Preparing to Implement the New Marketing Rule

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Overview of New Marketing Rule

Advisers Act Rule 206(4)-1

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Marketing Track

- Definition of Advertisement and Implementation
- Solicitation under the Marketing Rule
- Presentation of Performance under the Marketing Rule
- Impact of the Marketing Rule on Private Equity and Private Credit

Compliance Date

18-Month Transition Period

Effective Date
May 4, 2021

Compliance Date
November 4, 2022

Today
March 3, 2022

8 Months Left!
Definition of Advertisement

Communications Other than Compensated Testimonials and Endorsements (Prong 1)

Any direct or indirect communication to more than one person, or to one or more persons if the communication includes hypothetical performance, that:

(i) offers the investment adviser’s investment advisory services with regard to securities to prospective clients or private fund investors, or

(ii) offers new investment advisory services with regard to securities to current clients or private fund investors

Definition of Advertisement

Communications Other than Compensated Testimonials and Endorsements (Prong 1)

Does not include:

✓ Extemporaneous, live, oral communications (not based on prepared remarks)
✓ Information in a required notice or filing
✓ Communication that includes hypothetical performance that is provided:
  1) In response to an unsolicited request for such information; or
  2) To a prospective or current private fund investor in a one-on-one communication
Definition of Advertisement

Compensated Testimonials and Endorsements, Including Solicitations (Prong 2)

Any endorsement or testimonial for which an adviser provides *cash or non-cash* compensation directly or indirectly (e.g., directed brokerage, awards or other prizes, and reduced advisory fees)

Key Changes to Definition of Advertisement

- Expands definition of an advertisement
- Direct and indirect communications
- Applies to communications directed to investors in private funds managed by the adviser
- Does not distinguish between retail and non-retail investors
- Expands the concept of testimonials and endorsements to include solicitation and referral activities
General Prohibitions

Applicable to all advertisements and consider facts and circumstances (e.g., nature of audience):

Ø Untrue statements and omissions

Ø Unsubstantiated material statements of fact

Ø Untrue or misleading implications or inferences

Ø Failure to provide fair and balanced treatment of material risks or material limitations

Ø Anti-cherry picking provisions: failure to present specific investment advice and performance results in a fair and balanced manner

Ø Otherwise materially misleading

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- Expanded scope of rule, regardless of how disseminated

- Third-party content depends on adviser’s adoption or entanglement

- No per se ban on testimonials

- Hyperlinking required disclosures—consider the general prohibitions! (prominence / fair and balanced)

- Use of social media by firm employees in personal capacity (importance of adviser oversight and supervision)

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Effective Date: May 4, 2021
Compliance Date: November 4, 2022

Implementation

Assess All Communications

In:
- Bulk emails
- Templates
- Commentary (w/ discussion of strategies)
- Investment thesis
- Any communication with hypothetical performance
- “Cross selling”
- Solicit additional advisory services to existing clients

Out:
- One-on-one correspondence
- Responses to unsolicited requests
- Multiple individuals at a single entity
- Account statements (including inflows, outflows, transaction reports and account performance)
- Client correspondence
- Culture, philanthropy, community engagement
- “Pure” white papers/educational material
- Brand content without explicit offer

Stay up to date
- Recordkeeping
- Third-party vendors/contracts
- Solicitation/Referral arrangements
- Placement agent agreements
- Performance calculations

Training
- Amend Marketing Materials
- Implementation Date / Final P&Ps

Assess P&Ps

Begin Socializing

Develop Timeline

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Annual ADV Update (new item 5)
Intermediaries and Third-Party Content

**Not** considered adviser advertising:
- Unauthorized modifications made by third parties to adviser communications
- Unedited commentary on adviser’s social media site
- Edits to content based on objective criteria (social media!)
- Employees’ personal social media, *if the adviser exercises oversight and supervision*

**Yes**, if adviser takes *affirmative steps* with respect to the third-party content:
- Provides to intermediaries for distribution
- Participates in creation or dissemination of material (including related persons)
- Third-party content incorporated into adviser’s communications
- Selectively highlighting, prioritizing, or deleting third-party material

Assess Policies and Procedures

- Compliance Guidebook on “do” and “don’t do” (e.g., disclosure checklist)
- Review process
- Recordkeeping retention
- Process for ensuring consistency with disclosures (e.g., Form ADV)
- Communications with public, including media
- Logging and tracking marketing materials
- Request for proposals
- Testing performance presentations (e.g., disclosures, gross/net, sample RFP databases)
- Employee use of social media and personal devices
Implementation

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Recordkeeping

✓ Third-party vendors/contracts
✓ Solicitation/Referral arrangements
✓ Placement agent agreements
✓ Performance calculations

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Training

Effective Date
May 4, 2021

Compliance Date
November 4, 2022

✓ Timeline
✓ Definition of advertisement
✓ Determine level of training (e.g., interactions with clients and potential clients, involved in creation, review, or dissemination of materials)
✓ Policies and procedures including any review and approval process

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SEC Staff Guidance/FAQs
https://www.sec.gov/investment/marketing-faq

Q: I understand that an adviser must comply with the amended adviser marketing rule with respect to its advertising and solicitation activities by the compliance date (November 4th, 2022), which is 18 months after the effective date of the rule. May an adviser choose to comply with some of the marketing rule requirements before the compliance date, but not comply with others?

Q: The marketing rule prohibits an adviser from displaying performance results in an advertisement, unless certain requirements are satisfied. For example, an advertisement, except for an advertisement that includes private fund performance information, must include performance results for prescribed time periods ending on a date that is no less recent than the most recent calendar year-end. My firm is not able to calculate its one-, five-, and ten-year performance data immediately following a calendar year-end, but anticipates having updated performance figures within one month of the calendar year-end. However, my firm has performance information that is current as of the third quarter of that calendar year (“interim performance information”). May my firm instead use the interim performance information in an advertisement?