INVESTMENT ADVISER MARKETING:
A New Era for Advertising and Solicitation

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The new Advisers Act marketing rule went into effect on May 4, 2021. Designated as Rule 206(4)-1, this rule replaces the original advertising rule dating from 1961, as well as Rule 206(4)-3, which has governed cash solicitation arrangements since 1979. Revised Rule 206(4)-1 is designed to adapt the regulation of marketing activities to developments in technology and the investment advice industry and to replace decades of SEC staff guidance issued under the old rules.

Although there is a lot to like about the new rule, it is much longer and more complex than its predecessors. While it eliminates outdated prohibitions against testimonials and statements about past recommendations, it incorporates less precise principles-based standards and expands the concepts of "advertisement" and "solicitation," which could increase advisers' compliance burdens substantially. Given the breadth of the changes, the Commission has granted an 18-month transition period, which means that an adviser has until November 4, 2022 to implement a compliant marketing program.

A. Definition of Advertisement [Rule 206(4)-1(e)(1)]

There are two prongs to the new definition of "advertisement."

1. The first prong includes an adviser's direct or indirect communication that offers the adviser's investment advisory services regarding securities to prospective clients or investors in a private fund advised by the adviser (hereafter, "private fund investors") or offers new securities advisory services to current clients or private fund investors.

    a. This prong excludes:

        i. extemporaneous, live, oral communications;

        ii. information contained in, and reasonably designed to satisfy, a statutory or regulatory notice, filing or other required communication;

[1] Please note that this outline is intended as a general discussion of compliance issues. It is not an exhaustive treatment of the topics discussed, nor does it provide legal advice regarding fact-specific issues an investment adviser may face. We would be pleased to answer any questions you may have about these rule changes.

iii. one-on-one communications, except communications that portray hypothetical performance (as defined below), unless that hypothetical performance is directed to a current or prospective private fund investor; and

iv. a communication that includes hypothetical performance supplied in response to a current or prospective client's or private fund investor's unsolicited request.

- **Compliance Tip:** Because customized templates and duplicated inserts in custom communications are treated as advertisements, consider adopting policies and procedures to determine whether communications that are nominally directed to a single party are nevertheless subject to the marketing rule.

b. This definition does not depend on the method of dissemination. An advertisement may be communicated by email, text message, film, podcast, digital video or audio files, blogs, social media, *etc*., as well as through more traditional means such as letters, brochures, newspapers or magazines.

c. Generic brand content (such as use of an adviser's name in sponsoring an event), education material and market commentary generally would not be considered an advertisement under the revised rule, unless the facts and circumstances suggest otherwise.

d. The term encompasses both direct communications and communications made through a third party, such as a consultant or intermediary.

e. Third-party information might be attributed to an adviser under an "adoption or entanglement" theory.

i. An adviser might be found to "adopt" third-party information if the adviser explicitly or implicitly endorses or approves the information, while "entanglement" could occur if the adviser involves itself in the preparation of the information.

ii. The possibility of adoption and entanglement should be assessed if the adviser hyperlinks its own website or social media page to third-party content.

iii. Content third parties post on an adviser's own website or social media page could also implicate the marketing rule.

- Merely allowing all third parties to post public commentary to the adviser's website or social media page would not, by itself, make the adviser responsible for such content, so

long as the adviser is not involved in the preparation of the content and does not selectively delete or alter the comments or the presentation thereof.

- However, a different result obtains where the adviser is involved in the preparation or editing of comments, or where it endorses or approves such postings.

- Under some circumstances, an employee's personal social media posts may be treated as an advertisement of the adviser.

➢ **Compliance Tip:** In order to avoid responsibility for your supervised persons' personal social media sites, consider implementing policies and procedures reasonably designed to prevent employees from using their personal accounts to market your investment advisory services. Train staff on these policies and procedures and periodically test compliance by reviewing their publicly available social media posts.

2. The second prong of the definition covers compensated testimonials and endorsements, which include activities similar to those subject to the former cash solicitation rule.

a. This prong of the definition covers one-on-one communications, but does not include information contained in, and reasonably designed to satisfy, a statutory or regulatory notice, filing or other required communication.

b. A "testimonial" is a statement by a current client or private fund investor about the client's or investor's experience with the adviser or its supervised persons. This term also includes a statement that solicits a current or prospective client or investor for, or refers a current or prospective client or investor to, the adviser or a private fund it advises.

c. An "endorsement" is similar to a testimonial, but is made by a person other than a current client or private fund investor. This term also includes a statement that indicates approval, support or recommendation of the adviser or its supervised persons.

d. Lead generation firms and adviser referral networks are likely to be the source of testimonials and endorsements. The same is not true of third-party marketing services that are paid to prepare content for or to distribute the adviser's communication, although the communication itself would be an advertisement under the first prong of the definition.

e. For purposes of this definition, compensation includes not just cash, but also non-cash compensation, including sales awards or other prizes, gifts and entertainment, advisory fee discounts and directed brokerage that compensates brokers for referring clients and investors to the adviser.

f. An uncompensated testimonial or endorsement is an advertisement only if it meets the elements of the first prong of the advertisement definition.

B. General Prohibitions [Rule 206(4)-1(a)]

1. An adviser's advertisements may not include:

a. untrue statements or omissions of material fact;

b. material statements of fact the adviser does not reasonably believe it can substantiate if the SEC asks it to;

c. information that would reasonably be likely to cause a current or prospective client or private fund investor to draw an untrue or misleading implication or inference about a material fact regarding the adviser;

d. statements about the potential benefits to clients or private fund investors arising from the adviser's services or operations without providing fair and balanced treatment of relevant material risks or limitations; or

e. statements about the adviser's specific advice or performance, unless those statements are fair and balanced.

Nor may advertisements otherwise be materially misleading.

2. The application of these general prohibitions is a facts-and-circumstances exercise that depends on the audience to which the advertisement is directed. The type and amount of information that should be included in an advertisement directed at retail investors may differ from that needed in an advertisement whose target audience is composed of sophisticated institutional investors.

3. The requirement that any statements about specific investment advice be fair and balanced replaces the former advertising rule's absolute prohibition against advertising past specific recommendations. Displaying specific investment advice in a fair and balanced manner requires providing sufficient information and context to enable the target of the advertisement to evaluate the merits of the advice.

- **Compliance Tip:** In order to ensure that statements about specific advice are fair and balanced, consider supplying additional recommendations selected on the basis of non-performance-based, objective criteria.

- **Compliance Tip:** Although the SEC intends to withdraw existing sub-regulatory guidance on past specific recommendations, the agency suggests that this guidance may still be useful in determining whether an advertisement is fair and balanced.

- **Compliance Tip:** Layered disclosure and hyperlinks can be used to effect fair and balanced treatment of material risks or limitations associated with the advertised benefits of your services, but each layer must itself be fair and balanced. You cannot advertise benefits in one place and hyperlink to risks or limitations someplace else.

C. Testimonials and Endorsements [Rule 206(4)-1(b)]

Recognizing that consumers today rely on the internet, mobile applications and social media to gather information—including reviews and referrals—when selecting service providers, the revised marketing rule abandons the absolute prohibition against testimonials found in the previous version of 206(4)-1. Instead, the new rule allows testimonials and endorsements to be included in advertisements, subject to the general prohibitions and the following additional conditions:

1. The adviser must make *clear and prominent* disclosure that:

   a. the testimonial was given by a current client or private fund investor or the endorsement was given by someone other than a current client or private fund investor (both known as "promoters");

   b. cash or non-cash compensation was provided for the testimonial or endorsement, if applicable; and

   c. a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the person's relationship with the adviser.

      - In order to be "clear and prominent," the disclosure must be in the advertisement itself and must be at least as prominent as the testimonial or endorsement.

      - In the case of an oral testimonial or endorsement, the disclosure can be oral or written, but it must be provided at the same time as the testimonial or endorsement.

2. The adviser must make additional disclosure of:

   a. the material terms of any compensation arrangement between the adviser and the promoter, including, as applicable:

i. the specific amount of cash to be paid;

ii. the percentage of the advisory fee to be paid;

iii. the time period over which payment will be made;

iv. the value of non-cash compensation, if readily ascertainable;

v. any conditions to the payment; and

vi. material terms of a directed-brokerage arrangement, such as the range of commissions charged by the referring broker-dealer, whether the directed-brokerage arrangement extends to other clients and whether adviser recommends the proprietary investment products of the broker-dealer or its affiliates.

b. material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser's relationship with such person and/or any compensation arrangement.

- The additional disclosure must be supplied at the time the testimonial or endorsement is disseminated. A separate disclosure document is no longer required, but simply including the disclosures in Form ADV will not suffice.

- **Compliance Tip:** Although the marketing rule has done away with the old solicitation rule's requirement that a separate disclosure document be given to prospective clients at the time of a solicitation, such a document may be a good way to satisfy Rule 206(4)-1's disclosure requirements – particularly in the case of oral testimonials and endorsements.

3. The adviser must have a reasonable basis for believing that all testimonials and endorsements comply with the requirements of Rule 206(4)-1. If the adviser does not make the mandatory disclosures itself, it must reasonably believe the promoter has done so.

- **Compliance Tip:** To satisfy the duty to have a reasonable basis for believing that a testimonial or endorsement complies with the marketing rule, consider having compliance staff pre-review all written testimonials and endorsements and place limits on deviations from approved content and format.

- **Compliance Tip:** You can formulate a reasonable belief that a promoter is making required disclosures by providing the necessary disclosures to the promoter and seeking to confirm that the promoter has supplied

these disclosures to investors as required. You might also include an acknowledgement of this disclosure in the client agreement.

4. The adviser must have a written agreement with any person giving a testimonial or endorsement in exchange for more than *de minimis* compensation, except where the promoter is a related party, as explained in paragraph 6. below.

- *De minimis* compensation is defined as $1000 or less during the preceding 12 months.

- The agreement must describe the scope of agreed-upon activities and the terms of compensation for those activities.

5. The adviser cannot pay more than *de minimis* compensation for a testimonial or endorsement to a person who the adviser knows or reasonably should know is an "ineligible person" at the time the testimonial or endorsement is disseminated. An ineligible person is someone who is subject to certain enumerated disciplinary actions or events.

- This prohibition is similar, but not identical, to the one found in the former cash solicitation rule. The list of disciplinary actions or events that trigger a disqualification is broader under the new rule than the old, and certain carve-outs are provided.

- All triggers other than an SEC opinion or order barring, suspending or prohibiting a person from acting in any capacity under the federal securities laws are subject to a 10-year lookback period.

- A disciplinary disqualification under the new rule applies not just to the disciplined party, but also to that party's employees, officers, directors, general partners, and elected managers. It does not, however, apply to a disqualified person's control affiliates.

➢ **Compliance Tip:** Where a compensated testimonial or endorsement is disseminated over a long period of time (*e.g.,* where it is posted on a website) make sure that you update your inquiry into the promoter's eligibility at least annually.

6. *Exemptions.*

a. The contract and disqualification provisions do not apply to testimonials and endorsements disseminated for no or *de minimis* compensation.

b. The disclosure and contract requirements do not apply where the promoter is a partner, officer, director, employee or (in some cases) independent contractor of the adviser; a person who controls, is controlled

by or is under common control with the adviser; or is a partner, officer, director or employee of such a related person if:

i. the affiliation between the adviser and the promoter is readily apparent or is disclosed to the client or private fund investor at the time the testimonial or endorsement is disseminated; and

ii. the adviser documents the promoter's status at the time the testimonial or endorsement is disseminated.

c. If the promoter is a registered broker-dealer:

i. none of the disclosure requirements applies if the testimonial or endorsement is a "recommendation" for purposes of Regulation Best Interest (Exchange Act Rule 15l-1);

ii. the additional disclosure requirements do not apply if the testimonial or endorsement is provided to a person who is not a retail client for purposes of Reg BI; and

iii. the disqualification provisions do not apply if the broker-dealer is not subject to a statutory disqualification under Exchange Act Section 3(a)(39).

d. The disqualification provisions also do not apply to a person covered by Rule 506(d) of the Securities Act of 1933 with respect to a Rule 506 securities offering.

e. A paid promoter will not be disqualified on the basis of any disciplinary matter that occurred prior to May 4, 2021 (the marketing rule's effective date) if that matter would not have disqualified the person under the old cash solicitation rule.

D. Third-Party Ratings [Rule 206(4)-1(c)]

An investment adviser may not include third-party ratings in an advertisement without complying with the marketing rule's general prohibitions and satisfying two additional conditions.

1. A "third-party rating" is a rating or ranking of an investment adviser provided by an unrelated person who provides such ratings or rankings in the ordinary course of its business. A related person is someone one who controls, is controlled by or is under common control with the adviser.

2. The first condition is that the adviser must have a reasonable basis for believing that any questionnaire or survey used to produce the rating was structured to make

it equally easy for a respondent to provide favorable and unfavorable responses and was not designed to produce a predetermined result.

- **Compliance Tip:** An adviser might satisfy the "reasonable basis" standard by reviewing the questionnaire or survey used to prepare the rating; obtaining information regarding general aspects of how the survey or questionnaire was developed and administered; or conducting some other form of due diligence.

3. The adviser must also clearly and prominently disclose, or reasonably believe that the third-party rating clearly and prominently discloses the following:

a. the date on which the rating was given and the time period upon which the rating was based;

b. the identity of the third party that created and tabulated the rating; and

c. if applicable, that the adviser has provided direct or indirect cash or non-cash compensation in connection with obtaining or using the rating.

- **Compliance Tip:** To satisfy the "clear and prominent" standard, the disclosure must be included in the advertisement itself and must be at least as prominent as the third-party rating.

4. Additional disclosure may be required in order to avoid running afoul of the marketing rule's general prohibitions.

  - For example, an advertisement might be misleading if it indicates that the adviser is highly rated without also disclosing that the rating is based solely on assets under management and may not reflect the quality of the adviser's investment advice.

E. Performance Advertising [Rule 206(4)-1(d)]

The new marketing rule replaces the tangled web of sub-regulatory guidance on performance advertising issued under the old advertising rule with seven standards that apply to performance portrayals, in addition to disclosures that may be necessary to avoid the general prohibitions. The end result is similar, but not identical, to the former performance advertising requirements.

1. *Gross and Net Performance.* An advertisement may not advertise gross performance unless it also portrays net performance with at least equal prominence and in a format designed to facilitate comparison with gross performance. Both types of performance must be calculated over the same time period, using the same return methodology.

- **Compliance Tip:** In presenting net performance, you may deduct a model fee instead of the actual fee where (a) the model fee yields

performance that is no higher than if the actual fee had been deducted; or (b) the model fee is equal to the highest fee charged to the advertisement's intended audience.

2. *General Disclosure Considerations.* Although, with limited exceptions, the final rule does not require that advertised performance be accompanied by specific disclosure, additional disclosure may be necessary in order to ensure that an advertisement is not false or misleading. Such disclosure may include:

a. the material conditions, objectives and investment strategies used to obtain the advertised results;

b. whether and to what extent the advertised results reflect the reinvestment of dividends and other earnings;

c. the effect of material market or economic conditions on the portrayed results;

d. the possibility of loss;

e. the material facts relevant to any comparison made to the performance of an index or other benchmark; and

f. whether the returns account for cash flows into and out of the advertised portfolios, and whether gross returns reflect the deduction of transaction fees and expenses.

3. *Time Periods.* Performance of any portfolio or composite of related portfolios (other than private fund performance) must include data for 1-, 5- and 10-year periods, or the life of the portfolio if less than the specified periods. Each period must be presented with equal prominence, and must end on a date that is no earlier than the most recent calendar year-end.

- **Compliance Tip:** In order to satisfy the rule's general prohibitions, consider whether you should also present more recent performance. This might be required, for example, where events since the last calendar year-end had a significant negative effect on the advertised performance.

- **Compliance Tip:** If you cannot calculate compliant performance immediately after the close of a calendar year, you may substitute interim performance (such as 3rd quarter performance) – but only for a brief period of time. According to a marketing rule FAQ, the SEC staff believes that a reasonable period of time to calculate performance

results based on the most recent calendar year-end generally would not exceed one month.

4. *No SEC Endorsement.* An advertisement may not include any express or implied statement that the calculation or presentation of performance results has been reviewed or approved by the SEC.

5. *Related Performance.* In order to prevent cherry-picking, the revised marketing rule generally prohibits an adviser from advertising related performance, unless the advertisement includes all related portfolios.

a. "Related performance" means the performance results of one or more portfolios with substantially similar investment policies, objectives and strategies to those advertised, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.

- While an adviser may determine that an account with material client constraints or other differences is not substantially similar to the advertised account, different fees and expenses alone would not justify an account's exclusion.

b. Notwithstanding this prohibition. an advertisement may exclude related performance if:

i. the advertised performance results are not materially higher than they would be if all related portfolios had been included; and

ii. the exclusion of any related portfolio does not alter the presentation of the mandatory 1-, 5- and 10-year time periods.

c. An adviser may not advertise the performance of a single representative account for an advertised strategy, but it may include such performance alongside the required related performance, so long as the marketing rule's general prohibitions are observed.

d. Related performance may be displayed on a portfolio-by-portfolio or composite basis. Where a composite is used, the adviser may choose the criteria to define the relevant portfolios, but it may use only one composite for each stated set of criteria. These criteria should be disclosed in the advertisement.

6. *Extracted Performance.* An adviser may not advertise the performance results of a subset of investments extracted from a single portfolio (known as "extracted performance") unless the advertisement provides or offers to promptly provide the performance of the entire portfolio from which the advertised performance was extracted. The SEC suggests that an adviser should disclose whether the extracted performance reflects an allocation of the cash held by the entire portfolio

and the effect of such cash allocation or of the absence of such an allocation on the results portrayed.

7. *Hypothetical Performance.* Special concerns arise where an adviser advertises performance returns not actually achieved by any of its managed portfolios. The marketing rule imposes additional constraints on this type of performance advertising.

a. "Hypothetical performance" includes model performance, backtested performance and targeted or projected performance.

i. Model portfolios include those managed alongside portfolios for actual investors, computer-generated models and models the adviser creates or acquires from third parties, that are not used for actual investors.

ii. Backtested performance is created by applying a strategy to data from prior time periods during which the strategy was not actually used.

iii. Targeted returns reflect aspirational performance goals, while projected returns are the adviser's performance estimates, which often are based on historical data and assumptions. Targeted and projected returns relate to a portfolio or the advertised investment advisory services; they do not include general market projections or predictions about economic conditions.

b. On the other hand, hypothetical performance does not include an interactive analysis tool that allows a current or prospective client or private fund investor to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or strategies are followed, but only if the adviser:

i. describes the criteria and methodology used, including the tool's limitations and key assumptions;

ii. explains that the results may vary with each use and over time;

iii. if applicable, describes the universe of investments considered in the analysis; explains how the tool determines which investments to select; discloses if the tool favors certain investments and if it does, explains the reason for the selectivity; and explains that other investments not considered may have characteristics similar or superior to those being analyzed; and

iv. discloses that the tool generates hypothetical outcomes.

c. In order to advertise hypothetical performance, the adviser must:

i. implement policies and procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience;

ii. provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the performance; and

iii. provide sufficient information to enable the intended audience to understand the risks and limitations of using hypothetical performance in making investment decisions. If the intended audience is an investor in a private fund, the adviser may either provide or simply offer to provide this risk information.

- These conditions are designed to ensure that hypothetical performance information is distributed to only those clients who have the resources and financial expertise necessary to understand the information. As a practical matter, this is likely to prohibit the presentation of hypothetical returns to an unsophisticated retail audience.

8. *Predecessor Performance*. This category covers the performance of a group of investments (in an account or private fund) that were not managed at all advertised time periods by the adviser advertising the performance. In some cases, the investments or accounts were managed by the adviser's predecessor firm; in other cases, they were managed by the adviser's advisory personnel when they were employed by another adviser. In either case, an adviser will be permitted to "tack" predecessor performance in an advertisement if the following four conditions are satisfied:

a. The person or persons who were primarily responsible for achieving the prior performance also manage accounts at the advertising adviser. Where a committee was responsible for management at the predecessor firm, a committee with substantially the same members must manage the portfolios at the advertising firm.

b. The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising adviser that the performance results would provide relevant information to clients or private fund investors.

c. All accounts that were managed in a substantially similar manner (i.e., accounts with substantially similar investment policies, objectives and strategies) are included in the advertisement, unless the exclusion of any such account would not result in materially higher performance, and unless the exclusion of an account does not alter the presentation of the mandatory

1-, 5- and 10-year time periods. As a result of the related performance requirements explained above, an adviser who advertises predecessor performance may be obliged to advertise the predecessor accounts' related portfolios at the new firm.

d. The advertisement clearly and prominently discloses that the performance results were from accounts managed at another entity and includes all other relevant disclosures.

F. ETC.

1. *Recordkeeping.* Several changes have been made to the Advisers Act recordkeeping rule to reflect new requirements in the marketing rule.

a. Rule 204-2(a)(11) now requires advisers to keep a copy of *every* advertisement the adviser disseminates, in addition to the pre-existing duty to maintain every notice, circular, newspaper article, investment letter, bulletin or other communication the adviser sends to ten or more persons.

i. To satisfy this requirement, the adviser may retain a copy of written or recorded materials used in connection with an oral advertisement.

ii. For compensated oral testimonials and endorsements, the adviser may either record the advertisement or make and keep a record of the required disclosures made to clients or investors.

iii. An adviser that includes third-party ratings in its advertisements must also maintain a copy of any questionnaire or survey used in the preparation of those ratings, if the adviser obtains such a record.

b. Rule 204-2(a)(15), which currently covers cash solicitation disclosure statements and acknowledgements of receipt, has been repurposed. The new provision covers:

i. the second layer of disclosure required for testimonials and endorsements, where those disclosures are not included in the advertisements themselves;

ii. documentation substantiating the adviser's reasonable belief that a testimonial or endorsement complies with the marketing rule;

iii. documentation substantiating the adviser's reasonable belief that a third-party rating complies with Rule 206(4)-1(c)(1); and

iv. a record of the names of all affiliated persons who provide testimonials or endorsements on the adviser's behalf.

c. Subsection (a)(16) has been expanded to require:

i. documentation to support the calculation of any performance or rate of return of all "portfolios," as well as that of managed accounts or securities recommendations; and

ii. copies of all information provided or offered to clients in connection with hypothetical performance displays.

d. Performance data-related changes have been made to subsection (a)(7)(iv) as well. This provision now requires the retention of written communications relating to:

i. the performance or rate of return of "portfolios" as well as managed accounts or securities recommendations; and

ii. predecessor performance.

- **Compliance Tip:** As a practical matter, if you want to tack predecessor performance, you must have access to the predecessor firm's books and records in order to substantiate the advertised results. Merely sampling investor statements will not suffice.

e. Finally, an adviser will be required to maintain a record of who the "intended audience" is in the case of a hypothetical performance portrayal or model fee deduction.

2. *Form ADV Changes.* The SEC has amended Part 1A of Form ADV, adding a new Item 5.L. which addresses investment adviser marketing.

a. This item elicits information about advertised performance results (including hypothetical and predecessor performance), testimonials and endorsements, third-party ratings and references to specific investment advice.

b. Responses to Item 5.L. are subject to amendment only in the annual updating amendment.

3. *Compliance Deadlines*

a. As indicated above, compliance with the new marketing rule will be required as of November 4, 2022.

- Although advisers are permitted to begin complying with the new rule before this deadline, selective compliance is not allowed. Advisers cannot comply with bits and pieces of the new rule and default to other parts of the old advertising and cash solicitation rules.

- During the transition period, advisers may continue to operate under the old advertising and cash solicitation rules and may continue to rely on staff no-action letters issued under these rules.

- Because the cash solicitation rule will be rescinded, all the staff letters issued under that rule will be nullified. Letters and other guidance issued under the advertising rule will also be withdrawn in whole or in part, as the staff determines. A list of these letters will be posted on the Commission's website.

b. An 18-month transition period has also been provided for compliance with the changes to the recordkeeping rule. However, if an adviser opts to comply with the marketing rule before the November 2022 deadline, it should comply with the revisions to Rule 204-2 at the same time.

c. Initial responses to the new ADV questions will be due in the first annual update after the end of the eighteen-month transition period. For advisers with a December 31 fiscal year, this means by March 31, 2023.