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

SENT VIA ELECTRONIC MAIL TO RULE-COMMENTS@SEC.GOV

Re: File Number: S7-21-19

Dear Ms. Countryman:

Resolute Investment Managers, Inc. ("Resolute") is pleased to offer comments to the Securities and Exchange Commission ("SEC") on the proposed amendments to Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended.

Resolute is a multi-affiliate asset management platform with investments in nine investment advisers registered with the SEC and one broker-dealer registered with the Financial Industry Regulatory Authority ("FINRA"). Our investment adviser affiliates manage assets on behalf of retail and institutional persons directly in the form of separate accounts and indirectly through mutual funds, exchange-traded funds, private funds, and collective investment trusts. Resolute provides marketing services to the affiliated advisers through client solicitation efforts primarily targeted to financial intermediaries and institutional investors.

We welcome the SEC's amendments to Rule 206(4)-1 and the efforts by the SEC and its staff to balance the flexibility of a principles-based approach with the protections of a framework of restrictions. Having operated under the advertising requirements applicable to registered investment companies, we appreciate the level playing field that concrete advertising regulations provide for investors and believe that the rulemaking undertaken by the SEC with respect to investment advisers will extend these benefits more broadly.

Resolute offers the following comments to the SEC to assist with developing a final rule that clearly sets forth the respective requirements for investment advisers when offering their services to retail and institutional investors. Our comments are organized using the section headers and requests for comment in the proposing release, and we have grouped similar requests together preceding our comments, which are in bold typeface.[1]

[1] Capitalized terms are used as defined in the proposing release.

II.A.2.a. Proposed Definition

- Generally, does the proposed rule's definition of "advertisement" sufficiently describe the types of communications that should be subject to the requirements of the proposed rule? Are there types of communications that should be subject to the requirements of the proposed rule but are excluded from the proposed definition?
- Conversely, does the proposed rule's definition of "advertisement" include communications that should not be subject to the requirements of the proposed rule?

II.A.2.b.iii. Offer or promote advisory services or seek to obtain or retain clients or investors

- The proposed rule would explicitly include communications meant to "retain" existing clients. Is it appropriate to treat communications as "advertisements" when the persons receiving them already are "clients" of the investment adviser and benefit from the other protections of the Federal securities laws? Similarly, is it appropriate to treat communications as "advertisements" when the persons receiving them already are investors in pooled investment vehicles advised by the investment adviser and benefit from applicable protections of the Federal securities laws?

We believe that the inclusion of communications on a one-on-one basis that seek to retain existing clients is overly broad. Although the SEC has attempted to exclude communications such as account information and educational materials from the definition, investment advisers would be put in the position of expending significant time to evaluate communications that are prepared in the normal course of business to filter for advertisements. Many such communications are of a client service nature and do not have an advertising or marketing purpose. Such ongoing client services are intended to fulfill the adviser's obligations under its existing services agreement with the client. The existing agreement provides protections for the client in connection with those services and communications regarding those services.

We suggest that the SEC consider including communications on a one-on-one basis with existing clients in the definition of advertisement only to the extent that such communications seek to promote or offer a service that is not currently provided to the client pursuant to a services agreement (e.g., to manage an account in a new strategy). We believe this would capture the intent of Rule 206(4)-1, while also expanding the current Rule to clearly encompass communications with existing clients that are of a promotional nature. In our experience, compliance with this narrower definition would be facilitated by our ability to effectively organize our clients and communications by service type or strategy.

II.A.2.b.ii. By or on behalf of an investment adviser

- In our view, if an adviser were to modify the presentation of third-party comments, such an action would likely make the communication by or on behalf of the adviser. Should we consider providing additional guidance to allow an adviser to edit third- party content solely on the basis that it is profane or unlawful without such editing causing the content to be "by or on behalf" of the adviser? If so, how should we define profane or unlawful content? Would it be necessary to give an audience notice that such third-party content had been edited in such a way, and if so, how would such notice best be provided? Would such guidance have the effect of evading the intent of the proposed rule, considering that comments with profane content may indicate negative views of the adviser?
- Should we provide that editing the presentation of third-party comments pursuant to a set of neutral pre-established policies and procedures would not make such content "by or on behalf of the adviser"? For example, should we allow an adviser to determine in advance that it will delete all comments that are older than five years, or that include spam, threats, personally identifiable information, or demonstrably factually incorrect information? If so, should we require advisers to publically disclose the pre-established criteria for editing such comments?

We believe that investment advisers should have the flexibility to edit and/or remove third-party comments on the investment adviser's website and social media sites. Although factual errors in a comment can be addressed with a reply by the investment adviser, the inclusion of profane, obscene or unlawful content potentially subjects the investment adviser to legal or regulatory repercussions, as well as reputational damage particularly for advisers that have established their businesses based on moral, religious or ethical principles. We also believe that comments older than five years should not require retention by the investment adviser. Lastly, comments that include personally identifiable information put the commenter at risk and potentially subject the investment adviser to privacy regulation, even if the commenter does not have a consumer or customer relationship with the investment adviser under Regulation S-P.

Adviser-controlled websites and social media sites can be formatted to provide prominent disclosure of the adviser's right to edit or remove comments and set forth the standards on which such actions will be based. Such disclosures will provide commenters with adequate advance notice of how to format their comments such that they will not be revised or removed. Because of the limited space afforded for static content and the readability of such sections on social media sites, we suggest to the SEC that commenters' understanding of such disclosures will be facilitated by a prominent statement on the site with a link to further disclosure regarding the types of language and images that would likely result in

editing or removal. This type of hyperlinked disclosure is afforded to investment advisers in other federal regulations requiring Internet disclosure.[2]

II.A.2.c.i. Response to unsolicited request

- Should the unsolicited request exclusion apply to communications presenting performance results to Retail Persons? Should it apply to communications presenting performance results to any person, not just Retail Persons? Why or why not? Would it be appropriate to exclude such communications from certain requirements of the proposed rule? Why or why not?

When responding to unsolicited requests to complete requests for information ("RFIs") or requests for proposals ("RFPs") for public entities, the investment adviser may have foreknowledge that the public entity will publish all responses to its public records, thus making the adviser's responses accessible to Retail Persons. Because the communication is directed to the public entity making the request and such entity will make the decision whether to engage the investment adviser's services, we believe that such indirect delivery should not constitute a communication to a Retail Person. Similarly, an investment adviser's periodic reports to a public entity client may be deemed a matter of public record and thus made available to Retail Persons by the entity. In many cases, the information required to be included in those reports is dictated by the public entity and may include information that an adviser would not include in an advertisement to a Retail Person. Although the SEC makes clear that communications to existing clients in the vein of account statements are not necessarily advertisements, we would appreciate clarification of the treatment of account statements and similar reports intended for Non-Retail Persons, such as public entities, that are required to make such information publicly available.

It is our opinion that in the aforementioned examples, the investment adviser does not have a client relationship with a Retail Person and is not promoting or offering its services to a Retail Person. Retail Persons accessing these communications would be apprised of this fact by the clear labeling of the communications as for the benefit of the public entity. As such, investment advisers should be permitted to rely on the unsolicited request exclusion for communications containing performance results, so long as the investment adviser reasonably believes that the party to receive the services is a Non-Retail Person.

In addition to public entity clients, we believe that the unsolicited request exclusion bears expansion when a Retail Person is the ultimate recipient of a communication, but the investment adviser delivers the communication to a financial intermediary that represents the Retail Person. Resolute's advisers primarily market their advisory services through financial intermediaries, such as other investment advisers, broker-dealers, and banks.

[2] See, for example, the definition of "clear and conspicuous" as discussed in *Privacy of Consumer Financial Information (Regulation S-P); Rules*, SEC Release No. IA-1883, June 29, 2000.

Retail Persons may invest through a wrap sponsor platform, a unified managed account ("UMA") or a model delivery platform, and our investment adviser's advisory services are provided within those structures. In some cases, Resolute's advisers contract directly with Retail Person clients, but the Retail Person is represented by a financial intermediary (e.g., an investment adviser representative or registered representative) who assists the Retail Person in manager selection and oversight. In most cases, however, our investment advisers do not have a direct relationship with financial intermediary customers and thus are not in a position to know whether such customers are Retail Persons.

To fulfill their due diligence obligations to their customers, financial intermediaries routinely request information from our investment advisers, including requests for non-standard performance information. We believe that investment advisers should be able to rely on the unsolicited request exclusion for communications, including performance results, so long as the adviser has clearly labeled the communication as intended for financial intermediary use only and not for distribution to the public, and the adviser forms a reasonable belief that the intermediary is itself an investment adviser subject to Rule 206(4)-1, or has adopted procedures reasonably designed to prevent such communications from delivery to Retail Persons.

- Should we clarify any specific criteria by which an investment adviser can determine whether a request is "unsolicited" for purposes of the unsolicited request exclusion?

In the proposing release's discussion of responses to unsolicited requests, the SEC states that "any affirmative effort by the investment adviser intended or designed to induce an existing or prospective client or investor to request specified information would render the request solicited." In our experience, investment advisers often must take affirmative steps to be eligible to receive RFIs or RFPs for advisory services. For example, corporations and public entities often require interested parties to register with a procurement department as a pre-condition to receiving future RFIs or RFPs. In addition, investment consultants maintain databases where investment advisers submit firm and performance information to be considered for future RFIs and RFPs that the consultant sends on behalf of its clients. Such registration may be used to demonstrate that the investment adviser meets certain minimum qualifications for inclusion in a search.

Although communications submitted to prospective clients and investors through the procurement and database mechanisms described above may be deemed advertisements, we believe that the investment adviser's participation in subsequent RFIs and RFPs resulting from such participation should be eligible for treatment as an unsolicited request, so long as the investment adviser did not participate in developing the RFIs or RFPs, and the communications in response to such RFIs and RFPs meet the other criteria for the exclusion. In some cases, prospective clients request a 'standard' RFI from the investment adviser in lieu of providing their own form, or may request that an adviser provide a copy

of a recent RFI provided to another prospect. In these examples, the adviser either has complete control over the information presented in the RFI (i.e., the standard RFI) or has control over which RFI to provide as a recent example (i.e., the recent RFI). We agree that these examples would not qualify for the unsolicited request exclusion.

II.A.5.b.v. Prescribed Time Periods

- Are there investors other than qualified purchasers and knowledgeable employees that should be treated as Non-Retail Persons? If so, who and why? Are there criteria that we should consider instead of those underlying the "qualified purchaser" or "knowledgeable employee" definitions? Would the accredited investor or qualified client standard be more appropriate than the qualified purchaser standard? Why or why not?

As previously noted, Resolute's investment advisers primarily offer their advisory services through other financial intermediaries. In some cases, we contract with the financial intermediary and deem the intermediary to be our client, such as in wrap programs and model delivery platforms. In other cases, we contract directly with the financial intermediary's customer, such as in separately managed accounts. In either case, we commonly prepare advertisements intended for such intermediaries to assist with their manager selection and diligence processes.

We think that the "qualified purchaser" and "qualified institutional buyer" definitions may be appropriate when evaluating the ability of a direct investor to review advertisements. However, both of those definitions require that for a person to be a qualified purchaser or qualified institutional buyer, that person must be acting only on behalf of other qualified purchasers or qualified institutional buyers. Thus, it appears to us that a financial intermediary acting on behalf of Retail Persons would not be eligible under the Rule to receive an advertisement tailored for Non-Retail Persons. We believe that this is an inappropriate result given the role that financial intermediaries play on behalf of Retail Persons. As such, we suggest that the SEC consider expanding the definition of a Non-Retail Person to include other investment advisers, investment adviser representatives, broker-dealers, registered representatives, and other financial intermediaries for which the investment adviser forms a reasonable belief that the intermediary has a duty of care with respect to its underlying customers or clients whose assets would be serviced by the investment adviser. We believe this is an appropriate extension of the Non-Retail Person definition, since these firms and individuals would have the requisite knowledge and access to resources to evaluate advertisements tailored to Non-Retail Persons.

If the SEC does not extend the Non-Retail Person definition as discussed above, we propose that the SEC clarify whether investment advisers can deliver Non-Retail Person advertisements to investment adviser representatives and registered representatives based

on those representatives' firms (i.e., the investment adviser or broker-dealer) meeting the applicable "owns and invests" thresholds in the qualified purchaser and qualified institutional buyer definitions versus the particular representative meeting the thresholds.

II.A.5.c.i. Statements about Commission Approval

- Are there types of statements that would be prohibited under the proposed approval prohibition, but that commenters believe should be allowed in performance advertising? What types of statements and why should they be allowed?

Resolute's advisers commonly provide presentations to financial intermediaries in connection with the intermediaries' due diligence processes. These presentations may fall under the definition of advertisement for various reasons. To the extent that these presentations combine performance results with summary information on an adviser's recent SEC examinations, please clarify in the adopting release how an investment adviser may include SEC examination results in advertisements without violating the SEC approval prohibition.

II.A.5.c.iv.A. Types of Hypothetical Performance

- Are there types of performance that investment advisers currently present in advertising that would meet the proposed rule's definition of "representative model performance" but should not be treated as hypothetical performance under the proposed rule? What types of performance and why should they not be treated as hypothetical performance?

Resolute has an affiliated investment adviser whose advisory services consist of tax loss harvesting ("TLH") strategies. For this adviser, measurement of its performance results would be incomplete without reflecting the tax benefits that are generated for clients as a result of capturing capital losses, as that is the investment objective of the client. Those tax losses translate to potential savings in the following year, if the client is eligible to deduct those losses from gains realized in the client's portfolio or from other sources.

TLH strategies necessarily require evaluation of results on an after-tax basis. Investment advisers engaging in TLH strategies commonly present their performance in the form of total returns based on actual performance results of client accounts. These advisers also present the cumulative amounts of potential tax losses captured as a percent of aggregated client assets to reflect their achievement of the client's objective to capture tax losses. These performance results are actual results for clients. To reflect the relationship between tax savings and potential portfolio growth, TLH advisers may provide a hypothetical example showing the potential increase in value of a representative portfolio based upon the highest combined federal and state capital gains tax rate. In addition, certain TLH advisers calculate hypothetical performance results, assuming that the tax savings

generated in a particular tax year are reinvested in the client portfolio the following year (pro rata across the portfolio), to reflect the reinvestment and compounding benefits that clients could receive from TLH strategies. These hypothetical results are based on the adviser's actual historical performance results and the actual amounts of tax losses captured, but they presume a model combined capital gains rate to calculate tax savings and that those savings were reinvested in the portfolio, when they in fact may not have been.

In the proposing release, the SEC does not address the treatment of capital gains taxes in its discussion of net versus gross performance, and therefore, we presume that the SEC intended to exclude taxes on gains generated in the portfolio from the types of fees and expenses that would be disclosed as netted from an account (similar to custodian fees). This omission makes sense to us, since taxes are commonly paid outside the account, and an investment adviser would not always have access to the client's overall tax situation. We therefore presume that any presentation of after-tax performance would be treated as hypothetical performance. However, we do not see any type of hypothetical performance discussed in the proposing release that is appropriate. Therefore, we request that the SEC clarify in the adopting release whether after-tax performance is a form of hypothetical performance.

As TLH strategies gain popularity, in particular with high net worth investors and in states with high combined capital gains rates, we believe that the SEC should address presentation of after-tax performance in this context. We believe that clients and their financial intermediaries are best served when they have sufficient information to evaluate an investment adviser's results in TLH strategies, and the exogeneous nature of capital gains taxes indicate that a level of hypothetical performance is necessary to communicate these results in the absence of the adviser having information regarding the client's tax return information.

We refer the SEC and its staff to the United States Investment Performance Committee's After-Tax Performance Standards, which are available on the CFA Institute's website.

II.A.5.c.iv.B. Conditions on Presentation of Hypothetical Performance

- Are the proposed "calculation information" and "risk information" provisions sufficiently clear based on our description above? Should we require specifically that such information be designed to allow the audience to replicate the hypothetical performance presented? Why or why not?
- Would investment advisers face any compliance challenges in complying with the proposed "calculation information" or "risk information" provisions? Would there be circumstances in which investment advisers might have to provide proprietary or

sensitive information? Should we take those challenges or circumstances into account? If so, how?

We are concerned that the requirement to provide calculation information for hypothetical performance would jeopardize the proprietary nature of investment strategies employed by investment advisers. In particular, some investment advisers with quantitative investment strategies seek to protect their strategies as intellectual property, which would significantly limit their ability to provide calculation information without jeopardizing those protections. In addition, investment advisers managing portfolios subject to a confidentiality or non-disclosure agreement would be limited in their ability to provide portfolio holdings that form the basis for hypothetical performance when it is a matter of public record who their clients are. For example, an adviser to a mutual fund would be bound by the fund's portfolio holdings disclosure policy as disclosed to shareholders. Beyond these legal protections over portfolio information, we believe that investment advisers should not be obligated to provide proprietary commercial information when substantiating the methodology used to calculate and present hypothetical performance.

We hope that the SEC and its staff find our comments to be helpful in evaluating the impact of the proposed amendments to Rule 206(4)-1 on investment advisers of the type included in the Resolute family. If any of our comments require clarification or elaboration, please do not hesitate to contact me at (817) 391-6110 or christy.sears@resolutemanagers.com.

Regards,

Christy Sears

Christina E. Sears
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