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Filed Electronically

Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

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

Dear Ms. Countryman:

Pickard Djinis and Pisarri LLP[1] is pleased to submit these comments in response to the above-referenced proposals.[2] We commend the Commission's efforts to update these rules not only to address existing market practices and technologies but also to accommodate future developments in these areas that are yet unknown. That said, we are concerned that in some respects, the proposed rule amendments could impose unnecessary compliance burdens on investment advisers and impede their ability to serve their existing clients. We ask the Commission to address these issues before finalizing these important regulatory initiatives.

Updating the Advertising Rule

Rule 206(4)-1 under the Investment Advisers Act of 1940 ("Advisers Act") is showing its age. As it stands today, an investment adviser cannot divine which advertising practices the rule allows and which it prohibits without wading through a tangle of no-action letters and administrative enforcement cases. We support the proposed approach to replace the rule's existing prohibitions with principles-based provisions supplemented by more specific requirements regarding past advice, testimonials and performance advertising. While we also understand the effort to harmonize the amended rule with advertising requirements found in other regulatory regimes, we believe it is more important to harmonize the rule with other Advisers Act requirements and with the existing business practices of the very diverse universe of federally registered investment advisers.

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[1] Pickard Djinis and Pisarri LLP is a law firm specializing in securities regulation relating to investment advisers, broker-dealers and service providers thereto. Our investment adviser client base ranges from federally registered firms with billions of dollars of assets under management to state-regulated solo practitioners. This letter reflects the views of a number of our federally regulated adviser clients.

[2] *Investment Adviser Advertisements; Compensation for Solicitations,* Advisers Act Rel. No. 5407 (Nov. 4, 2019), 84 Fed. Reg. 67518 (Dec. 10, 2019), available at: https://www.sec.gov/rules/proposed/2019/ia-5407.pdf ("Proposing Release").

We generally endorse the thoughtful and comprehensive comments the Investment Adviser Association ("IAA") has submitted regarding this proposal.[3] While we will not separately address every aspect of the proposal, we offer the following observations and suggestions.

Definitions

Advertisement

- We believe that the proposed definition is too broad and could potentially impede an adviser's ability to service its existing clients. In particular, we object to the suggestion that supplying market commentary to existing clients along with their periodic account statements could constitute a promotional communication subject to the advertising rule.[4] Communications with existing clients are already subject to the general fiduciary standards of the Advisers Act, and do not need the added protections of Rule 206(4)-1. Therefore, we recommend that the words "or retain" be eliminated from the definition and that an express exclusion for communications regarding existing advisory relationships be added.[5] Communications that offer an additional or different type of advisory service to an existing client could be omitted from this exclusion.

- We urge the addition of a general exclusion from the definition of "advertisement" for market commentary, white papers, "thought" pieces and similar communications. While these may be used to attract new business by demonstrating an adviser's investment philosophy and competence, they are more appropriately characterized as types of investment advice.

- We ask the Commission to confirm that reprints of newspaper or magazine articles or other independently produced materials are not "advertisements" for purposes of Rule 206(4)-1. The distribution of such materials should be governed solely by the general antifraud provision of the Advisers Act.[6]

- The proposed exclusion for a communication that *does no more* than respond to an unsolicited request for information may be too narrowly drawn. We endorse the IAA's suggestion that this be revised to exclude any communication reasonably responsive to an unsolicited request for information.[7] We also suggest that responses to RFPs, DDQs and the like be construed as falling within this exclusion.

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[3] Letter from Karen L. Barr, President and CEO, IAA to Vanessa A. Countryman, Secretary, SEC (Feb. 10, 2020), available at: https://www.sec.gov/comments/s7-21-19/s72119-6794371-208376.pdf ("IAA Comment Letter").

[4] Proposing Release at 32, 84 Fed. Reg. at 67526.

[5] *See* IAA Letter at 12.

[6] Advisers Act § 206.

[7] IAA Letter at 17.

Non-Retail Person

As proposed, the revised advertising rule would distinguish between advertisements directed to "retail persons" and those directed to "non-retail persons," applying more restrictive performance advertising requirements on the former category. The Commission proposes to define the term "non-retail person" to mean a "qualified purchaser" as defined in Section 2(a)(51) of the Investment Company Act of 1940 ("Company Act").[8] A "qualified purchaser" generally means an individual who owns at least $5 million in total investments or an entity that owns at least $25 million in total investments, both of whom are eligible to invest in private funds that rely on the registration exemption found in Section 3(c)(7) of the Company Act. The term "non-retail person" would also include a "knowledgeable employee" of a 3(c)(7) fund advised by the investment adviser, but only for advertisements pertaining to that fund.[9]

The Commission suggests that incorporating the "qualified purchaser" standard into the Advisers Act advertising rule would ensure that the more liberal performance advertising standards would be used only for those clients and investors with sufficient resources "to ask questions of, and obtain information from," the adviser and "to assess that information" before selecting an adviser.[10] The Commission further opines that because the "qualified purchaser" definition has been around for twenty years, many investment advisers already have policies and procedures to enable them to formulate a "reasonable belief" that an individual or entity meets this standard.[11]

The Commission considered, but rejected, the use of other standards as the model for defining "non-retail person." Among these was the "qualified client" concept defined in Advisers Act Rule 205-3(d)(1). In addition to a "qualified purchaser" and officers, directors and knowledgeable employees of the adviser, a "qualified client" includes an entity or individual having at least $1 million under the investment adviser's management or a net worth of more than $ 2.1 million. The SEC adopted this term more than twenty years ago to identify the types of sophisticated clients who can lawfully be charged performance-based advisory fees. The qualified client standard is also used to determine whether an adviser's employees can be subject to state regulation as "investment adviser representatives."[12] Here, the Commission determined that qualified clients should not be treated as "retail" clients who need the added protections of state qualification requirements.[13]

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[8] Proposed Rule 206(4)-1(e)(8)(i).

[9] Proposed Rule 206(4)-1(e)(8)(ii). "Knowledgeable employees"—as defined in Rule 3c-5 under the Company Act—include executive officers and directors of a 3(c)(7) fund and certain employees of a 3(c)(7) fund or its affiliate, who are deemed to have sufficient investment experience to invest in the fund even though they do not meet the definition of "qualified purchaser."

[10] Proposing Release at 111, 84 Fed. Reg. at 67547.

[11] *Id.,* at 113, 84 Fed. Reg. at 67547.

[12] Advisers Act Rule 203A-3.

[13] *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Advisers Act Rel. No. 1633 (May 15, 1997) 43, 62 Fed. Reg. 28112, 28122 (May 22, 1997) ("NSMIA Release") ("Because of their wealth, financial knowledge, and experience, the Commission has presumed that [qualified clients] are less

In the instant rulemaking, the Commission acknowledges that qualified clients may have the resources necessary to effectively evaluate advertised performance information without the fuller disclosures provided to retail clients. Nevertheless, the agency proposes to bypass this longstanding Advisers Act standard and use the Company Act qualified purchaser standard instead.[14] We respectfully urge the Commission to rethink this choice.

First, we do not agree that qualified clients lack the resources and sophistication necessary "to ask questions of, and obtain information from," an adviser they're thinking of hiring to manage their assets. Nor do we agree that such clients are incapable of understanding the performance portrayals contemplated under Rule 206(4)-1(c)(1) without supplemental information. Furthermore, we believe that adopting inconsistent standards for investment adviser advertising and investment adviser contracts makes no sense. The natural outcome of a successful advertisement is a new client contract. We submit that a client who has the resources and sophistication necessary to understand a non-retail, performance-fee contract should be presumed to have the resources and sophistication necessary to understand a non-retail, performance advertisement.

We also are concerned that adopting a standard designed for investments in 3(c)(7) funds instead of the Advisers Act's own test for financial sophistication tailors the advertising rule to private fund advisers even though most firms subject to the advertising rule do not have any private fund clients.[15] While we appreciate the Commission's consideration of the fact that some advisers already have policies and procedures to identify qualified purchasers, we submit that far more advisers have policies and procedures to identify qualified clients, given the relevance of this term to state employee registration requirements.

In response to another question in the Proposing Release, we do not believe that the definition of "non-retail person" in Rule 206(4)-1 should be aligned with the definition of "institutional investor" in FINRA Rule 2210.[16] FINRA administers a rules-based regulatory regime for financial service providers who are not fiduciaries and whose primary function is something other than providing investment advice. As a general matter, we do not think such a regime is an appropriate model for investment advisers, who are more properly regulated under a principles-based, fiduciary regime.[17]

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dependent on the protections of the provisions of the Advisers Act that prohibit [performance] fee arrangements. The Commission believes that such individuals similarly do not need the protections of state qualification requirements.") (internal citation omitted).

[14] Proposing Release at 116-17, 84 Fed. Reg. at 67549.

[15] Less than 35% of all federally registered investment advisers report advising at least one private fund. Investment Adviser Association and National Regulatory Services, 2019 Evolution/Revolution: A Profile of the Investment Adviser Profession 20 (2019).

[16] Proposing Release at 136, 84 Fed. Reg. at 67554.

[17] We further note that the Commission's decision last year to adopt a new Advisers Act Rule 204-5 harmonizing investment advisers' Form CRS delivery requirements with Exchange Act requirements rather than using the existing and well understood Advisers Act brochure rule as a guide may have already created a compliance tripwire for advisers. We ask the Commission to take a more wholistic approach in the current

For all these reasons, we urge the Commission to define "non-retail person" under Rule 206(4)-1(e)(8) to at least[18] include a "qualified client" in accordance with Rule 205-3(d)(1) under the Advisers Act.

Testimonial and Endorsement

- Instead of including statements by clients and non-clients about the adviser or its "advisory affiliates" in these definitions, we think it would be preferable to include statements about the adviser or its "supervised persons," as defined in the Form ADV Glossary of Terms. It is unlikely that an investment adviser would distribute an advertisement containing testimonials and endorsements about its parents and subsidiaries (*i.e.,* persons who control or are controlled by the adviser). It is more likely that a testimonial or endorsement would relate to persons who provide advice on the adviser's behalf. The term "supervised persons" is a clearer way to describe such parties.

Review and Approval

With very limited exceptions, the revised advertising rule would oblige investment advisers to have every advertisement reviewed and approved by a designated employee before use. While the Commission suggests that designated employees generally should include the adviser's legal or compliance personnel and that the party that produces an ad should not also review and approve it, the agency concedes that very small advisers may lack the staff to satisfy these requirements.

The Commission also admits that Advisers Act Rule 206(4)-7 already requires investment advisers to implement and enforce policies and procedures reasonably designed to ensure compliance with the advertising rule and with the statute's anti-fraud provisions.[19] In adopting the compliance rule more than 16 years ago, the SEC wisely chose not to enumerate specific elements that advisers must include in their compliance policies and procedures, but adopted a principles-based approach instead. In so doing, the Commission explained:

> Commentators agreed with our assessment that . . . advisers are too varied in their operations for [Rule 206(4)-7] to impose . . . a single set of universally applicable required elements. Each adviser should adopt policies and procedures that take into consideration the nature of that firm's operations. The policies and procedures should be designed to prevent violations from occurring, detect violations that have occurred, and correct promptly any violations that have occurred.[20]

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rulemaking and, wherever possible, harmonize advisers' new compliance obligations with existing Advisers Act requirements and advisers' existing compliance programs.

[18] We also endorse the IAA's suggestion that certain classes of sophisticated financial intermediaries be treated as non-retail persons. *See* IAA Letter at 35.

[19] Proposing Release at 193-94, 84 Fed. Reg. at 67569.

[20] *Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Rel. No. 2204 (Dec. 17, 2003), 68 Fed. Reg. 74714, 74715-16 (internal citations omitted) (Dec. 24, 2003).

The Commission has not identified, and we are not aware of, any problems with this approach. Indeed, in the second part of the instant rulemaking, the Commission adopts such an approach to compliance regarding the cash solicitation rule.[21] Investment advisers today have implemented practical and effective ways to ensure that their sales and marketing materials satisfy the specific prohibitions of the current advertising rule, as well as their broader fiduciary duty not to mislead their clients and prospective clients. Advisers will already be obliged to update their compliance procedures to address the other proposed changes to Rule 206(4)-1. There is no need to add to that burden by mandating the specific elements of those procedures.

We ask the Commission to eliminate the review and approval provision from the proposal.

Amendments to Form ADV

The Commission proposes to amend Form ADV for the fifth time in ten years, this time to add questions relating to advertising as new Item 5.L. in Part 1A.[22] While we understand that some of the proposed new questions might be useful to the SEC staff in preparing for investment adviser examinations, the additional disclosure would be meaningless to investors. The only advertisements that are relevant to a client or prospective client are the ones she or he receives from the adviser. The fact that an adviser might present performance portrayals or examples of past advice to other prospective clients says nothing about the services the first client can expect to receive from that adviser or the fees the client can expect to be charged.

On the whole, we do not think the limited benefit of the proposed new disclosure justifies another expansion of the ADV at this time. However, if the Commission decides to proceed with this part of the proposal, we offer the following additional comments:

- If the SEC adds the terms *testimonial, endorsement* and *third-party rating* to the ADV Glossary,[23] it should add a definition for *"advertisement"* as well and eliminate the first full sentence of Item 5.L. (The italicization of the terms will direct advisers to the Glossary.)

- We believe the question about "specific investment advice" proposed to be added in Item 5.L.(5) will confuse advisers and will not provide meaningful information to the SEC staff. This question should be eliminated.

- Because the proposed revision of Rule 206(4)-1 does not mention review or verification of performance results by an *unrelated* party, this question should not be included in Item 5.L.,

- Advisers are already obliged to identify their websites and social media accounts,[24] which, along with other web-based sources, can be searched by the SEC staff in preparing for

[21] Proposing Release at 234-35, 84 Fed. Reg. at 67580.

[22] *Id.* at 195-96, 484, 84 Fed. Reg. at 67569-70, 67649.

[23] *Id.* at 198, note 343, 84 Fed. Reg. at 67570, note 343.

[24] Form ADV, Part 1A, Item 1.I.

compliance exams. There is no need for additional social media disclosure in Item 5.L. Nor do we think additional granular questions regarding performance calculations belong in the ADV.

- For the reasons explained above, we do not believe disclosure about advertising practices is useful for investors. Therefore, we do not think such disclosure belongs in an adviser's ADV brochure.

Updating the Cash Solicitation Rule

We generally support the Commission's efforts to update Rule 206(4)-3, but we believe the current proposal should be revised in certain respects before it is finalized. As we did with the advertising rule, we are pleased to endorse the comments on the solicitation rule submitted by the IAA, and to submit the following observations and suggestions:

- When it adopted Rule 206(4)-3 in 1979, the SEC took the position that an unaffiliated solicitor who engages in solicitation activities in accordance with the rule would be an "associated person" of the investment adviser with regard to those activities, and thus would not be obliged to separately register under the Advisers Act solely because of those activities.[25] The Commission proposes to withdraw that position, and leave the determination of a solicitor's status as an investment adviser to a facts and circumstances analysis in all cases.[26] We are concerned that this approach may lead to unnecessary compliance risks for advisers and solicitors and, possibly, confusion for clients.

  We believe that a solicitor that does not *engage in the business* of advising clients about selecting investment advisers and does not otherwise provide advice about securities should not be subject to investment adviser registration requirements merely by virtue of limited solicitation activities subject to Rule 206(4)-3. Without assurance that the SEC agrees with this position, an adviser may unnecessarily refrain from engaging a solicitor. If such a solicitor did register with the SEC or one or more states, the solicitor could assume unnecessary compliance burdens and the solicited client could be overwhelmed and confused by receiving the solicitor's brochure (and possibly Form CRS), along with the adviser's brochure, CRS, and solicitation disclosure document.

  Therefore, we ask the Commission to clarify when a solicitor would be required to register as an investment adviser.

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[25] *Requirements Governing Payments of Cash Referral Fees by Investment Advisers,* Advisers Act Rel. No. 688 (July 12, 1979), 44 Fed. Reg. 42126 (July 18, 1979). In promulgating rules under the National Securities Markets Improvement Act of 1996 ("NSMIA"), the Commission took the position that unaffiliated solicitors do not qualify for the state registration pre-emption that applies to in-house solicitors, because an outside solicitor may not provide investment advice on behalf of an adviser. NSMIA Release, *supra,* note 13 at 48-50, 62 Fed. Reg. at 28123. It may be time to revisit this position in light of the Commission's more recent statement that advice about engaging an adviser or selecting an account is a form of investment advice. *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Advisers Act Rel. No. 5248 (June 5, 2019) at 18, 84 Fed. Reg. 33669, 33674 (July 12, 2019).

[26] Proposing Release at 201, note 346, 84 Fed. Reg. at 76571, note 346.

- We also urge the Commission to avoid duplicative regulation of testimonials and endorsements. As proposed, a testimonial or endorsement an adviser pays for may be subject both to the advertising rule and the solicitation rule.[27] Since each rule is designed to ensure that the public is not misled by an investment adviser's promotional activities, there is no demonstrable benefit to having the same behavior regulated twice.

  A paid testimonial or endorsement on an adviser's website or social media page or in another communication under the adviser's control should be governed only by the advertising rule.[28] Conversely, a paid testimonial or endorsement undertaken on the adviser's behalf but not under the adviser's control (*e.g.,* an unscripted social media campaign) should be subject only to the solicitation rule. This is particularly important if the Commission retains a review and approval requirement in the advertising rule.

- Although we generally favor removing unnecessary verbiage from regulations, we do not agree with the proposed elimination from the solicitation rule of a provision reminding advisers of the additional restrictions on solicitation found in Rule 206(4)-5. Unlike a general fiduciary obligation that permeates every aspect of an adviser's business and need not be specifically referenced in the solicitation rule, the pay-to-play requirements are limited, prescriptive and hardly intuitive. Removing the reference to 206(4)-5 is likely to create a compliance tripwire for advisers. We ask that the existing language from Rule 206(4)-3(e) be retained.

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Although this package of proposed amendments has much to commend it, we are concerned that in some respects, it substitutes new complications for old ones, and that requests for staff guidance will immediately begin anew. We are happy to supply any additional information you may desire about the matters discussed above. Kindly contact the undersigned at [redacted] for further assistance.

Respectfully submitted,

Mari-Anne Pisarri

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

[27] *Id.* at 203, 84 Fed. Reg. at 67571-72.

[28] If the Commission is concerned about compensation being paid to "bad actors" for testimonials and endorsements, the Commission could include a prohibition to this effect in Rule 206(4)-1(b)(1), with a cross reference to the definition of "ineligible solicitor" in Rule 206(4)-3(a)(3)(ii).