

# The SEC's overhaul of the investment adviser advertising and solicitor rules

Overview of the rule amendments

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Clifford Kirsch, Michael Koffler and Issa Hanna



# Speakers



**Clifford Kirsch**  
New York, NY  
+1 212 389 5052  
cliffordkirsch@eversheds-  
sutherland.com



**Michael Koffler**  
New York, NY  
+1 212 389 5014  
michaelkoffler@eversheds-  
sutherland.com



**Issa Hanna**  
New York, NY  
+1 212 389 5034  
issahanna@eversheds-  
sutherland.com

## What happened?

- SEC amended advertising rule and cash solicitation rule and combined it into one rule—the marketing rule
- Compliance date
  - What should we start thinking about today?
  - What changes can we start making?
- Overall, many of the changes are favorable—but nevertheless will be a huge undertaking
  - Also some big surprises

# Charting the course

Overview of the rule amendments

Today's discussion:

- Big picture review
- Future webcasts
- Questions

## Starting point

- How do advisers market their services
  - Communications
  - Through intermediaries

## The current framework

- Two separate rules
- No-action letters
- Regarding performance, remember GIPS!
- Regarding solicitors, remember the states!

## What was the SEC trying to achieve?

- Changes in technology; the emergence of social media
- Capture staff positions in a rule as opposed to no-action letters
- Changes in the industry
- A new way of thinking about communications and solicitors

# The SEC proposal and adoption

- SEC proposal - 2019
- 100+ comments received
- Some points in contention
  - Pre-use review and approval
  - One-on-one communications



## Adopted rule—some surprises

- Combines prior rules into a single rule—significance?
- Extends to private funds
- Performance
  - Gross performance must be accompanied by net performance—even in institutional marketplace
  - Hypothetical
- SEC stresses solicitor due diligence
- No pre-use review or approval requirement

# The framework of the new rule

- Definition of Advertisement
  - Communications – prong 1
  - Endorsements or testimonials – prong 2
    - Currently the cash solicitation rule

## The framework of the new rule

### Definition of advertisement—prong 1

- Direct or indirect communications
- To more than one person (or one or more persons if it includes hypothetical performance)
- That offers advisory services to prospective clients or investors in a private fund advised by the adviser OR
- That offers new advisory services to current clients or investors in a private fund advised by the adviser
- Exceptions...

## The framework of the new rule

### Definition of advertisement—prong 2

- Endorsement or testimonial for which an adviser provides compensation directly or indirectly
- Exception
  - Information contained in a statutory or regulatory notice, filing or other required communication
  - A testimonial or endorsement disseminated for no compensation or *de-minimis* compensation is not required to have a written agreement with the person giving the testimonial or endorsement describing the agreed-upon activities and the terms of compensation for such activities and is not subject to the disqualification provision

## The framework of the new rule—continued

- Principle-based provisions versus prescriptive prohibitions
- Requirements for endorsements or testimonials (and solicitors)
- Performance advertising

## Other changes

- Form ADV amendments
- Books and records

Questions?





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New York, NY  
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cliffordkirsch@eversheds-  
sutherland.com



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+1 212 389 5014  
michaelkoffler@eversheds-  
sutherland.com



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