviser's investment advisory services or that seeks to *obtain or retain one or more* investment advisory clients or investors in any *pooled investment vehicle* advised by the investment adviser." (emphasis added) Proposed Rule 206(4)-1(e)(1).

We strongly support the Commission's goal of establishing an evergreen definition of advertisement that will remain relevant as methods and platforms used for communication continue to evolve. As discussed below, however, we are concerned that the definition as proposed is overly broad, will subject many communications that are not "advertisements" in the traditional sense of the word to unnecessary and burdensome content and procedural requirements, and will have a chilling effect on communications between advisers and their clients, particularly in light of the onerous review and pre-approval requirement that would be imposed on advertisements under the proposed rule. All communications made by an adviser are subject to the anti-fraud provisions of the Advisers Act, and we believe that the additional protections of the Advertising Rule should apply only to those types of communications that raise investor protection risks not already addressed under the general anti-fraud provisions.

For the reasons discussed below, we recommend the following definition of "advertisement" for purposes of the Advertising Rule:[10]

> "*Advertisement* means any communication by an investment adviser to more than ten (10) persons, disseminated by any means, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain investment advisory clients or investors in any pooled investment vehicle[11] advised by the investment adviser."

Specifically, we are recommending that the definition of "advertisement" not:

- *Be overly expansive*. The Commission should remove the "one or more" language in the rule text and instead limit its scope to communications made to more than ten persons.
- *Impede communications with existing clients*. The Commission should remove "or retain" from the rule text and add an explicit exclusion for communications about the advisory services currently provided by the adviser to existing clients or investors in pooled investment vehicles.
- *Reach communications outside of the adviser's control*. The Commission should remove "by or on behalf of" from the rule text in favor of well-established anti-circumvention principles that address the Commission's concerns.

As discussed below, we believe that our recommendations regarding the definition of "advertisement" and the exclusions from that definition would appropriately capture the types of communications that should be subject to the Advertising Rule and preserve the ability of

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[9] Proposing Release at 21.

[10] We note that corresponding changes would also need to be made to Rule 204-2 (**Recordkeeping Rule**) to reflect our recommendations.

[11] Although we have not recommended removing communications to investors in pooled investment vehicles from the definition of advertisement, we note that the inclusion of pooled investment vehicles creates certain unique challenges that are discussed throughout this letter.

advisers to communicate with and provide relevant information to existing and prospective clients regarding investments.

1. The definition of "advertisement" should be appropriately tailored to communications intended to be broadly disseminated and not capture routine day-to-day communications.

The scope of the proposed definition of "advertisement" includes many communications that do not meet the common-use definition of "advertising." It would, for example, reach many one-on-one or other routine communications with existing or prospective clients that should not logically be considered advertisements. In our view, communications that are widely disseminated or directed to the general public warrant the enhanced protections of the Advertising Rule, but the rule should be appropriately tailored to capture only those types of communications and not routine day-to-day communications by investment advisers.

We believe that appropriate tailoring could be achieved by establishing a *de minimis* number of recipients, which would serve to exclude one-on-one and other routine day-to-day communications from the scope of the rule. Specifically, we recommend that the Commission apply the definition to communications to more than ten persons.[12] Using a numerical threshold would provide clarity and a workable guideline that is easily understood by both compliance professionals and other personnel at investment advisers.[13] This clarity would also facilitate the application of reasonable and effective advertising-related compliance policies and procedures that advisers are already required to have. We believe that our recommended *de minimis* threshold strikes an appropriate balance and would better capture the types of communications that warrant the protections of the Advertising Rule.[14]

The Commission has correctly noted that expanding the scope of the rule to include one-on-one communications could affect the ability of advisers to communicate directly with clients in writing and would impose significant compliance burdens. The proposed rule attempts to address these concerns by providing an exclusion from the review and pre-approval requirement for one-on-one communications. However, we note that due to practical considerations, the proposed exclusion may not achieve the goal of addressing these concerns to the extent the Commission intends. Take, for example, a client services representative who sends an email to a client discussing the client's investments. Subsequently, the representative determines that some portion of the same information could be helpful to another client. The representative would typically cut-and-paste the same information in a subsequent email to the other client. Under the proposed rule, the representative would have had to determine, even before sending the first

[12] We suggest that the Commission make clear in the adopting release that the same communication to multiple natural persons representing a single institution or client/account counts as a communication to a single person.

[13] We also note that the proposed ten person threshold is derived from the current Recordkeeping Rule with which advisers are already familiar.

[14] As discussed below, should the Commission determine not to provide a *de minimis* threshold for ten persons, we are recommending that, in the alternative, the proposed exclusion from the review and pre-approval for one-on-one communications be increased to more than ten persons.

email, whether this information would be an advertisement, and if so, whether additional information would have to be provided and be pre-approved.

We understand that the Commission is proposing to expand the definition to capture one-on-one communications out of the concern that excluding such communications could create a workaround for communications that are nominally "addressed to" one person, but are actually widely disseminated (*e.g.*, emails that appear to be personalized but are in fact bulk emails).[15] As noted above, we agree that communications that are intended to be widely disseminated to the public *should* be considered advertisements under the rule. We believe that our recommendation of explicitly limiting the scope of the definition to communications to more than ten persons effectively captures communications that are intended to be disseminated to a wide audience while appropriately excluding tailored communications with prospective or existing clients. We suggest that the specific concerns cited by the Commission in the Proposing Release could be addressed through our recommended revision to the proposed definition.[16]

Our proposed *de minimis* threshold would result in certain communications that offer or promote advisory services not being advertisements for purposes of the Advertising Rule if they are given to ten or fewer persons. However, in our view, to the extent that these communications are standardized and/or prepared for general use, they would nonetheless likely be deemed as advertisements subject to the rule. For example, the adviser may prepare sales or marketing materials (*e.g.*, pitch books) that are generally available for use by firm personnel. While these materials are typically used in one-on-one meetings with prospective clients, they are clearly advertisements and treated as such under the current advertising rule irrespective of the *de minimis* threshold because the materials are in fact intended to be disseminated to more than one prospective client. We would similarly expect that sales or marketing materials would be deemed advertisements under our proposed *de minimis* threshold if the materials are provided to, or intended to be provided to more than ten persons, or to an indeterminate number of persons. If the Commission believes that this construction is not clear or may be subject to abuse, it could clarify this point in the adopting release.

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[15] *See* Proposing Release at 42. We note that the Commission did not articulate a reason in the Proposing Release for including one-on-one communications within the definition of advertisement other than in the context of providing an exclusion for such communications from the proposed review and pre-approval requirement.

[16] At a minimum, we recommend that the existing *de minimis* threshold of "more than one" be maintained rather than expanding the definition to include one-on-one communications. Conversely, for ease of compliance and regulatory consistency, we would also support increasing the threshold to more than 25 persons as used in FINRA Rule 2210.

Moreover, to the extent that the definition has been broadened "in order to prevent any evasion of a rule covering communications 'addressed to' one person," we note that the concern is already addressed by the anti-circumvention provision of Section 208(d) of the Advisers Act, which prohibits a person from doing indirectly any act or thing that it would be unlawful for such person to do directly under the Advisers Act or any rule thereunder. Establishing redundant anti-circumvention protections within the Advertising Rule is not necessary, particularly when Section 206(4) of the Advisers Act already provides the Commission broad authority to take action against an investment adviser that includes a fraudulent or misleading statement in any communication.

Thus, we believe that on balance the additional compliance burdens that would be imposed on advisers to review virtually all communications to determine whether they are advertisements, combined with the impediments to important non-marketing communications with investors, would substantially outweigh the incremental benefits of attempting to include these communications within the scope of the Advertising Rule.

2. **The "or retain" language should be removed from the definition and the Commission should provide a tailored exclusion for communications with existing clients to avoid blurring the line between client servicing and marketing and chilling communications with existing clients.**

The proposed rule would define "advertisement" to include communications that are disseminated "to offer or promote" the investment adviser's investment advisory services or that seek to "obtain or retain" investors. We are concerned that the proposed definition is so broad that it would blur the line between client servicing communications and marketing in a way that will inhibit the free flow of information between advisers and their clients, and even inhibit the provision of advice to clients.

We recognize that the Proposing Release restates existing staff guidance that communications to existing investors about the performance of their accounts "would not be promoting the adviser's services or be used to obtain or retain investors,"[17] and therefore would not be advertisements. However, the Proposing Release also states that if these communications contain general market commentary,[18] promotional language, or positive information about the adviser, they could be viewed as efforts to "retain" investors that would constitute advertisements and be subject to the rule. Advisers often provide market commentary or narrative portfolio updates along with client account statements. Clients value and expect this information from their advisers, and consider it part of the advisory services for which they engaged the adviser. We also note that the proposal would go beyond the SEC staff's current guidance with respect to communications with existing clients. We believe the increased regulatory risk and compliance burden would have a chilling effect and substantially impede prompt, detailed, and thorough communications by advisers to their clients. We are concerned that this would negatively affect a client's ability to receive advice and make informed decisions or ask important questions. Routine communications to existing clients should not be considered advertisements.

In addition, even beyond examples in the release, advisers would have difficulty determining when a communication to an existing client is solely a communication regarding the advisory services provided by the adviser, and when it is a communication designed to "retain"

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[17] *See* Proposing Release at 31; *see also* Investment Counsel Association of America, Inc., SEC No-Action Letter (Mar. 1, 2004) (**ICAA Letter**).

[18] The Commission does not explain why an adviser's commentary on financial markets, absent a specific entreaty to maintain a relationship with the adviser or other promotional language, would be considered a communication designed to "retain" a client.

the client. Other examples of statements that could render routine client communications advertisements under the proposal include:

- An explanation for the reasons behind good or bad performance over a preceding period;
- A comparison of client performance to an index absent a specific client request;
- Information regarding personnel changes at the adviser;
- An invitation to contact the adviser to discuss portfolio performance or other aspects of advisory services;
- Statements regarding an adviser's expectations for markets in the coming investment period, and how a client may mitigate risks;
- Individualized recommendations regarding changes to a client's investment profile in contemplation of changes to the client's specific situation;
- Information regarding enhancements to the investment and risk management processes at an adviser;
- Information regarding changes to the cybersecurity protocols at an adviser;
- An explanation of changes to an adviser's trade rotation methodology and the reasons for the changes;
- Information regarding the tax consequences of selling an investment;
- Communications that the adviser is contractually obligated to provide to clients or pooled fund investors;
- Communications related to regulatory developments that could affect the relationship or investments; and
- A single communication (*e.g.*, email) to all clients following a market event urging calm and/or discussing the potential consequences of the event.

In our view, each of these examples is a routine, non-marketing communication from an adviser to its clients and is designed to ensure that clients are kept informed and apprised of the advisory services being provided by the adviser, including material information that could impact investments. None of these examples should be considered an advertisement. Yet, each of these examples could also be construed as an effort to "retain" the client, because the distinction between communications designed to inform clients and communications designed to retain clients – both as set forth in the proposed rule and as interpreted in the Proposing Release – is entirely subjective. In practice, virtually all communications made by an adviser to an existing client could be viewed as communications that seek to retain such client.

To the extent that communications to clients regarding the advisory services provided by the adviser are swept into the definition of advertisements, the regulatory risk that a communication could be miscategorized is substantial. As a practical matter, an adviser's chief compliance officer or another specially trained compliance professional may need to review virtually every communication with existing clients to determine whether it is an advertisement under the rule, at enormous cost and foreseeable impairment of the prompt and open delivery of information to advisory clients. We therefore strongly believe this aspect of the proposed definition should be changed by entirely removing "or retain" from the rule text.

We also recommend that the Commission provide clarity on what types of communications with existing clients will and will not be considered advertisements by adding an explicit exclusion from the definition of advertisement for communications to existing clients about the services *currently provided* by the adviser to such clients.

We agree with the Commission that communications to existing clients that promote new or additional advisory services or encourage clients to change or increase the size of existing mandates that go beyond the scope of the agreed upon engagement do in fact "offer or promote" advisory services and are appropriately within the scope of the Advertising Rule.[19] However, we do not believe it is appropriate to subject to the Advertising Rule communications with existing clients about the advisory services currently provided by the adviser. We recommend that the Commission, in explaining the exclusion we are requesting, elaborate on existing guidance on communications with existing clients and draw a clearer line between communications around current advisory services and the marketing of additional services. At a minimum, we believe the Commission should make clear in the adopting release that communications by the adviser "regarding advisory services currently provided by the adviser" capture the adviser's provision of advice within the scope of the agreed-upon relationship as well as other routine communications about the client's account, investments, investment strategy, or personal circumstances,[20] as well as communications about the adviser or the adviser's market views such as those included in our list of examples above, and information the adviser is contractually required to provide.

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[19] In 2004, Commission staff recognized in relief provided to the IAA (then known as the Investment Counsel Association of America) that written communications by advisers to their existing clients about the performance of the securities in their accounts are not offers of investment advisory services but are part of the adviser's advisory services. *See* ICAA Letter. The staff's letter states that, "[i]f, however, the context in which the past specific recommendations are presented by the investment adviser to an existing client suggests that a purpose of the communication is to offer advisory services, we would conclude that the communication was an advertisement."

We note that an adviser that recommends, for example, allocating more assets to an IRA so that the client can meet its retirement goals should not be viewed as promoting new or additional advisory services but should appropriately be deemed giving investment advice within the scope of the agreed upon advisory relationship.

[20] Individual investment adviser representatives often cultivate personal relationships with clients and may send non-financial communications *e.g.*, by sending happy birthday messages or other messages tied to significant life events, or by "checking in" to see what is new in the client's life. Although the intent of such communications may, at least in part, be to retain clients, such communications should not be considered advertisements in the absence of factors that would indicate that they are promoting new or additional advisory services.

These communications are all subject to the anti-fraud provisions and the protections of the fiduciary duty and we do not believe that any additional marginal benefit outweighs the substantial burdens on advisers and the potential harm to clients from insufficient and delayed communications with their advisers. Consequently, in addition to removing the "or retain" language from the definition as we recommend above, we recommend that the Commission add an express exclusion for:

> "A communication by an investment adviser to one or more existing clients or investors in any pooled investment vehicle advised by the investment adviser regarding advisory services currently provided by the adviser to such clients or investors."

3. The breadth of the phrase "by or on behalf of" implicates many practices that generally would not be considered advertisements under the adviser's control.

The proposed rule would define "advertisement" to include all communications "by or on behalf of an investment adviser." As a result, advertisements disseminated by intermediaries (*e.g.*, affiliates, consultants, and solicitors) that relate to an adviser's services may subject advisers to liability under the rule. The breadth of the term "by or on behalf of" implicates many practices that generally would not be considered advertisements under the control of the adviser. We thus recommend that the Commission remove the term from the rule and make additional clarifications in the adopting release as discussed below.

Under the proposed definition of advertisement, depending on the facts and circumstances, an adviser may be liable for the content of a third party's communication if, for example: (i) the adviser provides data or other information to intermediaries that prepare their own materials; (ii) the adviser reviews, revises, or approves (explicitly or implicitly)[21] certain information in materials prepared primarily by a third party; (iii) an affiliate of the adviser prepares materials for use in foreign jurisdictions with respect to investment products subadvised by the adviser; or (iv) the adviser provides information or comments to the press in the ordinary course.[22]

In each case, the risk that these materials will be considered advertisements and subject to the full requirements of the rule (including both requirements as to content and as to review and pre-approval) will have a chilling effect on the adviser's involvement in the communication of information to investors. We believe that an unintended outcome of this dynamic could be to discourage the adviser's involvement in reviewing third-party materials. For example, advisers

[21] For example, there are often situations where the adviser is generally aware of materials being disseminated by third parties that it has not explicitly approved or endorsed.

[22] The Commission asserts in the Proposing Release that "[i]f an advertisement were disseminated without the adviser's authorization … such an unauthorized communication would not be 'by or on behalf' of the adviser." Proposing Release at 24. While we believe that this guidance is helpful, we also believe that there may be situations where an adviser generally authorizes third parties to use information that it provides, but does not have the opportunity to ensure that each advertisement disseminated by the third party is in strict compliance with the Advertising Rule.

may hesitate to provide factual statements or data to investment consultants and information aggregators or engage in discussions with them about the information or data for fear that this would be viewed by the Commission and its staff as an implicit adoption or authorization of the third party's statements. While we would argue that Section 206 of the Advisers Act imposes an obligation to correct factual errors when found, we believe that discouraging an adviser from sharing accurate information and engaging in related discussions because of increased regulatory risk is contrary to the interests of the investing public. We are concerned that the proposed rule could result in a larger number of third-party communications about the adviser that contain inaccurate or misleading information.

The requirement also introduces difficulties with respect to the marketing of advisory services or of pooled investment vehicles advised by a U.S. investment adviser in non-U.S. jurisdictions. Institutional investment advisers will frequently rely on non-U.S. affiliates to market their strategies in non-U.S. jurisdictions. Other advisers hire non-U.S. distributors of fund interests. In each case, the U.S. adviser relies on the expertise of the non-U.S. intermediary to ensure compliance with local requirements as to content and distribution practices. By deeming these communications advertisements subject to the requirements of the rule, the Commission introduces the potential for inconsistencies between U.S. requirements, on the one hand, and local requirements (*e.g.*, European PRIIPS regulation that *require* the presentation of projected performance information) and customs (*e.g.*, customary practice of *not* obtaining qualified purchaser representations of non-U.S. persons), on the other.

The chilling effect described above may also unduly restrict adviser communications with *bona fide* press in the ordinary course, such as interviews or articles on market events, regulatory and industry news, and business developments. Advisers should be able to engage with *bona fide* press in the ordinary course without each such communication being deemed an advertisement. Otherwise, the flow of accurate, non-misleading information to the public will be impeded significantly. Whether or not the Commission retains the term "on behalf of" in the definition of advertisement, we recommend that it clarify in the adopting release that communications with *bona fide* press are beyond the scope of the Advertising Rule.

A related issue is the treatment of reprints of newspaper, magazine, or other independently produced materials. Presently, these reprints are not subject to the prescriptive provisions of the current rule,[23] but they would be advertisements under the proposed rule. We believe these reprints, provided that the investment adviser has not materially altered their content other than to correct factual errors and any other changes required to make the reprint consistent with the anti-fraud rules,[24] should not be considered advertisements as they provide

[23] *See* Kurtz Capital Management, SEC No-Action Letter (pub. avail. Jan. 18, 1988) (stating that *bona fide* unbiased third party reports are generally not subject to the prohibition against testimonials and the distribution of a *bona fide* article drafted by an unbiased third party is not subject to the requirements of Rule 206(4)-1(a)(2) where past specific recommendations happen to be referred to within the article, but such reprints are subject to the prohibition against misleading and fraudulent advertisements under Rule 206(4)-1(a)(5)).

[24] *See* Stalker Advisory Services, SEC No-Action Letter (pub. avail. Jan. 18, 1994); New York Investors Group, Inc., SEC No-Action Letter (pub. avail. Sept. 7, 1982).

accurate, non-misleading information to the public from an unbiased, third-party source. We suggest that the Commission clarify this point in the adopting release as well.

For the reasons discussed above, we recommend that the Commission remove the "by or on behalf of" language from the definition and instead continue to rely on the lead-in language to the proposed rule that covers both direct and indirect advertising by an adviser, as well as the anti-circumvention provision of Section 208(d) of the Advisers Act. We believe these provisions are sufficient to address the stated concern, and more appropriately tailored in that the adviser must actually "do [an] act or thing" directly or indirectly to be liable for such act or thing, rather than potentially incurring liability for something done by a third party "on behalf of" the adviser, which captures many actions that are not necessarily under the control of the adviser.

B. Exclusions from the Definition of "Advertisement"

Under the proposed rule, certain types of communications would be explicitly excluded from the definition of "advertisement" including": (i) non-broadcast live oral communications; (ii) responses to certain unsolicited requests; (iii) communications relating to registered investment companies (**RICs**) and business development companies (**BDCs**);[25] and (iv) information required[26] by statute or regulation. We support the Commission's codification in the proposed rule of specific exclusions from the definition of "advertisement." However, the exclusions as proposed are too narrow and will result in a far greater number of communications being deemed advertisements than necessary to achieve the Commission's investor protection goals. We make several recommendations below that we believe would lessen the potential compliance burden on advisers by excluding from the definition of advertisement certain other communications that do not present a significant risk of misleading investors.

1. Educational communications, market commentary, "thought" pieces, white papers, and similar communications should be excluded.

The Commission should clarify in the adopting release or provide an explicit exclusion under section (e)(1) of the proposed rule that communications consisting primarily of educational content, market commentary, research, "thought" pieces, white papers, and similar

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[25] As proposed, any materials prepared by a RIC within the scope of rule 482 or rule 156 under the Securities Act of 1933 (**Securities Act**) would be excluded. We suggest the Commission also clarify that all of the following communications are similarly excluded: Investment Company Act Rule 34b-1 (sales literature deemed to be misleading), Securities Act Rule 135a (generic advertising), Securities Act Rule 163B (closed-end fund and BDC "test the waters"), and proposed Securities Act Rules 164 and 433 ("free writing prospectuses" proposed rules under Securities Offering Reform for Closed-End Investment Companies, https://www.sec.gov/rules/proposed/2019/33-10619.pdf).

[26] We recommend revising the exclusion for "information required by statute or regulation" to "information reasonably responsive to statutory or regulatory requirements." We believe this adjustment would provide greater flexibility and encourage transparency in regulatory filings. For example, if the exclusion were limited to only "required" information, an adviser may be hesitant to include additional detailed explanations on its Form ADV or Form 10-Q quarterly report that, while not strictly "required," would assist the reader in understanding the information presented, if the addition could cause the filing to be considered an advertisement.

communications that do not promote specific investment products or the potential benefits of engaging the services of an investment adviser are not advertisements.[27]

The Commission noted in the Proposing Release that "an adviser that disseminates a newspaper article about the operation of investment funds or the risks of certain emerging markets would generally be circulating educational materials and not offering or promoting the adviser's own services."[28] While this guidance is helpful, its scope is far too narrow and it presents many concerning questions, including:

- Is educational material prepared by an adviser, rather than third-party material circulated by the adviser, inherently an advertisement?
- Does the mere inclusion of an invitation to call an adviser transform a communication that does not otherwise offer or promote advisory services or seek to obtain or retain clients or investors into an advertisement?
- Is a communication that provides general commentary on market trends, risk control, or principles of security analysis an advertisement because it may improve the client's opinion of the adviser's expertise even if it is not intended to solicit the client to take any additional action?
- What about communications that provide political risk analysis, personal finance recommendations, or other matters that do not relate to securities, but are nevertheless valued by clients?

In each of these cases, we believe that investment advisers should be able to freely communicate with clients, prospective clients, and the public at large without the burden (including the utilization of significant compliance resources and expert counsel) of having to determine whether the form and content of the communication reveal an intent on the part of the adviser to obtain (and, if applicable, retain) investors. Subjecting these types of communications to the full scope of the Advertising Rule is unnecessary[29] and, in fact, may reduce the amount of useful information investors receive that is vital to their ability to make an informed decision about their investments. Consequently, we recommend that the Commission add an express exclusion for:

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[27] Other examples of communications we would deem to be educational in nature include financial analysis tools that do not reference the adviser's products and free online calculators. The Commission should also clarify that promoting a "non-advisory" service (*e.g.*, tax planning) by itself would not subject such communications to the Advertising Rule.

[28] Proposing Release at 32.

[29] We note again that, to the extent the communication contains content that is actually fraudulent, deceptive, or misleading, the Commission retains authority under Section 206 of the Advisers Act to take appropriate action.

> "A communication by an investment adviser that contains educational material, research, or market commentary, and does not promote specific investment products or discuss the potential benefits of the advisory services offered by the investment adviser."

2. The proposed exclusion for responses to unsolicited requests should be modified to include information "reasonably responsive" to a client's inquiry.

The proposed rule would exclude from the definition of "advertisement" any communication that "does no more than respond to an unsolicited request for information specified in such request."[30] Guidance in the Proposing Release states that "if the adviser were to include additional information beyond what was specifically requested, that additional information would not qualify for the exclusion if the additional information met the definition of 'advertisement.'"[31] The guidance clarifies that the communication would not be an advertisement if the additional information provided is "necessary to make the requested specific information not misleading" (*i.e.*, clarifying disclosures).[32] We agree with the Commission's intent to exclude responses to unsolicited requests from the definition of advertisement which, as proposed, is mostly consistent with existing SEC staff guidance. However, we have concerns regarding the utility of the exclusion in practice given the extremely narrow interpretive guidance provided in the Proposing Release.

First, we believe that the Commission should clarify in the adopting release that a response to a Request for Proposal (**RFP**) issued by a prospective client or an institutional investment consultant – whether published online or through other means – would be considered an unsolicited request even if the RFP was generally issued to the market and not submitted to one or more specific advisers. Investors and their agents frequently issue RFPs that invite responses from any qualified adviser, and we believe that advisers would benefit from clarity that these RFPs would be treated as unsolicited requests for purposes of the Advertising Rule.

Furthermore, advisers often maintain a bank of prepared responses to RFP questions that are used by the adviser's employees when compiling responses to RFPs. There are good policy reasons to permit these standard responses to provide additional detail beyond what is specifically requested in a given question. By providing additional detail in response to RFP questions, an adviser is able to provide information to prospective clients that it believes would best inform the client regarding the adviser's business and, in many cases, such information is necessary to provide a complete response, even if it is not "necessary to make the requested specific information not misleading." Under the guidance in the Proposing Release, an adviser's entire library of RFP responses would become "advertisements" subject to all of the rule's requirements, simply because the standard responses provide additional detail beyond what is "necessary" to respond to a specific inquiry. For example, if an RFP requests biographical information on the senior portfolio managers of a particular strategy and the adviser provides

[30] Proposed Rule 206(4)-1(e)(1)(ii).

[31] Proposing Release at 47.

[32] *Id.*

biographical information for two senior portfolio managers *and* for three junior portfolio managers because the adviser believes that having information regarding the junior portfolio managers could help provide a more comprehensive understanding of the overall portfolio management team, the response could be considered an advertisement because the additional information was not strictly "necessary" to make the information about the senior portfolio managers not misleading. We suggest that, instead, the Commission permit provision of additional information that is intended to assist the prospective client in making an educated decision to engage the adviser, and is clearly not misleading.

In addition, there may be circumstances where including information "beyond what was specifically requested" is necessary for a prospective client or investor to have a complete picture, but where omitting that information would not render the response misleading. In particular, the prohibition could prevent advisers from responding to questions a prospective client or investor does not know to ask, but that may be highly relevant to a prospective client or investor's decision making. For example, a prospective client might ask an adviser for information about using a particular strategy to help meet a specific objective (*e.g.*, investing for retirement). If the adviser typically recommends a different strategy for most clients with that objective, that might be highly relevant information for the prospective client. Nonetheless, including that information would likely transform the response into an advertisement, with the associated disclosure, review and pre-approval, and recordkeeping requirements. Consequently, in the absence of a broader exclusion, advisers may refrain from providing this information to prospective clients and investors, depriving them of important and relevant information relating to their retirement objectives.

Uncertainty in determining whether a communication "includes information beyond what was specifically requested" will inhibit full and fair disclosure because advisers will require significant compliance resources and counsel to determine how to treat communications that are in fact responsive to client inquiries, but may not be strictly limited to the question that was asked. In practice, short of individually reviewing each communication, compliance personnel will struggle to implement any testing or periodic review procedure that could effectively ensure that communications in response to client requests are not advertisements subject to review and pre-approval. At a minimum, we believe that the guidance set forth in the Proposing Release should be revised in the adopting release to include any information that is "reasonably responsive" to the specific request, rather than only the information that is "necessary" to the response. However, we believe a better approach would be to revise the text of the proposed rule to reference "a communication by an investment adviser that is reasonably responsive to an unsolicited request…" rather than "a communication by an investment adviser that does no more than respond to an unsolicited request…" as we believe the latter formulation is very challenging in practice as discussed above.[33]

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[33] We recognize that our recommendation in this regard goes beyond the guidance that was provided in the ICAA letter. The Commission's fresh look at all aspects of the Advertising Rule creates an opportunity for the Commission to consider whether prior staff guidance could be refined to better address compliance challenges for advisers and potential benefits to investors. We believe that this is one such opportunity. We also recommend that the

3. Non-retail due diligence materials should be explicitly excluded from the definition of advertisement.

The Commission should explicitly exclude from the definition of advertisement all subsequent communications between a prospective non-retail client or investor and an adviser about a particular investment product or service that follow a written expression of interest by the prospective client in the investment product or service (**Due Diligence Exclusion**). We recommend that the Due Diligence Exclusion would operate regardless of whether the initial communication is solicited or unsolicited. Such an exclusion would permit ongoing, detailed discussions between an adviser and a prospective non-retail client regarding the investment product or service in question, without these discussions being impeded or delayed by the requirements imposed by the Advertising Rule on advertisements. As with all communications, these subsequent communications would continue to be subject to the anti-fraud provisions of the Advisers Act, and we thus do not believe it is necessary that they be hampered by the prescriptive requirements imposed on advertisements.

Different types of managers make different types of due diligence materials available to prospective investors in advance of entering into an advisory relationship or accepting subscriptions for funds. The practice is most prevalent among private fund managers, whose communications with prospective investors would be subject to the Advertising Rule if the proposed rule is adopted. As an example, private equity managers and other advisers that invest in private market assets on behalf of clients routinely establish due diligence data rooms as a means to ensure that all prospective investors in funds managed by an adviser have equitable access to the entire universe of information about prospective investments and prospective strategies contemplated by the adviser. Investors are typically granted access to due diligence data rooms after expressing interest in a particular fund (typically after signing a non-disclosure agreement). These materials generally are not provided in response to an unsolicited request because investors typically do not have enough information to know specifically *what* to request. Thus, these materials would not qualify for the "unsolicited request" exclusion and would likely be deemed advertisements under the proposed rule.[34]

Commission provide guidance in the adopting release that, consistent with interpretation of the anti-fraud principles in the proposed rule, whether a communication is "reasonably" responsive to an unsolicited request will depend on the relevant facts and circumstances, including the sophistication of the prospective client or investor making the request.

[34] In addition, we note that materials presenting target/projected performance, or any other hypothetical performance, could only be provided to investors that had been deemed appropriately sophisticated, which could force an adviser to selectively disclose certain due diligence materials to only a subset of potential investors, or not disclose this information at all, even if it is relevant to prospective investors. Managers of private funds that rely on Section 3(c)(1) of the Investment Company Act would similarly face the prospect of selective disclosure of material information. They would either make the disclosure to non-retail person investors but not to retail persons or not make the disclosure at all. Our recommendation that the definition of non-retail person be expanded to include qualified clients (discussed below) would largely alleviate this disparity.

Consequently, each piece of information in a due diligence data room would need to be reviewed as an advertisement. This introduces numerous impediments to a process that is specifically designed to provide relevant information about investment strategies and material conflicts of interest to prospective investors in an efficient manner. We recommend that the Commission add the following Due Diligence Exclusion for these types of communications with non-retail investors to alleviate these concerns:

> "Any communication by an investment adviser regarding a specific investment product or service offered to a non-retail person that is responsive to an initial written request addressed to the investment adviser for information regarding such product or service."

4. Hypothetical performance should be permitted in responses to unsolicited requests by non-retail persons without additional requirements.

The proposed rule would carve-out any hypothetical performance from the exclusion from the definition of advertisement for responses to unsolicited requests. We recommend that this carve-out be removed with respect to communications with non-retail investors. Hypothetical performance – and, in particular, target or projected performance, which is considered hypothetical performance under the proposed rule and which we discuss below in Section II.G.8[35] – is often requested by sophisticated investors in RFPs and other unsolicited communications designed to obtain information about an adviser in advance of making a decision to engage the adviser. Fundamentally, we do not believe that a non-retail person that makes an unsolicited request for specific information from an investment adviser is the type of investor that requires the enhanced protections of a rule that was promulgated to protect investors "unskilled and unsophisticated in investment matters" from being misled by presentation of hypothetical performance in advertisements. Furthermore, in instances where an adviser responds to an RFP that requests a strategy's target return without full knowledge of the end client, the adviser would struggle to meet the qualifications in the proposed rule for advertisements that present hypothetical performance. We do not believe that the Commission's anti-fraud interest is advanced by requiring compliance personnel to review all responses to unsolicited requests from non-retail persons to ascertain whether they are advertisements and, if so, to determine what additional steps would be required to comply with the rule.

C. Review and Pre-Approval of Advertisements

The proposed rule imposes a prescriptive, procedural requirement on advisers to appoint a designated employee that must review and pre-approve all advertisements – subject to two limited exceptions for one-on-one communications and live, broadcasted oral communications – prior to dissemination.[36] We believe that this requirement is a significant burden that will strain

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[35] Proposed Rule 206(4)-1(e)(5)(iii) ("Hypothetical performance includes, but is not limited to … [t]arget or projected performance returns with respect to any portfolio or to the investment services offered or promoted in the advertisement.").

[36] Proposed Rule 206(4)-1(d).

advisers' limited resources and hinder advisers' ability to communicate promptly and consistently with prospective and existing clients and fund investors. We submit that the requirement in practice is much more onerous than the Commission recognizes, especially in light of the breadth of the definition.

1. The Compliance Rule already addresses the Commission's stated goals of ensuring compliance with the Advertising Rule.

The Commission is proposing the review and pre-approval requirement to "reduce the likelihood of advisers violating the proposed rule" and to require advisers to "have a process in place designed to promote compliance with the proposed rule's requirements." We strongly believe that the review and pre-approval requirement is unnecessary in light of the Compliance Rule, which requires advisers to adopt and implement compliance policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.[37] The Compliance Rule thus already imposes on investment advisers an obligation to establish policies and procedures reasonably designed to prevent the dissemination of any communication that is misleading or otherwise violates the Advertising Rule or the anti-fraud provisions of the Advisers Act. In adopting the Compliance Rule, the Commission specifically stated its expectation that advisers have controls regarding the "accuracy of disclosures made to investors, clients, and regulators, including … advertisements" and with respect to "marketing advisory services, including the use of solicitors."[38] Advisers must also review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be responsible for administering the policies and procedures."[39] In fact, advisers already devote significant compliance resources to annually test their advertising and marketing practices for compliance with such policies and procedures.[40] We believe that the Compliance Rule has proven to be a robust and effective means to ensure compliance by investment advisers with their regulatory obligations.[41]

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[37] 17 CFR § 275.206(4)-7.

[38] *See, e.g.*, *Compliance Programs of Investment Companies and Investment Advisers*, 68 Fed. Reg. 247 (Dec. 24, 2003), https://www.sec.gov/rules/final/ia-2204.pdf at 74716.

[39] *See* Rule 206(4)-7(b) and (c). In addition, the Recordkeeping Rule under the Advisers Act (Rule 204-2(a)(17)(ii)) also requires advisers to maintain "[a]ny records documenting the investment adviser[s'] annual review" of their compliance policies and procedures.

[40] According to our most recent Investment Management Compliance Testing Survey of compliance professionals, when asked to identify the area in which they have increased the "type, scope, and/or frequency of compliance testing" during the past year, respondents that indicated "Advertising/Marketing" came in second only to Cybersecurity. We note that this result has been the consistent for the past several years. The results of our annual surveys are available at https://www.investmentadviser.org/publications/investment-testing.

[41] The SEC staff has cited and expressed support for the Compliance Rule. *See, e.g.*, Remarks to the 2014 IAA Investment Adviser Compliance Conference by Norm Champ, Director, Division of Investment Management, SEC (Mar. 7, 2014) (stating that the "compliance rule has been a win for clients, the Commission and for the investment management industry as a whole in bringing attention and resources to this important function"), https://www.sec.gov/news/speech/2014-spch030714nc; *see also,* 2015 National Society of Compliance Professionals, National Conference: Keynote Address, Andrew Ceresney, Director, Division of Enforcement, SEC

Notably, in adopting the Compliance Rule, the Commission elected not to "enumerate specific elements that advisers must include in their policies and procedures" and correctly noted that advisers are "too varied in their operations" for the rules to impose a "single set of universally applicable required elements." We agree. The Commission should not adopt a one-size-fits-all approach when it comes to compliance.

The existing regime under Rule 206(4)-7 affords advisers the opportunity to appropriately tailor their compliance programs to the needs of their business, and is consistent with the Commission's stated goal of a "principles-based approach" to advertising regulation.[42] Under this principles-based framework, advisers are permitted the flexibility to tailor their policies and procedures to their size and business practices, and are able to approach this issue by, for example, requiring approval of broadly disseminated advertisements but not correspondence, providing training on acceptable content standards to appropriate personnel, affording personnel the flexibility to tailor standard communications within certain defined boundaries, and/or conducting risk-based reviews before and/or after dissemination. By contrast, the imposition of the inflexible review and pre-approval requirement in the proposed rule directly contradicts both the principles-based approach of the Compliance Rule and the Commission's goal of making the Advertising Rule more principles-based.[43] We believe that a better approach would be to remind investment advisers in the adopting release of their obligations to establish and maintain policies and procedures for the review and pre-approval of advertisements that are tailored to their specific circumstances and risks.

2. **Contrary to the Commission's intent, *in practice*, designated personnel will be compelled to review all communications to determine whether pre-approval is required.**

The review and pre-approval requirement will place an enormous burden on compliance professionals that seek to ensure compliance. As the Commission itself noted in the Proposing Release, the review and pre-approval requirement "could have an adverse effect on the adviser's business due to the delay in communicating with investors" and "could impose significant costs on an adviser because of the staffing requirements such a requirement would entail."[44] We agree,

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(Nov. 4, 2015), https://www.sec.gov/news/speech/keynote-address-2015-national-society-compliance-prof-cereseney.html.

[42] Proposing Release at 7 ("The proposed rule would replace the current rule's broadly drawn limitations with principles-based provisions."). As noted in the Proposing Release, the Commission has previously endorsed the use of a principles-based approach to provide greater flexibility in other contexts. *See, e.g.*, *Modernization of Regulation S-K Items 101, 103, and 105*, SEC Rel. No. 33-10668 (Aug. 8, 2019) ("The proposed amendments would … emphasize a more principles-based approach because businesses differ in terms of which aspects of these disclosures are material to them. Such a flexible approach, as opposed to prescriptive requirements, may elicit more relevant disclosures about these items.").

[43] Indeed, the imposition of specific ongoing workflow requirements is unprecedented in Advisers Act rules. The rule would impose a daily process requirement on most firms, and for many firms, the obligation to administer the prescribed review and pre-approval process could have dozens of iterations every day.

[44] Proposing Release at 191.

but we believe that the Commission understates the magnitude of these problems. Compliance professionals will need to train client service personnel to identify whether an email or other communication is an advertisement subject to the review and pre-approval requirement. In practice, client service officers generally are not qualified to determine whether, for example, an email to a limited number of investment consultants is an advertisement subject to review and pre-approval. This determination is difficult even for an expert in the proposed rule, and cannot reliably be made by client service personnel on multiple occasions every day.

Consequently, the person designated to review advertisements faces a decision to either (i) review virtually every communication to more than one person prior to release;[45] or (ii) implement less restrictive policies that require employees that are not compliance professionals to identify communications that should be subject to review and pre-approval. The less restrictive policy risks frequent procedural foot faults due to the practical reality that client service officers will not correctly identify communications that are subject to pre-approval in every instance. Firms that elect this option may be subject to examination deficiencies and even enforcement, and designated employees that allow it may be subject to personal liability for failing to take action to mitigate *foreseeable violations*[46] of the Commission's rules. On the other hand, a designated employee that elects to require compliance review of every communication made by the firm will incur immense costs and staffing requirements for the firm, and will impose extensive delays on all communications with outside parties (including communications with clients regarding existing advisory services). Neither option is remotely reasonable.

Furthermore, as proposed, correspondence sent "on behalf of" the adviser would constitute advertisements, and consequently must also be approved by a designated employee of the adviser prior to dissemination. In practice, this would subject third-party marketers, solicitors, placement agents, marketing platforms, consultants, capital introduction teams, and other investment advisers to the review and pre-approval policies of the adviser, which must be implemented by the adviser's designated personnel. This process would introduce extraordinary operational complexities. It could also expose proprietary and even client relationship information, requiring consideration of multiple nondisclosure agreements, and unnecessarily increase cybersecurity risks.

While the review and pre-approval requirement is intended to reduce the likelihood of substantive rule violations, we are concerned that this requirement will substantially *increase* the likelihood of inadvertent and non-material violations because the dissemination of communications that constitute advertisements under the rule will violate the procedural requirements of the rule if they are not first identified and formally approved by designated

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[45] The proposed "more than one person" exclusion from the review and pre-approval requirement is intended to address significant concerns that would result from the fact that the definition of advertisement brings virtually ***all*** one-on-one communications potentially within scope. However, we note that, as a threshold matter, effectively all one-on-one communications would have to be assessed to determine whether they are deemed "advertisements" in the first place.

[46] We note that a violation of the review and pre-approval requirement does not require intent, scienter, or the presence of any content that is actually fraudulent, deceptive, or misleading.

personnel. These procedural violations will occur even if the communications are not misleading and are properly disclosed.

Consider an adviser that generates 100 pieces of correspondence and 11 pages of content or material per day that would be captured as advertising under the proposed rule. If each piece of correspondence is reviewed for 6 minutes and each page of content is reviewed for 8 minutes, the adviser would require one or more designated employees to dedicate 688 minutes per day (more than a full-time position) to review and pre-approval.[47] If 12 of these communications are not appropriately identified as advertisements and are not reviewed and pre-approved by designated personnel, the adviser will have unambiguously violated the Commission's rules on 12 separate occasions and could potentially be subject to enforcement proceedings.[48] The Commission or its staff may refrain from recommending or initiating proceedings against a registrant with a 99.4% compliance rate, but the registrant would ignore the strict liability aspect of the rule at its peril. The text of the rule sends a message that one missed review is a basis for a rule violation, an examination deficiency, and a potential enforcement action. In practice, it is likely that many investment advisers will be unable to fully comply with this procedural aspect of the proposed rule, regardless of their good faith efforts or the extent of resources devoted to compliance. Assuming that the advertisements in question are not misleading and contain proper disclosure, none of these violations would create any risk that investors would be misled or deceived.

3. The proposed review and pre-approval requirement should be withdrawn.

In light of these concerns, we urge the Commission to withdraw this proposed requirement entirely, in favor of the existing regime under the Compliance Rule. As discussed above, and noted throughout our letter, the breadth and inflexibility of the proposed review and pre-approval requirement, coupled with the extraordinary expansion of the definition of advertisement, is, in our view, the single most concerning aspect of the proposed Advertising Rule. It would result in the diversion of limited compliance resources away from substantive activities in a potentially futile effort to satisfy a procedural requirement. Given the requirement under the Compliance Rule that advisers reasonably design their compliance programs to achieve compliance with all rules under the Advisers Act – including the Advertising Rule – we do not believe that any potential marginal additional benefit to investors from the proposed requirement justifies the additional implementation burdens that advisers would face.

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[47] We believe that the Commission's economic analysis profoundly underestimates both the costs associated with implementing the new substantive, recordkeeping, and review and pre-approval provisions of the Advertising Rule and the incremental number of additional advertisements that will be disseminated by investment advisers due to the broadening of the definition of advertisement. The estimate in the Proposing Release at n. 592 that each investment adviser "would disseminate 1 new advertisement per year," in particular, is not supported by analysis and is manifestly unreasonable.

[48] Moreover, because the proposed rule will be issued under Section 206(4), the enforcement proceeding would effectively allege that the adviser had committed fraud by failing to review those 12 advertisements, even if the advertisements themselves were not false or misleading.

4. If the Commission retains the review and pre-approval requirement, it should be significantly modified to reduce the burden on advisers.

Should the Commission nevertheless decide to impose an additional procedural requirement on advertisements on top of what the Compliance Rule may call for, the requirement should be narrowly tailored to apply only to those communications that create an enhanced risk to investors that is commensurate with the burden imposed, and the rule should not have the effect of impeding prompt and open communication between advisers and investors.

In the event that a review and pre-approval requirement is retained *and* the Commission does not include our recommended *de minimis* threshold in the definition of advertisement, we strongly recommend that the Commission incorporate that *de minimis* threshold here and exclude from the review and pre-approval requirement communications that are disseminated to more than ten persons or households or to more than ten investors in a pooled investment vehicle. We believe this *de minimis* exclusion would provide significant relief from the burdens imposed by the application of the review and pre-approval requirement to the broad universe of communications captured by the proposed definition of advertisement. In our view, increasing the threshold for the proposed exclusion for one-on-one communications would far better effectuate the Commission's stated goals for providing the exclusion. We also recommend that the Commission clarify in the adopting release that the same communication to multiple natural persons representing a single institution or client/account counts as a communication to a single person for purposes of any exclusion based on the number of intended recipients.

Additionally, advisers should be permitted to establish reasonable procedures in light of their business operations to identify which communications are subject to the requirement and to determine the most appropriate way for the firm to satisfy the requirement. Thus, we recommend that the Commission permit advisers the flexibility to tailor any review and pre-approval process by utilizing a "risk-based" approach rather than imposing the requirement on all advertisements subject to the review. An adviser's risk-based approach could, for example, require the adviser to conduct prior reviews of all advertisements of a particular type and post-use reviews of a sampling of all other advertisements. We note that in each instance, all advertisements excluded from a review and pre-approval requirement would still be subject to the other requirements of the Advertising Rule, the policies and procedures adopted pursuant to the Compliance Rule (including the recordkeeping and annual review requirements), the anti-fraud provisions under the Advisers Act, and, for existing clients, the fiduciary duty.

We support the proposed exclusion for live oral communications that are broadcast on radio, television, the internet, or any other similar medium from any review and pre-approval requirement. We also recommend that the Commission expressly exclude the following types of communications from any review and pre-approval requirement:

- Routine day-to-day emails and other client service-related communications, as described in Section A.1 above;
- Communications directed exclusively to non-retail persons;

- Re-use of a communication among multiple investors or clients;
- Re-use of a communication that has previously been approved with no changes other than figures in existing documents;
- Updates to performance returns or other data;
- Purely ministerial communications (such as an email directing the recipient to an attachment or a social media communication that directs to a hyperlink); and
- Templates and standardized text used in multiple types of communications.

We also recommend that the Commission clarify that outside third parties who are not technically employees or persons associated with the adviser, such as compliance consultants and legal counsel, may be retained to review and pre-approve advertisements on behalf of an adviser's designated employee(s). While the firm would still be responsible for the content of communications and ensuring that review and pre-approval are performed in accordance with the proposed rule, the opportunity to utilize outside experts may reduce the staffing burden on investment advisers, particularly smaller firms, associated with the proposed requirements.

We also suggest that the Commission clarify that designated personnel need not be legal or compliance personnel of the adviser and that the adviser may designate the employee or employees it determines are most appropriate in light of its business. We are concerned that the statements in the Proposing Release that "designated employees generally should include legal or compliance personnel of the adviser" and that the Commission generally does "not believe it would be appropriate for the person who creates the advertisement to be the same person who reviews and approves its use" would unnecessarily hamper an adviser's ability to comply with any review and pre-approval requirement. As noted by the Commission, many "small or single-person advisers may not have separate personnel to create an advertisement and review it."[49] In addition, many larger advisers are structured in a way that non-legal and compliance personnel with relevant business-related expertise play a substantial role in ensuring compliance with the Advertising Rule. We recommend that the Commission clarify that advisers would not be required to designate legal or compliance personnel to conduct any review and pre-approval requirement and that it may in fact be appropriate or necessary for the adviser to task non-legal or compliance persons with this requirement.

D. Principles-Based General Prohibitions

We strongly support the Commission's proposed transition away from prescriptive content standards to a set of general prohibitions that will afford advisers greater flexibility to

[49] We continue to be concerned regarding the impact of regulations on smaller advisers. As we have noted previously, small advisers have been significantly affected by "one-size-fits-all" regulations that effectively require fixed investments in infrastructure, technology, and systems relating to documentation, monitoring, operations, custody, business continuity planning, cybersecurity, and more. *See* IAA Priorities Letter.

provide investors relevant and complete information in advertisements.[50] We have long supported and explicitly recommended a more effective and flexible approach,[51] and we are pleased that the Commission considered our suggested approach in drafting the proposed rule. More specifically, we are pleased that the Commission has removed the *per se* prohibitions on the use of testimonials (as discussed in greater detail below) and past specific recommendations in advertisements and recognized their use in the modern marketplace. We also agree with the Commission's statement that specific investment advice is often used to illustrate an adviser's philosophy and process and can be presented in certain circumstances without misleading investors.[52] As discussed elsewhere in this letter, we also believe that reliance on the general prohibitions is sufficient to address several practices that are the subject of new prescriptive requirements in the proposed rule. However, we request some clarification regarding the interpretation of the proposed general prohibitions.

We believe that an adviser's satisfaction of its obligations with respect to all seven general prohibitions should include consideration, among other things, of the sophistication of the recipient. At present, the Proposing Release states that "instead of including a requirement for a particular presentation, advisers, when determining how to present this information in a fair and balanced manner, should consider the facts and circumstances of the advertisement, including the nature and sophistication of the audience."[53] This guidance may be interpreted to allow advisers to consider the sophistication of the recipient only with respect to the presentation of specific investment advice and performance results, which are subject to the "fair and balanced" standard.[54] We recommend that the Commission clarify in the adopting release that the sophistication of the recipients of an advertisement is a relevant consideration when determining whether the content of the advertisement would be considered false or misleading in the context of all seven general prohibitions in the proposed rule. Absent this guidance, an adviser may be reticent to consider the sophistication of a recipient when assessing whether, for example, an untrue or misleading inference could be reasonably drawn by the intended recipient of an

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[50] *See* Proposing Release at 64 ("[W]e are not prescribing any particular presentation or specific disclosure, which we believe would be unduly limiting on advisers.").

[51] *See, e.g.*, IAA Priorities Letter at 5-6 ("In particular, we believe that the Advertising Rule's *per se* prohibitions on advertisements that refer to either testimonials or to past specific recommendations no longer make sense in today's investing environment. As noted above, many advisory clients and prospective clients are more informed and sophisticated than ever before. They seek detailed information about the performance of their accounts and their peers' experience with their adviser or prospective adviser. … The Advertising Rule should be amended to make it more effective and flexible. We suggest, at a minimum, that the specific prohibitions in the Rule not be considered *per se* fraudulent – something that the SEC staff implicitly has recognized through their many no-action letters.").

[52] *See* Proposing Release at 63. We strongly support the Commission's approach with respect to past specific recommendations in advertisements. We have long argued that the current rule's *per se* ban on such information restricts the ability of an investment adviser to provide complete and accurate information to investors that may be useful in making decisions. For example, investors could benefit greatly from specific examples demonstrating how an adviser's investment process or philosophy has been put to work by the adviser's personnel in managing actual accounts.

[53] Proposing Release at 65.

[54] Proposed Rule 206(4)-1(a)(5)-(6).

advertisement. The sophistication of the recipient certainly impacts the type of information that can be presented and reasonably understood in an advertisement, and advisers should be expressly permitted and encouraged to consider sophistication when tailoring appropriate disclosures in all contexts.

We believe that the proposed list of prohibited practices is derived from SEC staff interpretive guidance and no-action letters that have been published over the years. Accordingly, we request that the Commission also clarify that the proposed principles-based prohibitions are not intended to be substantive departures from how these principles have been interpreted by the SEC staff.

E. Testimonials, Endorsements, and Third-Party Ratings

As noted above, we applaud the Commission for its removal of the *per se* prohibition on the use of testimonials. We agree with the Commission's statement that testimonials can serve as useful and important resources for investors when evaluating investment advisers and are not *per se* misleading.[55] While we generally believe that the Advertising Rule should establish principles-based standards rather than prescriptive requirements, we support the Commission's inclusion of certain specific guidelines for the use of testimonials, endorsements, and third-party ratings in the proposed rule. In prior no-action relief, the SEC staff has conditioned the use of third-party ratings on numerous disclosures intended to protect investors from drawing misleading inferences.[56] We support the Commission's recognition that the full scope of the disclosures on which prior no-action relief was conditioned are not necessary in all circumstances, and we believe that the targeted requirements set forth in the proposed rule appropriately supplement the proposed general prohibitions without the need for additional prescriptive requirements.[57] However, as discussed below, we believe certain aspects of the proposed rule and guidance provided in the Proposing Release require adjustments and further clarification by the Commission.

1. The Commission should clarify its guidance regarding the presentation of testimonials.

In the Proposing Release, the Commission states that, "if an adviser were to select a single positive testimonial to highlight in an advertisement, while excluding all negative testimonials, it is likely to create a misleading inference that the adviser has only received positive testimonials."[58] Although we recognize that there are certain circumstances where the selection of a single positive testimonial from a set of testimonials could create a misleading inference, we disagree that this is "likely" to be the case in most instances. Whether the selection

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[55] *See* Proposing Release at 77.

[56] *See, e.g.*, Investment Adviser Association, SEC No-Action Letter (pub. avail. Dec. 2, 2005); DALBAR, Inc., SEC No-Action Letter (pub. avail. Mar. 24, 1998).

[57] Proposing Release at 82.

[58] *Id.*

and presentation of a particular testimonial is likely to create a misleading inference depends on the particular facts and circumstances. For example, if an adviser has received two positive and 18 negative reviews on a third-party rating site, republication of the two positive testimonials in an advertisement along with a statement that "investors recognize that our services are superior," would likely be misleading. By contrast, selecting and presenting a single positive testimonial is not an inherently misleading practice simply because it was selected from a third-party aggregator of positive and negative reviews. The presentation of such a testimonial in an appropriate context should be permissible, provided that it is not otherwise misleading.

We recommend that the Commission clarify in the adopting release that the selection and republication of a positive testimonial from a set of positive and negative reviews *is* permissible under appropriate facts and circumstances. In order to ensure that the reader does not draw a misleading inference from the testimonial, the adviser could provide a hyperlink to the site from which a testimonial was selected, or include cautionary disclosure that not all clients have the same experience. This approach is consistent with the modern online marketplace, where consumers often rely on positive and negative reviews on social media sites and inherently understand that the selection of one positive review from such a site does not imply that all other statements on that site are positive. A reasonable investor would not draw such an inference.[59]

Absent additional guidance, the Commission's statement that a positive testimonial presented on its own would be inherently misleading may be interpreted by investment advisers – and by examination staff from the Commission's Office of Compliance Inspections and Examinations – to mean that side-by-side presentation of positive and negative testimonials is the *exclusive* manner by which an adviser may present a positive testimonial selected from a larger group of testimonials.[60] We do not believe this was the intent of the Commission and recommend that the statement be clarified.

Finally, we recommend that the Commission clarify in the adopting release that a testimonial provided by a client or investor that does not pay the highest fee charged by the adviser for a service would not in all cases require disclosure that the client receives reduced-fee advisory services. Clients and investors routinely negotiate fee breaks and bespoke fee arrangements for reasons that are not related in any way to the possibility that an adviser may at some point in the future request a testimonial. We believe that the Commission should clarify that this disclosure is only necessary where there is an agreement or understanding between the

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[59] We also believe that investors are in fact likely to navigate to the source of the testimonial, if provided, and review other positive and negative commentary provided about the adviser. Through this process, investors may learn more about an adviser than through the "balanced" presentation of a single positive testimonial beside a single negative testimonial.

[60] If this guidance became the standard, it could effectively eliminate an adviser's ability to present testimonials in certain circumstances. For example, if an adviser received nine positive reviews and one negative review that included an incorrect or misleading statement regarding the adviser's performance results, the adviser would be prohibited from presenting the negative testimonial and therefore could not present any of the positive testimonials. The same effective prohibition on presenting a positive testimonial would result in a case where an adviser receives one or more negative comments that all contain profane or unlawful content.

adviser and the client or investor that any fee reductions are provided in contemplation of the client or investor providing a favorable testimonial.[61]

2. The express requirement that an investment adviser obtain a "reasonable belief" regarding how third-party questionnaires or surveys are structured should be removed.

The proposed rule would require that an adviser "reasonably believes that any questionnaire or survey used in the preparation of the third-party rating that the adviser disseminates 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 result."[62] We believe that the Commission should remove this requirement, and instead clarify in the adopting release that an investment adviser may have an obligation under the principles-based standards set forth in proposed Rule 206(4)-1(a) to determine that a questionnaire or survey is structured in a balanced manner, depending on the facts and circumstances of the third-party rating.

This provision may be interpreted to impose a duty of inquiry on advisers regarding the content of third-party questionnaires in all cases. These questionnaires can be difficult to obtain in many instances, and many third-party ratings, by their nature, are not based on questionnaires or other data collection practices that can produce misleading responses. For example, where data is not gathered directly from the adviser and the stated basis for the rating is fair and balanced on its face (*e.g.*, ratings comparing the relative performance of advisers with similar investment strategies), the adviser should not have a duty to determine how the data was gathered. In other circumstances, managers may agree to release information regarding the performance or characteristics of certain investment strategies to a third party, but do not have complete information on how the third party calculates the rating, for example because the third party considers its methodology to be proprietary and/or a trade secret. In these cases as well, where the basis for the rating is clear, fair, and balanced on its face, the adviser should not be subject to a separate, explicit obligation to make determinations regarding the content of questionnaires and the process by which the ratings are compiled.

By contrast, where a questionnaire that forms the basis of a third-party rating poses questions that either on their face appear designed to achieve predetermined outcomes or that the adviser has reason to believe are not balanced, the general prohibitions set forth in proposed Rule 206(4)-1(a) would prohibit an adviser from publicizing the ratings, or from publicizing the ratings without providing adequate disclosure. The Commission has explicitly recognized that the principles-based anti-fraud standards of the proposed rule extend to testimonials, endorsements, and third-party ratings included in an investment adviser's advertisement, and that

[61] This recommendation is consistent with our recommendation in the Solicitation Rule that there be a nexus between solicitation activities and a benefit provided by the adviser for the Solicitation Rule to apply.

[62] Proposed Rule 206(4)-1(b)(2).

these provisions protect investors from the risk of misleading content in such an advertisement.[63] We believe that reliance on these standards is the best approach to the issue, and we do not believe that this protection is less effective with respect to third-party ratings than it is with respect to the presentation of testimonials and endorsements. Consequently, we recommend that the Commission remove the express requirement that advisers must have a reasonable belief regarding the design and preparation of any questionnaire or survey used in the preparation of a third-party rating. While we agree with the Commission's interest in protecting investors from misleading inferences that could be drawn in this situation, the general prohibitions in the proposed rule already protect against this risk.[64] Thus, where the risks that this requirement is designed to address are in fact present, they are properly addressed by the general prohibitions.

F. The Use of Social Media and Electronic Communications by Investment Advisers

We are pleased that the Commission explicitly recognized in the Proposing Release the growing use of social media as a means of communication between advisers and investors.[65] Currently, many firms have taken the conservative approach of considering all social media posts (including both posts made on the firm's account and employee posts mentioning the firm) to be advertisements, and have been reluctant to use social media beyond business card information even though clients increasingly use and expect their advisers to use social media.[66] We believe the industry would benefit from greater clarity in the adopting release on the application of the Advertising Rule to social media, and specifically request clarification that: (i) social media posts that do not discuss the advisory services provided by an adviser are not advertisements; (ii) commentary on a social media site will not be deemed an advertisement because an adviser edits or removes certain commentary *solely* to address profane or unlawful content; and (iii) hyperlinking to disclosures is permissible subject to a reasonably tailored standard.

1. The circumstances under which social media posts are considered advertisements should be clarified.

We encourage the Commission to provide additional guidance in the adopting release regarding the types of posts that would be deemed to "offer or promote" an adviser's investment advisory services or – assuming the Commission does not remove the language as we

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[63] *See* Proposing Release at 83 ("An adviser therefore would be prohibited from using any such statement or rating in an advertisement if, for example, the content, presentation or any other aspect of the statement or rating would be materially misleading if the adviser communicated it itself.").

[64] *See* Proposed Rule 206(4)-1(a)(2) (prohibiting an advertisement from containing any claim or statement that is unsubstantiated); Proposed Rule 206(4)-1(a)(3) (prohibiting an advertisement from being reasonably likely to cause an untrue or misleading implication to be drawn about a material fact relating to the investment adviser).

[65] Proposing Release at 12.

[66] *See* 2018 Investment Management Compliance Testing Survey (June 14, 2018) (stating that 32% of 454 respondent firms do not use social media and those that do mostly use social media only on a very limited "business card" basis). As noted in the Proposing Release, social media has become an integral part of business communications in the decades since the Advertising Rule was adopted and advisers are increasingly expected to communicate via social media by many prospective investors. Proposing Release at 11.

recommend – that seek to "obtain or retain" prospective or existing clients and that would thus be advertisements. Under the proposed rule, an argument could be made that any post on social media by an employee of an investment adviser is posted with the intent of attracting and/or retaining clients. Moreover, the daunting prospect that advance approval would be required for all social media posts and the attendant enormous compliance burden would likely mean that permitting any employee activity on social media would be nearly infeasible regardless of actual content. Advisers may thus be even more reluctant following the proposal to allow social media activity in order to avoid the regulatory risk and significant compliance costs incurred each time an employee post mentions the adviser.

For example, under the proposed rule, if 100 employees of an adviser each posted on LinkedIn about the firm only once a month, this would create an additional 1,200 advertisements in a year, *all* of which would be subject to review and pre-approval by the adviser's compliance personnel. In practice, the review process would be necessary even if the vast majority of the posts did not relate directly to the advisory services provided by the adviser, because the proposed definition of "advertisement" is so expansive that firms could not reasonably expect – nor would it be prudent to allow – their employees to ascertain which posts are "advertisements." This is not a result the Commission should welcome, particularly as investors more commonly seek to use social media as a means to research and compare prospective investment advisers. We therefore strongly recommend that the Commission clarify in the adopting release that social media posts by advisers and their employees that do not discuss the advisory services provided by the adviser do not constitute an advertisement.[67]

In addition, the Proposing Release states that third-party information (such as social media posts) will be attributable to an adviser under the "by or on behalf of" standard, and therefore deemed an advertisement, if the adviser has explicitly or implicitly endorsed or approved the information, for example by exercising "its ability to influence or control the content, including *editing*, suppressing, organizing, or prioritizing the presentation of the content."[68] At a minimum, we believe that the Commission should provide an exception for advisers that edit or remove commentary from a social media site solely to address profane or unlawful content.[69] The Commission's staff has endorsed this concept in prior guidance related to the use of social media[70] and we believe it should be reiterated in this context, particularly if

[67] For example, posts stating "we're a great corporate citizen," "this is a terrific place to work," or "best wishes to the summer interns as they leave us and head back to school" should not be considered advertisements.

[68] Proposing Release at 26 (emphasis added).

[69] We do not believe the Commission should establish standards as to what content is profane or unlawful, as those concepts are constantly changing. Rather, advisers should be permitted to adopt their own neutral criteria concerning profane, unlawful, or otherwise inappropriate content, and to apply such criteria per their policies and procedures.

[70] Prior guidance states that an adviser can republish edited commentary from an independent social media site if such content has been edited pursuant to the site's editorial policies (*e.g.*, requiring editing or removal of profane, defamatory, threatening, or racially offensive statements). *See* Guidance on the Testimonial Rule and Social Media, IM Guidance Update No. 2014-04 (Mar. 2014), https://www.sec.gov/investment/im-guidance-2014-04.pdf at n. 14 and accompanying text.

the staff's prior guidance regarding social media in IM Guidance Updates and OCIE Risk Alerts will be expressly withdrawn in connection with the proposed rule.

2. Hyperlinking to disclosures should be permitted, subject to compliance with a reasonably tailored standard designed to ensure the disclosures are clear and accessible.

We believe the discussion in the proposing release regarding "hyperlinking" to risk disclosures[71] represents a lost opportunity for the Commission to establish standards for reasonable and effective references to risk disclosures and other information that may be appropriate for recipients of advertisements, including through hyperlinking. We believe the Commission must address this issue in the near future, given its importance to the dominant modes of modern communication, and failure to provide reasonable standards for referencing additional information would be inconsistent with the Commission's stated goal of modernizing the Advertising Rule. It is also likely that, absent delineated standards, market participants will continue to use inconsistent practices when hyperlinking disclosures. The provision of reasonable guidance regarding the use of hyperlinking is therefore critically important for purposes of investor protection, particularly for less sophisticated retail investors.

The Commission requested comment in the Proposing Release regarding whether adoption of the Federal Trade Commission's standards for effective hyperlinking is appropriate.[72] We believe that adoption or explicit endorsement by the Commission of the Federal Trade Commission's standards, or of any other reasonably tailored standard, is both necessary and appropriate and would be consistent with the Commission's recognition of the communicative value of layered disclosure, including the use of hyperlinks, in other contexts.[73] We also believe the Commission should consider providing guidance in a form that anticipates the use of evolving technologies to deliver disclosure, rather than limit its rules or guidance specifically to "hyperlinking." For example, the use of scroll boxes, collapsible fields, mouse-overs, or similar design elements that are common in electronic communications and reasonably

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[71] Proposing Release at 60 ("[I]t would not be consistent with the clear and prominent standard to merely include a hyperlink to disclosures available elsewhere. For example, a post on social media advertising the benefits of an adviser's investment methods, but which only included relevant disclosures about the material risks in a hyperlinked 'additional information available here' or similar web link, would not meet this standard.")

[72] *See* Proposing Release at 61-62 (requesting comment on standards permitting hyperlinking to disclosures if the hyperlink: (i) is obvious; (ii) is labeled to appropriately convey the importance, nature, and relevance of the disclosures it leads to; (iii) is placed as close as possible to the relevant information it qualifies; and (iv) takes investors directly to the relevant disclosures on the click-through page).

[73] *See, e.g.*, *Form CRS Relationship Summary; Amendments to Form ADV*, 84 Fed. Reg. 134 (July 12, 2019) (**Form CRS Release**), https://www.sec.gov/rules/proposed/2019/33-10734.pdf at 22, 57-58 ("Layered disclosure is an approach that can balance the goal of keeping the relationship summary short and accessible with the goal of providing retail investors with fulsome and specific information.").

obvious to investors are effective ways to deliver disclosures where space is limited.[74] These practices – as well as other similar practices that evolve over time – should be permitted as well.

G. Investment Performance

We support the Commission's efforts to replace the complex web of staff no-action relief interpreting the situations in which the presentation of an investment adviser's investment performance complies with the Advertising Rule with the updated and comprehensive structure set forth in the proposed rule. Although we generally favor principles-based regulations, we recognize that in certain limited circumstances the interest of investor protection is better served on balance, by more detailed rules, including for the presentation of investment performance. However, we believe that certain of the Commission's most prescriptive provisions may confuse investors and investment advisers alike, and introduce unintended consequences that do not advance the goal of ensuring that investors are not misled by the performance information they receive from advisers. Thus, while we agree with the Commission's general framework for regulating advertisements containing investment performance, we provide below several recommendations that we believe would improve that framework and mitigate unintended consequences.

1. Certain aspects of the definitions of gross and net performance should be clarified.

We support the Commission's proposed definitions of gross performance and net performance, and we believe they are reasonably clear in most respects. In particular, we believe that the opportunity to calculate a model fee that is equal to the highest fee charged to the relevant audience is an appropriate option, and an improvement on existing staff no-action relief.[75] This provision provides investment advisers the opportunity to tailor presentations to their audience in a way that best represents the proposed advisory services. This appropriately tailored solution will help to remove uncertainty and difficulty regarding how to determine whether a model fee is in fact lower than actual fees.

While the text of the proposed rule is reasonably clear, we are concerned that the discussion in the Proposing Release may be misinterpreted to suggest that net performance may either exclude custodial fees or apply the deduction of a model fee, but not both.[76] We

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[74] Use of these types of design elements to deliver disclosures would also be consistent with the Commission's statement in the Form CRS Release that "encouraging the use of electronic and graphical formatting online features, and layered disclosures will permit firms to create innovative disclosures that engage investors." Form CRS Release at 59; 125 ("[W]e believe that certain definitions and concepts explained in the proposed relationship summary can be better explained in other ways, such as through layered disclosure that explain technical terms as appropriate for the specific firm (*e.g.*, 'hovers').").

[75] *See* J.P. Morgan Investment Mgmt., Inc. (pub. avail. May 7, 1996) (adviser may present advertising performance that reflects the deduction of a model fee when doing so would result in performance figures that are no higher than those reflecting the deduction of actual fees).

[76] *See* Proposing Release at 126-127 (presenting deduction of a model fee as a "second" possible modification and exclusion of custodial fees as a "third" possible modification).

recommend that the Commission clarify in the adopting release that custodial fees may be excluded regardless of the mechanism used to determine the effect of the adviser's fees on net performance. We also believe it is appropriate in all cases where an investment adviser has discretion and is responsible for the execution of client transactions to reduce performance (gross and net) by the brokerage commissions, exchange fees, and other transactional expenses incurred by the investment adviser, and failure to do so absent disclosure may be misleading. This concept is briefly addressed in a footnote in the Proposing Release,[77] but we recommend that it be further clarified in the adopting release. We do not believe that this issue warrants a refinement of the rule text, however, as this could introduce a "slippery slope" of prescriptive requirements and unintended consequences that should be avoided.

2. The definition of non-retail person should include qualified clients and sophisticated financial intermediaries.

The Proposal includes a definition of non-retail person that includes "qualified purchasers" and "knowledgeable employees," as those terms are defined under the Investment Company Act. We recommend that the non-retail person definition be expanded to include "qualified clients," as defined in Advisers Act Rule 205-3 as well as certain classes of sophisticated financial intermediaries, whether acting on their own behalf or on behalf of clients. We believe that qualified clients are generally sufficiently sophisticated to want and be able to understand the principles of gross performance calculation and are not at risk of being misled by gross performance. The same is true for financial intermediaries and their investment professionals generally. Including such intermediaries in the definition of non-retail person would also be consistent with the Commission's recent proposed updates to the definition of "accredited investor."[78] We thus recommend that the Commission revise the definition of non-retail person to include:

> "A 'qualified client' as described in §275.205-3"; and
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> "Any investment adviser registered under the Act, broker or dealer registered pursuant to section 15 of the Exchange Act, or bank as defined in Section 202(a)(2) of the Act; acting for its own account or the accounts of others."

We further suggest that the Commission clarify in the adopting release that a natural person who receives an advertisement when acting on behalf of a financial intermediary would also be considered a non-retail person.

[77] *See* Proposing Release at n. 244.

[78] *See Amending the "Accredited Investor" Definition*, SEC Rel. No. 33-10734 (Dec. 18, 2019), https://www.sec.gov/rules/proposed/2019/33-10734.pdf.

3. Investment advisers should not be required to present or offer a schedule of fees when presenting gross performance.

The proposed rule imposes an obligation when presenting gross performance in any advertisement to also provide or offer to provide promptly a schedule of the specific fees and expenses (presented in percentage terms) deducted to calculate net performance. In our view, this requirement is superfluous as applied to non-retail persons, who are generally capable of both negotiating their fees and recalculating performance based on negotiated fee schedules. It is also superfluous as to retail persons, who are only permitted to receive advertisements that present net performance alone, or net performance and gross performance with equal prominence. We thus believe that the requirement is not necessary. Although many investment advisers will choose to provide fee schedules in advertisements as a standard practice, the failure to do so is not misleading when considered in the broader framework of the proposed rule, and the requirement should be removed.

4. The Commission should clarify that non-retail advertisements include advertisements for investment products that are only available to non-retail persons.

We generally support the Commission's proposed framework for the presentation of gross performance to non-retail persons and net performance to retail persons, but we believe that certain common practices that do not introduce a significant risk of investor harm will be difficult for managers to navigate, and should be excepted from the rule's requirements.

Investment advisers will face difficulty ascertaining whether recipients of a communication are non-retail persons, as prospective investors typically do not provide this type of information or representations at the marketing stage. In the case of non-U.S. investors, this information is generally not gathered at any stage. While these protections may be appropriate in certain circumstances, we recommend that the Commission add a safe harbor for communications with respect to investment strategies and pooled vehicles that are available for investment only by non-retail persons, as there is no risk that retail persons will be misled into such investments by being exposed to gross performance. To achieve this goal, we recommend that the Commission revise the definition of non-retail advertisement as follows:

> "Non-retail advertisement means any advertisement for a pooled investment vehicle or investment advisory services that are available only to non-retail persons, or for which an investment adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisement is disseminated solely to non-retail persons."

5. The prescriptive requirement to present performance in one-, five-, and ten-year periods should not apply to retail advertisements directed to investors in pooled investment vehicles.

We appreciate the Commission's interest in ensuring that retail advertisements reflect investment performance over an adequately complete time period and its desire, in proposing that performance be presented in retail advertisements in one-, five-, and ten-year periods, to provide a mechanism for retail persons to compare sets of performance results.[79] We understand that the proposed requirement could create operational difficulties for many advisers[80] and that other advisers already present performance in one-, five-, and ten-year periods. While we have concerns with the imposition of highly prescriptive requirements on the format of presentations and prefer flexibility, we recognize the desirability of providing comparative information to retail investors generally.

We believe, however, that this requirement could actually create misleading performance metrics in the context of certain types of private funds. We thus recommend that retail advertisements directed to investors in pooled funds advised by the adviser be excluded from this requirement. For example, the presentation of one-, five-, and ten-year internal rates of return in private equity, venture capital, and private real estate funds (**Private Equity Funds**) in many cases will result in meaningless and/or misleading performance information due to the "J-Curve" effect on the performance of these asset classes.[81] We believe that a better solution to the Commission's concern that investment performance be presented over an appropriate time period would be to require retail advertisements directed to investors in pooled funds to present *either* performance for the prescribed one-, five-, and ten-year periods, *or* performance since the inception of the pooled investment vehicle. Advisers would, of course, need to ensure that the presentation is not misleading.

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[79] Proposing Release at n. 265.

[80] For example, advisers that claim compliance with the CFA Institute Global Investment Performance Standards (**GIPS®**) typically present GIPS performance in annual periods, rather than annualized periods, and the GIPS Advertising Guidelines require that performance be presented in one-, three-, and five-year periods. While these inconsistencies can be resolved by adding additional information to a GIPS-compliant presentation or advertisement, having to do so will add operational complexity and burdens for firms that would need to do so.

[81] The term "J-Curve" is used to describe the typical performance trajectory of investments made by Private Equity Funds. The portfolios of many Private Equity Funds, by design, are comprised of poorly performing investments that over time are made profitable and eventually spun off or sold. The J-Curve is a visual representation of the initial decline in performance followed, at least theoretically, by a sharp improvement in performance. Because managers of Private Equity Funds have discretion over the timing and amount of cash flows, industry practice is to show an internal rate of return, a type of money-weighted return, rather than a time-weighted return. Typically, the internal rate of return is shown since inception, and the presentation of internal rates of return for other time periods (*e.g.*, one-, five-, and ten-year periods or annual period end) are considered arbitrary or not meaningful by investors. The CFA Institute recognized significant industry feedback on this same issue in the final 2020 GIPS Standards, which require presentation of a single, since inception money-weighted return for Private Equity Funds and not for each annual period end as the CFA Institute had initially proposed. If the Commission adopts this proposed requirement, the amended rule would diverge from industry practice and the 2020 GIPS Standards without providing any practical or desired benefit to Private Equity Fund investors.

We thus recommend that the Commission restate proposed section (c)(2)(ii) as follows:

"(ii) Any performance results of any portfolio or any composite aggregation of related portfolios, unless the advertisement includes performance results:

(A) of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on the most recent practicable date; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period; or

(B) with respect to a portfolio that is a pooled investment vehicle, for the life of the portfolio."

6. The prescriptive requirements regarding related performance should be removed, or modified to permit related performance that is representative of an investment adviser's investment strategy.

The proposed rule defines related performance as "the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as one or more composite aggregations of all portfolios falling within stated criteria,"[82] and does not permit the use of related performance unless it includes all related portfolios.[83] The proposed rule provides a limited exception for firms to exclude related portfolios if the advertised performance results are no higher than if all related portfolios had been included.

The requirements of the proposed rule regarding related performance address an important issue: whether the presentation of the performance of one or more "cherry-picked" accounts may be presented as the performance of an investment strategy. For decades, the Commission and its staff have rightly been concerned that an investment adviser may misrepresent its performance simply by presenting its best-performing account(s) and suppressing information about poorly performing accounts that may be necessary for an investor to obtain a full understanding of the adviser's past performance. We agree that the practice of cherry-picking is misleading and should not be permitted under the Advertising Rule. However, we are concerned that the prescriptive requirements of the proposed rule will have many unintended consequences, and we suggest that cherry-picking would be better addressed through application of the general prohibitions in the proposed rule.

First, we note the proposed requirements appear to prohibit the presentation of representative account performance, unless the performance of the representative account is worse than the composite performance of the relevant investment strategy. Presenting the

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[82] Proposed Rule 206(4)-1(11).

[83] A related portfolio is defined as "a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered or promoted in the advertisement." Proposed Rule 206(4)-1(e)(12).

performance of representative accounts should be permitted as long as the performance is not misleading. Many advisers, particularly smaller wealth managers, do not have the resources to calculate composite performance, and will be challenged to conclude and demonstrate that the performance of a representative account is "no higher than if all related portfolios had been included."[84] Additionally, managers typically calculate Sharpe ratios, information ratios, and other risk metrics based on a representative account rather than on a composite basis. It is unclear whether this practice would be permitted under the proposed rule as written.

Second, the question of whether the performance of a related portfolio would be "no higher" than if all related portfolios had been included will not have a clear answer. A firm may seek to exclude an account that has a superior five-year return, but a poor one-year return, or present the performance of a representative account that has a superior one-year return, but a poor five-year return. In this scenario, the advertised performance over five and ten years would be lower, but the 1-year return would be higher. This practice may be prohibited by the proposed rule because the 1-year return does not satisfy the rule's requirements, even though the longer-term returns do satisfy the rule's requirements.

We believe that these outcomes were not intended, and that they do not advance the Commission's interest in ensuring that investors do not receive misleading performance information. To address these issues, the Commission could adjust the prohibition contained in section (c)(1)(iii)(A) of the proposed rule to allow the exclusion of related portfolios as long as the performance presented is "representative" of the universe of related portfolios or "not materially higher than" the universe of related portfolios. In the alternative, we also believe that section (c)(1)(iii) of the proposed rule could be removed entirely, as it is redundant with the general prohibitions contained in proposed sections (a)(1) (omitting to state a material fact necessary in order to make a statement made, in light of the circumstances under which it was made, not misleading) (a)(3) (making a statement that is reasonably likely to cause an untrue or misleading inference to be drawn) and (a)(6) (including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced). Each of these prohibitions would be implicated by an adviser that cherry picks accounts to make its performance appear materially better than it actually is, and we believe that additional, prescriptive requirements in connection with related performance are not necessary in light of these general prohibitions.

Regardless of whether and how the Commission chooses to address these concerns, we believe that the statement in the Proposing Release that firms may reasonably conclude that they have satisfied the requirement to show the performance of all related portfolios by complying with GIPS composite construction guidelines[85] is very important to GIPS-compliant firms as well as non-GIPS-compliant firms seeking guidelines on how to identify related portfolios. We believe that this guidance is appropriate, and that it should be repeated in the adopting release.

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[84] Proposed Rule 206(4)-1(c)(1)(iii)(A).

[85] *See* Proposing Release at 146-147.

7. The conditions on the use of extracted performance should be removed.

The proposed rule permits the presentation of extracted performance (*i.e.*, the performance results of a subset of investments extracted from a portfolio) only if the advertisement provides or offers to provide promptly the performance results of all investments in the portfolio from which the performance was extracted.[86] We generally support the Commission's recognition that extracted or "carve-out" performance derived from recommendations that an investment adviser actually made is useful to current and prospective clients and does not introduce the same degree of risk as truly hypothetical performance.[87] However, we are concerned that a presumptive prohibition on extracted performance that may only be satisfied through prescriptive remedial steps may, similar to the treatment of related performance, introduce certain unintended consequences.

By its terms, the proposed rule's requirement to provide or offer to provide "the performance results of all investments in the portfolio from which the performance was extracted" would create an additional hurdle for GIPS-compliant firms, which typically would present composite performance of a strategy (rather than the performance of a single portfolio). Consequently, GIPS-compliant firms that present carve-outs would need to include in their presentation materials:

1. The performance of the composite of carve-out segments;

2. The performance of a composite of standalone portfolios managed to the strategy (GIPS requirement); *and*

3. The performance of each of the total portfolios from which the carve-out segments were extracted (Advertising Rule requirement).

We believe that sufficient transparency would be provided by allowing advisers to present either #2 or #3, although #2 (only) would more closely align the Advertising Rule with the GIPS standards.

Moreover, there appears to be a disconnect between the proposed rule and the 2020 edition of the GIPS standards in that the GIPS standards *require* a firm that creates a carve-out from one portfolio that is representative of a strategy to present the composite performance of *all* carve-outs from the firm's existing portfolios that are also representative of the strategy.[88] The proposed rule's treatment of extracted performance does not contemplate the creation of

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[86] Proposed Rule 206(4)-1(c)(1)(iv); (e)(3).

[87] *See* Proposing Release at 154.

[88] Global Investment Performance Standards (GIPS®) for Firms (2020), 3.A.17, https://www.cfainstitute.org/-/media/documents/code/gips/2020-gips-standards-firms.ashx (**2020 GIPS Standards**) ("When the firm creates a carve-out of a particular strategy, allocates cash to the carve-out, and includes the carve-out in a composite, the firm must create carve-outs with allocated cash from all portfolios and portfolio segments within the firm managed to that strategy and must include those carve-outs with allocated cash in the composite.").

composite performance that includes extracted performance, and the rule's requirements in this instance are not clear.

To mitigate these concerns, we believe the Commission should remove the specific conditions imposed on the presentation of extracted performance, and instead clarify in the adopting release that extracted performance *is not* hypothetical performance. This would be consistent with our recommendations below regarding target and projected performance. Investment advisers that elect to present extracted performance would still be subject to the general anti-fraud prohibitions in the proposed rule. While it is possible that an adviser may take the position that the presentation of certain extracted performance does not require the provision of the performance of the portfolio(s) from which the performance was extracted, we believe this may be appropriate in certain situations, for example where narrative disclosure of the relationship between the extracted performance and those portfolios is sufficient to satisfy the general prohibitions of the rule.[89]

8. The definition of hypothetical performance should be revised to exclude target, projected, and certain forms of model performance that do not present the enhanced risks attendant to other forms of hypothetical performance.

The proposed rule prohibits the presentation of hypothetical performance in an advertisement unless the investment adviser first adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives of the person(s) to whom the advertisement is disseminated, provides information regarding the criteria used and assumptions made in calculating the performance, and provides or (for non-retail persons) offers to provide disclosures regarding the risks and limitations of hypothetical performance.[90] While we generally believe that principles-based prohibitions, rather than prescriptive requirements, are the appropriate method to address most advertising practices by investment advisers, we agree with the Commission that hypothetical performance, properly defined to include backtested and certain types of model performance, may introduce an enhanced risk to many investors, and should be subject to enhanced requirements. However, we believe the Commission's definition of hypothetical performance is overbroad, and its treatment of hypothetical performance is too restrictive in certain cases.

Our primary concern is the inclusion of "targeted or projected returns" within the definition of hypothetical performance. Statements regarding performance targets or projections do not introduce the same character or degree of risks as other forms of hypothetical

[89] An adviser may, for example, disclose that the performance of equity investments was extracted from a balanced portfolio, that equity constituted between 30% and 45% of the assets of the portfolio during the period in question, that only exchange listed common stocks in the portfolio are included in the extracted performance, and that the equity portion of the portfolio was allocated cash balances in accordance with its portion of the portfolio assets, calculated monthly. This disclosure would likely be sufficient to address the Commission's concerns with respect to extracted performance.

[90] Proposed Rule 206(4)-1(c)(1)(v).

performance, and should not be subject to the onerous requirements applicable to hypothetical performance. Current and prospective clients benefit when investment advisers explain the intended risk/return ratio of investment strategies. Advisers should be able to share this information with prospective and existing clients without first making a determination as to the sophistication of all recipients of the communication.

For example, a retail client could ask her wealth manager, "what is the strategy's performance target," or if the retail client is more sophisticated "how would you project the portfolio to perform if the 10-year UST rises by 1% next year." The proposed rule would prohibit the adviser from answering the client's question until it had (i) established procedures to gather information to determine that the information is "relevant" to the client; (ii) prepared disclosures regarding the basis for the target and projection; and (iii) prepared risk disclosures regarding the risks and limitations of providing this type of information. In this scenario, the adviser is clearly impeded by the proposed rule from providing relevant and meaningful information that is helpful to the client, and we do not perceive a corresponding need for enhanced protection of the investor or others like her.

The proposed rule would also create impracticalities for many alternatives managers. For fixed income, real estate, or private markets managers, presenting the performance of a portfolio that includes any unrealized positions (*i.e.*, securities that have not been liquidated) could be viewed as projected returns as they may not be liquidated as projected. This concern is most acute for private credit managers that do not hold marketable securities for client portfolios, and present a return based upon the "projection" that all lenders will pay back in full or at the contemplated amounts. Similarly, fixed income advisers are arguably advertising "projected or targeted" returns when they list basic portfolio characteristics such as the yield-to-maturity of a portfolio, the current yield of the fund, the duration, or weighted average life. All of these very standard metrics in the fixed income world carry the implicit assumption that the adviser is "projecting" that the debt/issuer will pay as contractually promised. Also, as noted above, private equity managers commonly provide underwriting analysis on existing or prospective investments by the funds that they manage in the interest of full and fair disclosure in the context of due diligence. We do not believe that any of these common practices introduce risks that would warrant the additional requirements proposed for hypothetical information.

We contrast the limited investor protection benefits that may be obtained from applying the requirements to target, projected, and (as noted above) extracted performance against the risk that an investor will be misled by the presentation of hypothetical backtested performance. On numerous occasions, the Commission has brought enforcement action against investment advisers based on allegations that the advisers misrepresented backtested performance as actual performance obtained for clients.[91] We agree that this practice is misleading and warrants

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[91] *See, e.g.*, *In re* Arlington Capital Management, Inc., SEC Rel. No. 4885 (Apr. 16, 2018) (adviser failed to disclose that the performance of its model portfolios was based on backtested performance); *In re* Alpha Fiduciary, Inc., SEC Rel. No. 4283 (Dec. 1, 2015) (adviser distributed performance advertisements to current and prospective clients that failed to disclose with significant prominence and detail that performance data was hypothetical rather than actual); *In re* Mackensen & Company, Inc., SEC Rel. No. 4188 (Sept. 4, 2015) (adviser presented backtested performance of its model portfolios as actual historical performance); *In re* F-Squared Investments, Inc., SEC Rel. No. 3988 (Dec.

enhanced protections under the adopted rule. But these protections should not be extended to other performance-related statements that do not raise similar concerns.

We also recommend that the Commission clarify, either in the rule or the adopting release, that the onerous requirements imposed on hypothetical information do *not* apply to the following circumstances:

- Performance of broad market or index-based data used in an educational presentation where disclosure on the presentation or other facts and circumstances regarding the presentation make clear that the performance is not the performance of the investment adviser's investment strategies.[92]

- The performance of investment recommendations reflected in model portfolios delivered by an investment adviser to advisory clients for a fee. The performance of these portfolios is reflective of actual investment recommendations of an investment adviser, and does not introduce the same risk of misleading clients as backtested performance or other types of "model" performance that do not reflect investment advice actually provided to clients.[93]

- The presentation of the actual performance of proprietary accounts owned by the investment adviser or its affiliates that is similar to a strategy offered to clients, notwithstanding that such accounts may not technically be the performance "of any client of the investment adviser."

- Information produced from technological tools that run simulations presenting various potential investment outcomes based on different investment strategies or styles that may be undertaken.[94]

23, 2014) (adviser used hypothetical backtested track record advertised as actual performance to materially inflate the performance of its strategy).

[92] This exclusion would not be necessary if the Commission agrees with our recommendation that *bona fide* educational materials should be expressly excluded from the definition of advertisement.

[93] For example, some advisers manage all accounts in a strategy to the same model (absent the imposition of any reasonable restrictions by an individual client). In that circumstance, it would not be misleading to present the performance of the model, rather than the composite performance (which, as noted, may be difficult or costly for some advisers to calculate). Other advisers serve as third-party model providers to other advisers. These model providers may not have any information about the performance of the accounts that use the models, or the performance of such accounts may be affected by decisions of the party receiving the model not to implement the model provider's recommendations. For these advisers, providing performance of the model is often the most accurate way to demonstrate their performance. The performance of advisers that manage according to a model or deliver models for a fee is in fact the performance of investment recommendations provided to clients.

[94] Many advisers use such tools to help their clients understand whether they are likely to meet projected future goals based on their current portfolios. Other advisers offer these tools free to use online for users to explore various savings and investment scenarios. These tools do not present the same risk as tools that provide "anticipated returns". *See* Proposing Release at 164.

In complying with the current rule, investment advisers have already addressed the risks of presenting these types of performance, including significant additional disclosure to ensure that readers of the advertisement understand relevant risks. We expect that investment advisers would continue to do so here. These communications would remain subject to the principles-based prohibitions in the proposed rule.

9. The Advertising Rule should contain specific standards for performance portability.

We support the inclusion in the Advertising Rule of guidelines regarding the presentation of predecessor performance results. We believe it would be challenging to develop prescriptive regulatory requirements that address all aspects of performance portability, and the various potential scenarios that may arise. However we also believe that the Advertising Rule could – and should – establish a general framework mirroring existing no-action precedent and industry best practices that could be applied to most situations.[95] Furthermore, we believe that, if full books and records of a predecessor firm are not available, the adviser should be able to substantiate the performance of the predecessor firm using publicly available information in conjunction with audit or verification statements.

We therefore recommend that the Commission adopt the following guidelines for allowing performance portability:

- At the time of transition,[96] substantially all of the investment-decision makers who manage accounts at the adviser were also those primarily responsible for achieving the prior performance results;
- The accounts managed at the predecessor entity are sufficiently similar to the accounts currently under management that the performance results would provide relevant information to clients and investors;
- All accounts that are managed in a substantially similar manner are included in the calculated performance results unless the exclusion of any such accounts would not result in materially higher performance;[97]

[95] *See* 2020 GIPS Standards at 1.A.32, 1.A.33, 1.A.34; South State Bank, SEC No-Action Letter (May 8, 2018); Horizon Asset Management, LLC, SEC No-Action Letter (Sept. 13, 1996); Great Lakes Advisors, Inc., SEC No-Action Letter (Apr. 3, 1992); Conway Asset Management, Inc., SEC No-Action Letter (Jan. 27, 1989); Fiduciary Management Associates, Inc., SEC No-Action Letter (Mar. 5, 1984).

[96] We believe that the natural expansion or turnover of investment decision-makers on an investment team should not prohibit a successor entity from presenting the performance of the investment team while at a predecessor entity, whether or not the predecessor entity is an affiliate. By contrast, the immediate termination of all investment decision-makers after a transition would likely be inconsistent with the goal of presenting meaningful information to prospective clients and investors. We believe that the latter concern would be best addressed through guidance in the adopting release that such a structured transaction would be inconsistent with the anti-fraud provisions of Section 206 and anti-circumvention provisions of Section 208(d) of the Advisers Act.

- The advertisement includes all relevant disclosures, including that the performance results were from accounts managed at another entity; and
- The adviser has sufficient records to support the performance results presented.

III. PROPOSED SOLICITATION RULE

The IAA generally supports the modernization of the Solicitation Rule. We continue to believe that the rule is an appropriate means to ensure that investors are aware that certain financial intermediaries that recommend or solicit on behalf of investment advisers may be influenced by pecuniary and other interests. However, we believe that certain aspects of the proposed rule would result in redundant regulation of certain solicitors, and that the overbroad scope of some aspects of the rule should be narrowed.

Accordingly, we recommend that the proposed rule not extend to the solicitation of private fund investors. We also believe that, as a general matter, the Solicitation Rule should only apply to situations in which an adviser and the potential solicitor have established a mutual understanding that the solicitor will be compensated for solicitation activities on behalf of the adviser, and we recommend that the proposal be modified to reflect this principle. We further believe that the proposed application of the rule to all forms of direct or indirect compensation is unworkably broad and would impose significant burdens without adding commensurate investor protections and we make recommendations in this regard. We also suggest ways to streamline the solicitor disclosure requirements, tailor the definition of "ineligible solicitor" to avoid imposing vicarious liability on certain solicitors merely by virtue of affiliation, exempt intermediaries acting on behalf of *clients* rather than advisers from the requirements of the rule, exclude certain types of "refer-a-friend" programs that lack the characteristics of professional solicitors, and raise the proposed threshold for *de minimis* payments.

A. The Scope of the Solicitation Rule

1. The solicitation rule should not be extended to solicitation of private fund investors or non-U.S. investors.

The proposed application of the Solicitation Rule to the solicitation of existing and prospective private fund investors would subject investment advisers to substantial operational and compliance obligations without a commensurate benefit to such investors. We agree with the Commission's goal of making fund investors "aware of a solicitor's financial interest in the investor's investment in a private fund and prohibiting the use of disqualified solicitors,"[98] but believe these concerns are already addressed through separate, existing laws and regulations.

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[97] This provision could likely be removed if the Commission elects to retain requirements related to the presentation of related performance as proposed.

[98] Proposing Release at 212.

The Commission notes in the Proposing Release that "the primary policy goal of the proposed solicitation rule is already satisfied by other regulatory requirements applicable to RICs and BDCs: prospective investors in RICs and BDCs sold through a broker-dealer or other financial intermediary already receive disclosure about the conflicts of interest that may be created as a result of the fund or its related companies paying the intermediary for the sale of its shares and related services."[99] We agree, and we further note that the same is true for private funds distributed in the U.S.

We recognize that, as the Commission states in the Proposing Release, investors in private funds may often be financially sophisticated but may not be aware that the person engaging in the solicitation activity may be compensated by the adviser.[100] Solicitors of investors in private funds typically would be required to register as broker-dealers under the Securities Exchange Act of 1934 (**Exchange Act**), and be subject to the Exchange Act's broker-dealer regime, including the new requirements set forth in Regulation Best Interest.

U.S. investors in private funds are also protected from solicitors that have disciplinary histories under existing regulations. As discussed above, because the offer and sale of securities are subject to regulation under the Exchange Act, most solicitors who place private fund interests are broker-dealers that are *already* subject to the statutory disqualifications in Section 3(a)(39) of the Exchange Act. In addition, private funds are typically offered in the U.S. in reliance on Rule 506 of Regulation D promulgated under the Securities Act. Rule 506(d) prohibits the sale of securities to any paid solicitor with a statutory disqualification. Consequently, private funds offered in reliance on Rule 506 may not compensate persons for soliciting investors if such persons (or their directors, general partners, managing members, executive officers, and officers participating in the offering) have been subject to a disqualifying event.[101] The protections of Rule 506(d) cover not only broker-dealers but also any type of compensated intermediaries. Consequently, the disqualification requirements of Rule 506(d) also apply to the small number of persons who solicit private fund investors but are not registered as broker-dealers.

Furthermore, we note that the application of the rule to the solicitation of current and prospective investors in any private fund could have the effect of governing solicitation arrangements of UCITS and other funds that are publicly offered to non-U.S. persons under non-U.S. regulatory regimes, as well as AIFs and similar funds that are privately offered, but subject to substantive non-U.S. regulation.[102] These funds can also be offered to U.S. persons in reliance on Section 3(c)(1) or 3(c)(7) of the Investment Company Act, in which case they are "private

[99] Proposing Release at 212.

[100] *See* Proposing Release at 211.

[101] Although disqualification does not arise from disqualifying events that occurred before September 23, 2013, such disqualifying events must be disclosed to investors pursuant to Rule 506(e) of Regulation D.

[102] UCITS funds are open-end pooled investment vehicles that are regulated by the European Commission and authorized pursuant to the Undertakings for Collective Investment in Transferable Securities Directive. AIFs are alternative investment funds that are not covered by the EU Directive on UCITS and instead fall under the Alternative Investment Fund Managers Directive.

funds" that are clearly subject to the rule. This raises concerns because of the potential for conflict with non-U.S. regulations and market practice.

In light of the substantive investor protection and extraterritorial issues discussed above, we believe that the Solicitation Rule should continue to apply only to solicitation of investment advisory services, rather than impose on the U.S. private placement regime an additional, redundant set of rules arising from the Advisers Act. We thus ask that the Commission: (i) remove the proposed extension of the scope of the Solicitation Rule to private fund investors; (ii) clarify in the adopting release, or revise the proposed rule to expressly provide, that the requirements of the proposed rule do not apply to solicitations of non-U.S. investors in pooled investment vehicles formed under the laws of a non-U.S. jurisdiction, consistent with prior staff guidance regarding the qualification of investors in such funds;[103] (iii) retain the current application of the Solicitation Rule to "clients"; and (iv) clarify in the adopting release that these changes from the proposal are intentional and intended to codify the existing Commission staff position in the Mayer Brown no-action letter.[104]

Alternatively, if the proposed expansion of the rule is retained and the Mayer Brown no-action letter is withdrawn, we request that existing solicitation arrangements that relied on a prior version of the Solicitation Rule be grandfathered. This treatment should apply as long as the investment assets in question remain in the same pooled investment vehicle that was the subject of the original solicitation, and even if the investment adviser continues to make payments in compensation for the original solicitation. Requiring advisers to apply new legal standards to solicitations that were in compliance with all applicable law at the time the solicitation was made would be commercially burdensome, unfair, and potentially disruptive to clients and investors.

2. **The Solicitation Rule should apply to situations in which an adviser and the potential solicitor have established a mutual understanding.**

As a general matter, we think that the Solicitation Rule should only apply to situations where the adviser and the potential solicitor have established a mutual understanding that any benefits that are or will be provided are compensation for solicitation activities on behalf of the adviser. The Solicitation Rule should require a nexus between the benefit and the referral to prevent second-guessing in hindsight whether there was, in fact, an agreement. We recommend that the Commission expressly limit the application of the rule only to situations where the adviser and the proposed solicitor have established a mutual understanding that compensation provided by the adviser is provided as compensation for solicitation activities. The understanding need not be explicit but could be inferred from the facts and circumstances.

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[103] *See, e.g.*, Touche Remnant & Co., SEC No-Action Letter (pub. avail. Aug. 27, 1984); Goodwin Procter & Hoar, SEC No-Action Letter (pub. avail. Feb. 28, 1997).

[104] Mayer Brown LLP, SEC No-Action Letter (July 28, 2008) (stating that Rule 206(4)-3 generally does not apply to a registered investment adviser's cash payment to a person solely to compensate that person for soliciting investors or prospective investors for, or referring investors or prospective investors to, an investment pool managed by the adviser).

3. The potentially limitless application of the Solicitation Rule to all forms of direct or indirect compensation is impractical.

We are also concerned that a retroactive facts and circumstances analysis will result in an overbroad application of the Solicitation Rule and impose significant burdens without commensurate benefits to investors, particularly in the case of certain items identified in the Proposing Release as non-cash compensation. Whereas the Solicitation Rule currently applies narrowly to the payment of a cash fee, directly or indirectly, to a solicitor, the proposal would prohibit the provision by an investment adviser to a solicitor of *any* form of compensation, directly or indirectly, unless the adviser complies with the rule. While this goal is laudable in theory, we believe that the Commission's guidance contained in the Proposing Release represents an overbroad and unworkable interpretation of the types of items that should be considered "compensation."

Because the proposed rule would apply to direct or indirect non-cash compensation, there could be any number of perceived or imagined benefits to a solicitor that, when viewed in hindsight in the context of an examination, could subject advisers to inadvertent violations of the Solicitation Rule. For example, an investor in a private fund could refer other investors or clients to the adviser and subsequently negotiate a *bona fide* reduced fee in a side letter for an investment in another fund.

The Solicitation Rule, as proposed, could also subject routine activities of investment advisers to the requirements of the rule, although those activities are not designed to compensate participants for solicitations or referrals, and in practice are unlikely to influence the activities of such participants in any event. For example, advisers regularly provide "training or education meetings, outings, tours, or other forms of entertainment, and free or discounted advisory services"[105] to clients and non-clients in the normal course of business. Imposing an obligation to enter into a written agreement, conduct diligence on potential disqualifications, and deliver the required disclosure on each occasion that a referral is received from any person who ever participated in any of these activities would create an extraordinary and disproportionate compliance burden on advisers relative to the little discernable extra protection of any referred client or investor.

Although we understand the Commission's concern that the payment of certain non-cash compensation for referrals creates the same conflicts of interest as cash compensation for referrals, the potential for the appearance of a referral arrangement relating to non-cash compensation to manifest itself retroactively renders the rule impractical from a compliance perspective. To the extent that the Solicitation Rule is adopted in a manner that covers the payment of non-cash compensation, we recommend that the Commission narrowly and specifically define the types of non-cash compensation that are subject to the Solicitation Rule and provide guidance that non-cash compensation would not include training or education

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[105] Proposing Release at 207.

meetings, outings, tours, or other forms of reasonable entertainment provided by advisers in the ordinary course of business.

4. The Commission should clarify when a solicitor is required to register as an investment adviser.

The Commission is proposing to no longer take the position that "a solicitor who engages in solicitation activities in accordance with paragraph (a)(2)(iii) of the rule … will be, at least with respect to those activities, an associated person of an investment adviser and therefore will not be required to register individually under the Advisers Act solely as a result of those activities."[106] Instead, the Proposing Release notes that whether a solicitor may be subject to the requirement to register as an investment adviser is a facts and circumstances determination.

We agree with this position. Not all solicitation activities with respect to advisory services are a basis for registration under the Advisers Act. A solicitor that engages in solicitation activities, without also being engaged in the business of providing investment advice or making recommendations with respect to securities or investment strategies, should not be required to register as an investment adviser. In these cases, the interest of investor protection is appropriately addressed by the Solicitation Rule's solicitor disclosure and statutory disqualification provisions. We further note that adviser registration would be particularly inapt for refer-a-friend programs that do not involve professional solicitors, as discussed below. To the extent that the Commission reverses its longstanding policy of not requiring investment adviser registration solely for solicitation activities, it should provide clear guidance in the adopting release regarding the types of activities that would require a solicitor to register as an investment adviser.

We also note that in most cases, the investment adviser will not have adequate information to determine whether the solicitor is obliged to register with the Commission or with one or more state authorities, if at all. The Commission should confirm that, absent actual knowledge of violations, an investment adviser should be able to rely on the representation of a third-party solicitor that the solicitor has satisfied and will satisfy all relevant registration obligations to which it is subject.[107]

B. Solicitor Disclosure Requirements

We appreciate the Commission's proposal to remove the written agreement requirement for affiliated solicitors. We also support the Commission's proposal to eliminate the requirement that the solicitor deliver the adviser's brochure, and we believe the enhanced flexibility for either the solicitor or the adviser to provide the disclosure statement is superior to the existing

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[106] Proposing Release at 201.

[107] Absent this clarification, we would be concerned about an adviser being liable for aiding and abetting a violation of registration provisions. *See, e.g.*, *In re* Ranieri Partners LLC and Donald W. Phillips, SEC Rel. No. 3563 (Mar. 8, 2013) (adviser caused, and adviser's Senior Managing Partner aided and abetted violations of the Exchange Act's registration provisions by third-party solicitor of fund investors that did not register as a broker-dealer).

requirement. We appreciate the Commission's efforts to streamline the disclosure requirement, and we suggest that the requirement could be further simplified by giving advisers the option to either provide the disclosure separately or incorporate it into other required disclosures. For example, virtually all clients of an adviser already receive the Form ADV brochure, natural person prospective clients will soon be required to receive Form CRS, investors in private funds also typically receive the adviser's Form ADV brochure along with a number of additional disclosure documents, including the fund's offering documents, and broker-dealer solicitors are also anticipated to provide Form CRS to the natural persons that they solicit. We recommend that advisers have the option, but not the requirement, to provide the disclosure separately.

To further provide firms with greater flexibility in meeting the rule's requirements while continuing to promote investor protection, we request that the modification of the timing of solicitor disclosure for mass communications be extended to all communications. Rather than delivering solicitor disclosure at the time of solicitation activities, before the prospective client has expressed an interest in receiving information, a more natural point in time at which to provide the solicitor disclosure would be promptly after the investor expresses an initial interest in the adviser's services or, if the adviser, rather than the solicitor, has agreed to deliver the disclosure, at the time the investor first reaches out in any manner to the adviser in response to the solicitation.

C. Definition of "Ineligible Solicitor"

We fully support the important goal of preventing bad actors from being involved in solicitation activities. However, the Commission should take care not to capture persons who are not themselves bad actors.

As written, the definition of ineligible solicitor appears to disqualify persons (and employees, officers, and directors of such persons) directly or indirectly controlling or controlled by a person who, at the time of solicitation, are subject to certain disqualifying events.[108] Consequently, for example, the proposed rule would prevent an adviser from compensating a subsidiary of a parent entity where the parent entity (but not the subsidiary) was subject to a disqualifying event. This relationship renders the subsidiary an ineligible solicitor even if it is a separate operating company, and had no involvement in the disqualifying event (and may not even have knowledge of the disqualifying event).

Because the proposed rule defines ineligible solicitor to include any person directly *or indirectly* controlling or controlled by the ineligible solicitor (as well as their employees, officers, and directors), this issue would be severely compounded in large organizations, potentially disqualifying large chains of wholly- or partially-controlled entities completely unrelated to the disqualifying event.

[108] Under proposed Rule 206(4)-3(a)(3)(ii)(A) and (E), taken together, the definition of ineligible solicitor encompasses any person directly or indirectly controlling or controlled by a person who at the time of the solicitation is subject to a disqualifying Commission action or a disqualifying event, as well as, among others, any employee, officer, or director of such person (and any other individuals with similar status or functions).

The Commission should more narrowly tailor the definition of "ineligible solicitor" to avoid imposing, in essence, vicarious liability on certain solicitors merely by virtue of affiliation. We recommend that the definition of ineligible solicitor exclude those parties that operate independently of the affiliate whose activity created the disqualifying event and that had no involvement in the disqualifying event.[109]

We also request that any solicitor that has been subject to a disciplinary event that was not disqualifying under the current version of the Solicitation Rule at the time of entering into the solicitation arrangement receive "grandfathering" treatment and be permitted to continue acting as a solicitor under that arrangement. Alternatively, the grandfathered solicitor should at a minimum be able to continue to receive any payments from the investment adviser in compensation for any solicitations that took place prior to the effective date of the amended Solicitation Rule.

D. Exemption for Intermediaries Acting on Behalf of Clients

In recent years, our members have increasingly dealt with situations where prospective investors engage agents to administer RFP processes, facilitate submissions by investment advisers in the RFP process, and prepare reports for prospective investors regarding potential investment advisers under consideration. In many of these situations, the agents are engaged by the prospective investor subject to the understanding that the prospective client will only hire an investment adviser that agrees to pay the expenses of the agent for providing this service. It is not clear whether these relationships would render the investor's agent a solicitor for purposes of the Solicitation Rule. While we believe that the investor's agent should not be considered a solicitor because the agent does not solicit *for* any adviser or refer the prospective investor *to* the adviser, in many cases the adviser must enter into an agreement to participate in the RFP process, which may be deemed to establish a form of commercial agency between the investor's agent and the investment adviser under consideration.

Due to the increasing prevalence of this practice in the institutional marketplace, we believe that an explicit exemption for such relationships is appropriate. We also believe that with the passage of time similar business practices will develop, and a narrow exemption may not adequately exempt practices with similar characteristics. However, we are cognizant that an overbroad exemption may capture relationships, primarily but not exclusively in the retail market, where the investor may not be aware that such an intermediary will receive compensation from the investment adviser. These arrangements should be subject to the Solicitation Rule's protections.

In light of these concerns, we recommend that the Commission consider a fifth exemption pursuant to which subsection (a) of the Solicitation Rule would not apply to any arrangement pursuant to which a client – or private fund investor if solicitation of such investors

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[109] For example, the Commission could look to the relevant part of the definition of "operationally independent" in the Custody Rule; *i.e.*, advisory personnel do not hold any position with the related person or share premises with the related person. *See* Rule 206(4)-2(d)(5) under the Advisers Act.

is not excluded from the rule – advises an investment adviser in writing that the investment adviser must provide cash or non-cash compensation to a third party as a condition of providing advisory services. We believe that conditioning the exemption on a written communication from the client in question should provide reasonable comfort in all cases that the client is aware of the proposed compensation and does not need additional disclosure from the adviser to understand the intermediary's interest and related conflicts. If the Commission is reluctant to provide such an exemption, then we recommend that the Commission clarify in the adopting release that such an arrangement would not cause the intermediary to be a solicitor.

E. Refer-a-Friend Programs and *De Minimis* Compensation

We request that the Commission exclude certain types of "refer-a-friend" programs that lack the characteristics of professional solicitors from the proposed Solicitation Rule. These are programs in which existing clients of an adviser, who are not professional solicitors, are able to refer new clients to the adviser in exchange for a limited waiver of advisory fees on their account or a small amount of cash (*e.g.*, $25 per referral). In some of these programs, referring clients simply initiate the sending of a generic email that the adviser has written and that is not in any way tailored to the circumstances of a particular client.[110]

We suggest that, as long as a refer-a-friend program only involves either non-transferable advisory fee waivers for individual investors or a small amount of compensation per referral, these programs should be excluded from the full scope of the Solicitation Rule as long as the investment adviser or the referring client discloses the referring client's conflict of interest before or upon account opening.[111]

We believe that the policy objectives of the Solicitation Rule would not be served by otherwise subjecting these types of non-professional communications to the *full* requirements of the rule, which would be exceedingly onerous in this context. Accordingly, we request that, as long as the fact of the referring party's compensation is disclosed before or at the time the referred client becomes a client, the other requirements of the rule, including those concerning a written agreement and statutory disqualification, should not apply.

For firms with thousands of retail clients and not knowing in advance which ones will participate in the refer-a-friend program, the burden of undertaking an affirmative inquiry into each person's disciplinary history would be a tremendous compliance challenge that is disproportionate to the limited scope and magnitude of such non-professional refer-a-friend programs. Alternatively, advisers with such programs should be able to rely on representations provided by referring parties regarding their lack of disqualification events, rather than being

[110] We believe that these types of emails would be subject to the proposed Advertising Rule.

[111] To the extent that there is variability in the benefits that a referring client (or a more traditional solicitor) will receive, firms should be permitted to disclose the maximum possible compensation that could be obtained, an approach that we understand is currently acceptable to the staff. We think that approach appropriately sensitizes a client to the greatest possible conflict and is much more workable than requiring greater individualization around compensation disclosure.

subject to the "reasonable care" standard under the proposed rule, and should not have to engage in inquiries of solicited investors absent some red flag.

Additionally, we believe the proposed Solicitation Rule should exclude advertising relationships with publishers (*e.g.*, bloggers who write about financial services) who create their own content, even if the publishers are compensated based on account sign ups that result from clicks on an advertisement created by the adviser. In such cases, there is no individualized client outreach or solicitation, and we believe that the risks inherent in these types of communications are more appropriately addressed through the proposed Advertising Rule, including, as applicable, the specific provisions related to compensated testimonials and endorsements,[112] which require clear disclosure of any conflicts designed to protect investors. If the Commission nevertheless decides that the Solicitation Rule should apply to these types of publishers, then we suggest a similar approach to the statutory disqualification provision as we recommend for refer-a-friend programs. We believe that a representation from these publishers that they are not subject to any statutory disqualification should suffice. Inquiries by advisers into the potential disciplinary histories of entities that are solely publishing non-individualized and publicly available content would be burdensome and would not add much additional benefit.

Finally, we appreciate that the Commission is proposing a new exemption to the Solicitation Rule for *de minimis* payments. This will help alleviate the compliance burden on investment advisers where incentives are inherently limited, and thus risks to prospective clients are low. However, we believe that the proposed *de minimis* threshold of less than $100 in any 12-month period is too low to be of much use, and should be raised to more appropriately capture referrals from non-professional solicitors. We would be happy to work with the staff to settle on an appropriate threshold that it is low enough to minimize the risk that advisers will be dealing with professional solicitors.

IV. WITHDRAWAL OF STAFF NO-ACTION RELIEF

We strongly support the withdrawal of all staff no-action letters and guidance relating to prior iterations of the Advertising Rule and Solicitation Rule, and the Commission's efforts to ensure that each letter or guidance statement is either superseded or incorporated into the revised Advertising Rule or Solicitation Rule, as appropriate. As noted above, the regulatory scheme that has developed under the Advertising Rule in particular has become a complex maze of enforcement actions and staff no-action letters that are difficult to decipher and apply to evolving circumstances. Streamlining the Advertising Rule and its interpretive framework will greatly simplify the compliance burden of the day-to-day review of investment adviser advertisements and the application of the rule's requirements in practice. This in turn should result in more consistent business practices among investment advisers and enhanced investor protection.

[112] The Commission states "that, as a practical matter, an adviser subject to both rules in such a situation would substantially satisfy its advertising rule disclosure obligation for testimonials and endorsements by adhering to the solicitation rule disclosure requirement (*e.g.*, the requirement to disclose the solicitor's compensation)." Proposing Release at 203-204. We believe the converse should be true in these instances, and that compliance with the Advertising Rule requirements should suffice as these situations are more akin to advertising than solicitation.

To that end, we have identified several no-action letters – in addition to those identified by the Commission in the Proposing Release – that we believe should be reviewed for withdrawal. Specifically, we note that a majority of the staff no-action letters regarding performance portability were absent from the list of letters under review in the Proposing Release.[113] If the Commission elects to provide specific guidelines regarding performance portability in the rule, as recommended above, we recommend that, in addition to Taurus, the following no-action letters be withdrawn: Fiduciary Management Associates, Inc., SEC No-Action Letter (pub. avail. Mar. 5, 1984); Conway Asset Management, Inc., SEC No-Action Letter (Jan. 27, 1989); Great Lakes Advisors, Inc., SEC No-Action Letter (Apr. 3, 1992); Horizon Asset Mgmt. LLC, SEC No-Action Letter (Sept. 13, 1996); and South State Bank, SEC No-Action Letter (May 8, 2018).

In addition, we recommend that the no-action relief provided by the staff in Munder Capital Management[114] be withdrawn because it will be superseded by the definition of advertisement in the proposed rule.[115] Finally, we believe that the following no-action letters should be considered for withdrawal because the statements made regarding past specific recommendations and misleading advertisements, as applicable, in the relief provided are superseded by the general prohibitions in the proposed rule: Dow Theory Forecasts, Inc., SEC No-Action Letter (pub. avail. Aug. 26, 1983); Mr. Charles Swanson, SEC No-Action Letter (pub. avail. Apr. 10, 1972); Munder Capital Management, SEC No-Action Letter (pub. avail. May 17, 1996); Mills-Price & Associates, Inc., SEC No-Action Letter (pub. avail. July 15, 1992); and National Corporate Sciences, Inc., SEC No-Action Letter (pub. avail. July 24, 1976).

To assist the SEC staff in its review, the IAA has prepared a summary of the content of the no-action letters identified by the Commission in the Proposing Release as well as the letters

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[113] However, we note that Taurus Advisory Group, Inc. (**Taurus**), which relates to performance portability in the context of a joint venture, was included in the list of no-action letters in the Proposing Release. *See* Taurus Advisory Group, Inc., SEC No-Action Letter (July 15, 1993).

[114] Munder Capital Mgmt., SEC No-Action Letter (pub. avail. May 17, 1996) (**Munder**).

[115] In addition, we note that Munder is cited in the Proposing Release as support for the proposition that materials designed to maintain existing clients should be considered "advertisements" under the Advertising Rule. S*ee* Proposing Release at 33. This statement by the staff is supported by citations to In re Spear & Staff, Inc. (**Spear**) and Securities & Exchange Commission v. Richmond & Co. (**Richmond**), which are also cited in the Proposing Release. In Spear, the communications at issue were designed "to induce persons to enter or renew subscriptions" for the adviser's services. In re Spear & Staff, Inc., Rel. No. IA-188 (Mar. 25, 1965) (settled order). Similarly, in Richmond, the Court stated that "investment advisory material which promotes advisory services for purpose of inducing *potential clients* to subscribe to those services is advertising material," and cited as support for this proposition an enforcement action in which the Commission stated that it has "emphasized the high degree of care required to insure accurate and adequate representations concerning securities in printed advisory material distributed by a registered investment adviser who *seeks clients* on the basis of representations that he is competent to furnish expert and informed advice." *Sec. & Exch. Comm'n v. C.R. Richmond & Co.*, 565 F.2d 1101 (9th Cir. 1977) (emphasis added); *In re* Paul K. Peers, Inc., 42 S.E.C. 539, 540-41 (Mar. 22, 1965) (emphasis added). Because these sources only discuss the scope of advertisements in the context of prospective clients, and not in the context of communications to existing clients, we do not believe that these SEC staff letters were intended to support the Commission's position that materials designed to maintain existing clients should be considered advertisements.

noted above. This summary, attached as Appendix A to this letter, is intended to facilitate a comparison of existing no-action relief to the proposed rule and the guidance contained in the Proposing Release.

V. TRANSITION PERIOD AND COMPLIANCE DATE

We strongly support the one-year transition period during which the Commission would permit investment advisers to continue to rely on the current Advertising Rule. It will be critical for investment advisers to have adequate time to make the necessary changes to their operations and policies and procedures to comply with the amended rules. We believe the one-year transition period will provide a reasonable amount of time for investment advisers to make these preparations, while also allowing investment advisers the flexibility to comply with the amended rules early, if they are ready to do so.

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We appreciate the Commission's consideration of our comments on these important proposals and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Gail Bernstein at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

Karen L. Barr
President & CEO

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

Appendix A

Advertising Rule – No-Action Letters

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
1.	A.R. Schmeidler & Co. Inc. (pub. avail. June 1, 1976)* *Staff has previously partially retracted the *per se* prohibition on model performance with a facts and circumstances test (*see* Clover Capital Management below).	Hypothetical performance Advertisement of model performance is *per se* misleading and cannot be cured by any amount of disclosure.	Yes, by Proposed Rule 206(4)-1(c)(1)(v)
2.	Alphadex Corp. (pub. avail. Feb. 21, 1971)	Graphs, charts, and formulas. hypothetical performance, past specific recommendations A list of securities market prices, including buy/sell recommendations based on such prices and the market prices as of the subsequent day, constitute a graph, chart, formula or other device to assist a person making investment decisions, and thus requires disclosure of the limitations thereof and the difficulties with respect to the list's use. Additionally, such list constituted past specific recommendations, which are hypothetical in nature.	Yes, by Proposed Rule 206(4)-1(a)(2)
3.	Amherst Financial Services Inc. (pub. avail. May 23, 1995)	Prohibition and scope of testimonials, generally, including audio files An investment adviser cannot include testimonials of any kind, including audio testimonials, as part of advertisements promoting the adviser's investment advisory services.	Yes, by Proposed Rule 206(4)-1(b) The Proposing Release does not specifically discuss "audio testimonials," but does include guidance that the Proposed Rule is intended to encompass all media.
4.	Analytic Investment Management Incorporated	Prohibition and scope of testimonials, such as client reference letters	Yes, by Proposed Rule 206(4)-1(b)

[1] Letters identified in *Investment Adviser Advertisements; Compensation for Solicitations*, 84 Fed. Reg. 237 (proposed Dec. 10, 2019) ("**Proposing Release**"), https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
	(pub. avail. March 22, 1971)	The distribution of a letter indicating that a mutual acquaintance of the adviser would be willing to inform a prospective customer about the investment experience of his/her fund constitutes an offer to provide a testimonial.	
5.	Anametrics Investment Mgmt. (pub. avail. May 5, 1977)	<u>Misleading performance</u> Whether any communication is misleading depends on all of the particular facts including (i) the form and the content of a communication; (ii) the implications or inferences arising out of the context of the communication; and (iii) the sophistication of the prospective client (*e.g.*, providing information concerning the average performance of accounts may be misleading; providing information as to the percentage change of each account may also be misleading).	Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(5), (a)(6), (a)(7) Cited in Proposing Release at 101 (consider whether performance causes a misleading inference); *see also* Proposing Release at 66 (consider the nature and sophistication of parties).
6.	Andrew M. Rich (pub. avail. Feb. 22, 1989)	<u>False or misleading advertisements</u> Including an award or recognition on a business card implying an adviser was selected from a more select group or wider universe of candidates is misleading.	Yes, by Proposed Rule 206(4)-1(a)(1)
7.	Association for Investment Management and Research (pub. avail. Dec. 18, 1996)	<u>Performance advertisements</u> Gross performance results may be provided to clients so long as this information is presented on a one-on-one basis or alongside net performance with appropriate disclosure. Net and gross of fee performance can be advertised so long as the performance information is presented with equal prominence and in a format designed to facilitate ease of comparison along with sufficient disclosure.	Yes, by Proposed Rule 206(4)-1(c)(1)(i) Cited in Proposing Release at 317 (failure to disclose how advisory fee expenses affect performance results is misleading).
		An adviser that manages only a portion of a client's account may advertise performance figures relating only to that portion of the account so long as performance is shown net of all transaction costs and advisory fees or charges paid to the adviser or its affiliates.	Multi-manager performance not addressed in the Proposed Rule or the Proposing Release.
8.	Bache & Company (pub. avail. Feb 5, 1976)	<u>Graphs, charts, and formulas, false or misleading advertisements, hypothetical performance</u> An advertisement cannot make a claim that a graph, chart, formula or other device	Yes, by Proposed Rule 206(4)-1(a)(2)

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		being offered by an investment adviser can be used to make decisions on which securities to buy or sell, or the timing of such decisions, irrespective of what limitations and difficulties are discussed.	
9.	Bradford Hall (pub. avail. Jul. 19, 1991)	<u>Performance advertisements, gross performance</u> An investment adviser may present its performance gross-of-fees if the adviser provides to a prospective client or third-party investment management consultant gross performance in a one-on-one presentation with disclosures as set forth in Investment Company Institute (pub. avail. Sept. 23, 1988).	Yes, by Proposed Rule 206(4)-1(c)(1)(i), (c)(2) Cited in Proposing Release at 130.
10.	BullBear Indicator, Inc. (pub. avail. Apr. 14, 1973)	<u>Past specific recommendations</u> An advertisement may contain past specific recommendations if (i) the advertisement provides, or offers free of charge, a list of all recommendations made in the last year; (ii) the list contains certain information; and (iii) the advertisement contains a cautionary legend on the first page.	Yes, by Proposed Rule 206(4)-(a)(5)
11.	Bypass Wall Street, Inc. (pub. avail. Jan. 17, 1992)	<u>Performance advertisements, gross performance</u> An investment adviser may present performance to a consultant gross-of-fees if the adviser instructs the consultant to present such gross performance in a one-on-one presentation to prospective clients with disclosures as set forth in Investment Company Institute (pub. avail. Sept. 23, 1988).	Yes, by Proposed Rule 206(4)-1(c)(1)(i), (c)(2) Cited in Proposing Release at 24 (communications distributed by consultants are advertisements "on behalf of" the adviser and must comply with all rule requirements, including gross performance).
12.	Cambiar Investors, Inc., (pub. avail. Aug. 28, 1997)	<u>Prohibition and scope of testimonials, generally, including partial client lists</u> A "testimonial" includes a statement of a client's experience with, or endorsement of, an investment adviser. A partial client list that does no more than identify certain clients of the adviser is not a testimonial.	Yes, by Proposed Rule 206(4)-1(e)(15) Cited in Proposing Release at 79.
13.	CIGNA Securities, Inc. (pub. avail. May 8, 1991)	<u>Prohibition and scope of testimonials, generally</u> Written statements from satisfied financial planning clients, even if unsolicited by the investment adviser and printed in full, are testimonials prohibited by Rule 206(4)-1(A)(1).	Yes, by Proposed Rule 206(4)-1(b)(1), 1(e)(15)

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
14.	Clover Capital Management (pub. avail. July 19, 1991)	Performance advertisements, gross performance The SEC staff declined to provide relief to allow the presentation of gross-of-fee performance to plan sponsors and investment consultants without complying with the conditions set forth in Investment Company Institute (pub. avail. Sept. 23, 1988).	Yes, by Proposed Rule 206(4)-1(c)(1)(i)
15.	Clover Capital Management (pub. avail. Oct. 28, 1986)	Performance advertisements, model or actual results Certain advertising practices in connection with the presentation of either model or actual returns are false or misleading under Rule 206(4)-1(a)(5).	Yes, by Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(7), (c) Cited in Proposing Release at 58, 68, 103, 105, 162 and 317.
16.	Covato/Lipsitz, Inc. (pub. avail. Oct. 23, 1981)	Past Specific Recommendations Whether any communication is misleading depends on all of the particular facts including (i) the form and the content of a communication; (ii) the implications or inferences arising out of the context of the communication; and (iii) the sophistication of the prospective client (*e.g.*, the application of an investment adviser's recommendations on when to enter/exit the market to the performance of certain funds selected by the adviser may be misleading if the application of the adviser's recommendations would produce significantly different results and if these results are not also presented).	Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(5), (a)(7)
17.	Cubitt-Nichols Associates (pub. avail. Dec. 22, 1971)	Past specific recommendations, hypothetical performance Using a hypothetical management service for 90 days as a device to induce prospective clients violates Rule 206(4)-1(a)(5), and (a)(2), which requires advertisements containing past specific recommendations to include a list of all recommendations for at least the preceding one year period.	Yes, by Proposed Rule 206(4)-1(a)(5), (c)(1)(iv)
18.	DALBAR, Inc., (pub. avail. March 24, 1998)	Prohibition and scope of testimonials, generally, including third-party ratings A rating that solicits client views about their experience with an adviser is a testimonial. An adviser may use references to third-party ratings that reflect client experiences so long as certain conditions are met and certain disclosures made, both of which are designed to ensure the rating is developed in a fair and unbiased manner and that disclosures provide investors with sufficient context to make informed decisions.	Yes, by less stringent requirements in Proposed Rule 206(4)-1(b)(2), (e)(16) Cited in Proposing Release at 314.

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
19.	Denver Investment Advisors, Inc. (pub. avail. July 30, 1993)	<u>Prohibition and scope of testimonials, generally, including partial client lists</u> Partial client lists may be included in advertisements so long as (i) the adviser did not use performance-based criteria in determining which clients to include in the list; (ii) each client list contained a disclaimer that it was not known whether the listed clients approved or disapproved of the adviser or the advisory services provided; and (iii) each client list included a statement disclosing the objective criteria used to determine which clients to include in the list. A communication provided to consultants, but not necessarily to prospective clients, to allow the consultants to evaluate the adviser as part of the consultants' own services to their own clients is an "advertisement" because the communication is provided "for the ultimate purpose of maintaining existing clients and soliciting new ones."	Yes, by Proposed Rule 206(4)-1(b)(1), (e)(1) Cited in Proposing Release at 31.
20.	Donaldson, Lufkin & Jenrette Securities Corp. (pub. avail. Mar. 2, 1977)	<u>Misleading advertisements, past specific recommendations</u> Comparing average percentage change in the value of the securities recommended with the percentage changes in the Dow Jones and S&P averages may be misleading, unless the average volatility of the market prices of the securities recommended was the same as that of the Dow Jones or S&P stock averages. The use of percentage figures to demonstrate the gains or losses, and the average gain or loss, which would have resulted from investment in the recommended securities may be misleading if it implies investment results that may not have occurred. An international division of a U.S. registered investment adviser with clients that are exclusively European institutions shall still set forth the performance of all recommendations made by the division within the immediately preceding period of not less than one year, and offer to furnish to its clients upon request a complete list of all securities recommended by its U.S. parent within the immediately preceding one year period.	Yes, by Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(5)
21.	Dow Theory Forecasts, Inc. (pub. avail. May 21, 1986)	<u>Report, analysis or service provided "free of charge"</u> The SEC staff declined to provide relief where an offer for a "free" subscription was subject to conditions.	Yes, by Proposed Rule 206(4)-1(a)(1) Cited in Proposing Release at 342

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
			("We believe that this practice would be captured by the proposed rule's prohibition on untrue statements or omissions.").
22.	Dow Theory Forecasts, Inc. (pub. avail. Nov. 7, 1985)* *Staff has previously partially retracted its position on past specific recommendations, noting that the distribution of an article drafted by an unbiased third party that refers to past specific recommendations made by the adviser is not subject to the requirements of Rule 206(4)-1(a)(2), but still is subject to the prohibition against misleading and fraudulent advertisements (*see* Kurtz Capital Management below).	<u>Past specific recommendations</u> An advertisement that includes an article commending an adviser for its ability to select well-performing stocks is an indirect reference to the adviser's past specific recommendations, and thus must contain all recommendations made by the adviser within the past year.	Yes, by Proposed Rule 206(4)-1(a)(5)
23.	Edward F. O'Keefe (pub. avail. Apr. 13, 1978)	<u>False or misleading advertisements, past specific recommendations</u> Information concerning performance of accounts over a period with special market characteristics may imply or cause an inference to be drawn about the competence of the adviser or the possibility of a client enjoying a similar experience, which would be misleading unless the special market characteristics are also disclosed.	Yes, by Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(5)
24.	Executive Analysts, Inc. (pub. avail. Aug. 6, 1972)	<u>False or misleading advertisements</u> The use of average performance figures requires a high degree of disclosure to make such average performance not misleading.	Yes, by Proposed Rule 206(4)-1(a)(6), (c)(1)

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
25.	F. Eberstadt & Co., Inc. (pub. avail. Jul. 2, 1978)	False or misleading advertisements Advertisements may be misleading if they imply positive facts about the adviser when additional facts, if also provided, would cause the implication not to arise (*e.g.*, the implied relevance of performance without a specific statement as to its relevance to a client or prospective client is an indication of the adviser's competence or the experience of the adviser's clients, which may be misleading without additional facts or disclosure).	Yes, by Proposed Rule 206(4)-1(a)(1), (a)(3), (a)(6), (a)(7) Cited in Proposing Release at 58.
26.	Ferris & Company, Inc. (pub. avail. May 23, 1972)* *Staff has previously partially retracted the *per se* prohibition on model performance with a facts and circumstances test (*see* Clover Capital Management above).	Performance advertisements, model or actual results No amount of disclosure would remove the potential for deception inherent in the practice of soliciting new clients by presenting model portfolios, which are entirely hypothetical in nature, as a meaningful measure of the performance of the adviser.	Yes, by Proposed Rule 206(4)-1(c)(1)(v)
27.	Foster & Marshall, Inc. (pub. avail. Feb, 18, 1977)	Past specific recommendations An investment adviser must provide a client or prospective client a list of all past recommendations made by the adviser, not a list containing only those past recommendations pertaining solely to the client or prospective client's investment objective.	Yes, by Proposed Rule 206(4)-1(a)(5)
28.	Franklin Management, Inc. (pub. avail. Dec. 10, 1998)	Past specific recommendations The inclusion of a discussion of certain past recommendations of the adviser in an advertisement without providing all of the adviser's positions is permitted so long as the adviser uses objective, non-performance based criteria and does not discuss whether the positions were or will be profitable.	Yes, by Proposed Rule 206(4)-1(a)(5) Cited in Proposing Release at 66 and 317 (requirements listed as safe harbor).
29.	Gallagher and Associates, Ltd. (pub. avail. July 10, 1995)*	Prohibition and scope of testimonials, generally, including non-investment related commentary (*e.g.*, religious affiliation or moral character) Any statement of a former, current or existing client regarding the client's experience with, or endorsement of, an adviser constitutes a testimonial. Such	Yes, by Proposed Rule 206(4)-1(b)(1), (e)(15) Cited in Proposing Release at 316.

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
	*Staff has previously partially retracted its prohibition on testimonials (*see* Guidance on the Testimonial Rule and Social Media, Division of Investment Management Guidance Update No. 2014-04 (Mar. 2014)).	statements may be deemed testimonials even if unrelated to the adviser's performance, such as statements regarding an adviser's character, diligence, or sensitivity to client needs.	
30.	Investment Adviser Association (pub. avail. Dec. 2, 2005)	<u>Prohibition and scope of testimonials, generally, including third-party ratings</u> In determining whether a third-party rating is a testimonial, advisers should consider the criteria used by the third party when formulating the rating and the significance to the ratings formulation of criteria related to client evaluations of the adviser.	Yes, by Proposed Rule 206(4)-1(b)(1), (b)(2) Cited in Proposing Release at 314 (safe harbor).
31.	Investment Company Institute (pub. avail. Aug. 24, 1987)	<u>Performance advertisements, gross performance</u> An advertisement including model or actual results that do not reflect the deduction of advisory fees, brokerage or other commissions, and any other expenses that a client would have paid or actually paid is a violation of the Advertising Rule. However, adviser performance figures may be presented without reflecting custodian fees paid to a bank or other organization for safekeeping client funds and securities.	Yes, by Proposed Rule 206(4)-1(c)(1)(i), (c)(2)(i), (e)(6)(iii) Cited in Proposing Release at 127 (guidance regarding deduction of custodial fees).
32.	Investment Company Institute (pub. avail. Sept. 23, 1988)	<u>Performance advertisements, gross performance</u> Investment advisers may present performance results to wealthy prospective clients for advisory accounts on a gross basis in a one-on-one presentation so long as the adviser also provides (i) disclosure that the performance figures do not reflect the deduction of investment advisory fees; (ii) disclosure that the client's return will be reduced by the advisory fees and any other expenses; (iii) disclosure that the investment advisory fees are described in Part II of the adviser's Form ADV; and (iv) a representative example which shows the effect an investment advisory fee, compounded over a period of years, could have on the total value of a client's portfolio.	Yes, by Proposed Rule 206(4)-1(c)(1)(i), (c)(2)(i) Cited in Proposing Release at 24.

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
33.	Investment Counsel Association of America (pub. avail. Mar. 1, 2004)	Past specific recommendations Responses to unsolicited requests by a client, prospective client or consultant about the adviser's past specific recommendations are not advertisements.	Yes, by Proposed Rule 206(4)-1(e)(1)(ii) Cited in Proposing Release at 31.
34.	Investor Intelligence (John Anthony) (pub. avail. April 18, 1975)	False or misleading advertisements Use of "psychic medium" abilities constitutes a "device" prohibited by the Advertising Rule prohibition on representing that a graph, chart, formula or other device can be used to make decisions on which securities to buy or sell, or the timing of such decisions, irrespective of what limitations and difficulties are discussed and constitutes an untrue statement of material fact that is false or misleading.	Yes, by Proposed Rule 206(4)-1(a)(1), (a)(2)
35.	J.D. Minnick & Co. (pub. avail. Apr. 30, 1975)	Past specific recommendations If presenting past specific recommendations, an advertisement must set out or offer to furnish a list of all recommendations made within the immediately preceding year.	Yes, by Proposed Rule 206(4)-1(a)(5)
36.	J.P. Morgan Investment Mgmt., Inc. (pub. avail. May 7, 1996)	Performance advertisements, gross performance, model fees An adviser may present advertising performance that reflects the deduction of a model fee when doing so would result in performance figures that are no higher than those reflecting the deduction of actual fees (*e.g.*, using the highest advisory fee charged to any account employing the same strategy during the performance period).	Yes, by Proposed Rule 206(4)-1(e)(6)(ii)
37.	J.Y. Barry Arbitrage Management, Inc. (pub. avail. October 18, 1989)	Prohibition and scope of testimonials, generally The use of testimonials is prohibited by the Advertising Rule because a testimonial will likely give rise to a fraudulent or deceptive implication or mistaken inference that the experience of the person giving the testimonial is typical of the experience of the adviser's clients.	Yes, by Proposed Rule 206(4)-1(b)(1)
38.	James B. Peeke & Co., Inc. (pub. avail. Sept. 13, 1982)	Past specific recommendations An advertisement cannot contain a partial list of past specific recommendations and offer to provide a complete list. Advertisements must provide a full list or	Yes, by Proposed Rule 206(4)-1(a)(5)

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		offer to provide a full list (without providing and recommendations in the advertisement). The staff does not review specific advertisements as a matter of policy.	
39.	James Maratta (pub. avail. June 3, 1977)	Graphs, charts, and formulas, false or misleading advertisements Advertisements can contain graphs, charts, formulas, and other devices so long as it does not represent that the graph, chart, formula, or other device can in and of itself be used to make buy/sell decisions.	Yes, by Proposed Rule 206(4)-1(a)(2)
40.	Kurtz Capital Management (pub. avail. Jan. 18, 1988)	Prohibition and scope of testimonials, generally, and third-party reports Distribution of past specific recommendations contained in third-party reports is permitted provided that the adviser sends only bona fide unbiased articles.	Yes, by Proposed Rule 206(4)-1(b)(2), (e)(16) Cited in Proposing Release at 316.
41.	Mark Eaton (pub. avail. June 9, 1977)	Past specific recommendations An adviser registered for less than one year will satisfy the rule by presenting all recommendations made during the immediately preceding year that the adviser was registered or, because of an exemption, was not so registered.	Yes, by Proposed Rule 206(4)-1(a)(5)
42.	Multi-Financial Securities Corp. (pub. avail. November 9, 1995)	Prohibition and scope of testimonials, generally, including audio files Distribution of an "audio business card" would constitute distribution of a prohibited testimonial promoting advisory services.	Yes, by Proposed Rule 206(4)-1(b) The Proposing Release does not specifically discuss "audio testimonials," but does include guidance that the Proposed Rule is intended to encompass all media.
43.	New York Investors Group, Inc. (pub. avail. Sept. 7, 1982)* *Staff has previously partially retracted this position (*see* Kurtz Capital Management above)	Prohibition and scope of past specific recommendations and testimonials, generally, and reprints of articles; false or misleading advertisements Reprinting an article that lauds the adviser's success in selecting stocks that perform well in all market conditions is an indirect reference to the adviser's past specific recommendations and must contains all past recommendations made by the adviser within the preceding year, but is not a testimonial.	Yes, by Proposed Rule 206(4)-1(a)(2) Cited in Proposing Release at 315.

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
44.	Norman L. Yu (pub. avail. Apr. 12, 1971)	<u>Past specific recommendations</u> Any advertisement that contains a partial list of recommendations and an offer to furnish a list of all recommendations made during the previous 12-month period would be misleading and fraudulent.	Yes, by Proposed Rule 206(4)-1(a)(5)
45.	Oberweis Securities, Inc. (pub. avail. July 25, 1983)	<u>Past specific recommendations</u> Prohibition on past specific recommendations does not apply to references in advertisements to the performance of the adviser's recommendations, so long as the advertisement does not state the specific securities recommended.	Yes, by Proposed Rule 206(4)-1(a)(5)
46.	Richard Silverman (pub. avail. March 27, 1985)	<u>Prohibition and scope of testimonials, generally</u> An article drafted by an unbiased third-party that discusses an adviser's performance is not a testimonial unless it includes a statement of a customer's experience or endorsement.	Yes, by Proposed Rule 206(4)-1(b)(1)
47.	S. H. Dike & Co., Inc. (pub. avail. Apr. 20, 1975)	<u>Past specific recommendations, hypothetical performance, graphs, charts, and formulas</u> Advertisement of hypothetical performance is *per se* misleading. Representations that a computer program (a "device") can be used in and of itself to determine which securities to buy and sell violates the rule's prohibition and is misleading.	Yes, by Proposed Rule 206(4)-1(a)(2), (c)(1)(v)
48.	Schield Stock Services, Inc. (pub. avail. Feb. 26, 1972)* *Guidance regarding adviser registration should not be withdrawn	<u>False or misleading advertisements</u> Using a hypothetical portfolio as a device to induce a prospective customer to use the services of a particular participant is misleading and violates the antifraud provisions of the Advisers Act.	Yes, by Proposed Rule 206(4)-1(a)(7), (c)(1)(v)
49.	Scientific Market Analysis (pub. avail. Mar. 24, 1976)	<u>Hypothetical performance, past specific recommendations</u> Hypothetical performance may be misleading absent adequate disclosure. A list of past specific recommendations may be offered, provided that the list is offered free of charge.	Yes, by Proposed Rule 206(4)-1(a)(5), (c)(1)(v) Cited in Proposing Release at 316 (safe harbor).

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
50.	Securities Industry Association (pub. avail. Nov. 27, 1989)	Performance advertisements, gross performance Net performance that reflects the deduction of a model fee may be advertised I adequately disclosed.	Yes, by Proposed Rule 206(4)-1(c)(1)(i) Cited in Proposing Release at 318.
51.	Stalker Advisory Services (pub. avail. Jan. 18, 1994)	Prohibition and scope of testimonials, generally, and reprints of articles Third party ratings that are based solely on performance, regardless of whether an adviser compensates the third party to verify and rank its performance, do not constitute testimonials and, as such, are permitted provided that their inclusion is not false or misleading.	Yes, by Proposed Rule 206(4)-1(b)(2), (e)(16) Cited in Proposing Release at 58.
52.	Starr & Kuehl, Inc. (pub. avail. Apr. 17, 1976)	Past specific recommendations The general prohibition against referring to past specific recommendations is intended to prevent investment advisers from misleading prospective clients by referring to only past recommendations of the adviser that were profitable and ignoring other recommendations that were not profitable.	Yes, by Proposed Rule 206(4)-1(a)(5)
53.	Taurus Advisory Group, Inc. (pub. avail. July 15, 1993)	Performance advertisements, past performance Permitting the presentation of past performance of one adviser in a newly formed joint venture subject to certain conditions.	Partially by Proposed Rule 206(4)-1(a)(6) If guidelines regarding portability are included in the final rule, this letter should be withdrawn.
54.	The Mottin Forecast (pub. avail. Nov. 29, 1975)	Graphs, charts, and formulas, false or misleading advertisements An advertisement cannot represent that any graph, chart, formula or other device offered can in and of itself be used to make trading decisions without prominently disclosing in the advertisement any limitations or difficulties in its use.	Yes, by Proposed Rule 206(4)-1(a)(2)
55.	The TCW Group (pub. avail. Nov. 7, 2008)	Performance advertisements, past specific recommendations Advertisements may present best and worst performing holdings if certain disclosures are provided and actual performance of the securities is not shown.	Yes, by Proposed Rule 206(4)-1(a)(5) Cited in Proposing Release at 65 and 316 (safe harbor).
56.	Triad Asset Management (pub. avail. Apr. 22, 1993)	Past specific recommendations	Yes, by Proposed Rule 206(4)-1(a)(5)

#	Letter[1]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		Advertisements presenting past specific recommendations must include for each security recommended the (i) name; (ii) date and nature of the recommendation; (iii) market price at that time; (iv) price at which the recommendation was to be acted upon; (v) market price of each security as of the most recent practicable date; and (vi) certain cautionary language on the first page.	

Solicitation Rule – No-Action Letters

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
1.	Allen Isaacson (pub. avail. Dec. 17, 1979)	Scope of the rule's exemption for certain affiliates A solicitor that is a person (rather than an officer, director or employee of such person) that controls, is controlled by, or is under common control with, the investment adviser should be considered within and subject to the terms of Rule 206(4)-3(a)(2)(ii).	Yes, by Proposed Rule 206(4)-3(b)(2) Cited in Proposing Release at 243.
2.	AMA Investment Advisers, Inc. (pub. avail. Oct. 28, 1993)	Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it) A registered investment adviser, rather than its solicitor, may provide the disclosure statement directly to prospective clients, subject to certain conditions. In the case of mass mailings, advisers/solicitors can forgo delivery of the solicitor's disclosure statement and the adviser's brochure until recipients of the mass mailings indicate preliminary interest by returning a reply card or making a telephone inquiry.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii) Cited in Proposing Release at 222.
3.	Ameriprise Financial Services, Inc. (pub. avail. Apr. 5, 2006)	Timing of delivery of required disclosures (solicitor disclosure and/or adviser brochure) An investment adviser may deliver the adviser's brochure at an initial client meeting instead of at the time of solicitation or after receiving a reply card from a customer if the adviser also gives to the prospective client a co-branding letter, which alerts the client of the relationship between the adviser and the solicitor.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)
4.	Bond Timing Securities Corporation (pub. avail. Nov. 29, 1984)	Solicitation for impersonal investment advice A public newsletter provided solely by means of written materials, which (i) does not meet the objectives or needs of specific clients; (ii) contains no expressions of opinions as to the investment merits of particular securities; and (iii) recommends only whether a person should stay within a general category (*e.g.*, bond, stock, or money market market) is an impersonal advisory service and not a solicitation.	Yes, by Proposed Rule 206(4)-3(b)(1)

[2] Letters identified in the Proposing Release.

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
5.	Charles Schwab & Co. (pub. avail. Dec. 17, 1980)	Discussion of "person associated with an investment adviser" A solicitor who engages in solicitation activities, whether for personal or impersonal advisory services, will be considered an associated person of the registered investment adviser and therefore will not be required to register individually under the Advisers Act solely as a result of such solicitation activities.	Yes, by Proposed Rule 206(4)-3(c)(4) Cited in Proposing Release at 201-02 (noting that the Commission will no longer take this position).
6.	Charles Schwab & Co. Inc. (pub. avail. Apr. 29, 1998)	Timing of delivery of required brochure A solicitor can mail a referred investment adviser's Form ADV brochure to the solicited investors within one business day after the solicitation is made so long as (i) the solicitor continues to provide solicited investors with the solicitor's disclosure document at the time of the referral; and (ii) the solicitor informs the solicited investors that the brochures will be promptly mailed to them and that they should not enter into an advisory contract until they have received and reviewed the brochures.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii) *See* Proposing Release at 222 (permitting delivery at time of solicitation or as soon as reasonably practicable thereafter); *see also* Proposing Release at 230 (proposing to eliminate requirement that the solicitor deliver to clients a copy of the adviser's Form ADV brochure).
7.	Cunningham Advisory Services, Inc. (pub. avail. Apr. 27, 1987)	"Person associated with an investment adviser" A solicitor is not required to register as an investment adviser under the Advisers Act if the investment adviser itself is registered and any solicitation activities are performed in compliance with Rule 206(4)-3.	Yes, by Proposed Rule 206(4)-3(c)(4) Cited in Proposing Release at 201 (noting that the Commission will no longer take this position).
8.	Dana Investment Advisors, Inc. (pub. avail. Oct. 12, 1994)* *Staff has previously partially retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pools managed by the	Application of rule to solicitation of investors in investment pool managed by the adviser The SEC staff declined to provide relief to an investment adviser under Rule 206(4)-3, although the solicitor was a subsidiary of the target clients. Because the solicitor was an interested party, notice of such interest together with sufficient information to evaluate the interest should be given to the solicited clients.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)(E)

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
	adviser (*see e.g.*, Mayer Brown, below).		
9.	Dechert Price and Rhoads (pub. avail. Dec. 4, 1990)* *Staff has previously retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pool managed by the adviser (*see e.g.*, Mayer Brown, below).	<u>Application of rule to solicitation of investors in investment pool managed by the adviser</u> When a registered investment adviser is acting as a solicitor, the adviser must provide a separate disclosure statement describing itself as a solicitor in addition to the adviser's brochure.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)
10.	Denver Credit Union (pub. avail. Sept. 15, 1988)	<u>General applicability of the rule</u> Any investment adviser required to register under the Advisers Act may not pay a cash fee, directly or indirectly, to any person to solicit clients for the adviser unless such fee is paid pursuant to a written agreement, and the written agreement (i) describes the solicitation activities to be undertaken and the compensation to be paid; (ii) contains an undertaking by the solicitor to perform these duties in accordance with the instructions of the adviser and the provisions of the Advisers Act; and (iii) requires the solicitor, at the time of solicitation, to provide the client with a copy of the adviser's brochure and a separate solicitor disclosure document.	Yes, by Proposed Rule 206(4)-3(a)(1)
11.	E. Magnus Oppenheim & Co. (pub. avail. Mar. 25, 1985)	<u>Written agreement requirement for an adviser's in-house (employee) solicitors, including solicitor disclosure</u> A "marketing" employee of an investment adviser must disclose his employment by the investment adviser each time he solicits a new client, unless only impersonal advisory services are offered. If the solicitor is a partner, officer, director or employee of the adviser or a partner, officer, director or employee of a person which controls, is controlled by or is under common control with the adviser, the disclosure related to the solicitation could be included in the investment advisory agreement given to the client at the time of the solicitation.	Yes, by Proposed Rule 206(4)-3(a)(1), (b)(2)

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
12.	E.F. Hutton and Co. Inc. (pub. avail. Sept. 21, 1987)	<u>Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it)</u> If an investment adviser markets its services through a solicitor by a mass communication, the adviser may deliver the required disclosure statements after the initial contact, provided that the initially distributed materials include a written statement stating that (i) a solicitation agreement exists between the adviser and solicitor under which the solicitor will be compensated; and (ii) information about the solicitation agreement will be furnished when the prospective client responds to obtain more information.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii) Cited in Proposing Release at 222-23.
13.	Excellence in Advertising, Ltd. (pub. avail. Dec. 15, 1986)	<u>Scope of rule</u> The definition of "solicitor" under Rule 206(4)-3 does not extend to advertising agencies that advertise an investment adviser's services to the general public for a fixed fee and provide ancillary clerical communications services.	Yes, by Proposed Rule 206(4)-3(b)(4)(C) Cited in Proposing Release at 257.
14.	Fried, Frank, Harris, Shriver & Jacobson (pub. avail. Dec. 17, 1979)	<u>Scope of the rule's exemption for certain affiliates</u> A solicitor that is a person that controls, is controlled by, or is under common control with, the investment adviser that is paying the cash referral fee to the solicitor is not individually subject to the cash solicitation rule's written agreement and other oversight provisions.	Yes, by Proposed Rule 206(4)-3(b)(2) *See* Proposing Release at 242-44 (modifying the current rule's partial exemption for in-house and affiliated solicitors).
15.	Heys, Robert J. (pub. avail. May 12, 1986)	<u>Scope of rule</u> A registered investment adviser paying a portion of its advisory fees as a referral fee to a broker-dealer constitutes solicitation activities.	Yes, by Proposed Rule 206(4)-3(c)(4)
16.	International Association for Financial Planning (pub. avail. June 1, 1998)	<u>Scope of rule</u> A referral program platform that is an ancillary communications program and provides consumers with a list of randomly selected investment advisers does not constitute solicitation activities, provided a registered investment adviser does not treat the platform as a solicitor.	Yes, by Proposed Rule 206(4)-3(b)(4)(C) Cited in Proposing Release at 257.
17.	JMB Financial Managers, Inc. (pub. avail. Jun. 23, 1993)	<u>General application of the rule</u> Investment advisers may have formal referral compensation programs, subject to	Yes, by Proposed Rule 206(4)-3(a)

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		certain conditions, if the compensation is cash. Rule 206(4)-3 does not cover the use of non-cash referral fees.	*See* Proposing Release at 206 (applying Proposed Rule to non-cash compensation).
18.	Koyen, Clarke and Assoc. Inc. (pub. avail. Nov. 10, 1986)	Discussion of "person associated with an investment adviser" Payment of a cash fee to a solicitor in compliance with Rule 206(4)-3 strictly for the performance of solicitation activities does not represent compensation for investment advisory services, and would not cause the registered representatives of a broker-dealer to be required to register as investment advisers.	Yes, by Proposed Rule 206(4)-3(c)(4) Cited in Proposing Release at 201 (noting that the Commission will no longer take this position).
19.	Lincoln National Investment Management Co. (pub. avail. Mar. 26, 1992)	Timing of delivery of required disclosures A solicitor may deliver the disclosure documents required by Rule 206(4)-3 as soon as it directly contacts prospective clients, or at least no later than immediately prior to the time prospective clients enter into an investment advisory contract.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)
20.	Mayer Brown LLP (pub. avail. July 15, 2008, superseded by letter with minor, non-substantive changes, pub. avail. Jul. 28, 2008)	Application of rule to cash payments by registered advisers to persons who solicit investors to invest in investment pools managed by the adviser Rule 206(4)-3 generally does not apply to cash payments by a registered investment adviser to solicit investments in pooled investment vehicles sponsored by the adviser.	Yes, by Proposed Rule 206(4)-3(c)(4) Cited in Proposing Release at 210.
21.	Merchants Capital Management, Inc. (pub. avail. Oct. 4, 1991)	Written agreement requirement for an adviser's in-house (employee) solicitors, including solicitor disclosure Adviser cannot forgo the individual written agreement requirement for in-house employee solicitors and use one written document to satisfy the requirement. A separate written and signed agreement must exist between an adviser and each employees participating in its referral plan.	Yes, by Proposed Rule 206(4)-3(b)(2) Cited in Proposing Release at 245 (proposing to forgo the current rule's requirement that advisers and their in-house and affiliated solicitors each enter into a written agreement).
22.	Mid-States Capital Planning (pub. avail. Apr. 11, 1983)	Setting the amount of the solicitation fee Registered investment advisers providing investment advice prepared by another person may determine the fees to be charged for their services, but solicitors may not set their fees.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)(D) Cited in Proposing Release at 216 (appropriateness of the

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
			compensation should be determined by the adviser).
23.	Moneta Group Investment Advisors, Inc. (pub. avail. Oct. 12, 1993).	Delivery of solicitor brochure (timing and the requirement for the solicitor to deliver it) When using mass mailings, an investment adviser may forgo delivery of the solicitation disclosure statement until a prospective client indicates preliminary interest, provided the mass communication states that a solicitation agreement exists between the adviser and the solicitor and that information about the solicitation agreement will be furnished to the client upon the indication of interest.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii) Cited in Proposing Release at 222-23 (in a mass mailing scenario, disclosure may be delivered promptly after investor expresses interest).
24.	National Football League Players Ass'n (pub. avail. Jan. 25, 2002)	Scope of rule Rule 206(4)-3 does not extend to an organization program that simply furnishes to its members a list of pre-screened financial advisors, including registered investment advisers, and is not designed to seek out clients or compensation on behalf of a specific investment adviser or advisers.	Yes, by Proposed Rule 206(4)-3(b)(4) Cited in Proposing Release at 257 and 261.
25.	Redmond Associates, Inc. (pub. avail. Jan, 12, 1985)	General requirements of the rule A registered investment adviser may make a cash payment for client solicitation, including to tax preparers and accountants, provided that the certain conditions specified in the rule are met.	Yes, by Proposed Rule 206(4)-3(a)
26.	Roy Heybrock (pub. avail. Apr. 5, 1982)	General applicability of the rule An investment adviser may not pay a cash fee to any person who, directly or indirectly, solicits any client for or refers any client to the adviser, unless the adviser is registered under the Advisers Act and complies with the other conditions of Rule 206(4)-3.	Yes, by Proposed Rule 206(4)-3(a)
27.	Securities International, Ltd., dba ITZ, Ltd. (pub. avail. Mar. 14, 1989)	General applicability of the rule Any investment adviser who is required to register under the Advisers Act may not pay a cash fee, directly or indirectly, to any person who solicits clients for, or refers any client to, the adviser, unless, among other things, the cash fee is paid pursuant to a written agreement between the adviser and the solicitor.	Yes, by Proposed Rule 206(4)-3(a)(1)

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
28.	Shareholder Service Corporation (pub. avail. Feb. 3, 1989)	Setting the amount of the solicitation fee The appropriateness of the solicitation fee or the range of the solicitation fee should be determined by the adviser, in light of the fiduciary duties an adviser owes its clients, based upon a general standard of reasonableness under the circumstances. Only the adviser, not the solicitor, may set the amount of the solicitation fee.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)(D) Cited in Proposing Release at 216.
29.	Stein, Roe and Farnham Inc. (pub. avail. May 26, 1987)	Scope of the rule's exemption for certain affiliates If an investment adviser pays a cash fee to a solicitor (but not the solicitor's officers, partners, or employees) that is under common control with the adviser, then the solicitor can rely on the less stringent requirements in Rule 206(4)-3(a)(2)(ii).	Yes, by Proposed Rule 206(4)-3(b)(2) Cited in Proposing Release at 243 (noting expansion of solicitor definition in Proposed Rule).
30.	Stein, Roe and Farnham, Inc. (pub. avail. Jan. 29, 1990)* *Staff has previously partially retracted statements it made in this letter about the application of the rule to solicitation of investors in investment pools managed by the adviser (*see e.g.*, Mayer Brown, above).	Application of rule to solicitation of investors in investment pools managed by the adviser; satisfaction of the rule's disclosure provisions The SEC staff granted a waiver allowing an investment adviser to not disclose a disqualifying event, given that a previous order already imposed more stringent remedial sanctions. The waiver was also granted in part because the disqualifying event did not relate to any violation of law or fiduciary duty with respect to any private client of the investment adviser.	Yes, by Proposed Rule 206(4)-3(a)(iii)(C)
31.	Stonebridge Capital Management (pub. avail. Dec. 12, 1979)	General applicability of the rule An investment adviser sharing part of its advisory fee with a person as a "finder's fee" constitutes solicitation activities, which makes Rule 206(4)-3 applicable to such activities.	Yes, by Proposed Rule 206(4)-3(a)
32.	The Lowry Management Corp. (pub. avail. Sept. 7, 1982)	Definition of solicitor (specifically, the term "person" as used in the definition of solicitor)	Yes, by Proposed Rule 206(4)-3(c)(4)

#	Letter[2]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		The definition of "solicitor" under Rule 206(4)-3 includes corporations and partnerships as well as natural persons.	*See* Proposing Release at 201-02 (noting a solicitor may be a firm, an individual at a firm, or both).
33.	Trident Investment Management, Inc. (pub. avail. Dec. 18, 1981)	<u>Content of solicitor disclosure</u> When a solicitor is not an employee or other close associate of the investment adviser, the solicitor is required to provide the written disclosure statement in order to provide clients with relevant information as to the extent of the solicitor's financial interest in the success of the solicitation.	Yes, by Proposed Rule 206(4)-3(a)(1)(iii)
34.	Trinity Investment Management Corp. (pub. avail. Mar. 7, 1980)	<u>General application of the rule</u> When a solicitor is paid a cash referral fee, there must be a written agreement between the solicitor and the investment adviser, and relevant disclosures must be made to the solicited clients. When no cash referral fee is paid, the requirements of the solicitation rule are not applicable.	Yes, by Proposed Rule 206(4)-3(a)(1)
35.	Van Eerden Investment Advisory Services, Inc. (pub. avail. May 21, 1984)	<u>Requirements for the written agreement</u> Written agreements required under Rule 206(4)-3 must contain (i) an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the adviser and the provisions of the Advisers and the rules thereunder, and (ii) a requirement that the solicitor, at the time of the solicitation activities, provides the client with a current copy of the adviser's brochure and a separate written disclosure document.	Yes, by Proposed Rule 206(4)-3(a)(1)(ii)-(iii) *See* Proposing Release at 229 (replacing requirement that the solicitor undertake to perform its duties consistent with the instructions of the adviser with a requirement to meet the requirements of the written agreement; eliminating brochure delivery requirement).

No-Action Letters Not Identified for Withdrawal in the Proposing Release

#	Letter[3]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
1.	Dow Theory Forecasts, Inc. (pub. avail. Aug. 26, 1983)	Past specific recommendations An advertisement of the performance of a list of recommended securities may not imply something about, or be likely to cause an inference to be drawn concerning, the experience of advisory clients or the adviser's competence by omitting facts the adviser knew (*e.g.*, the performance of a list of different securities recommended by the adviser) that would have prevented the implication from arising or inference from being drawn had it also been disclosed.	Yes, by Proposed Rule 206(4)-(a)(5)
2.	Mr. Charles Swanson (pub. avail. Apr. 10, 1972)*	Past specific recommendations, misleading advertisements, scope of advertisements An information service for prospective clients of no load mutual funds is an "advertisement" requiring compliance with Rule 206's prohibition on false or misleading advertising material and Rule 206(4)-1(a)(2)'s limitations and disclosure requirements (as set forth in the letter) with respect to past specific recommendations.	Yes, by Proposed Rule 206(4)-(a)(1), (a)(5), (e)(1) *The portion of the letter regarding Rule 206(4)-1 should be withdrawn, but the portion regarding adviser registration likely should be retained.
3.	Munder Capital Mgmt. (pub. avail. May 17, 1996)	Scope of advertisements Documents relating specifically to one or more investment companies, such as prospectuses, advertisements or sales literature are generally not advertisements because they are not designed to maintain existing clients or solicit new clients unless the documents are directed to such persons or refer to advisory services that are offered to such persons.	Yes, by Proposed Rule 206(4)-(e)(1)(iii) Cited in Proposing Release at 31.
4.	Mills-Price & Associates, Inc. (pub. avail. July 15, 1992)	Misleading advertisements Advertisements must comply with the Advertising Rule, including with respect to the prohibition on the use of testimonials, limitations on the use of past specific recommendations, and the requirement that advertisements may not make any untrue statement of material fact or be otherwise false or misleading.	Yes, by Proposed Rule 206(4)-(a)(1)-(7)

[3] This section identifies SEC staff no-action letters that are NOT identified in the Proposing Release for potential withdrawal. Letters 6-10 of this section relate to performance portability.

#	Letter[3]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
5.	National Corporate Sciences, Inc. (pub. avail. July 24, 1976)	Past specific recommendations, misleading advertisements An advertisement containing percentage gains and losses of past recommendations may result in a misleading impression of an adviser's actual performance record, for example, where relatively large percentage increases of low-priced securities have a minimal effect on profits realized while small percentage decreases of high-priced securities result in significant losses to clients. It may be possible to remedy such a misleading impression with meaningful disclosure regarding the limited significance of the percentage figures.	Yes, by Proposed Rule 206(4)-(a)(1), (a)(5)
6.	Conway Asset Management, Inc. (pub. avail. Jan. 27, 1989)	Performance portability An adviser solely owned by an employee can present the performance results of "other accounts" solely managed by the employee prior to registration, subject to several conditions (*e.g.*, no other party played a significant role in the management of the accounts).	Partially, by Proposed Rule 206(4)-1(a)(6) If guidelines regarding portability are included in the final rule, this letter should be withdrawn.
7.	Fiduciary Management Associates, Inc. (pub. avail. Mar. 5, 1984)	Performance portability A portfolio manager that transfers accounts to a new investment adviser can present the past performance of those accounts from the prior investment adviser, subject to certain conditions (*e.g.*, no other party played a significant role in the management of the accounts).	Partially, by Proposed Rule 206(4)-1(a)(6) If guidelines regarding portability are included in the final rule, this letter should be withdrawn.
8.	Great Lakes Advisors, Inc. (pub. avail. Apr. 3, 1992)	Performance portability It may be misleading for an adviser to advertise the performance results of accounts managed at an employee's prior place of employment when the employee was one of several persons responsible for selecting the securities for those accounts.	Partially, by Proposed Rule 206(4)-1(a)(6) Cited in Proposing Release at 184, 185, 318 and 319. If guidelines regarding portability are included in the final rule, this letter should be withdrawn.
9.	Horizon Asset Mgmt. LLC (pub. avail. Sept. 13, 1996)	Performance portability It would not be misleading for an investment adviser with an advisory committee to advertise the performance results that one of its advisory committee members achieved while at a prior unaffiliated firm when that advisory committee member	Partially, by Proposed Rule 206(4)-1(a)(6) Cited in Proposing Release at 146, 184, 185, 188, and 318.

#	Letter[3]	Topic of Letter	Guidance Replaced or Addressed in Rule/Release?
		was the person actually responsible for achieving the performance at the investment adviser.	If guidelines regarding portability are included in the final rule, this letter should be withdrawn.
10.	South State Bank (pub. avail. May 8, 2018)	Performance portability A successor investment adviser may use the performance data of a predecessor affiliate to the same extent that it could have if the restructuring had not occurred, subject to certain conditions.	Partially, by Proposed Rule 206(4)-1(a)(6) Cited in Proposing Release at 184 and 318. If guidelines regarding portability are included in the final rule, this letter should be withdrawn.