

**SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION
AMENDMENT TO RULE 204-2 UNDER THE ADVISERS ACT**

A. JUSTIFICATION

1. Necessity for the Information Collection

Section 204 of the Investment Advisers Act of 1940 (the “Advisers Act”) provides that investment advisers required to register with the Securities and Exchange Commission (the “Commission” or “SEC”) must make and keep certain records for prescribed periods, and make and disseminate certain reports.¹ Advisers Act rule 204-2 sets forth mandatory requirements for maintaining and preserving specified books and records.² The records that an adviser must keep in accordance with rule 204-2 must generally be retained for not less than five years.³ These requirements constitute a mandatory “collection of information,” within the meaning of the Paperwork Reduction Act.

On December 22, 2020, the Commission adopted an amended rule, rule 206(4)-1, under the Advisers Act, which addresses advisers marketing their services to clients and investors (the “marketing rule”).⁴ The marketing rule amends existing rule 206(4)-1 (the “advertising rule”), which we adopted in 1961 to target advertising practices that the Commission believed were likely to be misleading.⁵ The rule also replaces rule 206(4)-3 (the “solicitation rule”), which we

¹ 15 U.S.C. 80b-4.

² 17 CFR 275.204-2.

³ *See id.*, at 275.204-2(e). The standard retention period required for books and records under rule 204-2 is five years, in an easily accessible place, the first two years in an appropriate office of the investment adviser.

⁴ *See* 17 CFR § 275.206(4)-1; Investment Adviser Marketing, Release No. IA-5653 (Dec. 22, 2020) [86 FR 13024 (Mar. 5, 2021)] (the “Adopting Release”).

⁵ *See* Advertisements by Investment Advisers, Release No. IA-121 (Nov. 1, 1961) [26 FR 10548 (Nov. 9,

adopted in 1979 to help ensure clients are aware that paid solicitors who refer them to advisers have a conflict of interest.⁶ The amendments create a merged rule that replaces both the current advertising and cash solicitation rules. These amendments reflect market developments and regulatory changes since the rules' adoptions. The Commission also adopted amendments under the Advisers Act to the books and records rule, rule 204-2, under the Advisers Act, to correspond to the amended marketing rule.

We are amending rule 204-2 to require investment advisers to retain copies of all advertisements.⁷ The current rule requires investment advisers to retain copies of advertisements to 10 or more persons.⁸ For oral advertisements, amended rule 204-2 provides that an adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement.⁹ For compensated oral testimonials and endorsements, the adviser may instead make and keep a record of the disclosures provided to clients or investors required by the final rule.¹⁰ We are also amending the rule to require investment advisers to retain: (i) documentation of communications relating to predecessor performance; (ii) copies of all information provided or offered pursuant to the marketing rule's conditions on advertising hypothetical performance; and (iii) records of who the "intended audience" relating to the

1961)].

⁶ 17 CFR § 275.206(4)-3. *See also* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Release No. 688 (July 12, 1979) [44 FR 42126 (Jul 18, 1979)].

⁷ *See* final rule 204-2(a)(11); *see also* Adopting Release, *supra* footnote 4, at section II.I (discussing the amendments to the books and records rule).

⁸ Rule 204-2(a)(11).

⁹ *See* final rule 204-2(a)(11)(i)(A)(I).

¹⁰ *See id.*

conditions of hypothetical performance. The amendments will not require an adviser to maintain copies of written approvals of advertisements, since we are not adopting the proposed requirement that an adviser review and approve advertisements before dissemination.

Amended rule 204-2 will require registered investment advisers to maintain a copy of any questionnaire or survey used in preparation of the third-party rating. Advisers must also make and retain: (i) a record of the disclosures provided to clients or investors pursuant to the marketing rule, if not included in the advertisement, (ii) documentation related to the adviser's determination that it has a reasonable basis for believing that a testimonial, endorsement, or third-party rating complies with the applicable conditions of the marketing rule, and (iii) a record of all affiliated personnel of the adviser.¹¹ Each of these records will be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained under rule 204-2(a). Specifically, investment advisers will be required to maintain and preserve these records in an easily accessible place for not less than 5 years from the end of the fiscal year during which the last entry was made on such record, the first 2 years in an appropriate office of the investment adviser. Requiring maintenance of these records will facilitate the Commission's ability to inspect and enforce compliance with the marketing rule.¹² The information generally is kept confidential subject to the applicable law.¹³

The collection of information under rule 204-2 is necessary for the Commission staff to use in its examination and oversight program. The collection has been previously approved and

¹¹ See final rule 204-2(a)(15)(i)–(ii).

¹² *Id.*

¹³ See section 210(b) of the Advisers Act (15 U.S.C. 80b-10(b)).

subsequently extended under Office of Management and Budget (“OMB”) control number 3235-0278 (expiring October 31, 2022), and it is found at 17 CFR 275.204-2. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB number.

2. Purpose of the Information Collection

The purpose of the information collection in rule 204-2 is to assist the Commission’s examination and oversight program. Requiring the creation, maintenance and retention of the above records as part of rule 204-2 would facilitate the Commission’s ability to inspect for and enforce compliance with firms’ obligations with respect to amended rule 206(4)-1.

The respondents to the rule are investment advisers registered with the Commission. The likely respondents for the amendments to the rule will be the investment advisers registered with the Commission that advertise or compensate solicitors. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential subject to the applicable law.¹⁴ This collection of information is found at 17 CFR 275.204-2 and is mandatory.

3. Role of Improved Information Technology

The Commission’s use of computer technology in connection with this information collection, which has been previously approved by OMB, would not change. The Commission currently permits advisers to maintain records required by the rule through electronic media.¹⁵

¹⁴ See section 210(b) of the Advisers Act [15 U.S.C. 80b-10(b)].

¹⁵ See Electronic Recordkeeping by Investment Companies and Investment Advisers, Investment Advisers Act Release No. 1945 (May 24, 2001) 66 FR 29224 (May 30, 2001).

4. Efforts to Identify Duplication

The collection of information requirements of the rule, including the amendments, are not duplicated elsewhere.

5. Effect on Small Entities

The requirements of the rule are the same for all investment advisers registered with the Commission, including those that are small entities. The requirements of the amendments to rule 204-2 will not distinguish between small entities and other investment advisers because the protections of the Advisers Act are intended to apply equally to retail investor clients of both large and small firms. OMB has previously approved the effect of this collection on all investment advisers in general, including advisers that are small entities. Moreover, it would defeat the purpose of the rule to exempt small entities from these requirements. The Commission reviews all rules periodically, as required by the Regulatory Flexibility Act, to identify methods to minimize recordkeeping or reporting requirements affecting small businesses.

6. Consequences of Less Frequent Collection

Less frequent information collection will be incompatible with the objectives of the rule and would hinder the Commission's oversight and examination program for investment advisers and thereby reduce the protection to investors.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

The collection requirements under rule 204-2 generally require advisers to maintain documents for five years, and in some cases longer. The retention period will not be affected by the amendments to the rule. Although this period exceeds the three-year guideline for most kinds of records under 5 CFR 1320.5(d)(2)(iv), OMB has previously approved the collection

with this retention period. The retention periods in rule 204-2 are warranted because the recordkeeping requirements in rule 204-2 of the Advisers Act are designed to contribute to the effectiveness of the Commission's examination and inspection program. Because the period between examinations may be as long as five years, it is important that the Commission have access to records that cover the entire period between examinations.

8. Consultation With Persons Outside the Agency

In its release proposing to amend the advertising, cash solicitation, and recordkeeping rules, and Form ADV, the Commission requested public comment on the effect of information collections under these amendments. We published notice soliciting comments on the collection of information requirements in the 2019 Proposing Release and submitted the proposed collections of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission's solicitation of public comments included estimating and requesting public comments on updated burden estimates for all information collections under this OMB control number (i.e., both changes associated with the rulemaking and other burden updates). Although we received no comments directly on the proposed collections of information burdens, we did receive three comments on aspects of the economic analysis that implicated estimates we used to calculate the collection of information burdens for the final marketing rule (rule 206(4)-1). We addressed those comments in the separate collection of information we submitted to OMB for the marketing rule.

We have updated the estimated number of respondents to this information collection based upon updated data.¹⁶ We have also updated the information burden estimates based on

¹⁶ See Adopting Release, *supra* footnote 1, at text following footnote 1042.

updates to the rule due to the adopted amendments, as described below.

9. Payment or Gift to Respondents

None.

10. Assurance of Confidentiality

Responses provided to the Commission pursuant to rule 204-2 in the context of the Commission's examination and oversight program are generally kept confidential.

11. Sensitive Questions

No information of a sensitive nature, including social security numbers, will be required under this collection of information. The information collection collects basic Personally Identifiable Information (PII) that may include names, job titles, work addresses, and phone numbers. However, the agency has determined that the information collection does not constitute a system of record for purposes of the Privacy Act. Information is not retrieved by a personal identifier.

12. Estimate of Hour Burden

The respondents to this collection of information are investment advisers registered or required to be registered with the Commission. The use of advertisements is not mandatory, but as discussed above, we estimate that 100 percent of investment advisers will disseminate at least one communication meeting the rule's definition of "advertisement" (including oral advertisements) and therefore be subject to the requirements of the rule. The Commission therefore estimates that, based on Form ADV filings as of August 1, 2020, approximately 13,724 investment advisers will be subject to the proposed amendments to rule 204-2 under the Advisers Act. The approved annual aggregate burden for rule 204-2 is currently 2,435,364 hours, based on an estimate of 13,299 registered advisers, or 183 hours per registered adviser, with a total

monetized costs of \$154,304,664.

Based on staff experience, we estimate that 95 percent of advisers (or 13,038 advisers) provide, or seek to provide, performance information to their clients. The amendments to the recordkeeping rule will require advisers to maintain communications to clients or investors that contain performance calculations of portfolios, in addition to those that reference performance of managed accounts and securities recommendations as currently required. We believe based on staff experience that advisers already have recordkeeping processes in place to maintain client communications; however, this amendment will expand the types of communications subject to the recordkeeping rule and thus increase this collection of information burden.

The amendments will require advisers to maintain copies of any documents provided or offered to clients or investors explaining the assumptions and criteria underlying the hypothetical performance calculation and the risks and limitations in using hypothetical performance. In addition, the amendments will require advisers to create and maintain a record of who the “intended audience” is in connection with its advertisements that include hypothetical performance. We estimate that approximately 50 percent of advisers (or 6,862 advisers) will use hypothetical performance in an advertisement and therefore be subject to the expanded recordkeeping obligations relating to the retention of documents that support those performance calculations. The recordkeeping rule will also require advisers that present predecessor performance to maintain sufficient records to support the performance results provided. As discussed above, we estimate that 2% of advisers (or 275 advisers) will present predecessor performance thus be subject to this collection of information burden.

The rule will require advisers that use a testimonial or endorsement to create and maintain a record of the names of all affiliated personnel of the adviser and documentation

substantiating the adviser's reasonable basis for believing that the testimonial or endorsement complies with the specific conditions of the marketing rule. As discussed above, we estimate that 50 percent of advisers (or 6,862 advisers) will use a testimonial or endorsement.

In addition, we estimate that approximately 50 percent of advisers (or 6,862 advisers) will use third-party ratings in advertisements, and will therefore also be subject to the recordkeeping amendments corresponding to the rule's conditions relating to the use of third-party ratings. These amendments require that an adviser: (i) retain a copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement, and (ii) make and retain documentation substantiating the investment adviser's reasonable basis for believing that the third-party rating complies with the specific conditions of the marketing rule.¹⁷ In a change from the proposal, the marketing rule does not require advisers to obtain the questionnaire or survey to satisfy the specific conditions for third-party ratings; instead, advisers can comply with the conditions for third-party ratings by other means (which will not trigger a recordkeeping obligation). Accordingly, we estimate that approximately 50 percent of the investment advisers that will use a third-party rating, or 3,431 advisers, will comply with the third-party ratings conditions of the rule by obtaining the underlying questionnaire or survey.

For the recordkeeping amendments relating to testimonials and endorsements, we estimate that the amendments will result in a collection of information burden estimate of 5 hours for each of the estimated 6,862 advisers that will use a testimonial or endorsement. We are revising this estimate upwards versus the proposal to reflect the additional recordkeeping

¹⁷ See Adopting Release, *supra* footnote 4, at section III.B.2.

obligations we are adopting, such as the requirement to create documentation of the adviser’s reasonable belief that the testimonial or endorsement complies with the specific conditions of the marketing rule.

We also estimate the amendments will result in a collection of information burden of 3 hours for the 50 percent of advisers (or 6,862 advisers) that we estimate will use third-party ratings. Again, we have revised this estimate upwards from the proposal to reflect the additional obligations imposed by the amended recordkeeping rule, such as the requirement to create documentation of the adviser’s reasonable belief that the third-party rating complies with the specific conditions of the marketing rule. Table 1 summarizes the final PRA estimates for the internal and external burdens associated with these requirements.¹⁸

Table 1: Rule 204-2

	Internal Hour Burden		Wage Rate ¹	Internal Time Costs	Annual External Cost Burden
FINAL ESTIMATES FOR RULE 204-2 FOR ADVERTISING RETENTION AND PERFORMANCE					
Retention of advertisements	8	×	\$62 (general clerk)	\$496	
	2	×	\$70 (compliance clerk)	\$140	
Total burden per adviser	10			\$636	
Total number of affected advisers	×	13,724		×	13,724
Sub-total burden	137,240 hours			\$8,728,464	
Retention of communications containing performance results	2	×	\$62 (general clerk)	\$124	
	1	×	\$70 (compliance clerk)	\$70	
Total burden per adviser	3			\$194	
Total number of affected advisers	×	13,038		×	13,038

¹⁸ We estimate the hourly wage rate for compliance clerk is \$70 and a general clerk is \$62. The hourly wages used are from SIFMA’s *Management & Professional Earnings in the Securities Industry 2013* (“SIFMA Report”), modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

Sub-total burden	39,114 hours			\$2,529,372
Retention of documentation relating to hypothetical performance and record of intended audience	2	x	\$62 (general clerk)	\$124
	1	x	\$70 (compliance clerk)	\$70
Total burden per adviser	3			\$194
Total number of affected advisers	x 6,862			x 6,862
Sub-total burden	20,586 hours			\$1,331,228
Retention of documentation relating to predecessor performance	2	x	\$62 (general clerk)	\$124
	1	x	\$70 (compliance clerk)	\$70
Total burden per adviser	3			\$194
Total number of affected advisers	x 275			x 275
Sub-total burden	825 hours			\$53,350
FINAL ESTIMATES FOR RULE 204-2 FOR TESTIMONIALS AND ENDORSEMENTS				
Creation and retention of records documenting adviser's reasonable belief, disclosures not included in an advertisement, and list of affiliates	4	x	\$62 (general clerk)	\$248
	1	x	\$70 (compliance clerk)	\$70
Total burden per adviser	5			\$318
Total number of affected advisers	x 6,862			x 6,862
Sub-total burden	34,310 hours			\$2,182,216
FINAL ESTIMATES FOR RULE 204-2 FOR THIRD-PARTY RATINGS				
Creation and retention of records documenting adviser's reasonable belief and list of affiliates	2	x	\$62 (general clerk)	\$124
	1	x	\$70 (compliance clerk)	\$140
Total burden per adviser	3			\$264
Total number of affected advisers	x 6,862			x 6,862
Sub-total burden	20,586 hours			\$1,811,568
TOTAL ESTIMATED FINAL BURDEN FOR RULE 204-2				
Total burden	252,661 hours			\$16,636,198

Notes:1. See SIFMA Report, *supra* footnote 18.

13. Estimate of Total Annual Cost Burden

There is no cost burden other than the cost of the hour burden described above.

14. Estimate of Cost to the Federal Government

There are no additional costs to the federal government directly attributable to rule 204-2.

15. Explanation of Changes in Burden

As noted above, the approved annual aggregate burden for rule 204-2 is currently 2,435,364 hours, based on an estimate of 13,299 registered advisers, or 183 hours per registered adviser, with a total monetized costs of \$154,304,664.¹⁹ We therefore estimate that the amendments to the recordkeeping rule will result in an aggregate increase in the collection of information burden estimate by 18.44 hours for each of the estimated 13,724 registered advisers, resulting in a total of 201.44 hours per adviser.²⁰ This would yield an annual estimated aggregate burden of 2,764,563 hours under amended rule 204-2 for all registered advisers,²¹ for a monetized cost of \$175,980,426.²² This represents an increase of 329,199²³ annual aggregate hours in the hour burden and an annual increase of \$21,675,762 from the currently approved total aggregate monetized cost for rule 204-2.²⁴ These increases are attributable to a larger registered investment adviser population since the most recent approval and adjustments for

¹⁹ 2,435,364 hours / 13,299 registered advisers = 183 hours per adviser.

²⁰ 10 hours (advertising retention) + 3 hours (performance retention) x 95% + 3 hours (hypothetical performance) x 50% + 3 hours (predecessor performance) x 2% + 5 hours (testimonials and endorsements) x 50% + 3 hours (third-party ratings) x 50% = 18.44 hours.

²¹ 13,724 registered investment advisers x 201.44 hours = 2,764,563 hours.

²² \$16,636,198 / 252,661 hours = \$65.84/ hour for these amendments; \$65.84 / hour x 329,199 hours = \$21,675,762. \$21,675,762 + \$154,304,664 = \$175,980,426.

²³ 2,764,563 hours – 2,435,364 hours = 329,199 hours.

²⁴ \$175,980,426- \$154,304,664 = \$21,675,762.

inflation, as well as the rule 204-2 amendments relating to the new marketing rule. The changes in burden therefore reflect the Commission’s revision and update of burden estimates for all information collections under this OMB control number (whether or not associated with rulemaking changes), and the Commission requested public comment on all those information collection burden estimates for this OMB control number. The following chart shows the differences from the approved annual hourly burden for the current books and records rule.

Requirement	Estimated Burden Increase or Decrease	Brief Explanation
All collections of information under rule 204-2 (including new requirements).	<p>18.44 hour increase.</p> <p>The overall hour burden per adviser would increase from 183 hours to 201.44 hours.</p>	<p>The currently approved burden reflects the current rule’s requirement that investment advisers retain copies of advertisements to 10 or more persons. The amended rule will require that they retain copies of all advertisements, as well as copies of any questionnaires or surveys obtained in connection with third-party ratings in advertisements. The amended rule will also require that advisers that use testimonials, endorsements, or third-party ratings make and retain a record documenting that the adviser has a reasonable belief that these items comply with the applicable conditions of the marketing rule.</p>

16. Information Collection Planned for Statistical Purposes

None.

17. Approval to not Display Expiration Date

Not Applicable.

18. Exceptions to Certification Statement

Not Applicable.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.