
December 27, 2022

Submitted via E-mail in PDF format

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

Re: Proposed Rule: Outsourcing by Investment Advisers (Release No. IA-6176;
File No. S7-25-22)

Dear Secretary Countryman,

Flexible Plan Investments, Ltd. ("FPI") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "SEC" or "Commission") proposed rule to prohibit registered investment advisers ("advisers") from outsourcing certain services or functions without first meeting minimum requirements ("Proposed Rule"). The Proposed Rule would require advisers to conduct due diligence prior to engaging a service provider to perform certain services or functions and would further require advisers to periodically monitor the performance to reassess retention of the service provider.

First and foremost, FPI joins the request made by several investment trade associations to the extend the comment period by a minimum of 90 additional days.¹ The Proposed Rule is 232 pages long and solicits comments on 101 numbered questions (many of which contain multiple subparts). The issuance of the Proposed Rule overlapped with the final weeks of preparation for the compliance date for the new SEC Marketing Rule and the comment period spans Thanksgiving, Hanukkah, Kwanzaa and Christmas, not to mention the additional burdens on compliance professionals at year-end. Given the length, complexity and timing of the Proposed Rule, we respectfully request that the Commission extend the comment period to provide the public adequate time to fully understand and appreciate the implications of the Proposed Rule, both intended and unintended, and provide thoughtful and meaningful comments.

¹ See letter from Mr. Elliot Ganz et al. to Vanessa Countryman, Proposed Rules, File Nos. S7-26-22, S7-25-22; RIN 3325-AM95; RIN 3235-AN18 (November 16, 2022).

The Proposed Rule states that it would be unlawful for an investment adviser, registered or required to be registered, with the Commission to retain a service provider to perform a covered function unless the investment adviser conducts certain due diligence and monitoring of the service provider. The Commission defines a covered function by breaking it down into two elements: (1) those necessary for the adviser to provide its investment advisory services in compliance with Federal Security laws; and (2) those that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser's ability to provide investment advisory services. We find this language vague and ambiguous, opening the door to interpretation and inconsistent application of the rule. Making determinations as to what is "necessary" to provide compliant investment advisory services and what "would be reasonably likely to cause a material negative impact" could prove difficult, especially if the services rendered by a provider evolve over time, presenting challenges when determining whether a service provider is performing a covered function.

Generally, outsourced service providers are engaged to provide efficiencies and expertise, which typically results in lower costs to the adviser, which then translates to cost-effective investment management options for clients. If there is uncertainty as to whether a service provider is performing a covered function, in an abundance of caution, to avoid enforcement, advisers may take the conservative approach of treating each outsourced vendor as providing a covered function. This could lead to the unintended consequence of limiting the benefits, especially financially due to increased compliance costs related to additional due diligence, monitoring and record keeping costs, gained via outsourcing the services, leading to potential harm to clients. If advisers, in response to increased costs, bring certain services back in-house, the efficiencies and expertise gained by outsourcing would be lost, potentially harming clients.

In the Proposed Rule, the Commission discusses the general fiduciary duty owed by an adviser to its clients which is comprised of a duty of loyalty and a duty of care imposed by Section 206 of the Advisers Act. The Commission further characterizes this combination of obligations as requiring the investment adviser to act in the best interest of its clients at all times, a duty which cannot be waived and is very broad in scope. This duty includes fulfilling all of adviser's obligations under the Adviser Act, other Federal securities law, and any contract entered into with the client.

It would seem that advisers are already required to conduct due diligence on their service providers pursuant to the broad, general fiduciary duty enforceable under Section 206 of the Advisers Act. It follows that an adviser would remain liable for its obligations (contractual, regulatory, or otherwise) even when a function has been outsourced to a third party. This is not a new business practice, as advisers have been outsourcing services/functions for years and responsibility for non-compliance and oversight of service providers has been included within the adviser's fiduciary duty.

This being the case, it is uncertain as to what additional protections the Proposed Rule will provide to clients as it seems that the spirit of the Proposed Rule is already underlying an adviser's general fiduciary duty to its clients. As noted by the Commission in the Proposed Rule: "Excessive oversight can result in costs to the adviser and potentially its clients, that outweigh the intended benefits." We contend that any benefit derived by the clients pursuant to the Proposed Rule would not be commensurate to the efforts expended by advisers (especially small advisers), and that proper protections are already in place within Section 206 of the Advisers Act coupled with the representations and warranties contained in investment advisory and service provider agreements, respectively.

Thank you for your consideration of these comments.

Sincerely,

Sean M. Burke
Corporate Counsel

Cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
Mr. William Birdthistle, Director, Division of Investment Management
Mr. Dan Berkowitz, General Counsel