

SEC Overhauls Investment Adviser Advertising and Solicitation

December 23, 2020

Yesterday, the Securities and Exchange Commission (the “SEC”) adopted a new “Marketing Rule” under the Investment Advisers Act of 1940 (the “Advisers Act”) that overhauls the SEC’s longstanding approach to investment adviser advertising and that will substantially impact how investment advisers market themselves and their products, including private funds, and communicate with their clients and investors.¹ The Marketing Rule (Rule 206(4)-1 under the Advisers Act) will replace the existing Advertising Rule and the existing Cash Solicitation Rule.² The Marketing Rule will be effective 60 days after publication in the Federal Register, and the compliance date will be 18 months after the effective date (thus, no sooner than September 2022).

The Marketing Rule’s principal changes include:

- Revisions to the definition of “advertisement” to, among other things, include communications to prospective private fund investors (but not communications to existing fund investors that relate to the fund) and attribute to an investment adviser certain marketing materials distributed by third parties, pursuant to the SEC staff’s “entanglement” and “adoption” interpretive approaches;
- A new set of general prohibitions, which, while overlapping with an adviser’s antifraud obligations, are intended to provide a principles-based framework and further clarity to assess compliance of advertisements with the Marketing Rule;
- A new disclosure, oversight and disqualification framework applicable to testimonials and endorsements, particularly where the person providing the testimonial or endorsement (a “promoter”) is compensated;
- New disclosure and preparation criteria requirements applicable to the use of third-party ratings; and

¹ Investment Adviser Marketing, Release No. IA-5653; File No. S7-21-19 (Dec. 22, 2020), available [here](#).

² The existing advertising rule under Rule 206(4)-1 and the existing cash solicitation rule under Rule 206(4)-3 will be replaced with new Rule 206(4)-1.

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- New requirements and restrictions regarding the presentation of performance, and codification of portability requirements, in both cases consistent with factors that the SEC staff has previously identified. In a reversal from the proposal, and consistent with current SEC staff guidance, gross performance will have to be accompanied by net performance.

The SEC also amended the Advisers Act books and records rule (Rule 204-2) to reflect the changes in the Marketing Rule, and amended Form ADV to require investment advisers to make additional disclosures concerning their marketing practices. Finally, the SEC staff withdrew certain no-action letters and other guidance applicable to the existing Advertising Rule and Cash Solicitation Rule.

The Marketing Rule is not only a radical revision of the existing rules but also materially different from the proposed rule, particularly with respect to private fund advisers. For example, the Marketing Rule includes a narrower definition of “advertisement” applicable to private fund advisers, and eliminates the proposed requirement to designate an employee to pre-review all advertisements prior to dissemination and the requirement to provide a schedule of fees in fund marketing materials.³ And while the SEC states that the Marketing Rule is intended to represent a more principles-based approach that eliminates certain of the prescriptive restrictions in the existing Advertising Rule, the Marketing Rule appears to impose a number of new prescriptive requirements and restrictions. Given the sheer length of the release adopting the Marketing Rule—over 400 pages—and that the Marketing Rule in many ways represents an entirely different framework under which investment advisers will market their services and products, including private funds, we expect significant interpretative issues to arise concerning its application.

We will provide more in-depth analysis of the Marketing Rule in the near future.

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Please do not hesitate to contact us with any questions.

³ See Investment Adviser Advertisements; Compensation for Solicitations, Release No. IA-5407; File No. S7-21-19 (Nov. 4, 2019), available [here](#). For a summary of the proposal, please refer to our previous client update, available [here](#).



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