Investment Management Regulatory Update

Debevoise & Plimpton

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Advisers Act Marketing Rule: One Year to Compliance Date

All advisers registered under the Investment Advisers Act of 1940 (the "Advisers Act") must comply with the new Marketing Rule by November 4, 2022.

Rule 206(4)-1, as amended in December 2020 (the "Marketing Rule"), codifies and modernizes decades' worth of SEC and SEC staff guidance relating to investment adviser advertisements. It also incorporates solicitation activities, now under the umbrella of "endorsements," previously covered in the Cash Solicitation Rule (Rule 206(4)-3 under the Advisers Act, which will be rescinded in November 2022). The SEC has stated that the Marketing Rule represents a more principles-based approach to investment adviser advertising and the SEC believes that the existing approach relieves the industry of some existing, out-of-date restrictions.

In its attempt to modernize the Marketing Rule's framework, the SEC expressly permits (subject to certain restrictions) social media advertising, third-party ratings, compensated and uncompensated testimonials (which were previously prohibited under the former advertising rule), and compensated and uncompensated endorsements.[1] At the same time, the Marketing Rule imposes seven key prohibitions on investment adviser advertising, one of which imposes a new, prescriptive "fair and balanced" standard that applies to certain advertisements. For example, advertisements that reference past specific investment advice or performance results must do so in a manner that is "fair and balanced." We expect significant interpretative issues to arise relating to the implementation of the "fair and balanced" standard. In addition, the Marketing Rule contains certain express requirements applicable to the presentation of performance, including a requirement to present net performance alongside gross performance and specific requirements applicable to hypothetical performance, extracted performance, and related performance.

We also expect interpretive issues to arise in relation to the definition of "advertisement" under the Marketing Rule, such as whether a third-party statement is potentially attributable to an investment adviser. The SEC has indicated that this could cause the statement to be an advertisement, depending on the adviser's adoption of, or entanglement in the preparation of the statement.

The staff of the SEC has stated that, during the transition period leading up to the Marketing Rule's compliance date, registered investment

1. Note that the SEC did not carry forward the private funds carve-out from the Cash Solicitation Rule when adopting the Marketing Rule. As a result, advisers to private funds will need to comply with the solicitation requirements of the Marketing Rule.

advisers must fully comply with the existing advertising rule and cash solicitation rule or the Marketing Rule – it is important that advisers do not cherry-pick between the rules during this time. That said, it remains to be seen whether the SEC will provide some flexibility for firms seeking to implement compliance in phases, given the sheer complexity and scope of the Marketing Rule. Registered advisers currently engaged in (or expecting to soon be engaged in) fundraising or an active marketing period should consider when it would be commercially appropriate to transition to the Marketing Rule in light of ongoing business needs.

Please contact us with any questions about the Marketing Rule.

Director of the SEC's Division of Enforcement Gives Speech Emphasizing Proactive Compliance

On October 6, Gurbir Grewal, the Director of the SEC's Division of Enforcement delivered prepared remarks and took the opportunity to set out, for the first time since his appointment to the position, his likely approach to SEC enforcement. Grewal emphasized three points: (i) proactive compliance, (ii) proactive enforcement and (iii) his views on the importance of enforcement penalties. Grewal cautioned that stock policies and "check-the-box" compliance programs are unlikely to pass muster in the eyes of the staff of the Division of Enforcement. He also suggested that pushing the limits on ambiguous regulatory issues could increase the risk of enforcement in light of the Division's focus on addressing emerging risks before any perceived investor harm occurs. Grewal ended his statement by emphasizing the importance of imposing significant penalties to deter misconduct and noted that the Division may seek larger penalties than before, especially for repeat offenders.

SEC Commissioner Lee's "Going Dark" Speech Highlights the SEC's Continued Focus on Private Market Transparency

In a prepared speech at The Practising Law Institute's SEC Speaks in 2021, SEC Commissioner Lee continued her focus on private securities transactions and market transparency, highlighting what she believes to be insufficient transparency in private company ownership information, driven largely by the public reporting thresholds in Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") and the rules promulgated thereunder. Currently, under Section 12(g) of the Exchange Act, most issuers that have (i) more than $10 million in assets; and (ii) either 2000 persons or 500 non-accredited investors as shareholders of record are subject to public, periodic reporting requirements similar to public company reporting. Commissioner Lee suggested that the Commission should reconsider the way issuers, including private funds, count shareholders of record under Section 12(g) (and Rule 12g5-1) and focus instead on beneficial ownership.

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Marc Ponchione, a partner in the firm's Investment Management Group, focuses on advising financial services firms on various regulatory, compliance and transactional issues arising in the asset management industry. Mr. Ponchione is based in the firm's Washington, D.C. office.

Mr. Ponchione represents asset managers, funds, sponsors and issuers of financial products on a broad range of regulatory and transactional issues inside and outside the United States. He regularly advises clients on issues under the federal securities laws, including the Investment Company Act of 1940 and the Investment Advisers Act of 1940 as well as various other regulations affecting investment managers, funds and financial product sponsors.

From 2001 to 2006, he served as senior counsel at the Securities and Exchange Commission (Division of Investment Management). Mr. Ponchione serves on the American Bar Association Subcommittee on Hedge Funds, the American Bar Association Subcommittee on Investment Companies and Investment Advisers and the New York City Bar Committee on Investment Management Regulation. He frequently writes on investment management best practices and issues for various legal and business publications, and is an adjunct professor at Georgetown University Law Center.

Mr. Ponchione received his B.A. from Marietta College in 1996 and his J.D. from Duquesne University in 1999. He serves on the Board of Trustees at Marietta College.

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Sheena Paul is a counsel in the Investment Management Group's U.S. regulatory practice, based in the firm's Washington, D.C. office. Ms. Paul focuses her practice on providing regulatory advice to investment managers, with a particular focus on private equity clients. She works closely with the firm's other practices on regulatory advice related to domestic and cross-border corporate and capital markets transactions, and enforcement matters.

Ms. Paul has extensive experience advising asset managers and institutional investors on a broad range of U.S. regulatory matters, regularly advising on issues arising under the Investment Company Act of 1940, the Investment Advisers Act of 1940 and the Securities Act of 1933. She has also provided U.S. regulatory support for transactions and played an active role in private fund formations.

Ms. Paul previously worked in the asset management group of another international law firm.

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Ms. Burger joined Debevoise in 2018. She received a J.D. from Cornell Law School in 2018, where she was an articles editor of the *Cornell International Law Journal*. She received a B.A. from Yale University in 2011. Prior to law school, she worked as a Confidential Assistant at the United States Department of Justice. She is fluent in Spanish.