July 20, 2020

Via Electronic Filing

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

Re: Investment Adviser Advertisements; Compensation for Solicitations (SEC Rel. No. IA-5407; File No. S7-21-19)

Dear Ms. Countryman:

The Investment Adviser Association (**IAA**)[1] is writing to supplement our previous comments[2] on the Commission's proposed amendments to Rule 206(4)-3 (**Solicitation Rule**) under the Investment Advisers Act of 1940 (**Advisers Act**).[3] We appreciate the many constructive discussions that we have had with Commissioners and staff regarding the Solicitation Rule and our Prior Letter. Following up on questions raised by staff, we are providing additional details regarding the impact that extending the Solicitation Rule to private funds would have on the solicitation of non-U.S. investors in non-U.S. pooled investment vehicles.[4]

While we are not aware of foreign laws or regulations that directly conflict with the proposed amendments, many of our members have expressed concern that expanding the Solicitation Rule to private funds without exempting the solicitation of non-U.S. investors in

[1] The IAA is the largest organization dedicated to advancing the interests of SEC-registered investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *See* Letter from Karen L. Barr, President & CEO, Investment Adviser Association, to the Commission re: Investment Adviser Advertisements; Compensation for Solicitations (Feb. 10, 2020) (**Prior Letter**), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/Comment_Letter_Compendiums/2020/February_10__2020_-_IAA_Advertising_and_Solicitation_Comment_Letter.pdf.

[3] *Investment Adviser Advertisements; Compensation for Solicitations*, 84 Fed. Reg. 237 (proposed Dec. 10, 2019), https://www.sec.gov/rules/proposed/2019/ia-5407.pdf.

[4] The recommendations in this supplemental comment letter are provided in the event that the Commission decides to extend the Solicitation Rule to private fund investors. However, we reiterate the recommendation in our Prior Letter that the rule not apply to the solicitation of private fund investors for the reasons stated therein.

non-U.S. private funds would make it more difficult and expensive for U.S. advisers to manage these funds, creating a material competitive disadvantage for U.S. advisers in non-U.S. markets. For example, many SEC-registered investment advisers provide discretionary investment advice to Undertakings for Collective Investment in Transferable Securities (**UCITS**) and similar funds that are publicly offered to non-U.S. persons under extensive non-U.S. regulatory regimes, as well as alternative investment funds (**AIFs**) and similar funds that are privately offered, but also subject to substantive non-U.S. regulation.[5] These funds are sometimes also offered to certain U.S. investors in reliance on Section 3(c)(1) or 3(c)(7) of the Investment Company Act, including in connection with the contribution of "seed" funds from U.S. advisers and their affiliates, in which case they are "private funds" that would be subject to the Solicitation Rule as proposed.[6] However, UCITS and AIFs are already subject to comprehensive regulation in the EU governing their distribution under the UCITS Directive, the AIFMD, and/or the European Commission's Markets in Financial Instruments Directive and its companion directives and regulations (**MiFID II**).[7]

As a matter of industry practice, many U.S. fund managers enter into distribution agreements with regulated European financial institutions or third-party marketers (**Distributors**) in the EU to market, promote, and distribute UCITS and AIFs to European investors. Distributors include certain distribution "platforms" that provide investors with a choice of multiple investment funds or products.[8] These investors typically invest through nominee or omnibus accounts under a Distributor's institutional name. In exchange for the services that the Distributor provides, a share of the adviser's investment management fee is paid to the Distributor. These payments, commonly referred to as "retrocessions," are analogous in many respects to so-called "12b-1 fees" and direct revenue sharing payments made by fund managers that are paid for distribution and shareholder services with respect to U.S. mutual funds.

Typically, European distribution agreements provide that the ultimate beneficial owners who subscribe to a fund's shares do not have privity of contract with the UCITS or AIF with which their financial institution has placed their assets. The Distributor retains responsibility for KYC, suitability determinations, and recordkeeping, each of which is viewed as a service that

[5] UCITS funds are public open-end pooled investment vehicles available to retail investors and are governed by European Commission Directives, specifically pursuant to the Undertakings for Collective Investment in Transferable Securities Directive (**UCITS Directive**) and regulations promulgated thereunder. Like U.S. mutual funds, UCITS funds have significant investor protection features including investment and leverage limitations, risk concentration limits, management and transparency standards and at least fortnightly if not daily liquidity requirements. AIFs are alternative investment funds that fall under the Alternative Investment Fund Managers Directive (**AIFMD**), which generally are marketed to non-retail investors.

[6] *See* Touche Remnant & Co., SEC No-Action Letter (pub. avail. Aug. 27, 1984); Goodwin Procter & Hoar, SEC No-Action Letter (pub. avail. Feb. 28, 1997).

[7] Guided by the concerns of our members, this letter focuses on European funds and regulations. Similar regulatory regimes exist in most developed countries.

[8] These may be on a recommended or approved list or may be listed without any particular recommendation or endorsement.

enhances the quality of client service received by a fund investor and justifies receipt of retrocession payments under applicable EU regulation. In addition, the EU, the UK, Switzerland, and other European jurisdictions have all promulgated extensive conflict of interest, disclosure, and business conduct laws and regulations modeled after MiFID II.[9]

Under the proposed Solicitation Rule, U.S. investment advisers that pay retrocessions to European Distributors would be obligated to require that these Distributors disclose the compensation arrangements and any related conflicts of interest to the ultimate investors in a manner that satisfied the requirements of the proposed rule. However, we believe that such Distributors are likely to resist or refuse to voluntarily add additional disclosures that are not already required under local regulation to their regulatory burden. If they agree to do so, these Distributors may charge U.S. advisers more than they charge European firms. Furthermore, ultimate beneficial owners do not appear on the fund's shareholder registry and Distributors are not required to – and can refuse to – provide U.S. investment advisers with contact information for their client base. This would prevent U.S. investment advisers from directly providing the required disclosures to the ultimate investors.

The additional disclosures that would be required under the proposed Solicitation Rule would therefore create practical implementation, compliance, and enforcement issues with respect to payments made directly or indirectly to non-U.S. Distributors due to the incompatibility of the rule requirements with local regulations and market practices. We also believe that it would be challenging for U.S. investment advisers to find European Distributors willing to adjust their market practices in order to facilitate the participation of U.S. fund managers in European markets. This exclusion from existing distribution channels would put U.S. fund managers at a significant competitive disadvantage.

UCITS and AIFs are largely offered to and held by non-U.S. persons, and their investors are protected by extensive EU securities (as well as banking, insurance, and pension) regulatory regimes. We do not believe that imposing the Solicitation Rule on the solicitation of non-U.S. investors in non-U.S. private funds represents an appropriate balance between the Commission's interest in remedying harms with a foreseeable substantial effect within the United States and the principles of international comity.[10] Moreover, we note that the Commission retains regulatory

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[9] Under Article 24 of MiFID II, which governs EU investment firms, "non-independent" firms (*i.e.*, firms that offer financial instruments provided by the firm or its affiliates) and UCITS management companies are permitted to receive third-party monetary and non-monetary benefits (inducements) for referrals. Receipt of these benefits is subject to clearly disclosing "the existence, nature and amount of the payment or benefit … in a manner that is comprehensive, accurate and understandable" prior to the provision of the service. Many European financial institutions avail themselves of this provision in order to accept benefits for marketing, promoting, and distributing UCITS and AIFs (*i.e.*, make referrals).

In contrast, firms that provide investment advice on an "independent" basis (recommend only non-proprietary investments) and discretionary portfolio managers may only receive *non-monetary* benefits for referrals and only in limited situations that enhance the quality of the service to the client, subject to well-established disclosure requirements. (Article 12 of Delegated Directive (EU) 2017/593 of 7 April 2016).

[10] *See. e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

and anti-fraud enforcement oversight of U.S. investment advisers operating in non-U.S. jurisdictions through its authority under Sections 203(e), 203(f), and 206(4) of the Advisers Act, regardless of whether it applies the specific requirements of the proposed Solicitation Rule to non-U.S. investors in non-U.S. funds.

In light of the concerns discussed above, we continue to recommend that, if the Commission proceeds with the proposed extension of the Solicitation Rule to private funds, it should at a minimum expressly exclude solicitation of non-U.S. investors in non-U.S. private funds from the requirements of the rule.

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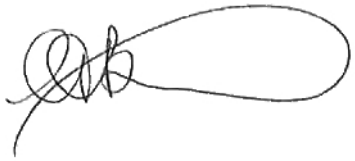
We appreciate the Commission's consideration of our additional comments on the proposed Solicitation Rule and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Associate General Counsel Laura Grossman at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,



Gail C. Bernstein
General Counsel

cc: The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
Dalia Blass, Director, Division of Investment Management