CREDIT SUISSE

February 10, 2020

Submitted via electronic mail

Securities and Exchange Commission
Secretary Vanessa A. Countryman
100 F Street NE
Washington, DC 20549-1090
File Number S7-21-19

RE: Investment Adviser Advertisement; Compensation for Solicitations – Release No. IA-5407

Ladies and Gentlemen:

Credit Suisse Securities (USA) LLC ("we" or "Credit Suisse") is a registered broker-dealer, a member of the Financial Industry Regulatory Authority, Inc. ("FINRA") and a registered investment adviser. We operate one of the largest and most respected third-party placement agents in the United States for private fund issuers, and have raised over $545 billion of capital for over 395 private funds in the past 25 years.

We appreciate the opportunity to comment on the recently proposed amendments (the "**Proposed Amendments**") to Rules 206(4)-1 (the "**Advertising Rule**") and 206(4)-3 (the "**Cash Solicitation Rule**" and, together with the Advertising Rule, the "**Rules**"), as promulgated under Section 206 of the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"). We support the efforts of the U.S. Securities and Exchange Commission (the "**SEC**" or the "**Commission**") to update and modernize the current Rules to reflect market developments, regulatory changes and the evolution of industry practices that have occurred in the decades since the Rules were adopted.[1]

However, we are deeply concerned that the Proposed Amendments would undermine the Commission's efforts to protect investors by restricting the ability of knowledgeable and experienced market participants to act as solicitors, thereby depriving investors of access to both a large number of investment opportunities and a variety of investment advisers across geographic areas and industries. In order to avoid any adverse consequences and achieve the stated objectives of the Proposed Amendments, Credit Suisse respectfully requests that the Commission re-evaluate and refine the Proposed Amendments to incorporate the changes we propose below.

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[1] Investment Adviser Advertisements; Compensation for Solicitations, Advisers Act Rel. No. 5407 (Nov. 4, 2019) [84 FR 67518 (Dec. 10, 2019)] at 1 ("The proposed amendments to the advertising rule reflect market developments since the rule's adoption in 1961. The proposed amendments to the solicitation rule update its coverage to reflect regulatory changes and the evolution of industry practices since we adopted the rule in 1979.").

COMMENTS ON THE PROPOSED AMENDMENTS TO THE CASH SOLICITATION RULE

We request that the SEC eliminate the Proposed Amendments' application to the solicitation of private fund investors.

The Advisers Act has been interpreted to govern the provision of advice by investment advisers to their clients—not to establish an advisory relationship between a fund's investment adviser and such fund's investors.[2] Accordingly, we believe the SEC should exclude the solicitation of private fund investors from the Proposed Amendments and maintain the SEC staff's long-standing position that the Cash Solicitation Rule does not apply to the placement of fund interests.[3] Amending the Cash Solicitation Rule to treat investors in a private fund as "clients" of the fund's adviser—such that the adviser and a private placement agent, acting on behalf of the adviser, would be deemed to have a direct "duty" to each investor—would be inconsistent with both the D.C. Circuit's ruling in *Goldstein v. S.E.C.* and the SEC staff's prior guidance.[4]

In *Goldstein*, the D.C. Circuit determined that private funds themselves, and not their shareholders, constituted "clients" as referenced in Section 203 of the Advisers Act and, as a result, ordered that an SEC rule requiring many hedge funds advisers to register under the Advisers Act be vacated. The *Goldstein* court justified its ruling by noting that investors do not receive advice directly from the adviser,[5] the advice provided by the investment adviser is not "individualized advice" based on the investor's needs and, if investors were clients, both they and the fund would be owed a fiduciary duty by the adviser, which would present irreconcilable conflicts of interest.[6]

Similarly, in the Mayer Brown No-Action Letter, the SEC staff indicated that the Commission did not intend for the Cash Solicitation Rule to apply "to a registered investment adviser's cash payment to a person solely to compensate that person for soliciting investors or prospective investors for . . . an investment pool managed by the adviser."[7] This conclusion was based in part on the fact that the Cash Solicitation Rule was designed to apply to solicitations in which the solicited persons might ultimately enter into investment

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[2] *See Goldstein v. S.E.C.*, 451 F.3d 873 (D.C. Cir. 2006) ("The adviser owes fiduciary duties only to the fund, not to the fund's investors.").

[3] *See* Mayer Brown LLP, SEC Staff No-Action Letter (Jul. 28, 2008), available at https://www.sec.gov/divisions/investment/noaction/2008/mayerbrown072808-206.htm ("**Mayer Brown No-Action Letter**").

[4] *See supra* n.2 and n.3.

[5] *See id.* at 879-80 ("An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice directly. He invests a portion of his assets in the fund. The fund manager—the adviser—controls the disposition of the pool of capital in the fund. The adviser does not tell the investor how to spend his money; the investor made that decision when he invested in the fund. Having bought into the fund, the investor fades into the background; his role is completely passive. If the person or entity controlling the fund is not an "investment adviser" to each individual investor, then *a fortiori* each investor cannot be a "client" of that person or entity. These are just two sides of the same coin.").

[6] *See id.* at 881. ("Consider an investment adviser to a hedge fund that is about to go bankrupt. His advice to the fund will likely include any and all measures to remain solvent. His advice to an investor in the fund, however, would likely be to sell. For the same reason, we do not ordinarily deem the shareholders in a corporation the "clients" of the corporation's lawyers or accountants.")

[7] *See* Mayer Brown No-Action Letter.

advisory contracts with the investment adviser, and, as the SEC staff noted, investors in pooled investment vehicles "do not typically enter into investment advisory contracts with the investment advisers of the pools."[8] The SEC staff also indicated that the decision to grant the no-action relief sought by Mayer Brown was based directly on the reasoning set forth in *Goldstein*—that investors in private funds are simply not "clients" of the investment adviser to the fund.[9] Therefore, we respectfully request that the SEC maintain its long-standing position and exclude the solicitation of private fund investors from the Cash Solicitation Rule.

From a policy perspective, the disqualification rules in the Proposed Amendments, if applied to placement agents for private funds, would also create different regulatory requirements for placement agents acting for private funds as compared to placement agents acting for operating company issuers. This discrepancy is unjustified in light of the fact that the risks, conflicts and legal responsibilities of placement agents acting for the two different groups of issuers are nearly identical. In both cases, a prospective investor would need to evaluate the competence of either a manager (in the case of an operating company) or an investment manager (in the case of a fund) and would seek to work with a placement agent who has expertise in the particular industry in which the issuer operates. We respectfully request that the SEC avoid such a discrepancy by continuing to refrain from regulating the solicitation of investors in private funds under the Cash Solicitation Rule.

The Proposed Amendments note that expanding the Cash Solicitation Rule's scope would be appropriate in order to protect private fund investors by requiring solicitors to disclose their financial incentive in soliciting an investment. While we support the SEC in its efforts to protect private fund investors, we believe that such expansion is unnecessary to achieve its objective given that such conflicts of interest are already disclosed to private fund investors through the adviser's Form ADV disclosure requirements (including Form ADV Part 3 or Form CRS),[10] and through a broker-dealer solicitor's conflicts of interest disclosure obligations pursuant to Regulation Best Interest and Form CRS.[11] The Proposed Amendments also note that expanding the Cash Solicitation Rule to regulate the solicitation of private funds investors would be necessary because solicitation fees are paid out of fund assets.[12] As the Commission itself recognizes in the Proposed Amendments, placement-related fees are not always paid through fund assets.[13] Even in cases where placement fees are paid through fund assets, however, those fees, as well as the source of the payment (if from the assets of the private fund), are already required to be disclosed, and in practice are disclosed, in compliance with applicable anti-fraud regulations, including Rule 10b-10 under the Securities Exchange Act of 1934 (the "**Exchange Act**")) and the rules of FINRA.[14] Furthermore, investors in private funds receive additional protection from the anti-fraud provisions contained in Section 206(4) of

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8 *See id.*

9 *See id.* ("the *Goldstein* decision supports the conclusion that the Rule generally does not apply to advisers' cash payments to others solely to compensate them for soliciting investors to invest in investment pools managed by the advisers.").

10 *See* 17 CFR § 279.1.

11 *See id.*; 17 CFR § 240.15l-1.

12 *See, e.g.,* Proposed Amendments at 329-333, 357.

13 *See id.* at 333 n.577.

14 *See* 17 CFR § 240.10-b; FINRA, Rule 2010 (requiring adherence to just and equitable principles of trade); FINRA, Rule 2020 (prohibiting manipulative and fraudulent devices).

the Advisers Act and Rule 206(4)-8, as well as other anti-fraud provisions of the Securities Act of 1933, as amended and the Exchange Act.[15]

Should the SEC decide to expand the Cash Solicitation Rule to include solicitation of private fund investors, in order to ease the burden of compliance, we respectfully request that the Commission include a grandfathering provision that exempts solicitation arrangements that were entered into prior to the effective date (or the compliance date, as applicable) of the Proposed Amendments, regardless of whether compensation for solicitation is paid after the effective date.

We request that the SEC exclude SEC-registered broker-dealers from the definition of "solicitor" under the Cash Solicitation Rule.

In light of the robust regulatory framework already applicable to SEC-registered broker-dealers, we do not believe that it would be necessary to treat an SEC-registered broker-dealer and FINRA member, such as Credit Suisse, as a solicitor under the Cash Solicitation Rule. Accordingly, we respectfully request that the SEC include an express exclusion from the definition of "solicitor" in the Cash Solicitation Rule for SEC registered broker-dealers that are FINRA members.

The SEC's concerns regarding unregulated entities and the potential for abuse and conflicts of interest raised by paid solicitation activities are adequately addressed for SEC-registered broker-dealers under SEC and FINRA rules. Under applicable FINRA requirements, for example, solicitors for funds are expressly required, among other things, to: (i) conduct a reasonable investigation of the issuer and offered securities; (ii) carry out a heightened investigation of any "red flags" uncovered during the investigation; (iii) perform a suitability analysis; (iv) comply with FINRA marketing rules and just and equitable principles of trade; and (v) comply with the anti-fraud provisions of the federal securities laws.[16]

SEC-registered broker-dealers, such as Credit-Suisse, are also subject to FINRA examination and enforcement oversight,[17] as well as to applicable state laws governing sales practices. State securities regulators may bring enforcement actions against broker-dealers acting as placement agents for violations

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[15] *See generally* 17 CFR § 275.206(4)-1, 206(4)-8; 17 CFR § 240.12b-20; 15 U.S.C. § 78r; 17 CFR § 240.10b-5.

[16] *See generally* FINRA Regulatory Notice 10-22 (April 2010) (discussing the considerable obligations placed on SEC-registered broker-dealers conducting Regulation D offerings).

[17] FINRA has been active in monitoring private placement activity by its members to ensure compliance with applicable FINRA rules. *See, e.g.*, Sunset Financial Services, Inc., FINRA Letter of Acceptance, Waiver and Consent No. 2011026915701 (Jul. 17, 2017) (finding that the firm failed to establish and maintain supervisory policies and procedures reasonably designed to comply with applicable federal securities laws and FINRA rules in connection with the sale of private fund securities, failed to follow up on red flags, failed to re-evaluate the appropriateness of retaining a fund on its approved list and placing a fund on its approved list without conducting adequate due diligence); Newbridge Securities Corporation, FINRA Letter of Acceptance, Waiver and Consent No. 201604569601 (Sept. 26, 2019) (failure to have a reasonable basis for recommending a private placement offering due to inadequate due diligence and failure reasonably to supervise the offering).

of state anti-fraud and sales' practices rules.[18] In addition, SEC-registered broker-dealers are subject to examination by the SEC, rigorous supervisory responsibilities, regular internal inspections, annual evaluation, certification and review of compliance procedures, continuous record keeping and risk-monitoring and risk-management obligations. SEC-registered broker-dealers are also required to implement and maintain a comprehensive compliance program and designate a chief compliance officer.[19]

In light of these requirements, we believe that the existing regulation and oversight of SEC-registered broker-dealers is sufficient to address investor concerns regarding solicitation activity and that further regulation under the Advisers Act should not be required.

We request that the SEC clarify that merely acting as a solicitor will not create a requirement for a registered broker-dealer to seek registration as an investment adviser or comply with the substantive provisions of the Advisers Act.

In the Solicitation Rule Adopting Release,[20] the SEC noted that a solicitor that engaged in solicitation activities in accordance with the Cash Solicitation Rule would not be required to separately register as an investment adviser as a result of its solicitation activities because the SEC would consider the solicitor to be a person associated with an investment adviser due to the investment adviser's responsibility to supervise the solicitor under the Cash Solicitation Rule.[21] In the Proposed Amendments, the SEC now proposes to withdraw the position taken in the Solicitation Rule Adopting Release,[22] and instead require solicitors to evaluate the particular facts and circumstances surrounding their solicitation and obtain the relevant registrations and otherwise comply with the requirements of the Advisers Act.[23]

We urge the SEC not to withdraw its prior guidance and to clarify that a solicitor—or at least a solicitor that is an SEC-registered broker-dealer—would not be required to register as an investment adviser or comply with the substantive requirements of the Advisers Act (e.g., providing separate disclosures as other investment advisers must on Form ADV) in connection with conducting its solicitation activity. Requiring solicitors who are registered with the SEC as broker-dealers or associated persons of broker-dealers to register and comply with the terms of the Advisers Act as investment advisers in connection with solicitation activities would be duplicative. As we detailed above, SEC-registered broker-dealers are already subject to extensive SEC oversight as well as FINRA regulation and state anti-fraud oversight in regard to their private placement and solicitation activities. We see no justification for requiring duplicative regulation and do not

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[18] *See, e.g.*, *Massachusetts Regulator Sweeps 63 Broker-Dealers Selling GPB Private Placements*, THE DI WIRE, Sept. 13, 2018, https://thediwire.com/massachusetts-regulator-sweeps-63-broker-dealers-selling-gpb-private-placements.

[19] *See, e.g.*, FINRA Rule 3110.

[20] Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Advisers Act Rel. No. 688 [139 FR 42146] (July 18, 1979) ("**Solicitation Rule Adopting Release**").

[21] *See id.*

[22] *See* Proposed Amendments at 201 n.346, including references to related no-action guidance including Cunningham Advisory Services, Inc., SEC No-Action Letter (Apr. 27, 1987); Koyen, Clarke and Assoc. Inc., SEC No-Action Letter (Nov. 10, 1986); Charles Schwab & Co., SEC No. Action Letter (Dec. 17, 1980).

[23] *See id.*

believe that the SEC has established a clear rationale for requiring such duplicative coverage in the Proposed Amendments. Moreover, in many cases broker-dealer firms that act as solicitors, including Credit Suisse, are already dually registered as broker-dealers and investment advisers. If the SEC were to withdraw its prior guidance, investors dealing with such firms could erroneously conclude that such firms are registered as investment advisers because of their solicitation activities. Because of the different standards of care attaching to the two different roles, and the fact that broker-dealers do not owe a fiduciary duty to their counterparties, we believe that prospective investors would be confused as to the nature of the relationship if the clarity afforded by the prior guidance were eliminated.[24]

In our view, given that a solicitor is acting as an agent of a registered investment adviser and is required to be supervised by the investment adviser, it should be deemed to be a person associated with an investment adviser, as the SEC concluded in 1979, and should have no obligation to register independently as an investment adviser.[25] This position is consistent with the definition of "person associated with an investment adviser" in Rule 202(a)(17) under the Advisers Act, which includes "any partner, officer, or director of such investment adviser (or any person performing similar functions) . . . ." A solicitor performs a "similar function" to that of an officer of an investment adviser because, like an officer, a solicitor is responsible for marketing the services of the investment adviser and explaining to potential clients the particular expertise of the investment adviser.

We request that the SEC refine the disqualification regime under the Cash Solicitation Rule to codify the standard put forth in the SEC Staff's Dougherty No-Action Letter.

The Dougherty No-Action Letter[26] struck a balance between appropriate disclosure of information about disqualifying events to protect investors and protecting market efficiency by allowing solicitors to participate in the market following a disqualifying event. The Proposed Amendments would disturb that balance by expanding the disqualification provisions while simultaneously depriving solicitors of an effective waiver process, resulting in the possible disqualification of broker-dealers associated with large financial services firms with a number of affiliated, but otherwise unrelated, business lines.

In the Proposed Amendments, the SEC suggests that the conditional waiver pursuant to Section 9(c) of the Investment Company Act would replace the Dougherty No-Action Letter.[27] In the seventeen years since its release, the Dougherty No-Action Letter has provided ample protection for investors by requiring the

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[24] The SEC recently declined to impose on registered broker-dealers the same fiduciary duty that applies to investment advisers under the Advisers Act. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Rel. No. 86031 [84 Fed. Reg. 33318] (June 5, 2019) at 19 ("We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules.").

[25] *See* Herbert-Simon Co., SEC Staff No-Action Letter (Mar. 18, 1986) ("a person who is controlled by a Registrant would be a "person associated with an investment adviser" within the meaning of Section 202(a)(17) of the Act and would have no obligation to register independently an investment adviser").

[26] *See* Dougherty & Co. LLC, SEC Staff No-Action Letter (Jul. 3, 2003) (the "**Dougherty No-Action Letter**").

[27] *See* Proposed Amendments at 277.

disclosure of 10 years of a solicitor's disqualifying events, and strict adherence to the SEC and court orders giving rise to the disqualifying events, while also providing clear guidance to solicitors with regards to the process for conducting solicitation activities following a disqualifying event. We believe that the SEC should allow investors to determine whether they want to proceed with a solicitor armed with the ample information required under the Dougherty No-Action Letter, which information should be able to be included in the offering memorandum of the private fund and not in a separate disclosure statement (as discussed further below).

In our view, concerns regarding disqualification should be addressed through disclosure. Providing investors the information they need to make informed investment decisions makes it possible for investors to confidently and effectively evaluate investment opportunities and, as a result, allows the capital markets to flourish.

Credit Suisse and its peer firms have a long and deep relationship with a wide array of investment advisers in every field and industry and are well situated to connect investors with the investment advisers that best meet a particular investor's needs. Such firms serve an essential market-making function and supply markets with necessary liquidity. Disqualification without an effective waiver process would adversely affect investors by removing some of the most knowledgeable and experienced solicitors and placement agents in the business.

The Proposed Amendments do not set forth compelling reasons as to why the Dougherty No-Action Letter should be replaced. Rather than implementing the waiver process set forth in the Proposed Amendments, we urge the SEC to codify the Dougherty No-Action Letter.

We request that the SEC allow a firm to be eligible to act as a solicitor so long as the division and personnel involved in the solicitation are not themselves disqualified.

The Proposed Amendments disqualify any "ineligible solicitor," including certain Related Persons,[28] from participating in solicitation activities. In the context of Rule 506 under the Securities Act, the SEC has interpreted the concept of participation in a solicitation process broadly.[29] As a result, we are concerned that a broker-dealer that would not fall within the definition of "ineligible solicitor" by itself would nevertheless be disqualified under the Proposed Amendments if it shares back office and other corporate services with an affiliate that is subject to a disqualifying event. If the Proposed Amendments were to be interpreted in

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[28] The Proposed Amendments define an ineligible solicitor as person who, at the time of the solicitation, is either subject to a disqualifying Commission action or is subject to any disqualifying event. The Proposed Amendments also apply the definition of "ineligible solicitor" to the following persons: (i) any employee, officer or director of an ineligible solicitor and any other individuals with similar status or functions; (ii) all general partners of the solicitor, if the solicitor is a partnership; (iii) all managers of the solicitor, if the solicitor is a limited liability company; and (iv) any person directly or indirectly controlling or controlled by the solicitor and its employees, officers, directors, partners and limited liability company managers (the "**Related Persons**").

[29] *See* SEC Compliance and Disclosure Interpretations, Dec. 4, 2013, Question 260.19 ("Participation in an offering is not limited to solicitation of investors.").

this way, we believe that a number of qualified broker-dealers could be disqualified from acting as placement agents.

The SEC further suggests that a solicitor may be disqualified solely due to its affiliation with a Related Person who has been subject to a disqualifying event, even if such affiliate is not participating in the solicitation.[30] Disqualifying an SEC-registered broker-dealer firm from acting as a placement agent solely due to a disqualifying event experienced by a Related Person (who is not participating in the solicitation) would unfairly and disproportionately impact larger and more established placement agents that are housed within global firms with multiple unrelated business lines.

We believe that disqualifying a solicitor due to its affiliation with a Related Person who has been subject to a disqualifying event would have the inadvertent adverse effect of pushing more established firms out of the market, while leaving smaller standalone placement agents largely unaffected. Such smaller standalone placement agents are likely to have access to fewer investment advisers across geographic areas and industries, and less experience and knowledge in conducting private placements. In our view, this will deprive investors of a large number of investment opportunities and access to the expertise on which they currently rely.

If the Commission decides not to accept our recommendation to retain the current disqualification requirements as well as the Dougherty No-Action Letter, we request, in the alternative, that the SEC (i) confirm that the proposed definition of "ineligible solicitor" would not disqualify personnel or a division of a firm from acting as a solicitor so long as that division and those employees were not themselves subject to a disqualifying event, (ii) exclude any person directly or indirectly controlling or controlled by the ineligible solicitor and adopt the approach it took with regards to covered persons that experience a disqualifying event under Rule 506, and simply allow solicitors to terminate the disqualified Related Persons or no longer allow them to perform placement agent activities, and (iii) confirm that a broker-dealer that itself is not an "ineligible solicitor" would be able to receive operational, financial and other service-level support from a Related Person that is an ineligible person without running afoul of the restrictions contained in the Proposed Amendments.[31]

We request that the SEC amend the disqualification provisions in the Cash Solicitation Rule to offer more clarity to solicitors.

If the Commission declines to take both our recommendation to exclude the solicitation of private fund investors from the Cash Solicitation Rule and our recommendation to codify the Dougherty No-Action Letter, we believe the SEC should conform the disqualifying acts that result in a disqualifying event under the Cash Solicitation Rule with those that constitute a "bad act" under Regulation D. Given that a significant majority of fund private placements are carried out under Rule 506 of Regulation D, private placement agents are already subject to the "bad actor" rules in Rule 506(d). While the categories of disqualifying

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[30] *See id.* at 265 (". . . under our proposal, a firm would not ***necessarily*** be an ineligible solicitor if one or more of such listed persons are ineligible solicitors under the proposed rule, provided that such persons do not conduct solicitation activities.") (emphasis added).

[31] *See* SEC Compliance and Disclosure Interpretations, Dec. 4, 2017, Question 260.15.

events specified in the Proposed Amendments overlap to some degree with those in Rule 506(d),[32] there are some categories that do not. If the Proposed Amendments are adopted without change, issuers and solicitors conducting private fund offerings in reliance on Regulation D would need to comply with two overlapping but different sets of disqualifying events, which would impose a significant compliance burden on advisers, issuers and placement agents.

Credit Suisse concurs with the SEC's determination that the proposed disqualification provisions should apply only to a disqualifying Commission action or disqualifying event occurring *after* the effective date (or the compliance date, as applicable) of the Proposed Amendments.[33] Without a reasonable grandfathering provision, the Proposed Amendments would create significant disruption to the market and could result in the immediate and long-term disqualification of many large and knowledgeable placement agent businesses, causing substantial harm to investors and market liquidity. This approach would also be consistent with the implementation of the "bad actor" disqualification provisions in Regulation D, Rules 506(d) and (e).[34]

We request that the SEC replace the separate solicitor's disclosure statement with a disclosure statement integrated with marketing materials.

While we agree that prospective clients and, if the Cash Solicitation Rule is expanded to include private fund investors, prospective investors in private funds, should be informed that a solicitor is being compensated by the investment adviser, we do not agree that it is necessary, in the context of private funds, to create a separate disclosure document to inform them of such facts. The requirement to provide a separate disclosure statement should be replaced with a requirement to conspicuously disclose a solicitor's compensation and conflicts of interest in a fund's offering memorandum.

The SEC's goal of arming private fund investors with the information necessary to make an informed investment decision is most efficiently met by disclosing potential conflicts of interest in a single integrated document laying out the investment opportunity and any material conflicts of interest that would impact an investor's decision, rather than disclosing only certain conflicts in a separate document. Both institutional and other private fund investors generally have professional advisers to assist them in obtaining relevant information, including regarding conflicts of interest relating to the investment adviser and any placement agent, as part of a due diligence investigation. In light of this fact, we believe that requiring delivery of a separate disclosure statement is unnecessary and risks diluting relevant information regarding the investment opportunity being evaluated.

In addition, while it may be feasible to provide a disclosure statement at the time of solicitation in the context of separately managed accounts, if the Cash Solicitation Rule is expanded to cover investors in private

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[32] *See* Proposed Amendments at 275 n.485 and accompanying text ("[t]o the extent that a person is subject to both the disqualification provision of rule 506 and the proposed amendments to the disqualification provision under the solicitation rule, there would be some overlapping categories of disqualifying events (*i.e.*, certain bad acts would disqualify a person under both provisions").

[33] *See id.* at 270.

[34] *See* 17 CFR § 230.506(d), (e).

funds, the Proposed Amendments' requirement to provide disclosure at the time of solicitation would be unduly burdensome and impractical given the nature of solicitations in the private fund context. Providing a single disclosure statement at the time of solicitation, which discloses information relevant to all funds discussed by a solicitor with a prospective investor, would be untenable as placement agents may discuss multiple funds with an investor at the same time, each of which would likely be subject to a bespoke compensation arrangement. Requiring tailored disclosure of each of these compensation arrangements in a single document (or other medium that can be retained in accordance with the Advisers Act record retention rules) at the time of the solicitation would add considerably to the expense and complexity of conducting the solicitations. Moreover, to the extent that a solicitor were to create a separate disclosure statement for each fund and provide each of those disclosure statements to a prospective investor when discussing multiple investment alternatives (which is likely to be the approach taken if the Proposed Amendments are adopted, as it is the most efficient compliance solution), the multiple statements would result in a significant amount of paper being provided to a prospective investor, thereby confusing investors.

The Proposed Amendments seek to add an additional requirement to disclose material conflicts of interest resulting from the relationship between an investment adviser and the solicitor. We do not believe that separate conflict of interest disclosure is necessary in light of existing obligations to disclose such conflicts of interest to private fund investors through the adviser's Form ADV disclosure requirements (including Form ADV Part 3 or Form CRS),[35] and through a broker-dealer solicitor's conflicts of interest disclosure obligations pursuant to Regulation Best Interest and Form CRS.[36] Therefore, we respectfully request the SEC to remove the obligation to provide a separate conflict of interest disclosure.

We request that the SEC not impose caps on solicitor compensation.

In the Proposed Amendments, the Commission sought comment on whether the Cash Solicitation Rule should be revised to impose a cap on the compensation paid to solicitors.[37] We do not believe that it would be appropriate for the SEC to limit fees negotiated between investment advisers and their service providers. Capping fees would not necessarily benefit investors. As discussed above, a solicitor's fees are not generally paid out of fund assets, but are usually paid by investment managers, and so, in such cases, capping a solicitor's fees does not provide any protection to investors.[38] Consistent with the framework of the federal securities laws, which rely on disclosure to protect investors, we believe that prospective clients should have transparency into the solicitors engaged to act for the investment adviser and their compensation but the compensation itself should not be fixed or capped.

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[35] *See* 17 CFR § 279.1.
[36] *See* 17 CFR § 240.15l-1.
[37] *See* Proposed Amendments at 209.
[38] *See id.* at 333 n.577 (discussing that fund assets are not always used to pay a solicitor's fees).

COMMENTS ON THE PROPOSED AMENDMENTS TO THE ADVERTISING RULE

We request that the SEC clarify that communications in one-on-one meetings are not "advertisements."

The Proposed Amendments should be revised to confirm that (i) communications directed to a single client, such as in a one-on-one meeting, and (ii) interactive communications that are equivalent to live oral communications that are not "broadcast" (*i.e.*, widely disseminated), such as writing on a white board during a seminar (e.g., for illustration purposes),[39] are not deemed to be advertisements. As recognized informally by the SEC staff and FINRA, communications between an investment adviser or its agent, such as a solicitor, with a prospective or existing client, in one-on-one meetings, should not be treated as "advertisements" because they are informational discussions customized to the interests and needs of such prospective or existing client.[40] Likewise, FINRA has recognized that certain "interactive communications," which are typically conducted in real time and involve a dialog with others, are distinguishable from so-called "static" communications which FINRA deems to be advertisements under FINRA Rule 2210.[41] Although any such communications are, and should continue to be, subject to general anti-fraud principles, they should not be subject to form or substance restrictions of the Advertising Rule.

We request that the SEC create a principles-based standard for using hypothetical, related and "extracted" performance with Institutional Investors that does not rely on a determination that the information is "relevant" to a particular investor.

While we applaud the Commission's decision to allow the use of hypothetical (including back-tested), related and extracted performance information (collectively, "**Performance Data**") with non-retail persons, we have some concerns that many of the requirements of the Proposed Amendments, such as the requirement that an investment adviser adopt policies and procedures that are reasonably designed to ensure that the information provided is "relevant to the financial situation and investment objectives" of the investor, are unclear.[42] We recommend that the SEC instead adopt a principles-based approach, such as that set forth in the Clover Capital No-Action Letter, and the subsequent line of letters.[43]

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[39] Although the new exception in the Proposed Amendments that exclusives oral communications that are not "broadcast" arguably should cover use of a white board in a meeting with a single perform or small group of investors, use of visual aids in a larger meeting would appear to fall outside the proposed exception to the definition of "advertisement." In our view, use of such a visual aid with a larger group should also be acknowledged to be an "oral communication" because it carried out in the moment, as an oral inter-change would be, and cannot be removed and redistributed.

[40] *See, e.g.*, Investment Company Institute, SEC No-Action Letter (Sept. 23, 1988) (permitting an investment adviser to provide prospective clients performance results for advisory accounts on a "gross basis," in a one-on-one presentation, rather than on a "net basis" subject to certain conditions).

[41] *See* FINRA Regulatory Notice 10-06 (Jan 2010).

[42] *See* Proposed Amendments at 169 ("[t]he first condition for the presentation of hypothetical performance would require the adviser to adopt and implement policies and procedures "reasonably designed to ensure that the hypothetical performance is relevant to the financial situation and investment objectives" of the recipient.").

[43] *See* Clover Capital Management, Inc. SEC No-Action Letter (Oct. 28, 1986) ("**Clover Capital No-Action Letter**").

In our view, the requirement to adopt policies reasonably designed to ensure that Performance Data is relevant to the financial situation and investment objectives of a recipient would impose significant compliance burdens, particularly if the Commission does not provide clear criteria for determining when certain Performance Data would be appropriate for a particular investor's financial situation. As an alternative, we believe the Commission should provide investment advisers and their agents with the flexibility to provide Performance Data to all investors or, at a minimum, all institutional investors, as long as the Performance Data is prepared in a fair and balanced way, is materially accurate and complete and describes the nature of the performance provided and the assumptions underlying the presentation, as provided in the Clover Capital No-Action Letter.[44] Such a system would provide sufficient clarity on the format and content of any Performance Data, while sufficiently addressing investor protection concerns.

Since all communications between investment advisers and fund investors are subject to the anti-fraud provisions of Section 10(b) and Rule 10b-5 under the Exchange Act, we believe that the principles-based approach discussed above and the applicable anti-fraud provisions collectively offer adequate protection to non-retail persons receiving Performance Data.

Furthermore, in the absence of clear criteria to determine whether Performance Data would be "relevant" given a particular investor's financial situation, allowing an investment adviser to make this evaluation on its own could create a situation in which every investor would receive different amounts and quality of information. This informational asymmetry would provide an unfair advantage to certain investors and hurt the credibility of the markets. The principles-based approach discussed above would help to ensure that identical information is being provided to all potential investors, while also protecting such investors by requiring that the information be prepared in accordance with the Clover No-Action Letter's strict guidelines.

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We appreciate the opportunity to comment on the Proposed Amendments. We would be please to discuss our comments with you at any time as you proceed to evaluate your proposal. Please do not hesitate to contact the undersigned at (212) 325-4495 or roger.machlis@credit-suisse.com, or Peter Ryan at (202) 626-3306 or peter.ryan@credit-suisse.com, regarding this letter.

Sincerely yours,

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[44] *See id*.