LinkedIn Corporation
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February 10, 2020

Submitted via email to: rule-comments@sec.gov

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

Re: Investment Adviser Advertisements (File No. S7-21-19)

Dear Ms. Countryman:

This letter is submitted in response to requests for comment by the Securities and Exchange Commission ("SEC" or "Commission") with respect to the above-referenced release proposing amendments to the advertising rule that applies to SEC-registered investment advisers, Rule 206(4)-1 under the Investment Advisers Act of 1940 ("Advisers Act").[1] LinkedIn appreciates the opportunity to comment on the proposed advertising rule. We strongly support the Commission undertaking this important task of updating the current advertising rule and its related guidance to account for developments in technology and modes of communication, including the widespread use and reach of social media.

Social media has evolved as the default medium for disseminating information across all channels and segments of our society. Based on feedback we consistently receive from our LinkedIn members and customers, social media has become one of the most prominent forms of communication among financial services organizations, including registered investment adviser representatives and their clients. It provides a tremendous opportunity for those firms to educate investors and increase the financial literacy of the U.S. consumer

[1] Release No. IA-5407; File No. S7-21-19 RIN: 3235-AM08 Investment Adviser Advertisements; Compensation for Solicitations ("Proposing Release").

and affords them a channel to grow and market their businesses and better communicate with existing and prospective clients.

Since its launch in 2002, LinkedIn's online presence has grown to approximately 675 million members and 50 million companies worldwide, which include the largest financial services organizations in the U.S. and around the globe. Many of these financial services firms have investment adviser subsidiaries that are subject to SEC regulation. We have worked with a number of these firms in developing their LinkedIn presence and have learned firsthand the challenges they face in complying with the current rules and regulations, which were adopted long before social media was even contemplated. These compliance challenges make it difficult for investment advisory firms to utilize social media as effectively as possible -- not only to increase their client base and assets under management, but also to provide general educational material to the investing public that can assist Americans in meeting their financial goals. One such oft-cited compliance challenge relates to the current prohibition on testimonials, which has resulted in many of our SEC-regulated members disabling LinkedIn's "endorsement" feature.

As detailed in this letter, we strongly support a "principles-based" approach to the advertising rule amendments that would provide investment advisers greater flexibility to make effective use of social media and its interactive features, while achieving the SEC's investor protection objectives. We emphasize that this principles-based approach should recognize that the general anti-fraud provision under Section 206(4) of the Advisers Act already applies to and governs investment adviser communications.[2]

We have outlined below several areas where we believe additional clarification is warranted under the proposed advertising rule. In considering possible areas on which to comment that are specific to social media use, we have sought feedback from our own LinkedIn users who are large financial services organizations that have subsidiaries that are SEC-registered investment advisers that are required to comply with the SEC's advertising rule.

1. Need for greater clarity on when an advisory firm's employee's social media posts would be imputed to the adviser

The proposed advertising rule does not set forth any direct guidance on when social media posts made by an employee of an investment adviser would be imputed to the adviser. For example, if an employee posts about volunteering at a local homeless shelter with a group of other employees of the adviser, should that be deemed an advertisement of the investment adviser? If all or nearly all social media posts by employees of the investment

[2] Section 206(4) of the Advisers Act makes it unlawful for an investment adviser to "engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative" and authorizes the Commission "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative."

adviser are deemed to constitute advertisements, investment advisers may be subject to heavy burdens with respect to monitoring employee social media accounts. Furthermore, a lack of clarity can raise privacy concerns as it could lead employers to impose broad monitoring and recording obligations on employee actions and interactions on social media platforms, whether those actions are professional or personal, to minimize potential risk. We believe additional guidance from the Commission to clarify when a communication by a firm's employee would be deemed to be a communication by or on behalf of the firm would be helpful in order to ensure the firm's compliance with the rule's provisions. This would also be helpful to potentially limit the business communications advisers are required to retain for recordkeeping/archiving purposes and the significant costs required to maintain electronic storage capacity. As discussed in more detail below, these types of compliance challenges impede investment advisers' ability to use the social media platform in a way that is most beneficial for their businesses.

2. Clarification on what constitutes an "advertisement" in the context of social media posts

The proposed advertising rule broadly defines an "advertisement" to include communications that are disseminated "to offer or promote" the adviser's investment advisory services or that seek to "obtain or retain" one or more investment advisory clients. We request that the Commission consider providing further clarity on what constitutes an "advertisement" and what does not, particularly as it relates to common types of social media posts. This could also include clarification as to whether only an initial social media post constitutes an advertisement or whether it could extend to a description of services that is provided in the course of a conversation (e.g., responses to a posted inquiry). With respect to the latter, we agree with the proposed exclusion of a communication by an investment adviser "that does no more than respond to an unsolicited request" for "information, specified in such request, about the investment adviser or its services" from the definition of "advertisement."

We note that the Proposing Release includes the following:

> In addition, we would not view materials that provide general educational information about investing or the markets as offering or promoting an adviser's services or seeking to obtain or retain investors. For example, an adviser that disseminates a newspaper article about the operation of investment funds or the risks of certain emerging markets would generally be circulating educational materials and not offering or promoting the adviser's own services.
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> However, investment advisers also may choose to deliver to existing investors communications that include promotional information that is neither account information nor educational material. Such additional promotional information may make the communication an

> advertisement, if that additional information "offers or promotes" the adviser's advisory services under the facts and circumstances. For example, a communication to existing investors that includes the adviser's own market commentary or a discussion of the adviser's investing thesis may be considered to be "offering or promoting" the adviser's services depending on the facts and circumstances of the relevant communication.[3]

Given the broad proposed definition, even thought or educational pieces reflecting the adviser's views on the markets will likely fall under the proposed definition of advertisement. In our experience, these types of pieces comprise a lot of the content that advisory firms currently post on social media. The wide reach of social media presents a great opportunity to further investor education and financial literacy, but that can only be achieved with a definition of "advertisement" that isn't overly inclusive and unduly burdensome.[4]

We believe a more narrow definition of what constitutes an advertisement is key to achieving optimal engagement on social media platforms and will facilitate the marketplace of ideas that allows people to comment and respond on social media -- resulting in improved investor engagement and education. As the tremendous growth of social media use demonstrates, this interactive feature, unique to social media, is preferable and often viewed as superior to conventional forms of communication and information dissemination, and should be encouraged through an appropriately flexible regulatory framework.

Moreover, the proposed definition of "advertisement" includes communications disseminated "to obtain or retain" investors. Accordingly, certain general statements commonly posted on LinkedIn about the firm or its employment policies could be deemed to fall under the definition. For example, a firm's or employee's posting about the firm's diversity and inclusion efforts may likely constitute an advertisement if they could be viewed as attracting investors for whom those goals are important. We believe clarification that general communications regarding workplace practices or the like are excluded from the definition of advertisement would be helpful to advisory firms and consistent with the SEC's objectives.

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[3] Proposing Release at 32.

[4] See Proposing Release at 311 and 312 and footnotes 525 through 529 and accompanying text, citing U.S. Securities and Exchange Commission, *Study Regarding Financial Literacy Among Investors As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Aug. 2012), available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf and stating that "According to the Library of Congress Report, studies show consistently that American retail investors lack basic financial literacy. For example, studies have found that investors do not understand many elementary financial concepts, such as compound interest and inflation. Studies have also found that many investors do not understand other key financial concepts, such as diversification or the differences between stocks and bonds, and are not fully aware of investment costs and their impact on investment returns."

3. Pre-use review and approval by "designated employee"

Investment advisers are currently required to maintain records of all advertisements disseminated, including records evidencing the advertisement creation and review process, but are not required to obtain approval from a designated employee prior to disseminating an advertisement. The proposed advertising rule would require investment advisers to have an advertisement reviewed and approved as compliant with the rule by a "designated employee" before, directly or indirectly, disseminating the advertisement. (The only exclusions from this pre-use and approval obligation 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.)

We understand that this pre-use review and approval process would apply to any LinkedIn posts by an investment adviser that fall under the definition of an advertisement. It could therefore arguably extend to any social media activity, including likes, comments, and events created, if it offers or promotes the adviser's investment advisory services or it seeks to "obtain or retain" one or more investment advisory clients. If that is the case, even replying to another member's comments would require pre-review and approval by an adviser/employer. Hence, the need for further clarity noted above as to what constitutes an advertisement. The changes required by LinkedIn to accommodate this new pre-use approval requirement would represent a significant change to the experience for investment adviser members and their prospects and clients. Such changes would also take away from the spontaneous or conversational nature of some social media communications to the extent those are permitted by the firm for certain personnel.

We request that the Commission consider the burden of this pre-use review and approval process and the likelihood that it would reduce use of the platform by investment advisers resulting in an information vacuum on social media platforms. A member's activity on the platform helps other members assess the skills and qualifications of the professional. Curtailing investment advisers' ability to engage in these public forums will hinder them from fully developing their online profiles, forcing platform users to rely on static profiles to assess qualifications and skills. One possibility is a sort of hierarchy of communications, some of which require pre-approval with others that permit post-use supervision and monitoring, similar to the approach under existing Financial Industry Regulatory Authority ("FINRA") rules that apply to SEC-registered broker-dealers.[5] We also note the challenges

[5] FINRA Rule 2210. FINRA Rule 2210 generally differentiates between static content and interactive content and correspondence versus retail communications. Static content generally must be preapproved by a registered principal, except when the communication is "correspondence", *i.e.*, made available to 25 or fewer retail investors within any 30-calendar-day period. Interactive content (retail communications posted in online interactive forums) is not required to be preapproved by a registered principal as long as it does not

for dual registrants, those registered with the SEC as advisers and broker-dealers, with having separate and distinct SEC and FINRA requirements with which their social media communications must comply.

We also support further clarification that pre-use review and approval of advertisements could be delegated to a third-party consultant, subject to procedures reviewed or developed by the investment adviser. In our experience, many investment advisers rely upon third-party firms to review social media content and activity, subject to the adviser's oversight, or they rely on software or compliance systems developed by third parties which they implement in-house.

4. Use of hyperlinks and required disclosures of material risks

The proposed advertising rule prohibits advertisements that "include any untrue statements of a material fact, or that omit a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading." The Proposing Release explicitly states that linking disclosure through a hyperlink would not satisfy an adviser's obligation to "clearly and prominently" disclose the material risks and other information necessary to make a statement not misleading. The Proposing Release notes that it is not consistent with this requirement for advisers to merely include a hyperlink to disclosures available elsewhere, but not include the disclosure within the communication itself. The Proposing Release states, "Such hyperlinked disclosures may not be seen or read by investors, as they may not click through to the additional information necessary to make an informed decision."[6]

The Proposing Release specifically asked for comment on this approach. We believe hyperlinked disclosure if incorporated appropriately can be as effective as, or perhaps *more* effective than, lengthy disclosures in the communication itself. The Proposing Release specifically asks whether the rule should permit hyperlinked disclosures in cases where the adviser can be assured that the investor has accessed the information. It is our view that hyperlinks have become the accepted norm in disclosure across many key risk areas. Consumers are conditioned to understand that hyperlinks contain additional relevant disclosures. Moreover, the effective use of hyperlinks can provide enhanced real-time disclosure than more conventional means.

In addition, the Proposing Release requested feedback on what conditions would be appropriate for hyperlinked disclosures, and cited as a possible solution the Federal Trade Commission ("FTC") standards for ensuring that a hyperlinked disclosure is effective. We recognize it is likely the Commission will not adopt the use of hyperlinks absent meaningful conditions designed to ensure the information beyond the hyperlink is easily accessible; we

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make any financial or investment recommendation; it is still subject to reasonable post-use supervision which may be risk-based.

[6] Proposing Release at 60.

believe the FTC standards are one likely path forward on this issue. The Proposing Release explains the FTC standards:

> The FTC provides guidance on how to make effective disclosures through hyperlinks, which provide that if a hyperlink: (i) is obvious; (ii) is labeled to appropriately convey the importance, nature, and relevance of the disclosures it leads to; (iii) is placed as close as possible to the relevant information it qualifies; and (iv) takes investors directly to the relevant disclosures on the click-through page, that such hyperlinked disclosures may be effective.[7]

We respectfully request that the Commission consider that social media platforms will struggle with providing investment advisers the ability to include all required disclosures of material risks in the communication itself (as opposed to a hyperlink) without compromising the current user-friendly formatting used on platforms today to which members have become accustomed. For example, the current experience within a LinkedIn member's feed (mobile or desktop) would be dramatically altered by adoption of this type of disclosure requirement. The sheer volume of LinkedIn members whose posts would be subject to this requirement would result in significant changes to the face of the LinkedIn feed at significant cost and sacrifice to user experience. This proposed change would impact LinkedIn to such a degree that we may be forced to re-evaluate the extent to which we can service financial services firms altogether since so many of those firms have registered investment advisers under their organizational structure to which these rules would apply (for example, every time an investment adviser or its representative "likes" or comments on a post, it could be deemed to require additional disclosure). From our perspective, the established LinkedIn feed is simply not an appropriate place to host and present risk disclosures. We would encourage the SEC to consider the wide population of 675 million members who are currently deriving value from the LinkedIn platform and the potential disruption that could be created by this type of disclosure requirement within the LinkedIn feed.

5. Testimonials and Endorsements/Third-party Content

We support the proposed advertising rule's removal of the current prohibition on testimonials. This prohibition has raised a lot of questions from LinkedIn members about an investment adviser's ability to use LinkedIn endorsements; as a result, many advisers have opted to disable the feature. This is a less than optimal result since many investors perform research online to learn about an investment adviser's or an adviser representatives' capabilities. As the SEC's Division of Investment Management acknowledged in its guidance

[7] Proposing Release at 61 and 62 and footnote 129 citing Federal Trade Commission, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," press release (March 2013), available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

on the testimonial rule and social media, genuine third-party social media commentary can be useful to consumers.[8]

Under the proposed rule, investment advisers are prohibited from including in an advertisement a testimonial or endorsement *unless* the adviser clearly and prominently discloses (or the adviser reasonably believes that the testimonial or endorsement clearly and prominently discloses) that the testimonial was given by a client, or the endorsement was given by a non-client and, if applicable, that cash or non-cash compensation has been provided by the adviser in obtaining the testimonial or endorsement. The Proposing Release explains that the proposed definitions of testimonial and endorsement would broadly cover a client's experience with the adviser (testimonial), and a non-client's approval, support, or recommendation of the adviser (endorsement). In addition, testimonials and endorsements would both include "opinions or statements by persons about the investment advisory expertise or capabilities of the adviser." The Proposing Release further explains that when a statement does not cover a client's experience with the adviser, or a non-client's approval, support or recommendation of the adviser, it would not be treated as a testimonial or endorsement.[9]

The Proposing Release clarifies that the fact that an adviser permits third parties to post public commentary to the adviser's social media page generally would not, by itself, render the commentary attributable to the investment adviser, unless the adviser took steps to influence the content of the commentary, such as by selectively deleting or altering the comments or their presentation.[10] The Proposing Release specifically notes that the SEC would not consider an adviser that merely permits the use of "like," "share," or "endorse" features on a third-party social media platform to implicate the proposed rule. We support this position. However, if the investment adviser took affirmative steps to involve itself in the preparation of the comments or to endorse or approve the comments, those comments could be communications "by or on behalf of" the adviser. The Proposing Release explains:

> For example, if an adviser substantively modifies the presentation of comments posted by others by deleting negative comments or prioritizing the display of positive comments, then we believe the adviser is exercising sufficient control over third-party comments with the goal of promoting its advisory business that the content would be "by or on behalf of" the investment adviser and would likely be considered an advertisement under the proposed rule. We request comment on the proposed definition's inclusion of communications "on behalf of" an investment

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[8] Guidance on the Testimonial Rule and Social Media, Division of Investment Management Guidance Update No. 2014-04 (Mar. 2014) at 1 ("Through this guidance, we seek to clarify application of the testimonial rule as it relates to the dissemination of genuine third-party commentary that could be useful to consumers.")

[9] Proposing Release at 78.

[10] Proposing Release at 82.

> adviser, including our views above on when third-party content would be considered a communication by or on behalf of an investment adviser.[11]
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> The Proposing Release further requests comment on the following items:
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> Should we consider providing additional guidance to allow an adviser to edit third party content solely on the basis that it is profane or unlawful without such editing causing the content to be "by or on behalf" of the adviser? If so, how should we define profane or unlawful content? Would it be necessary to give an audience notice that such third-party content had been edited in such a way, and if so, how would such notice best be provided? Would such guidance have the effect of evading the intent of the proposed rule, considering that comments with profane content may indicate negative views of the adviser?
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> Should we provide that editing the presentation of third-party comments pursuant to a set of neutral pre-established policies and procedures would not make such content "by or on behalf of the adviser"? For example, should we allow an adviser to determine in advance that it will delete all comments that are older than five years, or that include spam, threats, personally identifiable information, or demonstrably factually incorrect information? If so, should we require advisers to publically disclose the pre-established criteria for editing such comments?[12]

We believe the SEC should consider providing greater flexibility for advisers to remove third-party comments on an adviser's social media account without such modification resulting in the communication being deemed to be made "by or on behalf of the adviser." There may be a range of comments that are posted by third-parties on an adviser's social media page that are factually inaccurate, profane, unlawful, misleading or simply not useful or relevant to a prospective client or investor.[13] (We are not suggesting, however, that advisers be able to "cherry pick" comments simply for the purpose of removing negative feedback, unless the adviser can provide evidence or documentation that the statements are also factually inaccurate or otherwise misleading.) Further, we

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[11] Proposing Release at 28.

[12] Proposing Release at 29-30.

[13] The SEC staff stated support for a similar approach in its Guidance on the Testimonial Rule and Social Media, Division of Investment Management Guidance Update, *supra* n. 9, at n. 14 ("Independent social media sites may have editorial policies that edit or remove public commentary violative of the site's own published content guidelines (*e.g.*, prohibiting defamatory statements; threatening language; materials that infringe on intellectual property rights; materials that contain viruses, spam or other harmful components; racially offensive statements or profanity). An investment adviser or IAR's publication of public commentary that has been edited according to such an editorial policy would not call into question the independence of the independent social media site for purposes of the staff's views herein.")

understand it is also quite common for investment advisers to serve as administrators of groups or events and thus they will need the flexibility to delete off-topic, untrue, or low-quality content when serving in that capacity. Members also have "notice" regarding the removal of posted content, as the LinkedIn User Agreement already provides notice that certain posts can and will be removed, so we do not believe that any additional notice should be necessary or required under the rule. Accordingly, we request that the Commission consider providing investment advisers greater flexibility to remove such content pursuant to approved policies and procedures.

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LinkedIn appreciates the opportunity to comment on the proposed advertising rule, and respectfully requests that the Commission consider our recommendations and suggestions for additional clarifications. We are available to meet and discuss these matters and to respond to any questions. Please feel free to contact Christopher Grant at (415) 801-1534 or cgrant@linkedin.com, or Lori Schneider at (202) 778-9305 or lori.schneider@klgates.com.

Sincerely,

Blake Lawit
Senior Vice President and General Counsel