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February 10, 2020

United States Securities and Exchange Commission
Attn: Vanessa A. Countryman, Secretary
100 F Street NE
Washington, DC 20549-1090

RE: File Number S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations

Dear Ms. Countryman:

The Financial Planning Association® (FPA®) appreciates the opportunity to comment regarding the SEC Release No. IA-5407, File Number S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations. The United States Securities and Exchange Commission (SEC) is proposing amendments to advertisements by investment advisers, 17 CFR 275.206(4)(1) (Rule 206(4)(1)), cash payments for clients solicitations, 17 CFR 275.206(4)-3 (Rule 206(4)-3), and books and records maintained by investment advisers, 17 CFR 275.204-2 (rule 204-2), under the Investment Advisers Act of 1940 (Advisers Act), and amendments to Form ADV, 17 CFR 279.1, under the Advisers Act.

FPA is the principal membership organization for CERTIFIED FINANCIAL PLANNERS™ (CFP®) and those who support the financial planning process with 22,000 members nationwide. Many members of the FPA are registered as SEC investment adviser representatives, broker-dealer, registered representatives, and/or insurance agents. With a national network of 86 chapters and two-state councils, FPA represents tens of thousands of financial planners, educators, and allied professionals involved in all facets of providing financial planning services.

The determination of whether a financial planner falls within the definition of an investment adviser depends on whether the planner provides advice, issues reports or analysis regarding securities, is in the business of providing such service, and provides such service for compensation.¹ Financial planners provide a variety of investment advice principally to individuals and small businesses that includes advice on estate planning, life insurance, annuities, investments, investment strategy, and IRA roll-overs, and they may prepare financial plans based on the client's financial circumstances and goals.

¹ Applicability of Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, SEC IA Release 1092 (October 8, 1987) ("IA-1092"); 15 U.S.C. § 80b-2(a)(11)

All CFP® professionals agree to abide by CFP Board’s *Code of Ethics and Standards of Conduct*. The purpose and effect of the *Code of Ethics and Standards of Conduct* are captured in the preamble thereto: *CFP Board’s Code of Ethics and Standards of Conduct reflects the commitment that all CFP® professionals make to high standards of competency and ethics. CFP Board’s Code and Standards benefits, and protects the public, provides standards for delivering financial planning and advances financial planning as a distinct and valuable profession. Compliance with the Code and Standards is a requirement of CFP® certification that is critical to the integrity of the CFP® marks. Violations of the Code and Standards may subject a CFP® professional to discipline.*²

CFP Board *Standards*, complete with fiduciary obligations, apply across a wide variety of business models: CFP® professionals work at independent broker-dealers, wirehouses, registered investment advisers, insurance companies, and other stand-alone business models or dual registrants. Wherever CFP® professionals are employed, they are required to provide professional services under the fiduciary standard articulated in CFP Board *Standards*.

I. Summary

FPA shares the SEC's belief that the Investment Adviser Advertisements and Compensation for Solicitations rules should be modernized. FPA believes that increased transparency will be beneficial to the financial services industry and the consumers it serves. Increased transparency will lead to increased consumer trust and enhance consumers’ ability to make quality decisions about their financial lives. However, while the SEC's proposal intends to modernize these rules in response to technological advances, it will have widespread and costly implications on advisers. It expands the scope of both rules by including additional forms of communication and different types of compensation, all of which will require a significant change to compliance procedures for advisers and solicitors.

The SEC's proposal is a "principle-based" approach, and even though advisers may be able to modify their practices better, this new flexibility may result in advisers' confusion over what is accepted and prohibited practices. FPA requests clarity on what constitutes “by or on behalf of the adviser,” advertisements to existing investors, the requirement of a designated employee, and modifying the books and records requirement for investment advisors. Also, FPA recommends a two-year transition period before the rules go into effect. FPA is concerned that the rule proposals would increase costs to all investment advisers’ firms regardless of their sizes.

II. Advertisements by Investment Advisers Rule 206(4)(1)

A. “By or On Behalf of the Adviser”

The SEC proposes to define "advertisement" to include all communications "by or on behalf of the adviser."³ In doing so, the SEC provides several examples of communications that would be treated as “by or on behalf of the adviser”; however, FPA believes more clarity

² <https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/cfp-code-and-standards.pdf?la=en&hash=AFC0087B53EDE26B2A478BD84DF7DDA3>

³ File Number S7-21-19, pg. 24-30.

is needed to avoid confusion for our members.

i. Interviews with the Media and Podcasts

The proposed amendments do not address when advisers are interviewed by the media or participate in podcasts to provide their views on the market. FPA suggests the SEC provide examples of whether or not interviews with the media or participating in podcasts concerning current market trends or particular market events would be considered an advertisement “by or on behalf of the adviser.”

ii. Hyperlinked Content

The proposed amendments provide the following example:

“an adviser’s hyperlink to third-party content within the adviser’s press release generally would not, by itself, make the hyperlinked content part of the advertisement, provided that the third party, and not the adviser or its affiliate, drafted the hyperlinked content and is free to modify it.”⁴

According to footnote 50 in the proposed rule, this is a more flexible approach to the SEC’s 2008 interpretative guidance regarding uses of hyperlinks to third-party content.⁵ FPA requests the SEC provide examples of when hyperlinked content would not be considered to be content provided “by or on behalf of” an investment adviser.

B. Offer or Promote Advisory Services or Seek to Obtain or Retain Clients or Investors

Communications to existing investors that include promotional information could make the communication an advertisement “if the additional information ‘offers or promotes’ the adviser’s advisory services *under the facts and circumstances*.”⁶ The proposed amendments state that communications to existing investors about the performance of their accounts would not be considered “promoting the adviser’s services or be used to obtain or retain investors.”⁷ The SEC believes that by defining advertisement “as a communication that ‘offers or promotes’ services would allow investment advisers to continue to deliver to existing investors account statements or transaction reports that are intended to provide only details regarding those accounts and investments without those communications being considered advertisements.”⁸

Under the current and proposed advertising rule, investor reports could be considered an advertisement if the adviser adds promotional material to the reports for existing investors. Therefore, FPA recommends that there should be an exception to the advertisement definition so that communications to existing clients are excluded from falling within the definition of an advertisement.

⁴ Id. at 27.

⁵ Id.

⁶ Id. at 32 (*emphasis added*).

⁷ Id. at 32-33.

⁸ Id. at 31.

C. *General Prohibitions to Prevent Fraud, Deception, or Manipulative Actions*

The proposed rule includes general prohibitions designed to prevent fraud, deception, or manipulative actions in relation to adviser advertising.⁹ The adviser would violate this proposed rule by the SEC, showing the adviser acted negligently. The rule would prohibit the following: untrue statements or omissions, unsubstantiated claims and statements, untrue or misleading implications or interferences, failure to disclose material risks or other limitations, failure to present specific investment advice information in a fair and balanced manner, unfair presentation of performance results, and a catch-all provision of otherwise misleading.¹⁰ The proposed rule prohibitions are similar to the anti-fraud provisions in the current rule; however, the proposed rule expands the reach of the current rule's provisions. FPA is concerned with the following prohibitions:

- i. The unsubstantiated claims and statements prohibit any advertisement that includes any material claim or statement that is unsubstantiated.¹¹ This could apply to advisers' opinions on market opportunities, which would require advisers to substantiate these claims.
- ii. The proposed rule would prohibit references to "specific investment advice where such investment advice is not presented in a manner that is fair and balanced."¹² This language is taken from FINRA advertising rules. It is unclear if the proposed language is different from the prohibition for omissions, which prohibits omissions of material fact necessary to make the statements made not misleading.¹³

In order for FPA members to comply with the proposed rule, we seek clarity on these prohibitions.

D. *Review and Approval of Advertisements: Designated Employee*

The SEC is proposing to require an adviser to have its advertisements reviewed and approved by a designated employee.¹⁴ The proposed rule also states, "[a]dvisers may designate one or more employees . . . designated employees generally should include legal or compliance personnel of the adviser."¹⁵ FPA seeks clarity on whether or not the designated employee may be a third-party independent contractor.

Additionally, FPA believes this provision will not only be a cost burden to smaller advisory firms but to advisory firms in general as it will add additional significant burdens on existing employees or require firms to hire a designated employee to perform this role. This provision could be viewed as being anti-competitive if it adversely affects a disproportionate number of advisers in favor of larger advisers. Therefore, FPA respectfully seeks to have this section removed from the final rule.

⁹ Id. at 53.

¹⁰ Id.

¹¹ Id. at 56.

¹² Id. at 62.

¹³ Id. at 54-55.

¹⁴ Id. at 190.

¹⁵ Id. at 192.

III. Books and Records Maintained by Investment Advisers Rule 204-2

The proposed rule requires investment advisers to “make and keep records of all advertisements they disseminate to one or more persons.”¹⁶; and represents a significant departure from the current rule, which requires advisers to keep records sent to 10 or more persons.

FPA believes that maintaining records for advertisements sent to one or more persons will be burdensome to its members and their firms of all sizes. FPA recommends the SEC keep the current requirement, which requires advisers to keep records sent to 10 or more persons.

IV. One Year Transition Period

The SEC proposes a one-year transition period following each rule’s effective date. FPA believes our members will need more than a one-year transition period. FPA suggests a two-year transition period.

V. Conclusion

FPA is committed to working with the SEC on this and other regulatory efforts, in order to maximize investor protections consistent with a reasonable level of regulatory burden on service providers. We appreciate the opportunity to comment on the SEC Release No. IA-5407, File Number S7-21-19, Investment Adviser Advertisements; Compensation for Solicitations. Please contact Josephine M. Colacci, Esq., Public Policy Counsel, FPA, with any questions at 303-759-4900 or jcolacci@onefpa.org.

Sincerely,



Lauren Schadle, CAE
Executive Director/CEO

¹⁶ Id. at 286