

Via Email

February 11, 2020

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

Re: File No. S7-21-19: Proposed Rule: Investment Adviser Advertisements

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to comment on the United States (U.S.) Securities and Exchange Commission (SEC or Commission) proposal to amend Rule 206(4)-1 (the “Proposed Advertising Rule”), as reflected in “Investment Adviser Advertisements; Compensation for Solicitations” (the Release).¹

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

CII appreciates that the Commission seeks to move advertising rules from broad prescriptive prohibitions to more flexible principles-based rules, while continuing to ensure that investors receive communications from investment advisors, directly or indirectly, that are fair, balanced and not misleading.

CII generally supports the views expressed in a comment letter submitted February 10, 2020, by the Institutional Limited Partners Association (ILPA). We note in particular that while ILPA commends the Commission’s expansion of the advertising rule to expressly cover promotion materials disseminated by advisors that seek to “obtain or retain” investors in pooled investment vehicles, ILPA has certain concerns, including the following:

Some of the changes proposed by the Commission may have a chilling effect on existing investment and operational due diligence efforts of existing and prospective investors, while others may be used as a “shield” by private fund advisers seeking to limit, or

¹ Investment Adviser Advertisements; Compensation for Solicitations, 84 Fed. Reg. 67518 (Dec. 10, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-12-10/pdf/2019-24651.pdf>.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

misleadingly standardize, the information disseminated, even in response to specific or tailored requests.

In CII's view, the Proposed Advertising Rule could impair the ability of investment advisors to share certain information that investors seek, potentially reducing transparency that is essential to institutional investors in evaluating and monitoring investments. In particular, CII believes that the breadth of the proposed definition of "advertisement,"³ along with the narrowness of the exception from the definition for unsolicited investor requests, could reduce the flow of information to institutional investors and complicate discussions between investors and investment advisors that happen in the ordinary course.

CII supports the Commission's proposed exclusion from the definition of "advertisement" for responses to direct client or fund investor requests.⁴ However, we are concerned that this exclusion would not apply if the unsolicited client or investor requests are for performance information (*i.e.*, all performance information in the case of a "Retail Person"; only "hypothetical performance" information in the case of a "Non-Retail Person").⁵ We similarly are concerned that this exclusion would not apply if the investment advisor responds to an investor's request for information with additional contextual information that the investor did not specifically include in its request.

CII believes that the Proposed Advertising Rule should not hamper investment advisors' ability to respond to unsolicited institutional investor requests and provide performance information and such other information in response that is useful and reasonably related to an investors' request. Institutional investors need investment advisors to respond fully and promptly to their requests for information. It could be contrary to the needs and natural expectations of our members if regulations, instead of the scope of the request itself, shaped an investment advisor's response to a direct investor request, including requests pertaining to performance information. We are concerned that such a limitation would alter the investment advisor-client relationship and be an overly prescriptive restriction on an investment advisor's ability to service its members.

The exclusion requires that an investment advisor's response to an unsolicited request address only the specific question asked and provide supplemental information only if "necessary" to make the "the requested specified information not misleading."⁶ We appreciate the intention behind this language, but are concerned that the language seems likely to lead investment advisors to err on the side of too little information unless an investor has asked a precisely correct question.

CII also is concerned that the language in the proposed definition of "advertisement" related to communications that "offer or promote" the investment advisor will limit institutional investors' ability to receive general market commentary and ordinary course investor communications.

Language in the Proposed Advertising Rule appears to extend the rule to an unnecessarily large share of an investment advisor's regular communications, including those relating to the services it is already rendering to investors. Therefore, CII suggests that the Commission consider distinguishing between

³ Proposed § 275.206(4)-1(e)(1).

⁴ Proposed § 275.206(4)-1(e)(1)(ii).

⁵ The exclusion from the "advertisement" definition for unsolicited requests carves out: (A) any communication to a retail person that includes performance results; or (B) any communication that includes "hypothetical performance." Proposed §§ 275.206(4)-1(e)(1)(ii)(A)-(B).

⁶ Release at 67,530.

the advertisement of a service and communications to investors about an ongoing service. For example, we are skeptical that an investment advisor's terms of services, or a relationship summary sent by an investment advisor to an existing investor, should constitute an "advertisement."

In addition, we are skeptical about the treatment of any material containing market commentary as an "advertisement," as the Commission discusses in the Proposed Rule Release.⁷ Market commentary designed for current investors is an essential element of ongoing advisor service. Therefore, CII suggests that the Commission consider providing guidance clarifying that the following communications do not in and of themselves constitute an "advertisement" and do not "promote" an investment advisor's services:

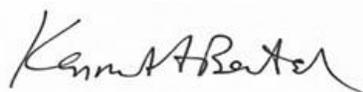
- *Bona fide* commentary to existing clients, such as market, industry or regulatory commentary or news;
- Non-promotional client communications limited to existing investors or to qualified prospective investors upon specific request by a prospective investor (such as newsletters); and
- Informational documents sent to existing clients, such as terms of service or relationship summaries.

Finally, we would endorse ILPA's view that some assumptions underlying the Commission's bifurcation of clients and investors into "Retail Persons" and "Non-Retail Persons" may (1) overestimate the effectiveness of resources of Non-Retail Persons, particularly in their relationship to private fund advisors; (2) underestimate the difficulty even institutional investors can have in obtaining information on fees, expenses, performance data, material conflicts of interest and other information necessary to effectively analyze investments in private equity funds; and (3) not reflect prior SEC enforcement actions against some of the largest and most prominent private fund advisers for inadequate disclosure and transparency.

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CII appreciates the opportunity to submit comments on this important matter and is available to provide any additional information the Commission requests.

Sincerely,



Kenneth A. Bertsch
Executive Director



Jeffrey P. Mahoney
General Counsel

⁷ See *id.* at 67,526.