sifma

asset management group

February 10, 2020

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

Re: Investment Adviser Advertisements; Compensation for Solicitations, Investment Advisers Act Release No. 5407; File Number S7-21-19

Dear Ms. Countryman:

The Asset Management Group ("AMG") of the Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to provide our comments to the Securities and Exchange Commission ("SEC" or "Commission") on the proposed changes to the rules governing investment adviser advertisements in Advisers Act Release No. 5407 (Nov. 4, 2019) (the "Proposing Release").[1] SIFMA has reviewed and generally endorses the views and opinions in this letter.[2]

SIFMA AMG is the voice for the buy-side within the securities industry and broader financial markets, which serve millions of individual and institutional investors as they save for retirement, education, emergencies, and other investment needs and goals. Our members represent U.S. asset management firms whose combined global assets under management exceed $34 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

The Proposing Release updates two rules under the Investment Advisers Act of 1940 ("Advisers Act") that govern how investment advisers advertise their services and solicit clients. The comments below relate to the proposed amendments to Advisers Act Rule 206(4)-1 (the "Advertising Rule" or the "Proposed Rule"). The proposed changes to the Advertising Rule represent the Commission's first substantive update to the framework for advertisements since 1961. We understand that the proposed amendments are intended to modernize the Advertising

[1] Investment Adviser Advertisements; Compensation for Solicitations, 84 FR 67518 (December 10, 2019).

[2] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

Rule based on developments in technology, the changing profiles of federally registered investment advisers, and the Commission's experience administering the current rule.

SIFMA AMG supports the Commission's objective of modernizing the Advertising Rule and moving away from per se violations, including on testimonials and past specific recommendations, in favor of a more principles-based approach to regulating advertisements. At the same time, however, the Proposed Rule introduces a number of legal and practical implications that we urge the Commission to consider in the rule making process. We list our comments below chronologically in the order in which they appear in the Proposing Release; however, we wish to highlight the following areas:

- First, the expansive definition of an "advertisement" sweeps virtually every communication into the Advertising Rule. We fear that in exchange for removing the per se limitations and providing advisers with a more flexible, principles-based regime, the Commission has effectively eliminated the distinction between communications that are designed to advertise and promote advisory services on the one hand, and communications used to service existing clients and investors, to actually provide investment advice, and to solicit clients and investors, on the other. This broad approach creates a number of unintended consequences, including the potential that all day-to-day communications used to service existing clients will be covered by the definition of an advertisement. We encourage the Commission to narrow the scope of the proposed definition of an advertisement to focus on those communications that are actually designed to offer and promote advisory services - it is those communications that present the greatest investor protection concerns.

- Second, the prior review and approval requirement is unprecedented in the investment adviser space and will require firms to dedicate significant additional resources and effectively reengineer their entire compliance program for the review and approval of advertisements. This prior review and approval requirement is compounded by the broad definition of an advertisement, which will exponentially increase the number of communications that will be subject to approval - far in excess of the estimates set forth in the Commission's costs and benefits analysis. We urge the Commission to eliminate any prior review and approval requirement and give investment advisers the flexibility to design advertising review controls that are appropriate and consistent with the nature of their business and the way they advertise their services.

- Third, SIFMA AMG would like the Commission to reconsider the proposed approach to the use of hypothetical performance. The Proposed Rule effectively prevents investment advisers from showing hypothetical performance to retail investors, with the result that retail investors may no longer have access to financial planning and advice tools, retirement calculators, investment proposals, and a range of other materials designed to help investors assess their financial circumstances and investment goals. We have significant concerns that the Commission's approach to the use of hypothetical performance will disadvantage retail clients and investors and eliminate access to valuable investment tools.

- Fourth, we believe the Commission's approach to the use of hyperlinks to present disclosure is unduly restrictive and inconsistent with technological innovation. SIFMA AMG requests that the Commission revisit this area and align the approach set forth in the Proposing

Release with other regulators and with its own prior guidance regarding the presentation of effective disclosure.

Each of these areas of focus, as well as SIFMA AMG's additional comments, are discussed in more detail below.

1. Definition of an "Advertisement"

The Proposed Rule would define an "advertisement" broadly to mean "any communication, disseminated by any means, by or on behalf of an investment adviser, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment adviser." SIFMA AMG requests that the Commission narrow the scope of the proposed definition in a number of respects.

A. The definition of an advertisement should exclude individualized communications that are disseminated to one investment advisory client or investor.

The existing definition of an advertisement applies to communications "addressed to ***more than one person***." The Proposed Rule reverses this approach and instead defines an advertisement to include any communication "directed to ***one or more*** investment advisory clients or investors." We urge the Commission to reincorporate the "more than one" limitation into the definition or adopt a separate exception for communications that are directed to one investment advisory client or investor. Further, we request that the Commission make clear that for purposes of any numerical limitation, the concept of an "investment advisory client or investor" is intended to be applied in a flexible manner that reflects the nature of the particular client or investor relationship.

We believe the Commission should refine the proposed definition of an advertisement to exclude communications that are appropriately customized or "individualized" for the particular client or investor to whom the communication is directed. It is common for investment advisers to create proposals and other communications for particular clients, investors, consultants, and other intermediaries that are designed to present a customized solution or otherwise to provide information tailored to the specific needs of a particular client or investor. This would include requests for proposals ("RFPs"), requests for information ("RFIs"), and due diligence questionnaires ("DDQs"), even if the same information is requested by and provided to more than one client, investor, or consultant. Particularly in the institutional setting, clients, investors, and consultants rely on RFPs, RFIs, and DDQs to request information and conduct due diligence that meets their specific needs. We recognize that the Commission wants to prevent investment advisers from evading the Advertising Rule by excluding communications that are nominally directed to one person, but are in fact widely disseminated. However, we believe the Commission can adequately address its anti-evasion concern by relying on Advisers Act Section 208(d). Further, the Commission should balance its anti-evasion concern against the need for clients and investors to conduct due diligence and receive customized information so that they can reasonably evaluate an investment adviser's services, whether in the context of a prospective or existing relationship.

While the "more than one" element should be reincorporated into the definition of an advertisement, our members agree that the definition should focus on communications sent to more

than one "investment advisory client or investor," rather than more than one "person." We request that the Commission acknowledge the fact that investment advisers often interact with many people that represent "one" client or investor. For example, a communication sent to various members of an investment committee or a group of trustees representing a single corporation, pension plan, or trust should still come within the exception for communications directed to one client, even though there are multiple committee members or trustees representing the particular client. The same situation may apply if a client is working with a consultant. In that case, a communication to consultants or other agents acting on behalf of a client or investor should also fall within the exception for one-on-one communications. Further, investment advisers often view multiple accounts, which may or may not be established in the name of different individuals or legal entities, together to comprise a single relationship. Similarly, many advisers develop investment proposals based on multiple related accounts that are part of a single family, household, or institutional relationship. A particular communication should not be considered an advertisement just because it is directed to more than one person or because it relates to multiple accounts that comprise a single client or investor relationship.

We recognize that the Commission has tried to reduce the impact of including one-on-one written communications in the definition of an advertisement by excluding such communications from the internal review and approval requirements. However, the exception from prior review and approval does not minimize the impact of including one-on-one communications in the definition of an advertisement. The individuals who are communicating with clients and investors daily will not necessarily be in the best position to determine whether their communications would be considered advertisements or would comply with the technicalities of the Advertising Rule, and given the high volume of one-on-one communications, it is unlikely that pre-review by an expert will be feasible prior to distribution. The result is that many advisers will be compelled to treat all one-on-one communications as an advertisement. This will subject all correspondence with clients and investors to the general prohibitions (including the requirement to include risk disclosure) and recordkeeping requirements. Thus, including one-on-one communications in the definition of an advertisement potentially would result in a chilling effect on adviser communications, while dramatically increasing compliance burdens.

B. The definition of an advertisement should exclude communications by intermediaries that are not under the direction or control of the investment adviser.

The Proposed Rule would define an advertisement to include all communications "by or on behalf of" an investment adviser. This would include communications disseminated by affiliates, intermediaries, solicitors, and other third parties. SIFMA AMG respectfully submits that any communication disseminated by intermediaries that is not under the direction or control of the adviser should not be deemed to be an advertisement.

The SEC requests comment on whether advisers routinely use intermediaries to communicate with clients and investors, and whether advisers would be able to comply with the "by or on behalf of" element through practices they currently use in communicating through intermediaries. Advisers routinely rely on intermediaries to communicate with prospective and existing clients and investors. In the institutional investment advisory space, the use of consultants is pervasive. Many wrap and separately managed account programs are distributed exclusively through intermediaries, and it is common in the managed account space for advisers to provide commentary about their investment

strategy and performance to other managers or sponsors whose client's they serve. Investment advisers also commonly provide commentary and performance information to data aggregators that consolidate information from various sources to provide risk or performance reports to investors. Similarly, in the private fund space, investment advisers often rely on placement agents to offer interests in private funds.

We agree that in these situations where investment advisers are using intermediaries to communicate with prospective and existing clients and investors, investment advisers should be able to comply with this element of the Proposed Rule through existing practices. However, we wish to clarify that the existing practices generally are limited to ensuring that any materials the investment advisers themselves produce comply with the Advertising Rule before they are provided to the intermediary and by enforcing contractual provisions that prohibit intermediaries from disseminating any information that was not created or approved by the adviser. There should be no expectation that investment advisers will take affirmative steps, including contacting clients or investors to determine whether the intermediaries are complying with the terms of their agreements, in the absence of red flags or other circumstances under which an investment adviser knows or has reason to know that an advertisement contains an untrue statement of a material fact or materially misleading information that would be fraudulent or deceptive under Advisers Act Section 206. Aside from attempting to enforce contractual provisions, advisers cannot be responsible for the redistribution of content by intermediaries and their agents. Such activities are not subject to the direction or control of the adviser.

At a minimum, the broad interpretation of "by or on behalf" should exclude communications by intermediaries whose practices merely involve introductions between investors and who will not receive payment of cash compensation or non-cash compensation that is tied to the success of the introduction. These communications are not in furtherance of true solicitation or selling activity.

C. The definition of an advertisement should not extend to communications by employees and other associated persons who are acting in their personal capacity.

SIFMA AMG is also concerned that the concept of "by or on behalf" of an investment adviser threatens to encompass the personal use of social media by employees and other associated persons. We request that the Commission clarify that the definition of an advertisement does not extend to personal social media posts that reference an individual's employer or their work life. If an employee posts an informal reference to a work charity event, a farewell party for a fellow employee, or bring your dog to work day on their LinkedIn site, that should not be considered an advertisement. Employee posts about participation in industry panels or conferences, or the announcement of a new job opening should not be considered adverting if the post does not mention the firm's advisory services. Similarly, employees and other individuals associated with an investment adviser should be able to re-tweet, re-post, or otherwise redistribute content the investment adviser has approved and posted on its own social media channels as long as the employee or associated person does not include additional commentary designed to offer or promote the firm's advisory services. The prospect of subjecting such content to the specific requirements of the Advertising Rule, including the prior review and approval and recordkeeping obligations, would make all personal social media activity completely infeasible.

We differentiate the activities described above from a situation where an individual is authorized to speak on behalf of the investment adviser or where an individual acting in a marketing or sales capacity uses their personal social media channels to promote the firm's advisory products and services. Most advisers already have policies and procedures that would treat this type of content as an advertisement distributed on behalf of the adviser.

D. Third-party content should not be subject to the Advertising Rule if investment advisers edit such content based on objective factors or to remove profane or unlawful content.

In the context of social media, the Commission requests comment on whether it should allow advisers to edit third-party content under certain circumstances without such editing causing the content to be "by or on behalf of" the adviser. Advisers absolutely need the flexibility to develop and maintain editorial policies that allow them to assert control over third-party content in appropriate situations. This includes the ability to develop pre-defined, objective criteria that will allow third-party content to be edited or removed if, for example, it is older than five years, or if it includes spam, threats, personally identifiable information, or demonstrably factually incorrect information.[3] Further, advisers should not be required to host profane or unlawful content on their websites. However, the Commission should not define profane or unlawful content. Profanity on the internet is constantly changing and difficult to define. Rather, advisers should have the ability to use their own judgement about what is profane or unlawful - subject to appropriate editorial policies. If a social media post is a complaint, the adviser should be permitted to censor the offending portions of the complaint (e.g., curses, slurs) while maintaining the substance. In contrast, advisers should be permitted to remove statements that are just obscene or offensive, or which the adviser reasonably believes to be part of a negative campaign by non-clients (e.g., trolls, review bombs).

Many advisers already publish content guidelines or terms and conditions that govern third-party content. Accordingly, it is not necessary to require that advisers publish their editorial policies or put users on notice that certain content has been edited. Rather, advisers should be required to document such editorial policies as part of compliance policies and procedures. Under Advisers Act Rule 206(4)-7, any such editorial policies would be subject to periodic testing to ensure that advisers are only editing or removing content that complies with the policy.

E. The definition of an advertisement must exclude communications designed to obtain or retain existing clients or investors.

The proposed definition of an advertisement includes communications that are designed to "offer or promote" the adviser's services and to "obtain or retain" investors. The SEC requests comment on whether it is appropriate to treat communications as "advertisements" when the persons receiving them are already clients or investors that benefit from the other protections of the Federal securities laws. SIFMA AMG submits that is it not appropriate to include communications that are designed

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[3] This is consistent with the approach the Division of Investment Management has taken in concluding that the publication of public commentary that has been edited would not undermine the independence of a social media site where the website maintains content guidelines that prohibit "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"). *See Guidance on the Testimonial Rule and Social Media*, IM Guidance Update No. 2014-04 (March 2014).

to retain existing clients and investors as advertisements. This approach expands the definition of an advertisement to include virtually every communication directed to an existing client or investor. At the same time, the exceptions for account information and educational information are too narrow to be meaningful. The Commission must remove the "obtain or retain" prong from the definition of an advertisement.

Every communication or interaction with an existing client or investor is designed, in part, to retain the client or investor. As a result, there is no way to distinguish communications designed to obtain retain existing clients or investors from those that are provided in the ordinary course of business to service existing clients or investors. Depending on the investment adviser, clients and investors may interact with a number of different professionals and groups across the firm. Advisers would have to develop a process to monitor all verbal, written, and electronic communications between clients and investors and the adviser's sales, client service, account management, investor relations, portfolio management, account opening and on boarding, and operations groups, among others. Even if all of these communications are not subject to the prior review and approval requirements, investment advisers would still have to develop a process to identify, review, and monitor these communications and ensure that they comply with - at a minimum - the general prohibitions of the Advertising Rule.

SIFMA AMG is also concerned that the application of the Advertising Rule to communications used to obtain and retain existing clients and investors will prevent advisers from distributing valuable information to clients and investors. For example, an adviser might wish to provide information on the tax consequences of liquidating an investment. It may also wish to send out a communication to existing clients and investors following a market event urging calm or explaining the potential impact on client portfolios. This information may be very useful to a client in considering their options. However, because these communications urge clients and investors to hold existing investments, they likely would be considered advertisements. Treating these types of communications as advertisements could have a chilling effect on advisers' willingness to communicate with clients and investors and provide useful information. To the extent that such communications need to be reviewed and approved before they are disseminated, that process could also prevent important information from being distributed in a timely manner.

Further, it is not clear that the Commission is on firm legal ground in asserting that communications designed to "obtain and retain" clients and investors are covered under the existing Advertising Rule. The Proposing Release cites to the Munder Capital Management no-action letter to support the staff's position that "materials designed to maintain existing clients ***should*** be considered to be advertisements under the current rule's definition."[4] However, that no-action letter actually addressed an entirely different issue, which was whether portfolio transaction information directed to mutual fund shareholders would be subject to the Advertising Rule. The letter does reference the "retain" concept, but offers no discussion or analysis. In our view the Munder Capital Management no-action letter stands for the proposition that investment company sales literature that reflects only services provided to mutual funds, and not to an investment adviser's other clients, is not considered an advertisement for advisory services under Advisers Act Rule 204(4)-1(b).[5]

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[4] *Munder Capital Management*, SEC Staff No-Action Letter (May 17, 1996).

[5] The case law precedent cited to support the Commission's position is equally weak. Neither case analyzes whether communications sent to existing clients and investors should be considered an advertisement within the meaning of Advisers Act Rule 206(4)-1.

The proposed exceptions from the "obtain or retain" prong of the definition are as narrow as the definition is broad. The Proposing Release is clear that "information typically included in an account statement, such as inflows, outflows, and account performance" would not be considered an advertisement. However, the Commission seems to limit the concept of account information to quantitative data included in account statements and transaction reports. Such materials already would be excluded from the definition of an advertisement because they are required by statute or regulation, so we do not find this exception meaningful. Moreover, the exception for account information would not include a narrative explanation such as a market commentary, an investment outlook, or a performance review, which clients and investors expect to receive. Similarly, the Proposing Release indicates that "materials that provide general educational information about investing and the markets" would not be viewed as offering or promoting an adviser's services or seeking to obtain or retain investors." However, the example the Commission provides in the Proposing Release relates to the distribution of third-party content - the dissemination of a newspaper article. We do not believe this exception would be meaningful if it is only intended to cover third-party content that is not developed by the adviser.

We request that the Commission remove the "obtain or retain" prong of the definition because it is over-inclusive. Rather than the content of the communication (e.g., whether it includes quantitative account information or educational information), the Commission should focus on the context and intent of the communication. Communications designed to "offer or promote" investment advisory services or to "obtain or retain" clients and investors should be subject to the Advertising Rule if that is the intent of the communication. For example, a communication used to cross sell a new product or service to an existing client should be considered an advertisement. However, communications that are sent to existing clients and investors to inform them about the performance of their portfolios, to explain the impact of recent market events, or to service clients and investors are not offers of advisory services - these communications are *part of* the advisory services.[6] The Commission has adequate tools to address communications directed to existing clients and investors under the anti-fraud provisions of Advisers Act Sections 206(1) and (2) and Rule 206(4)-8.

F. The definition of an advertisement should exclude "brand content" and other communications that do not offer or promote investment advisory services.

The Proposing Release states that under the Advertising Rule, "promotional materials are advertisements, even if the content does not explicitly 'offer' investment advisory services or participation in a pooled investment vehicle." We request that the Commission clarify that, notwithstanding this comment, the distribution or redistribution of brand content is not considered to be an advertisement. Brand content refers to communications about an investment adviser's culture, philanthropy, community activity, social activism, diversity and inclusion activities, and other activities that relate to the brand generally, but that do not identify financial products or services, including investment advisory services.

In addition, we request clarification that communications containing educational content, market commentary, and thought leadership are excluded from the definition of an advertisement so long as they do not specifically discuss a firm's investment advisory services or the benefits of engaging an

[6] *See Investment Counsel Ass'n. of America*, SEC Staff No-Action Letter (Mar. 1, 2004).

investment adviser. Likewise, materials that promote non-advisory services offered by the adviser, such as the free availability of online calculators or tools that do not offer advisory services, should not be subject to the requirements of the Advertising Rule. Although such communications may promote the firm or the brand generally, they do not offer or promote advisory services.

G. The application of the Advertising Rule to communications directed to investors in pooled investment vehicles is duplicative and unnecessary.

The proposed definition of an advertisement would extend to communications directed to investors in pooled investment vehicles, with the exception of advertisements and sales literature relating to registered investment companies ("RICs") and business development companies ("BDCs"). We question why the Proposing Release focuses on the potential overlap with Advisers Act Rule 206(4)-8 and, in the case of RICs and BDCs, Rules 156 and 482 under the Securities Act of 1933, but does not address the fact that communications relating to interests in private funds distributed by a broker-dealer are already subject to a parallel system of regulation under FINRA Conduct Rule 2210. We request that the Commission explain the rationale for subjecting such investor communications to both the Advertising Rule and FINRA rules governing communications with the public.

SIFMA AMG believes that requiring communications relating to the sale of interests in private funds to comply with both regulatory regimes is duplicative and unnecessary. There is no distinction between communications that promote the advisory services provided to a pooled investment fund advised by the investment adviser and communications that promote the sale of the fund itself. Generally, if a communication mentions the fund, the communication relates to the sale of a security and would be covered by FINRA requirements if distributed by a broker-dealer. The result is that the Commission is subjecting the same communication to two different - and in some cases inconsistent - regulatory regimes. This duplication is further exasperated by the fact that under the "by or on behalf of" prong of the definition of an advertisement, a fund communication distributed by an affiliate or intermediary that is registered as a broker-dealer would be considered an advertisement under the Advertising Rule. Thus, a fund communication delivered exclusively by a broker-dealer that refers to interests in a private fund managed by an adviser would be required to comply with both the Advertising Rule and FINRA rules.

In order to eliminate the application of duplicative and inconsistent regulatory regimes, SIFMA AMG requests that the Commission clarify that compliance with FINRA requirements relating to advertisements designed to sell interests in pooled investment vehicles satisfies the Advertising Rule.[7] We believe that this approach is consistent with the approach the SEC is taking for communications relating to RICs and BDCs, each of which has been excluded from the definition of an advertisement to the extent they are within the scope of Rule 482 or Rule 156 under the Securities Act. We view the FINRA standards as being an equally meaningful parallel set of regulations. Where a broker-dealer is involved in the sale of a pooled investment vehicle it should be reasonable to rely on the standards set forth in FINRA Rule 2210.

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[7] This exception should not be limited to "pooled investment vehicles" as defined in Rule 206(4)-8 (any investment company as defined in Section 3(a) of the Investment Company Act of 1940 or that are excluded from that definition by either Section 3(c)(1) or Section 3(c)(7)). Instead, the exception should extend to any pooled investment vehicle that would be within the meaning of Section 3(a) were they offered in the United States (e.g., UCITS funds), including Section 3(c)(3), 3(c)(5), and 3(c)(11) funds.

2. Specific Exclusions from the Proposed Definition of an Advertisement

We understand that the Proposed Rule would exclude certain communications from the definition of an advertisement. Below we respond to specific requests for comment relating to the proposed exclusions and identify additional categories of communications that should be excluded from the definition.

A. All live oral communications should be excluded from the definition of an advertisement, regardless of whether they are broadcast.

The SEC requests comment on whether the exclusion from the definition of an advertisement should extend to live oral communications that are broadcast. The exclusion should extend to all "live" oral communications, regardless of whether they are broadcast. It is not clear how to define or differentiate communications that are broadcast or "widely disseminated" from those that are not. Further, we do not believe that the framework for advertisements should be applied to extemporaneous oral communications.

The Commission states that the proposed approach is conceptually similar to FINRA's approach to "public appearances" in Rule 2210, which generally subjects members' unscripted public appearances to only the rule's general content standards, and requires members to comply with all applicable provisions of the rule for any scripts, slides, handouts, or other written materials used in connection with the public appearance. However, unlike the Commission's approach, the FINRA concept of a "public appearance" includes unscripted participation in live events - irrespective of whether the appearance is broadcast. This is an important distinction. The FINRA standards do not distinguish between public appearances that are broadcast and those that are not. Instead, it takes a more pragmatic approach that strikes a reasonable balance between investor protection and the practical limitations of public appearances.[8] The Commission should do the same.

SIFMA AMG's members have executives, chief investment officers, and portfolio managers that regularly interact with the press and provide interviews and commentary that is distributed through a variety of media outlets - both traditional media outlets like television, streaming video, and other interactive electronic forums. Moreover, such media exposure, commentary, interviews, and public speaking engagements generally focus on market conditions, economic and government policy topics, and industry trends that are "of the moment" and transitory in interest. It is simply not feasible to subject live oral communications to the specific requirements or the general prohibitions set forth in the Advertising Rule, or to the related record keeping requirements, nor is additional regulation required under these circumstances. Live oral communications are already subject to the general anti-fraud provisions under Advisers Act Section 206.

B. The exception for unsolicited requests should be expanded to cover additional information provided in response to an unsolicited request for information.

The Proposed Rule excepts unsolicited requests from the definition of an advertisement; however, the exception is limited to the specific information requested by the client or investor and would exclude a communication to a retail person (as defined in the Proposing Release) that includes

[8] *See* NASD Notice to Members 01-45 (July 2001).

performance results, or a communication to any person that includes hypothetical information. We request that the Commission reconsider the limitations imposed on the provision of "specified information." We also request that the Commission clarify that an unsolicited request may be submitted by a client or investor directly, or through an intermediary. The Commission references RFPs, RFIs, and DDQs as examples of the type of information that may be provided under this unsolicited request exception. However, the current exception is so narrowly drawn that it is unlikely that responses to RFPs, RFIs, and DDQs could fit within this exception and we continue to believe that it is critical that prospective clients and investors continue to have access to appropriate information to conduct due diligence about investment advisers, even if the same information is requested by and provided to more than one client, investor, or consultant. For this reason, we reiterate our request that the Commission reinstitute the one-on-one exception from the definition of an advertisement.

The members of SIFMA AMG request that the Commission expand the exception to permit advisers to provide additional information beyond what is specifically requested if the adviser believes such additional information is reasonably related to a client's request, or if such additional information is consistently provided by the adviser in response to similar client requests. There may be factors unknown to the requestor that require additional information in order to provide a proper and complete response, even if the response would not be misleading in its absence. If including that information would cause the communication to become an advertisement, it could have a chilling effect on adviser communications, ultimately reducing consumer's access to information about their available choices in products and services. In addition, information that is routinely made available to clients and investors on a confidential basis through data rooms, for example, should not be considered an advertisement merely because it is considered "additional information" that was not specifically requested. It is not uncommon, particularly in the private fund context, for data rooms to contain pitch books, fact sheets, legal and entity formation documents, financial statements and other materials typically associated with investor due diligence. Advisers need additional flexibility to provide the information they believe would be most appropriate to a prospective or existing client or investor, without the need to consider whether such "additional information" could be deemed to be an advertisement.

Finally, in response to the Commission's request for comment, we request that the Commission take the position that an existing or prospective client or investor may submit an unsolicited request directly to the investment adviser, or through an intermediary such as a consultant. As discussed above, institutional clients and investors routinely rely on consultants and other intermediaries to interface with investment advisers. In addition, institutional consultants routinely request that investment advisers enter performance data and provide other detailed information to populate databases that the consultants and their clients use to run manager searches.

C. ***All legally required filings should be excluded from the definition of an advertisement, regardless of content.***

SIFMA AMG believes that statutory or regulatory notices, filings or other communications required to be provided to clients and investors under Federal or state law should be excluded from the definition of an advertisement - regardless of whether the content of such communication is specifically required. The Commission's proposed approach would limit the exception to information specifically required to be provided under applicable law. We respectfully submit that the Commission's approach is not feasible for a number of reasons. First, compliance professionals

do not necessarily have the expertise or resources to review all regulatory communications to evaluate whether they contain information that is not specifically required by law, and to evaluate whether such content offers or promotes the adviser's services. Second, it may be difficult to identify what is actually "required" in a regulatory filing. Investment advisers take varying interpretive positions on how best to answer a particular question and the level of detail required to be provided in a regulatory filing. Third, investment advisers are already subject to additional legal duties and potential liability that attaches to the information included in regulatory filings. As a result, we believe it is unlikely that advisers would include excess information in regulatory filings in order to avoid compliance with the Advertising Rule. The inclusion of excess information would open them up to additional regulatory risk and would potentially violate Advisers Act Section 208(d).

D. The exclusions from the Advertising Rule should be expanded to include all one-on-one communications and internal communications.

The SEC requests comment on whether the proposed exclusions sufficiently describe the types of communications that should not be subject to the requirements of the Advertising Rule. In particular, the SEC asks if it should provide an exclusion for all one-on-one communications made by an adviser to its clients, including written communications. As discussed above in section 1.A, there absolutely should be an exclusion for all one-on-one communications, and the concept of a one-on-one communication should be interpreted to mean a communication with a particular client or investor, rather than one "person."

In addition, we request that the Commission exclude internal communications and "internal use only material" from the definition of an advertisement, even if such communications relate to internal education and training. Such internal communications are not designed to offer or promote advisory services, and do not raise the investor protection considerations associated with communications directed to prospective or existing clients and investors.

3. General Prohibitions

The Proposed Rule contains a series of general prohibitions that are designed to prevent fraudulent, deceptive, or manipulative acts. In general, SIFMA AMG supports the general prohibitions and believes that the Commission has appropriately incorporated a materiality standard into the general prohibitions. However, we wish to clarify the application of these general prohibitions in certain circumstances. In addition, we urge the Commission to reconsider its position on the use of hyperlinks for purposes of addressing disclosure. We believe that the Commission's approach to hyperlinks is unduly restrictive and inconsistent with statements elsewhere in the Proposing Release that the Commission is attempting to embrace technological innovation, as well as with recent adoption of Form CRS.

A. Whether an adviser can substantiate a particular claim or statement should be evaluated at the time the claim or statement is made.

SIFMA AMG submits that whether an investment adviser can substantiate a particular claim or statement should be determined at the time the particular claim or statement is made. Although we recognize that advisers have an obligation to ensure that their advertisements continue to be appropriate, we do not believe that reasonable claims or statements should be subject to hindsight

criticism based on subsequent events. For example, realized poor performance could make risk statements appear insufficient with the benefit of hindsight.

B. We request clarification that the prohibition on misleading implications and inferences does not prevent the use of advertisements that contain awards or are reprints or redistribution of third-party content.

The Proposing Release references the use of "ratings" as an example of a statement or claim that likely would require the inclusion of additional information to ensure that it did not create misleading implications or inferences. We believe that the reference to ratings was simply an example and was not in any way intended to limit the types of statements or claims that may be included in advertisements. Specifically, we request that the Commission confirm that investment advisers may continue to refer to awards in advertisements so long as the advertisement contains appropriate disclosure to balance the communication and prevent any misleading implications or inferences.

In addition, we request confirmation that advisers may continue to reprint or link to articles printed in independent publications so long as they do not create implications or inferences that are false or misleading.

C. We urge the Commission to reconsider the approach to whether information presented through hyperlinks would be sufficient to "clearly and prominently" disclose material risks or other limitations associated with the adviser's services.

The Proposed Rule would prohibit advertisements that "discuss or imply any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without clearly and prominently discussing any associated material risks or other limitations associated with the potential benefits." The commentary in the Proposing Release indicates that "it would not be consistent with the clear and prominent standard to merely include a hyperlink to disclosures available elsewhere." The Commission then goes even further to contemplate that it may be acceptable to link to disclosures elsewhere if the adviser had reasonable assurance that the investor would access or view the disclosures - such as by providing them *before* the relevant content and requiring the investor to acknowledge their review *before* accessing the substance of the advertisement. We find this position surprising and completely inconsistent with the numerous statements throughout the Proposing Release that the Commission is attempting to modernize the Advertising Rule to recognize developments in technology. To the contrary, this approach to disclosure completely fails to recognize the creativity and flexibility of electronic media and the increasing reliance on digital advisory services and the use of mobile applications to access advice.

SIFMA AMG requests that the Commission clarify that the use of hyperlinks is not limited to circumstances under which the adviser can be assured that the client or investor has accessed the disclosure. However, we do believe that it would be useful to identify certain standards that investment advisers could look to in considering whether their disclosure meets the clear and prominent standard. For this purpose, we would look to the Commission's own guidance in

adopting Form CRS[9], as well as recent FINRA guidance relating to disclosure innovations in advertising and other communications with the public.

In adopting Form CRS, the Commission referenced one commentator who "endorsed electronic, including mobile, formats as inherently easier to navigate and use in a layered approach and asserted that the relationship summary would be more engaging to investors, and thus more effective as a disclosure, if the Commission encouraged more creative use of electronic media."[10] General instruction 3.A to Form CRS itself lists a number of different tools firms may use to "enhance a retail investor's understanding of the material in the relationship summary. These different tools include, video or audio messages, mouse-over windows, pop-up boxes, and chat functionality among other things. Further, given the proliferation of mobile applications to access advice, tools such as carousel ads, hover ads, collapsible fields and scroll boxes, are particularly effective in delivering disclosures in mobile or tabular format.

Moreover, we request that the Commission consider embracing innovative design techniques that tailor the level of explanation and information provided in communications to the journey of a potential user. These approaches, sometimes referred to as "progressive" or "responsive" disclosure, stage disclosures based on the user's interest. For example, an adviser should be able to make a claim, so long as the claim is not false or misleading, yet prominently present the substantiation on the following page - *after* the user has clicked on the advertisement and demonstrated interest. We believe that these and similar technological innovations are in keeping with the Commission's embrace of technological innovation in adopting Form CRS. However, not six months after adopting Form CRS, the Commission seems to be taking the opposite approach and concluding that electronic media is not effective to deliver disclosure unless the disclosures actually precede delivery of the advertisement.

We encourage the Commission to take a more flexible approach to the presentation of disclosures consistent with FINRA Regulatory Notice 19-31 and the Federal Trade Commission ("FTC") guidance on hyperlinks. FINRA has recognized that "there are multiple ways to address the prominence of required information, and electronic media and design innovations may open new possibilities."[11] We commend the principles set forth in the FINRA guidance to the Commission, including:

- Using technology to customize the level of explanation and information provided;

- Using various features such as icons, illustrations, cartoons, animations, short videos, pictograms, and other medial and emerging technologies to alert investors about important information and disclosure;

- Relying on more limited and efficient disclosure that is appropriate to the content of the communication;

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[9] *Form CRS Relationship Summary; Amendments to Form ADV*, Advisers Act Release No. 5247 (June 5, 2019) ["Form CRS Adopting Release"].

[10] Form CRS Adopting Release at n.149.

[11] FINRA Regulatory Notice 19-31 at Question 2.

- Incorporating disclosure into the body of the marketing message; and

- Distinguishing between promotional and non-promotional communications.

Further, we endorse the FTC guidelines regarding effective disclosures through hyperlinks and believe they provide a far more appropriate way to address the Commission's concerns around hyperlinks.[12]

4. Testimonials, Endorsements, and Third-Party Ratings

The Proposed Rule would permit investment advisers to use testimonials, endorsements and third-party ratings in advertisements, subject to the rule's general prohibitions and certain additional conditions. The Proposed Rule defines a testimonial to mean "any statement of a client's or investor's experience with the investment adviser or its advisory affiliates." An endorsement refers to "any statement by a person other than a client or investor indicating approval, support, or recommendation of the investment adviser or its advisory affiliates."

A. The definition of testimonials and endorsements should only extend to opinions or statements that are explicitly about the investment advisory services or capabilities of the investment adviser.

We request that the Commission revise the definitions of a testimonial and endorsement to make it clear that such opinions or statements must refer directly to the investment advisory services of the investment adviser in order to be subject to the Advertising Rule. Many investment advisers provide services that are not advisory in nature and do not relate to securities. Additionally, as currently drafted, opinions or statements that speak to an investment adviser's soft skills constitute a testimonial or endorsement. We do not believe that statements or opinions that commend, for example, an adviser's active listening, implicate the same concerns and should be subject to the Advertising Rule.

Additionally, the Commission states that "cherry picking testimonials, or otherwise selecting only using the most positive testimonials available about an adviser, would not be consistent with the general prohibition in the proposed rule." We respectfully submit that advisers need additional flexibility in determining how to utilize testimonials in advertisements for a couple of reasons. First, in the context of online and social media platforms, requiring advisers to address any negative comments in order to use a positive comment, would effectively eliminate the adviser's ability to use any testimonials. Secondly, this is counter to marketplace experience. Most users understand that there are often is a range of reviews provided through social media. Generally speaking, users would not take highlighting a positive review to mean that there are no negative reviews.

Further, the Commission does not address why it has extended the definition of testimonials and endorsements to cover statements and opinions about advisory affiliates. Many investment advisers

[12] The FTC provides guidance on how to make effective disclosures through hyperlinks, which provide that if a hyperlink: (i) is obvious; (ii) is labelled 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.

have multiple affiliates that provide a range of products and services that do not involve the provision of investment advice, or for which they would otherwise be exempt from registration as an investment adviser. Statements or opinions about advisory affiliates should not implicate the Advertising Rule.

B. The distinction between testimonials and endorsements has to be evaluated at the time of the opinion or statement.

Because the distinction between whether a statement is a testimonial or an endorsement depends on the status of the speaker, we wish to clarify that the determination of whether the speaker is a client or a non-client must be determined at the time of the statement or opinion. Prospects will, of course, become clients and vice versa. It is not feasible for an investment adviser to continuously update disclosure as the status of the speaker changes.

Additionally, in the context of social media, given the prevalence of anonymous reviews and pseudonyms, it may not always be feasible to discern the identity of the speaker, and consequentially, the status of a speaker as a client or non-client. Moreover, attempting to do so may require significant time and careful monitoring by the adviser. We request the Commission clarify that this determination is intended to be applied in a pragmatic manner that strikes a reasonable balance between investor protection and the practical limitations of social media.

C. The obligation to disclose compensation received in connection with testimonials, endorsements, and third-party ratings should be subject to a de minimis threshold.

We request that the Commission implement a de minimis exception that would only require disclosure if the amount of the compensation paid in connection with a testimonial, endorsement, or third-party rating exceeds a certain dollar amount or equivalent value. Please refer to the SIFMA AMG letter commenting on the Solicitation Rule for a discussion of the de minimis threshold.

D. The Commission should narrow the concept of non-cash compensation.

We request that the Commission narrow the concept of non-cash compensation to prevent the need to identify and disclose indirect compensation that would not realistically affect the nature of the testimonial, endorsement or third-party rating. Please refer to the SIFMA AMG letter commenting on the Solicitation Rule for a discussion of non-cash compensation.

5. Performance Advertising

A. The Commission should rely on a principles-based approach to address the distinction between retail and non-retail advertisements.

The Advertising Rule includes specific requirements for the presentation of performance results based on the advertisement's intended audience. We recognize that the Commission considered a number of different alternatives in evaluating how to differentiate between retail and non-retail advertisements. However, we question why this distinction is necessary in a principles-based regulatory framework. The sophistication of the audience has long been considered a factor in evaluating whether advertisements contains any untrue statement of a material fact or are otherwise

false and misleading.[13] SIFMA AMG believes that advisers should continue to be able to review and evaluate the application of the general prohibitions and the general anti-fraud provisions of Section 206 in relation to a range of different facts and circumstances, including the sophistication of the audience. It is not necessary to adopt prescriptive definitions that are inconsistent with a principles-based regulatory regime.

To the extent the Commission believes it is necessary to distinguish between retail and institutional clients and investors by defining a "non-retail person," we urge the Commission to focus on a standard that addresses not only natural person clients and investors, but also the full range of institutions and intermediaries that investment advisers rely on to advertise their services. As noted in the Proposing Release, the definition of a qualified purchaser extends to entities with $25 million in "investments," meaning assets that are held for investment purposes. The definition of a qualified person was designed to identify persons that, based on their investments, has the investment expertise and sophistication necessary to evaluate the risks associated with investing in unregulated investment pools. Accordingly, this standard would not necessarily encompass financial intermediaries that are not investing their own assets, but rather acting on behalf of retail clients and investors. Such intermediaries, which include banks, savings and loan associations, insurance companies, RICs, federal and state registered investment advisers and their investment adviser representatives, broker-dealers and registered representatives of broker-dealers, governmental entities, employee benefit plans, and qualified plans, are covered by the definition of an "institutional investor" under FINRA Rule 2210(a)(4). SIFMA AMG submits that any definition of a non-retail person would have to extend to such intermediaries because investment advisers rely on intermediaries to offer advisory services. Further, communications directed at intermediaries are often inherently different than those aimed at retail clients and investors.

6. Related Performance

The Proposed Rule would permit the use of related performance so long as that performance includes all related portfolios or, if it does not include all related portfolios: (i) the advertised performance results are no higher than if all related portfolios had been included; and (ii) the exclusion of any related portfolio does not alter the presentation of the time periods required to be shown under the Advertising Rule.

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[13] *See, e.g., Anametrics Investment Management*, SEC Staff No-Action Letter (May 5, 1977) (noting that "[w]hether any specific advertisement is or is not misleading depends on all the particular facts relating to the advertisement and the statements contained in it, including (1) the form as well as the content of the advertisement; (2) the adviser's ability to perform what is advertised; (3) the implications or inferences arising from the context of the communication; and (4) the sophistication of the prospective clients"); *Clover Capital Management, Inc.*, SEC Staff No-Action Letter (Oct. 28, 1996); *Investment Company Institute*, SEC Staff No-Action Letter (Sept. 23, 1988); *Investment Adviser Association*, SEC Staff No-Action Letter (Dec. 2, 2005). *See also*, *In the Matter of Spear & Staff, Inc.*, Advisers Act Release No. 188 (March 25, 1965) ("[i]n appraising advertisements … we do not look only to the effect that they might have had on careful analytical persons. We look also to their possible impact on those unskilled and unsophisticated in investment matters."); *In the Matter of LBS Capital Management, Inc.*, Advisers Act Release No. 1644 (July 18, 1997).

A. The Commission should clarify that "related performance" refers to performance generated by a portfolio that is different from the portfolio being advertised.

The Commission asks whether the proposed definitions of "related performance" and "related portfolio" are clear. We respectfully submit that the discussion of composite construction is creating confusion as to what the Commission is referring to when it discusses "related performance." SIFMA AMG requests that the Commission clarify that the discussion of related performance does not refer to the primary performance results generated by the separately managed accounts or pooled investment vehicles that are the subject of the advertisement. Instead, "related performance" refers to the use of performance generated by portfolios that are distinct (but related) to the portfolios that are the subject of the advertisement. We believe this understanding is consistent with the FINRA construct around related performance[14], as well as existing SEC staff no-action guidance.[15]

B. The Commission should rely on the general prohibitions to govern related performance.

Rather than prescribing the circumstances under which related performance may be used, we request that the Commission instead rely on the general prohibitions.[16] In particular, we believe that any concerns about the use of related performance will be addressed under the "anti-cherry picking provisions" of the general prohibitions, including the general prohibition against including or excluding performance results, or presenting time period for performance, in a manner that is not fair and balanced.[17] There may be a wide disparity in the performance of the related portfolios depending on the type of product or account that is used. Instead, advisers should have the flexibility to identify objective criteria that are documented (in policies or procedures) and applied on a consistent basis to exclude certain types of accounts. For example, advisers may exclude

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[14] *See, e.g., Interpretive Letter to Clair Pagnano, K&L Gates LLP*, dated June 9, 2017 (defining related performance as the actual performance of all separate or private accounts or funds (other than the fund that was the subject of the request) that have (i) substantially similar investment policies, objectives, and strategies of the Fund, and (ii) are managed or were previously managed by the Fund's investment adviser).

[15] *See, e.g., IM Guidance Update No. 2013-05 - Disclosure and Compliance Matters for Investment Company Registrants That Invest in Commodity Interests* (August 2013) (stating that "the staff of the Division of Investment Management has previously expressed the view that a fund may include in its prospectus information concerning the performance of private accounts and other funds managed by the fund's adviser that have substantially similar investment objectives, policies, and strategies to the fund, provided that the information is not presented in a misleading manner and does not obscure or impede understanding of information that is required to be included in the fund's prospectus (including the fund's own performance information)" (*citations omitted.)).*

[16] As noted SIFMA AMG does not believe it is necessary to include specific requirements to address the use of related performance. However, if the requirement makes sure that the advertised performance results are no higher than if all related portfolios had been included is retained, we request that the Commission also include the materiality standard that was included in the no-action guidance from which this provision was borrowed. *See Horizon Asset Management, LLC* (pub. avail. Sept. 13, 1996) (requiring the inclusion of all relevant accounts in predecessor performance, "unless the exclusion of any such account would not result in ***materially*** higher performance") (Emphasis added.).

[17] Proposed Rule 206(4)-1(a)(6).

related portfolios that have client constraints and customization that materially impact performance (e.g. a higher allocation to cash or specific holdings) because such portfolios are not consistent with the relevant investment strategy. While such portfolios may be related, they do not provide an accurate representation of the investment strategy, regardless of whether their performance is higher or lower.

Our members are also concerned that the guidance on related performance would exclude the use of representative accounts. We submit that advisers should be able to select representative accounts to illustrate performance, subject to compliance with the general prohibitions and appropriate policies and procedures to ensure that the representative account is selected based on objective, non-performance-based criteria.

7. Hypothetical Performance

The Proposed Rule defines hypothetical performance as "performance results that were not actually achieved by any portfolio of any client of the investment adviser."[18] The Commission identifies three types of hypothetical performance: representative performance, back tested performance and targeted or projected performance. Hypothetical performance is subject to a series of conditions designed to address heightened investor protection concerns associated with the presentation of hypothetical performance. Although we understand and appreciate the Commission's concerns relating to the use of hypothetical performance, we urge the Commission to reconsider its entire approach to hypothetical performance.

A. Given the widespread use of models in the investment management industry, the Commission should clarify the definition of representative performance.

The Proposed Rule defines representative performance to mean performance derived from representative model portfolios that are managed contemporaneously alongside portfolios managed for actual clients. We understand the concept of representative (or model) performance to refer to performance that is generated by investment decisions that are made in real time under existing market conditions, but which do not put actual assets (whether client or adviser) at risk. Although the facts in the 1986 Clover Capital no-action letter contemplated that model portfolios were managed alongside actual client accounts, we believe that reflects the specific circumstances of that letter, where the manager's philosophy was that all clients should own the same portfolio of securities. In the context of the Proposed Rule, however, the "alongside" reference is not clear. We request that the Commission delete the "alongside" reference and simply define model performance as "performance derived from representative model portfolios that are managed by an investment adviser in real time."

In addition, model performance should not be treated as hypothetical because it reflects that actual performance of an investment strategy managed in real time. In this regard, the performance is not "hypothetical." Many advisers serve as model providers to wrap accounts and other advisers. Such model providers would not necessarily have the data on the actual performance of the accounts managed to their models, as they are not acting directly as advisers to the underlying accounts. Moreover, the end-user advisers of these models may make modifications to implementation, which

[18] Proposed Rule 206(4)-1(e)(5).

are outside of the model-provider's control. However, understanding the performance of these models is important to both other advisers (who may want to provide the models), and to their clients (who may want performance data about the models from which they are choosing).

Finally, we wish to clarify that composite performance for a model or strategy that is comprised of actual client accounts managed pursuant to that model or strategy would not be considered hypothetical performance. Such performance may refer to or be managed pursuant to a "model," but that performance is based on decisions made by the investment adviser in managing actual client accounts.

B. The definition of hypothetical performance needs to distinguish between projected performance, which is hypothetical, and targeted performance, which is not hypothetical.

Targeted performance is not the same thing as projected performance. Projected performance refers to the estimated value or performance of a portfolio at some point in the future. It is a hypothetical estimate that is generally based on underlying capital markets assumptions about the future return of asset classes or particular investments. Targeted performance, to the contrary, is a performance goal (or target) that is descriptive of the style of a particular fund or investment strategy. In the institutional setting, targeted performance is a means of categorizing the fund or strategy on a risk/reward spectrum. This enables the client or its consultant to compare it with appropriate alternatives. Targets should not be considered hypothetical performance.

C. The Commission's approach to the use of hypothetical performance effectively eliminates access by retail investors to financial planning and advice tools, retirement calculators, investment proposals, and a range of other materials designed to help investors assess their financial circumstances and investment goals.

The Proposed Rule requires investment advisers to adopt and implement policies and procedures reasonably designed to ensure that hypothetical performance that is included in advertisements is relevant to the financial situation and investment objectives of the person to whom the advertisement is disseminated. Although the Proposing Release makes clear that this determination does not have to be conducted on a client by client basis, we understand that the "condition is intended to ensure that the adviser provides hypothetical performance only where the recipient has the financial and analytical resources to assess the hypothetical performance and that the hypothetical performance would be relevant to the recipient's investment objective." Investment advisers can (and currently do) highlight the assumptions, risks, and limitations associated with the use of hypothetical performance, but the adviser has no way to evaluate whether the client has access to the "financial and analytical resources" the Commission believes are appropriate to assess hypothetical performance. As a result, we fear that the Commission creates an unrealistic standard that effectively prohibits the use of hypothetical performance for retail investors. We are very concerned about this because investment advisers routinely rely on hypothetical information to offer retail investors financial planning and advisory services.

In the retail setting it is common to use projections that are based on statistically valid methodologies (e.g., Monte Carlo simulations) to assist clients and investors in understanding whether the investment of their current assets will allow them to meet future goals - the most

common of which is saving for retirement. Hypothetical information is incorporated into a wide range of financial planning and advice tools, retirement calculators, investment proposals, and other materials designed to help investors assess their financial circumstances and investment goals. It is for this reason that FINRA has long recognized an exception to the prohibition of making predictions or projections of specific investment results for so-called "investment analysis tools."[19] SIFMA AMG submits that advisers should be able to continue to show hypothetical performance, subject to the general prohibitions. In addition, we request clarification that dual registrants may continue to show projections in investment analysis tools prepared in accordance with FINRA Rule 2214.

Similarly, although we understand the importance of ensuring that back tested performance is not represented as actual performance, there are many times where the use of back tested performance is useful, even to retail investors, to understand how a new quantitative strategy may have performed in the past, or to simulate the performance of a portfolio during historical market conditions, or to show performance for a new product that does not have a track record.

8. Portability of Performance

The Proposing Release contemplates that the use of predecessor performance, which refers to the use of performance that was not generated by the adviser disseminating the advertisement (the "Advertising Adviser"), would be subject to the general prohibitions set forth in the Proposed Rule. The Commission requests comment on whether the proposed Advertising Rule should include specific provisions relating to the use of predecessor performance, or whether it is sufficient to rely on the general prohibitions and conditions relating to the use of performance in proposed Rule 206(4)-1(c). SIFMA AMG notes that investment advisers have long been relying on the existing no-action guidance, primarily Horizon Asset Management LLC[20], to evaluate whether the use of predecessor performance is appropriate and not misleading. Further, many investment advisers also adhere to the Global Investment Performance Standards, which provide additional guidance on portability.[21] Accordingly, we do not believe it is necessary to include specific provisions in the Advertising Rule to address predecessor performance results.

We do, however, encourage the Commission to permit investment advisers to continue to use predecessor performance, even in those situations where the books and records of the prior firm are unavailable to the Advertising Adviser. Except in limited circumstances where an investment adviser acquires the firm responsible for generating the predecessor performance, advisers routinely encounter difficulty obtaining records or documents that form the basis for or demonstrate the calculation of the performance within the meaning of Advisers Act Rule 204-2(a)(16). Accordingly, we request that the Commission continue to maintain the flexibility set forth in existing no-action

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[19] *See* File No. SR-NASD-2003-013 - Proposed Interpretive Material Regarding the Use of Investment Analysis Tools (Jan. 31, 2003) (proposing a rule change to allow broker-dealers to use certain investment analysis tools that show the probability that investing in specific securities or mutual funds may produce a desired result).

[20] Horizon Asset Management LLC, SEC Staff No-Action Letter (Sept. 13, 1996).

[21] *See Global Investment Performance Standards*, Guidance Statement on Performance Record Portability (adopted Sept. 28, 2010).

guidance that permits investment advisers to use alternative documentation to substantiate prior performance.[22]

9. Review and Approval of Advertisements

The Proposed Rule would prohibit the investment adviser from directly or indirectly disseminating an advertisement unless the advertisement has been previously reviewed and approved by a designated employee, except in the case of communications that are disseminated only to a single person or household or to a single investor in a pooled investment vehicle, and live oral communications that are broadcast on radio, television, the internet, or any other similar medium.

A. *The SEC should eliminate the prior review and approval requirement and allow investment advisers to retain the flexibility to design their own internal controls.*

SIFMA AMG understands the Commission's desire to ensure that investment advisers have a process in place to review advertisements to promote compliance with the Proposed Rule, as well as a written record to substantiate the operation of that process. However, we do not believe it is necessary or appropriate to require prior approval. The Proposing Release does not explain why the Commission is requiring prior approval and that requirement does not seem consistent with a "principles-based approach." When the SEC adopted Advisers Act Rule 206(4)-7 (the "Compliance Rule") in 2003, it recognized that "advisers are too varied in their operations for the rules to impose [of] a single set of universally applicable required elements."[23] As the Commission itself acknowledges in this Proposing Release, the nature of the investment advisory industry and the technology used for communications continues to evolve. As a result, advisers need the flexibility to adopt and modify internal controls based on the nature of their business, their advertising practices, and the various mediums they use to communicate. There are a number of different controls currently used by advisers. These controls include reviewing templates upfront; spot-checking or conducting a sampling review after distribution; or using a risk-based approach depending on the type of communication. Due to the overly broad definition of "advertisement" in the Proposed Rule, the prior review and approval requirement also creates a "compliance redundancy" for intermediary advisers marketing products or services of another adviser or sub-adviser.[24] Accordingly, we request that the Commission eliminate the prior review and approval requirement and instead provide advisers with the discretion to adopt controls "reasonably designed" to prevent a violation of the Advertising Rule.

The burden of the prior review and approval requirement is compounded by the extraordinarily expansive definition of an advertisement. The costs and benefits analysis is based on the assumption that investment advisers that are light advertisers would create new advertisements and

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[22] *See Salomon Brothers Asset Management Inc. and Salomon Brothers Asset Management Asia Pacific Limited*, SEC Staff No-Action Letter (July 23, 1999); Jennison Associates LLC, SEC Staff No-Action Letter (July 6, 2000).

[23] *See Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Release 2204 (Dec. 17, 2003).

[24] *See* FINRA Regulatory Notice 08-12 (creating "an exception to Rule 2210's registered principal approval requirements for intermediary firms that use the sales material of another firm" based on, among other things, "to eliminate what FINRA regards as a compliance redundancy . . . .").

update them approximately 10 and 50 times per year, respectively. For heavy advertisers, the estimates are based on 50 and 250 times per year. These estimates account for the expanded definition of an "advertisement" and so reflect the volume of advertisements the SEC estimates *after* the Proposed Rule is adopted. SIFMA AMG submits that these estimates are exceedingly low and unrealistic. Based on information submitted by our members, we estimate that the current volume of advertisements - *before* the implementation of any new definition of an advertisement - is up to 31 times greater than the SEC estimate for "light advertisers" and up to 80 times greater than the SEC estimate for "heavy advertisers."[25]

We note that these numbers also do not include servicing communications sent to existing clients, which we expect would substantially increase SIFMA AMG's estimates, nor do they include the review of RFPs and related communications, which generally are not treated as advertisements. The prior review and approval requirement is unprecedented in the investment adviser space and given the significant volume of advertisements, this requirement will cause firms to dedicate significant additional resources and effectively reengineer their entire compliance program for the review and approval of advertisements - including general communications with existing and prospective clients and investors.

Finally, we question whether the SEC has the authority to require the prior review and approval of advertisements under a fraud-based rule. SIFMA AMG members do not believe that the negligent failure to comply with the prior review and approval requirement should constitute an act, practice, or course of business that is fraudulent, deceptive, or manipulative within the meaning of Section 206(4). This is particularly the case in light of the fact that the structure of the proposed Advertising Rule would cause an advertisement to be considered fraudulent if it was not pre-reviewed, even in the absence of any material misstatements or omissions. We request that the Commission explain the basis of its statutory authority to impose the prior review and approval requirement of proposed Rule 206(4)-1(d).

B. The Commission should expand the universe of communications that are excluded from any review and approval requirement that is retained under the proposed Advertising Rule.

As with the proposed definition of an advertisement, the Commission's proposed review and approval requirement is overly broad. Rather than identify and focus on those advertisements that have the potential for the most investor risk, the Commission effectively subjects every investment adviser communication to prior review and approval. We respectfully request that if the Commission does not eliminate the prior review and approval requirement, the exceptions to that requirement should be substantially expanded to cover:

- Correspondence, including e-mail, sent to 25 or fewer people;
- Non-retail advertisements (if this category is retained in the final Advertising Rule);
- Live oral communications, regardless of whether they are broadcast;

[25] Based on feedback from our members, light advertisers reported advertising volumes between 300 to 800 pieces, and heavy advertisers reported advertising volumes ranging from 8,250 to 20,000 pieces for calendar year 2019.

- Interactive social media content and any other communications posted to an interactive electronic forum;
- Responses to RFPs, RFIs and DDQs;
- Non-substantive updates to advertisements that were previously reviewed and approved; and
- Communications that do not specifically identify or promote advisory services.

C. The Commission should provide additional flexibility around the conditions for any review and approval requirement that is retained under the proposed Advertising Rule.

As noted above, investment advisers need the flexibility to adopt appropriate procedures and controls to govern advertising review based on the nature of their business. In many instances, this will be a risk-based review that considers a number of different variables. Accordingly, SIFMA AMG recommends that the Commission permit advertising review to be conducted by a designated "person," rather than a designated employee. Advisers should be able to rely on independent contractors, affiliates, supervised persons, and associated persons who may not technically be employed by the investment adviser. Advisers should also have the flexibility to outsource the advertising review function to a third-party provider. In addition, although the designated reviewer obviously has to be familiar with the Advertising Rule, we wish to clarify that the Commission is not requesting any particular level of experience or education. Finally, our members request that the Commission reconsider its statements in the Proposing Release about the role of legal and compliance personnel. Legal and compliance personnel will, of course, be involved in the advertising review function, but the business units creating the advertisements have primary responsibility for ensuring that the content is created, reviewed, and approved in compliance with the Advertising Rule. It is critical that the Commission not minimize the role of the business in reviewing advertising or specify that advertising review should be conducted exclusively by legal and compliance personnel.

10. Proposed Amendments to Form ADV

The Proposed Rule would amend Part IA of Form ADV to add Item 5.L (Advertising Activities). According to the Release, this information would be used by the examination staff to prepare for examinations and to "review an adviser's compliance with the proposed amendments to the advertising rule, including the proposed restrictions and conditions on advisers' use in advertisements of performance presentations and third-party statements."

SIFMA AMG does not support the addition of Item 5.L. Part 1A is designed to collect factual information about an adviser's business. We recognize the SEC staff uses this information to inform the examination program and to inform its risk-based approach, both in selecting advisers as examination candidates and in scoping risk areas to examine.[26] However, there is a difference between collecting objective data about a firm (e.g., number of clients, regulatory assets under management, number of employees, locations, private funds, control persons) to inform the examination program, and using Part 1A to evaluate compliance and effectively conduct remote

[26] *See 2020 Examination Priorities*, Office of Compliance Inspections and Examinations (Jan. 7, 2020), *available at* https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf.

examinations of investment advisers. The SEC staff should continue to request the information it needs to assess compliance during the examination process, not through Form ADV.

Further, the information the Commission is requesting in Item 5.L is not easily summarized or disclosed, whether in Part 1A or Part 2A. Whether a particular communication is considered an "advertisement" in the first instance is highly subjective based on particular facts and circumstances. Moreover, information about advertising practices is extremely fluid. Depending on the nature of the firm, investment advisers are constantly creating new advertising materials and launching new marketing campaigns. The use of social media and other technology further accelerates both the volume of advertisements and how quickly they may change over time. This raises the compliance risk of saying something in Part 1A or Part 2A that is not precisely on point (either by commission or by omission) and then subjecting the firm to unnecessary liability under Advisers Act Section 207 because the disclosure was inaccurate and inconsistent with rapidly evolving business practices. The inverse is also true. Even if the response to Item 5.L is measured only at a particular point in time (e.g., annually) and is not required to be updated if the response becomes inaccurate,[27] we expect that information to become stale relatively quickly. As a result, we are concerned that the SEC examination staff would be relying on inaccurate information in evaluating compliance with the Advertising Rule and, in the case of disclosure in Part 2A, clients and investors would not receive meaningful disclosure of a firm's advertising practices.

In response to certain of the specific requests for comment, SIFMA AMG does not support the disclosure of the amount or range of compensation an adviser provides in connection with testimonials, endorsements, and third-party ratings. The way in which advisers (like any other business) advertise and the strategies they adopt to do so can be regarded as competitive or sensitive information and requiring disclosure in a public document is not necessary. For the same reason, it would not be appropriate to require advisers to report the amount of compensation paid for referrals - whether on an aggregate basis, per referral, or based on another metric - in Form ADV. This information and the related conflicts of interest is already communicated to those clients and investors to whom it is relevant through the separate disclosure statement required under Rule 206(4)-3.

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[27] General Instruction 4 for Form ADV provides that an investment adviser submitting an other-than-annual amendment is not required to update its response to Item 5, even if the response to that item has become inaccurate.

SIFMA AMG sincerely appreciates the opportunity to comment and your consideration of these views. We stand ready to provide any additional information or assistance that the Commission might find useful. Please do not hesitate to contact either Timothy Cameron at 202-962-7447 or tcameron@sifma.org or Lindsey Keljo at 202-962-7312 or lkeljo@sifma.org with any questions.

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cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson Jr.
The Honorable Hester M. Pierce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

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