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February 10, 2020

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

Re: Investment Adviser Advertisements; Compensation for Solicitation (File No. S7-21-19)

Dear Ms. Countryman:

The Investment Company Institute¹ supports the Securities and Exchange Commission’s proposal to modernize the Investment Advisers Act rules for adviser advertising and cash solicitations.² In the decades since the Commission last visited these rules, broad changes have occurred in the asset management industry, including new types of firm structures, products, and marketing practices.

The Commission proposed principles-based regulatory changes that likely will accommodate the adviser industry’s continued evolution. We believe that, overall, the proposed rules would reduce compliance burdens for advisers and facilitate investors’ ability to make sound investment decisions. We recommend that the Commission go further and, either on its own, or in coordination with the Financial Industry Regulatory Authority (FINRA), more closely align requirements for registered fund advertising with any final requirements for advisers. Doing so should better position Main Street investors to evaluate a variety of investment products.

¹ The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$25.5 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² See Investment Adviser Advertisements; Compensation for Solicitation, Investment Advisers Act Release No. 5407 (Nov. 4, 2019) (“Proposal” or “Proposing Release”), available at <https://www.sec.gov/rules/proposed/2019/ia-5407.pdf>. Hereinafter, we will use “Advertising Rule” for Investment Advisers Act Rule 206(4)-1 and “Cash Solicitation Rule” for Investment Advisers Act Rule 206(4)-3.

I. Executive Summary

The current asset management landscape allows investors to choose from a number of investment products, including registered funds,³ separately managed accounts, and private funds that may pursue similar strategies, invest in similar securities, and market to, at least some of, the same types of investors – but notably, under the Proposal, the investment products would be subject to different regulations.

We recommend that the Commission consider the asset management landscape holistically as it evaluates how best to recalibrate the scope of permissible marketing activities for investment advisers. Doing so should enhance investor understanding, facilitate comparisons among products, and promote informed decision-making. Our comments are intended to assist the Commission in implementing this important, overarching policy objective.

We present our views from the perspective of registered funds, the distribution of which must be accomplished under an existing and robust regulatory framework, which includes both the federal securities laws and FINRA regulations. In particular, we recommend that the Commission either directly, or in coordination with FINRA, align advertising requirements for registered funds with any final Advertising Rule to permit funds more flexibility to report related, extracted, and hypothetical performance.

In addition, we recommend that the Commission explicitly exclude from any final Advertising Rule: (i) all registered fund communications; (ii) any communications that are subject to FINRA Rule 2210; (iii) any communications for institutional use only; and (iv) advertisements by, or on behalf of, any regulated non-U.S. funds.

We then recommend that the Commission: (i) align the treatment of testimonials under FINRA rules and the Advertising Rule; (ii) clarify that advisers may establish policies and procedures reasonably designed to moderate third-party comments on social media or websites; (iii) explicitly exclude all registered fund, as well as all regulated non-U.S. fund, solicitations from the Cash Solicitation Rule; and (iv) review and rationalize the various regulatory categories of investors.

We discuss our recommendations in further detail below.

II. Definition of Advertisement

In the Proposal, the Commission excluded from the definition of “advertisement” any marketing materials about a registered investment company or BDC that are “within the scope” of Securities Act Rules 156 or 482. We support this aspect of the Proposal.

³ We primarily address registered investment companies (“registered funds”) in our comment letter. Business development companies (BDCs), which are not registered funds, are subject to different regulations. However, the principles underlying our discussion on behalf of registered funds also apply to BDCs.

A robust regulatory framework – consisting of Commission and FINRA requirements – already exists for registered fund sales materials. This framework strikes an appropriate balance by allowing funds to provide potential investors with useful information and requiring that the information not be presented in a misleading manner. Therefore, it is unnecessary to layer on the Advertising Rule.⁴ We expect that the Commission recognized this by excluding certain registered fund sales materials from the Advertising Rule’s definition of advertisement,⁵ but to fully implement its objective, and for the sake of clarity, we recommend that the Commission exclude *any* type of registered fund-related communications from any final Advertising Rule.⁶

We specifically recommend that the Commission explicitly exclude from any final Advertising Rule:

- registered fund sales materials that are “within the scope” of Securities Act Rules 156 and 482 as well as any other registered fund related sales communications subject to Commission regulation;
- communications, including those regarding registered funds, that are subject to FINRA Rule 2210;
- any sales materials, including those regarding registered funds, that are provided to financial intermediaries but not intended to be distributed to investors, such as so-called “institutional use only” or “broker-dealer use only” materials;⁷ and
- advertisements by, or on behalf of, regulated non-U.S. funds.

A. Exclude Registered Fund Communications from the Advertising Rule

For the reasons discussed above, we strongly support the Commission excluding registered fund sales materials subject to Securities Act Rules 156 (*i.e.*, sales literature)⁸ or Rule 482 (*i.e.*, performance

⁴ For example, doing so could potentially subject a single marketing communication on behalf of a registered fund to multiple, disparate internal and FINRA reviews and approvals under the proposed Advertising Rule and FINRA Rule 2210.

⁵ Proposed Advisers Act Rule 206(4)-1(e)(1)(iii).

⁶ Scoping out registered fund sales materials from the Advertising Rule would be consistent with longstanding staff guidance. See Munder Capital Management No-Action Letter (May 16, 1996), *available at* <https://www.sec.gov/divisions/investment/noaction/1996/mundercapital051796.pdf>.

⁷ An example of this type of communication would be materials that are intended to educate or train financial intermediaries about registered funds or advisory products or services. Because these communications are for institutional use only, applying the Advertising Rule is unnecessary to protect investors. For the same reasons, we recommend that the Commission clarify that any communications by an adviser, such as educational materials, that do not market products or services that the adviser offers, be excluded from the definition of “advertisement” under the Advertising Rule.

⁸ Sales literature includes any communication “used by any person to offer to sell or induce the sale of securities of any investment company.” Securities Act Rule 156(a); *see also* Amendments to Investment Company Advertising Rules, Investment Company Act Release No. 26195 (Sep. 29, 2003), *available at* <https://www.sec.gov/rules/final/33->

advertising)⁹ from the scope of any final Advertising Rule. As the Commission noted, these rules generally are consistent with the principles of the Advertising Rule.

The Commission asked whether the scope of the exclusion should include other registered fund communications, including those that are filed or deemed filed with the Commission.¹⁰ We recommend that the Commission exclude all types of registered fund communications from the scope of the rule, including communications subject to Investment Company Act Rule 34b-1 (*i.e.*, sales literature)¹¹ and Securities Act Rule 135a (*i.e.*, generic advertisements).¹² Consistent with this recommendation, the Commission should confirm that a fund prospectus, including any appendices to that prospectus, summary prospectus, statement of additional information, and shareholder report, including any management discussion of fund performance, are excluded from the definition of advertisement.¹³ Further, any regulatory reports that registered funds or BDCs file (or deem to file) with the Commission should also be outside the scope of the Advertising Rule.¹⁴

[8294.htm#P94_19724](#) (amending Rule 156 to provide further guidance regarding the factors to be weighed in considering whether a statement involving a material fact in investment company sales materials is or might be misleading).

⁹ Securities Act Rule 482 generally applies to registered investment company and BDCs sales materials, except that the rule's performance reporting requirements do not apply to BDCs or closed-end funds. Rule 482 permits open-end funds to advertise performance information, provided that specific requirements for calculating and presenting performance and disclosing key information are followed.

¹⁰ Proposal at 52.

¹¹ Given that Rule 34b-1 incorporates both Rules 156 and 482 and the anti-fraud provisions of the federal securities laws, we expect the Commission intended to exclude Rule 34b-1 sales literature from the Advertising Rule. Rule 34b-1 incorporates Securities Act Rule 482 regarding advertising money market funds or any sales literature including performance data and Securities Act Rule 156 regarding misleading statements.

¹² Rule 135a permits only limited information in a "generic" advertisement and is subject to existing anti-fraud requirements. We also request that the Commission similarly clarify that all communications regarding closed-end funds and BDCs are outside the scope of the Advertising Rule, including annual reports of closed-end funds. *See* Proposal at 52. For example, the Commission recently adopted Securities Act Rule 163B, which allows issuers, including closed-end funds and BDCs, to deliver "test-the-waters" communications to sophisticated investors prior to or following the filing of a registration statement under the Securities Act. *See* Release No. 33-10699 (Sep. 25, 2019), *available at* <https://www.sec.gov/rules/final/2019/33-10699.pdf>. The Commission also proposed rules that would permit closed-end funds and BDCs to use "free writing prospectuses" rules under Securities Act Rule 164 and 433 as well as other offering communications that are limited in scope. *See* Release No. 33-10619 (Mar. 20, 2019), *available at* <https://www.sec.gov/rules/proposed/2019/33-10619.pdf>. It is likewise unnecessary to layer the Advertising Rule on communications subject to these rules (or proposed rules that subsequently are adopted).

¹³ The content of these communications is subject to existing Commission rules and forms. *See, e.g.*, Form N1-A, Form N-CSR, Securities Act Rule 498 (summary prospectus); Investment Company Act Rules 30a-1 (annual reports), 30e-1 and 30b2-1 (shareholder reports), and 30a-2 (certification of reports).

¹⁴ We expect the Commission intended this result by acknowledging that communications about registered funds are already regulated by the Securities Act and Investment Company Act. *See* Proposal at 50. In addition, the proposed rule excludes from the definition of advertisement any information required to be contained in a statutory or regulatory notice, filing, or other communication. *See* Proposed Adviser Act Rule 206(4)-1(e)(1)(iv)).

The existing registered fund regulatory framework robustly regulates sales materials, filings, and regulatory reports. It is unnecessary for investor protection to layer additional requirements for registered fund communications by means of the Advertising Rule.

B. Exclude Communications Subject to FINRA Rule 2210 from the Advertising Rule

FINRA regulation provides fulsome investor protection for broker-dealer distributed communications, including, in particular, registered fund communications. We therefore recommend that any communications that are within the scope of FINRA Rule 2210 be deemed to be outside the scope of any final Advertising Rule.

By doing so, the Commission would not be ceding its authority to FINRA. In fact, the Commission must approve the proposal and adoption of any and all FINRA regulations.¹⁵ It can only do that if it finds that FINRA's proposed regulations are consistent with the Exchange Act. As relevant here, the Commission has reviewed and approved the FINRA advertising rule – Rule 2210 Communications with the Public – and amendments thereto numerous times. In approving Rule 2210, the Commission found that the rule was designed

to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹⁶

Indeed, Rule 2210 is substantially similar to, and in some cases exceeds, the proposed Advertising Rule, so that requiring compliance with both rules is unnecessary. Rule 2210 imposes core, principles-based content standards that are consistent with investor protection objectives and sets forth minimum supervision requirements designed to ensure that content standards are met.¹⁷ Rule 2210 has many of the same requirements as those in the Advertising Rule, which we describe immediately below.

- Communications with the public must be based on the principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts regarding any particular security or type of security, industry and service.
- Communications with the public must not be misleading.¹⁸

¹⁵ Exchange Act Section 19(b)(2).

¹⁶ See Release No. 34-66681 (Mar. 29, 2012), available at <https://www.sec.gov/rules/sro/finra/2012/34-66681.pdf>.

¹⁷ See FINRA 2014 Retrospective Rule Review Report, available at <https://www.finra.org/sites/default/files/p602011.pdf>.

¹⁸ Rule 2210(d)(1)(B). In addition, a communication may not omit a material fact or qualification if the omission, in the light of the context of the material presented, would cause the communication to be misleading. Further, material disclosures must be prominent.

- Communications with the public must not include false, exaggerated, or unwarranted statements or claims.¹⁹
- Information may be placed in a legend or footnote only if such placement would not inhibit a customer's understanding.²⁰
- Statements must be clear and not misleading within the context in which they are made and that they provide balanced treatment of risks and potential benefits.²¹
- The nature of a communication must be appropriate to the audience.²²
- Any comparisons in retail communications between investments or services must disclose all material differences between them.²³

In addition, Rule 2210 has specific content standards for communications that are consistent with these general standards, such as tax considerations.²⁴ Further, broker-dealer distributed registered fund sales materials are subject to internal compliance review as well as FINRA approval in specified instances.²⁵

For these reasons, the Commission should exclude from the scope of the Advertising Rule any communications that already are subject to Rule 2210. Requiring firms to comply with two sets of regulations that accomplish the same goal in substantially similar – but not identical – manners would be burdensome, unnecessary, and costly.

¹⁹ Rule 2210(d)(1)(B).

²⁰ Rule 2210(d)(1)(C).

²¹ Rule 2210(d)(1)(D).

²² Rule 2210(d)(1)(E).

²³ Rule 2210(d)(2).

²⁴ Rule 2210(d)(2)-(8).

²⁵ As discussed above, we recommend that any registered fund materials filed or deemed to be filed with the Commission should be excluded from the definition of advertisement under any final Advertising Rule. We note that Investment Company Act Rule 24b-3 provides that any sales material shall be “deemed” filed with the Commission for purposes of section 24(b) upon filing with a registered national securities association – in particular, FINRA. These materials should be excluded from the Advertising Rule. *See supra* section II.A.

C. Exclude Regulated Non-U.S. Fund Marketing from the Scope of Any Final Advertising Rule

We request that the Commission clarify that any final Advertising Rule does not apply to advertisements or communications by or on behalf of regulated non-U.S. funds.²⁶ Generally, these funds are subject to substantial regulation in the jurisdictions in which they are domiciled, reflecting common principles that IOSCO has developed, including those regarding presenting performance in advertisements.²⁷ In the European Union, for example, UCITS already are subject to fulsome requirements for their offering documents and advertisements, such as the requirement that advertisements be fair, clear, and not misleading.²⁸ Given this, layering additional regulations would increase compliance costs without providing any appreciable benefits.²⁹

III. Performance Advertising

As the Commission noted, performance advertising “can be a useful source of information for investors when such advertisements are presented in a manner that is neither false nor misleading.”³⁰ The Commission proposed to allow advisers to provide:

- related performance of other portfolios that an adviser manages, generally conditioned on including all related portfolios;³¹
- extracted performance, conditioned on the adviser providing or offering to provide promptly the performance results of all investments in the portfolio;³² and

²⁶ “Regulated non-U.S. funds” refer to funds that are organized or formed outside the United States and are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (“UCITS”).

²⁷ See IOSCO Performance Presentation Standards for Collective Investment Schemes (May 2002), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD130.pdf>; IOSCO Performance Presentation Standards for Collective Investment Schemes: Best Practice Standards (May 2004), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD169.pdf>; IOSCO Good Practice for Fees and Expenses of Collective Investment Schemes (Aug. 2016); *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD543.pdf>.

²⁸ See, e.g., Directive 2009/65/EC, *available at* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0065>; Commission Regulation 583/210, *available at* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:176:0001:0015:en:PDE>.

²⁹ For identical reasons, solicitation of investors into regulated non-U.S. funds also should be outside the scope of any final Cash Solicitation Rule.

³⁰ Proposal at 99.

³¹ Proposed Advisers Act Rule 206(4)-1(c)(1)(iii) and (e)(11) (defining “related performance” as “the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as one or more composite aggregations of all portfolios falling within stated criteria”). As an alternative to providing all related portfolios, advisers could exclude related portfolios if the advertised performance results are no higher than if all related portfolios had been included.

- hypothetical performance, conditioned on the adviser having policies and procedures and providing information on the risks, limitations, and calculation of the hypothetical to investors.³³

We support this aspect of the Commission’s proposal because many investors value having access to these additional types of performance information in making investment decisions.³⁴

We recommend, however, that the Commission take steps to permit registered funds, and broker-dealers that distribute registered funds,³⁵ to report related, extracted, and hypothetical performance to the same extent that advisers would be able to do so under any final Advertising Rule. We further recommend that, in doing so, the Commission continue to require open-end funds to accompany any presentation of performance information with standardized average annual total return, calculated in accordance with Rule 482.

Investors, for example, may find related performance information useful to assess registered funds with relatively short (or no) performance track records. Likewise, extracted performance may be particularly helpful to investors in asset allocation funds to evaluate the performance of a portion of a fund. Hypothetical performance may be useful to investors who are evaluating various investment options to decide how to best achieve, short- and long-term, financial objectives.³⁶ As required, the inclusion of standardized average annual total return would provide a common point of comparison for all investors.

Having access to a variety of performance measures would support investors’ ability to make informed decisions and promote fair and easy performance comparisons across products. If an adviser uses a certain type of performance information to advertise its own separately managed accounts, for example,

³² Proposed Advisers Act Rule 206(4)-1(c)(1)(iv) and (e)(3) (defining “extracted performance” as the performance results of a subset of investments extracted from a portfolio). *See also* Proposal at 153.

³³ Proposed Advisers Act Rule 206(4)-1(c)(1)(v) and (e)(5). For purposes of the proposed Advertising Rule, “hypothetical performance” includes back-tested, representative, and targeted and projected performance. *See* Proposal at 158.

³⁴ We recommend, however, that the Commission not treat targeted and projected performance as hypothetical performance. Targeted and projected performance should be subject to the general principles of any final Advertisement Rule and align with the conditions for providing targeted returns under FINRA Rule 2210. We urge the Commission to also clarify that investment analysis tools that express a likelihood of investment performance success also be excluded from the definition of hypothetical performance.

³⁵ We use the term “broker-dealer” broadly, including limited purpose broker-dealers. Because broker-dealers generally distribute registered funds, fund sales material must comply with FINRA, as well as Commission, regulation.

³⁶ *See* Letter from Dorothy Donohue, Deputy General Counsel, ICI, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA (Mar. 27, 2017) (supporting the FINRA proposal to allow firms to provide customers with investment planning illustrations because it would help inform customer’s investment decision-making), *available at* https://www.finra.org/sites/default/files/notice_comment_file_ref/17-06_ICI_comment.pdf

Commission and FINRA rules should permit registered funds and the broker-dealers that sell them to use comparable performance information. Further, doing so would allow market participants to compete on a more level playing field.

We specifically recommend that the Commission take the following steps to allow registered funds and broker-dealers that sell registered funds to provide additional performance information to investors:

- amend Securities Act Rule 482 to clarify that funds can report additional types of “other performance measures” – *i.e.*, related, extracted, and hypothetical performance – so long as that reporting is not misleading;³⁷
- amend Securities Act Rule 156 as necessary to clarify the circumstances under which funds can provide hypothetical performance data that would not be misleading;
- direct FINRA to formalize in Rule 2210 its existing guidance that conditionally permits broker-dealers to use related³⁸ and hypothetical performance³⁹ for some fund sales materials and expand the use of additional performance measures in both retail and institutional communications; and

³⁷ See Securities Act Rule 482(d)(3) and (d)(5). In doing so, the Commission would formalize staff guidance that permits open-end funds to provide related performance *information* in advertisements as a supplement to presenting the fund’s total return. *See, e.g.*, Nicholas-Applegate Mutual Funds No-Action Letter (Feb. 7, 1997), *available at* <https://www.sec.gov/divisions/investment/noaction/1997/nicholas-applegate-mutual-funds-020797.pdf>.

³⁸ See FINRA Frequently Asked Questions About Advertising Regulations at D.3.1, *available at* <https://www.finra.org/rules-guidance/guidance/faqs/advertising-regulation#d3>; Interpretive Letter from Joseph P. Savage, FINRA, to Joan E. Boros, Stradley Ronon Stevens & Young LLP (Apr. 16, 2018), *available at* <https://www.finra.org/rules-guidance/guidance/interpretive-letters/joan-e-boros-esq-stradley-ronon-stevens-young-llp>; Interpretive Letter from Joseph P. Savage, FINRA, to Clair Pagnano, K&L Gates LLP (Jun. 9, 2017), *available at* <https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-clair-pagnano-kl-gates-llp>; Interpretive Letter from Joseph E. Price, FINRA, to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015), *available at* <https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-edward-p-macdonald-hartford-funds-distributors-llc>.

³⁹ FINRA Rule 2210 currently allows some types of hypothetical reporting but prohibits predicting or projecting performance, implying that past performance will recur, or making any forecast. However, FINRA guidance conditionally allows pre-inception index performance reporting a type of hypothetical performance. *See* Interpretive Letter from Joseph P. Savage, FINRA, to Meredith F. Henning, Foreside (Jan. 31, 2019), *available at* <https://www.finra.org/rules-guidance/guidance/interpretive-letters/interpretive-letter-meredith-f-henning-foreside>; Interpretive Letter from Joseph E. Price, FINRA, to Bradley J. Swenson, ALPS Distributors, Inc. (Apr. 22, 2013), *available at* <https://www.finra.org/rules-guidance/guidance/interpretive-letters/bradley-j-swenson-alps-distributors-inc>. We request the Commission to direct FINRA to align its guidance regarding pre-inception index performance under these interpretive letters with that of any final Advertising Rule. We note that FINRA CAB Rule 221 allows capital acquisition brokers to predict or project performance in their communications. *See* Release No. 34-76675 (Dec. 17, 2015), *available at* <https://www.sec.gov/rules/sro/finra/2015/34-76675.pdf>.

- direct FINRA to adopt its pending rule proposal to permit customized investment planning illustrations and expand the scope of that rule to include illustrations regarding registered funds.⁴⁰

Some may argue that related, extracted, and hypothetical performance reporting may be confusing, or, at the extreme, misleading for some investors. Appropriately tailored regulations should be able to protect against this. In the Proposal, the Commission proposed conditions that would mitigate investor protection concerns such as by requiring that advisers provide sufficient information for investors to understand the risks and limitations of hypothetical data.⁴¹ Therefore it is reasonable for the Commission to determine that requirements intended to protect investors in separately managed accounts and private funds should equally protect registered fund investors.

IV. Testimonials and Social Media

The Proposal would amend the Advertising Rule to permit testimonials, endorsements, and third-party ratings, subject to disclosures and other tailored conditions.⁴² We agree that the current prohibition on these types of communication are outdated and support this aspect of the Commission's proposal.⁴³ We appreciate that the Commission's approach is broadly consistent with FINRA's in Rule 2210 and recommend one minor modification for even further consistency.

In particular, the Commission should direct FINRA to align its disclosure requirements, including by eliminating the requirement that broker-dealers disclose whether more than \$100 was paid for a testimonial, with those of any final Advertising Rule.⁴⁴ Aligning the requirements for testimonials would improve clarity for firms in the asset management industry, set expectations and reduce confusion for investors, and lessen compliance burdens for firms that are dual-registered, or that offer multiple product lines.

⁴⁰ See FINRA Regulatory Notice 17-06 (Feb. 2017), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-06.pdf. The proposed rule would permit a firm to distribute a customized hypothetical investment planning illustration regarding asset allocations or other investment strategies, but not for single investment products, such as registered funds. We believe registered funds should be within the scope of any final rule.

⁴¹ Proposal at 161.

⁴² Proposal at 75-76; Proposed Advisers Act Rule 206(4)-1(b).

⁴³ See Letter from Susan Olson, General Counsel, ICI to Brent J. Fields, Secretary, SEC, regarding SEC Request for Comment on Fund Retail Investor Experience and Disclosure (Oct. 24, 2018) (urging the Commission to modernize the Advertising Rule treatment of testimonials and facilitate advisers' and funds' use of social media), *available at* <https://www.sec.gov/comments/s7-12-18/s71218-4932121-178430.pdf>. We request that the Commission provide additional guidance, however, regarding how advisers can comply with the Advertising Rule general prohibition against cherry picking when including positive testimonials in an advertisement, whether through disclosure or otherwise.

⁴⁴ We recommend that the Commission direct FINRA to adopt the proposed Advertising Rule disclosure requirements for testimonials. See Proposed Advisers Act Rule 206(4)-1(b).

We also request that the Commission clarify that advisers may establish policies and procedures reasonably designed to moderate third-party comments on social media or websites. Specifically, the Commission should permit advisers to monitor, change, or delete third-party comments for spam, threats, harassment, personally identifiable information, offensive language, defamation, or as otherwise required by law. The Commission should not consider advisers taking actions pursuant to their policies and procedures as taking steps to influence those comments.⁴⁵

V. Cash Solicitations

The Commission proposed to modernize the Cash Solicitation Rule in several ways, including expanding the rule to cover both cash and non-cash compensation and updating disclosure requirements that are redundant with other rules. We support the Commission's proposed amendments that make the rule more consistent with current marketing practices.

Like our recommendations for the proposed Advertising Rule, however, the Commission should codify in the rule text that any activities to solicit investor interest in registered funds are outside the scope of the Cash Solicitation Rule.⁴⁶ As the Commission recognized in the Proposal, other regulations govern the solicitation of investors in registered funds and offer sufficient protection.⁴⁷ Specifically, broker-dealers and investment advisers primarily solicit investors in registered funds. Broker-dealers and investment advisers themselves are subject to Commission (and, in the case of broker-dealers, FINRA) rules about conflicts of interest and disclosures to investors regarding compensation.⁴⁸ These existing regulations protect investors in a broadly similar manner as the proposed Cash Solicitation Rule.

⁴⁵ See FINRA Regulatory Notice 11-39 at Q.12 (Aug. 2011), *available at* <https://www.finra.org/sites/default/files/NoticeDocument/p124186.pdf> (advising that the firms' policies blocking or screening offensive third-party comments would not indicate that the firm has adopted the remaining third-party comments).

⁴⁶ The Commission could do so by adding a subparagraph (i) to Advisers Act Rule 206(4)-3(c)(4), as proposed, to state "Solicitor does not include any person who, directly or indirectly, solicits any investor for an investment company registered under the Investment Company Act of 1940 or for a business development company." This approach would be consistent with the approach the Commission takes to excluding fund advertising from the definition of the term advertisement.

⁴⁷ Proposal at 210.

⁴⁸ See, e.g., *See Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Release No. 34-86031 at 108, (Jun. 5, 2019), *available at* <https://www.sec.gov/rules/final/2019/34-86031.pdf> (requiring broker-dealers making a recommendation to retail customers to act in the best interest of the customer and disclose all material facts relating to conflicts of interest that are associated with a recommendation); FINRA Report on Conflicts of Interest (Oct. 2013), *available at* <https://www.finra.org/sites/default/files/Industry/p359971.pdf>; (discussing Commission and FINRA regulation of broker-dealer conflicts of interest); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (Jun. 5, 2019), *available at* <https://www.sec.gov/rules/interp/2019/ia-5248.pdf> (discussing investment adviser fiduciary duties); CRS Relationship Summary; Amendments to Form ADV, Release No. 34-86032 (Jun. 5, 2019), *available at* <https://www.sec.gov/rules/final/2019/34-86032.pdf> (requiring investment advisers and registered broker-dealers to provide retail investors with information about their fees, costs, conflicts of interest, standards of conduct, and disciplinary history).

VI. Consider Aligning Categories of Investors Across the Asset Management Framework

The regulatory framework for advisers and funds is overwhelmed with categories of investors – and specialized regulations for each. These classifications are numerous and sometimes overlapping. The proposed Advertising Rule would add two additional categories of investors to the mix – retail and non-retail persons.⁴⁹ As a longer-term initiative, it is important that the Commission review and rationalize the various categories.

For example, advisers already must distinguish which clients are “retail investors” to comply with Form CRS requirements.⁵⁰ Some private funds must determine whether their investors meet the definitions of “qualified purchaser”⁵¹ and “qualified client.”⁵² To the extent advisers and funds provide communications subject to FINRA regulations, those regulations have definitions of “retail investors” and “institutional investors,”⁵³ with requirements pegged to each specifically defined type of investor.⁵⁴

To this crowded landscape, the proposed Advertising Rule would add yet more categories of “retail persons” and “non-retail persons,” definitions with slightly differing, yet similar terms to those already used in the market. Adding new, but overlapping, investor groupings will require advisers to spend more time onboarding clients to verify whether a potential client meets the thresholds for each category and separate purposes. This is likely to confuse and burden both the adviser and potential client with added time and cost yet no discernible benefit.

Where an investor meets the definition of one classification, but not another, an adviser’s policies and procedures would have to reflect how the adviser would address those differences. For example, if an individual client of a dual-registrant firm who is a “retail investor” for Form CRS, meets the definition of “non-retail person” under the proposed Advertising Rule, but not the definition of “institutional investor” under the FINRA regulations, the firm would need to parse specifically the delta between those regulations in marketing to the client – a confusing and costly exercise. Simplifying the categories will reduce burdens for market participants as well as regulators.

* * *

⁴⁹ See Proposed Advisers Act Rule 206(4)-1(e)(8) and (14).

⁵⁰ See Form CRS Release; *see also* Regulation Best Interest (regarding the term “retail customer” for broker-dealers).

⁵¹ See Investment Company Act Section 2(a)(51)(A).

⁵² See Advisers Act Rule 205-3.

⁵³ See FINRA Rules 2210 and 4512. FINRA also designates a third category of communications as correspondence.

⁵⁴ Additional investor categories include “Qualified Investor” for certain entities that meet ownership or investment tests, *see* Exchange Act Section 3(a)(54), and “Qualified Institutional Buyers” to purchase unregistered securities in a resale. *See* Securities Act Rule 144A.

Ms. Vanessa Countryman

February 10, 2020

Page 13 of 13

ICI and its members appreciate the opportunity to comment on the SEC's proposal. If you have any questions with respect to this comment letter, please contact me at (202) 218-3563.

Sincerely,

/s/ Dorothy Donohue

Dorothy Donohue

Deputy General Counsel, Securities Regulation

cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

Dalia O. Blass
Director, Division of Investment Management