Money Management Institute

February 10, 2020

Submitted electronically through http://www.regulations.gov

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

Re: Investment Adviser Advertisements; Compensation for Solicitations (Investment Advisers Act Release No. 5407); Request for Comment on Enhancing Investment Adviser Regulation [File Number S7-21-19]

Dear Ms. Countryman:

The Money Management Institute ("MMI") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") on its proposed amendments to the rules governing investment adviser advertisements and compensation for solicitations under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), and related proposed amendments to the books and records rule and Form ADV (collectively, the "Proposed Rules" and individually, each the "Proposed Rule").[1]

MMI is the national organization for the advisory solutions industry, representing a broad spectrum of investment advisers that manage separate accounts, as well as sponsors of investment consulting programs. MMI was organized in 1997 to serve as a forum for the industry's leaders to address common concerns, discuss industry issues, and work together to better serve investors. Our membership comprises firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

We agree with the Commission's determination that both Rule 206(4)-1 (the "Advertising Rule") and Rule 206(4)-3 (the "Solicitation Rule" and, together with the Advertising Rule, the "Rules") under the Advisers Act are in need of modernization. As the Commission stated in the Proposing Release, advances in technology, changes in the way that advisory services are offered and consumed, and an increase in the number of investment advisers in the marketplace have made certain provisions of the Rules obsolete. We applaud the Commission's effort to drive meaningful change in regulations governing the investment adviser space, which has the potential to improve the operating and compliance environments for advisory firms, while improving the quality and type of information available to investors and prospective investors, without sacrificing any protections afforded to them. In general, we support the Commission's attempt at modernizing the Rules, but we would suggest

[1] *Investment Adviser Advertisements; Compensation for Solicitations*, 84 Fed. Reg. 67518 (December 10, 2019) (the "Proposing Release"), *available at* https://www.govinfo.gov/content/pkg/FR-2019-12-10/pdf/2019-24651.pdf

the following comments and changes be considered by the Commission as part of its process for adopting final amendments to the Rules.

1. **Proposed Rule 206(4)-1**

a. Definition of Advertisement

The proposed definition of "advertisement" is designed flexibly to capture communications disseminated by any current or evolving means of communication and also to expressly apply to communications disseminated to fund investors (other than investors in registered funds or business development companies) in addition to advisory clients and prospective clients. In addition, the proposed definition would cover communications made "on behalf of" an investment adviser and, unlike the current Advertising Rule, would apply to communications made to a single person, but would exempt live oral communications that are not broadcast and would exempt responses to certain unsolicited requests. As proposed, communications disseminated without an adviser's consent would not be considered to be made "on behalf of" the adviser, but third-party content could, under certain facts and circumstances, be considered to be made "by or on behalf of an adviser" if the adviser was involved in its creation or has endorsed or approved the information.

<u>Monitoring Third-Party Comments.</u> The proposal contemplates an adviser having to take "affirmative steps" with respect to the preparation or endorsement of third-party comments in order for such comments to be deemed "advertisements" subject to the Advertising Rule. For example, simply providing a platform for any third-party comments to be posted or permitting the use of "like," "share" or "endorse" features on a social media platform would not be sufficient, on its own, to constitute "affirmative steps" that would deem such platforms to be "advertisements," but providing users with suggested words for them to post as commentary or reviews, editing the content of third-party posts, deleting negative comments or prioritizing or highlighting positive comments could all be examples of an adviser exercising sufficient control over third-party content to promote its advisory business, and thereby could constitute "affirmative steps." Among other requests for comment on this proposal, the Commission asked whether an adviser should be allowed to edit third-party content solely on the basis that it is profane or unlawful without such act of editing causing the content to be made "by or on behalf of" the adviser and thereby making the platform an "advertisement," or whether an adviser should be permitted to apply a set of neutral pre-established policies and procedures to monitor content posted by third-parties without making the platform an "advertisement." We are of the view that an adviser should be able to edit third-party content based on a neutral, pre-established set of policies that is objectively and consistently applied, without making such commentary an "advertisement" as a result of such editing. For example, an adviser should be permitted to have a policy to remove all content after a certain length of time, or to remove or redact content that includes personal information, spam, threats, profane, offensive or defamatory content, information that encroaches a person's intellectual property, or demonstrably factually false or misleading information. An adviser should not have to choose between being held captive to any such content that has been posted on its public website or social media page or having to adopt and implement burdensome compliance policies and procedures that treat such platforms and all posted content as "advertisements." Just as an adviser would not have to allow graffiti to remain across the front of its brick-and-mortar location, it should be permitted to similarly protect itself from such content in digital form. In addition, for the very reasons articulated by the Commission in proposing these regulatory changes – advances in how investment advice is offered and consumed – much information will become stale or irrelevant over time, and allowing advisers to remove content after a period of time that is uniformly applied would ensure that content is fresh and relevant (e.g., reflects the experience of current investment professionals at the adviser and the current menu of investment strategies, products and services offered by the adviser). Finally, given the constant threat of personal information being misappropriated, an adviser should be permitted to promptly remove any personally

identifying information posted by third-parties. We do not believe that these neutral criteria would have to be publicly disclosed, but they should be subject to internal review and any changes should be approved by the adviser. Copies of such policies could be made available to the Commission's examination staff.

Communications with Existing Clients/Investors; Educational Communications. We recommend that the definition of "advertisement" expressly exclude communications made to existing clients about strategies in which they already invest, or services which they already receive. Further, the definition of "advertisement" should expressly exclude materials provided to any recipient (or made generally available to the public) that are educational in nature, such as market or economic commentary. Depending on the facts and circumstances, each of these types of communication are already excluded from the proposed definition of "advertisement" because they do not offer or promote the investment adviser's investment advisory services or seek to obtain or retain one or more investment advisory clients or fund investors. Nonetheless, we are of the view that additional clarification that such communications are able to exist outside the definition of "advertisement" would be useful to the marketplace. The majority of adviser-client relationships are personal in nature, where the adviser is a trusted fiduciary and routinely is called upon by its client to answer questions about the client's individualized financial circumstances.[2] For example, advisers often will include commentary in client reports that illustrates how an investment or investment strategy performed (or did not perform) as expected, or how it contributed to (or detracted from) the performance of the strategy in which the client is enrolled or the client's account over a given period time. These communications are extremely useful to clients and fund investors and should not be viewed as "advertisements" aimed at retaining them. Having to assess whether each one of these communications meets the proposed definition of "advertisement" would represent an undue burden on advisers that could chill their willingness to respond to client inquiries and slow down the timing of such communications, potentially eroding the adviser-client relationship over time. Accordingly, if the final amendments to the Advertising Rule include an express exclusion from the definition of "advertisement" for communications made to existing clients about their current investments, strategies or services, advisers would have a much clearer path to compliance and communications could flow more freely. Similarly, advisers will routinely project their expertise to the marketplace through materials that are educational in nature and express the adviser's viewpoint on global economic trends, expectations for areas of growth or retraction in the market or particular countries or sectors, or otherwise provide helpful information to marketplace that explains different types of assets classes, how investing in certain types of instruments work, or explains concepts like compounding or dividends. These materials improve the marketplace by making investors more informed and able to ask questions of, and challenge the assumptions of, their advisers. Further, such materials are already subject to the general anti-fraud provisions of the Advisers Act. We believe that, as long as these types of educational communications do not include information about the adviser's specific products or services, then they would not meet the proposed definition of "advertisement." Having these categories expressly carved out from application of the Advertising Rule would provide important certainty to advisers, thereby permitting them to continue to provide freely such helpful information to the public and to their clients.

Internal Communications. We suggest that certain materials that are intended for internal use only should be expressly excluded from the definition of "advertisement." It is important that investment advisory firms be able to communicate freely inside their business with minimal worry

---

2 *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (July 12, 2019) (noting that "an adviser's fiduciary duty is imposed under the Advisers Act in recognition of the nature of the relationship between an adviser and its client—a relationship of trust and confidence. The adviser's fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client").

about inadvertent violations of the Advertising Rule. Advisory firms often will communicate market outlooks, changes in product offerings or changes in strategy from the top down (e.g., from a home office or global investment committee out to branch offices and individual financial advisors). Similarly, individual representatives frequently will ask questions of senior management or the legal and compliance function. Although most such internal communications would not meet the proposed definition of "advertisement" because they do not offer or promote the firm's advisory services or seek to obtain or retain one or more clients or fund investors, it would be useful to advisers if internal communications were expressly excluded from application of the Advertising Rule. Further, we are of the view that the definition of "advertisement" should include an express exclusion for communications from an adviser to its associated or affiliated financial professionals, such as broker-dealers, other investment advisers, banks, or any of their representatives, provided that such entities or persons are within the same family of financial services companies, regardless of the content of any such communication. In addition, we feel strongly that communications to non-affiliated financial professionals should be excluded from the definition of advertisement where such communications are part of the firm's talent recruitment process. However, internal communications designed to be used externally, such as scripts for telephone calls to prospective investors, could remain subject to the Advertising Rule if they offer or promote the firm's advisory services or seek to obtain or retain one or more advisory clients or fund investors.

<u>Live Oral Communications to Multiple Representatives of a Single Client.</u> We generally agree with the proposed carve out from the definition of "advertisement" for live oral communications that are not broadcast on radio, television, the internet or any other similar medium. However, we are of the view that additional clarification around this exclusion could be helpful to the marketplace. Specifically, we suggest that the Commission or its Staff clarify that a live oral communication that is directed to multiple representatives of a single client (e.g., a retail client with a tax professional or attorney in the room, a webinar delivered to several employees of an institutional client or family office, or a Skype-based video conference directed at several members within the same household of a retail client) would not be deemed to be "broadcast," and therefore would still be able to rely on the exclusion from the definition of "advertisement," even if such communications offered or promoted the investment adviser's investment advisory services or sought to obtain or retain one or more investment advisory clients or fund investors.

<u>Requests for Proposals and Due Diligence Questionnaires.</u> The exclusion from the definition of "advertisement" for a communication that does no more than respond to an unsolicited request for information should be clarified such that materials provided by an adviser to an investor or prospective investor as part of a request for proposals ("RFPs") or in response to a due diligence questionnaire would fit within that exclusion, regardless of whether such materials provide information that is reasonably beyond the scope of what was specified in the request. For example, we would not expect an adviser that provides information about a separate strategy or product that is completely unrelated to the request to be able to rely on this exclusion. However, an adviser that provides a longer performance track record than what was requested or provides additional materials about the same strategy or product on which information was requested, should not have to consider such communications to be "advertisements" subject to the Advertising Rule. In the current marketplace, nearly every institutional investor, and even many high net worth individual investors, will use RFPs and due diligence questionnaires in connection with their selection of an investment adviser and their investment decision-making processes. For commercial purposes and in order to avoid inadvertent violations of ancillary regulations (e.g., state or local lobbying rules applicable to municipal clients) advisers typically will narrowly tailor their responses to the information requested, so we do not believe that providing additional flexibility on this point in the final Advertising Rule would open the door for widespread abuse. Advisers should be able to provide investors and prospective investors with the most relevant information available about the strategies and products that they have asked about,

without the adviser having to worry about whether a slightly broader response would then pull such materials into the regulatory framework of "advertisements."

Alignment with FINRA Rules. Financial Industry Regulatory Authority ("FINRA") Rule 2210 divides the universe of brokerage communications with the public on the basis of retail and institutional communications, with a third category of "correspondence," that is defined as "any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period." The FINRA regulations then apply the same general content standards to all three types of communications, but apply additional compliance requirements, or reduced compliance requirements, depending on the nature and type of communication. In the proposed Advertising Rule, the definition of "advertisement" would make no distinctions analogous to the FINRA rules. Although there is some proposed variation in the application of the Advertising Rule to "retail persons" and "non-retail persons" with respect to advertising performance, we suggest that the Commission consider whether the definition of advertisement itself should be divided similar to the approach taken by the FINRA regulations, which would have the added benefit of harmonizing regulations applicable to broker-dealers and advisers. In particular, we believe that a category similar to "correspondence" under FINRA Rule 2210 could be a useful mechanism for the Advertising Rule, particularly with respect to the proposed review and approval requirements, as discussed below. In general, we are not opposed to the frameworks applicable to investment advisers and broker-dealers to continue to exist on parallel tracks, but we are of the view that a more uniform approach to regulation could result in a more consistent set of information being delivered to the marketplace—including for materials subject to both sets of rules—and reduced compliance costs for financial services firms, which would reduce barriers to entry and increase competition. Accordingly, we urge the Commission to consider whether elements of the FINRA framework could be carried over sensibly to the Advertising Rule.

b. General Prohibitions

The current Advertising Rule includes a catch-all provision forbidding the use of "any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading." For nearly 60 years this provision has functioned relatively well as a tool for the Commission's examination and enforcement staff to protect investors, while also providing the marketplace with a relatively straight-forward and easy to articulate standard to be applied to the process of creating, reviewing and using advertising materials. Although the generality of the term "false or misleading" makes it difficult to interpret and apply consistently in every context, sales and marketing teams within advisory firms have largely become accustomed to the ambiguity and subjectivity of the standard, and have evolved to, more or less, co-exist peacefully with their legal and compliance departments, which occasionally must cite such standard (or any surrounding Commission or Staff guidance) when pushing back on certain communications. The proposed Advertising Rule would substantially expand this concept with a list of six "ever-green" general principles, in addition to a seventh catch-all for any advertisement that is otherwise "materially misleading." Although the Commission's intention with this expansion is to provide clarity to the marketplace, we are of the view that, as proposed, the Advertising Rule likely would have the opposite effect.

Simplified General Prohibitions. With respect to the proposed expansion of general prohibitions that would apply to all advertisements, we are of the view that "more" may not be "better," particularly as proposed. There is an inherent subjectivity in determining what is "false or misleading" in the context of an advertisement, which has resulted in some variation over time as to how the Commission and its Staff have interpreted and applied the current catch-all standard. Similarly, as noted by the Commission in the Proposing Release, changes in the types of products in the marketplace and how those products are offered and consumed necessarily change the context in which the catch-all is evaluated. Admittedly, this does periodically lead to some confusion among advisers with respect to the creation and use of advertisements, and perhaps some additional set of standards or guidance could provide some clarity to the marketplace on this point. But we are of the view that the proposed general prohibitions go too far.

As proposed, a designated employee of an investment adviser would have to review and approve each advertisement[3] to ensure that all seven general prohibitions (most of which include various subparts) have been satisfied. Among the proposed standards, an advertisement cannot include a material claim that is unsubstantiated, include a misleading implication about a material fact relating to the adviser, or make a statement reasonably likely to cause a misleading inference to be drawn concerning a material fact relating to the adviser. As drafted, it is difficult even to understand what the proposed general prohibitions are. We are of the view that paragraphs (a)(2) and (a)(3) of the proposed general prohibitions are redundant and unnecessary. Paragraphs (a)(1) and (a)(7) are, more or less, in line with the current catch-all provision in the Advertising Rule, and paragraphs (a)(4) through (a)(6) incorporate the concepts of fair and balanced disclosures of potential benefits and risks and anti-cherry picking. In addition, if adopted as we suggest, the general prohibitions would be better aligned with the general content standards of FINRA Rule 2210 and would be easier for advisers' legal and compliance departments to articulate to their marketing and sales departments. Removing paragraphs (a)(2) and (a)(3) of the proposed general prohibitions would also reduce the potential for subjective, inconsistent application of the Advertising Rule by the Commission's examination staff, thereby resulting in a more uniform and competitive marketplace, with more consistent investor-facing materials.

c. Testimonials, Endorsements and Third-Party Rankings

Contrary to the express prohibition of testimonials in the current Advertising Rule, the Proposed Rule would allow the use of testimonials under certain conditions. The Proposed Rule also addresses the use of endorsements and third-party ratings, whereas the current Advertising Rule is silent on these matters.

Under the Proposed Rule, a "testimonial" would be defined as "any statement of a client's or investor's experience with the adviser or its advisory affiliates," and an "endorsement" would be defined as "any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser or its advisory affiliates." An adviser that uses a testimonial or endorsement in an advertisement would have to clearly and prominently disclose: (1) that any testimonial was given by a client or investor, and any endorsement was given by a non-client or non-investor, as applicable, and (2) if applicable, any compensation provided by the adviser in connection with obtaining or using the testimonial or endorsement. In order to be "clear and prominent," the disclosure must be at least as prominent as the testimonial or endorsement itself, and not relegated to obscure footnotes or endnotes.

"Third-party ratings" would be defined as any "rating or ranking of an investment adviser provided by a person who is not a related person . . . and such person provides such ratings or rankings in the ordinary course of its business." These types of ratings would be permitted in an advertisement so long as the adviser reasonably believes the process used to determine the rating was not designed to create a predetermined result. The adviser would also be required to disclose (or would have to reasonably believe that the rating party discloses) the date of the rating, the time period used to determine the rating, the identity of the rating provider, and any compensation provided by, or on behalf of, the adviser in connection with obtaining or using the rating.

---

[3] This portion of the proposal is discussed in more detail below.

Alignment with FINRA's Regulation of Testimonials. Because many advisers are dually-registered as broker-dealers or have affiliated broker-dealers that are subject to FINRA regulations, we are of the view that it would be in the best interests of the marketplace for the Advertising Rule's treatment of testimonials to be better aligned with FINRA Rule 2210. Paragraph (d)(6) of FINRA Rule 2210 applies special content standards for broker-dealer communications with the public that include testimonials. Specifically, the FINRA rule requires, among other elements, that any communication made to a non-institutional investor that includes a testimonial concerning the investment advice or investment performance of a broker-dealer or its products must prominently disclose (1) that the testimonial may not be representative of the experience of other customers, (2) that the testimonial is no guarantee of future performance or success, and (3) the fact that it is a paid testimonial, if more than $100 in value was paid for the testimonial. We believe that these disclosure requirements are clearer, more concise and, accordingly, would be more useful to the marketplace than those proposed by the Commission. In addition, adopting similar standards for advisers that are already in place with respect to the approximately 3,600 FINRA members firms would reduce variation in marketplace communications and lessen the compliance burden on the more than 500 dual-registrant firms and approximately 2,000 advisory firms with affiliated broker-dealers.[4] In a regulatory environment that is already complex with relatively high compliance costs, we are of the view that the Commission should leverage, wherever possible, pre-existing regulatory approaches that have been proven useful.

Clear and Prominent Disclosure. With respect to the Proposed Rule's requirement that testimonials, endorsements and third-party rankings include certain clear and prominent disclosure (as noted above), we would caution the Commission and Staff that what is "clear and prominent" would depend significantly on the facts and circumstances surrounding the mode of advertisement, which will evolve over time. For example, what is "clear and prominent" may vary depending on whether the advertisement is delivered in hard copy format, through a traditional website, through a website designed for a smartphone or tablet format, through a social media platform or application, or through a future mode of communication. We are of the view that advisers should be afforded the flexibility to provide "clear and prominent" disclosures based on the context in which the advertisement is delivered, which should be able to leverage hyperlinks and pop-up affirmations, as applicable. For example, in the context of social media communications, "likes" on Facebook or endorsements on LinkedIn could meet the definition of "testimonial" or "endorsement" under the proposed Advertising Rule, but advisers should be able to comply with the clear and prominent disclosure requirement by including a blanket statement on the relevant portion of their social media pages that explains the nature of such communications and otherwise satisfies any other requirements of the final rule. Moreover, there are often space limitations in particular media and, as a result, the only option may be to include fulsome disclosure through the use of a hyperlink or similar medium. It is also conceivable that certain icons or graphical standards could become widely-accepted and adopted in the future, which could indicate whether an adviser has compensated the person making the statement. This could permit a short symbol or phrase to instantly convey meaningful disclosure to the viewer, similar to the blue verification badge used on Instagram to identify the true account of a public figure. In this vein, we suggest that the Commission not adopt a final Advertising Rule that is too narrow and restrictive, and that the Commission's examination Staff afford ongoing flexibility to the industry based on evolving practices and standards.

d. Performance

---

[4] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019). In addition, according to Form BD filings, 2,098 (55.7%) broker-dealers report that, directly or indirectly, they control, are controlled by, or are under common control with an entity that is engaged in the securities or investment advisory business. Comparatively, 2,421 (18.2%) SEC-registered investment advisers report an affiliate that is a broker-dealer in Section 7A of Schedule D of Form ADV. *See id.*

The proposed Advertising Rule would set explicit conditions on the use of performance results. Although questions frequently arise regarding how and when performance results can be used in advertisements, this topic is not explicitly addressed in the current version of the Advertising Rule. Instead, the Commission and its Staff has informed market practices on the use of performance in advertising through dozens of guidance releases, no-action letters, deficiency letters, enforcement actions, and informal communications. For example, through no-action letters the Staff has informed the types of disclosures that must be included in a performance advertisement in order to prevent the advertisement, in the Staff's view, from being false or misleading.[5] The proposed amendments to the Advertising Rule seek to codify and streamline the various Commission and Staff guidance, which would presumably be supplanted by the proposed rule changes if adopted by the Commission. Although we generally support a modernized approach to the regulation of performance in investment adviser advertisements that consolidates the patchwork quilt of guidance that has evolved over time, there are certain clarifying changes that we propose for the final amendments to the Advertising Rule.

Non-Retail Persons Should be Expanded. As proposed, the definition of "Non-Retail Person" would be limited to qualified purchasers and knowledgeable employees, as those terms are defined in the Investment Company Act of 1940, as amended and regulations thereunder (the "Company Act"). We believe that the proposed definition of "Non-Retail Person" is too narrow and would result in an unfair bifurcation of the marketplace causing certain types of financially sophisticated investors to receive information different from that available to others. In addition, the proposed definition of Non-Retail Person would subject investment advisers to an additional sophistication standard applicable to communications, disclosures and services provided to clients.

We understand the Commission's desire to create standards applicable to communications with clients based on the client's sophistication, and agree that investors that meet certain sophistication standards are able to withstand certain risks. That being said, we are concerned that the definition of Non-Retail Person is too narrow and creates yet another sophistication standard for investment advisers (and, in particular firms that are also registered broker-dealers) to abide by in communicating with, and providing services to, clients. We are concerned that the myriad of sophistication standards that touch an investment adviser's dealings with clients are too varied, creating undue burdens on advisers. For example, the Advisers Act contains the "qualified client" sophistication standard with regard to performance fees[6], FINRA Rule 2210 establishes different standards for communications with the public for institutional and retail investors[7], Regulation D under the Securities Act of 1933 establishes the concept of an "accredited investor" for purposes of determining eligibility to participate

---

[5] *See, e.g.*, Clover Capital Mgmt. Inc., SEC Staff No-Action Letter (Oct. 28, 1986).

[6] A qualified client is (i) any natural person with at least $1,000,000 of assets under management of the investment adviser; (ii) a natural person with a net worth of at least more than $2,000,000 (assets may be held jointly with a spouse); (iii) an executive officer, director, trustee, general partner of the investment adviser; or (iv) an employee of the investment adviser who participates in the investment activities of such investment adviser. *See* 17 C.F.R. § 275.205-3(d)(1).

[7] Broker-dealer communications with the public are separated into three categories under FINRA Rule 2210: correspondence, retail communications and institutional communications. Retail communications (communications sent to more than 25 retail investors within any 30 calendar-day period) must be approved by a registered principal and then filed with FINRA (unless an exception applies) within 10 business days of first use or publication. Standards for institutional communications (any written communication distributed or made available only to institutional investors, not including a member's internal communications) include adopting and implementing policies and procedures designed to prevent institutional communications from being forwarded to retail investors (e.g., use of legends), and such procedures need to be maintained and made available to FINRA upon request. *See* FINRA Rule 2210(a)(1)-(7). *See also* FINRA Rule 2210(b)(1)-(3).

in a private placement[8], and Regulation Best Interest and Form CRS contain yet a different standard for what is and is not "retail"[9]. Each of the standards noted above differ in various ways yet all such standards have the potential to touch an investment adviser's dealings with its clients – in many instances, the same client. For instance, under Regulation Best Interest and Form CRS, most natural persons will be considered "retail" irrespective of investment experience or net worth, whereas such persons would be considered "Non-Retail" under the Proposed Rules if they have $5 million in investments (among other ways to qualify) and "Institutional" for FINRA purposes if they have at least $50 million in total assets. Each of these sophistication standards deviate materially and we are concerned that the Proposed Rule contains a definition that is too narrow and creates yet another inconsistent standard for advisers to manage.

Just six weeks after the Commission published the Proposing Release, it also proposed to amend the definition of "accredited investor" to add new categories of natural persons based on professional knowledge, experience or certifications, noting that modernizing the binary approach to who does and does not qualify for accredited investor status is long overdue.[10] We are of the view that the term "Non-Retail Person" should be expanded to include accredited investors, including the additional categories of accredited investors (e.g., family offices) proposed by the Commission, as well as "qualified clients" as such term is defined under the Advisers Act. Persons who have obtained certain professional certifications and designations (e.g., Series 7, 65 or 82 licenses or similar credentials), professional personnel associated with a broker-dealer (i.e., registered representatives), registered investment adviser or bank, investment consultants, investment platform gatekeepers, or other similarly financially sophisticated investors should not be prohibited from receiving non-retail advertisements simply because they do not have $5 million in investments. For example, when a manager in a wrap fee program provides marketing material to an investment professional associated with a broker-dealer or adviser that is a wrap fee program sponsor, with the intent that the material is intended to be used solely by the associated professional and after having adopted, implemented and followed policies and procedures reasonably designed to ensure that such advertisement is not disseminated to retail persons (e.g., clear disclosures to that effect), then such marketing material should be considered a non-retail advertisement.

We urge the Commission to consider whether the definition of "Non-Retail" is too narrow in light of other relevant sophistication standards applicable to investment advisers and the services they provide. We appreciate that the Commission considered the "accredited investor" and "qualified client" standards in issuing the Proposed Rule, however, we urge the Commission to reconsider these points. Specifically, we think the term should be expanded to include "accredited investors" and "qualified clients" as well as individuals with the professional designations discussed above. We think that these standards are more appropriate barometers for what should be "Non-Retail" for purposes of the Advertising Rule – particularly, the qualified client standard since such standards are established under the Advisers Act. Moreover, we urge the Commission to consider what operational burdens will

---

[8] A natural person qualifies as an "accredited investor" with an individual income in excess of $200,000 (or $300,000 with a spouse); a net worth (individual or joint with spouse) of over $1,000,000; or is an executive officer, director or general partner of the issuer. *See* 17 C.F.R. § 230.501(a).

[9] Regulation Best interest defines a retail customer as "a person or legal representative of such person who (i) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (ii) uses the recommendation primarily for personal, family, or household purposes," whereas for purposes of Form CSR, a retail investor is "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes." *See* 17 C.F.R. § 240.15l-1(b) and C.F.R. §249.641.

[10] *See* Amending the "Accredited Investor" Definition, SEC Release No. 10,734 (Dec. 18, 2019).

be imposed on investment advisers, particularly dually registered firms, operating within the divergent standards discussed above.

Gross and Net Performance. Investment advisers often offer products and strategies with differing fee rates. In such instances, showing the fees that were actually charged in "net performance" figures are not always appropriate in performance advertisements that market a product or strategy that will charge different fee structures for those clients or investors receiving the advertisement. We appreciate that in proposed changes to the Advertising Rule the Commission recognized the need to permit the use of model fees in calculating net performance. However, it is our view that the most applicable fees are actually those fees that *will be charged* to clients or investors going forward, as opposed to those that were charged historically. For that reason, we recommend the Commission affirmatively permit advisers to use model fees that reflect *either* the highest fee that was charged historically or the highest potential fee that it will charge the investors or clients receiving the particular advertisement, provided the performance is accompanied by appropriate disclosure. We further ask the Commission to clarify how an adviser would reflect flat fees charged periodically in net performance figures.

The Commission has also proposed that advisers can, under certain circumstances, show gross performance without accompanying net performance information. The Proposed Rule goes on to prohibit a presentation of gross performance unless the advertisement provides or offers to provide promptly a schedule of the specific fees and expenses deducted to calculate net performance. We ask that the Commission clarify that the requirement to provide or offer to provide fee schedules is not triggered where a presentation shows *both* gross and net performance, but rather only in instances where gross performance is shown without accompanying net performance.

Prescribed Time Periods. The Commission has proposed that performance results contained in Retail Advertisements are shown for 1-, 5-, and 10-year periods, each presented with equal prominence and "ending on the most recent practicable date." We appreciate the Commission recognizing the need for flexibility in determining the end date for such performance, given that advisers with different types of strategies value their client's portfolios at different frequencies. However, we ask that the Commission expressly clarify that quarterly performance figures would be sufficient to meet this standard. We do not make this request, however, in an effort to limit the flexibility the Commission is proposing – we recognize that strategies that hold illiquid investments (among other things) may not have quarterly figures available at all times and think the final rules should contain flexibility for this reason.

Related Performance. The Proposed Rule would permit the use of related performance so long as that performance includes all related portfolios or, if it does not include all related portfolios: (i) the advertised performance results are no higher than if all related portfolios had been included; and (ii) the exclusion of any related portfolio does not alter the presentation of the time periods required to be shown under the proposed Advertising Rule. In connection with these proposed requirements, the Commission requested comment on whether it should consider adopting FINRA's approach and prohibit the presentation of related performance in Retail Advertisements. We concur with the views expressed by the Commission in the Proposing Release that there is value and utility in permitting advisers to include related performance in advertisements – both with retail and non-retail audiences. It is imperative that advisers are able to demonstrate the adviser's experience in managing portfolios within certain parameters. Moreover, clients expect to see such information – including clients that would be considered "Retail Persons" under the Proposed Rule. For these reasons, we would not support the Commission adopting FINRA's standards with regard to related performance.

Hypothetical Performance. The Proposed Rule would allow an adviser to provide hypothetical performance in an advertisement, provided that the adviser takes certain steps to address the potential misleading nature of hypothetical performance if its underlying assumptions are not subjected to further analysis. We support the Commission's general view that hypothetical performance should remain permissible, however, we have a number of comments on the Proposed Rule.

The Proposed Rule defines "hypothetical performance" as "performance results that were not actually achieved by any portfolio of any client of the investment adviser." Under the Proposed Rule, hypothetical performance would explicitly include, but not be limited to, backtested performance, representative (model) performance, and targeted or projected performance returns. We urge the Commission to reconsider this definition. We respectfully submit that targeted returns, backtested returns and model returns are not the same as truly hypothetical performance and, accordingly, should not be subject to the same standards.

First, target returns are performance goals that an adviser seeks to achieve with a particular strategy or product. Such figures are not hypothetical, but rather they are goals that the adviser manages an account towards achieving. While we submit that target returns should be based on a reasonable methodology and accompanied by appropriate disclosures, these figures are materially different than hypothetical returns, which represent a projection of what returns will or could be based on a series of assumptions.

Second, backtested performance figures are not purely hypothetical, but rather reflect an analysis of actual investment performance based on certain assumptions. As the Commission acknowledged, "backtesting is intended to demonstrate how an investment strategy may have performed in the past if the strategy had existed or had been applied at that time." Backtested performance is useful in a variety of contexts, including for stress-testing an adviser's investment methodology to determine how it would have performed in given market conditions. These illustrations do not project expected returns but rather analyze historical data. Moreover, while the Commission expressed concern that backtesting "presents the opportunity for an investment adviser to claim credit for investment decisions that may have been optimized through hindsight" and that an adviser would be able to "modify its investment strategy or choice of parameters and assumptions until it can generate attractive results," we submit that this is how advisers determine whether modifications to a strategy would be appropriate for purposes of managing accounts in the future. In addition, such performance is often useful in presentations with clients to illustrate how a portfolio would have performed under certain market conditions. We believe these are important tools for advisers to use in communicating with clients and do not present the same risks as projected performance returns.

Finally, representative performance, or model performance, is noted by the Commission to include "performance derived from representative 'model' portfolios managed contemporaneously alongside portfolios managed by the adviser for actual clients." While we agree with the Commission that such model portfolios do not reflect decisions made by an adviser in managing an actual client's account, such performance is not "hypothetical" as it reflects actual performance of an investment strategy in real-time. Accordingly, we request that the Commission consider excluding target returns, backtested performance and representative performance from the definition of "hypothetical performance," or at a minimum, differentiating the treatment of such metrics under the Advertising Rule.[11]

[11] The Commission may consider as instructive the illustrations carved out of FINRA's prohibition on projected performance.

Finally, we ask the Commission to reconsider the criteria applicable for the use of hypothetical performance. The Commission has proposed to condition the use of hypothetical performance on the adoption and implementation of policies and procedures "reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives" of the recipient. Having to determine whether hypothetical performance is "relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated" is an inherently subjective exercise and would be incredibly difficult, if not impossible, to satisfy with respect to an advertisement that will be disseminated to a large number of people. Moreover, the standard, as proposed, is unclear as to what would, or would not be, relevant. For these reasons, we ask that the Commission eliminate this requirement from the final rules.

Alternatively, we request that the Commission provide further clarity as to instances when hypothetical performance could be used with Retail Persons. Given the difficulty an adviser would have in assessing whether a particular person has the resources to analyze the underlying assumptions and qualifications of hypothetical performance, we think that a more appropriate standard would be to require advisers to include clear and prominent disclosure (with respect to assumptions, effect of fees, limited use of such performance) along with the performance information.

We also request that the Commission explicitly permit the use of hypothetical performance with financial professionals that are acting on behalf of a client or investor, including Retail Persons, without subjecting investment advisers to the requirement to assess relevance and sophistication of the underlying client or investor.

e. Review and Approval of Advertisements

The Proposed Rule would require that advertisements are reviewed and approved by a designated employee before an investment adviser could, directly or indirectly, disseminate the advertisement, except for advertisements that are: (i) communications disseminated only to a single person or household or to a single investor in a pooled investment vehicle; or (ii) live oral communications that are broadcast on radio, television, the internet, or any other similar medium.

The review and approval requirements of the Proposed Rule are unnecessary and will be unduly burdensome on investment advisers. While MMI understands and agrees with the Commission that it is important for investment advisers to maintain procedural controls around the content of advertisements, we urge the Commission to reconsider the review and approval requirement as proposed. Specifically, it is our view that the review and approval requirement is unnecessary and inconsistent with the principles-based approach the Commission has indicated it seeks to achieve. The Commission indicated in the Proposing Release that "it is important that investment advisers have a process in place designed to promote compliance with the proposed rule's requirements." Indeed, investment advisers already are required to have such a process in place. Advisers Act Rule 206(4)-7 requires investment advisers to adopt and implement policies and procedures reasonably designed to ensure compliance with the Advisers Act, which includes ensuring that any advertisements disseminated are consistent with the Advertising Rule. In adopting Rule 206(4)-7 and opting ***not*** to require prescriptive policies uniformly, the Commission specifically acknowledged the necessity for investment advisers to have flexibility in crafting policies and procedures tailored for their businesses because in its assessment "funds and advisers are too varied in their operations for the rules to impose of a single set of universally applicable required elements."[12] We submit that since Rule 206(4)-7's adoption, the businesses and operations of advisers have become even more varied, which supports that a uniform standard would be inappropriate. Accordingly, we implore the Commission to take a

[12] *See* 17 C.F.R. § 275.206(4)-7.

more reasoned approach that allows investment advisers flexibility in crafting controls reasonably designed to ensure the advertisements disseminated are consistent with the Advisers Act, including the Advertising Rule.

The Commission indicated that it proposed the review and pre-approval requirement because it believes "it may reduce the likelihood of advisers violating the proposed rule." As noted above, registered investment advisers have long been required to adopt controls designed to ensure such compliance – which generally includes some pre-review process. In fact, the Commission acknowledged that "the internal policies and procedures of most advisers currently require such reviews for broadly disseminated communications." Unlike the Proposed Rule, however, under the current framework, investment advisers are in a position to consider their businesses, including available resources, in designing an appropriately tailored review process. Further, as acknowledged by the Commission and its Staff, the current iteration of the Advertising Rule is antiquated and more importantly perhaps, the no-action guidance interpreting the application of the Advertising Rule, is itself quite dated and narrowly tailored to the particular facts of the petitioner – resulting in ambiguity around the relevant standards applicable to particular advisers in a modern marketplace. It is our view that perceived violations of the existing Rule often arise as the result of a lack of clear and/or modernized standards—not necessarily a lack of controls or internal review conducted by investment advisers.

Finally, it is our view that given the expansive definition of "advertisement" under the Proposed Rule, the review and pre-approval requirement would be overly burdensome on investment advisers, particularly smaller firms with limited resources. By its own account, the Commission's list of possible means of communications being disseminated demonstrates the impossibility of meeting the pre-review requirement, which includes "… emails, text messages, instant messages, electronic presentations, videos, films, podcasts, digital audio or video files, blogs, billboards and all manner of social media, as well as by paper, including in newspapers, magazines and the mail."[13] These requirements would create an impracticable standard for firms to meet. For the reasons noted above, MMI is of the view that the proposed review and approval requirements are unnecessary and overly burdensome, and as a result should not be part of the Commission's final rulemaking.

If the review and approval requirements are part of the Commission's final rulemaking, MMI implores the Commission to focus the explicit review and approval requirements to those communications that have the potential for the most risk. At a minimum, we would request that only Non-Retail Advertisements require pre-approval. In addition, we would suggest the Commission carve out communications disseminated to less than 25 persons, to more closely align with FINRA standards for review and approval.[14] Under FINRA's standards, communications to less than 25 persons (correspondence) are subject to supervisory procedures that are "appropriate for the member's business, size, structure, and customers."[15] This standard provides flexibility for firm's to tailor their review, as appropriate, and allows for review *after* the dissemination of such communications – which we feel is more appropriate than pre-approval. MMI is concerned that requiring pre-approval of communications with limited distribution, coupled with the expansive definition of "advertisement," would create inefficiencies in communicating with clients in a fast-paced business. Delays in communications can cause investor harm, particularly with regard to investments that may have a limited window for participation or price volatility. For these reasons, it is important to ensure that investment advisers are in a position to communicate with clients in real-time, even more than one

---

[13] *See* Investment Adviser Advertisements; Compensation for Solicitations, 84 Fed. Reg. 67518 (proposed December 10, 2019).

[14] *See* FINRA Rule 2210(a)(2).

[15] See FINRA Rule 3110(a)(4).

client at a time, without encumbrances. As such, we think it is more realistic and appropriate to have post-dissemination surveillance controls instead of pre-dissemination review and approval in the case of limited scope distributions.

Further, we urge the Commission to limit the review and approval requirements in the case of templates or "form" materials. Often investment advisers create templates or form marketing materials that are updated periodically with regard to performance figures, dates, and other non-substantive changes. MMI asks the Commission to limit the review and approval of such templates or forms to the initial creation and/or dissemination of the template or form, and not require that advisers review and approve such materials before each use or each time they are non-substantively modified. Requiring a review each time a template or form is non-substantively modified would require substantial resources, particularly for large retail investment advisory firms that service thousands of accounts. In addition, we ask that templates that are customized for specific clients or strategies are excluded from review and pre-approval. Rather, we think it is more appropriate for firms to conduct periodic review of customized templates as part of their compliance policies and procedures.

Finally, we urge the Commission to explicitly exclude materials prepared by and regarding another advisory firm ("Other Adviser") or its products, where such Other Adviser is itself subject to the review and approval requirements of the Advertising Rule. Many advisory firms, particularly sponsors of wrap fee programs, offer products and services provided by Other Advisers. Such program sponsors rely on materials prepared by such Other Advisers regarding their products and services. The affirmative review and designated employee requirements would have a significant economic impact on advisory firms offering Other Advisers' products or services given the volume of materials that would have to be reviewed. In addition, sponsor firms would not be in a position to substantively review and validate the materials provided by these Other Advisers. There would be no benefit to the second-layer of review, as a result. This requirement would increase cost considerably without any discernable benefit. We note that FINRA instituted an exception process in 2008 for materials that were previously filed and approved by FINRA to eliminate the "compliance redundancy" of numerous firms reviewing the same document to meet their Rule 2110 requirements.[16] The proposed requirements would certainly create the same "compliance redundancy" that FINRA determined to eliminate. Accordingly, we ask that the Commission explicitly carve out such materials from the review and approval requirements.

2. Proposed Amendments to Rule 206(4)-3

In addition to the proposed amendments to the Advertising Rule, the Commission proposed to significantly amend the Solicitation Rule to: (1) cover solicitation of current and prospective clients and investors in any private fund, rather than only solicitation of "clients" of the investment adviser, (2) cover solicitation arrangements involving all forms of compensation, rather than only cash compensation, (3) revise the content and delivery requirements associated with the solicitor disclosure and written agreements, (4) add two additional exemptions to the rule for de minimis compensation and nonprofit programs, and (5) refine the existing provisions regarding disciplinary events that would disqualify a person from acting as a solicitor. In general, we support a modernized approach to the regulation of solicitation activities, but we are of the view that certain changes should be made to the final rule.

[16] *See* FINRA Rule 2110(b). *See also* FINRA Regulatory Notice 08-12: Principal Approval of Sales Material (March 26, 2008).

a. Inclusion of Private Funds

Private Funds Should Remain Outside the Scope of the Solicitation Rule. We are of the view that the Solicitation Rule should continue to be applied only to clients and prospective clients of an adviser, and we disagree that the Solicitation Rule should be amended to apply expressly to prospective private fund investors. Since 2008, the market has operated pursuant to the no-action relief granted by the Staff to Mayer Brown LLP, which expressed the Staff's view that the Solicitation Rule 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, based on the fact that an investor in a private fund is not a "client."[17] We are of the view that the position stated in the *Mayer Brown* no-action letter should remain in place (even if expanded to all forms of compensation other than cash) and that current market practices and compliance programs designed around that position should not be unnecessarily uprooted. An intermediary that is paid transaction-based compensation in connection with the recommendation, offering or sale of private fund interests will, in most circumstances, be required to be registered as a broker-dealer and, accordingly, will be subject to Commission and FINRA regulations governing the standard of care they owe to such investors and prospective investors. In addition, advisers are already subject to Rule 206(4)-8 under the Advisers Act, which prohibits an investment adviser to a pooled investment vehicle (i.e., a 3(c)(1) fund or 3(c)(7) fund) from making any untrue statement of a material fact or omitting to state a material fact necessary to make such statement not misleading to any investor or prospective investor.. In nearly any instance, the arrangement of a payment, of cash or any other form of compensation, from a private fund adviser to an intermediary that is marketing the product to prospective investors would be considered a material fact requiring disclosure pursuant to Rule 206(4)-8. Accordingly, because both the private fund adviser and the intermediary selling the fund's interests are already sufficiently regulated by existing rules, we are of the view that the proposed expansion of the Solicitation Rule to private funds would be unnecessary, confusing and redundant.

b. Exemptions

De Minimis Exemption Should be Increased. The current version of the Solicitation Rule covers any adviser that pays a cash fee to a solicitor with respect to solicitation activities. The proposed amendments would expand coverage of the rule to solicitors receiving any form of compensation arrangements, and would not be limited to cash payments. This would apply to solicitors who receive non-cash compensation, such as directed brokerage, sales awards and prizes, training or educational meetings, outings, tours, other forms of entertainment, and free or discounted advisory services provided in exchange for solicitation activities, subject to a de minimis exception. The de minimis compensation exemption would be available to solicitors that perform solicitation activities for an investment adviser during the preceding 12 months for compensation payable to the solicitor for those solicitation activities of $100 or less (or the equivalent value in non-cash compensation). Given the broad scope of forms of compensation that would be subject to the revised rule, we are of the view that the de minimis exemption is too narrow and would result in burdensome compliance requirements falling onto the shoulders of advisers, who would be forced to choose between undertaking detailed analyses of the value of a wide range of forms of compensation, or significantly expanding the number of deemed solicitors with which the adviser does business subject to the Solicitation Rule. Given the proposed year-long measurement period, we believe that a $2,000 de minimis exemption would be more manageable for advisers, without presenting any risk to the marketplace. Such a threshold would

[17] *See* Mayer Brown LLP, SEC Staff No-Action Letter (July 15, 2008).

also be consistent with analogous regulations applicable to lobbying activities.[18] In addition, as proposed, this exemption could apply to online and retail investor arrangements such as refer-a-friend programs, inadvertently pulling such persons into the Solicitation Rule. Further, with regard to non-cash compensation and wrap fee programs, we request that the Commission consider only extending the Solicitation Rule to instances where there is a specific connection between non-cash compensation paid to a wrap fee program sponsor and specific clients referred to a manager.

Documentation of In-House Solicitors. As proposed, the Solicitation Rule would exempt a solicitor that is (1) one of the adviser's partners, officers, directors or employees, (2) a person that controls, is controlled by, or is under common control with the adviser, or (3) a partner, officer, director or employee of such affiliated person, provided that the affiliation is readily apparent to or disclosed to the investor at the time of the solicitation, and provided that the adviser "documents such solicitor's status at the time the adviser enters into the solicitation arrangement." We suggest that the Commission remove or clarify the proposed documentation requirement. Requiring an adviser to document a person's status at the onset of the solicitation arrangement seems inconsistent with the exemption from the written agreement requirement that is available to this same universe of persons. We are of the view that documenting the status of internal solicitors is unnecessary and would be unduly burdensome. In addition, if the Commission does adopt this requirement, it should consider clarifying the form and type of such documentation that would be expected.

General Activities and Networking Relationships. The Commission should clarify in the final Solicitation Rule that the exchange of any items of value between and among financial services companies, or internally within an investment adviser, would not trigger the application of the Solicitation Rule unless such exchange of value was specifically connected to the solicitation, promotion or marketing of advisory services to clients and prospective clients. For example, where an adviser, in compliance with its gifts and entertainment policies and procedures sends a gift to a third-party adviser or broker-dealer with which it routinely does business, and such third-party, completely unrelatedly refers a client to the adviser, such scenarios should not be considered "solicitation," unless the third-party has a reasonable expectation that it will receive some form of compensation from the adviser in exchange for that referral. Similarly, client referral that stem from networking arrangements among financial services firms, such as "meet and greet" events or conferences where financial professionals can become familiar with each other's businesses and range of available services, should not be considered as having resulted from a "solicitation," where there is no reasonable expectation that the referring party will be compensated for the referral.

Non-Profit Programs Exemption Should be Expanded. Under the non-profit programs exemption, the proposed Solicitation Rule would not apply when an adviser has a reasonable basis for believing that the solicitor is a non-profit program that provides a list of advisers based on non-qualitative criteria, such as geographic proximity and lack of disciplinary history. The investment advisers would also be required to limit compensation to the solicitor to the costs reasonably incurred in operating the program. Additionally, the solicitor would need to disclose the criteria for inclusion on the list of investment advisers, as well as the fact that advisers reimburse the solicitor for the costs incurred in operating the program.[19] We are of the view that this exemption should be expanded

[18] *See e.g.*, N.Y. Legis. Law § 1-e (McKinney 2011) (applying $5,000 annual de minimis standard for exemption from lobbyist registration); 65 Pa. Stat. and Cons. Stat. Ann. § 13A06 (West 2007) ($2,500 annual threshold); Cal. Gov't Code § 86100 (West 2020) ($5,000 annual threshold).

[19] This would effectively codify certain Commission and Staff guidance, such as the National Football League Players Association no-action letter, which involved a non-profit program that provided investors with a list of advisers pre-selected through non-qualitative criteria.

beyond its proposed limitation to permit for-profit entities to rely on the exemption, provided that such entities do not engage in promotional activities with respect to any advisers but merely make adviser's services available via the entity's platform. There are a growing number of platforms in the industry that make third-party advisory services accessible, such as model portfolio providers. Such platform providers should not have to choose between being regulated as "solicitors" or making a fair market profit for the non-promotional service they are providing. In providing these platforms, such entities may themselves be providing investment advice that could subject them to regulation as an investment adviser, or could be receiving transaction-based compensation that could, depending on the particular facts and circumstances, subject the platform provider to regulation as a broker-dealer. But we do not believe such platforms should be considered "solicitations" as long as they do not promote or recommend particular services or products accessible on the platform, even if the platform provider charges an administrative or service fee to the investment advisers whose products and services are accessible through the platform. Any such arrangements would separately be regulated as potential conflicts of interest requiring disclosure by the platform provider, participating advisers, or both, to the platform users. Accordingly, treating such platforms as "solicitations" that would subject to the additional requirements of the Solicitation Rule would be unnecessary and redundant and could chill the growth and availability of these platforms.

Grandfathering Existing Arrangements. The Commission should expressly permit pre-existing arrangements to continue, even if they result in trailing fees being paid to a solicitor after the effective and compliance dates of the final rule, if adopted.

c. Disqualification

Harmonization with Regulation D. We are of the view that the universe of disqualifying events in the Solicitation Rule should be amended to be consistent with the universe of disqualifying events set forth in Rule 506(d)(1) under the Securities Act of 1933. Paragraph (d) of Rule 506 was adopted in July 2013 pursuant to Congressional direction via the Dodd-Frank Act and was vetted by the Commission's rulemaking process. As proposed, the universe of disqualifying events under the Solicitation Rule amendments would be slightly narrower than those already enumerated in Rule 506(d). We see no reason for these narrow gaps to exist, as there seems to be no rationale for permitting certain persons (e.g., a person subject to a United States Postal Service false representation order) from being able to solicit prospective clients for investment advisers, despite being deemed to be bad enough actors such that they should be prohibited from engaging in their own private securities offerings. Adopting a consistent universe of disqualifying events between Rule 506(d) and the Solicitation Rule would also reduce the compliance burden on advisers, as similar compliance checklists could be leveraged between the two activities, and compliance professionals would have one fewer nuanced regulatory inconsistencies to track. Where an existing regulatory framework that has worked reasonably well can be leveraged in a new context, we believe the Commission should take advantage of that opportunity and not create further complexity unnecessarily.

We thank the Commission and its Staff for taking the initiative to lead on these issues. The various separate efforts to address investment adviser advertising and compensation for solicitations has engendered concern within the industry, and we believe that the Commission's Proposed Rules are a significant step in the right direction. In this regard, we applaud the Commission's efforts to publish rulemaking and interpretive guidance designed to address investor confusion, clarify the standards of conduct and enhance existing protections for retail investors. MMI shares the Commission's goals of enhancing the quality and transparency of investors' relationships with advice providers, while preserving access to a variety of types of advice relationships and investment products. We and our members are committed to working with the Commission to meet these important goals.

To that end, while we are generally supportive of the Commission's efforts as noted above, we have some concerns about the Proposed Rules. We have therefore highlighted the foregoing considerations and recommended certain adjustments to the Proposals that we believe will enhance their effectiveness and applicability while still achieving the Commission's stated objectives.

We hope that our comments are helpful to the Commission and its Staff as they further refine their approach to modernizing the Advertising and Solicitation Rules. We would be glad to answer any questions or provide further assistance. Please feel free to contact me at (646) 868-8501 or contact Samantha Lustig at (646) 868-8516.

Very truly yours,

Craig D. Pfeiffer
President and CEO
Money Management Institute