

ADVERTISING CHECKLIST:

**INVESTMENT ADVISERS ACT OF 1940
GLOBAL INVESTMENT PERFORMANCE STANDARDS (GIPS®)
COMMODITY FUTURES TRADING COMMISSION (CFTC) AND
FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)
REGISTERED FUNDS
SEC RULE 156 FOR PRIVATE FUNDS**

MICHAEL S. CACCESE¹

K&L GATES LLP

¹ Michael S. Caccese is K&L Gates' Chairman of the Management Committee. Mr. Caccese focuses his practice in the areas of investment management, including mutual funds, closed-end funds, registered fund of funds, private funds and separately managed accounts, in addition to advising on investment management and broker-dealer regulatory compliance. He works extensively with investment firms on compliance issues, including investment adviser and broker dealer marketing regulations and the GIPS standards. He was previously the General Counsel to the CFA Institute and was responsible for overseeing the development of the GIPS and other standards governing the investment management profession and investment firms. He can be reached at 617.261.3133 and michael.caccese@klgates.com.

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ADVERTISING CHECKLIST: INVESTMENT ADVISERS ACT OF 1940

A. ADVERTISEMENTS. [T]he term “advertisement” shall include any notice, circular, letter or other written communication *addressed to more than one person*, or any notice or other announcement in any publication or by radio or television, which offers:

(1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or

(2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or

(3) any other investment advisory service with regard to securities.

(Rule 206(4)-1 under the Investment Advisers Act of 1940)

Advertising	NOT Advertising
<ul style="list-style-type: none"> ▪ Marketing brochures ▪ Paid advertising in periodicals and other publications ▪ Television, radio or other broadcast advertising ▪ Internet websites ▪ Form letters and mass mailings ▪ Email messages sent to multiple recipients ▪ Audio/videotapes of marketing presentations ▪ Slides used in marketing presentations ▪ Press releases and some interviews ▪ Reprints of third party publications ▪ Questionnaires from independent rating services ▪ Performance presentations used for more than one prospective client ▪ Telemarketing scripts ▪ Internal material that reaches clients 	<ul style="list-style-type: none"> ▪ In person, telephone or other oral conversations ▪ Any written communication that does no more than respond to an unsolicited¹ request by a client, prospective client, or consultant for specific information ▪ Regular account statements & reports sent only to existing clients (but not to solicit new business from prospective or existing clients) ▪ Academic articles that discuss portfolio management methodology, but do not offer advisory services

¹ A solicited request would be the result of, for example, any affirmative effort by an adviser that is intended or designed to induce a client, prospective client, or consultant to request the adviser to provide past specific recommendations, or an advertisement indicating that the adviser is willing to provide past specific recommendations upon request.

B. TESTIMONIALS. Advisers are prohibited from including in any advertisement any direct or indirect reference to testimonials regarding statements of a former, existing or prospective client’s experience or endorsement of the adviser’s services or advice. However, the following are permitted:

1. PARTIAL CLIENT LISTS, so long as:

- clients that are listed were not selected on the basis of performance data;
- criteria for selecting clients are disclosed;
- disclaimer is included that it is not known whether the listed clients approve or disapprove of the adviser or its services; and
- client consent is obtained.²

(Denver Investment Advisors, Inc., SEC No-Action Letter (pub. avail. July 30, 1993))

In the social media context, a list of “friends” or “contacts” of an investment adviser is permissible if:

- the contacts or friends are simply listed as accepted contacts or friends of the adviser; and
- there is no inference that such contacts/friends have experienced favorable results from the adviser’s investment advisory services.

(Division of Investment Management, Securities and Exchange Commission, No. 2014-4, IM Guidance Update: Guidance on the Testimonial Rule and Social Media (Mar. 2014))

2. RATINGS based primarily on client evaluations of the investment advisers, are permitted so long as:

- the rating does not emphasize favorable client responses or ignore unfavorable client responses;
- the rating represents all, or a statistically valid sample, of the client responses;
- the questionnaire sent to clients was not prepared to produce any pre-determined results that could benefit any adviser;
- the questionnaire was structured to make it equally easy for a client to provide a negative or positive response; and
- the research firm did not perform any subjective analysis of the survey results, but rather assigned numerical ratings after averaging the client responses for each adviser.

(DALBAR, Inc., SEC No-Action Letter (pub. avail. Mar. 24, 1998))

² Although client consent is not explicitly required, many states prohibit disclosure of client identity without client consent and the fact that a particular customer or consumer is an advisory client also constitutes nonpublic personal information under Regulation S-P.

Any rating, whether based primarily on client evaluations or otherwise, should adhere to the following conditions in order to avoid being deemed false or misleading under Rule 206(4)-1(a)(5):

- the advertisement should disclose the criteria on which the rating was based;
- adviser should not be aware of undisclosed facts that would call into question the validity of the rating or appropriateness of advertising the rating (e.g., adviser received numerous client complaints relating to rating category or areas not included in the survey);
- adviser should disclose unfavorable ratings (if any) when disclosing favorable ratings;
- advertisement must not state or imply that adviser was a top-rated adviser in a category when it was not rated first in that category;
- advertisements should disclose clearly and prominently the category for which the rating is calculated or determined, the number of advisers surveyed in that category, and the percentage of advisers that received that rating;
- advertisement should disclose that the rating may not be representative of any one client's experience because the rating reflects an average of all, or a sample of all, of the experiences of the adviser's clients;
- advertisement should disclose that the rating is not indicative of the adviser's future performance; and
- advertisement discloses prominently who created and conducted the survey, and (if applicable) that the adviser paid a fee to participate in the survey.

(Investment Adviser Association, SEC No-Action Letter (pub. avail. Dec. 2, 2005))

Mathematical averages of ratings on independent social media sites are permissible if:

- commentators themselves provide the rating of the investment adviser;
- the rating system used is not designed to elicit any pre-determined results that could benefit the investment adviser; and
- neither the independent social media site nor the investment adviser provides a subjective analysis of the commentary.

(Division of Investment Management, Securities and Exchange Commission, No. 2014-4, IM Guidance Update: Guidance on the Testimonial Rule and Social Media (Mar. 2014))

3. ARTICLE REPRINTS, drafted by an unbiased third-party that discuss the investment adviser are permitted, so long as the reprint:

- does not imply the experience of advisory clients;
- does not imply the possibility of a prospective client having an investment experience similar to that of prior clients;

- does not imply the adviser's competence, when there are additional facts, if disclosed, would imply different results from those suggested in the article; and
- is accompanied by disclosure or additional information that, in the absence of which, would otherwise make the article false or misleading.

(Stalker Advisory Services, SEC No-Action Letter (pub. avail. Feb. 14, 1994))

- Investment advisers may reference the fact that public commentary regarding the adviser may be found on an independent social media site, but investment advisers may not publish any testimonials from such a site in non-social media advertisements.

(Division of Investment Management, Securities and Exchange Commission, No. 2014-4, IM Guidance Update: Guidance on the Testimonial Rule and Social Media (Mar. 2014))

4. SOCIAL MEDIA TESTIMONIALS appearing on independent, third-party social media sites are permitted so long as:

- the independent social media site provides content that is independent of the investment adviser;
- there is not a material connection between the site and the investment adviser that would call into question the independence of the site or its commentary; and
- the investment adviser publishes all of the unedited comments appearing on the site regarding the investment adviser.

Investment advisers may also publish testimonials from an independent social media site in a way that allows social media users to sort the criteria so long as:

- the investment adviser publishes such testimonials in a content-neutral manner (e.g., chronologically or alphabetically) which presents positive and negative commentary with equal prominence; and
- any display or sorting of the criteria is done by the social media user (e.g., the investment adviser does not itself sort the commentary).

Investment advisers may publish public commentary from an independent site if that site also features the investment adviser's advertising if:

- it is readily apparent to a reader that the investment adviser's advertisement is separate from the public commentary features on the independent social media site; and
- the receipt or non-receipt of advertising revenue did not in any way influence which public commentary is included or excluded from the independent social media site.

(Division of Investment Management, Securities and Exchange Commission, No. 2014-4, IM Guidance Update: Guidance on the Testimonial Rule and Social Media (Mar. 2014))

C. PAST SPECIFIC RECOMMENDATIONS.

- 1. PERFORMANCE-BASED PAST RECOMMENDATIONS.** Advertisements that make direct or indirect references to past specific recommendations, that were or would be profitable, are prohibited unless the adviser sets forth or agrees in the advertisement to give upon request, *free of charge*, the list of *all* recommendations made by the firm within the immediately preceding period of not less than one year, which must include:

- name of each security recommended;
- date and nature of each recommendation (e.g., buy, sell or hold);
- market price of security at time of recommendation;
- price recommendation was to be acted upon;
- most recent market price of each security listed; and
- the following legend on the first page (in print or type as large as largest print or type used in text of the advertisement or list): “It should not be assumed that the recommendations made in the future will be profitable or will equal the performance of the securities in this list.”

(Rule 206(4)-1(a)(2) under the Investment Advisers Act of 1940)

Clarification: *Note that despite the plain language of Rule 206(4)-1, the SEC staff has taken the position that an adviser may NOT provide a partial list of past specific recommendations accompanied by an offer to provide a complete list. Therefore, an advertisement must contain either a list of all the adviser’s recommendations for the past year OR offer to provide the complete list of those recommendations. Under no circumstances may an adviser include a partial list of select recommendations, even if it offers to provide the complete list separately.*

- 2. PERFORMANCE-BASED PAST RECOMMENDATIONS – BEST AND WORST PERFORMING HOLDINGS.** An advertisement may, however, include references to specific securities that were selected for inclusion in the advertisement based on an objective, mathematical calculation of best and worst performance so long as:

- the best and worst holdings are selected by taking into account consistently the weighting of every holding in a representative account that contributed to the account’s performance during a period of time (the “Measurement Period”);
- the Measurement Period consists of at least a full calendar month, as computed as of the most recent calendar month’s last trading day;
- the presentation of information and number of holdings is consistent from period to period;
- the presentation shows no fewer than a total of ten holdings, including an equal number of the best and worst performing holdings during the Measurement Period (*i.e.*, Top 5/Bottom 5, at a minimum);

- the presentation includes all information necessary to make the information not misleading, including showing the best and worst performing holdings on the same page with equal prominence;
- the presentation includes the following disclosures in close proximity to (*i.e.*, on the same page) the performance information: (i) how to obtain the calculation methodology; (ii) how to obtain a list showing the contribution of each holding in the representative account to the overall account's performance during the Measurement Period; (iii) that the holdings identified do not represent all of the securities purchased, sold or recommended for the adviser's clients; and (iv) that past performance does not guarantee future results; and
- the adviser maintains, and makes available to the SEC staff upon request, records that evidence: (i) the criteria used to select the specific holdings listed; (ii) a list showing the contribution of each holding in the representative account to the overall account's performance during the Measurement Period; and (iii) all supporting data necessary to demonstrate the calculation of the contribution analysis and the appropriateness of the holdings included in each presentation.

(TCW Group, Inc. SEC No-Action Letter (pub. Avail. Nov. 7, 2008))

Clarification: *Note that the advertisement may not show actual performance of the best and worst performing securities, but may show only (1) the average weight of the best and worst performing holdings in a representative account during a specified period; and (ii) the impact of those holdings on the representative account's return overall.*

3. NON-PERFORMANCE BASED PAST RECOMMENDATIONS. Non-performance based past specific recommendations may be included in advertisements so long as:

- recommendations are selected by objective, non-performance based criteria;
- same selection criteria are used each quarter;
- there is no direct or indirect reference to any realized or unrealized profit or losses of named securities;
- adviser maintains supporting records that evidence (i) the complete list of securities recommended by the adviser in the preceding year for the specific investment category covered by the advertisement, (ii) the information set forth in Rule 206(4)-1(a)(2) for each recommendation, and (iii) the criteria used to select the specific recommendations listed in the advertisement; and
- the adviser includes a cautionary legend. (*For example: "The securities identified and described do not represent all of the securities purchased, sold or recommended for client accounts. The reader should not assume that an investment in the securities identified was or will be profitable."*)

(Franklin Management, Inc., SEC No-Action Letter (pub. avail. Dec. 10, 1998))

4. **CHARTS & FORMULAS.** Adviser may not claim that a chart or formula will give certain results or help a person select securities unless the limitations are prominently disclosed. (Rule 206(4)-1(a)(3) under the Investment Advisers Act of 1940)
5. **FREE REPORTS OR SERVICES.** If an advertisement states a service or product is free, it must be free without any limitations or obligations. (Rule 206(4)-1(a)(4) under the Investment Advisers Act of 1940)

D. PERFORMANCE. If the adviser's performance is being advertised, the adviser must adhere to the following principles.

1. **DISCLOSURES.** The adviser must disclose the following:

- effect of material market or economic conditions on results portrayed;
- whether performance includes reinvestment of dividends and other earnings;
- if potential for profit is implied, must disclose the potential for loss;
- if comparison is made to an index, must disclose material facts relevant to the comparison;
- material conditions, objectives, and investment strategies used to obtain the results portrayed;
- results portrayed relate only to a select group of adviser's clients (e.g., representative account), the basis on which selection was made, and effect of practice on results portrayed, if material; and
- any other material factors that affected performance.

(Clover Capital Management, Inc., SEC No-Action Letter (pub. avail. Oct. 28, 1986))

***Clarification:** Note that the SEC clearly states that a disclaimer to the effect of "Past performance is not a guarantee of future results," may not in and of itself, be sufficient to cure a misleading presentation.*

2. **MODEL PERFORMANCE.** If the adviser shows model performance, the following additional disclosures must be made:

- limitations inherent in model results (e.g., model returns may not reflect material economic or market factors);
- material changes in conditions, objectives or investment strategies of the model portfolio during the period portrayed and the effect of those changes (if applicable);
- some or all of the securities or strategies reflected in the model portfolio do not relate, or relate partially, to the services currently offered by the adviser (if applicable); and
- adviser's clients actually had investment results that were materially different from those portrayed in the model (if applicable).

(Clover Capital Management, Inc., SEC No-Action Letter (pub. avail. Oct. 28, 1986))

- 3. HYPOTHETICAL BACKTESTED PERFORMANCE.** “Backtested” performance is the use of theoretical performance applying a particular investment strategy (e.g., quantitative) to historical financial data to show what decisions would have been made if the strategy were employed. Great care should be taken when presenting backtested performance, which is regarded as highly suspect by the SEC. **Backtested returns should only be presented to sophisticated (non-retail) clients.** The following disclosures, at minimum, should be made when presenting backtested performance:

- the backtested performance was derived from the retroactive application of a model with the benefit of hindsight. (e.g., the adviser only began to offer the given service after the performance period depicted by the advertisement);

(*In re* Schield Management Company et al., SEC Release No. IA-1872 (May 31, 2000))

- inherent limitations of data derived from the retroactive application of a model developed with the benefit of hindsight (e.g., performance results do not represent actual trading) and the reasons why actual results may differ;

(*In re* Market Timing Systems, Inc. et al., SEC Release No. IA-2047 (Aug. 28, 2002))

- whether the trading strategies retroactively applied were not available during the periods presented;

(*In re* Leeb Investment Advisors et al, SEC Release No. IA-1545 (Jan. 16, 1996))

- all material economic and market factors that might have impacted the adviser’s decision-making when using the model to manage actual client accounts;
- whether the model has changed materially over the time period presented
- whether the actual performance with client accounts was materially less than the advertised hypothetical results for the same period;
- whether the advertised performance reflects the deduction of advisory fees, brokerage or other commissions, mutual fund exchange fees, and other expenses a client would have paid;
- all material facts relevant to any comparison between backtested performance and its benchmark; and
- potential for loss as well as profit.

(*In re* Patricia Owen-Michel, SEC Release No. IA-1584 (Sept. 27, 1996))

Clarification: In addition, advisers should ensure that the disclosures referenced above are complete and prominent and that any hypothetical backtested performance presented is clearly labeled as such.³

In addition to the disclosures enumerated above, backtested performance in investment adviser advertisements should be presented in a manner that is not otherwise misleading. Therefore, such data must be:

- based on actual historical data rather than assumptions; and
- calculated in a manner fully consistent with the investment strategy that the back-tested data is used to advertise.

(In the Matter of Raymond J. Lucia Companies, Inc. and Raymond J. Lucia, Sr., Administrative Proceeding File No. 3-15006 (Dec. 6, 2013))

4. NET OF FEE PERFORMANCE. Investment adviser performance must be shown after the deduction of advisory fees, brokerage and commissions, and expenses that the client would have paid or actually paid (e.g., foreign taxes) UNLESS an exception applies (see Section C.5. below).

- Custodial Fees.** Custodial fees paid to a bank or other organization for safekeeping client funds and securities do not have to be deducted when the adviser is not responsible for determining the custodial fee.

(Investment Company Institute, SEC No-Action Letter (pub. avail. Sept. 23, 1988))

- Multi-Manager Account Performance.** An adviser that manages only a portion of a client's account may advertise performance figures relating only to that portion of the account so long as performance is shown net of all transaction costs and advisory fees or charges paid to the adviser or its affiliates.

(Association for Investment Management and Research, SEC No-Action Letter (Dec. 18, 1996))

5. GROSS OF FEE PERFORMANCE. Gross of advisory fee performance (not brokerage and commission costs) is permissible under the following situations:

- One-on-One Presentations.**⁴ Gross of fee performance can be shown in one-on-one presentations to pension plans, wealthy individuals and institutions⁵ so long as the presentation:
 - is labeled "one-on-one presentation" and states that the performance reported is gross of advisory fees;

³ See In the Matter of Alpha Fiduciary, Inc. and Arthur T. Doglione, SEC Release No. IA-4283 (November 30, 2015).

⁴ "One-on-one presentations" occur where the participants have an opportunity to discuss and ask questions concerning the type of fees, adviser fees are negotiated, and the conversations are of a confidential and private nature.

⁵ Wealthy prospective clients include wealthy individuals, pension funds, universities and other institutions that have sufficient assets to justify the adviser incurring the costs of a one-on-one presentation.

- includes a representative example in form of table, chart, graph or narrative, showing the compounding effect of advisory fees over a period of time on the value of the client's portfolio; and
- includes the following disclosures:
 - client return will be reduced by advisory and other expenses the client may incur; and
 - adviser's fees are disclosed in Form ADV, Part 2A.

(Investment Company Institute, SEC No-Action Letter (pub. avail. Sept. 23, 1988))

- One-on-One Presentations to Consultants.** Advisers can report performance to consultants so long as the adviser instructs the consultant to provide gross performance results on a one-on-one presentation and accompanies the performance with the disclosures described above under "One-on-One Presentations."

(Investment Company Institute, SEC No-Action Letter (pub. avail. Sept. 23, 1988))

- Side-by-Side Gross and Net of Fee Performance.** Net and gross of fee performance can be advertised so long as the performance information is presented with equal prominence and in a format designed to facilitate ease of comparison along with sufficient disclosure (e.g., gross performance does not reflect payment of advisory fees and other expenses).

(Association for Investment Management and Research, SEC No-Action Letter (Dec. 18, 1996))

- 6. ACTUAL AND MODEL FEES.** Actual fees are to be used by an adviser when presenting investment performance on a net-of-fee basis. However, a model fee can be used if:
- the model fees are equal to the highest fee charged to any account managed in the same investment strategy included in the performance presented for the applicable period;
 - if the advertisement presents net performance that includes wrap and non-wrap fee accounts, the model fee must be equal to the highest fee charged for each type of account;
 - the advertisement must disclose that (i) for each strategy shown, the performance was reduced by the highest fee charged to any client employing that particular strategy during the period under consideration; (ii) actual fees may vary depending upon, among other things, the applicable fee schedule and portfolio size; and (iii) the firm's fees are available on request and also may be found in Part 2A of its Form ADV.

(J.P. Morgan Investment Management, Inc., SEC No-Action Letter (pub. avail. May 7, 1996))

- 7. PORTABILITY.** An advertisement that includes prior performance results of accounts managed by a predecessor would not, in and of itself, be misleading under Rule 206(4)-1(A)(5) of the Advisers Act if:
- the persons who manage accounts at the successor adviser are also primarily responsible for achieving the prior performance results;

- the accounts managed at the predecessor firm are so similar to the accounts currently under management that the performance results would provide relevant information to prospective clients of the successor adviser;
- all accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance;
- if all accounts that were managed in a substantially similar manner are not advertised, the advertisement discloses the criteria for selecting the accounts presented and/or the reasons why certain accounts are excluded (*e.g.*, sufficient records are not available to substantiate prior firm performance of certain accounts);
- performance dates back only to the date as of which the current portfolio manager(s) began managing the account at the predecessor firm;
- the advertisement is consistent with staff interpretations with respect to the advertisement of performance results;
- the advertisement includes all relevant disclosures, including that the performance results were from accounts managed at another entity; and
- the successor adviser has records sufficient to comply with Rule 204-2(a)(16) in connection with the performance of accounts managed at the predecessor adviser at which the firm's portfolio managers previously managed accounts.

(Horizon Asset Management, LLC, SEC No-Action Letter (pub. avail. Sept. 13, 1996))

8. RECORDKEEPING. Each adviser is required by Rule 204-2 to make and kept true, accurate and current:

- a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication circulated to 10 or more persons (other than persons connected with the adviser); and
- all records that are necessary to form the basis for and demonstrate the calculation of performance distributed to 10 or more persons (other than persons connected with the adviser).⁶

⁶ On May 20, 2015, the SEC proposed two amendments to Rule 204-2 that would require investment advisers to maintain additional materials related to the calculation and distribution of performance information. First, the SEC proposed to amend Rule 204-2(a)(16) by removing the "10 or more persons" condition and replacing it with "any person." This would require advisers to maintain the materials listed in Rule 204-2(a)(16) that demonstrate the calculation of the performance or rate of return in any communication that the adviser circulates or distributes, directly or indirectly, to any person. Second, the SEC proposed to amend Rule 204-2(a)(7) to require advisers to also maintain originals of all written communications received and copies of written communications sent by an investment adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations. *See* Amendments to Form ADV and Investment Advisers Act Rules, SEC Release No. IA-4091 (May 20, 2015).

If records have been lost or destroyed see Jennison Associates, SEC No-Action Letter, (pub. avail. July 23, 2000).

To satisfy the recordkeeping requirements under Rule 204-2(a)(16) through the use of published materials listing the net asset values of an account together with worksheets demonstrating the performance calculations based on net asset values, see Solomon Brothers Asset Management Inc., SEC No-Action Letter (pub. avail. July 23, 1999).

E. MISLEADING ADVERTISEMENTS. Each adviser must ensure that its advertisements do NOT contain any untrue statement of a material fact or any statement that is otherwise false or misleading, bearing in mind the form and content of the advertisement, the adviser's ability to perform what is advertised, the implications or inferences arising from the context of the advertisement, and the sophistication of the prospective client. (Rule 206(4)-1(a)(5) under the Investment Advisers Act of 1940).

**ADVERTISING CHECKLIST: GLOBAL INVESTMENT PERFORMANCE
STANDARDS¹**

A. GIPS COMPLIANCE. Once a firm has met all the requirements of the GIPS standards, the firm must adhere to the following:

- Disclose compliance with GIPS using **one** of the following statements (*note: the claim of compliance can only be used in a compliant presentation*):²

1. For firms that are verified:

“[Insert name of firm] claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with the GIPS standards. [Insert name of firm] has been independently verified for the periods [insert dates]. The verification report(s) is/are available upon request.

Verification assesses whether (1) the firm has complied with all the composite construction requirements of the GIPS standards on a firm-wide basis and (2) the firm’s policies and procedures are designed to calculate and present performance in compliance with the GIPS standards. Verification does not ensure the accuracy of any specific composite presentation.”

OR

2. For composites of a verified firm that have also had a performance examination:

“[Insert name of firm] claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with the GIPS standards. [Insert name of firm] has been independently verified for the periods [insert dates].

Verification assesses whether (1) the firm has complied with all the composite construction requirements of the GIPS standards on a firm-wide basis and (2) the firm’s policies and procedures are designed to calculate and present performance in compliance with the GIPS standards. The [insert name of composite] composite has been examined for the periods [insert dates]. The verification and performance examination reports are available upon request.”

OR

3. For firms that have not been verified:

“[Insert name of firm] claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with the GIPS standards. [Insert name of firm] has not been independently verified.”

¹ Please note, the GIPS Real Estate provisions and GIPS Private Equity provisions are beyond the scope of this checklist.

² A compliant presentation is a presentation for a composite that contains all the information required by the GIPS standards and may also include additional information or supplemental information.

- If the firm is jointly marketing with other firms, the firm claiming GIPS compliance must be clearly defined and separate relative to other firms being marketed and the advertisement must be clear as to which firm claims GIPS compliance.
- Firms *must*
 1. Make every reasonable effort to provide a compliant presentation to all prospective clients.³ (Note: as long as a prospective client received a compliant presentation within the past 12 months, the firm has met this requirement)
 2. Provide the following, upon request, to a prospective client: (i) a complete list of composite descriptions; and (ii) a compliant presentation for any composite listed on the firm's list of composite descriptions.
 3. Satisfy the input data, calculation methodology and composite construction requirements under the GIPS standards.

B. PRESENTATION AND REPORTING – FULL GIPS PRESENTATION

1. For each composite presented, the following items must be reported:

- At least 5 years of performance (or since firm or composite inception if firm or composite is in existence for less than 5 years); after 5 years of performance, must present an additional year of performance building up to a minimum of 10 years of GIPS-compliant performance. (Note: If the firm is converting from AIMR-PPS to GIPS, a full 10 years of compliant performance must be presented.)
- Composite returns for each annual period, *clearly identified* as gross-of-fees or net-of-fees.
- The total return for the benchmark(s) that reflects the composite mandate, objective or strategy must be presented for each annual period.
- Number of portfolios in the composite as of each annual period end, *except if* the composite contains five or fewer portfolios at period end, in which case the number of portfolios is not required.
- Composite assets as of each annual period end.
- Either:*
 1. Total firm assets as of each annual period end,

Note: Firms must not double-count assets when determining total firm assets. If a firm manages a multi-level master-feeder structure where funds may be invested in each other,

³ Prospective client is defined broadly to include “any person or entity that has expressed interest in one of the firm’s composite strategies and is qualified to invest in the composite. Existing clients may also qualify as prospective clients for any strategy that is different from their current investment strategy. Investment consultants and other third parties are included as prospective clients if they represent investors that qualify as prospective clients.”

the firm must determine which level of the master-feeder structure is relevant for composite inclusion. Firms must document their policies and procedures, and apply them consistently on a composite-specific basis.

OR

2. Composite assets as a percentage of total firm assets as of each annual period end.

Measure of internal dispersion of individual portfolio returns for each annual period, *except if* composite has 5 portfolios or less for the full year, in which case an internal measure of dispersion is not required.

2. **Non-Compliant Returns.** Firms may link non-GIPS compliant performance to GIPS compliant performance provided that only GIPS-compliant performance is presented for periods beginning on or after January 1, 2000 (i.e. firms may link returns for periods ending on or before January 1, 2000 but they may not link returns for periods ending on or after January 1, 2000).

3. **Returns of Less than 1 Year.** Returns of portfolios and composites for periods of less than 1 year must not be annualized.

4. **Carve-Outs.** For periods beginning on or after January 1, 2006 and ending prior to January 1, 2011, if a composite includes carve-outs the presentation must include the percentage of the composite that is composed of carve-outs as of each annual period end. This information need not be shown for periods ending on or after January 1, 2011.

Note: For periods beginning on or after January 1, 2010 carve-outs must not be included in a composite unless the carve-out is managed separately with its own cash balance. For periods prior to January 1, 2010, if carve-outs were included in a composite, cash must have been allocated to the carve-out in a timely and consistent manner.

5. **Estimated Values.** If a composite uses estimated values, firms must disclose the percentage of the assets in the composite for which estimated values are used.

6. **Non-Fee Paying Portfolios.** If composite contains any non-fee paying portfolios, must present as of each annual period end, the % of composite assets represented by non-fee paying portfolios.

7. **Bundled Fees.** If composite includes portfolios with bundled fees, the presentation must include the % of composite assets represented by portfolios with bundled fees as of each annual period end.

8. **Model Fees.**

When presenting returns for a fund with multiple classes of shares or a composite strategy with multiple portfolios, net-of-fee returns must generally either (1) reflect all actual fees applicable to all share classes and series; or (2) reflect the deduction of a model fee that reflects the highest investment management fee incurred by a portfolio in a composite.

Where it is impossible to determine which investment management fee is the highest among portfolios in a composite, such as where portfolios in a composite are subject to both asset-based and performance fees, net-of-fee returns may reflect deduction of the

highest model fee applicable to the specific prospective client or intended recipient of the compliant presentation so long as the net-of-fee returns presented are no higher than the returns that would have been presented had actual fees been used.

9. Fund of Fund Fees.

- Gross-of-Fees Returns.** If presenting gross-of-fees returns for a fund of funds composite strategy, the gross-of-fees returns must be presented net of all of the underlying funds' fees and expenses
- Net-of-Fees Returns.** If presenting net-of-fees returns for a fund of funds composite strategy, net-of-fee returns must be net of both the overall fund of funds investment management fee and all of the underlying funds' fees and expenses.

10. Master Feeder Fund Fees. Presentation of net-of-fees returns for master funds must reflect any fees charged at the feeder fund level.

11. Performance Fees. Presentation of net-of-fees returns must reflect any performance-based fees and/or carried interest.

12. Portability.

- Performance track records of past firm or affiliation must be linked if:
 - substantially all investment decision-makers are employed by the new firm;
 - the decision-making process remains substantially intact and independent within the new firm; and
 - new firm has supporting documents for the performance.

Note: If a compliant firm acquires or is acquired by noncompliant firm, the acquiring firm has 1 year to bring noncompliant assets into compliance.

- Must disclose that performance results from past firm are linked to performance record of new firm.

13. Composites showing performance for periods ending on or after January 1, 2011.

- For composites with an inception date of January 1, 2011 or after:* If the initial period is less than a full year, performance must be shown from the inception date through the initial annual period end.
- For composites with a termination date of January 1, 2011 or after:* Performance from the last annual period end through the composite termination date must be shown.

Risk. For composites showing performance for periods ending on or after January 1, 2011, firms must show:

- The three-year annualized ex-post standard deviation (using monthly returns) of both the composite and the benchmark as of each annual period end).

AND

- If the firm determines that the three year annualized ex-post standard deviation is not relevant or appropriate, the firm must show an additional three-year ex-post risk measure for the benchmark (if available and appropriate) and the composite. (Note: the periodicity of the composite and the benchmark must be identical when calculating the ex-post risk measure.)*

14. Side Pockets.

- Single-Fund Composites.** If a firm manages a single-fund composite that includes discretionary side-pockets, performance must be presented both including and excluding the side-pocket.
- Multi-Portfolio Composites.** If a firm manages a multi-portfolio composite that includes one or more portfolios with discretionary side-pockets, performance must include performance of the discretionary side-pocket (performance excluding such side-pocket performance is not required).
- Non-Discretionary Side Pockets.** Where a side-pocket (or particular assets included in the side-pocket) is non-discretionary (*i.e.*, the adviser does not have investment discretion over the side-pocket or particular assets in the side-pocket), the performance of the side-pocket (or particular assets) must be excluded from the composite performance. Firms must not classify side-pocket performance as non-discretionary unless all of the following criteria are met:
 - it is segregated into a separate sub-portfolio;
 - its assets are no longer considered in the fund's asset allocation and investment process;
 - there are no investment decisions for the side-pocket assets (other than monitoring and liquidating); and
 - side-pocket assets are subject to no (or reduced) investment management fees.

Firms must not claim that illiquid securities are non-discretionary just because of their illiquidity in order to exclude the performance of the illiquid securities from portfolio or composite performance.

15. Misleading Information. The following types of information are deemed to be misleading and unrepresentative, and may NOT be presented unless specifically requested by a prospective or current client in a one-on-one presentation:

- model, hypothetical, backtested or simulated results *linked* to actual performance returns
- non-portable performance from a prior firm *linked* to current ongoing performance

C. DISCLOSURES – FULL GIPS PRESENTATION

- General Information about the firm.**
 - Firm Definition.** Must disclose firm definition used to determine total firm assets and firm wide compliance.
 - Where a portfolio is subject to oversight by a third party who is theoretically free to follow the firm's advice or not, firms must include the portfolio in the

firm definition if the firm effectively exercises discretionary investment management and can provide documented evidence to demonstrate that all investment advice has been implemented accordingly.

- Firm Redefinition.** If firm redefined, must disclose date of, description of, and reason for redefinition.
- List of Composites.** Must disclose availability of a complete list and description of all firm composites.
- General Information about the composite.**
 - Composite Description.** Must disclose the composite description (i.e., general information regarding the composite strategy).
 - Illiquid Securities.** Firms must disclose in the composite description whether illiquid securities are a significant part of the composite strategy or if there is a strategic intent to invest in illiquid investments.
 - Composite Redefinition.** If composite redefined, must disclose date of, description of and reason for change. Changes to composite are not permitted to be applied retroactively.
 - Composite Name Change.** Must disclose any changes to name of composite.
 - Composite Creation Date.** Must disclose the composite creation date.
 - Minimum Asset Levels.** Must disclose minimum asset level (if any) below which portfolios are not included in a composite, and any changes to the minimum asset level.
- Fees.**
 - Gross-of-fee Performance.** Disclose if any other fees are deducted in addition to the trading expenses.
 - Net-of-fee Performance.** Disclose:
 - If any other fees are deducted in addition to the investment management fees and trading expenses;
 - If model or actual investment management fees are used; and
 - If returns are net of any performance-based fees.
 - Fee Schedule.** Must disclose fee schedule appropriate to presentation.
- Currency.** Disclose the currency used to express performance.
- Dispersion Measures.** Must specify which dispersion measure is presented.

- Calculation Policies.** Must disclose that policies for valuing portfolios, calculating performance, and preparing compliant presentations are available upon request.
- Leverage & Derivatives.** Must disclose presence, use, and extent of leverage, derivatives, and short positions, if material, including description of frequency of use and characteristics of the instruments sufficient to identify risks.
- Significant Events.** Must disclose all significant events that would help a prospective client interpret the compliant presentation. If a composite contains investment that become illiquid or if an illiquid investment ceases to be managed in a discretionary manner, the firm must disclose this fact to the extent the firm determines the situation rises to the level of a significant event.
- Noncompliant Periods.** If performance presented prior to 1/1/2000 does not comply with GIPS, must disclose period of non-compliance.
- Withholding Tax.** Must disclose relevant details of treatment of withholding tax on dividends, interest income, and capital gains, if material.
- Exchange Rates.**
 - For periods beginning on or after January 1, 2011, must disclose and describe any known material differences in exchange rates or valuation sources used among portfolios within a composite and between composite and benchmark.*
 - For periods prior to January 1, 2011, must disclose and describe any known inconsistencies in exchange rates used among portfolios within a composite and between composite and benchmark.*
- Local Law.** If local laws & regulations differ from GIPS, must disclose that presentation adheres to local laws and disclose manner in which law conflicts with GIPS.
- Carve-outs.** *For periods prior to 1/1/2010, if carve-outs are included in a composite, must disclose the policy used to allocate cash to carve-outs. (Note: for periods beginning on or after January 1, 2010, carve-outs can only be included in a composite if the carve out is managed separately with its own cash balance.)*
- Side-Pockets.** Must disclose if any portfolio in the composite contains side-pockets.
- Bundled Fees.** If composite contains portfolios with bundled fees, must disclose the types of fees that are included in the bundled fee.
- Subadvisers.** *For periods beginning on or after January 1, 2006, disclose use of subadviser and periods subadviser was used.*
- Valuation.**
 - Month-End Valuations.** *For periods prior to January 1, 2010, must disclose if any portfolios were not valued at calendar month end or on the last business day of the month.*

- Use of Subjective Inputs.** *For periods beginning on or after January 1, 2011, must disclose use of subjective unobservable inputs for valuing portfolio investments if the portfolio investments valued using subjective unobservable inputs are material to the composite.⁴*
- Valuation Hierarchy.** *For periods beginning on or after January 1, 2011, must disclose if the composite's valuation hierarchy materially differs from the recommended valuation hierarchy in the GIPS valuation Principles.*
- Valuation Frequency.** Firms must disclose if any portfolios in a composite are valued less frequently than monthly and/or are unable to be valued on the date of large cash flows, and must disclose why such valuations are not possible.
- Estimated Values.** Firms must disclose whether estimated values are used for a composite and any additional information necessary or appropriate in connection with the use of estimated values.
- Benchmarks.**
 - Must disclose the benchmark description.
 - Must disclose if benchmark returns are net of withholding taxes, if this information is available.
 - If no benchmark is shown, must disclose why no benchmark is presented.
 - If the firm changes benchmark, must disclose date of, description of, and reason for change.
 - If a custom benchmark or combination of multiple benchmarks is used, must disclose the benchmark components, weights and rebalancing process.
 - Must disclose if the three-year annualized ex-post standard deviation of the benchmark is not presented because 36 monthly returns are not available.
- Significant Cash Flows.** If the firm has adopted a significant cash flow policy for the composite, must disclose how the firm defines significant cash flow and for which periods.
- Risk.**
 - Must disclose if the three-year annualized ex-post standard deviation of the composite is not presented because 36 monthly returns are not available.
 - If the three-year annualized ex-post standard deviation is not relevant or appropriate, must (1) describe why the ex-post standard deviation is not relevant or appropriate; and (2) describe the additional risk measure presented and why it was selected.

⁴ Subjective unobservable inputs should only be used to measure fair value of portfolio investments if observable inputs and prices are not available or appropriate. Unobservable inputs reflect the firm's own assumptions about the assumptions that market participants would use in pricing the investment and should be developed based on the best information available under the circumstances.

- Linked Performance.** Must disclose if performance from a past firm or affiliation is linked to the performance of the firm.

D. SUPPLEMENTAL INFORMATION

- 1. Supplemental information is any performance-related information included as part of a compliant performance presentation that supplements or enhances the required and/or recommended disclosure and presentation provisions of GIPS.**
- 2. Supplemental information may be shown so long as the supplemental information:**
 - satisfies the spirit and principles of the GIPS standards (i.e., fair representation and full disclosure);
 - does not contract or conflict with information provided in the compliant composite presentation; and
 - is clearly labeled and identified as supplemental to a specific composite presentation (e.g., “as provided on page 11” or “as provided on 15 March 20XX”).
- 3. A fully compliant presentation must be provided prior (within the past 12 months) to or must accompany the supplemental information.**

E. GIPS ADVERTISING GUIDELINES

1. Definition of “Advertisement”:

[A]n advertisement includes any materials that are distributed to or designed for use in newspapers, magazines, firm brochures, letters, media, or any other written or electronic material addressed to more than one prospective client. Any written material (other than one-on-one presentations and individual client reporting) distributed to *maintain existing clients or solicit new clients* for an advisor is considered an advertisement.

- 2. General Requirements.** All advertisements that include a claim of compliance with the GIPS standards must include:
 - The definition of the firm;
 - how a prospective client can obtain a compliant presentation and/or the firm’s list of composite descriptions; and
 - the GIPS Advertising Guidelines compliance statement: “[xxx] claims compliance with the Global Investment Performance Standards (GIPS®).”
- 3. Performance Information.** If the advertisement includes a claim of GIPS compliance *and* performance results, the following information must be taken/derived from a presentation that adheres to requirements of the GIPS standards:
 - Composite Description.** Must disclose description of the strategy of the composite.

- Performance Returns.** Present composite total returns according to one of the following:
 - One-, three-, and five-year annualized composite returns through the most recent period with the period-end date clearly identified. Returns for periods of less than one year cannot be annualized. *(Note: if the composite has been in existence for less than five years, must also present the annualized return since the composite inception date.)*
 - Period-to-date composite returns in addition to one-, three-, and five-year annualized composite returns through the same period of time as presented in the corresponding compliant presentation with the period end date clearly identified. Returns for periods of less than one year cannot be annualized. *(Note: if the composite has been in existence for less than five years, firms must also present the annualized returns since the composite inception date.)*
 - Period-to-date composite returns in addition to five years of annual composite returns (or for each annual period since the composite inception date if the composite has been in existence for less than five years) with the period end date clearly identified. The annual returns must be calculated through the same period of time as presented in the corresponding compliant presentation.
- Gross/Net Returns.** Must disclose whether performance is gross and/or net of advisory fees.
- Benchmarks.**
 - Must disclose total return for the benchmark for the same periods for which the composite return is presented. *(Note: benchmark must be the same benchmark return presented in corresponding GIPS presentation).*
 - The benchmark description
 - If no benchmark is shown, must disclose why.
- Currency.** Must disclose currency used to express returns.
- Leverage and Derivatives.** Must disclose description of use and extent of leverage, derivatives, and short positions, if material, including a description of the frequency of use and characteristics of the instruments sufficient to identify risks.
- Noncompliant Information.** If presenting noncompliant performance information before 1/1/2000, must disclose period(s) of noncompliance.
- Local Laws/Regulations.** Must disclose if advertisement conforms with laws/regulations that conflict with the GIPS standards or the Advertising Guidelines and disclose the manner in which the laws/regulations conflict with the GIPS standards or Advertising Guidelines.

**ADVERTISING CHECKLIST: COMMODITY FUTURES TRADING COMMISSION
("CFTC") AND NATIONAL FUTURES ASSOCIATION ("NFA")**

A. CFTC REGULATIONS APPLICABLE TO ALL CPOS AND CTAS. A commodity pool operator ("CPO") or a commodity trading adviser ("CTA"), as defined by the CFTC, regardless of whether such CPO or CTA is exempt from registration under the Commodity Exchange Act ("CEA"), may not advertise in a manner which:

- employs any device, scheme or artifice to defraud any participant or client or prospective participant or client; or
- involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client¹.

(CFTC Regulation §4.41(a))

1. Testimonials. An advertisement by a CPO or CTA may not refer to any testimonials unless the testimonial prominently discloses:

- that the testimonial may not be representative of the experience of other clients;
- that the testimonial is no guarantee of future performance or success; and
- if more than a nominal sum has been paid, the fact that it is a paid testimonial.

(CFTC Regulation §4.41(a)(3))

2. Hypothetical Performance. Simulated or hypothetical performance² must be accompanied by the proper disclosure (in bold, all capital letters and in immediate proximity to the performance).

- A CPO or CTA may use *either* the language specified in CFTC Regulation §4.41(b)(1)(i) *or* the legend prescribed by NFA Compliance Rule 2-29(c).

(CFTC Regulation §4.41(b))

*NOTE – Separate NFA rules also apply to the presentation of hypothetical performance.
See Section B.13-15.*

B. NFA REGULATIONS APPLICABLE TO REGISTERED CPOS AND CTAS.³

1. Prohibited Communications with the Public. A registered CPO or CTA may not make any communication with the public that:

¹ The restrictions intended to prevent misleading advertising are similar to the Advisers Act.

² Registered CPOs and CTAs are generally required by CFTC regulations to deliver a "Disclosure Document" to investors. The Disclosure Document is subject to additional requirements under CFTC regulations, including additional requirements for and restrictions on the presentation of hypothetical performance.

³ CPOs and CTAs that are registered under the CEA must become members of the NFA and are subject to the NFA's compliance rules and guidance.

- operates as a fraud or deceit;
- employs or is part of a high-pressure approach (such as rushing a customer through the account opening process, glossing over risk disclosures, or attempting to dissuade unsophisticated customers from seeking further advice, among other things); or
- makes any statement that futures trading is appropriate for all persons.

(NFA Compliance Rule 2-29(a))

2. Promotional Materials - General Prohibitions. An NFA member may not use promotional materials for commodity interest advice or commodity pools⁴ that:

- is likely to deceive the public; or
- contains any material misstatement of fact or that the NFA member knows omits a fact if the omission makes the promotional material misleading.

(NFA Compliance Rule 2-29(b))

3. Testimonials. Testimonials must be representative of all reasonably comparable accounts.

(NFA Compliance Rule 2-29(b)(6))

4. Possibility of Profit.

- Discussion of the possibility of profit must be accompanied by an *equally prominent* statement of the risk of loss;

(NFA Compliance Rule 2-29(c))

- Equal prominence requires that profits and losses must be emphasized proportionally, considering:
 - font size;
 - the number of times profit is addressed as compared to the number of times risk of loss is addressed; and
 - whether the risk disclaimer address the risk of loss that is unique to the futures industry, as opposed to trading activities generally.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 10)

5. Performance Presentation. Past performance:

- must be accompanied by a statement that past performance is not necessarily indicative of future results;

⁴ Unless otherwise indicated, NFA rules regarding promotional materials only apply with respect to promotional materials concerning commodity interest advice or commodity pools.

(NFA Compliance Rule 2-29(b)(4))

- must be representative of the actual performance of all reasonably comparable accounts for the same time period;
- must be calculated in accordance with CFTC Regulation 4.25(a)(7) (for commodity pools) and CFTC Regulation 4.35(a)(6) and Compliance Rule 2-34 (for separate accounts), including the requirements that performance:⁵
 - must be presented **net of fees**; and
 - must be recent as of a date no more than 3 months prior to the date of the promotional materials;

(NFA Compliance Rule 2-29(5); CFTC Regulation 4.25(a)(7))

NOTE: NFA senior staff has indicated that gross-of-fee performance may be presented under circumstances permitted by the SEC (side-by-side with net-of-fees performance and without net-of-fees performance in one-on-one presentations to high net worth clients/consultants with appropriate disclosure).

(Current, unpublished opinion of NFA staff)

- must be balanced with regard to the risk of loss (See “Possibility of Profit”);
- must fully disclose the nature of the results (for example, disclose what is meant by and included in “average rate of return”);
- must not be presented as “average” or “cumulative” returns where individual returns for the period have wide fluctuations;
- must not omit any information that would render the data misleading; and
- must be accompanied by disclosure of all relevant costs, including commissions, spreads and fees.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 11,12)

6. Performance Presentation. Projected Performance:

- Must disclose all relevant costs, including commissions and fees;
- Must have a reasonable basis in fact;
- Must clearly identify all material assumptions in projecting performance; and
- The risks must be discussed and balanced with the discussion of projected profits.

⁵ This requirement applies to all registered CPOs and CTAs, including CPOs and CTAs claiming an exemption from certain requirements pursuant to CFTC Rule 4.7.

(Guide to NFA Compliance Rule 2-29)

7. Performance Calculation – Annual Rates of Return.

- Annual rates of return must generally be:
 - based on 12 consecutive months of performance;
 - computed on a compounded monthly basis;
 - calculated by dividing net performance by beginning net asset value for pools and using beginning and end of period portfolio values for separate accounts.
- CPOs/CTAs may use one of the following three alternative methods for calculating returns; however, CPOs/CTAs must use the method that most accurately depicts client performance:
 - Time Weighting for Additions and Withdrawals;
 - Only Accounts Traded; or
 - Compounded Rate of Return.
- Once a method of calculating rate of return is selected, it must be used consistently moving forward unless its use would produce misleading results.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 12)

- Separate account returns may include interest earned on actual funds but may not impute interest on other funds.
- For partially-funded separately managed accounts, rates of return must be calculated using nominal account size (and not actual funds) as the denominator.

(NFA Compliance Rule 2-34(a))

8. Related Performance. Related performance must be:

- representative of all reasonably comparable accounts; and
- meet the other requirements for actual performance reporting. See “Performance Presentation” and “Performance Calculation – Annual Rates of Return,” above.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 19)

9. Indices. If index data is included in an advertisement, CPOs/CTAs must:

- disclose the source of the data; and
- be willing to furnish supporting documentation for any comparison included.

10. Statements of Opinion. Any statement of opinion included in promotional material must be:

- clearly identified as an opinion; and

- supported by a reasonable basis in fact (with the extent of support required depending on the nature of the opinion).

(NFA Compliance Rule 2-29(d))

11. Approval.

- Supervisory personnel (other than the individual who prepared the material) must review all promotional material and must document its review and approval prior to first use.
- Mass-media advertisements (radio, television and any other audio or video advertisements distributed through media accessible to the public) that contain specific trading recommendations or refer to or describe the extent of any profit obtained in the past that can be achieved in the future must be submitted to NFA's Promotional Material Review Team for approval 10 days prior to first use.

Note: this includes submission of a script or outline in the event of a live broadcast, and submission of a tape of the advertisement must be submitted to the NFA after the live broadcast.

- Advertisements that only contain a general discussion of the firm and the markets in which it trades or factual market data are not required to be pre-approved by NFA.
- NFA offers CPOs/CTAs a voluntary program to review promotional material prior to its first use, which requires that:
 - the material must be submitted to NFA 21 calendar days prior to its intended use;
 - the material must be submitted by a supervisory employee who is responsible for the review and approval of promotional material; and
 - the CPO/CTA must indicate that the material is being submitted for pre-approval.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 37)

12. Ratings and Rankings. Third party ratings or rankings based on performance that are included in promotional materials:

- must not be accompanied by any implication that such ratings or rankings are officially sanctioned by the futures industry;
- must be accompanied by disclosure about the basis and limitations of such ratings or rankings;
- must be based on rate of return calculations that comply with CFTC rate of return rules (See "Performance Presentation" and "Performance Calculation – Annual Rates of Return," above);
- must be supported by all data necessary to support the performance results; and
- must be balanced with an equally prominent discussion of the risk of loss; and

- must be accompanied by a statement that past performance does not guarantee future results.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 21)

13. Hypothetical Performance. The NFA considers each of the following to be “hypothetical” performance:

- The NFA considers each of the following to be “hypothetical” performance:
 - any trade or series of trade that was not actually executed for an account;
 - simulated trading;
 - combining the performance of several advisors who have not traded together;
 - applying models or calculations to actual performance; and
 - “extracted performance” of one component of a broader trading program.

NOTE – performance considered to be “model” performance under SEC rules and guidance would be hypothetical performance under NFA rules.

- Hypothetical performance must be clearly labeled as hypothetical and calculated in the same manner as actual performance.
- CPOs/CTAs must be able to demonstrate the validity of the presentation, the underlying theory generating the hypothetical results, and the basis for their calculations.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 13)

14. Hypothetical Performance – Materials Presented or Distributed to Persons other than Qualified Eligible Persons (“QEPs”). Simulated or hypothetical performance of Commodities Products in promotional materials directed to persons other than *QEPs* under CFTC Regulation 4.7:

- must not be used for any trading program with at least 3 months of actual performance history;
- if the trading program is new, must be able to demonstrate that hypothetical performance *significantly* differs from other programs with actual trading results;
- must be accompanied by actual performance of all customer accounts for the past five years (or over the entire performance history, if less than five years) with equal prominence;
- if the CPO/CTA has less than one year experience in directing customer accounts, must be accompanied by actual performance of proprietary accounts for the past five years (or over the entire performance history, if less than five years) with equal prominence;
- must disclose all material assumptions made in preparing hypothetical results, including: (i) the initial investment amount, (ii) whether profits were reinvested or distributed, (iii)

commissions and fees that were charged/deducted, and (iv) the method used to determine purchase and sales prices for each hypothetical transaction;

“extracted performance” of one component of a broader trading program may only be presented if:

the applicable “Disclosure Document” expressly designates the specific percentage of assets committed to the component being highlighted (i.e., if a pool’s disclosure document states that ___% of a fund’s assets are dedicated to a particular strategy, the pool may “extract” the results of that strategy);

the results are adequately labeled as extracted performance; and

trading results of the overall program are disclosed with equal prominence.

(Guide to NFA Compliance Rules 2-29 and 2-36, at 12)

must be accompanied by the following disclosures, as applicable, displayed as prominently as the results *and immediately preceding or following the results* (if the hypothetical or simulated results are lengthy, disclosures may need to be made more than once):

Hypothetical Performance Legend (Materials Directed to Persons other than QEPs)

HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN HYPOTHETICAL PERFORMANCE RESULTS AND THE ACTUAL RESULTS SUBSEQUENTLY ACHIEVED BY ANY PARTICULAR TRADING PROGRAM.

ONE OF THE LIMITATIONS OF HYPOTHETICAL PERFORMANCE RESULTS IS THAT THEY ARE GENERALLY PREPARED WITH THE BENEFIT OF HINDSIGHT. IN ADDITION, HYPOTHETICAL TRADING DOES NOT INVOLVE FINANCIAL RISK, AND NO HYPOTHETICAL TRADING RECORD CAN COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FOR EXAMPLE, THE ABILITY TO WITHSTAND LOSSES OR TO ADHERE TO A PARTICULAR TRADING PROGRAM IN SPITE OF TRADING LOSSES ARE MATERIAL POINTS WHICH CAN ALSO ADVERSELY AFFECT ACTUAL TRADING RESULTS. THERE ARE NUMEROUS OTHER FACTORS RELATED TO THE MARKETS IN GENERAL OR TO THE IMPLEMENTATION OF ANY SPECIFIC TRADING PROGRAM WHICH CANNOT BE FULLY ACCOUNTED FOR IN THE PREPARATION OF HYPOTHETICAL PERFORMANCE RESULTS AND ALL OF WHICH CAN ADVERSELY AFFECT ACTUAL TRADING RESULTS.

If the CPO/CTA uses the immediately preceding disclosure and has less than one year experience trading client or proprietary accounts, then the following disclosure must also be included:

Hypothetical Performance Legend – Less than 1 Year Experience (Materials Directed to

Persons other than QEPs)

[THE CPO/CTA] HAS HAD LITTLE OR NO EXPERIENCE IN TRADING ACTUAL ACCOUNTS FOR ITSELF OR FOR CUSTOMERS. BECAUSE THERE ARE [LITTLE OR] NO ACTUAL TRADING RESULTS TO COMPARE TO THE HYPOTHETICAL PERFORMANCE RESULTS, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE HYPOTHETICAL PERFORMANCE RESULTS.

CPOs/CTAs who use hypothetical performance records that show, through use of a hypothetical composite, what a multi-advisor account or pool could have achieved if assets had been allocated among certain advisors should replace the two preceding disclosures with the following:

Hypothetical Performance Legend – Multi-Advisor Accounts (Materials Directed to Persons other than QEPs)

THIS COMPOSITE PERFORMANCE RECORD IS HYPOTHETICAL AND THESE TRADING ADVISORS HAVE NOT TRADED TOGETHER IN THE MANNER SHOWN IN THE COMPOSITE. HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY MULTI-ADVISOR MANAGED ACCOUNT OR POOL WILL OR IS LIKELY TO ACHIEVE A COMPOSITE PERFORMANCE RECORD SIMILAR TO THAT SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN A HYPOTHETICAL COMPOSITE RECORD AND THE ACTUAL RECORD SUBSEQUENTLY ACHIEVED.

ONE OF THE LIMITATIONS OF A HYPOTHETICAL COMPOSITE PERFORMANCE RECORD IS THAT DECISIONS RELATING TO THE SELECTION OF TRADING ADVISORS AND THE ALLOCATION OF ASSETS AMONG THOSE TRADING ADVISORS WERE MADE WITH THE BENEFIT OF HINDSIGHT BASED UPON THE HISTORICAL RATES OF RETURN OF THE SELECTED TRADING ADVISORS. THEREFORE, COMPOSITE PERFORMANCE RECORDS INVARIABLY SHOW POSITIVE RATES OF RETURN. ANOTHER INHERENT LIMITATION ON THESE RESULTS IS THAT THE ALLOCATION DECISIONS REFLECTED IN THE PERFORMANCE RECORD WERE NOT MADE UNDER ACTUAL MARKET CONDITIONS AND THEREFORE, CANNOT COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FURTHERMORE, THE COMPOSITE PERFORMANCE RECORD MAY BE DISTORTED BECAUSE THE ALLOCATION OF ASSETS CHANGES FROM TIME TO TIME AND THESE ADJUSTMENTS ARE NOT REFLECTED IN THE COMPOSITE.

If the CPO/CTA uses the immediately preceding disclosure and has less than one year of experience allocating assets among particular trading advisors, then the following disclosure must also be included:

Hypothetical Performance Legend – Multi-Advisor Accounts - Less than 1 Year Experience (Materials Directed to Persons other than QEPs)

[THE CPO/CTA] HAS HAD LITTLE OR NO EXPERIENCE ALLOCATING ASSETS AMONG PARTICULAR TRADING ADVISORS. BECAUSE THERE ARE [LITTLE OR] NO ACTUAL ALLOCATIONS TO COMPARE TO THE PERFORMANCE RESULTS

FROM THE HYPOTHETICAL ALLOCATIONS, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE RESULTS.

(NFA Compliance Rule 2-29(c); Guide to NFA Compliance Rules 2-29 and 2-36, at 14)

- 15. Hypothetical Performance – Materials Presented Exclusively to QEPs.** Simulated or hypothetical performance of commodities products in promotional materials that are directed exclusively to *QEPs* under CFTC Regulation 4.7 must be accompanied by the following disclaimer, displayed as prominently as the results and *immediately preceding or following the results* (if the hypothetical or simulated results are lengthy, disclosures may need to be made more than once):

Hypothetical Performance Legend (Materials Directed Exclusively to QEPs)

THESE RESULTS ARE BASED ON SIMULATED OR HYPOTHETICAL PERFORMANCE RESULTS THAT HAVE CERTAIN INHERENT LIMITATIONS. UNLIKE THE RESULTS SHOWN IN AN ACTUAL PERFORMANCE RECORD, THESE RESULTS DO NOT REPRESENT ACTUAL TRADING. ALSO, BECAUSE THESE TRADES HAVE NOT ACTUALLY BEEN EXECUTED, THESE RESULTS MAY HAVE UNDER-OR OVER-COMPENSATED FOR THE IMPACT, IF ANY, OF CERTAIN MARKET FACTORS, SUCH AS LACK OF LIQUIDITY. SIMULATED OR HYPOTHETICAL TRADING PROGRAMS IN GENERAL ARE ALSO SUBJECT TO THE FACT THAT THEY ARE DESIGNED WITH THE BENEFIT OF HINDSIGHT. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THESE BEING SHOWN.

Alternatively, such materials may include the legends set forth under “Hypothetical Performance – Materials Directed to Persons other than QEPs” above.

(NFA Compliance Rule 2-29(c); Guide to NFA Compliance Rules 2-29 and 2-36, at 14)

ADVERTISING CHECKLIST: FINRA (UNREGISTERED FUNDS)¹

The advertising rules and related interpretations promulgated by the Financial Industry Regulatory Authority (“FINRA”) govern communications by FINRA-member broker-dealers with the public, including existing retail customers, prospective retail customers and institutional investors. Therefore, with respect to investment products distributed by a broker-dealer, the following guidelines must be adhered to by such broker-dealer.

A. FINRA COMMUNICATIONS RULES. FINRA Rules 2210 and 2212 through 2216 govern communications with the public. “Communications” generally consist of Retail Communications, Correspondence and Institutional Communications, each as defined below.²

1. DEFINITIONS.

“Retail Communication” means *any* written (including electronic) communication that is distributed or made available to more than 25 **Retail Investors** within any 30 calendar-day period.³

Note: all types of written communications (e.g., seminar handouts) are included.

“Correspondence” means *any* written (including electronic) communication that is distributed or made available to 25 or fewer **Retail Investors** within any 30 calendar-day period.⁴

“Retail Investor” means any person other than an Institutional Investor, regardless of whether the person has an account with the firm.⁵

“Institutional Communication” means *any* written (including electronic) communication that is distributed or made available only to **Institutional Investors**, but does not include a firm’s internal communications (e.g., materials used to train internal salespeople, etc.).⁶

Note: sales/telemarketing scripts for use with retail investors are Retail Communications.

2. GENERAL CONTENT STANDARDS. All Communications, including Retail Communications, Correspondence and Institutional Communications:

- must be based on principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service;

¹ Please note, registered investment company advertisements are beyond the scope of this checklist.

² FINRA Rule 2210(a)(1).

³ FINRA Rule 2210(a)(5).

⁴ FINRA Rule 2210(a)(2).

⁵ FINRA Rule 2210(a)(6).

⁶ FINRA Rule 2210(a)(3). “Institutional Investors” are banks, savings and loan associations, insurance companies, registered investment companies, registered investment advisors, any entity (including a natural person) with assets of at least \$50 million, government entities, employee benefit plans and qualified plans with at least 100 participants, FINRA members and registered persons, and a person acting solely on the behalf of an institutional investor. *See* FINRA Rules 2210(a)(4), 4512(c).

- must not omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading;
- must not make any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- must be clear and not be misleading within the context in which they are made;
- must provide a balanced treatment of risks and potential benefits;
- must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments;
- must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience;
- may include information placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication; and
- may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.⁷

(FINRA Rule 2210(d)(1))

3. TESTIMONIALS. If any Retail Communication or Correspondence provides any testimonial⁸ concerning the investment advice or investment performance of a member or its products:

- must prominently disclose (i) the fact that the testimonial may not be representative of the experience of other clients; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial.

(FINRA Rule 2210(d)(6))

4. COMPARISONS. If any comparison between investments, services or indices is included in Retail Communications, then must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

⁷ As of the date of the most recent update of this checklist, FINRA had proposed amendments to FINRA Rule 2210 that, subject to certain qualifying circumstances, would create an exception to the rule's prohibition on projecting performance. The proposed amendments' public comment period closed on March 27, 2017, and it is unclear when such proposed amendments will become effective. For the full text of the comment request and proposed amendments, see FINRA Regulatory Notice 17-06 at: http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory Notice 17.06.pdf.

⁸ If a testimonial in any Communication (including Institutional Communications) concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. Although FINRA permits broker/dealers to provide testimonials, investment advisers are generally prohibited from doing so. See "Advertising Checklist: Investment Advisers Act of 1940", Section A.

(FINRA Rule 2210(d)(2); (SEI Investments Distribution Co., Letter of Acceptance, Waiver and Consent No. 2009018186201 (Feb. 14, 2012) (“SEI Investments AWC”))

5. DISCLOSURE OF MEMBER’S NAME. All Retail Communications and Correspondence:

- must prominently disclose the name of the member or the name under which the member’s broker-dealer business is primarily conducted (as disclosed in the member’s Form BD);
- may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- must reflect any relationship between the member and any non-member or individual who is also named; and
- if it includes other names, reflect which products or services are being offered by the member.

(FINRA Rule 2210(d)(3))

6. SURVEY DATA. If citing to survey data:

- must provide a sound basis for evaluating the data, including the nature and scope of the survey, the methodology used, and any other information needed to make the significance/reliability of the survey clear.

(SEI Investments AWC)

7. APPROVAL, REVIEW AND RECORDKEEPING.

- Retail Communications generally must be approved by a registered principal of the member before the earlier of its use or filing with FINRA’s Advertising Regulation Department.
- Three categories of Retail Communications are exempt from principal pre-use approval requirement, *provided that* all three categories must be supervised as Correspondence (see below):
 - Market letters (*i.e.*, discussions of broad-based indices; commentaries on economic, political or market conditions; technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price; statistical summaries of multiple companies’ financial data, including listings of current ratings; recommendations regarding increasing or decreasing holdings in particular; and notices of ratings or price target changes), including white papers and market commentary pieces that meet the foregoing definition, unless they make a recommendation. *See NASD Rule 2711(a)(9)(A)*
 - Retail Communications posted on an online interactive electronic forum (*i.e.*, social media)
 - Retail Communications that do not make any recommendation or promote a product or service of the member firm

(FINRA Rule 2210(b)(1))

- Correspondence is not required to be approved by a registered principal prior to use, provided that Correspondence must be subject to written supervisory procedures designed to reasonably supervise the firm's Correspondence that complies with NASD Rule 3010(d)(2).

(FINRA Rule 2010(b)(2); NASD Rule 3010(d)(2))

- Institutional Communications are not required to be approved by a registered principal prior to use, provided that Institutional Communications must be subject to written supervisory procedures designed to reasonably supervise the firm's Institutional Communications.

(FINRA Rule 2010(b)(3))

- Copies of all Retail Communications and Institutional Communications must be maintained in a separate file for three years following the date of last use, along with the dates of first and last use, name of the registered principal who approved each item, the date approval was given, and the name of the person who prepared or distributed the communication (if registered principal approval is not required).
- Members must maintain in a file information concerning the source of any statistical table, chart, graph or other illustration used by the member in communications with the public.
- Retail Communications that have previously been approved by FINRA's Advertising Regulation Department and have not been materially altered are not required to be approved by a registered principal. For such Communications, firms must maintain records of the name of the member that filed the Retail Communication for approval and a copy of the review letter from FINRA's Advertising Regulation Department.

(FINRA Rule 2210(b)(4))

- Copies of all Correspondence must be maintained in a separate file for three years. The names of the persons who prepared the Correspondence and who reviewed the Correspondence must be ascertainable from the retained records.

(NASD Rule 3010(d)(3); FINRA Rule 4511; Securities Exchange Act Rule 17a-4(b)(4))

8. FILING REQUIREMENTS.

Newly registered firms must file Retail Communications with FINRA's Advertising Regulation Department at least 10 days prior to first use for a period of one year beginning on the date that the firm's FINRA membership became effective.

(FINRA Rule 2210(c)(1)(A))

B. USE OF GRAPHS AND CHARTS. Any graphs or charts used in broker-dealer advertising material:

- should be accompanied by a clear explanation of the relevant differences between product types (which cannot be in a footnote or legend);
- must identify the indexes, averages, or specific securities on which the performance is based, and must disclose that past performance does not guarantee future results;
- if using index performance, must include language that clearly and prominently discloses that the index performance is not illustrative of the security's performance, and offers to provide the security's performance, and must not present index performance in such a way to imply that an investment can be made in the index
- NOTE: a broker-dealer using index performance should verify whether any of the index performance is back-tested performance (*i.e.*, all or a portion of the historical index performance presented was calculated retroactively for periods that predate the creation of the index). Back-tested index performance may only be used with institutional investors in connection with marketing passively-managed exchange-traded products.

(FINRA Interpretive Letter to Mr. Bradley J. Swenson, ALPS Distributors, Inc., April 22, 2013.)

- must be proportionately correct or drawn to scale;
- must have clearly labeled axes and baselines so that the reader can understand how the performance data relates to the graph;
- must include accompanying text that clearly state their purpose and must disclose the relevant assumptions;
- must have starting points that fairly reflect the performance of the product without exaggeration; and
- must only use a comparative index that is appropriate and must provide the reader with a sound basis for evaluating the facts with respect to the product.

(NASD RCA – April 1995 – Misuse Of Charts Comparing Index Returns Concerns NASD; NASD RCA - Summer 2000 - Inaccurate Performance Graphs Result In Formal Action)

C. PAST SPECIFIC RECOMMENDATIONS. Retail Communications and Correspondence may not refer (directly or indirectly) to past specific recommendations made by the firm that were or would be profitable; however, such Communications may include a list of all recommendations made by the firm within the immediately preceding period of not less than one year.⁹

The list must include:

- name of each security recommended;
- date and nature of each recommendation (e.g., buy, sell or hold);

⁹ This requirement does not apply to any Communication that meets the definition of “research report” for purposes of NASD Rule 2711 (and meets the requirements of that rule). *See FINRA Rule 2210(d)(7)(D)*

- market price of security at time of recommendation;
- price recommendation was to be acted upon;
- most recent market price of each security listed; and
- prominently within the communication or list, the following legend: *It should not be assumed that the recommendations made in the future will be profitable or will equal the performance of the securities in this list.*

(FINRA Rule 2210(d)(7)(C))

D. HEDGE FUND SPECIFIC CONTENT STANDARDS. The following standards apply to all Communications with the public promoting hedge funds, including Retail Communications, Correspondence and Institutional Communications.

1. RISK DISCLOSURES. FINRA has sanctioned broker-dealers for failure to provide investors with a sound basis for evaluating whether to invest in a hedge fund where adequate risk disclosures were absent from the sales material for such funds.

- Risk factors should be clear and conspicuous, and in close proximity to the discussion of potential benefits of investing in the hedge fund.

To the extent applicable, sales material for hedge funds should disclose that:

- the fund is speculative and involves a high degree of risk;
- the fund may be leveraged;
- the fund's performance can be volatile;
- an investor could lose all or a substantial amount of his investment;
- the fund manager has total trading authority over the fund. The use of a single advisor applying generally similar trading programs could mean lack of diversification and, consequently, higher risk;
- there is no secondary market for the investor's interest in the fund and none is expected to develop;
- there may be restrictions on transferring interests in the fund;
- the fund's high fees and expenses may offset the fund's trading profits;
- a substantial portion of the trades executed for the fund take place on non-US exchanges;
- the fund is not required to provide periodic pricing or valuation information to investors;
- the fund may involve complex tax structures and delays in distributing important tax information;
- the fund is not subject to the same regulatory requirements as mutual funds.;

(FINRA Notice to Members 03-07; NASD News Release, “NASD Fines Altegris Investments for Hedge Fund Sales Violations” (Apr. 22, 2003) (“Altegris Release”); NASD News Release, “NASD Fines Citigroup Global Markets, Inc. \$250,000 in Largest Hedge Fund Sales Sanction to Date” (Oct. 25, 2004) (“Citigroup Release”))

***Clarification:** Note that disclosure of risk factors in a fund’s offering document does not cure deficiencies in Communications regarding that fund. Also, the member may be required to disclose risk factors in addition to those above depending on the structure and investment strategy of the particular fund being promoted.*

2. MISLEADING OR EXAGGERATED CLAIMS. Communications with the public promoting a hedge fund:

- must accurately state the fund’s investment objective as disclosed in the fund’s offering document;
- must not claim that hedge funds offer superior professional management with more investment flexibility, protection against declining markets, and better returns due to the imposition of performance fees, unless these statements are fair, accurate and without exaggeration; and
- must not include any language that states or implies that hedge funds or funds of hedge funds are appropriate for all investors; and
- must not embellish the investment adviser’s capabilities.

(NASD Notice to Members 03-07; NASD Member Update, “NASD Review of Hedge Fund Advertising Results in Formal Action” (Oct. 9, 2003))

- The use of superlatives in communications with the public is generally prohibited by FINRA. Descriptive terms such as “one of the top” or “a major” may be permitted, provided a basis for such statement exists.

3. PERFORMANCE. If the adviser’s performance is being advertised, the adviser must adhere to the following principles.

- Gross of fees performance may not be presented unless net of fees performance is also presented with equal prominence.

(MD Sass Securities, LLC Letter of Acceptance, Waiver and Consent No. 2009018187701 (March 7, 2013))

- Related performance¹⁰ may only be presented in sales material for Section 3(c)(7) funds, provided that the member ensures that all recipients of such sales material are “qualified purchasers.” (NASD Interpretive Letter to Davis Polk & Wardwell (Dec. 30, 2003))¹¹

¹⁰ FINRA considers “related performance” to include the performance of other, separate investment companies, funds, portfolios, accounts or composites thereof managed by the same investment adviser, sub-investment adviser, or portfolio manager that manages the hedge fund that the member is promoting. The term also includes the performance of “clone” funds and other similarly managed accounts and funds, the performance of funds or accounts that preceded and were converted into the advertised hedge fund, and

- Target rates of return must include a sound basis for investors to evaluate the reasonableness of the stated target. (Citigroup Release)
- Hypothetical or backtested performance that does not reflect the actual performance of the hedge fund may not be used. (Citigroup Release; NASD Interpretive Letter to Securities Industry Association (Oct. 2, 2003), Bear Stearns Letter of Acceptance, Waiver and Consent No. 2007011145701 (Jul. 30, 2009) (“Bear Stearns AWC”))
- Hypothetical performance may not be presented in combination with the actual historical performance of a hedge fund. (Citigroup Release, Bear Stearns AWC)

4. DELIVERY OF OFFERING DOCUMENT.

- The prospectus or other offering document of the hedge fund must be provided along with any sales material.

(NASD Notice to Members 03-07)

composites of other similarly managed funds, accounts or portfolios. (NASD Interpretive Letter to Securities Industry Association (Oct. 2, 2003) at n. 1)

¹¹ Except with respect to 3(c)(7) funds, FINRA takes the view that under Rule 2210, no member may publish or distribute sales material for a hedge fund that presents related performance information. (*see* NASD Interpretive Letter to Securities Industry Association (Oct. 2, 2003)) This general prohibition on the use of related performance information applies to communications with qualified institutional buyers who are potential investors in 3(c)(1) funds. (*see* NASD Interpretive Letter to Collins/Bay Island Securities (Sept. 14, 2004))

ADVERTISING CHECKLIST: REGISTERED FUNDS

Registered fund advertisements and sales literature are subject to specific rules under the Securities Act of 1933, as amended (the “1933 Act”), in addition to Securities and Exchange Commission (“SEC”) and Financial Industry Regulatory Authority (“FINRA”) rules, regulations and guidance.

A. DEFINITIONS AND SCOPE.

1. **FINRA Rules.** The FINRA advertising rules and related interpretations apply with respect to investment products distributed by a FINRA member broker-dealer. FINRA Rule 2210 contains content standards applicable to all communications with the public, which, collectively with the Rule 156, serve as the basis for the fundamental full disclosure standard that generally applies to all communications to investors.

“Retail Communication” means *any* written (including electronic) communication that is distributed or made available to more than 25 **Retail Investors** within any 30 calendar-day period.¹

Note: all types of written communications (e.g., seminar handouts) are included.

“Correspondence” means any written (including electronic) communication that is distributed or made available to 25 or fewer Retail Investors within any 30 calendar-day period.²

“Retail Investor” means any person other than an Institutional Investor, regardless of whether the person has an account with the firm.³

“Institutional Communication” means any written (including electronic) communication that is distributed or made available only to Institutional Investors, but does not include a firm’s internal communications (e.g., materials used to train internal salespeople, etc.).⁴

Note: sales/telemarketing scripts for use with retail investors are Retail Communications.

(FINRA Rule 2210(a))

2. **Rule 156 under the 1933 Act.** Rule 156 under the 1933 Act provides guidance with respect to registered fund “sales literature,” which generally includes all types of fund sales material and advertising.

“Sales literature,” for purposes of Rule 156, means “any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company. Communications between issuers, underwriters and dealers are included in

¹ FINRA Rule 2210(a)(5).

² FINRA Rule 2210(a)(2).

³ FINRA Rule 2210(a)(6).

⁴ FINRA Rule 2210(a)(3). “Institutional Investors” are banks, savings and loan associations, insurance companies, registered investment companies, registered investment advisors, any entity (including a natural person) with assets of at least \$50 million, government entities, employee benefit plans and qualified plans with at least 100 participants, FINRA members and registered persons, and a person acting solely on the behalf of an institutional investor. *See* FINRA Rules 2210(a)(4), 4512(c).

this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.”

3. **Rule 482 under the 1933 Act.** Rule 482 advertisements are the primary vehicle for advertising registered funds and for communicating fund performance data to prospective investors. **In addition, because registered funds are distributed by FINRA member broker-dealers, Rule 482 advertisements are subject to all applicable FINRA rules.**⁵

B. GENERAL REQUIREMENTS. Registered fund advertisements generally may not contain information that is materially misleading and must comply with the fundamental principal of full and fair disclosure.

1. **General Content Standards.** In general, all Communications with the public, including Retail Communications, Correspondence and Institutional Communications:

- must be based on principles of fair dealing and good faith, and be fair and balanced and provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service;
- must not omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading;
- must not make any false, exaggerated, unwarranted or misleading statement or claim, opinion or forecast;
- must not include information in a legend or footnote unless such placement would not inhibit an investor’s understanding of the information;
- must not predict or project performance or imply that past performance will recur⁶; and
- must not include superlatives.
 - NOTE: certain phrases are considered to be inherently misleading (“unique,” “proven,” “best-in-class,” “world class,” “best,” “one of a kind,” “exceptional”). Other superlatives/descriptions are only permitted if they are based on clear, supportable data: (“one of the top,” “a major,” “leading,” “top performing,” “first,” “oldest”).

(FINRA Rule 2210(d)(1); SEC Rule 156)

2. **Contextual Evaluation.** Statements must be evaluated in light of the context in which they are made. As such, communications:

⁵ Advertisements may also fall under Rule 135A (Generic Advertising) or Rule 34b-1 (Supplemental Sales Literature); however, for all practical purposes, registered fund sales material will fall under, and be subject to, Rule 482.

⁶ A hypothetical illustration of mathematical principles is permitted, provided that it does not predict or project the performance of an investment or an investment strategy [e.g., *how a \$10,000 investment would have performed if invested in the fund*]. See FINRA Rule 2210(d)(1)(F)(i).

- must be clear and not be misleading within the context in which they are made;
- must provide a balanced treatment of risks and potential benefits;
- must disclose all explanatory or qualifying information necessary to make a statement not misleading;
- must consider whether circumstances exist or have ceased to exist (e.g., relevant general economic or financial circumstances) that would change the meaning of a statement;
- must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments;
- must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience (particularly if such audience includes retail investors);

(SEC Rule 156(b)(1); FINRA Rule 2210(d)(1); *see, e.g., In the Matter of Marketlines, Inc., et. al.* SEC Rel. No. IA-206 (Jan. 20, 1967) (citations omitted))

- must present any possible risks or limitations with equal prominence as possible benefits of products or services;
- must not make exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes;
- must not make unwarranted or incompletely explained comparisons to other investment vehicles or to indices; and

(SEC Rule 156(b)(3))

- must not characterize income or returns as “tax-free” or “tax-exempt” if tax liability is merely postponed or deferred (e.g., when taxes are payable upon redemption).

(FINRA Rule 2210(d)(4)(B))

3. Offers to Sell.

- Advertisements must only be used for fund that is selling (or proposing to sell) its securities pursuant to a registration statement which has been filed with the SEC; and
- Advertisements must not contain or be accompanied by any application by which a prospective investor may buy fund shares.

(SEC Rule 482)

- All advertisements should disclose that:
 - the advertisement is qualified in its entirety by the fund’s prospectus;

- the information provided does not constitute investment advice and is not an offering of or a solicitation to buy or sell any security, product, service or fund, including the fund being advertised; and
- that an offer for the advertised fund can only be made by the fund's prospectus.

4. General Disclosure Legend.

- All registered fund advertisements must contain a general disclosure legend substantially similar to the following:

Before investing, consider the fund's investment objectives, risks, charges and expenses. To obtain a prospectus [or summary prospectus] which contains this and other information, call [DISTRIBUTOR] at 1-800-[-] or visit www.[].com. Please read the prospectus [and summary prospectus] carefully before investing.

Distributor: [____], member FINRA, SIPC. [Disclose any affiliation between the Distributor and other entities referred to in the presentation (e.g., the investment advisor)].

Not FDIC Insured – No Bank Guarantee – May Lose Value.

- If used prior to the effectiveness of a fund's prospectus or prior to the determination of the public offering price, registered fund advertising must include a "Subject to Completion" legend substantially similar to the following:

Information contained herein is subject to completion or amendment. A registration statement relating to these securities has been filed with the Securities and Exchange Commission. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This prospectus shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any State in which such offer, solicitation, or sale would be unlawful prior to registration or qualification under the securities laws of any such State.

(SEC Rules 481(b)(2), 482(b)(2))

5. Testimonials. Any testimonial concerning a fund must prominently disclose:

- the fact that the testimonial may not be representative of the experience of other clients;
- the fact that the testimonial is no guarantee of future performance or success; \
- if more than \$100 in value is paid for the testimonial, the fact that it is a paid testimonial; and
- if a testimonial in any communication (including Institutional Communications) concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.⁷

⁷ Although FINRA permits broker/dealers to provide testimonials, Investment Advisers are generally not allowed to do so. See "Advertising Checklist Investment Advisers Act of 1940," Section A.

(FINRA Rule 2210(d)(6)(A)-(B))

6. Comparisons.

- Any comparison between products, investments, services or indices included in Retail Communications must be accompanied by disclosure of all material differences between products, investments, services or indices, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

(FINRA Rule 2210(d)(2)); (SEI Investments Distribution Co., Letter of Acceptance, Waiver and Consent No. 2009018186201 (Feb. 14, 2012) (“SEI Investments AWC”))

7. Survey Data.

- Survey data must be accompanied by a sound basis for evaluating the data, including the nature and scope of the survey, the methodology used, and any other information needed to make the significance/reliability of the survey clear.

(SEI Investments AWC)

8. Graphs and Charts. Any graphs or charts:

- should be accompanied by a clear explanation of the relevant differences between product types (which cannot be in a footnote or legend);
- must identify the indexes, averages, or specific securities on which the performance is based, and must disclose that past performance does not guarantee future results (see also, “Index/Benchmark Performance”);
- must be proportionately correct or drawn to scale;
- must have clearly labeled axes and baselines so that the reader can understand how the performance data relates to the graph;
- must include accompanying text that clearly state their purpose and must disclose the relevant assumptions; and
- must have starting points that fairly reflect the performance of the product without exaggeration.

(NASD RCA – April 1995 – Misuse Of Charts Comparing Index Returns Concerns NASD; NASD RCA - Summer 2000 - Inaccurate Performance Graphs Result In Formal Action)

9. Fund Rankings. Independently prepared fund rankings (whether based on performance or other factors) are not subject to the requirements of Rule 482 with respect to standardized return calculation, presentation and related disclosures. Fund rankings:

- must not be misleading;
- must be accompanied by disclosure sufficient to allow an investor to assess the relevance and significance of the information presented;

- must be created and published by a “Ranking Entity” (or by a fund or an affiliate of a fund, but based upon performance measurements of a Ranking Entity);⁸
- must not state or imply that a fund is the best performer in a category unless it is actually ranked first in the category;
- must be accompanied by disclosure of:
 - the name of the category;
 - the number of funds (or fund families) in that category;
 - the Ranking Entity’s name and, if applicable, the fact that the fund created the category/subcategory;
 - the length of the measuring period and its ending date;
 - the criteria on which the ranking is based (e.g., total return);
 - the fact that past performance does not guarantee future results;
 - whether the ranking takes front-end sales loads into account (for those funds that charge such a load);
 - if the ranking is based on total return or SEC yield and fees/expenses waived had a material effect on performance, then a statement to that effect;
 - the publisher of the ranking data; and
 - if applicable, the meaning of any ranking symbol included (e.g., star rankings);
- must be current to the most recent calendar quarter (at a minimum). If no such ranking exists, then a FINRA member may only use the most current ranking from the Ranking Entity unless such ranking would be misleading (in which case no ranking may be used);
- may not cover a period of less than one year, unless based upon yield;
- if based on total return, must be accompanied by rankings based on total return for the one-, five- and ten-year periods (if in existence for such time periods) provided by the same Ranking Entity for the same category. If no such period rankings exist, a FINRA member may use rankings representing short, medium and long term performance for the required periods;
- must be of a category choice that provides a sound basis for evaluating the fund’s performance. The category must be based on a Ranking Entity’s published category (or a category created by a fund but based on performance measurements of a Ranking Entity),

⁸ “Ranking Entity” is any entity that provides general information about funds to the public, that is independent of the fund and whose services are not procured by the fund or its affiliate to assign the fund a ranking.

and no category may be used if based on asset size of a fund, regardless of whether a Ranking Entity produced it; and

- if for more than one class of a fund (or for feeder funds), must be accompanied by prominent disclosure that the fund classes (or fund feeders) have a common portfolio.
- Fund Families. There are special requirements in addition to those above for fund family rankings that should be referenced if a FINRA member elects to advertise such rankings.

(FINRA Rule 2212)

10. Past Specific Recommendations: Retail Communications and Correspondence.

- Retail communications and correspondence may not refer (directly or indirectly) to past specific recommendations made by the firm that were or would be profitable; however, such communications may include a list of all recommendations made by the firm within the immediately preceding period of not less than one year.

The list must include:

- name of each security recommended;
- date and nature of each recommendation (e.g., buy, sell or hold);
- market price of security at time of recommendation;
- price recommendation was to be acted upon;
- most recent market price of each security listed; and
- prominently include the following legend on the first page, in print or type as large as largest print or type used in text of the advertisement or list:

It should not be assumed that the recommendations made in the future will be profitable or will equal the performance of the securities in this list

NOTE – FINRA rules with respect to past specific recommendations generally mirror the Advisers Act rules; however FINRA has not endorsed the SEC’s no action guidance with respect to best and worst performing holdings and non-performance based past specific recommendations.

(FINRA Rule 2210(d)(7)(C))

- Top/Bottom Holdings. Fund portfolio holdings are not considered past specific recommendations of the firm, but should be accompanied by the following disclosure:

Listed holdings are presented to illustrate examples of the securities that the Fund has bought and do not represent all of the Fund's holdings or future investments. [In the case of fixed income and cash funds the securities are aggregated and shown at the issuer level.] The holdings do not include other assets or instruments that may be held by the Fund including, for example and not by way of limitation, cash or cash equivalents and

derivatives such as futures, options and swaps. Holdings are as of the date shown above, may change at any time and are not recommendations to buy or sell any security.

11. Investment Analysis Tools. Investment analysis tools,⁹ written reports indicating the results generated by such tools, and related advertisements and sales literature must:

- describe the criteria and methodology used, including the tool’s limitations and key assumptions;
- explain that results may vary with each use and over time;
- if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose if the tool favors certain securities and, if so, explain the reason for the selectivity, and state that other investments not considered may have characteristics similar or superior to those being analyzed; and
- be accompanied by disclosures that are clear and prominent in light of the content, context and presentation of the tool and/or written report, including the following disclosure:

IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results.

(FINRA Rule 2214)

12. Bond Mutual Fund Volatility Ratings. Bond mutual fund volatility ratings¹⁰ may be used only in supplemental sales literature, subject to the following: volatility must not be identified or described as a “risk” rating;

- the rating must be the most recently available rating and information must, at a minimum, be current to the most recently completed calendar quarter ended prior to use;
- the rating, disclosure statement accompanying the rating, and criteria and methodology used to determine the rating must be clear, concise, understandable, and based exclusively on objective, quantifiable factors;
- the entity that issued the rating must provide detailed disclosure on its rating methodology to investors through a toll-free telephone number, a web site, or both; and

⁹ An “Investment Analysis Tool” is “an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.”

¹⁰ A “bond mutual fund volatility rating” is defined as a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund's individual portfolio holdings, the market price volatility of the portfolio, the fund's performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk. See FINRA Rule 2213.

- a disclosure statement must accompany the supplemental sales literature and must include all current bond fund volatility ratings that have been issued with respect to the fund (current to the most recently completed calendar quarter ended prior to use) including, with respect to each rating:
 - the name of the entity that issued the rating;
 - the most current rating and date of the current rating, with an explanation of the reason for any change in the current rating from the most recent prior rating; and
 - a description of the rating in narrative form, containing: a statement that there is no standard method for assigning ratings; a description of the criteria/methodologies used; a statement that not all bond funds have volatility ratings; whether consideration was paid for the rating; a description of the types of risks that the rating measures (*e.g.*, short-term volatility); a statement that the portfolio may have changed since the date of the rating; and that there is no guarantee that the fund will continue to have the same rating or perform in the future as rated.

(FINRA Rule 2213)

C. REGISTERED FUND PERFORMANCE ADVERTISING.

1. Performance Disclosures.¹¹

- If performance data is included, the advertisement must include a legend substantially similar to the following:

*Performance quoted represents past performance. **Past performance does not guarantee future results.** [Investment return and principal value will fluctuate, so you may have a gain or loss when shares are sold.] **[Remove for money market funds.]** Current performance may be higher or lower than that quoted. All results are historical and assume the reinvestment of dividends and capital gains.*

- If the materials do not include total return quotations current to the most recent month-ended seven business days prior to the date of use, also include either a toll-free (or collect) telephone number or a web site where an investor may obtain performance data current to the most recent month-end.

(SEC Rule 482(b)(3)(i))

2. Standardized Performance Calculation.

- Performance data must be calculated in accordance with methodologies that apply to performance data in the fund's prospectus.
- Generally, only standardized performance data reflecting average annual total return and yield (including tax-equivalent yield) may be shown.

¹¹ Rule 482 permits, but does not require, inclusion of performance data in Rule 482 materials.

- Average annual total return: If any historical performance information is shown, the 1-, 5- and 10-year average annual returns (or since inception, if earlier) must be included as of the most recently completed calendar quarter.
- Current yield: Current yield (for the most recent 30-day period practicable) may only be included if average annual total return is also included.
- Tax-equivalent yield: For funds with significant tax-exempt income, taxable-equivalent yield may be quoted only if calculated using a specific formula and if accompanied by the current yield and the average annual total return that relate to the identical base period.
- After-tax return: Certain funds¹² must accompany performance information with average annual total return (after taxes on distributions) and average annual total return (after taxes on distributions and redemptions) for a recent 1-, 5- and 10-year period, based on the highest federal income tax rate.

NOTE: Standardized performance data must reflect the deduction of the maximum sales load (including any deferred sales load) and any other recurring fees that are charged to all shareholder accounts. See Instructions to Item 26 of Form N-1A.

- Non-standardized performance measures may only be included if they include all elements of return and are accompanied by equally prominent standardized total return data.

(SEC Rule 482(d))

3. Standardized Performance Calculation – Money Market Funds.

- Yield. Yield must be calculated in accordance with methodologies that apply to performance data in the fund’s prospectus, and may include:
 - Current Yield that identifies the length and date of the last day in the base period used to compute the quotation *adjacent to* and *with equal prominence as* the yield quotation;
 - Effective Yield only if the advertisement also includes current yield relating to the same base period with equal prominence;
 - Tax-Equivalent Yield or Tax Equivalent Effective Yield only if:
 - (1) the advertisement also includes current yield relating to the same base period with equal prominence; and
 - (2) the income tax rate used in the calculation is disclosed.
- Total Return. Total return quotations:

¹²

This requirement applies to mutual funds (other than a fund permitted to use a name suggesting that the fund’s distributions are exempt from federal income tax or from federal or state income tax, pursuant to the “names” rule (Rule 35d-1 under the 1940 Act)) that represent or imply that the fund is managed to limit or control the effect of taxes (See, Rule 482(f)).

- must be accompanied by current yield quotations, side-by-side and in the same size print, and;
- if there is a material difference between total return and current yield, must disclose that current yield more closely reflects the fund's current earnings than total return.

4. Performance Presentation. Advertising materials that include performance must:

- reflect the maximum amount of any front-end or back-end sales charge (including any contingent deferred sales charge) or any other nonrecurring load or fee. If non-standardized performance does not reflect the sales load or fee, disclose that performance does not reflect the deduction of the sales load or fee, and that, if reflected, the load or fee would reduce the performance quoted;
- NOTE: Standardized performance data must reflect the deduction of the maximum sales load (including any deferred sales load) and any other recurring fees that are charged to all shareholder accounts. See Instructions to Item 26 of Form N-1A.*
- reflect the annual operating expense ratio (gross of any fee waivers or expense reimbursements), as stated in the fee table in the fund's prospectus.
- NOTE: annual operating expenses may also be presented net of fee waivers or expense reimbursements, accompanied by disclosure that is consistent with the fund's prospectus.*
- reflect the length of, and date of the last day of, the base period for the performance in no less prominence than the measurement;

(SEC Rule 482(b)(3); (FINRA Rule 2210(d)(5))

- not represent or imply that a fund is managed to limit or control the effect of taxes unless the fund is permitted to use a name suggesting that the fund's distributions are exempt from federal income tax or from federal or state income tax, pursuant to the "names" rule;¹³ or performance information is accompanied by after-tax return information;

(SEC Rule 482(f))

- not include past performance information about past income, gain, or growth of assets that implies results that would not be justified under current circumstances;
- not include communications about future performance that make express or implied representations as to security of capital, possible future gains or income or expenses associated with an investment or representations stating or implying that future gain or income may be inferred from or predicted based on past performance information; and
- not portray past performance in a manner that implies past gains or income will be repeated in the future.

¹³ Rule 35d-1 under the Investment Company Act of 1940.

(SEC Rule 156(b)(2))

- 5. Net of Fee Performance.** All performance must be shown net of fees. Gross of fee performance may not be presented unless net of fee performance is also presented side-by-side and with equal prominence.

(Unpublished, but current position of FINRA staff)

- 6. Model Fees.** Registered fund performance advertising must not reflect a deduction of a model advisory fee. Performance must reflect the actual performance results of the fund and realized by fund shareholders.

- 7. Index/Benchmark Performance.** If fund performance is compared to an index or benchmark or if an advertisement otherwise refers to an index/benchmark, the advertisement must:

- only use a comparative index that is appropriate (typically, an index identified in the fund's prospectus);
- provide the reader with a sound basis for evaluating the facts with respect to the product;
- clearly and prominently disclose that the index performance is not illustrative of the fund's performance, provide or offer to provide the fund's performance;
- not present index performance in such a way to imply that an investment can be made in the index; and
- verify whether any of the index performance is back tested performance (i.e., all or a portion of the historical index performance presented was calculated retroactively for periods that predate the creation of the index). If back tested index performance is used, the advertising material must disclose this fact and identify the source of the back tested index performance history.

(SEI Investments AWC)

- 8. Related Performance.**¹⁴

- Registered fund advertisements must not include related performance information.¹⁵ Such information may only be included in the statutory prospectus that is filed with the

¹⁴ FINRA considers "related performance" to include the performance of other, separate investment companies, funds, portfolios, accounts or composites thereof managed by the same investment adviser, sub-investment adviser, or portfolio manager that manages the fund that the member is promoting. The term also includes the performance of "clone" funds and other similarly managed accounts and funds, the performance of funds or accounts that preceded and were converted into the advertised fund, and composites of other similarly managed funds, accounts or portfolios. (NASD Interpretive Letter to Securities Industry Association (Oct. 2, 2003) at n. 1)

¹⁵ Please note, however, that the staff of the SEC's Division of Investment Management has taken the position that a registered fund may include in its registration statement information concerning the performance of separate accounts and other funds managed by the fund's adviser that have substantially similar investment objectives, policies, and strategies as the fund, *provided that* such information is not presented in a misleading manner and does not obscure or impede the understanding of information that is required to be in the fund's registration statement (including the fund's own performance). Where such

SEC (subject to numerous limitations and selected, calculated and presented in accordance with SEC staff guidance and conditions).

(*See, e.g.,* MassMutual Institutional Funds (pub. avail. Sept. 28, 1995); Nicholas-Applegate (pub. avail. Feb. 7, 1997); Nicholas-Applegate (pub. avail. Aug. 6, 1996); GE Funds (pub. avail. Feb. 7, 1997); ITT Hartford Mutual Funds (pub. avail. Feb. 7, 1997); Bramwell Growth Fund (pub. avail. Aug. 7, 1996); NASD Interpretive Letter to Davis Polk & Wardwell (Dec. 30, 2003))

- Related performance information may, however, be used in communications that are distributed solely to “institutional investors” (excluding institutional investors who intend to share the information with persons other than institutional investors) so long as:
 - the related performance information is actual performance of all separate or private accounts or funds that (i) have substantially similar investment policies, objectives, and strategies, and (ii) are managed or were previously managed by the same adviser or sub-adviser that manages the registered fund that is the subject of an institutional communication (“related accounts”);
 - the presentation of related performance information includes all related accounts, and, if there are multiple related accounts, the investment performance of such accounts is presented in a composite or a list (displaying the performance of each account with equal prominence);
 - institutional communications are clearly labeled “for use with institutions only, not for use with retail investors,” and institutional investors receiving the materials are instructed not to provide them to current or prospective customers or others who are not institutional investors;
 - the presentation of related performance information discloses performance information that is net of fees and expenses of related accounts, or net of a model fee that is the highest fee charged to any account managed in the strategy;
 - if gross performance information is also provided, the communication prominently discloses that (i) the performance information does not reflect the deduction of fees and expenses, (ii) different funds and accounts have different fees and expenses, and (iii) the related performance information would have been lower to the extent the related funds or accounts were subject to higher fees and expenses;¹⁶

related performance is included in a registered fund’s registration statement, the Division has noted that the fund should not exclude the performance of separate accounts or other funds managed by the fund’s adviser that have substantially similar investment objectives, policies, and strategies as the fund if the exclusion would cause the performance shown to be materially higher than would be the case if the other funds or accounts were included or if such exclusion would otherwise be materially misleading. *See*, Division of Investment Management IM Guidance Update No. 2013-05 (Aug. 2013); Nicholas-Applegate (pub. avail. Aug. 6, 1996); ITT Hartford Mutual Funds (pub. avail. Feb. 7, 1997).

¹⁶

The presentation of related performance information must be consistent with the presentation of such performance information in the adviser’s Past Performance (Related Performance) Appendix in the registered fund’s prospectus. *See* FINRA Interpretive Letter to Clair Pagnano, K&L Gates LLP, on behalf of Evanston Alternative Opportunities Fund (June 9, 2017) (the “Evanston Letter”)

- the fees and expenses of the registered fund that is the subject of the communication are prominently disclosed and the fund’s performance information reflects all fees and expenses;
- if the fees and expenses are higher than the fees and expenses of the Related Accounts, the communication discloses that fact;
- the related performance information (i) includes the performance of each related account, (ii) is for a period of at least one year and since the inception of the investment strategy, and (iii) is current as of the most recently-ended calendar quarter;
- the related performance information is clearly labeled as such and contains clear disclosure of the applicable dates for the performance;
- for a registered fund in existence for more than one year, the actual performance is displayed more prominently than the related performance information;
- institutional communications disclose any material differences between the funds or accounts that the related performance information relates to and the registered fund that is the subject of the communication; and
- institutional communications comply with all other applicable FINRA rules and federal securities laws and are subject to the same supervisory requirements that the distributor applies to all other firm communications.

(FINRA Interpretive Letter to Mr. Edward P. Macdonald, Hartford Funds Distributors, LLC, May 12, 2015 (the “Hartford Letter”); the Evanston Letter (applying the Hartford Letter rationale to continuously offered closed-end registered investment companies.))

9. Model/Hypothetical Backtested Performance.¹⁷

- Registered fund advertisements must not include model or hypothetical backtested performance data, even where presented in combination with actual historical performance.
- Advertisements may, however, show the hypothetical growth of an investment provided that such performance is calculated using the actual performance of the Fund.

(See, NASD News Release, “NASD Fines Citigroup Global Markets, Inc. \$250,000 in Largest Hedge Fund Sales Sanction to Date” (Oct. 25, 2004) (“Citigroup Release”); NASD Interpretive Letter to Securities Industry Association (Oct. 2, 2003), Bear Stearns Letter of Acceptance, Waiver and Consent No. 2007011145701 (Jul. 30, 2009) (“Bear Stearns AWC”))

¹⁷ The term “model” performance generally refers to the actual performance results achieved by applying a particular investment strategy to a model portfolio of securities, but does not reflect actual trading or the adviser’s decision making for the particular fund or strategy presented. The term “hypothetical backtested performance” refers to the use of theoretical performance applying a particular investment strategy (e.g., quantitative) to historical financial data to show what decisions would have been made if the strategy were employed.

Pre-inception index performance (“PIP”) data may be used in communications regarding certain exchange traded products (“ETPs”) distributed solely to “institutional investors” (excluding financial intermediaries who intend to share the PIP data with persons other than institutional investors) so long as:

- any piece of marketing material that includes PIP data would be clearly labeled “For use with institutions only, not for use with retail investors”;**
- any PIP data would be used only with respect to an index created according to a pre-defined set of rules that cannot be altered except under extraordinary market, political or macroeconomic conditions;
- PIP data will be used to market passively managed ETPs and would not be used to market actively managed ETPs, in which active changes to underlying securities are permitted by the methodology of the ETP;
- any piece of marketing material containing PIP data would include an offer to provide the rule set or methodology of the ETP index upon request and any electronic marketing material would include a hyperlink to such information;
- the presentation of PIP data will reflect the deduction of fees and charges applicable to the ETP;
- PIP data will reflect a period of time that includes multiple securities market environments, and at a minimum, ten years since the inception of the index;
- PIP data will be current as of the most recently ended calendar quarter;
- PIP data will be clearly labeled and presented separately from actual performance along with disclosure of the applicable dates for the PIP data and the dates for the actual ETP performance since inception;
- for any ETP in existence for greater than one year, the use of PIP data will be accompanied by the prominent presentation of actual performance of the ETP since inception that reflects the deduction of fees and charges of the ETP;
- PIP data will not be inconsistent with information in the prospectus but may be used regardless of whether the fund prospectus contains the data; and
- in addition to disclosures required to meet the content standards of Rule 2210(d), PIP data will be accompanied by the following disclosures:
 - the ETP is a new product and any performance prior to the date of index inception is hypothetical;
 - if the PIP data is produced by an index provider that is paid by the fund sponsor to produce the data, this arrangement and the identity of the index provider will be disclosed;
 - the PIP data results are based on criteria applied retroactively with the benefit of hindsight and knowledge of factors that may have positively affected its

performance, and cannot account for all financial risk that may affect the actual performance of the ETP;

- the actual performance of the ETP may vary significantly from the PIP data; and
- any known reasons why the PIP data would have differed from actual performance during the period shown (e.g., assumptions regarding transaction costs, liquidity, or other market factors).

(FINRA Interpretive Letter to Mr. Bradley J. Swenson, ALPS Distributors, Inc., April 22, 2013.)

10. Target Rates of Return/Performance.

- Target rates of return may not be included unless accompanied by a sound basis for investors to evaluate the reasonableness of the stated target.
- Target rates of return must be consistent with those stated in a Fund's prospectus.

(Citigroup Release)

11. Non-Standardized Returns - Independently Prepared Reprints. Independently published newspaper and magazine articles containing non-standardized performance data are permitted, but must include a legend stating:

- with respect to any other funds mentioned in the reprint, that it is not an advertisement for such funds; and
- with respect to the fund itself, any non-standardized returns included are accompanied by the standardized total return quotations as required by Rule 482.

(See, GMAM Services Inc., SEC No-Action Letter (May 3, 1990))

- A third party article only constitutes an "independently prepared reprint" if:
 - the report is prepared by an entity that is independent of the fund, its affiliates, and the FINRA member using the report (the "research firm");
 - the report's contents have not been materially altered by the FINRA member using the report except as necessary to make the report consistent with applicable regulatory standards or to correct factual errors;
 - the research firm prepares and distributes reports based on similar research with respect to a substantial number of funds;
 - the research firm updates and distributes reports based on its research of the fund with reasonable regularity in the normal course of the research firm's business;
 - neither the fund, its affiliates nor the FINRA member using the research report has commissioned the research used by the research firm in preparing the report; and

- if a customized report was prepared at the request of the fund, its affiliate or a FINRA member, then the report includes only information that the research firm has already compiled and published in another report, and does not omit information in that report necessary to make the customized report fair and balanced.

(FINRA Rule 2210(c)(7)(I))

D. ADMINISTRATIVE MATTERS UNDER SEC AND FINRA RULES

1. Timeliness.

- Performance data must be as of the most recent practicable date considering the type of fund and the media through which the data is conveyed.
- Total return quotations:
 - must be as of the most recent calendar quarter-end prior to submission of the advertisement for publication; and the advertisement must identify a toll free (or collect) number or an internet address where an investor can find the most recent month-end performance data; or
 - must be current to the most recent month ended seven business days prior to the date of its use.

(SEC Rule 482(g))

2. Prominence.

1. Print Ads

- The text of the advertisement itself must be in roman type at least as large and as legible as 8-point modern type.
- The text of narrative disclosures must be at least as large as and of a style different from, but at least as prominent as, that used in the majority of the advertisement.
- Disclosures pertaining to performance data may be no smaller than the text of the performance data.

2. Electronic Ads

- The text of the ad, in addition to related disclosures, must be presented in a type size and style reasonably calculated to draw investor attention to them.

3. Radio and Television Ads

- Disclosures must be given equal emphasis as the major portion of the advertisement.

4. Non-Standardized Performance

- Any non-standardized performance information that is included in advertising materials must be presented with no greater prominence than standardized total return quotations.

(SEC Rules 420 and 482(b), (d)(5))

3. Proximity.

- Narrative disclosures related to fund performance must be in close proximity to the performance data in print, radio and television ads.
- For print ads, this disclosure must be in the body of the ad (footnote disclosure is not permissible).

(See SEC Rel. No. 26195, at n. 46-49 and accompanying text)

4. FINRA Member Identification. All Retail Communications and Correspondence must:

- prominently disclose the name of the FINRA member, or the name under which the member's broker-dealer business primarily is conducted (as disclosed on the member's Form BD), which may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- reflect any relationship between the FINRA member and any non-member or individual who is also named [*e.g.*, disclose affiliation with affiliated adviser in the case of dual-registrants]; and
- if the material includes other names, reflect which products or services are being offered by the FINRA member.

(FINRA Rule 2210(d)(3))

5. Approval and Recordkeeping.

- All Retail Communications must be approved by a registered principal of the FINRA member by signature or initial and date before the earlier of its use or filing with FINRA's Advertising Regulation Department (the "Department").
- Three categories of Retail Communications are exempt from the principal pre-use approval requirement, provided that all three categories must be supervised as Correspondence (see below):
 - (1) Market letters (i.e., discussions of broad-based indices; commentaries on economic or market conditions; technical analysis concerning the demand and supply for a sector, index, or industry based on trading volume and price; statistical summaries of multiple companies' financial data, including listings of current ratings; recommendations regarding increasing or decreasing holdings in particular; and notices of ratings or price target changes), including white papers and market commentary pieces that meet the foregoing definition, unless they make a recommendation;

- (2) Retail Communications posted on an online interactive electronic forum (e.g., social media); and
- (3) Retail Communications that do not make any recommendation or promote a product or service of the member firm.

(FINRA Rule 2210(b)(1))

- Correspondence is not required to be approved by a registered principal prior to use, provided that Correspondence must be subject to written supervisory procedures designed to reasonably supervise the firm's Correspondence that complies with NASD Rule 3010(d)(2)

(FINRA Rule 2010(b)(2); NASD Rule 3010(d)(2))

- Institutional Communications are not required to be approved by a registered principal prior to use, but must be subject to written supervisory procedures designed to reasonably supervise the firm's Institutional Communications.

(FINRA Rule 2010(b)(3))

- Copies of all Retail Communication and Institutional Communications must be maintained in a separate file for three years following the date of last use, along with the dates of first and last use, name of the registered principal who approved each item, the date approval was given, and the name of the person who prepared or distributed the communication (if registered principal approval is not required)
- FINRA members must maintain in a file information concerning the source of any statistical table, chart, graph or other illustration used by the FINRA member in communications with the public.
- Retail Communications that have previously been approved by the Department and have not been materially altered are not required to be approved by a registered principal. For such Communications, firms must maintain records of the name of the member that filed the Retail Communication for approval and a copy of the review letter from the Department.
- Copies of all Correspondence must be maintained in a separate file for three years. The names of the persons who prepared the Correspondence and who reviewed the Correspondence must be ascertainable from the retained records.

(FINRA Rules 2210(b)(4) and 4511; NASD Rule 3010(d)(3); SEC Rule 17a-4(b)(4))

6. Filing Requirements – Certain Retail Communications.¹⁸

- The following types of Retail Communications must be filed with the Department at least 10 business days prior to use:

¹⁸ Please see FINRA Rule 2210(c)(7) for a list of types of communications that are excluded from FINRA's filing requirements.

- Retail Communications of new FINRA members for a period of one year beginning on the date that the firm's FINRA membership became effective;
- Retail Communications concerning registered funds that include or incorporate performance rankings or comparisons that are not generally published or are the creation (directly or indirectly) of the fund, its underwriter or an affiliate. The filing must include a copy of the ranking or comparison used in the Retail Communication;
- Retail Communications concerning security futures, unless the communication is submitted to another self-regulatory organization with comparable review standards (e.g., the National Futures Association);
- Retail Communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings.

(FINRA Rules 2210(c)(1)(A); 2210(c)(2))

- The following types of Retail Communications must be filed with the Department within 10 business days of first use:
 - all other Retail Communications concerning registered funds not included above;
 - Retail Communications concerning public direct participation programs;
 - any template for written reports produced by, or retail communications concerning, an investment analysis tool;
 - Retail Communications concerning collateralized mortgage obligations registered under the Securities Act; and
 - Retail Communications concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, not otherwise included above.

(FINRA Rule 2210(c)(3))

- When filing materials with FINRA, the FINRA member must provide with each filing the actual or anticipated date of first use, the name and title of the registered principal who approved the material and the date that the approval was given.

(FINRA Rule 2210(c)(4))

ADVERTISING CHECKLIST: SEC RULE 156 FOR PRIVATE FUNDS

This section of the checklist describes the proposed application of Rule 156 to communications concerning private funds.

A. DEFINITIONS AND SCOPE.

- 1. Sales Literature.** Rule 156 under the 1933 Act provides guidance with respect to “sales literature,” which generally includes all types of fund sales material and advertising, Private Placement Memoranda, Offering Memoranda, RFPs, RFIs, DDQs, and other written materials related to a fund, as well as oral communications.

“Sales literature,” for purposes of Rule 156, means “any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company [or private fund]. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either written or oral form in the offer or sale of securities.”

The term “private fund” would be defined in Rule 156 as an issuer that would be an investment company but for Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940.

- B. GENERAL REQUIREMENTS.** Under Rule 156, private fund advertisements will not be permitted to contain information that is materially misleading, depending on an evaluation of the context in which statements involving material facts are made.

- 1. General Content Standards.** Sales literature may not include descriptions, representations, illustrations, or other statements involving a material fact that are misleading in light of the context in which they are made, taking into account:

- other statements being made in connection with the offer of sale or sale of the securities in question;
- the absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading; and
- general economic or financial conditions or circumstances.

(SEC Rule 156(b)(1))

Sales literature:

- must present any possible risks or limitations with equal prominence as possible benefits of products or services;
- must not make exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes;

- must not make unwarranted or incompletely explained comparisons to other investment vehicles or to indices;

(SEC Rule 156(b)(3))

- must provide adequate disclosure of unusual circumstances that have contributed to fund performance;
- provide adequate disclosure of the performance period or that more current information about performance is available and may be lower than advertised performance; and
- provide disclosure that would permit an investor to evaluate the significance of performance that is presented for a selective time period.

(SEC Release no. 33-9416)

2. Performance. Representations about past or future investment performance must:

- not include past performance information about past income, gain, or growth of assets that implies results that would not be justified under current circumstances;
- not include communications about future performance that make express or implied representations as to security of capital, possible future gains or income (*i.e.*, must not project performance) or expenses associated with an investment
- not include representations stating or implying that future gain or income may be inferred from or predicted based on past performance information; and
- not portray past performance in a manner that implies past gains or income will be repeated in the future.

(SEC Rule 156(b)(2))