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Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E. Washington, D.C. 20549-1090

Re: File Number S7-21-19
Comments on Proposed Amendments to Advertising Rules

Dear Ms. Countryman:

We appreciate the opportunity to submit comments on the proposed amendments to Rules 206(4)-1, 206(4)-3 and 204-2 under the Investment Advisers Act of 1940, as amended (the “Advisers Act”). We generally applaud the efforts of the Commission and its staff to update the rules to reflect changes to the investment management industry and its clients since the adoption of the original rules. We would like to take this opportunity to comment on certain specific proposals that we believe are of particular relevance to private investment funds and their managers and investors.

Preservation of Flexibility When Dealing with Sophisticated Investors

As a general principle, we strongly endorse the approach taken by the Commission of permitting flexibility with respect to communications between investment advisers and sophisticated investors. Given the scope of the proposed expansion of the definition of advertisement contained in the proposed amendments, the revised rules will capture a potentially very wide range of communications between investment advisers and both existing and prospective clients and fund investors. In order to facilitate and encourage useful exchanges of information between investment advisers and sophisticated investors, we strongly urge the Commission not to prohibit or unduly restrict the content of communications between advisers and “non-retail” persons (as defined in the proposed rules), and instead to take the approach, as reflected in the proposed rules, of continuing to rely on the broad anti-fraud rules under the securities laws and only requiring specified disclosures under certain limited specified circumstances.

We also urge the Commission to expand the definition of “non-retail” persons to include accredited investors, as defined under Regulation D under the Securities Act of 1933, as amended (the “Securities Act”), and to include persons who are not U.S. persons, as defined

under Regulation S under the Securities Act. The exclusion of non-U.S. persons, in particular, would avoid subjecting investment advisers to potentially conflicting requirements applicable to products and services offered to persons outside the United States.

Definition of Advertisement

We believe that it would be appropriate to exclude from the definition of advertisement a private placement memorandum for a private fund and any reports prepared primarily for the benefit of existing investors in a private fund. Private offering memoranda and investor reports provided to sophisticated investors in private funds are already subject to the broad anti-fraud requirements under the securities laws. We believe that the existing anti-fraud rules provide a sufficient level of protection to investors in private funds. We are also very concerned that imposing new and different standards, such as a requirement that the disclosure in a private offering memorandum be “fair and balanced”, would be impractical in practice. We also believe that one-on-one communications, in any form, should be excluded from the definition of the term advertisement.

Extracted Performance and Related Performance

We strongly support the approach taken in the proposed rules with respect to both “extracted performance” and “related performance” as defined in the proposed rules. These types of information about the actual past performance of an adviser can be very useful to both investment advisers and investors, and yet do not, we believe, involve a significant risk of misleading investors, especially sophisticated investors, if the information is properly and clearly identified as such in marketing materials as contemplated under the proposed rules.

Information about extracted performance and related performance is often requested by investors, and each can be a very valuable tool to assist an investor in evaluating a particular investment adviser or investment strategy, especially new or modified investment strategies, or new investment vehicles using a new or modified investment strategy. We do not believe that it is in the best interests of either investment advisers or sophisticated investors to unduly restrict or impede the free flow of this type of information, nor do we believe that there is a material risk that sophisticated investors will be misled by this information, or be at any risk of failing to appreciate the inherent limitations of such information, so long as the information is appropriately identified as extracted performance or related performance as required by the proposed rules.

Gross Performance

We appreciate the risks inherent in disclosures of gross performance without simultaneously showing net performance. However, we also support preserving flexibility to permit advisers to disclose gross performance to sophisticated investors, subject to appropriate disclosures identifying it as such. Investors often request, and investment advisers often wish to provide, information about specific types or categories of investments (for example, about investments in a particular industry or sector, in a particular geographic market, in a particular type of security, or based upon a particular investment thesis or style). Requiring advisers at all times to incur the additional time, effort and expense that may be required to produce such results on a pro forma

net basis, rather than on a gross basis (especially when the information may include investments made by a number of different funds or accounts subject to potentially very different fee arrangements), may unduly inhibit or restrain the ability of advisers to provide this type of information. We therefore strongly endorse the approach taken by the Commission in the proposed rules of permitting disclosures of gross performance subject to appropriate disclosures identifying it as such as contemplated under the proposed rules.

References to Specific Past Investments

We support the approach taken by the Commission to permit the use in marketing materials of specific past recommendations, and of examples of actual past investment positions held in client accounts, subject to the “fair and balanced” standard proposed in the rules. However, we believe that it would also be helpful to provide investment advisers with clearer guidance, either in the rules or in the adopting release, in one particular situation as discussed below.

We request that the Commission confirm that the inclusion of information about specific past investments is permitted in any advertisement so long as the advertisement also prominently presents, in the case of an advertisement for a private fund, the actual performance of the private fund for the relevant time period, and in the case of other investment strategies, the actual performance of an appropriately representative account or composite, as further discussed below.

Information about past and present portfolio investments of an adviser is generally considered by sophisticated investors to be very valuable information when conducting evaluations of investment advisers. Information about past investments is often specifically requested by investors, and can be very helpful to investors trying to better understand and evaluate the specific investment strategy or strategies used by an investment adviser.

This issue arises in particular in the context of periodic letters or reports from investment advisers to their clients and investors. Investment advisers often provide monthly, quarterly, semi-annual, annual or other periodic letters or reports to their clients, and to investors in private funds that they manage. These reports typically present and discuss the overall performance of the relevant strategy or fund for the relevant time period covered by the report, and also identify and discuss the key positions that contributed significantly to profit or loss during the relevant time period.¹ Prospective clients and investors frequently request to see copies of these reports as part of their due diligence reviews and evaluations of investment advisers, as it is generally considered that these reports can provide valuable insight both as to an investment adviser’s investment philosophy and as to how that philosophy has been implemented by the adviser through specific investments under different market conditions.

¹ The usefulness of this information to existing and prospective investors is demonstrated by the requirement in Item 27(b) (Instruction 7) of Form N-1A that managers of investment companies registered under the Investment Company Act of 1940 must discuss in the annual report to shareholders “factors that materially affected the fund’s performance,” together with relevant performance data.

Investment advisers frequently desire to provide copies of these letters or reports to prospective clients and investors on an unsolicited basis, and also to include specific examples of prior investments in other marketing materials, in order to assist prospective clients and investors in understanding and evaluating how the adviser's investment strategy is implemented in practice.

For example, an investment adviser using a "value-based" investment strategy may wish to show and discuss how specific past investments reflect the adviser's value-based philosophy, how the adviser analyzed available information related to a particular company, how the adviser's thesis was implemented through specific investments, and how those investments subsequently performed in different market environments. An investment adviser using an "event-driven" strategy may wish to discuss the performance of specific past investments in companies that were or became involved in merger, acquisition, bankruptcy, restructuring or other extraordinary transactions or events, how the company was affected by the event, how the adviser anticipated or responded to the event, what long and short investment positions were established in different companies or different parts of a company's capital structure in anticipation of or response to the event, the impact of regulatory approvals or proceedings, hedging strategies used, and other relevant considerations.

However, many investment advisers worry that, under the present rules, they are not permitted to provide copies of such letters or reports to prospective clients and investors (other than in the context of in-person meetings or in response to a specific request from an investor) unless the adviser either discloses all positions held by the relevant fund or account (which might raise practicality, confidentiality and competitive concerns, as discussed below) or gives equal prominence to discussions of both "winning" and "losing" positions (even if the overall performance of the relevant strategy or fund is prominently disclosed in the letter or report).

We believe that investors would be adequately protected against the risks of selective disclosure of past investments by requiring that any advertisement (including a periodic letter or report to clients or investors that is used as marketing material) containing such information also prominently disclose the overall performance of the relevant investment strategy or private fund for at least the relevant time period covered by the letter or report. In the case of an advertisement related to an investment strategy (rather than a private fund), the advertisement should prominently disclose the performance of a representative account or appropriate composite of relevant accounts. In the case of an advertisement that is not a letter or report covering a specific period of time, the advertisement should prominently disclose the total return of the relevant private fund or investment strategy for at least the most recent 12 month period. We believe that compliance with these requirements would ensure that an investor can see the overall performance of the relevant fund or investment strategy during the relevant time period, and therefore cannot be misled by descriptions of specific recommendations or investments that are a component of the relevant strategy.

We note that the existing exception in Rule 206(4)-1(a)(2), that permits selective disclosure of past investments if the investment adviser also provides, or offers to provide, a list of all recommendations made by the adviser during the preceding twelve month period, is often of limited practical use to investment advisers. In particular, advisers that hold large numbers of

investment positions in client accounts, or that trade positions very actively, may find it impractical to disclose large volumes of transactions and positions. A detailed report including information on hundreds or thousands of investment positions and transactions also may not be helpful to investors. Finally, disclosure of large illiquid positions or open short positions currently held in client accounts may expose an adviser's clients to potentially adverse actions by other market participants.

We therefore urge the Commission to provide clarifying guidance on this issue in order to remove a potential impediment to helpful communications between investment advisers and their prospective clients and investors.

Disclosure of Compensation Paid to Solicitors

We believe that prospective clients and investors will be adequately alerted to the inherent conflict of interest in a solicitor arrangement if it is clearly disclosed to them that the solicitor is receiving a payment from the investment adviser. We do not believe that it is important, or that it would add materially to the ability of an investor to evaluate a particular investment adviser, to require the disclosure of detailed disclosures about the calculation of the compensation payable to each solicitor, so long as that compensation does not affect the fees payable by any investor. To the contrary, we are concerned that requiring detailed disclosures about compensation arrangements between investment advisers and their solicitors (in particular in the context of private funds that may use multiple placement agents) may, in addition to being administratively burdensome in many cases, be unnecessarily confusing to investors. The result of requiring detailed disclosures would, in many cases, be to require very extensive disclosures of information that would be mostly irrelevant to investors. This will be particularly true if an investment adviser has multiple arrangements with multiple solicitors, as is often the case (not just with respect to private funds). Instead, we would recommend requiring a simple statement to the effect that the solicitor is receiving compensation from the investment adviser for soliciting investors. We believe that such a simple statement would be more easily understandable to investors, would facilitate a more consistent approach to disclosures, would be more recognizable and understandable to investors, and would better facilitate comparative evaluations of advisers by investors.

Disclosure of Compensation Arrangements with In House Solicitors

For similar reasons, we are concerned that requiring any disclosures to investors regarding the compensation arrangements between investment advisers and their in-house partners, officers, directors and employees, other than the basic disclosure of such a relationship, will impose significant burdens on advisers, and at the same time have significant potential to confuse investors, without providing them with additional valuable information with which to evaluate an adviser. We believe that the key disclosure to the investor is, and should be, that the adviser and the solicitor are related (for example, because the solicitor is clearly identified as an employee of the adviser, or of an affiliate of the adviser). We therefore support the approach taken by the proposed rules to focus on ensuring that it is clear to investors that the solicitor is affiliated with

the adviser, rather than by requiring detailed disclosures of potentially complex and confusing details about the compensation arrangements between an adviser and in house solicitors.

We appreciate the opportunity to comment on the proposed rules and would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,



Christopher M. Wells