SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA-6578; File No. S7-13-23]

RIN 3235-AN31

Exemption for Certain Investment Advisers Operating Through the Internet

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting amendments to the rule under the Investment Advisers Act of 1940 that exempts certain investment advisers that provide advisory services through the internet ("internet investment advisers") from the prohibition on Commission registration, as well as related amendments to Form ADV. The amendments are designed to modernize the rule's conditions to account for the evolution in technology and the investment advisory industry since the initial adoption of the rule in 2002.

DATES: *Effective date*: This rule is effective July 8, 2024.

Compliance dates: See section II.E of this release.

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SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 275.203A-2(e) ("rule 203A-2(e)" or "Internet Adviser Exemption") under the Investment

Advisers Act of 1940 ("Advisers Act" or "Act") [15 U.S.C. 80b-1 *et seq.*] and corresponding amendments to 17 CFR 279.1 ("Form ADV") under the Advisers Act.[1]

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[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any section of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any section of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

I. Introduction

A. Overview

We are adopting amendments to rule 203A-2(e) under the Advisers Act. The Internet Adviser Exemption provides an exemption from the prohibition on registration with the Commission that may otherwise affect certain advisers seeking to register with us. The amendments are designed to modernize the Internet Adviser Exemption's conditions to account for the evolution in technology and the investment advisory industry since the adoption of the rule over 20 years ago. Specifically, the amendments will require an internet investment adviser to provide investment advice to all of its clients exclusively through an "operational" interactive website at all times during which it relies on the Internet Adviser Exemption. The amendments also will eliminate the *de minimis* exception in the current rule that permits internet investment advisers to have fewer than 15 non-internet clients in the preceding 12-month period. In addition, we are adopting amendments to Form ADV to conform certain instructions and definitions to the amended Internet Adviser Exemption and to require additional representations regarding an internet investment adviser's reliance on the rule.

In July 2023, the Commission proposed amendments to the Internet Adviser Exemption with certain corresponding amendments to Form ADV.[2] The Commission received eight comments on the proposed amendments.[3] Most commenters expressed broad support for the

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2 *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No. 6354 (July 26, 2023) [88 FR 50076 (Aug. 1, 2023)] ("Proposing Release"). *See also* Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches, Exchange Act Release No. 92766 (Aug. 27, 2021) [86 FR 49067 (Sept. 1, 2021)] (a request for information and comments issued by the Commission in 2021 on the Internet Adviser Exemption, among other areas).

3 The comment letters on the Proposing Release are available at https://www.sec.gov/comments/s7-13-23/s71323.htm.

proposal while a few commenters suggested modifications.[4] One commenter disagreed with the proposal in its entirety.[5] After consideration of the comments received and as discussed in more detail below, we are adopting the amendments to the Internet Adviser Exemption, as proposed.

B. Background

The National Securities Markets Improvement Act of 1996 ("NSMIA") amended the Advisers Act to divide the responsibility for regulating investment advisers between the Commission and State securities authorities.[6] Congress allocated to State securities authorities the primary responsibility for regulating smaller advisory firms and allocated to the Commission the primary responsibility for regulating larger advisory firms.[7] Section 303 of NSMIA amended the Advisers Act to include section 203A[8] to effect this division of responsibility by generally prohibiting advisers from registering with the Commission unless they either have assets under management of not less than $25 million or advise a registered investment company,[9] and preempt State adviser statutes regarding registration, licensing, or qualification as to advisers

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4 *See e.g.*, Comment Letter of Better Markets, Inc. (Oct. 2, 2023) ("Better Markets Comment Letter") (stating that the proposal was an "important reform to implement the framework Congress envisioned for dividing responsibility for regulating investment advisers between the Commission and the States"); Comment Letter of North American Securities Administrators Association Inc. (Sept. 29, 2023) ("NASAA Comment Letter") (stating that it was an opportune time to revise the exemption's requirements because it shared the Commission's concern that the exemption has been misused by advisers that do not meet its requirements); Comment Letter of Andres Giraldo Suarez (Sept. 28, 2023) ("Suarez Comment Letter") (stating that the proposal would modernize the exemption and that it will help investors get the best service in the digital age). *See also infra* section II.

5 *See* Comment Letter of Estelle Brunk (July 29, 2023). This commenter, however, did not provide a rationale for their disagreement with the proposal.

6 National Securities Markets Improvement Act of 1996, Pub. L. 104-290, 110 Stat. 3416 (1996) (codified in various sections of 15 U.S.C.). *See also* Proposing Release at section I.A.

7 *See* S. Rep. No. 293, 104th Cong., 2d Sess. 3-4 (1996) ("Senate Report"), at 4.

8 Pub. L. 104-290, Sec. 303. S*ee also* section 203A of the Advisers Act [15 U.S.C. 80b-3a].

9 Section 203A(a)(1) of the Advisers Act [15 U.S.C. 80b-3a(a)(1)].

registered with the Commission.[10] The "$25 million assets under management" test was designed by Congress to distinguish investment advisers with a national presence from those that are essentially local businesses.[11] Congress expressed that its goal in enacting the statute was more efficiently to allocate the Commission's limited resources by allowing the Commission to concentrate its regulatory responsibilities on larger advisers with national businesses, and to reduce the burden on investment advisers of the overlapping and duplicative regulation between Federal and State regulators.[12] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended certain provisions of the Advisers Act, including section 203A, to, among other things, reallocate primary responsibility for oversight of investment advisers by delegating generally to the States responsibility over certain "mid-sized" advisers—*i.e.*, subject to certain exceptions, advisers with between $25 million and $100 million of assets under management.[13]

Congress has recognized, however, that it is more efficient to regulate some advisers at the Federal level despite managing less than the minimum thresholds in assets under management and gave the Commission authority to enable advisers to register with the

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10 Section 203A(b) of the Advisers Act [15 U.S.C. 80b-3a(b)]. Advisers prohibited from registering with the Commission remain subject to the regulation of State securities authorities. Section 222 of the Advisers Act [15 U.S.C. 80b-18a]. The prohibition in section 203A against registration with the Commission applies to advisers whose principal office and place of business is in a United States jurisdiction that has enacted an investment adviser statute. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)], at text accompanying note 83.

11 *See* Senate Report at 4-5 ("The states should play an important and logical role in regulating small investment advisers whose activities are likely to be concentrated in their home state.").

12 *See* Senate Report at 2-4 (stating "[r]ecognizing the limited resources of both the Commission and the states, the Committee believes that eliminating overlapping regulatory responsibilities will allow the regulators to make the best use of their scarce resources to protect clients of investment advisers.").

13 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Commission if the prohibition would be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of [section 203A]."[14] In exercising this authority, the Commission in 2002 adopted the Internet Adviser Exemption, which relieves certain advisers that provide investment advisory services primarily through the internet from the burdens of multiple State regulation and allows them to register with the Commission.[15]

The Internet Adviser Exemption was designed to create a narrow exemption from the prohibition on registration for certain internet investment advisers that otherwise are not eligible for registration with the Commission, because they do not meet the statutory thresholds for registration.[16] These advisers, therefore, "do not fall neatly into the model assumed by Congress when it added [s]ection 203A to the Act to divide regulatory authority over advisers."[17] An adviser could rely on the Internet Adviser Exemption (as originally adopted) if, among other obligations, it provided investment advice to all of its clients exclusively through an interactive website, except it was permitted to provide investment advice to fewer than 15 clients through other means during the preceding 12 months.[18]

The asset management industry has experienced substantial growth and change since the

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14 Section 203A(c) of the Advisers Act [15 U.S.C. 80b-3a(c)]. *See also* Senate Report at 5 and 15.

15 *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No. 2028 (Dec. 12, 2002) [67 FR 77619 (Dec. 18, 2002)], at section I ("2002 Adopting Release"). The exercise of our exemptive authority enables registration with the Commission and preempts most State law with respect to the exempted advisers that register with us. *See also* rule 203A-2.

16 *See* Proposing Release at section I.A (discussing the Commission's rationale for providing the Internet Adviser Exemption in 2002, including, for instance, the recognition that because internet investment advisers provide investment advice to their clients through an interactive website, the adviser's clients can come from any state, at any time, which, absent the Internet Adviser Exemption, may result in an internet investment adviser incurring the burden of temporarily registering in multiple states and later withdrawing). *See also* 2002 Adopting Release.

17 2002 Adopting Release at section II (citing Section 203A(c)).

18 *See* 17 CFR 275.203A-2(e)(1)(i) ("rule 203A-2(e)(1)(i)").

rule was adopted over 20 years ago. Assets under management have more than quadrupled since the adoption of the rule.[19] Similarly, since the adoption of the rule, advisers are increasingly using technology to interact with clients, including through email, websites, mobile applications, investor portals, text messages, chatbots, and other similar digital platforms.[20] The use of technology is now central to how many investment advisers provide their products and services to clients. For example, the growth of services available on digital platforms, such as those offered by online brokerage firms and robo-advisers, has multiplied the opportunities for investors to invest in and trade securities. This increased accessibility has been one of the many factors associated with the increase of retail investor participation in U.S. securities markets in recent years.[21] Concomitant with the growth in assets under management and the broader evolution and adoption of technology in the investment advisory industry, we have seen an increase in the number of advisers seeking to rely on the Internet Adviser Exemption.[22] We

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19 There were approximately $23.6 trillion regulatory assets under management among registered investment advisers as of Dec. 2003 and approximately $114.4 trillion assets under management as of June 2023. Based on analysis of Form ADV data.

20 *See* Bilal Majbour, *Embracing A Digital-Human Model: The Future of Financial Advisory* (June 20, 2023), https://www.forbes.com/sites/forbesbusinesscouncil/2023/06/20/embracing-a-digital-human-model-the-future-of-financial-advisory/?sh=6b27dd457291. *See also* Andrew Osterland, *Technology is redefining that client-financial advisor relationship* (Oct. 14, 2019), https://www.cnbc.com/2019/10/14/technology-is-redefining-that-client-financial-advisor-relationship.html ("Easy-to-use client portals have become essential to provide investors with the ability to see their accounts, exchange secure emails with their advisor and share documents.").

21 *See, e.g.*, Maggie Fitzgerald, *Retail Investors Continue to Jump Into the Stock Market After GameStop Mania*, CNBC (Mar. 10, 2021), https://www.cnbc.com/2021/03/10/retail-investor-ranks-in-the-stock-market-continue-to-surge.html (providing year-over-year app download statistics for Robinhood, Webull, Sofi, Coinbase, TD Ameritrade, Charles Schwab, E-Trade, and Fidelity from 2018-2020, and monthly figures for Jan. and Feb. 2021); John Gittelsohn, *Schwab Boosts New Trading Accounts 31% After Fees Go to Zero*, Bloomberg (Nov. 14, 2019), https://www.bloomberg.com/news/articles/2019-11-14/schwab-boosts-brokerage-accounts-by-31-after-fees-cut-to-zero (noting that Charles Schwab opened 142,000 new trading accounts in October, a 31% increase over September's pace).

22 Based on Form ADV data, the number of advisers relying exclusively on the exemption has grown from approximately 107 advisers as of Dec. 2015 to 261 advisers as of June 2023. From the initial adoption of

recognize that investment advisers are increasingly using a wide range of technologies in their businesses. The Internet Adviser Exemption, however, was intended as a narrow exemption for entities that *exclusively* provide investment advice through an interactive website.[23]

While some advisers have used the exemption as intended, others have used the exemption to register with the Commission while failing to satisfy the conditions of the exemption.[24] The recent increase in the number of advisers seeking to rely on the Internet Adviser Exemption coincides with an increase in registration withdrawals and cancellations of internet investment advisers, which has affected the cumulative growth in the number of advisers relying on the Internet Adviser Exemption.[25] For example, approximately 67% of the advisers

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the Internet Adviser Exemption through June 2023, approximately 937 advisers have relied on the exemption as a basis for registration with the Commission. Of these advisers, 772 initially registered exclusively in reliance on the Internet Adviser Exemption. The exemption has been used with increasing frequency recently, with 154 of the 261 advisers relying exclusively on the exemption registering after 2015.

23 *See* Proposing Release at section I.B. *See also* 2002 Adopting Release at section II.A.

24 *See* Proposing Release at note 26 (stating that the SEC examination staff observed that "[n]early half of the [examined] advisers claiming reliance on the Internet Adviser Exemption were ineligible to rely on the exemption, and many were not otherwise eligible for SEC-registration"). *See also* Observations from Examinations of Advisers that Provide Electronic Investment Advice (Nov. 9, 2021), https://www.sec.gov/files/exams-eia-risk-alert.pdf ("Risk Alert"). Staff documents (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

25 The Commission has cancelled the registration of internet investment advisers after finding the firms are no longer in existence, not engaged in business as an investment adviser, or prohibited from registering as an investment adviser under section 203A of the Advisers Act (and related rules). The Commission also has revoked the registration of an internet investment adviser on the basis that it was ineligible to rely on the exemption. *See* In re. Boveda Asset Management, Inc., Investment Advisers Act Release No. 6016 (May 6, 2022) (referencing *SEC v. Boveda Asset Management, Inc. and George Kenneth Witherspoon, Jr.*, 1:21-cv-05321-SCJ (N. D. GA) (Apr. 27, 2022)). *See also* Ajenifuja Investments, LLC; Order Cancelling Registration Pursuant to Section 203(h) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 5110 (Feb. 12, 2019) (finding that the adviser was registered as an internet investment adviser for over three years and in that time period did not have an interactive website and did not demonstrate any other basis for registration eligibility); Strategic Options, LLC; Order Denying a Request for Hearing and Cancelling Registration Pursuant to Section 203(h) of the Investment Advisers Act of 1940, Investment

withdrawing their registration under the rule have done so since 2017, while only approximately 33% of the withdrawing advisers did so from the rule's adoption in 2002 through 2016.[26]

Our examination staff has observed numerous compliance deficiencies by advisers relying on the rule.[27] For example, the staff observed advisers relying on this exemption that did not have an interactive website. In addition, the staff observed advisers relying on this exemption that provided advisory personnel who could expand upon the investment advice provided by the adviser's interactive website or otherwise provide investment advice to clients, such as financial planning, outside of the adviser's interactive website.[28]

As discussed above, the Commission intended the Internet Adviser Exemption to be a narrow exemption for certain investment advisers that did not fall neatly within the framework established by Congress to divide regulatory authority between State regulators and the Commission.[29] The amended Internet Adviser Exemption will better align current practices in the investment adviser industry with this narrow exemption and will adapt the rule to the broader evolution in technology and the marketplace that has occurred since the rule was adopted. In addition, the amendments will enhance investor protection through more efficient use of the

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Advisers Act Release No. 5689 (Feb. 24, 2021) (finding that since its registration in 2015, the registrant has not had, and does not have, any clients for which it provides investment advice through an interactive website); In re. RetireHub, Inc., Investment Advisers Act Release No. 3337 (Dec. 15, 2011) (settled) (alleging that the adviser was never an internet investment adviser because, over the course of its registration, it did not provide investment advice exclusively through an interactive website, advised more clients than permitted through personal contact, or both).

26 Based on analysis of Form ADV data.

27 *See* Risk Alert.

28 Risk Alert at 8 (also finding that some advisers' affiliates were operating as unregistered investment advisers, because the affiliates were operationally integrated with the registered advisers, and the Internet Adviser Exemption prohibited those affiliates from relying on the internet investment adviser's registration as a basis for their own registration).

29 *See supra* notes 16-17.

Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. The amendments also will minimize opportunities for advisers to rely on the exemption to register with the Commission without meeting the rule's conditions.

II. Discussion

A. Operational Interactive Website

Largely as proposed, we are renaming the defined term "interactive website" as "operational interactive website," and defining it as a website or mobile application through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de minimis* duration).[30] In a change from the proposal, to keep the rule evergreen as technology changes, we are also including in the definition any "similar digital platform" through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client.[31] The current rule defines "interactive website" to mean a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.[32]

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30 *See* amended 17 CFR 275.203A-2(e)(2) ("rule 203A-2(e)(2)").

31 *See infra* note 46 and accompanying text.

32 *See* rule 203A-2(e)(2). Personal information provided by the internet client generally should consist of information relevant to the client's financial situation, level of financial sophistication, investment experience, and financial goals and objectives. *See also* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] ("Fiduciary Interpretation"), at 12-14 (discussing an adviser's duty of care, which includes a duty to provide advice that is in the best interest of the client).

Most commenters supported the proposed definition of "operational interactive website."[33] Another commenter stated that the definition was "entirely appropriate" to protect against clients being misled by an investment adviser touting itself as Commission-registered.[34] Further, a commenter suggested that requiring investment advisers to maintain an operational website at all times ensures that "clients can access the advice and information they need whenever they want, which is essential in the digital era."[35]

Two commenters did not support this element of the proposal. One asserted that the requirement that investment advisers have operational interactive websites would make it harder for smaller entities, because they tend to have fewer clients.[36] We carefully considered the potential impact this change would have on smaller advisers. However, we are requiring an adviser to have a minimum of only two internet clients to qualify for the exemption, as proposed.[37]

The other commenter stated that the Commission does not need to add the word "operational" to the term "interactive website" if the Commission eliminates the *de minimis* exception for non-internet clients and defines "digital investment advisory service" as proposed.[38] This commenter explained that the defined term "interactive website" should be sufficient, because a website cannot be interactive if it is not already operational. As discussed

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33 *See, e.g.*, Better Markets Comment Letter; Suarez Comment Letter.

34 Better Markets Comment Letter.

35 Suarez Comment Letter.

36 Comment Letter of Robert Martin Comment Letter (Aug. 22, 2023) ("Robert Martin Comment Letter).

37 *See infra* section IV.D.2 (stating that a larger minimum number of clients may put advisers with a small clientele or advisers that are at the early stages of starting their advisory business at a disadvantage). *See also infra* section VI.B (stating that advisers with zero or one client are more akin to local businesses that can be effectively regulated by a State).

38 NASAA Comment Letter.

above, EXAMS staff has observed advisers relying on the exemption without having an operational interactive website.[39] Therefore, it is important to include the term "operational" in the definition of "operational interactive website," because this addition reinforces the rule's requirement that an adviser must, at all times during which the adviser relies on the Internet Adviser Exemption (*i.e.*, at the time of the adviser's registration and at all times an adviser is registered in reliance on the amended Internet Adviser Exemption), have an operational interactive website through which it provides investment advice to more than one client.

Some commenters suggested modifications to the proposed definition of "operational interactive website."[40] In this regard, one commenter stated that the Commission should modify it by requiring an investment adviser to provide digital investment advisory services to at least 15 clients.[41] This commenter expressed that, in its view, 15 or more clients, rather than the proposed "more than one," is a better indicator of an adviser's national presence. Although there could be various ways of demonstrating national presence, in the context of the Internet Adviser Exemption, the existence of an operational interactive website that can be accessed by persons located in multiple States better reflects that the adviser has a national presence. Requiring a larger minimum number of clients to qualify for the exemption, such as 15 clients, would be inconsistent with the general policy objective that underpins the Internet Adviser Exemption. It would burden advisers that do not fall neatly within the State and Federal regulatory framework

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39 *See supra* notes 24, 27-28 and accompanying text. *See also* notes 25-26 and accompanying text.

40 *See, e.g.*, NASAA Comment Letter; Robert Martin Comment Letter.

41 Better Markets Comment Letter.

established by Congress with the obligation of registering in several States before the adviser would be eligible for Commission registration.[42]

Another commenter urged the Commission to provide more clarity around the meaning of the phrase "ongoing basis" within the definition of "operational interactive website."[43] An internet investment adviser generally is providing investment advice on an ongoing basis through its website to a client if the advice is within the scope of the adviser-client relationship.[44] For example, an internet investment adviser and a client may come to an express agreement where the adviser-client relationship is of limited duration, such as for the provision of a one-time financial plan for a one-time fee. Following the termination of this adviser-client relationship by way of the expiration of the agreed duration of the agreement, the investment adviser generally would not be providing advice to the former client on an "ongoing basis" (absent some other arrangement or circumstance). Alternatively, an adviser providing comprehensive discretionary and continual advice to a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) generally would be providing advice to a client on an "ongoing basis."

Further, the Proposing Release requested comment on whether to include "digital platform" in the definition of operational interactive website.[45] The one commenter addressing

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42 *See infra* section IV.D.2.

43 Comment Letter of Maksym Puzin (July 28, 2023) ("Maksym Puzin Comment Letter").

44 *See* Fiduciary Interpretation at section II.A. (describing the scope of the adviser-client relationship). Internet investment advisers, like all registered investment advisers, should consider the clarity of the descriptions of the investment advisory services they offer and use reasonable care to avoid creating a false implication or sense about the scope of those services which may materially mislead clients. For example, internet investment advisers should be careful to not imply that their operational interactive website will provide a comprehensive financial plan for a client if it will not do so.

45 *See* Proposing Release at section II.A.1.

this request for comment specifically did not take a position, expressing, on the one hand, that more generic terminology could stand up better against rapidly advancing technology and remain evergreen and, on the other hand, that a "whole new medium of investment advice" would be significant enough to require refreshing rules.[46] After further consideration, the Commission is adding "similar digital platform" to the definition of operational interactive website to recognize that different types of technologies may develop in the future but to also reinforce that qualifying technologies must be ones through which an adviser can provide digital advisory services consistent with the rule.

We understand that unforeseen technological issues outside of the control of an adviser occur at times. We also understand that websites may be temporarily inoperable due to periodic maintenance to ensure that the website performs optimally. Accordingly, as proposed, we have incorporated into the definition of "operational interactive website" a hardship clause that allows an internet investment adviser to satisfy the rule despite temporary technological outages of the operational interactive website of a *de minimis* duration.[47] The amended rule otherwise specifies that the requirement to provide an operational interactive website will apply at all times during which the adviser relies on the Internet Adviser Exemption (*i.e.*, at the time of the adviser's registration and at all times an adviser is registered in reliance on the amended Internet Adviser

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46 NASAA Comment Letter.

47 Internet investment advisers may seek exemptive relief from the Commission for technological outages of the operational interactive website that last longer than a *de minimis* duration. Any request for an exemptive order will be evaluated based on its particular facts and circumstances and must meet the standard under section 206A of the Advisers Act, including that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act.

Exemption).[48] An adviser intending to rely on the Internet Adviser Exemption may, however, rely on current rule 203A-2(c) ("120-day rule") as an initial basis for registration with the Commission. The 120-day rule allows an adviser that is not registered with the Commission but has a reasonable expectation that it will be eligible for registration within 120 days to register in anticipation of its separate eligibility.[49] With advances in technology since the initial adoption of the rule more than 20 years ago, advisers seeking to rely on the Internet Adviser Exemption may use the 120-day rule to develop, test, and launch an operational interactive website and obtain initial clients by the time the 120-day temporary registration expires. Accordingly, like the current rule, the amended rule has no grace period of its own for meeting its conditions, including providing an operational interactive website.[50]

The definition of "operational interactive website" is designed to specify the rule's application to advisers' use of technology, including their use of mobile applications or similar digital platforms, in connection with their eligibility to rely on the rule. We are adopting this aspect of the definition largely as proposed with the addition of "similar digital platform" to the definition.[51] Thus, the definition will expressly permit an internet investment adviser to use

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48 In the case of an existing registered investment adviser seeking to change its registration to rely on the Internet Adviser Exemption, the adviser will be required to have an operational interactive website at the time in which it begins relying on the rule.

49 An adviser relying on the 120-day rule must file an amendment to its Form ADV at the end of the 120 days indicating it has become eligible for registration or must withdraw its registration. *See* Form ADV Part 1A, Item 2.A.(9).

50 In order to rely on the Internet Adviser Exemption, a person must first meet the definition of investment adviser under the Advisers Act. *See* section 202(a)(11) of the Advisers Act. Also, as discussed above, an adviser relying on the Internet Adviser Exemption must meet the conditions of the rule, which includes providing investment advice to all of its clients exclusively through an operational interactive website at all times. *See supra* notes 30 and 48 and accompanying text.

51 *See supra* note 31 and accompanying text.

mobile applications or similar digital platforms to provide investment advice to clients.[52] It is appropriate to allow internet investment advisers using these platforms to interact with advisory clients to rely on the Internet Adviser Exemption, because clients increasingly access services, including investment advisory services, through these platforms,[53] which can provide interactive functionality similar to the functionality of websites.[54] By including mobile applications or similar digital platforms in the definition of "operational interactive website," internet investment advisers will have broad flexibility to design the interactive website in a manner that best suits their needs and their clients' needs. In addition, the definition will allow for the evolution of advisers' use of technologies consistent with the Internet Adviser Exemption. We understand that these platforms use various methods of communication, including, but not limited to, push notifications, in-app messages, online client portal communications, and similar forms of electronic communication. The amended rule will permit an investment adviser relying on the

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52 The term "mobile application" generally, refers to a software application developed primarily for use on wireless computing devices, such as smartphones and tablets. *See, e.g.*, techopedia, Mobile Application (Mobile App) (Aug. 7, 2020), https://www.techopedia.com/definition/2953/mobile-application-mobile-app ("techopedia").

53 *See* Sarah Perez, *Majority of Digital Media Consumption Now Takes Place in Mobile Apps*, TechCrunch (Aug. 21, 2014) ("[M]obile apps [. . .] eat up more of our time than desktop usage or mobile web surfing, accounting for 52% of the time spent using digital media. Combined with mobile web, mobile usage as a whole accounts for 60% of time spent, while desktop-based digital media consumption makes up the remaining 40%."). *See generally*, Hannah Glover, *'Healthy Paranoia' Drives Innovation at Vanguard* (June 17, 2016), https://www.ignites.com/c/1385943/158263?referrer_module=searchSubFromFF&highlight=%22mobile%20applications%22 ("Next on the horizon is mobile applications. When you travel [outside of the United States], you see how PC-centric technology does not exist anywhere else[.] In the future, [. . . [i]t's going to be all about the phone. Companies without easy-to-use, yet powerful, apps will be left behind [. . . .]") (internal quotations omitted).

54 *See, e.g.*, techopedia ("Mobile applications frequently serve to provide users with similar services to those accessed on PCs."); Fundfire, *What Are Major IT Trends in Wealth Mgmt?* (Oct. 15, 2012), https://www.fundfire.com/c/422571/47531?referrer_module=searchSubFromFF&highlight=%22mobile%20applications%22 ("Dedicated mobile applications for smartphones and tablets can enable unified digital communication between advisors and their clients – a combination of email, chat, voice and video.").

Internet Adviser Exemption to provide digital investment advisory services through any form of mobile application technology or similar digital platform.

B. Digital Investment Advisory Service

We are adopting the definition of "digital investment advisory service," as proposed. The amendments will define "digital investment advisory service" to mean investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website. The definition is designed to require that, as under the current rule, an adviser must provide investment advice exclusively through an interactive website.

Most commenters generally supported the defined term "digital investment advisory service."[55] One commenter asserted that it was appropriate to define the exemption narrowly to apply to firms whose investment advice is technologically rendered.[56] The same commenter requested that the Commission provide clarity, within the rule text itself, that personnel of the adviser cannot expand upon technologically generated advice but can answer other questions and help clients navigate the website or application.

Advisers are increasingly using algorithms to generate investment advice in order to provide clients with cost-effective and tailored advice and the definition encompasses this use.[57]

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55 *See, e.g.*, Better Markets Comment Letter; NASAA Comment Letter.

56 NASAA Comment Letter.

57 *See, e.g.*, Investment Adviser Association, *2020 Evolution Revolution* (2020), at 8 (noting that by 2020, ''two of the top five advisers as measured by number of non-high net worth individual clients served [were] digital advice platforms, representing 7.5 million clients, an increase of 2.7 million clients from [the prior year].''); Akin Ajayi, *The Rise of the Robo-Advisers* (July 16, 2015) ("Robo-advisers – to use the suitably futuristic moniker adopted as a description for these services – are investment services driven by automated customer service and an investment strategy governed by computer algorithms. A clutch of start-ups, largely located in the United States but spreading to Europe and Asia, have emerged over the last few years.").

The amendments will specify that, to qualify for the exemption, the investment advice to clients must be "generated by" the website's software-based models, algorithms, or applications.[58] Like the current rule, this definition is designed so that an adviser's personnel do not generate, modify, or otherwise provide client-specific investment advice through the operational interactive website or otherwise.[59] Human-directed client-specific investment advice, even if delivered through electronic means, would not be eligible activity under the Internet Adviser Exemption.

The amendments will not prohibit advisory personnel from all interactions with advisory clients, however. Consistent with the current rule, advisory personnel generally can continue to assist clients with technical issues or collect feedback in connection with the use of the website (*e.g.*, accessing the website), including by assisting clients with explanations of how the algorithm generating the investment advice was developed or operates. Advisory personnel generally should be able to perform those services telephonically, through email, live electronic chats, and similar forms of electronic communication. Continuing to provide this guidance,

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58 As a fiduciary, investment advisers have a duty to make full and fair disclosure of all material facts and conflicts of interest to, and to employ reasonable care to avoid misleading, clients. Given the unique aspects of internet investment advisers' business models and because client relationships may occur with limited, if any, human interaction, internet investment advisers generally should consider the most effective way to communicate to their clients the limitations, risks, and operational aspects of their advisory services. For example, internet investment advisers generally should effectively disclose to clients, among other matters, that an algorithm is used to manage individual client accounts with a description of the particular risks inherent in the use of an algorithm to manage client accounts. In addition, internet investment advisers generally should consider whether such disclosures are presented prior to client sign-up so that information necessary to make an informed investment decision is available to clients before they engage. Finally, an adviser should carefully consider whether its disclosure is sufficiently specific so that a client is able to understand the material facts or conflicts of interest and make an informed decision whether to provide consent. *See* Fiduciary Interpretation.

59 *See* 2002 Adopting Release at section II.A.1 (stating that the exemption is for advisers that provide investment advice to all of their clients 'exclusively' through their interactive websites and that these advisers may not use their advisory personnel to elaborate or expand upon the investment advice provided by its interactive website, except as permitted by the *de minimis* exception).

rather than changing the rule as suggested by a commenter,[60] is appropriate in light of the breadth of services offered to investors through advisers' interactive websites and our administration of the current rule. This approach also is consistent with the Commission's approach in the 2002 Proposing Release and the 2002 Adopting Release.[61]

C. Elimination of *De Minimis* Non-Internet Client Exception

We are eliminating the *de minimis* exception that permits an internet investment adviser to provide investment advice to fewer than 15 non-internet clients during the preceding 12 months, as proposed.[62] As a result, an internet investment adviser must provide advice to all of its clients exclusively through an operational interactive website.

Most commenters broadly supported the elimination of the *de minimis* exception.[63] One commenter stated that eliminating the *de minimis* exception for non-internet clients would remove the possibility that some advisers are servicing clients directly and personally, while ignoring their obligation to provide advice through an interactive website.[64] One commenter, however, expressed concern that the elimination of the *de minimis* exception would constrain the growth potential, quality, and usefulness of internet-based services, because the rule would no longer permit human interaction to enhance the quality and reliability of fully automated, internet-based services.[65]

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60 NASAA Comment Letter.

61 *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No.2028 (Apr. 12, 2002) [67 FR 19500 (Apr. 19, 2002)] ("2002 Proposing Release"), at section II; 2002 Adopting Release at section II.A.1.

62 *See* amended rule 203A-2(e)(1)(i).

63 *See, e.g.*, NASAA Comment Letter; Suarez Comment Letter; Better Markets Comment Letter.

64 *See* NASAA Comment Letter.

65 Comment Letter of Anonymous (Oct. 2, 2023) ("Anonymous Comment Letter").

In considering whether to retain the *de minimis* exception, we took into account the basis for it as well as the Commission's experience administering the rule. The Internet Adviser Exemption was adopted for advisers that provide investment advice to their internet clients "exclusively" through their interactive website, but it was adopted at a time when providing advice in this manner was still in a fairly nascent stage.[66] Accordingly, the Commission initially adopted the *de minimis* exception so that internet investment advisers would not lose their ability to rely on the Internet Adviser Exemption as a result of providing advice to a small number of clients through means other than an interactive website. The Internet Adviser Exemption was not designed[67] to permit human interaction more broadly, however.[68] In addition, the *de minimis* exception is no longer needed in light of the widespread use of the internet, the relative ease of building and maintaining a website and applications, and other technological advances that better allow advisers to monitor to whom their advice is being provided. Accordingly, the elimination of the *de minimis* exception better reflects the allocation of regulatory responsibility between the

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66 2002 Adopting Release at section II.A.1.

67 2002 Adopting Release at section I. When the Commission initially adopted the fewer than 15 client *de minimis* exception, the Commission stated that it was similar to the (since repealed) "private adviser exemption" which, subject to certain additional conditions, exempted from the requirement to register with the Commission any adviser that during the course of the preceding 12 months, had fewer than 15 clients. That exemption was repealed by section 403 of Dodd-Frank. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) [76 FR 42949 (July 19, 2011)]. *See also* 2002 Proposing Release, at section II. In the 2002 Proposing Release, the Commission proposed permitting an adviser to rely on the exemption so long as at least 90% of the adviser's clients obtained their investment advice exclusively through the interactive website ("90% test"). In light of comments stating that the 90% test would permit more than a *de minimis* number of non-internet clients, the Commission replaced the 90% test with a provision permitting an adviser relying on the rule to have fewer than 15 non-internet clients during the course of the preceding 12 months.

68 *See supra* section II.B (stating that advisory personnel can continue to assist clients with technical issues in connection with the use of the website, including by assisting clients with explanations of how the algorithm generating the investment advice was developed or operates). Accordingly, the elimination of the *de minimis* exception should not decrease quality and reliability of fully automated, internet-based services and, in turn, should not constrain the growth potential, quality, and usefulness of internet-based services, as suggested by a commenter.

Commission and the States. Eliminating the *de minimis* exception also will allow the Commission more effectively to identify advisers claiming reliance without meeting the requisite conditions of the rule (*i.e.*, providing investment advice to all clients exclusively through an operational interactive website). To the extent advisers have non-internet clients, these advisers may register with the States or rely on another basis for registration with the Commission, as appropriate.

D. Form ADV

We are amending Form ADV, as proposed. The amendments to Form ADV will require an investment adviser relying on the exemption as a basis for registration to represent on Schedule D of its Form ADV that, among other things, it has an operational interactive website.[69] As noted above, there has been an increase in the number of registration withdrawals and cancellations of internet investment advisers.[70] Many of these withdrawals and cancellations were a result of the adviser not having an operational interactive website.

Most commenters broadly supported the amendments to Form ADV.[71] One commenter, however, suggested that the Commission remove the proposed representation on Form ADV generally, because Form ADV Part 1A Item 2.A(11) already asks an investment adviser to indicate whether it is relying on the exemption, and an adviser that mistakenly or falsely selects ADV Part 1A Item 2.A(11) is already susceptible to an examination deficiency finding or an

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69 Consistent with the definition of operational interactive website, the amendments will also require an adviser that is relying on the rule to represent that it will provide investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.

70 *See supra* notes 25-26 and accompanying text.

71 *See, e.g.*, Better Markets Comment Letter; Suarez Comment Letter.

enforcement action.[72] The same commenter stated that "singling out one of the [e]xemption requirements could give the impression that it is somehow more important, which could unintentionally cause advisers to neglect the [e]xemption's other requirements."[73] Another commenter expressed concern that Form ADV may become too lengthy as a result of the proposed amendments.[74]

The amendments to Form ADV will help ensure that registrants are aware of the new "operational interactive website" requirement and avoid erroneous registrations. The amendments also will require internet investment advisers, as an initial matter and periodically thereafter, to provide an additional representation on Form ADV that more clearly notes the requirements of the exemption. In addition, the existing form has not reduced the number of advisers erroneously relying on the exemption. While we appreciate commenters' concerns regarding the existing form and adding length to the form, it is important to aid registrants with understanding and reinforcing the conditions of the Internet Adviser Exemption.[75] The amendments to Form ADV will also aid Commission staff in administering the adviser registration process.

E. Compliance Dates

The compliance date for the amended rule is March 31, 2025. An adviser relying on the amended Internet Adviser Exemption must comply with the rule's conditions, including the

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72 NASAA Comment Letter.

73 *Id.*

74 *See* Robert Martin Comment Letter.

75 In our experience, registrants generally seek to follow registration requirements. Therefore, we disagree that the proposed representation on Form ADV would cause advisers to neglect the rule's other requirements, as suggested by the commenter. *See* NASAA Comment Letter. In addition, the benefits of aiding registrants with understanding and reinforcing the conditions of the Internet Adviser Exemption justify any costs in this regard.

condition to maintain the filing of a Form ADV that includes a representation that the adviser is eligible to register with the Commission under the Internet Adviser Exemption (the "Form ADV representation"), by the rule's compliance date. The compliance date reflects the date for which most investment advisers will have filed their annual updating amendments to Form ADV (*i.e.*, 90 days after the December 31, 2024 fiscal year end).[76]

An adviser that is no longer eligible to rely on the amended Internet Adviser Exemption and does not otherwise have a basis for registration with the Commission, must register in one or more States and withdraw its registration with the Commission by filing a Form ADV-W[77] by June 29, 2025, 90 days after the rule's compliance date. After the end of this period, the Commission expects to cancel the registration of advisers no longer eligible to register with the Commission that fail to withdraw their registrations.[78]

III. Other Matters

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated the final amendments as not a "major rule" as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such

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76 Our staff is working closely with FINRA, our Investment Adviser Registration Depository ("IARD") contractor, to re-program IARD and we understand that the system is expected to be able to accept filings of Form ADV reflecting the Form ADV representation by Sept. 30, 2024. Advisers not filing an annual updating amendment between Sept. 30, 2024, and Mar. 31, 2025, must file an other than annual amendment updating Form ADV by Mar. 31, 2025. *See also infra* notes 158-162162.

77 17 CFR 279.2.

78 *See* section 203(h) of the Advisers Act. As provided in the Advisers Act, an adviser would be given appropriate notice and opportunity for hearing to show why its registration should not be cancelled. Section 211(c) of the Advisers Act.

provisions to other persons or circumstances that can be given effect without the invalid provision or application.

IV. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 202(c) of the Advisers Act provides that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors.[79] The following analysis considers the likely significant economic effects that may result from the amended rule to rules and forms, including the benefits and costs to clients and investors and other market participants as well as the broader implications of the amended rule for efficiency, competition, and capital formation.

Where possible, the Commission quantifies the likely economic effects of its amended rules. However, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges of costs. For instance, data that separately captures the number of non-internet clients or the types of internet clients an adviser has is generally unavailable.[80] The Proposing Release requested any of such available data, but received no data or estimates from the commenters. Further, in some cases, quantification would require numerous assumptions to forecast how investment advisers and other affected parties

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79 15 U.S.C. 80b-2(c).

80 Information on number of clients, such as that described *supra* section I.B., is generally developed during adviser examinations.

would respond to the amended rule, and how those responses would in turn affect the broader markets in which they operate. In addition, many factors determining the economic effects of the amended rule would be investment adviser-specific. Investment advisers vary in size and sophistication, as well as in the products and services they offer. Even if it were possible to calculate a range of potential quantitative estimates, that range would be so wide as to not be informative about the magnitude of the benefits or costs associated with the amended rule. Many parts of the discussion below are, therefore, qualitative in nature. As described more fully below, the Commission is providing a qualitative assessment and, where practicable, a quantified estimate of the economic effects.

B. Baseline and Affected Parties

The final rule will amend the definitions used in the existing Internet Adviser Exemption, which allows internet investment advisers to register with the Commission. The application of this exemption, along with other applicable rules, determines which advisers the Commission regulates and which advisers may fall under State regulation. The entities potentially affected by the amended rule include all advisers that are currently relying on the Internet Adviser Exemption, or are contemplating relying on the Internet Adviser Exemption; their clients and affiliated parties; and users of Form ADV data.

1. Regulatory Baseline

NSMIA divided regulatory responsibility for advisers between the Commission and the States, where larger advisers with national presence are regulated by the Commission and smaller advisers with sufficient local presence are regulated by the States.[81] Subject to certain

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[81] *See supra* section II.

exemptions, only advisers that advise a registered investment company or have assets under management above $100 million are allowed to register with the Commission.[82] All other advisers may be subject to State regulation and may be required to register with one or multiple States.[83]

However, section 222(d) of the Advisers Act [15 U.S.C. 80b–18a(d)] establishes a "national *de minimis* standard" before a State can require an adviser to register with its securities commissioner. Under section 222(d) of the Advisers Act, States are preempted from requiring an adviser to register with its securities commissioner, if the adviser (1) does not have a place of business located within the State and (2) has had fewer than six clients who are residents of that State during the preceding 12-month period. State law varies, and States may choose to exempt from State regulation certain advisers with a place of business in that State if the adviser has a sufficiently low number of clients.[84] Depending on the location of the adviser and the number and location of its clients, an adviser not eligible for Commission registration might need to

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82 Section 203A(a)(2)(A) and (B) of the Advisers Act provides that an adviser is required to register with the Commission if the adviser has $25 million or more in assets under management and is not subject to examination as an adviser by the State where it maintains its principal office and place of business.

83 *See supra* note 16 and accompanying text.

84 *See, e.g.,* N.Y. Gen. Bus. Law sec 359-eee(a)(5) (excluding from the definition of "investment adviser" a person that has sold investment advisory services to fewer than 6 persons in the State, in the preceding 12 months); N.J. Stat. Ann. sec 49:3-56.9(g)(1) (exempting from registration as an investment adviser a person that does not have more than 5 clients in the State, in a 12-month period); Ill. Admin. Code tit. 14 sec 130.805(b) (exempting from registration as an investment adviser any investment adviser that had no more than 5 clients in the State, in the preceding 12 months); Ga. Comp. R. & Regs. R. 590-4-4-.13(1)(b) (exempting from registration an investment adviser that had fewer than 6 clients in the State, in the preceding 12 months).

register with no State, or with up to 14 States.[85] States may also require advisers to file copies of their Commission filings with the State (notice filings) even if State registration is not required.[86]

Certain exemptions allow advisers to register with the Commission if State registration becomes unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Act.[87] The multistate exemption is one such exemption: it allows advisers that would otherwise have to register with 15 or more States to register with the Commission instead.[88] The current Internet Adviser Exemption similarly allows Commission registration for advisers that conduct their business predominantly over the internet and by the nature of their business have national presence. That is, their clients may come from multiple States, but they may not advise a registered investment company or have sufficient assets under management to be able to register with the Commission. To alleviate the burden of potentially registering with numerous States for business conducted over the internet, the Commission created in 2002 the exemption found in rule 203A-2(e).[89] Under current 17 CFR 275.203A-2(e)(1), Commission registration is allowed for an investment adviser that provides advice to all of its clients

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85 Advisers that would otherwise have to register with 15 or more states may register with the Commission using an existing exemption under 17 CFR 275.203A-2(d) ("multi-state exemption"). An investment adviser relying on the multi-state exemption would not be eligible for that exemption until the adviser had obtained the requisite number of clients in 15 states to trigger its registration obligations in those states. Under the rule, an investment adviser relying on this exemption must represent that it has reviewed its obligations under State and Federal law and has concluded that it is required to register as an investment adviser with the securities authorities of at least 15 states. For information on the number of State-registered investment advisers, *see, e.g.*, NASAA, NASAA 2023 Investment Adviser Section Annual Report, https://www.nasaa.org/wp-content/uploads/2023/09/2023-IA-Section-Report-FINAL.pdf.

86 15 U.S.C. 80b-3a note [Pub. L. 104-290, section 307, "Continued State Authority"]. *See, e.g.*, Neb. Rev. St. sec. 8-1103(2)(b); N.H. Rev. Stat. sec. 421-B:4-405; 7 TX Admin. Code sec 116.1.(b)(2).

87 15 U.S.C. 80b-3a(c).

88 *See* 17 CFR 275.203A-2(d). *See also* 2002 Adopting Release and *supra* note 85.

89 *See* 2002 Adopting Release and the relevant discussion in section I.A of this release. The 2002 Adopting Release described the exemption as "providing relief to certain investment advisers who, unlike State-registered advisers, have no local presence and whose advisory activities are not limited to one or a few states." At that time, the threshold for the multi-state exemption was registration in 30 states rather than 15.

exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months. Current rule 203A-2(e) also requires the internet investment adviser to maintain records demonstrating that it meets the conditions of rule 203A-2(e)(1)(i).[90]

2. Current Use of the Internet Adviser Exemption

As of June 2023, there were 15,391 registered investment advisers with $114,430 billion regulatory assets under management. Of these, 261 (1.70%) with a combined total of $1.09 billion in regulatory assets under management (0.001%) exclusively relied on the Internet Adviser Exemption. An additional 10 advisers were dually registered with the Commission under both the Internet Adviser Exemption and another basis for registration. The total number of advisers claiming use of the Internet Adviser Exemption was 271, of which 197 were investment advisers with less than $25 million in regulatory assets under management.[91]

As of June 2023, registered internet investment advisers had on average 5,347 clients, with a minimum of 0 clients, reported by 107 advisers, and a maximum of 522,345 clients.[92] The median number of clients for all advisers using the exemption was 5, indicating that the distribution is highly skewed. As of June 2023, 107 advisers (39% of 271) reported advising 0 clients, 5 advisers (2% of 271) reported advising 1 client, and 38% of internet investment advisers (102 of 271) advised 2 to 100 clients. Only 17 advisers (6% of 271) reported advising

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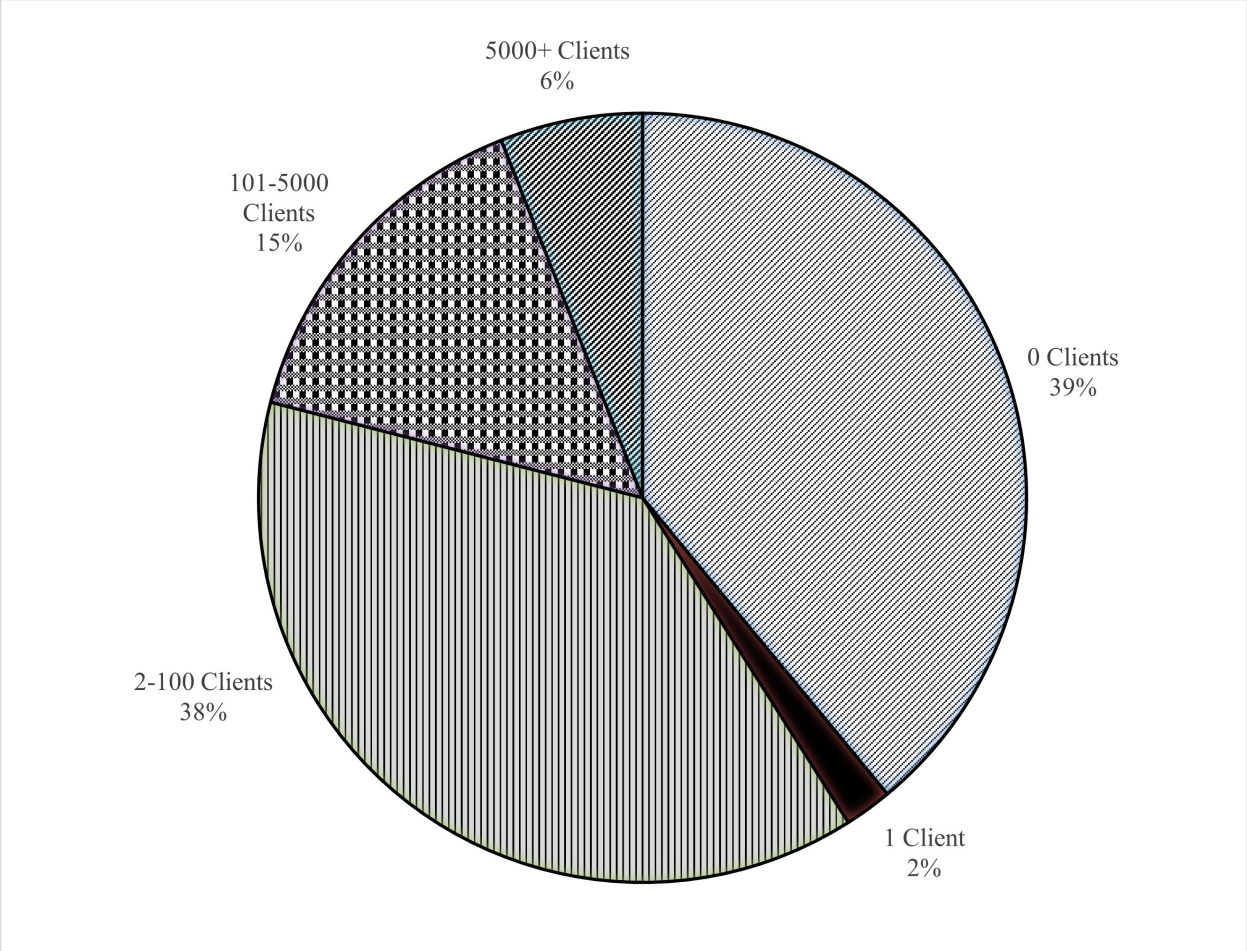
90 *See* 17 CFR 275.203A-2(e)(1)(ii) ("rule 203A-2(e)(1)(ii)"); relevant discussion *supra* section II

91 The data is based on the analysis of Form ADV data for the reporting period ending June 2023.

92 The data is based on the analysis of Form ADV data for the reporting period ending June 2023.

more than 5,000 clients. Figure 1 demonstrates that 41% of internet advisers have fewer than 2 clients.

Figure 1: Number of Clients Reported by Internet Advisers



Data source: Form ADV data for the reporting period ending June 2023.

The largest categories of clients that internet investment advisers currently have are: non-high net worth individuals, pension plans, and high net worth individuals.[93] The distribution of these client types among all internet advisers is as follows:

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93 The instructions of Form ADV specify that the category "individuals" includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members but does not include businesses organized as sole proprietorships. "High Net Worth Individual" is defined as an individual who is a qualified client or who is a "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940.

Table 1: Largest Categories of Clients: Distribution Across All Internet Advisers

Type of client	Mean clients per adviser
Non-high net worth individuals	4,955
Pension plans	256
High net worth individuals	1

Data source: Form ADV data for the reporting period ending June 2023.

The low median, relative to the average, is an indication of skewed distribution within the population of internet advisers. If the dataset is reduced to only those 214 advisers with 100 or fewer clients, the distribution of clients in these categories is as follows:

Table 2: Largest Categories of Clients for Internet Advisers with 100 or Fewer Clients

Type of client	Mean clients per adviser
Non-high net worth individuals	6.1
Pension plans	0.1
High net worth individuals	0.8

Data source: Form ADV data for the reporting period ending June 2023.

The data indicate that the majority of clients using internet advisers are non-high net worth individuals.

We do not have information on the States in which these clients are located. Advisers using the Internet Adviser Exemption might also be eligible for the multistate exemption if they have clients in 15 or more States.[94] But, we would expect that relatively few advisers with the option to use either exemption would choose the Internet Adviser Exemption instead of the multi-state exemption, because the multi-state exemption is less restrictive: it does not limit advice provided through non-internet means, as the Internet Adviser Exemption does. This suggests that advisers using the Internet Adviser Exemption most likely do not have the option of

[94] The multistate exemption became more widely available after the creation of the current Internet Adviser Exemption, because of the change from a minimum of 30 states to a minimum of 15. Thus, the burden of registering in numerous states has lessened, compared to what it had been when the current exemption was developed.

using the multi-state exemption instead. The Proposing Release invited public comment on this topic but received no comments on the matter.

Similarly, we cannot estimate how many advisers currently using the Internet Adviser Exemption would potentially be subject to regulation by multiple States if they did not elect to use the exemption. State law varies, and regulation would depend on the location of the adviser's place of business and the location of their clients.[95] In light of the substantial number of internet investment advisers with only a few clients, however, it is likely that many of the advisers currently relying on the exemption would, if not registered using the exemption, be subject to registration in at most one State.[96] Additionally, advisers now may be able to use technology and targeted advertisement in such a way as to better control in which States they may be required to register, thereby reducing the State regulation burden.[97]

In the instances where State law does not require the adviser to register with a State, for example because the adviser has fewer than the *de minimis* number of clients in the State, registration with the Commission represents an additional compliance burden that some internet investment advisers appear to be voluntarily assuming. Moreover, where State law would require

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95 For example, the Uniform Securities Act would, if adopted by the relevant State, require an investment adviser to register with the State unless the adviser has no place of business in the State and no more than five clients in the State other than certain types of clients described in the Uniform Securities Act. UNIF. SEC. ACT OF 2002 (rev. 2005), sec. 403(b). As of Feb. 2024, 21 states and territories had adopted the 2002 version of the Uniform Securities Act and 5 states had adopted an earlier version. *2002 Securities Act Enactment History*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=8c3c2581-0fea-4e91-8a50-27eee58da1cf, *last visited Feb. 21, 2024.*

96 The 2002 rule contemplated internet advisers potentially having clients that "can come from any State, at any time, without the adviser's prior knowledge" and thus potentially necessitating registration in all states. 2002 Adopting Release at 77622. However, the significant number of currently registered internet investment advisers with one or fewer clients would not face that risk. Additionally, as noted in the Proposing Release at note 69, today's investment advisers are better able to control in which states they may be required to register.

97 *See* Proposing Release at II.A.2.

a Commission-registered adviser to make notice filings with one or more States, the combination of Commission registration and State notice filings may also represent an additional, voluntarily assumed compliance burden as compared to registering directly with those States.[98] Because some advisers choose to register with the Commission despite the potential additional compliance burden, we assume that some advisers perceive value in Commission registration as compared to State registration. We received no comments about this assumption.

Based on observations of Commission staff conducting examinations, we think some investors may believe that registration with the Commission confers a reputational advantage or appeals to potential clients. Other possibilities include the intent to obtain clients in multiple States in the future, or avoidance of individual State registration requirements such as bond and invoicing requirements. We did not receive comment letters regarding the matters discussed above.

3. Increased Reliance on the Internet Adviser Exemption

Use of the Internet Adviser Exemption has increased since its adoption, especially in recent years.[99] The number of investment advisers using the exemption as of June 2023 (that is, 271 advisers) was almost 18 times larger than it was in December 2003, one year after the exemption was put in place, when there were 15 such advisers.[100] The value of regulatory assets under management for advisers exclusively relying on the Internet Adviser Exemption as of June

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98 The cost of notice filing is often the same as the cost of registering with the State. *See* INVESTMENT ADVISER REGISTRATION DEPOSITORY, *IA Firm State Registration/Notice Filing Fee Schedule* (Jan. 1, 2024), https://www.iard.com, under the tab "Fees & Accounting." We invited public comment on the cost of State registration and notice filing fees, but did not receive comment on this topic.

99 *See supra* note 22 (number of advisers relying exclusively on the exemption grew from 107 in 2015 to 261 in 2023).

100 The 2002 Adopting Release used a figure of 20 eligible advisers in its analysis, acknowledging that the number of eligible firms would likely grow. 2002 Adopting Release at 77623.

2023 was $1.09 billion,[101] or 0.001% of total adviser registered assets under management. The average regulatory assets under management per adviser for internet investment advisers (about $56.09 million) was 144 times larger than it was in December 2003 when advisers using the exemption had on average about $0.39 million of registered assets under management per adviser. Further, from 2003 to 2023, 474 unique registered investment advisers that had indicated in their prior ADV filing they were utilizing the internet adviser registration basis withdrew and filed a total of 514 Forms ADV-W.[102] Note that the number of withdrawals has increased, for example, there were 69 Form ADV-W filings by internet investment advisers between 2003 and 2012 and 445 ADV-W filings between 2013 and June 2023.[103] This increase could suggest erroneous registration, as discussed later in this analysis.

Technology use in the advisory industry has also changed. One commenter wrote that since the Commission adopted the Internet Adviser Exemption in 2002, there has been an increased use of technology by internet advisers to provide investment advice including through interactive websites, mobile applications, investor portals, text messages, chatbots, and robo-advisers.[104] While the 2002 Adopting Release stated that internet investment advisers might not be fully operational within 120 days of registration,[105] today websites and associated services are more common, more website development services are available on the market, and new technologies, such as

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101 Accounting for inflation using the Bureau of Labor Statistics' Consumer Price Index inflation calculator (https://www.bls.gov/data/inflation_calculator.htm), this number is 0.68 billion in Dec. 2003 dollars.

102 The filing of 475 Forms ADV-W includes singular investment advisers that utilized the Internet Adviser Exemption on a non-continuous basis (*e.g.*, investment advisers that registered, withdrew, registered again, and subsequently withdrew).

103 Based on analysis of Form ADV data for the reporting period ending June 2023.

104 *See* Better Markets Comment Letter.

105 2002 Adopting Release at 77622.

mobile applications that can generate advice, have emerged as well.[106] Currently, different options are available on the market to develop a website, from using website builder programs for an average upfront cost of about $200 and maintenance cost of about $50 per month, to hiring a website designer for an average upfront cost of about $6,000 and maintenance cost of about $1,000 per year.[107]

As discussed in section I.B., the Commission adopted rule 203A-2(e) to alleviate, for a narrow set of advisers with national presence, the burden of having to register in multiple States as a result of providing advice primarily through the internet. The increase in its use, especially among advisers that would not be subject to registration in more than one State, or that appear to have advised no clients in several years, suggests the exemption may currently be used in ways that were not intended by the 2002 rule.

In addition, the Commission's examination program has identified multiple instances of compliance issues relating to advisers relying on the exemption without an interactive website, or providing advisory personnel who could expand upon the investment advice provided by the adviser's interactive website or otherwise provide investment advice to clients, such as financial planning.[108] Consistent with these observations, one commenter noted that some investment advisers were attempting to rely on the Internet Adviser Exemption to register with the

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106 *See supra* note 20 and surrounding text. *See also* Alex Padalka, *RIAs Depend on Tech for Client Communications, Growth*, FIN. ADVISOR IQ (Dec. 10, 2021), https://www.financialadvisoriq.com/c/3402044/435734/rias_depend_tech_client_communications_growth?preview=1.

107 These estimates are available from Lucy Carney, *How Much Does a Website Cost in 2024? (Full Breakdown)*, WEBSITEBUILDEREXPERT (updated Sept. 20, 2023), https://www.websitebuilderexpert.com/building-websites/how-much-should-a-website-cost/. None of the commenters expressed an opinion or provided an estimate on the costs of developing a website.

108 *See* Risk Alert. *See also supra* note 25 and surrounding text.

Commission without having a national presence.[109] The frequency of registration withdrawals has increased as well: as discussed previously in the baseline, the number of withdrawals by internet investment advisers between 2013 and 2023 (445) was over five times larger than the number of withdrawals between 2003 and 2012 (69).[110]

C. Benefits, Costs and Effects on Efficiency, Competition, and Capital Formation

1. Benefits

The amendments to the Internet Adviser Exemption are designed to modernize the exemption and address technological and other industry developments that have occurred since 2002, and to respond to observations about the use of the exemption that were not available when the exemption was first put in place.[111] Further, as discussed in more detail below, the final changes to the definitions in the rule are designed to better align regulatory authority between the Commission and the States and improve investor protection. The amended rule will:

1. Specify that the exemption is available to an investment adviser that provides investment advice to all of its clients exclusively through an operational interactive website at all times during which the investment adviser relies on the exemption found in section 275.203A-2(e).
2. Modernize the meaning of "interactive website" by:
    - Adding the word "operational," thus changing the term to "operational interactive website;"

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109 *See* Better Markets Comment Letter.

110 Based on analysis of Form ADV data for the reporting period ending June 2023.

111 *See supra* section I.B for a relevant discussion.

- Adding the term "digital investment advisory service," defined to mean investment advice to clients that is generated by the website's algorithms as well as the software-based models and applications covered by the existing rule;
- Adding a reference to mobile applications or similar digital platforms;
- Requiring more than one client to which the adviser provides digital investment advisory services on an ongoing basis; and
- Adding an exception to the operational interactive website requirement for "temporary technological outages of a *de minimis* duration."

3. Eliminate the *de minimis* exception allowing fewer than 15 non-internet clients;

4. Require advisers to make a representation of eligibility on Schedule D of Form ADV (in addition to checking the appropriate box in Item 2.A.(11) of Form ADV).

These changes are intended to modernize the Internet Adviser Exemption, retain its intended narrow scope, and minimize opportunities for advisers to misuse the exemption to register with the Commission without meeting its conditions. Most commenters generally expressed broad support for the proposed rule amendments. For example, one commenter mentioned that the amendments would reflect a better allocation of regulatory responsibility between State regulators and the Commission by allowing the Commission to focus on regulating internet investment advisers that have a national presence. The commenter noted further that these amendments would help accomplish the original purpose of the exemption.[112]

Amending the definition of "interactive website" to include the new defined term "digital investment advisory service" captures the increasing variety of technological methods by which

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[112] *See* Better Markets Comment Letter.

internet investment advisers provide advice using the internet. Also, the addition of the terms "mobile application, or similar digital platform" and "algorithms" will better align with technological advances in the industry. Advisers increasingly make use of various mobile applications to interact with the clients and use algorithms to generate investment advice.[113] The improved definition thus allows internet investment advisers that rely on mobile applications, or similar digital platforms, to generate advice to use the Internet Adviser Exemption, potentially reducing their burdens associated with multiple States' registrations and regulations. Further, internet investment adviser clients will benefit from being able to rely on mobile applications, or similar digital platforms, and algorithms, which offer a convenient means of interaction between the adviser and its clients. Additionally, including an exception for temporary technological outages of a *de minimis* duration should help accommodate occasional technological issues with the digital platform so the internet investment adviser is not required to frequently withdraw and re-register due to minor or temporary technical difficulties or planned maintenance.

To the extent advisers may be registering with the Commission in order to market themselves to potential clients, the amended rule should help avoid misleading clients. For instance, advisers without an "operational" website will be excluded from the pool of advisers eligible for the Internet Adviser Exemption. This will avoid clients contracting with an adviser that is relying on the Internet Adviser Exemption for registration whose website cannot be used to provide investment advice. To the extent any investors may be led to believe that an adviser relying on the Internet Adviser Exemption for registration has national presence and conducts its

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[113] *See supra* section II.B.

business via the internet, when this is not in fact the case, the amended rule could help avoid the possibility of investors using a type of adviser they did not intend to use.

The amendments remove the *de minimis* exception for non-internet clients, preventing advisers with any non-internet clients from relying on the Internet Adviser Exemption. Removing the exception better serves the narrow-intended scope of the Internet Adviser Exemption.[114] As explained in section II.C., this amendment will assist Commission staff in identifying advisers claiming reliance on the exemption without meeting the requisite conditions. Additionally, the *de minimis* exception is no longer needed in light of the widespread use of the internet, the relative ease of building and maintaining a website and applications, and other technological advances that better allow advisers to monitor to whom their advice is being provided. Accordingly, the elimination of the *de minimis* exception better reflects the allocation of regulatory responsibility between the Commission and the States.

Additionally, the amended rule requiring advisers to represent their Internet Adviser Exemption eligibility on Schedule D of Form ADV should reduce the number of erroneous registrations and subsequent withdrawals. Instead of only checking a box on Form ADV indicating they "are an internet adviser relying on rule 203A-2e," advisers will see a separate text description, on Form ADV, of the actions the adviser must have taken to become or remain eligible for the Internet Adviser Exemption.[115] The separate text description will clearly state for registrants the requirements that they must meet in order to qualify, and which they are certifying

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114 *See supra* section II.C.

115 Schedule D of Part 1A of Form ADV currently is submitted in a structured (*i.e.*, machine-readable), XML-based data language specific to that Form, so the additional information that would be required on Schedule D under the proposed rule amendments would also be structured.

that they have met when they file Form ADV.[116] We also anticipate that by avoiding erroneous registration, ineligible registrants will avoid expending time and effort on dealing with withdrawals, and corresponding legal fees.

The amendments to Form ADV will help ensure that registrants are aware of the new "operational interactive website" requirement and avoid erroneous registration.[117] In addition, the amendments will require internet investment advisers, as an initial matter and periodically thereafter, to provide an additional affirmative representation on Form ADV that more clearly notes the requirements of the exemption. As discussed in section II.D, the existing form, has not reduced the incidence of advisers erroneously relying on the exemption. The amendments to Form ADV will also aid Commission staff in administering the adviser registration process.[118]

Prior to the amendments, the Internet Adviser Exemption did not require an adviser to have a minimum number of clients.[119] Requiring that digital investment advisory services be provided on an ongoing basis to more than one client will better align with the original goal of the exemption, which was to provide relief from multiple State registration requirements for advisers with a national presence via the internet.[120]

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116 This amendment would also assist Commission staff in connection with its review of existing registrations and registration applications for compliance with the rule and, as applicable, for possible deregistration for inability to meet the conditions of the rule.

117 *See supra* section II.D.

118 *See supra* section II.D.

119 The rule required an adviser relying on the exemption to provide investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months.

120 *See supra* section II.

2. Costs

The amended rule may adversely affect some advisers. The adopted amendments would specifically require that the website be "operational," and advisers may incur a cost of updating their website to become operational or withdrawing their Commission registration if their website is not operational. One commenter expressed concern that such a requirement may adversely affect small advisers with only a few clients.[121] Advisers relying on the Internet Adviser Exemption, large or small, however, should already have an interactive website and the Commission does not currently recognize a grace period to develop a website, beyond the separate, rule 203A-2(c) exemption for an investment adviser expecting to be eligible for Commission registration within 120 days, so the amended rule is not expected to require new website development costs for advisers of any size.[122] Therefore, this amendment would not produce significant incremental costs for small investment advisers.[123]

Advisers that choose to withdraw their Commission registration must file Form ADV-W. The current burden estimate to file Form ADV-W is 0.75 hour per respondent,[124] implying a cost of withdrawal of $319 per adviser.[125] The costs to file this form may vary between advisers and

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121 *See* Robert Martin Comment Letter.

122 *See supra* note 48 and accompanying text.

123 *See also infra* section VI.

124 *See*, *e.g.*, Submission for OMB Review; Comment request; Extension: Rule 203-2 and Form ADV-W, 88 FR 37913 (June 9, 2023) (describing the burden associated with the previously approved collection of information under OMB Control No. 3235-0313).

125 0.75 hour * $425 = $319. The maximum total cost of withdrawals assuming all 261 currently registered internet investment advisers relying exclusively on the Internet Adviser Exemption have to withdraw is 0.75 hour * $425 * 261 = $83,194. Assuming only 107 currently registered internet investment advisers with zero clients and 5 advisers with one client will have to withdraw, the total estimated cost is 0.75 hour * $425 *112 = $35,700. The $425 compensation rate used is the rate for a Sr. Operations Manager in the SIFMA Report on Management & Professional Earnings in the Securities Industry – 2013 (Oct. 7, 2013), adjusted for inflation using the Bureau of Labor Statistics' Consumer Price Index inflation calculator,

may be larger than this estimate for some. In addition, depending on their location and the scope and nature of their activities (if any), advisers that withdraw from Commission registration might need to register with one or more States. While these advisers would no longer be required to bear the costs associated with compliance with Commission rules, they would bear the cost associated with preparing State registration filings, paying State registration fees,[126] and complying with the registration requirements of the States with which they register. Also, to the extent some clients value Commission registration and select advisers based on their Commission registration status, advisers could lose clients as a result of withdrawal; however, we do not have information that would allow us to predict the size or magnitude of this effect.[127] The Commission received no comments or estimates pertaining to these costs.

Internet investment advisers that rely exclusively on the Internet Adviser Exemption and have non-internet clients, as is currently allowed, would be affected by the rule amendments because they could no longer rely on the exemption as a basis for registering with the Commission. Advisers that offer human-directed advice provided by electronic means would not be eligible for the exemption. These advisers may be required to register with one or more States if their total number of clients in any given State exceeds five and the State requires registration.[128]

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modified to account for a 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

126 State registration fees are typically the same as State notice filing fees, so to the extent the adviser is already paying notice filing fees in the states where it would need to register, the difference in filing fees should be *de minimis*. *See supra* note 9898.

127 *See* Proposing Release at note 65 and surrounding text (discussion of dual basis registration).

128 *See* section 222(d) of the Advisers Act. We are unable to quantify the costs of registering with the States, beyond State registration fees, because the registration requirements and forms, and the corresponding time spent by firms, vary by each State and there is no available data to make such estimates. The average of State registration fees is $224. *See supra* note 98.

One commenter expressed a concern that disallowing human generated advice could adversely affect adviser-client interactions due to a loss of valuable client feedback on, for example, new services or software.[129] The Internet Adviser Exemption was adopted for advisers that provide investment advice to their internet clients "exclusively" through their interactive website.[130] The current *de minimis* exception was adopted when providing advice through the internet was still in a fairly nascent stage and the exception could prevent internet investment advisers from losing their ability to rely on the exemption while providing advice to a small number of clients other than using the internet.[131] As discussed in section II.C., the Internet Adviser Exemption was not designed to permit human interaction more broadly.[132] However, the rule amendment does not prohibit human interactions with clients unrelated to the provision of investment advice, such as human interactions to resolve technical issues or collect feedback related to with new services, software, computer models, or help clients navigate the website or application. The elimination of the *de minimis* exception is to respond to the widespread use of internet, relative ease of building and maintaining a website and applications and other technological advances. Thus, it will better reflect the allocation of regulatory responsibility between the Commission and the States.[133] It will also help the Commission better identify advisers claiming reliance on the exemption without meeting the requirement that investment advice is provided to all clients exclusively through an operational interactive website.

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129 *See* Anonymous Comment Letter.

130 *See* 2002 Adopting Release at section II.A.1. *See also supra* note 16 and accompanying text.

131 *See supra* note 66 and accompanying text.

132 *See supra* notes 66-67.

133 *See supra* section I.B. (discussing the allocation of regulatory responsibility under NSMIA).

The amended rule is designed to focus on advisers that provide advice exclusively through the internet. Advisers currently relying on the Internet Adviser Exemption may need to change the way they communicate with or deliver services to their clients or rely on a different basis for Commission registration, if available. For example, internet investment advisers that have been providing advice via means other than an interactive website or with some human input might have to change their communication with clients in order to continue to rely on the exemption. In some cases, such advisers may either have to withdraw their registration or lose clients that request and/or require human-directed client-specific investment advice. Depending on the clients' needs, they may have to switch to a different adviser. As discussed in section IV.B, internet investment advisers typically advise non-high net worth individual clients. In addition to the cost associated with finding a new adviser, switching to a different adviser may represent a cost increase for such clients if the new adviser has higher fees. If in some cases the new adviser has lower fees, the clients may still face some switching costs, which could be higher than the savings from the lower fees.

The additional representation of eligibility on Schedule D of Form ADV may increase the time and effort advisers expend when filing Form ADV. One commenter, for example, expressed concern that Form ADV may become too lengthy as a result.[134] Nevertheless, such costs are expected to be minimal.[135] In addition, some of the costs associated with advisers having to register with multiple States are alleviated by the fact that the State registration burdens assessed when the exemption was originally implemented have declined since 2002, as now the advisers

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134 *See* Robert Martin Comment Letter. *See also supra* note 74 and accompanying text for a discussion of this commenter's concern.

135 *See supra* section IV.C.

may be able to rely on other available exemptions or more easily meet registration thresholds in order to register with the Commission. For example, as discussed in the baseline, the multi-state exemption threshold was decreased from 30 to 15, making it easier for advisers to qualify for this exemption. Further, as discussed in the baseline, advisers relying on the Internet Adviser Exemption now tend to have more registered assets under management on average per adviser and some may be able to reach the minimum threshold on the registered assets under management sooner in order to qualify for the Commission registration. Specifically, the average regulatory assets under management per adviser for internet investment advisers (about $56.09 million) was 144 times larger than it was in December 2003 when advisers using the exemption had on average about $0.39 million of registered assets under management per adviser.

The adopted change would render ineligible for the exemption all the currently registered internet investment advisers with one or zero clients. This would reduce the current population of exemption-eligible advisers by approximately 40%, unless those advisers obtained additional clients.[136] While reducing the number of advisers relying on the exemption is not a goal of the rule, a reduction would reflect the narrow scope of the Commission's exemptive rule.[137]

3. Effects on Efficiency, Competition, and Capital Formation

We do not anticipate any significant effects on efficiency, competition, and capital formation, as the amended rule represents a minor change of the exemption parameters and is not intended to conceptually change the exemption or the original intended division of the regulatory

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136 *See* previous discussion in baseline on the number of internet investment advisers with zero (107) and one (5) client out of 271 total internet investment advisers.

137 2002 Adopting Release at 77621; 15 U.S.C. 80b-3a(c) (allowing exemptions from the limits on Commission registration when those limits "would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of this section").

authority over investment advisers between the Commission and the States. As discussed in the baseline, the number of advisers potentially affected by the amendments is small and does not represent a significant portion of the population of investment advisers or their clients.

The amendments may have a positive effect on competition and capital formation as they are designed to modernize the rule to recognize advances in technology and digital services employed by the investment advisory industry. Specifying that internet investment advisers may use technology, such as mobile applications, or a similar digital platform, that can better fit their clients' needs should improve client-adviser interactions, and the quality of the services provided, and could encourage client participation. Increased client participation, in turn, may also encourage new entrants in the internet adviser space. The potential increase in client participation, and any associated increase in new entrants that provide internet adviser services, could lead to more investment in the capital markets, although this effect may not be significant given the small number and market share of internet advisers.

Conversely, there could be opposing, negative effects on competition and capital formation, because certain rule amendments, such as the removal of the current *de minimis* exception, could adversely affect adviser-client interactions by preventing internet investment advisers from relying on the Internet Adviser Exemption when providing, to any client, advice beyond digital investment advisory services. In some cases, advisers may need to choose between retaining their Commission registration (if they rely solely on the Internet Adviser Exemption) or continuing to provide human-directed advice as is allowed under the current wording of the exemption. This may lead to advisers losing some clients who value both Commission registration and human-directed advice and thus affect competition in the investment adviser market.

D. Reasonable Alternatives

1. Allowing Non-Internet Clients

As an alternative to removing the *de minimis* provision that allowed internet investment advisers to have 15 or fewer non-internet clients, the Commission considered reducing that number, for example, by setting a defined maximum of non-internet clients, such as five. Reducing the maximum to five could strengthen the link between the Internet Adviser Exemption and the internet advisory business, while retaining an adviser's flexibility to accommodate a small number of customers who seek advice beyond mere website output allowed under the final amendment to the exemption.

However, as discussed in section II.C, if an internet investment adviser is advising non-internet clients, it should not be exempted from the registration rules that otherwise apply to all investment advisers and should more properly be regulated by a State (or States) or the Commission (using a different basis for registration), as applicable. This alternative may require advisers to keep additional records tracing instances in which clients received advice beyond the model generated output. Such cases may be hard to identify because, as discussed earlier in the Economic Analysis, it may not always be clear when some human input was involved and to what extent. This alternative may thus result in a greater number of erroneous registrations and subsequent withdrawals as compared to the current rule.

The Commission also considered variations, such as defining a maximum number of non-internet clients as a percentage of the adviser's total number of clients. Under this variation, however, the maximum number of non-internet clients could be quite large for advisers with many clients, implying sufficient local presence to register with one or more States, while remaining quite small for investors with few clients and still limiting their interactions with

clients. This may not be fair, efficient or reflect the originally intended allocation of adviser regulation responsibilities between the Commission and the States: for example, advisers with a large number of non-internet clients in a given State are more likely to have a local presence in the State as opposed to a national presence.

2. Alternative Definitions of "Interactive Website"

The Commission also considered adding a different minimum number of clients to the definition of "operational interactive website." One commenter suggested 15 clients.[138] This commenter expressed that, in its view, 15 or more clients, rather than the proposed "more than one," is a better indicator of an adviser's national presence.[139] Although there could be various ways of demonstrating national presence, in the context of the Internet Adviser Exemption, the existence of an operational interactive website that can be accessed by clients located in multiple States demonstrates a national presence, whereas the requirement to have a certain minimum number of clients is designed to ensure that the adviser meets the definition of investment adviser and has a basis for registration.

A larger number of clients would indeed help limit Commission registration to those advisers with a national presence. Requiring a larger minimum number of clients to qualify for the exemption would exclude advisers that are not otherwise eligible for Commission registration, but that obtain one or a few clients with the sole purpose of relying on the exemption. This would work against the originally intended division of regulatory authority between the Commission and the States. A larger minimum number of clients may, however, put

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138 Better Markets Comment Letter.

139 *Id.*

advisers with a small clientele or advisers which are at the early stages of starting their advisory business at a disadvantage.

Further, the definition of "interactive website" could use a term other than "operational," such as "functioning" or "working," to highlight the requirement that the website can be used by the clients or prospective clients to interact with adviser or obtain advising services. These alternative terms could simplify the rule text. However, such terms may be less technical and more prone to potentially inconsistent interpretations across advisers. As discussed in the Benefits section, adding the term "operational" helps prevent advisers from relying on the Internet Adviser Exemption if their website cannot be used to provide investment advice.

Further, the definition of "interactive website" could use a more specific definition of the types of client interactions allowed, as suggested by one commenter.[140] For example, the definition of the term could specify that while expanding on model-generated advice is not allowed, other human interactions are permissible. This alternative would help avoid situations when rule text risks giving advisers the impression that they cannot communicate directly with their clients without violating the Exemption's requirements. Such a misunderstanding could lead advisers to not respond to their clients.[141] However, adding such language may result in non-internet advisers attempting to rely on the Internet Adviser Exemption by manipulating these definitions, for instance, by attempting to redefine certain human interactions as those permissible by the rule.

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140 *See* NASAA Comment Letter.

141 *See id.*

One commenter suggested further clarifying which clients are served on an "ongoing basis."[142] We considered adding a test or definition to classify clients who receive investment advice on an ongoing basis, but concluded that the meaning of "ongoing basis" as proposed and as adopted is sufficiently understood under an existing, broadly applicable framework. That is, as discussed in section II.A, an internet investment adviser generally is providing investment advice on an ongoing basis through its website to a client if the advice is within the scope of the adviser-client relationship.

3. Eliminating the Internet Adviser Exemption

As another alternative, the Commission considered eliminating the Internet Adviser Exemption. With the proliferation of internet tools and their frequent use by all types of advisers, the distinction might no longer be valuable. In addition, specifically defining the bounds of the exemption may remain difficult, as evolving industry practices could quickly make rule definitions stale. New innovations and new ways of communication with the clients, which are not accounted for by the exemption definitions, could render the exemption unavailable to some internet investment advisers who adopt those new technologies. Further, as discussed in the section on costs, erroneous registrations associated with the rule can create additional costs for advisers due to registration withdrawals. Eliminating the exemption would eliminate these issues.

However, eliminating the exemption would result in certain costs. Advisers that currently rely on the exemption would no longer be able to use it, and therefore would not be eligible to register with the Commission unless they meet the criteria of another exemption. Losing

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142 *See* Maksym Puzin Comment Letter.

Commission registration would impose costs: for example, the adviser may lose some clients or may need to comply with State regulation requirements, as discussed in the Costs section. Further, losing a basis for Commission registration would require the adviser to file Form ADV-W. We estimate the burden to file Form ADV-W to withdraw from registration as 0.75 hour per respondent,[143] which can be expressed as a per-registrant cost of $319.[144] Assuming 261 currently registered internet investment advisers relying exclusively on the Internet Adviser Exemption would have to withdraw from registration, the total cost of filing Form ADV-W is estimated as $83,194.[145]

This alternative could also result in advisers losing some clients to the extent clients value Commission registration. Such clients would have to seek a different adviser and potentially face higher fees as well as switching costs as discussed above.[146] Further, losing Commission registration may result in advisers having to register in multiple (up to 14) States and be subject to the appropriate State regulations until they become eligible under a different rule or exemption, which would create a burden, especially for small advisers.[147] Nevertheless, in aggregate, such costs would likely be small as the advisers exclusively using the Internet Adviser

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143 *See supra* note 124 and accompanying text.

144 $425*0.75 hour per respondent. The $425 compensation rate is calculated as described in *supra* note 125125.

145 $425 * 0.75 hour per respondent * 261 advisers. The $425 compensation rate is calculated as described in *supra* note 125125.

146 As discussed previously in the costs section, we are unable to quantify these costs due to a lack of data on such clients and the new advisers they may have selected. Commenters did not provide information on this topic.

147 *See* relevant discussion in section IV.C.2. As stated previously in the costs discussion, we are unable to quantify the costs of registering with the states, beyond State registration fees ($224 on average across states), because the registration requirements and forms, and the corresponding time spent by firms, vary by each State and there is no available data to make such estimates.

Exemption comprise a very small portion of the relevant market (as discussed previously, 1.7% of the total number of advisers and 0.003% of the total assets under management).

V. Paperwork Reduction Act

A. Introduction

The amendments will result in new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[148] The amendments will have an impact on the current collection of information burdens of rule 203A-2(e) and Form ADV under the Act. The titles for the collections of information are: (i) "Exemption for Certain Investment Advisers Operating Through the Internet (Rule 203A-2(e))" (OMB control number 3235-0559); and (ii) "Form ADV" (OMB control number 3235-0049). The Commission is submitting the final collections of information to the OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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 control number. The Commission published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted the proposed collections of information to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission did not receive any comments that addressed the estimated PRA burdens and costs in the Proposing Release.

B. Rule 203A-2(e) Recordkeeping Requirement

The amended rule will require an internet investment adviser to provide investment advice to all of its clients exclusively through an operational interactive website,[149] and will

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148 44 U.S.C. 3501 *et seq*.

149 *See* amended rule 203A-2(e)(1)(i).

require advisers registering with the Commission under the exemption to maintain a record demonstrating that the adviser's advisory business has been conducted through an operational interactive website in accordance with the rule.[150] Although most advisers registering under the rule usually generate the necessary records in the ordinary conduct of their internet advisory business, the recordkeeping requirement of rule 203A-2(e) nonetheless may impose a small additional burden on these advisers. We estimate this recordkeeping burden to amount to an average of four (4) hours annually per adviser.[151]

We estimate the number of respondents to this information collection to be 271 advisers.[152] Accordingly, we estimate the total recordkeeping burden hours for all rule 203A-2(e) advisers to be 1,084 hours.[153] We estimate that the total monetized cost to each internet adviser to comply with the recordkeeping provision of rule 203A-2(e) will be approximately $1,700,[154]

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150 *See* amended rule 203A-2(e)(1)(ii). Under the amended rule, advisers will need to maintain records of their compliance with the rule. The elimination of the *de minimis* exception does not result in an increase in the burden under the amended rule but it has been accounted for in our estimated burden for the amended rule.

151 The adviser will need to demonstrate that all of its clients obtain investment advice from the firm exclusively through an operational interactive website. Internet investment advisers that conduct their business exclusively through interactive websites and whose employees never directly communicate with clients will likely need to spend very little time documenting their compliance with the condition. An adviser that has personnel that assist clients directly (whether through email, chatbots, telephonically, or otherwise) with administrative functions like accessing the website may need to spend more time.

152 This estimate is based on information reported by advisers through IARD. Based on IARD data as of June 30, 2023, of the approximately 15,391 SEC-registered advisers, 271 checked Item 2.A(11) of Part 1A of Form ADV to indicate their basis for SEC registration under the Internet Adviser Exemption. This estimate may be overinclusive to the extent that advisers currently registered in reliance on the exemption, including, but not limited to, those that currently have one or fewer clients, are not able to satisfy the requirements of the amended rule. The estimate may be underinclusive to the extent that additional advisers seek to rely on the Internet Adviser Exemption, whether due to the industry's increased reliance on technology or otherwise.

153 Four (4) hours x 271 advisers = 1,084 hours.

154 We estimate the cost at a rate of $425 per hour. The compensation rate for the current approved information collection used is the rate for a Sr. Operations Manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 4 hours x $425 per hour = $1,700.

and that the total monetized cost for the 271 advisers relying on this exemption at this time will be $460,700.[155]

C. Form ADV

We are amending Form ADV Part 1A to require advisers to indicate on Schedule D that, if applying for registration with the Commission, the adviser will provide—and if amending its existing registration and continuing to rely on the Internet Adviser Exemption, that it has provided—investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[156] These changes are designed to provide information to the Commission in connection with the registration and annual amendments to Form ADV filed by internet investment advisers and will assist Commission staff in connection with its review of existing registrations and registration applications for compliance with the rule and, as applicable, for possible deregistration of an adviser for an inability to meet the conditions of the rule.

Based on Form ADV data as of June 30, 2023, the Commission estimates that approximately 261 of the 271 SEC-registered internet investment advisers (approximately 96%) will complete the final rule's Form ADV representation by submitting their annual updating amendment on or prior to the rule's compliance date.[157] For these advisers, the ministerial amendments to Form ADV requiring advisers to check a box do not make any substantive modifications to any existing collection of information requirements or impose any new

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155 1,084 hours x $425 per hour = $460,700. We do not expect advisers to incur any external cost burden in connection with this information collection because advisers registering under the rule will generate the necessary records in the ordinary course of their advisory businesses.

156 *See supra* section II.D.

157 *See supra* section II.E.

substantive recordkeeping or information collection requirements within the meaning of the PRA.

In addition, based on Form ADV data as of June 30, 2023, the Commission estimates that approximately 10 of the 271 SEC-registered internet investment advisers (approximately 4%) will not file an annual updating amendment between September 30, 2024,[158] and the compliance date, and will file an other than annual amendment in order to comply with the rule by the rule's compliance date.[159] We estimate that the total burden hours attributable to such internet investment advisers completion of the other than annual amendment will be 10 hours.[160] We estimate that the total monetized cost to each such adviser will be approximately $360,[161] and that the total monetized cost for the 10 advisers relying on this exemption at this time will be $3,600.[162]

D. Total hour burden associated with amendments to rule 203A-2(e) and Form ADV

We estimate investment advisers that will be subject to the amended rule will incur a total annual hour burden resulting from the collections of information discussed above of

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158 *See supra* note 76 (stating that we expect the IARD system to be able to accept Form ADV filings reflecting the Form ADV representation by Sept. 30, 2024).

159 *See supra* section II.E.

160 One (1) hour x 10 advisers = 10 hours.

161 We estimate the cost at a rate of $360 per hour. The compensation rate for the current approved information collection used is the rate for a compliance manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 1 hours x $360 per hour = $360.

162 10 hours x $360 per hour = $3,600.

approximately 1,094 hours, at a monetized cost of $464,300 or $1,713 per adviser.[163] The total external burden costs will be $0. The table below summarizes our PRA annual burden estimates associated with the amendments to rule 203A-2(e) and Form ADV.

Rule 203A-2(e) Description of New Requirements	No. of Responses	Internal Burden Hours	External Burden Costs
Final Estimates for Internet Investment Advisers under Rule 203A-2(e) and Form ADV			
Annual burden for making records sufficient to demonstrate compliance with rule.	271	1,084 (4 hours per adviser)	0
Annual burden for making representations on Form ADV, Part 1A, Schedule D.	10	10 (1 hour per adviser)	0

We estimate the total burden under amended rule 203A-2(e) to amount to an average of four (4) hours annually per internet investment adviser. This estimate is identical to the estimate of the per-adviser burden under current 203A-2(e). The differences in total burden hours and internal monetized costs between current 203A-2(e) and amended 203A-2(e) will be determined primarily by the number of advisers subject to the rule.

VI. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") in accordance with section 604 of the Regulatory Flexibility Act ("RFA").[164] It relates

163 This estimate is based upon the following calculation: (1,084 hours x $425) + (10 hours x $360) = $464,300. $464,300 ÷ 271 advisers = $1,713.

164 5 U.S.C. 604.

to amended rule 203A-2(e) and Form ADV. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and is included in the Proposing Release.[165]

A. Need for and Objectives of the Rule and Form Amendments

1. Amendments to Rule 203A-2(e)

We are amending the Internet Adviser Exemption, which we initially adopted in 2002. The current Internet Adviser Exemption generally requires an adviser to:

- Provide investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months; and
- Maintain records for a period of not less than five years demonstrating compliance with the conditions of the rule.

The amended rule will require an internet investment adviser to provide investment advice to all of its clients exclusively through an operational interactive website at all times during which the adviser relies on the Internet Adviser Exemption. The rule's definition of "interactive website" will be renamed to "operational interactive website" and will be expanded to include mobile applications or similar digital platforms; the definition will also be amended to define operational interactive website as a website, mobile application, or similar digital platform through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de*

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165 *See* Proposing Release at section V.

minimis duration).[166] In addition, the amended rule will remove the current rule's *de minimis* exception,[167] which allows advisers relying on the rule to provide advice to fewer than 15 clients through means other than an interactive website during the preceding 12 months. The amended rule will also require advisers to comply with the requirement to maintain certain records in accordance with section 203A-2(e)(1)(ii) of the amended rule.

The amendments to the Internet Adviser Exemption are designed to reflect the evolution in technology and advisory industry since the adoption of the rule. In addition, the amendments are designed to better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. The reasons for, and objectives of, the amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections IV and V, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section V.

2. Amendments to Form ADV

The amended rule will also require an adviser to make representations on its Form ADV, Part 1A, Schedule D, indicating that it satisfies the requirements of the rule. This representation

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166 *See* amended rule 203A-2(e)(2). For purposes of the rule, "digital investment advisory service" will be defined as investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website. *See id.*

167 *See* amended rule 203A-2(e)(1)(i).

is similar to the representation that advisers relying on the multi-state exemption make on their Form ADV and will assist Commission staff in connection with its review of registration applications and deregistration of advisers that are not in compliance with the rule. The reasons for, and objectives of, the amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections IV and V, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section V.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be subject to the proposed amendments to rule 203A-2(e) and related amendments to Form ADV, the potential impacts discussed in the analysis of the IRFA, and whether the proposed amendments could have an effect on small entities that the Commission has not considered. Although we did not receive comments specifically addressing the IRFA, one commenter stated that the "operational interactive website" requirement will make it harder for "smaller entities to conduct business solely based on the amount of clients they may have."[168] We carefully considered the potential impact the amended rule would have on smaller advisers. We recognize that a larger minimum number of clients may require advisers with a small clientele or advisers that are at the early stages of starting their advisory business to register with one or more States, rather than the Commission, which may subject them to different regulations.[169] The requirement that an adviser have a minimum of two clients is intended to "reflect that advisers with zero or one client are more akin to local businesses that

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168 *See* Robert Martin Comment Letter. *See also supra* section II.A

169 *See supra* section IV.D.2.

can be effectively regulated by a State, consistent with Congress' intent in NSMIA's amendments to the Advisers Act."[170] After considering comments, we are adopting the amendments, as proposed.[171]

C. Legal Basis

The Commission is amending rule 203A-2(e) and Form ADV under the authority set forth in sections 203A(c) and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-3a(c) and 80b-11(a)].

D. Small Entities Subject to the Rule and Rule Amendments

Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year. Our amendments to rule 203A-2(e) will not affect most investment advisers that are small entities ("small advisers") because they are generally registered with one or more State securities authorities and not with the Commission. Under section 203A of the Advisers Act, unless subject to an exemption such as the Internet Adviser Exemption, most small advisers are prohibited from registering with the Commission and are regulated by State regulators. Based on IARD data, we estimate that as of June 30, 2023, approximately 502 SEC-registered advisers are small entities under the RFA.

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170 *See* Proposing Release at section II.A.1.

171 *See supra* section II.

1. Small entities subject to amendments to the internet adviser rule

As discussed above in section IV (the Economic Analysis), the Commission estimates that based on IARD data as of June 30, 2023, approximately 271 investment advisers will be subject to the amended rule and the related amendments to Form ADV. Of the approximately 502 SEC-registered advisers that are small entities under the RFA, 197 will be subject to the amendments to rule 203A-2(e) and the corresponding amendments to Form ADV.

E. Projected Reporting, Recordkeeping and Other Compliance Requirements

1. Amendments to rule 203A-2(e)

Amended rule 203A-2(e) will impose certain reporting, recordkeeping, and compliance requirements on investment advisers relying on the exemption for registration with the Commission, including those that are small entities. We estimate that 271 advisers[172] will be required to comply with the amended rule's requirement to maintain records in accordance with amended rule 203A-2(e)(1)(ii).[173] The requirements and rule amendments, including compliance, reporting, and recordkeeping requirements, are summarized in this FRFA (section VI.A., above). All of these requirements are also discussed in detail, above, in section II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections IV and V (the Economic Analysis and Paperwork Reduction Act Analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section V.

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172 Based on IARD data as of June 30, 2023.

173 Amended 203A-2(e)(1)(ii) is identical to current 203A-2(e)(1)(ii) except for a conforming change to reflect the requirement that the interactive website be "operational."

As discussed above, approximately 502 small advisers were registered with us as of June 30, 2023, and we estimate that 197 of those small advisers registered with us will be subject to the amendments (39.2% of all registered small advisers). As discussed above in our Paperwork Reduction Act Analysis in section V above, the amendments to rule 203A-2(e) under the Advisers Act will create an annual burden of approximately 4 hours per adviser, or 788 hours in aggregate for small advisers.[174] We estimate that the total monetized cost to each small adviser to comply with the amendments to the Internet Adviser Exemption will be approximately $1,700.[175] We expect the annual monetized aggregate cost to small advisers associated with our amendments to the Internet Adviser Exemption will be $334,900.[176]

2. Amendments to Form ADV

The amendments to Form ADV will impose certain reporting and compliance requirements on investment advisers relying on the rule to register and remain registered with the Commission, including those that are small entities. An adviser relying on the rule as a basis for registration will be required to represent on Schedule D of its Form ADV that it provides investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[177] An adviser registered under the rule and continuing to rely on the rule as a basis for its registration will be required to make a representation that it has provided investment advice on an ongoing basis to more than one client exclusively through an

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174 197 small advisers x 4 hours.

175 *See supra* note 154 and accompanying text.

176 We estimate the cost at a rate of $425 per hour. The compensation rate for the current approved information collection used is the rate for a Sr. Operations Manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 788 hours x $425= $334,900.

177 *See supra* section II.D.

operational interactive website.[178] The requirements and rule amendments, including recordkeeping requirements, are summarized above in this FRFA (section VI.A). All of these requirements are also discussed in detail, above, in section II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections IV and V (the Economic Analysis and Paperwork Reduction Act Analysis) and below. The professional skills required to meet these specific burdens are also discussed in section V.

Our Economic Analysis (section IV above) discusses these costs and burdens for respondents, which include small advisers. As discussed above in our Paperwork Reduction Act Analysis in section V above, the amendments to Form ADV will not increase the annual burden for advisers and will have no annual monetized cost.

F. Agency Action to Minimize Effect on Small Entities

The RFA directs the Commission to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse effect on small entities. Accordingly, we considered the following alternatives for small entities in relation to our amendments to rule 203A-2(e) and the corresponding amendments to Form ADV: (i) differing compliance or reporting requirements that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the amended rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposals, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements for small advisers, or exempting small advisers

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178 *See id.*

from the amended rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under the final amendments to rule 203A-2(e) and Form ADV. As discussed above, the amended rule is intended to better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and will enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. These benefits should apply to clients of smaller firms as well as larger firms. In addition, as discussed above, our staff will use the corresponding information that advisers will report on the amended Form ADV to help determine compliance with the rule and to help prepare for examinations of investment advisers. Establishing different compliance or reporting requirements for large and small advisers relying on the Internet Adviser Exemption would negate these benefits and would be inconsistent with our mandate to provide a system of public disclosure of investment adviser information. An internet investment adviser that is a small entity, however, by the nature of its business, will likely spend fewer resources in maintaining records and completing Form ADV and amendments than a larger adviser. Regarding the fourth alternative, specifically, the Commission has considered exempting small advisers from the amended rule. Small advisers are one of the primary beneficiaries of this exemption. Such an exemption would be inconsistent with the intended purpose of the amended rule, which, in part, is to provide regulatory relief from multiple State regulatory requirements.

Regarding the second alternative, the amended rule is clear and further clarification, consolidation, or simplification of the compliance requirements is not necessary. As discussed above, the amended rule will require an internet investment adviser to (i) provide investment advice to all of its clients exclusively through an operational interactive website, (ii) maintain records demonstrating that it provides investment advice to its clients exclusively through an operational interactive website,[179] and (iii) represent on Schedule D of its Form ADV that it provides investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[180] These provisions will better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and will enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. Further, our amendments requiring the representation on Schedule D of Form ADV will assist the Commission's examination and enforcement capabilities, including assessing compliance with rules, and therefore, it will provide important investor protections.

Regarding the third alternative, we are using design standards because we determined that removing the *de minimis* exception and requiring internet investment advisers to exclusively

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179 *See* amended rules 203A-2(e)(1)(i) and (ii). As with the current rule, a person may not rely on the Internet Adviser Exemption under the amended rule if it controls, is controlled by, or is under common control with another investment adviser registered with the Commission solely in reliance on the adviser registered under the Internet Adviser Exemption. *See* 17 CFR 275.203A-2(e)(1)(iii); amended 17 CFR 275.203A-2(e)(1)(iii).

180 *See supra* section II.D.

advise internet clients to be a design standard necessary to better reflect Congress's intent under NSMIA and the Dodd-Frank Act.

Statutory Authority

The Commission is amending rule 203A-2(e) and Form ADV under the authority set forth in sections 203A(c) and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-3a(c) and 80b-11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities

Text of Rules and Form Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

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Section 275.203A-2 is also issued under 15 U.S.C. 80b-3a.

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2. Amend § 275.203A-2 by revising paragraph (e) to read as follows:

§ 275.203A-2 Exemptions from prohibition on Commission registration.

* * * * *

(e) *Internet investment advisers.* (1) An investment adviser that:

(i) Provides investment advice to all of its clients exclusively through an operational interactive website at all times during which the investment adviser relies on this paragraph (e);

(ii) Maintains, in an easily accessible place, for a period of not less than five years from the filing of a Form ADV that includes a representation that the adviser is eligible to register with the Commission under this paragraph (e), a record demonstrating that it provides investment advice to its clients exclusively through an operational interactive website in accordance with the limits in paragraph (e)(1)(i) of this section; and

(iii) Does not control, is not controlled by, and is not under common control with, another investment adviser that registers with the Commission under paragraph (b) of this section solely in reliance on the adviser registered under this paragraph (e) as its registered adviser.

(2) For purposes of this paragraph (e), "operational interactive website" means a website, mobile application, or similar digital platform through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de minimis* duration). For purposes of this rule, "digital investment advisory service" is investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website.

(3) An investment adviser may rely on the definition of client in § 275.202(a)(30)-1 in determining whether it is eligible to rely on this paragraph (e).

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

3. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b-1, *et seq.,* Pub. L. 111-203, 124 Stat. 1376.

4. Amend Form ADV (referenced in § 279.1) by:

a. In the instructions to the form, Form ADV: Instructions for Part 1A, by revising 2.i.;

b. In the Glossary of Terms by:

i. Redesignating paragraphs 13. through 42. as paragraphs 15. through 43.; and paragraphs 43. through 65. as paragraphs 45. through 67.; and

ii. Adding new paragraphs 13. and 44.;

c. In Part 1A, revising Item 2.A.(11); and

d. In Part 1A, Schedule D, by adding Section 2.A.(11).

Note: Form ADV is attached as Appendix A to this document. Form ADV will not appear in the Code of Federal Regulations.

By the Commission.

Dated: March 27, 2024

J. Matthew DeLesDernier,

Deputy Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Form ADV

FORM ADV (Paper Version)

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Form ADV: Instructions for Part 1A

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2. Item 2: SEC Registration and SEC Report by Exempt Reporting Advisers

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i. **Item 2.A.(11): Internet Adviser.** You may check box 11 only if you are eligible for the Internet adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(e). If you check box 11, you must complete Section 2.A.(11) of Schedule D. You are eligible for this exemption if:

• You provide investment advice to all of your *clients* exclusively through an *operational interactive website* at all times during which you rely on rule 203A-2(e). Other forms of online or Internet investment advice do not qualify for this exemption;

• You maintain a record demonstrating that you provide investment advice to your *clients* exclusively through an *operational interactive website* in accordance with these limits.

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GLOSSARY OF TERMS

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13. **Digital Investment Advisory Service**: Investment advice to *clients* that is generated by the *operational interactive website*'s software-based models, algorithms, or applications based on personal information each *client* supplies through the *operational interactive website*.

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44. **Operational Interactive Website**: A website, mobile application, or similar digital platform through which the investment adviser provides *digital investment advisory services* on an ongoing basis to more than one *client* (except during temporary technological outages of a de minimis duration).

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PART 1A

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Item 2. * * *

A. * * *

* * * * *

(11) are an **Internet adviser** relying on rule 203A-2(e);

If you check this box, complete Section 2.A.(11) of Schedule D.

* * * * *

Schedule D

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SECTION 2.A.(11) Internet Adviser

If you are relying on rule 203A-2(e), the Internet adviser exemption from the prohibition on registration, you are required to make a representation about your eligibility for SEC registration. By checking the appropriate box, you will be deemed to have made the required representation.

If you are applying for registration as an investment adviser with the SEC or changing your existing Item 2 response regarding your eligibility for SEC registration, you must make this representation:

□ I will provide investment advice on an ongoing basis to more than one client exclusively through an *operational interactive website*.

If you are filing an annual updating amendment to your existing registration and are continuing to rely on the Internet adviser exemption for SEC registration, you must make this representation:

□ I have provided and will continue to provide investment advice on an ongoing basis to more than one client exclusively through an *operational interactive website*.

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