ICE DATA SERVICES™

February 10, 2020

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

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

Dear Ms. Countryman:

ICE Data Pricing & Reference Data, LLC ("PRD"), appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's Proposed Rule[1] that would amend SEC Rule 206(4)-1 ("Advertising Rule"). We support the Commission's initiative to modernize this rule. We are writing to provide the Staff with insight on challenges that we anticipate in the application of the Advertising Rule as currently proposed. As described below, PRD is concerned that certain aspects of the definition of the term "advertisement" are ambiguous and that those impacted by the Advertising Rule would benefit from additional Commission guidance.

Background

PRD is an indirectly wholly owned subsidiary of Intercontinental Exchange, Inc. (NYSE: ICE) and a registered investment adviser. ICE Data Services is the marketing name used to refer to the suite of pricing, market data, analytics, and related services offered by Intercontinental Exchange, Inc. and certain of its affiliates, including PRD.

The PRD business provides global security pricing, evaluations, reference data and corporate actions designed to support financial institutions' and investment funds' pricing activities, securities operations, research, and portfolio management. We produce daily evaluations for approximately 2.8 million fixed income and international equity issues. Our evaluated pricing spans approximately 145 countries and covers a wide range of financial instruments including sovereign, corporate and municipal bonds, structured products, leveraged loans, and our Fair Value Information Services for international equities, options, futures and fixed income products. Our reference data complements our evaluated pricing services by offering our clients a broad range of descriptive information, covering over 33 million financial instruments across over 210 markets. Our reference data coverage increased from 13 million securities by representing both active and inactive (historical) securities.

Advertising Rule

The proposed rule defines "advertisement" as "any communication, disseminated by any means, by or on behalf of an investment adviser, that offers or promotes the investment adviser's investment advisory services or that seeks to obtain or retain one or more investment advisory clients or investors in any pooled investment vehicle advised by the investment adviser." The proposed rule also includes four exclusions from the definition.

PRD appreciates the SEC's effort to modernize the rule. We agree that the rule is in need of revision to reflect regulatory changes and the evolution of industry practices. In general, the proposed definition is in line with other regulatory definitions and appropriately captures advertising activity. As described below, however, we believe that certain portions of the proposed definition warrant additional clarification and we encourage the Commission to provide guidance on those portions in its final rule.

[1] Investment Advisers Act Release No. 5407 (Nov. 4, 2019).

Dissemination "on behalf of" the investment adviser

Is the "on behalf of" element of the proposed definition sufficiently clear based on our description above? Should we further clarify any specific indicia to determine when a communication is disseminated "on behalf of" an investment adviser, particularly circumstances when an adviser might have exercised sufficient influence over third-party content?[2]

We encourage the Commission to provide additional guidance as to the meaning of the term "on behalf of" in the proposed definition of advertisement. The Commission states in the release that "If an advertisement were disseminated without the adviser's authorization, however, such an unauthorized communication would not be 'by or on behalf of' the adviser."[3] Footnote 46 goes on to state that "we intend 'by or on behalf of' to require affirmative steps by the adviser."[4] The release, however, does not provide any indicia to give investment advisers confidence that certain communications that it creates, reviews and/or approves and shares with affiliates, distribution partners or other third parties, can remain outside of the definition of advertisement. In addition, the following statement in the release seems likely to cause significant uncertainty without additional guidance:

> *Additionally, content created by or attributable to unaffiliated third parties… could be considered by or on behalf of an investment adviser, depending on the investment adviser's involvement… Whether a communication is "by or on behalf of" an investment adviser when the communication involves content from an unaffiliated third party would require a facts and circumstances analysis. We believe that whether third-party information is attributable to an adviser under the "by or on behalf of" standard depends on whether the adviser has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information.*[5]

Although this guidance considers various ways by which an adviser may interact with third parties to produce content that would be deemed an advertisement disseminated on behalf of the adviser, it does not take into account instances when an investment adviser's information may be incorporated into advertisements of third parties that may be subject to other regulatory regimes as well as third parties over which the adviser has no control. This creates risk that *any* involvement by the investment adviser in the review or approval of those third-party materials would make those materials, in their entirety, advertisements of the investment adviser, subject to the proposed Advertising Rule that otherwise may have not been applicable to such third party. Investment advisers are generally only in a position to verify the accuracy of statements about itself and its own services, not those of their affiliates or third parties.

As currently written and without further guidance, the definition of advertisement may unintentionally dissuade an investment adviser from collaborating with third parties that refer to the services of the investment adviser in marketing materials.

We urge the Commission to provide guidance regarding the conditions wherein the preparation, review or approval of information about the investment adviser, for the purpose of including that information as a component part of marketing materials of a third party, would not automatically make the third party content part of a communication disseminated "on behalf of" the investment adviser, and therefore an advertisement of the investment adviser.

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[2] *Id.* at 28.
[3] *Id.* at 24.
[4] *Id.* at n.46.
[5] *Id.* at 25.

Review and Approval of Advertisements

The review and approval requirement in the proposed rule represents, in our view, a significant change from the practice of letting investment advisers develop for themselves the procedures that would be reasonably designed to prevent violation of the Investment Advisers Act of 1940 and regulations thereunder ("Advisers Act"). The extent to which this review and approval requirement becomes unduly burdensome for investment advisers will largely depend on how the Commission interprets the "on behalf of" element of the proposed definition of advertisement, as explained above. Additional guidance around the "by or on behalf" element of the proposed definition of advertisement should consider the burden that the review and approval of advertisements, deemed disseminated by the third party "on behalf of" the investment adviser, could place upon investment advisers.

Are there types of communications that "offer or promote" investment advisory services or that seek to "obtain or retain" investors that should not be treated as "advertisements"?[6]

We are concerned that the rule could be interpreted in a manner that would make it difficult or impossible for an investment adviser to have any involvement in the review and approval of third party materials, because the third party, by mentioning the investment adviser or its services in its marketing materials, could be deemed to be "promoting" the investment adviser or its services. Further guidance on what may constitute "promote" would be helpful.

Should we require that the review and approval process differ or be more or less comprehensive based on the audience that the advertisement is directed towards?[7]

At least with respect to "non-retail advertisements", as that term is defined in the proposed rule (and which would also depend on how the definition of "advertisement" is interpreted by the Commission) , we believe the Commission should consider giving investment advisers more latitude to design procedures, other than review and pre-approval, that are reasonably designed to ensure that those advertisements comply with applicable standards. For certain types of advertisements, the adviser should have the flexibility to put in place processes that differ from review and approval prior to the release.

Should we except live oral communications that are broadcast from the review and approval requirement as proposed? Are there any other types of advertisements that we should except from the requirement?[8]

We believe it is appropriate to except live oral communications that are broadcast from the review and approval requirement. However, we believe that the rule should also consider tailoring the review and approval requirement for certain other written social media communications to ensure that the rule is flexible enough to enable investment advisers to communicate with its clients about time sensitive events, in a manner that complies with the Advisers Act. A quick Tweet can be a more efficient and fairer way to communicate promptly with a large client base.

Proposed Amendments to Form ADV (Advertising)

Should we require advisers to state the approximate percentage of their testimonials, endorsements, or third-party statements in advertisements that are current (within a specific time frame) versus not current (within a specific time frame)? Why or why not, and if so, what should those time frames be? [9]

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[6] *Id.* at 33.
[7] *Id.* at 195.
[8] *Id.* at 195.
[9] *Id.* at 199.

We urge the Commission to consider carefully the additional burdens that it is imposing on the industry by expanding the information that must be reported on Form ADV. In general, information to be filed on Form ADV in response to a binary question is less burdensome than requiring an investment adviser to retain and report on descriptive statistics. We believe that the Commission could obtain valuable information regarding whether advertisements are current by asking, for example, whether an investment adviser has policies and procedures in place to monitor whether or not the firm's advertisements are current.

Conclusion

PRD appreciates the opportunity to present our perspective and views on the Commission's initiative to modernize the Advertising Rule.

Respectfully submitted,

/s/ John F. Robbins, CFA
Chief Compliance Officer
ICE Data Pricing & Reference Data, LLC