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February 10, 2020

Filed Electronically

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

Re: Investment Adviser Advertisements – File No. S7-21-19

Dear Ms. Countryman:

T. Rowe Price appreciates the opportunity to comment on the SEC's proposed amendments to the rule under the Investment Advisers Act of 1940 that governs certain investment adviser advertisements (the "**Proposed Rule**").[1] We strongly support the Proposed Rule, and commend the Commission for its efforts to modernize a rule that has not changed substantively since its adoption in 1961. Moving to a principles-based regime will allow the rule to remain evergreen, which is critically important in light of rapidly changing technology and investor preferences for how they wish to receive information.

We do, however, have several recommendations, most of which ask the Commission to consider ways to align the Proposed Rule with approaches taken by other regulators. We believe that a principles-based regime has the potential for greater consistency across regulatory regimes, both domestically and globally, which would make compliance much more efficient for investment advisers without sacrificing investor protection.

Our comments are explained in more detail below.

The Movement to a Principles-Based Regime

The Proposed Rule takes a principles-based approach. It replaces the current rule's broadly drawn limitations with a mix of general prohibitions and specific provisions for certain types of advertisements, and adds a compliance requirement for internal review and approval of most advertisements before dissemination. The Commission explains that, in proposing this type of approach, it carefully considered changes in the technology used for communications, the expectations of investors shopping for advisory services, and the nature of the investment advisory industry, including the types of investors seeking and receiving investment advisory services.

We strongly support the move to a more principles-based regime and very much appreciate the Commission's forward-thinking rationale. At T. Rowe Price, we have found that many of our fund shareholders and other clients have expressed a clear preference for digital communications. For example, in 2019, 89% of our interactions with personal investors took place digitally via mobile applications or the Web, with a continued increase in mobile interactions – including our app and mobile website – which made up 42.3% of all digital interactions, a number that has more than doubled since 2016. These trends – which are not unique to T. Rowe Price – show no signs of abating, and indeed should accelerate as we begin to see generations of "digital native" investors grow up more comfortable with digital information than traditional hard-copy print. All of this suggests that the Commission's efforts to modernize rules written for a paper-based world are critically important to meeting investor expectations and improving their end-to-end experience in the future.

[1] Investment Adviser Advertisements; Compensation for Solicitations, SEC Rel. No. IA-5407 (Nov 4, 2019), 84 FR 67518 (Dec. 10, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-12-10/pdf/2019-24651.pdf.

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As the Commission clearly recognizes, however, principles-based rules present their own challenges, such as how best to clearly and consistently communicate an evolving interpretation of the standards without creating a patchwork of specific requirements that would undercut the benefits of moving to a principles-based regime. In the FINRA context, in addition to FINRA's advertising-related notices and other guidance, we get the benefit of feedback on every piece of advertising we file, which informs us as to FINRA's latest thinking. The Proposed Rule's reliance on an internal review process – which we support – makes this more challenging for the Commission. Recognizing this, we hope the Commission and its staff remain open to engaging with the industry and sharing their interpretations of the general standards, whether through interpretive letters, guidance statements, summaries of exam results, or otherwise.

The Definition of "Advertisement"

Communications Designed to Retain Existing Clients. The Proposed Rule significantly broadens the current definition of advertisement. While we generally support the proposed definition, we have one recommendation for a change with regard to communications designed to retain existing clients that would improve the rule without sacrificing investor protection.

The proposed definition of an advertisement explicitly includes communications meant to "retain" existing clients, but the Commission asks whether it is appropriate to treat communications as advertisements when the persons receiving them are already clients or investors that benefit from the other protections of the Federal securities law.

We support removing the "retain" prong from the definition of advertisement in the final rule. In a very practical sense, every communication with existing clients is designed to retain them, so this prong of the definition could be broadly interpreted such that every communication becomes an advertisement for purposes of the rule. That is clearly not the Commission's intent.

Rather, the Commission notes that, in including the "retain" prong, it is proposing to incorporate the approach that the staff took in the 1996 *Munder Capital* no-action letter.[2] At a minimum, if the Commission ultimately includes the "retain" prong, it should explicitly reference other elements of the *Munder Capital* letter that provide context, such as the staff's statement that it would not view documents relating specifically to one or more investment companies (such as prospectuses, advertisements or sales literature) as designed to maintain existing clients or solicit new clients for the adviser, unless the documents are directed to such persons or refer to advisory services that are offered to such person.[3]

Social Media Posts. In the release, the Commission notes that it would not consider the use of "like," "share," or "endorse" features on a third-party website or social media platform by an adviser's employees to implicate the Proposed Rule, absent other factors that indicate that the adviser has involved itself in the presentation of such content. We fully support that approach.

Correspondence. The Commission asks for comment on whether there should be different requirements for advertisements depending on how broadly the adviser disseminates them, citing the FINRA definition of "correspondence" as an example. In our view, the rule should draw that distinction, but we recognize that it can be a challenge to base an exception on a particular number of communications. Some materials that appear to be personalized are, in reality, widely disseminated. Other materials might go to more than one recipient but be sufficiently customized that they are not advertisements. Rather than creating a new category for correspondence based on the number of recipients, we would suggest that the Commission consider a specific carveout from the Proposed Rule for electronic correspondence (*e.g.*,

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[2] Proposed Rule, at n.61, citing *Munder Capital Management*, SEC Staff No-Action Letter (May 17, 1996) ("*Munder Capital*").

[3] *Munder Capital*, text accompanying n.7.

emails, texts, etc.) that are sent by an adviser to either (1) existing clients regarding their investments and current services, or (2) prospective clients using an approved template. The Commission could further require investment advisers to adopt policies and procedures designed to reasonably ensure compliance, such as a post-use review of a sampling of such communications. We think this strikes an appropriate balance for an exception based on dissemination.

The Distinction Between "Retail" and "Non-Retail" Communications

The Proposed Rule draws a distinction between "retail" and "non-retail" communications based on the status of the investor as qualified purchaser or knowledgeable employee. It would allow communications with non-retail clients to include performance information gross of fees if the adviser offers to promptly provide the information necessary to calculate net performance.

We agree that there should be a distinction that allows greater flexibility to present performance to audiences who can fairly be expected to understand the nature and limitations of that information. We are concerned, however, that the proposed definition of "non-retail" is overly narrow, inconsistent with other SEC rules[4] and other regulators, and based on terminology that has little application outside the private fund context. If adopted, it would create an unnecessary operational burden for firms who are either dually registered in the US or who distribute information globally to institutional clients.

To avoid these challenges while still maintaining an appropriate distinction, the Commission could adopt a broader definition, such as the one used by ESMA in MiFID II to define "professional clients" as those who "possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs."[5] ESMA provides a number of examples of entities that are deemed to meet that standard, as well as others who could be considered to meet the standard after an adequate assessment of their expertise, experience, and knowledge. As an alternative, the Commission could rely on FINRA's definitions of "institutional investors" and "retail investors" which would help dual registrants comply with the Proposed Rule.[6]

More broadly, these kinds of distinctions create largely unnecessary compliance challenges. Where consistency makes sense, as we think it does in this case, we encourage the Commission to take the opportunity to rationalize these definitions so that there is one set of standards for broker-dealers and investment advisers to apply in distinguishing a sophisticated investor from a retail investor across rule regimes.

References to Specific Investment Advice

The Proposed Rule would prohibit a reference to specific investment advice where such investment advice is not presented in a manner that is fair and balanced. The Commission explains that the use of the phrase "reference to specific investment advice" is intended to substantively broaden the scope of the provision and eliminate confusion. The Commission further explains that the provision would apply to any reference to specific investment advice given by the investment adviser, regardless of whether it is current or past, whether the advice was acted upon or reflected actual portfolio holdings, whether it was profitable or not, and whether it was given in the context of discretionary or non-discretionary portfolios.

We welcome the change whereby the Commission would no longer require a specific presentation, but rather allow a firm to present this information in a fair and balanced manner, considering the facts and circumstances of the communication, including the nature and sophistication of the audience.

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[4] For example, the SEC's new Form CRS must be delivered to a broker-dealer's "retail investors," which are defined differently from the Proposed Rule and FINRA rules.

[5] *See* https://www.esma.europa.eu/databases-library/interactive-single-rulebook/mifid-ii/annex-ii.

[6] *See* FINRA rules 2210 and 4512.

Nevertheless, we are concerned that the discussion in the release includes an example of what would be acceptable with reference to the no-action letter to *Franklin Management, Inc*.[7] The Commission states that "an adviser may find these criteria helpful guidance in complying with the proposed rule, but the proposal would not require them." Nevertheless, the inclusion of the reference in the release suggests that the Commission may continue to expect to see the adviser use objective, non-performance based criteria to select the specific securities that it lists and discusses in an advertisement, the same selection criteria for each quarter for each particular investment category, and no discussion of the amount of the profits or losses, realized or unrealized, of any of the specific securities. If so, that would undercut the move to a "fair and balanced" principle, potentially confuse SEC examiners who might apply prior no-action letters as precedent in their exams, and continue to make the Commission an outlier among regulators in its approach to security mentions, both in the U.S. and globally. There are other ways that an adviser could mention security selections in a fair and balanced manner without complying with past precedent, so we strongly encourage the Commission to remove the reference or make this clear in the final rule release.

Hypothetical performance

The Proposed Rule would allow an adviser to provide hypothetical performance in an advertisement, provided that the adviser takes certain steps to protect against misleading investors. The Commission explains its concerns with the potentially misleading nature of hypothetical performance, while recognizing that hypothetical performance may be useful to prospective investors who have the resources to analyse the underlying assumptions and qualifications of the presentation, and other information that may demonstrate the adviser's investment process.

The Commission also notes that FINRA's communications rule prohibits the projection of performance in most cases, while permitting "investment analysis tools" as a limited exception, and asks for comment on whether it should adopt a similar exemption in the final SEC rule.

We strongly agree with the Commission's statement that certain types of prospective investors find projections, like Monte Carlo simulations, highly useful in their analysis. As the Commission correctly suggests, "the information may allow an investor to evaluate an adviser's investment process over a wide range of time periods and market environments or form reasonable expectations about how the investment process might perform under different conditions."

We believe that the Proposed Rule would allow advisers to use Monte Carlo simulations and similar performance projections consistent with FINRA's treatment of investment analysis tools. The proposed requirements to have relevant policies and procedures, provide sufficient calculation information, and provide (or offer to provide) information to understand the risks and limitations of the projected performance are, in our view, both reasonable and workable in this respect.

Having asked for comment on whether a specific exception is necessary, the Commission should make this point clear in adopting the final rule, either through a statement in the adopting release or by incorporating an express exception mirroring the FINRA definition of "investment advice tools."

Hyperlinks

The Commission states that the Proposed Rule "would provide an approach that is more flexible than our 2008 interpretive guidance to evaluating the use of hyperlinks to third-party content, as the proposed rule would not prohibit testimonials."[8] We support this approach.

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[7] Release, at text accompanying n.136.

[8] Release, at n.50.

The Proposed Rule would treat hyperlinks for risk disclosure differently. The Proposed Rule prohibits advertisements that discuss or imply any potential benefits connected with or resulting from the investment adviser's services or methods of operation without clearly and prominently discussing associated material risks or other limitations associated with the potential benefits. In explaining this prohibition, the Commission states that "it would not be consistent with the clear and prominent standard to merely include a hyperlink to disclosures available elsewhere."

We commend the Commission for seeking feedback on this point and asking whether the rule should permit hyperlinked disclosures subject to other conditions, such as those in the FTC's current guidance on how to make hyperlinked disclosure effective.[9] We believe the Commission can and should be more flexible in this regard and we welcome additional guidance, although we are not wedded to the FTC's approach. For example, in the U.K., "prominence" is defined as "the state of being easily seen," which the regulator explains as being "likely to attract attention, for instance, by virtue of its size or position."[10] This principle is followed with examples of prominence in various mediums, including digital properties. We would support a similar approach from the SEC, with a definition of "prominence" and guidance that allows for flexibility depending upon the medium used for the advertisement.

We believe a similar approach should apply to the use of third-party article reprints that mention the investment adviser and its investment capabilities. A disclosure page is typically used to provide supplemental information on the risks of the investment strategies mentioned or past performance of the strategies, among other information designed to provide fair and balanced content. The final rule release should make clear that an adviser could use article reprints in the same manner as hyperlinked content with an accompanying disclosure page designed to meet a "fair and balanced" and "clear and prominent" standard that would contain such supplemental information.

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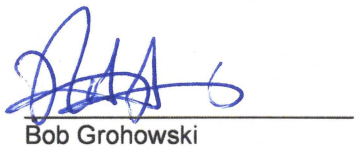
[9] Proposed Rule, at n.129 (citing FTC guidance that a hyperlink may be effective if it: (i) is obvious; (ii) is labeled to appropriately convey the importance, nature, and relevance of the disclosures it leads to; (iii) is placed as close as possible to the relevant information it qualifies; and (iv) takes investors directly to the relevant disclosures on the click-through page).

[10] *See, e.g.*, Financial Services Authority, Guidance Consultation on "Financial Promotions - Guidance: Prominence," (July 2011), available at https://www.fca.org.uk/publication/guidance-consultation/gc11_15.pdf.

We thank the Commission for its consideration of our perspective. Please do not hesitate to contact us if we could be of further assistance.

Respectfully,



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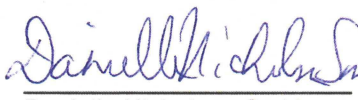

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The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
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