SEC Regulation of Investment Adviser and Private Fund Advertisements Under the New Marketing Rule

Mark Perlow
Aaron Withrow
Emily Towill[1]

I. Introduction

On December 22, 2020, the U.S. Securities and Exchange Commission ("SEC") adopted rule and form amendments to modernize the regulatory framework governing investment adviser advertising and payments to solicitors.[2] The rulemaking creates a single rule ("Marketing Rule" or "final rule") governing investment adviser marketing by replacing the prior investment adviser advertising and cash solicitation rules. The SEC also withdrew certain no-action letters and other guidance that were either incorporated into the Marketing Rule or no longer apply. A list of SEC staff no-action letters being withdrawn has been posted on the SEC's website.[3]

II. Background

In 1962, the SEC adopted the Rule 206(4)-1 ("Advertising Rule") under the Investment Advisers Act of 1940 ("Advisers Act"). In 1979, the SEC adopted Rule 206(4)-3 ("Cash Solicitation Rule") under the Advisers Act. On November 4, 2019, the SEC proposed amendments to the Advertising Rule and Cash Solicitation Rule.

III. Structure of the Marketing Rule

The Marketing Rule prohibits investment advisers registered or required to be registered with the SEC from directly or indirectly disseminating any "advertisement" that violates any provision of the Marketing Rule, which include:

- **General Prohibitions.** A set of seven general, principles-based prohibitions that apply to all advertisements, "drawn from historic anti-fraud principles under the Federal securities laws and . . . tailored specifically" to communications within the scope of the Marketing Rule;

- **Testimonials and Endorsements.** Requirements for "testimonials" and "endorsements," which, among other elements, incorporate much of the prior cash solicitation regime with some alterations;

- **Third-Party Ratings.** Provisions regarding the use of "third-party ratings" in advertisements; and

---

 Mark Perlow and Aaron Withrow are partners and Emily Towill is an associate in the Financial Services Group of Dechert LLP. Mr. Perlow is resident in Dechert's San Francisco Office, Mr. Withrow is resident in Dechert's Washington DC office and Ms. Towill is resident in Dechert's Boston office. This outline should not be considered as legal advice, a legal opinion on specific facts or as a substitute for legal counsel. It is provided by Dechert LLP as a general informational service and may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. Certain portions of this outline are based on prior Dechert publications. We would like to thank our Dechert colleagues for their contributions to the outline.

[2] *See* Investment Adviser Marketing, Rel. No. IA-5653 (Dec. 22, 2020) (Release). Unless otherwise noted, Section and Rule references are to the Advisers Act and rules thereunder.

[3] *See* Division of Investment Management Staff Statement Regarding Withdrawal and Modification of Staff Letters Related to Rulemaking on Investment Adviser Marketing, SEC Division of Investment Management, IM-INFO-2021-10 (Oct. 2021).

- **Performance.** Codification of an array of requirements pertaining to performance marketing, including with respect to gross and net performance, the time periods over which performance is presented, "related" and "extracted" performance, hypothetical performance (including model, backtested and target or projected performance) and predecessor performance.

The Marketing Rule contains a number of substantive definitions that inform the scope and application of these provisions, and the SEC provided extensive guidance in the Release concerning the final rule. The SEC also adopted related amendments to Form ADV and the Advisers Act recordkeeping requirements and addressed prior SEC staff guidance concerning topics within the scope of the Marketing Rule. The Marketing Rule became effective on May 4, 2021, and the deadline for compliance was November 4, 2022 (compliance date).[4]

Among a number of departures from the proposed rule,[5] the final Marketing Rule does not contain separate performance advertising requirements related to retail and non-retail investors, does not require advisers to review and approve advertisements prior to dissemination, and does not define "advertisement" to include communications addressed to one person (with certain exceptions) or designed to retain existing investors, each as discussed below.[6] The final Marketing Rule and guidance in the Release include a number of other distinctions from the proposed rule and proposed guidance in the Proposing Release.

IV. Scope of the Marketing Rule: The Definition of Advertisement

The Marketing Rule's definition of "advertisement" expanded the prior rule's definition in important ways, including by encompassing an adviser's "marketing activity for investment advisory services with regard to securities."[7] On the other hand, except in certain specified circumstances described below, the scope of "advertisement" under the Marketing Rule was not expanded to include one-on-one communications. Certain communications related to private funds[8] are included within the scope of the definition of "advertisement," but the Marketing Rule does not apply to advertisements concerning registered investment companies or business development companies.[9] The Marketing Rule also generally does not apply to extemporaneous, live, oral communications or to information contained in required filings and similar communications.[10]

Under the Marketing Rule, the term "advertisement" is defined to include two broad categories of communications, the first concerning communications by an investment adviser offering advisory services (*i.e.*, traditional advertising) and the second concerning endorsements and testimonials for which the adviser provides compensation. The term "advertisement" is defined under the Marketing Rule to mean:

---

4 To the extent an investment adviser subject to the Marketing Rule chose to comply with the final rule's requirements prior to the compliance date, the adviser was required to comply with all such requirements (*i.e.*, it could not choose to comply with some provisions but not others prior to the compliance date). *See* Marketing Compliance Frequently Asked Questions, SEC Division of Investment Management (Apr. 14, 2021). For instance, an adviser could not choose to permit testimonials (which were prohibited under the pre-amendment advertising rule) consistent with the Marketing Rule's requirements unless the adviser came into full compliance with all provisions of the Marketing Rule (*e.g.*, all requirements pertaining to the presentation of performance).

5 *See* Investment Adviser Advertisements; Compensation for Solicitation, Rel. No. IA-5407 (Nov. 4, 2019) (Proposing Release).

6 Release at 12 – 14.

7 Release at 12.

8 The Marketing Rule defines "private fund" to mean an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act of 1940, but for section 3(c)(1) or 3(c)(7) of the Investment Company Act.

9 Release at 13.

10 Release at 13.

- **Traditional Advertising.** An adviser's direct or indirect communication made to more than one person (or to one or more persons if the communication contains hypothetical performance) that offers: (i) the adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the adviser; or (ii) new investment advisory services with regard to securities to current clients or investors in a private fund advised by the adviser.

    - However, an "advertisement" under the Marketing Rule does not include: (a) extemporaneous, live, oral communications; (b) information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or (c) a communication that includes hypothetical performance that is provided either (1) in response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the adviser, or (2) to a prospective or current investor in a private fund advised by the adviser in a one-on-one communication.

- **Compensated Testimonials and Endorsements.** Any endorsement or testimonial for which an investment adviser provides (cash or non-cash) compensation, directly or indirectly.[11] This part of the definition also excludes information contained in a statutory or regulatory notice, filing, or other required communication that is reasonably designed to satisfy such requirements.

The following discussion examines SEC guidance in the Release related to certain elements of the first prong of the definition of "advertisement" and to marketing communications to private fund investors.

Traditional Advertising: "Direct or Indirect Communications." In the final rule, the SEC sought to promulgate a definition of "advertisement" that reflects modern communication methods. The final rule's reference to "direct or indirect communications" replaces the prior rule's references to "written" communications or notices, as well as its references to notices or announcements in publications or by radio or television. Importantly, these changes expand the definition's scope to capture all offers of an adviser's investment advisory services with regard to securities no matter the channel or means of dissemination, subject to limited exceptions. Thus, an adviser's communications by email, text, messaging services, podcasts, all manner of social media, video or other electronic communications, digital audio and video, as well as more traditional modes of communication like physical mailings, are potentially included in the Marketing Rule's definition of "advertisement" and, thus, subject to the Marketing Rule.[12] The final rule's definition of "advertisement" is designed to be flexible and applicable as new communication channels and means of reaching prospective and current clients and private fund investors expand and develop.[13]

As a result of the final rule's "direct or indirect communications" language, an adviser's communications through third parties, or that incorporate third-party content, can be within the scope of "advertisement."[14] For instance, communications through intermediaries, like consultants, other advisers and promoters, may fall within the scope of "advertisement" as indirect communications.[15] More generally, the facts and circumstances surrounding particular communications will determine whether they are communications made by an adviser, and an adviser's participation in the creation, dissemination or authorization of a

---

[11] As discussed in more detail below, uncompensated testimonials and endorsements may in some cases fall within the first, "traditional advertising," prong of the definition of "advertisement." *See* Release at 15 n.26.

[12] Release at 16 – 17.

[13] Release at 17.

[14] Release at 18-19.

[15] Release at 17.

communication will need to be considered.[16] The SEC's discussions in the Release on "adoption and entanglement" and social media are instructive.

SEC Guidance on Scope of "Advertisement" and Marketing Rule: Adoption and Entanglement

Whether third-party content or information is attributable to an adviser such that it would be deemed to satisfy the definition of "advertisement" – *i.e.*, whether the adviser is responsible for Marketing Rule compliance with respect to the content or information – requires an analysis of "adoption" and "entanglement." The SEC uses the term "adoption" to refer to whether the adviser has explicitly or implicitly endorsed or approved the information after its publication. Explicitly or implicitly endorsing or approving third-party information, such as by incorporating third-party information into the adviser's performance advertising, can constitute "adopting" such information under this guidance. An adviser is responsible for Marketing Rule compliance with respect to any such content that it adopts. The SEC uses the term "entanglement" to refer to the extent of the adviser's involvement in the preparation of the information. Where an adviser is involved in the preparation of third-party content or information, the adviser can, depending upon the level of involvement and related compensation, bear responsibility for Marketing Rule compliance with respect to such content or information.[17]

The SEC noted in the Release that editing third-party content "based on pre-established, objective criteria . . . that are documented in the adviser's policies and procedures and that are not designed to favor or disfavor the adviser" would not result in the content being attributed to the adviser for purposes of the Marketing Rule. Examples of such criteria include editing to correct factual errors or remove inappropriate content (profanity, defamatory or offensive statements, threats), materials that contain harmful content like viruses, spam, unlawful content, or materials that infringe on intellectual property rights.[18]

The SEC's social media guidance provides a useful study in the application of these concepts.

SEC Guidance on Scope of "Advertisement" and Marketing Rule: Adviser's Use of Websites and Social Media

The SEC's guidance on advisers' use of websites and social media addresses three primary topics: (i) linking to third-party content; (ii) third-party comments and content on an adviser's page and the adviser's moderation of such comments and content; and (iii) an adviser's associated persons' personal social media accounts.

- Linking to Third-Party Content. The SEC noted that linking to third-party content that the adviser knows or has reason to know contains materially false or misleading information would be fraudulent or deceptive under the Advisers Act and other anti-fraud laws.[19] More generally, the SEC stated that the "adoption" and "entanglement" considerations above should inform the adviser's analysis of whether linking to third-party content may result in the adviser becoming responsible for Marketing Rule compliance with respect to such third-party content.[20]

---

16 Release at 19 – 20.

17 Release at 21 – 22. These terms and guidance reflect certain prior SEC guidance. *See* Release at 21 n.43.

18 Release at 22. The SEC stated, as an example, that a policy to remove only negative comments about the adviser would conflict with the condition that such criteria not be designed to favor the adviser. *Id.*

19 Release at 22 – 23. In this discussion, the SEC specifically cited Advisers Act Section 206, which (among other things) makes it unlawful for an investment adviser, directly or indirectly, to: (i) employ any device, scheme, or artifice to defraud any client or prospective client; (ii) engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; and (iii) engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

20 Release at 22.

- Third-Party Content on Adviser's Site or Page. The adviser's involvement is a key determinant in the SEC's guidance on whether third-party posts on an adviser's website or social media page would be attributed to the adviser. According to the SEC's guidance, generally permitting all third parties to comment on the adviser's site or page would not, without more, result in such comments being attributed to the adviser for Marketing Rule purposes. This position assumes, as discussed above, that any adviser moderation of such comments conforms to the SEC's guidance concerning documented, pre-established, objective criteria for editing; it further assumes that the adviser does not selectively delete or alter the comments or their presentation, and that the adviser is not involved in the preparation of the content.[21] Notably, the SEC confirmed that "if an adviser merely permits the use of 'like,' 'share,' or 'endorse' features on a third-party website or social media platform, we would not interpret the adviser's permission as implicating the final rule."[22]

  Where an adviser takes "affirmative steps" in the preparation or presentation of comments, to endorse or approve comments, or to edit posted comments (except to edit profane, unlawful, or other such content according to a neutral pre-existing policy), the adviser would be responsible for Marketing Rule compliance with respect to the comments whether they appear on the adviser's own site or page or on third-party sites.[23] As examples of such affirmative steps, the SEC referred to substantively modifying comments, deleting or suppressing negative comments and prioritizing the display of positive comments.

- Personal Social Media. The SEC's guidance regarding social media postings on an adviser's associated person's[24] personal account relates to the adviser's compliance program. Specifically, where an adviser adopts and implements policies and procedures reasonably designed to prevent the use of associated persons' social media accounts for the adviser's marketing, the SEC generally would not view postings on the associated persons' social media accounts as the adviser marketing its advisory services. The SEC noted several suggestions for effective supervision and compliance with such policies and procedures: conducting periodic training, obtaining attestations and periodically reviewing publicly available content on associated persons' social media accounts. The SEC also noted that an adviser may consider prohibiting such communications altogether.[25]

Traditional Advertising: "More than One Person." One-on-one communications generally do not fall within the definition of "advertisement" under the Marketing Rule. Such communications that include hypothetical performance, however, are "advertisements" subject to the Marketing Rule, with two exceptions – (1) when provided in response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the adviser, or (2) when provided to a prospective or current investor in a private fund advised by the adviser in a one-on-one communication. The following table summarizes how these rules interact:

---

[21] Release at 23. Note that the mere ability to influence commentary, in the absence of its exercise, would not, by itself, implicate the Marketing Rule. *See id.* ("We believe such treatment of third-party content on the adviser's own website or social media page is appropriate even if the adviser has the ability to influence the commentary but does not exercise this authority. For example, if the social media platform allows the investment adviser to sort the third-party content in such a way that more favorable content appears more prominently, but the investment adviser does not actually do such sorting, then the ability to sort content would not, by itself, render such content attributable to the adviser.").

[22] Release at 23.

[23] Release at 23 – 24.

[24] Advisers Act Section 202(a)(17) defines "person associated with an investment adviser" to mean "any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of Section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term."

[25] Release at 24 – 25.

One-on-One Communication	Hypothetical Performance Included	In response to unsolicited request for hypothetical performance from prospective/current client or private fund investor	Provided to prospective/current private fund investor	"Advertisement"?
X				No
X	X			Yes
X	X	X		No
X	X		X	No

The SEC noted that the general exclusion from the definition of "advertisement" for one-on-one communications applies whether communicating to a single natural person with an account or multiple natural persons representing a single entity or account. It also applies when communicating with multiple natural persons that share the same household.[26]

Communications that "appear to be personalized to single investors and are 'addressed to' only one person, but are actually widely disseminated to multiple persons" would not be eligible for the one-on-one communication exclusion. For example, bulk emails nominally directed at or addressed to only one person are considered to be widely disseminated to multiple investors and are subject to the Marketing Rule. Similarly, seemingly customized mass mailings or presentations where the "customization" consists only of "filling in the name of an investor and/or including other basic information about the investor" would not be eligible for the exclusion and would be subject to the Marketing Rule. The SEC also notes that, even where a communication is otherwise customized, if an adviser inserts generic performance information from a database of performance information inserts or tables, the duplicated inserts are subject to the Marketing Rule. The SEC generally recommends adoption of reasonably designed compliance policies and procedures for determining whether a communication may be considered a one-on-one communication in light of this guidance.[27]

Traditional Advertising: Offering Advisory Services with regard to Securities. The Marketing Rule's definition of "advertisement" includes adviser communications offering (i) investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the adviser and (ii) new investment advisory services with regard to securities to current clients or investors in a private fund advised by the adviser. The second element of this provision – concerning new investment advisory services offered to current clients or private fund investors – represents a narrower formulation than in the proposed rule. Commenters expressed concern that the proposal to include communications seeking to "retain" investors would unnecessarily include ordinary-course communications to current investors. The final rule's approach is intended to address these concerns.[28]

Offering Advisory Services: SEC Guidance on Brand Content, General Educational Material and Market Commentary

The SEC stated in the Release that generic brand content, educational material and market commentary would generally not be expected to fall within the definition of "advertisement" under the Marketing Rule.

---

[26] Release at 27 – 28.

[27] Release at 28 – 29.

[28] *See* Release at 34 – 36.

Whether an adviser's communications including brand content, general educational material and market commentary offers the adviser's investment advisory services with regard to securities is a factual question. Brand content, such as firm name displays as a sponsor of philanthropic efforts, that do no more than raise the adviser's profile generally and do not offer advisory services with regard to securities generally would not be advertisements. Similarly, communications limited to providing general educational information about investing or informational commentary on market and regulatory developments generally would not be advertisements. On the other hand, if any such communications include descriptions of how the adviser's securities-related services can help the reader or similar content that constitutes an offer of advisory services, they would fall within the scope of "advertisement" under the Marketing Rule.[29]

Traditional Advertising: Exclusions from the Definition of "Advertisement." As noted above, an "advertisement" under the Marketing Rule does not include extemporaneous, live, oral communications or information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.

Exclusion for Extemporaneous, Live, Oral Communications

The exclusion for live, oral communications is intended "to avoid treating extemporaneous statements as advertisements, in light of the difficulties in ensuring that they comply with the requirements of the rule, and to avoid chilling adviser communications with investors."[30] Such communications need not be in person in order to qualify for the exclusion, only live and oral (such as a phone call or live video communication).[31] Prepared remarks and speeches given from scripts do not qualify for this exclusion, nor do materials provided to an audience.

Exclusion for Required Communications (Statutory or Regulatory Notice, Filing, or Other)

The final rule excludes from the definition of advertisement "[i]nformation contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication." This exclusion applies to information that an adviser provides to an investor under any statute or regulation under federal or state law, including rules promulgated by regulatory agencies. In the Release, the SEC noted that it does not consider communications that are prepared as a requirement of statutes, rules, or regulations as "advertisements" under the final rule. However, if an adviser includes in such communication information that is not reasonably designed to satisfy its obligations under applicable law, and such additional information offers the adviser's advisory services with regard to securities, then that information will be considered an "advertisement" for purposes of the Marketing Rule.

Marketing Communications to Private Fund Investors.

Both prongs of the definition of "advertisement" expressly include marketing communications to private fund investors. The term "private fund" is defined for purposes of the Marketing Rule to mean an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act. The SEC in the Release expressly stated that the term "private fund" does not include a broader definition of "pooled investment vehicles," as the SEC proposed. The SEC stated in the Release that a private fund advertisement does not include information in a fund's private

---

[29] *See* Release at 36 – 38.

[30] *See* Release at 39.

[31] *See* Release at 39 n.107.

placement memorandum regarding material terms, objectives and risks (although covered by the anti-fraud provisions of the federal securities laws). The SEC added the caveat that pitch books and other materials accompanying a PPM may be advertisements. The SEC also stated in the Release that account statements, transaction reports, similar statements and presentations to existing investors would be advertisements for purposes of the Marketing Rule.

V. General Prohibitions

A significant change under the Marketing Rule is the replacement of the prior rule's explicit prohibitions with new, general prohibitions. The general prohibitions reflect a more principles-based approach to the regulation of advertisements that is intended to provide flexibility to accommodate changes in technology, investor expectations and market practices. Under the Marketing Rule, the general prohibitions prohibit an advertisement from:

- Including any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;

- Including a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC;

- Including information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the adviser;

- Discussing any potential benefits to clients or investors connected with or resulting from the adviser's services or methods of operation without providing fair and balanced treatment of material risks or material limitations associated with the potential benefits;

- Including a reference to specific investment advice provided by the adviser where such investment advice is not presented in a fair and balanced manner;

- Including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced; or

- Otherwise being materially misleading.

When applying these general prohibitions, the SEC staff indicated in the Release that an adviser should consider the facts and circumstances with respect to each advertisement and the nature of the intended audience (e.g., retail versus sophisticated institutional investor), noting that an adviser might consider tailoring the content of an advertisement depending on the audience.

As noted above, the SEC withdrew certain no-action letters upon the compliance date of the Marketing Rule. No-action letters were an important component of the previous advertisement regulatory framework, particularly with respect to the circumstances in which an adviser may advertise specific investments and performance results. In response to a comment that the withdrawal of SEC staff no-action letters would create a lack of guidance, the staff indicated its view that the principles of the general prohibitions are not substantive departures from the positions indicated in previous SEC staff letters and guidance, signaling that advisers may continue to look to prior SEC staff guidance to facilitate compliance with the new general prohibitions.

Each of the general prohibitions is discussed in more detail below.

1. Untrue Statements and Omissions

The Marketing Rule prohibits an advertisement from including untrue statements of material fact or omitting a material fact necessary for the statement to not be misleading in light of the circumstances in which it was made. The SEC stated in the Release that this prohibition "retains the substance" of the prior prohibition under Rule 206(4)-1(a)(5) against including in an advertisement untrue statements of material fact. The SEC also noted that this new prohibition applies to certain activities that were explicitly prohibited under the prior rule, including statements that (i) "a report, analysis, or other service will be furnished free of charge" when such items are not actually furnished free of charge, and (ii) any "graph, chart, or formula can by itself be used to determine which securities to buy or sell."

2. Unsubstantiated Material Statements of Fact

The Marketing Rule prohibits advertisements from including a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC. The SEC stated in the Release that, although not required, an adviser might demonstrate that it had a reasonable basis with respect to a material statement in an advertisement by creating a contemporaneous record documenting the basis of the adviser's belief, and the SEC indicated that an adviser might also consider implementing policies and procedures to address the reasonable basis requirement. In addition, the SEC indicated that the SEC staff would presume that an adviser did not have a reasonable basis if upon demand, the adviser was unable to substantiate a material statement in an advertisement.

As originally proposed, the rule would have prohibited "advertisements that include any material claim or statement that is unsubstantiated." The SEC stated in the Release that the final rule reflected two changes intended to reduce burdens on advisers and enhance the rule's clarity. Specifically, the prohibition applies to material *facts* instead of material *claims or statements*, which the SEC believes to be easier to verify, and requiring a reasonable basis to believe that a material statement *can be* substantiated, which the staff indicated allows advisers to "avoid the need to develop and maintain a file of substantiating materials for every advertisement."

3. Untrue or Misleading Implications or Inferences

The Marketing Rule prohibits an advertisement from including information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the adviser. In response to comments on the proposed rule, the SEC indicated that this prohibition covers activities that are addressed in previous no-action letters that are not subject to the first prohibition against false statements and material omissions, including, for example, statements that might literally be true but without all material facts could result in a misleading implication as to the adviser's competence or future investment results. The SEC further noted that this prohibition would cover cherry picking past investment recommendations or strategies of the adviser.

Discussing the application of this prohibition to the use of testimonials, the SEC indicated that this prohibition would not require an adviser to present an equal number of negative testimonials alongside positive testimonials to prevent a misleading inference. The staff further noted that although a general disclaimer would not be sufficient to avoid a misleading implication from a testimonial, including a general disclaimer that the testimonial is not representative and providing a link or other means to access "all or a representative sample" of testimonials concerning the adviser would be consistent with the general prohibition.

4. Failure to Provide Fair and Balanced Treatment of Material Risks or Material Limitations

The Marketing Rule prohibits advertisements from including discussion of any potential benefits to clients or investors connected with or resulting from the adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits. The SEC indicated in the Release that this prohibition is not intended to result in lengthy, boilerplate or overly inclusive disclosure; rather, the "fair and balanced" qualifier is intended to result in disclosure that is digestible for investors. In the Release, the SEC suggested that the "fair and balanced" qualifier could facilitate the use of layered disclosures (e.g., using hyperlinks, QR codes or mouse-over windows to provide access to additional disclosure), noting that an advertisement might address one benefit and corresponding material risks and provide a link to discussion of additional benefits and material risks. The SEC explained that when using a layered approach, providing a fair and balanced discussion of benefits and material risks at each level would be consistent with the general prohibition, but cautioned against using layers to obscure "important information."

5. References to Specific Investment Advice

The Marketing Rule prohibits advertisements from including references to specific investment advice provided by the adviser where such advice is not presented in a manner that is fair and balanced. As an example, the SEC indicated that the following approaches would be consistent with a fair and balanced requirement:

- Providing both favorable and unfavorable past specific investment advice;
- Listing some or all specific investment advice "of the same type, kind, grade, or classification" in the advertisement";
- Generating a list of specific investment advice based on certain selection criteria (e.g., top holdings) that produces fair and balanced results; or
- If the advertisement includes a case study, providing the overall performance of the investment strategy.

In a departure from the prior rule's provisions governing the advertisement of past specific recommendations, this new general prohibition applies to both current and past recommendations, as well as recommendations that were not profitable. In the Release, the SEC confirmed that it was not prescribing any of the factors from existing no-action letters with respect to the use of past specific recommendations in advertisements, noting however that such letters may serve as helpful examples to inform advisers as to how to comply with the fair and balanced manner requirement.[32] The SEC further confirmed that advisers may satisfy the fair and balanced manner requirement in other ways not prescribed in previous no-action letters. Addressing the use of criteria to select investment advice, the SEC noted that it continues to believe that a consistent application of such selection criteria will limit the ability of advisers to "unfairly reflect" only favorable results. As a result, advisers who use criteria to select which investment advice to include in an advertisement may want to consider whether a change to the criteria could potentially be viewed by the SEC as an attempt to cherry-pick more favorable investment advice.

In addressing the use of case studies, the SEC provided some more specific guidance on satisfying the "fair and balanced" test. The SEC stated that it is not fair and balanced to present only profitable investments

---

[32] See, e.g., TCW Group, SEC Staff No-Action Letter (Nov. 7, 2008) ("TCW Letter"), and Franklin Management, Inc., SEC Staff No-Action Letter (Dec. 10, 1998).

when there are also "similar" unprofitable investments. The SEC also stated that the fair and balanced test is met if the adviser also discloses the overall performance of the relevant investment strategy or fund.

6. Presentation of Performance Results

The Marketing Rule prohibits including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced. The SEC indicated its belief that this general prohibition prohibits cherry-picking favorable periods when advertising investment results. The SEC stated that whether information is presented "in a manner that is not fair and balanced" will depend on the facts and circumstances, and further stated that the fair and balanced standard would not be satisfied in a situation where an investor cannot assess performance results without additional information, such as market conditions, material contributing factors or unusual conditions affecting performance. In addition, the SEC indicated that in addition to satisfying the fair and balanced requirement, advisers must also comply with the new requirements imposed by Marketing Rule 206(4)-1(c) on performance advertising, which are discussed in more detail below.

7. Otherwise Materially Misleading

The Marketing Rule prohibits any advertisement that is otherwise materially misleading. The prohibition is intended to serve as a catchall for materially misleading advertisement practices not covered by the forgoing prohibitions.

VI. Testimonials and Endorsements

A. Overview and Scope

The scope of the new Marketing Rule "recognizes the overlap between" traditional solicitation activities and compensated testimonials and endorsements, and "expanded the definitions of both testimonial and endorsement to include certain solicitation activity" according to the Release. The Marketing Rule permits advertisements to include "testimonials" and "endorsements," and it permits advisers to provide direct or indirect compensation for testimonials or endorsements, subject to several conditions. The Marketing Rule also contains certain related disqualification provisions and exemptions. Adviser's ability to use testimonial under the Marketing Rule represents a significant policy shift for the SEC, as the prior rule prohibited their use in advertisements.

The Release states that "compensated testimonials and endorsements present a heightened risk for conflicts and misleading investors," and such statements, if provided by third parties, are subject to similarly heightened rule requirements, including the conditions (disclosure provisions and adviser oversight), written agreement, and disqualification provisions.

B. Definitions

Under the Marketing Rule, a "testimonial" means any statement by a current client or investor in a private fund advised by the adviser:

- About the client or investor's experience with the adviser or its supervised persons;
- That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the adviser; or
- That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the adviser.

The Marketing Rule defines "endorsement" to mean any statement by a person other than a current client or investor in a private fund advised by the adviser that:

- Indicates approval, support, or recommendation of the adviser or its supervised persons or describes that person's experience with the adviser or its supervised persons;
- Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the adviser; or
- Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the adviser.

A person providing a testimonial or endorsement can be referred to as the "promoter".[33] Examples of "testimonial" or "endorsement" activity and "promoters" include: (1) a firm that solicits for an adviser (e.g., broker-dealer, bank); (2) an individual at a soliciting firm who engages in solicitation activities for an adviser (e.g., a bank representative, or an individual registered representative of a broker-dealer); (3) an unaffiliated fund-of-funds or a feeder fund that solicits investors in an underlying fund or a master fund; (4) lead-generation firms and adviser referral networks; (5) a lawyer or other service provider that refers an investor to an adviser; or (6) a blogger's review.

A promoter does not include: (1) a third-party marketing service or news publication preparing content for or disseminating a communication; (2) a non-investor selling an adviser a list of names/contact information; or (3) an investment consultant hired by investor to administer an RFP to aid investor(s) in selecting an adviser or private fund.

The term "compensation" can include: asset-based fees; flat fees, retainers, hourly fees; reduced advisory fees, fee waivers; directed brokerage that compensates brokers for soliciting investors; rewards (cash or non-cash) for a testimonial or endorsement; sales awards or other prizes; gifts and entertainment (e.g., outings, tours, other entertainment if compensation for a testimonial or endorsement); and trainings and education meetings (e.g., company-sponsored meetings, annual conferences) if provided in exchange for a testimonial or endorsement, but not attendance at training and education meetings if there is no *quid pro quo* (i.e., attendance provided in exchange for a testimonial/endorsement).

C. Conditions

The conditions for including testimonials or endorsements in advertisements, and for providing direct or indirect compensation for testimonials or endorsements, include required disclosures, adviser oversight and compliance, and written agreements.

1. Required Disclosures

The Release states that the required disclosures[34] are "needed to inform and protect investors effectively" and that paid testimonials and endorsements increase the "likelihood that personal bias will mislead investors". The disclosure on compensation arrangements and material conflicts of interest are intended to

---

[33] The Release uses the term "promoter" to mean a person providing a testimonial or endorsement, whether compensated or uncompensated. Traditionally, those who engaged in compensated solicitation activities have been referred to as "solicitors."

[34] The staff rejected a suggestion to align disclosure to FINRA rule 2210 and its standardized disclosures regarding testimonials, and opted for a broader framework, meaning dual-registrants not subject to the exemption for broker-dealers discussed below "should consider what additional or different disclosures they would need to make to comply with" the Marketing Rule.

address these issues, and these additional disclosures provide "a fuller context . . . without overly burdening those providing the testimonial or endorsement."

The disclosures required to be provided by the adviser (or by the promoter if the adviser reasonably believes promoter is so disclosing) are:

Prominent disclosure. Delivered "clearly and prominently" at the time of the testimonial or endorsement, including disclosure on:

- The status of the promoter as a client/investor (or not), and this is intended to "provide investors with important context for weighing the relevance" of the statement;[35]
- That (cash or non-cash) compensation is paid, and this is intended to assist an investor in determining whether the statement is an "authentic, unbiased review of the adviser";[36] and
- A brief statement of any material conflicts of interest of the promoter resulting from the investment adviser's relationship with such person (e.g., a statement was provided by an affiliate of the adviser; a promoter is related to the adviser); this is intended to "better focus" on the conflict posed by the relationship in comparison to a "fuller description" required if compensation is involved.

Additional disclosure. Additional disclosure on certain terms that are considered "material" from the viewpoint of the solicited client/investor: i.e., a conflict that would be material to their choice of investment adviser can be required by the Marketing Rule, including:

- Material terms of any compensation arrangement (i.e., the amount of cash compensation or the value of non-cash compensation if readily ascertainable; timing of payment; the structure of the compensation, for example receipt of a flat or fixed fee for a number of referrals, an asset-based fee per referral and/or of trailing fee contingent on the investor's continued relationship; if known or reasonably obtained, whether increased advisory fees to the promoter would result; and the promoter's third-party expenses); this is intended to explain the "nature and magnitude" of the specific promoter's incentive to refer the investor but "need not include detailed information about the calculations" of compensation due to a promoter;[37] and
    - Such a disclosure would also address compensation to another firm, such as a third-party marketing company or any directed brokerage arrangement with a third-party brokerage

---

[35] Note that a former client discussing their "recent prior experience with the adviser" may be treated as a client for this purpose and their statement may be treated as a testimonial. The name of the promoter is not required to be disclosed by the Marketing Rule to balance privacy concerns and the wishes of the promoter; however, an adviser could still choose to disclose the name of the promoter to assist an investor in assessing the reputation or qualifications of the promoter.

[36] The Release characterizes this requirement as "easy to implement" by labeling the statement as a "paid testimonial or endorsement" on a platform.

[37] This disclosure would also include any "indirect" compensation to a related person of the promoter such as their employer if "a broker-dealer, refers clients to advisers that recommend the broker-dealer's or its affiliate's proprietary investment products or recommend products that have revenue sharing or other pecuniary arrangements with the broker-dealer or its affiliate, the disclosures must say so." The Release states that compensation to a firm for a statement is compensation because "it would be likely to affect the individual's salary, bonus, commission or continued association with the firm."

firm for referrals, including the range of commissions, any contingencies/thresholds, and whether the compensation extends to the solicited clients' friends and families.

- Material conflicts of interest of the promoter resulting from the investment adviser's relationship with such person and/or any compensation arrangement; this is intended to reflect on the credibility of the statement according to the Release.[38]

To be clear and prominent, the required disclosure "must be at least as prominent as the testimonial or endorsement":[39]

- For a writing, the disclosure must be "within the testimonial or endorsement" such that it can be "read at the same time".
    - For example, a testimonial provided electronically through an advertisement on a mobile device "could be automatically redirected to the required disclosure before viewing the substance of an advertisement".[40]
- For an oral statement, the disclosure should be provided "at the same time" whether verbally or in writing (in which case the adviser or promoter "should alert the investor to the importance of the disclosures"). Providing the required disclosure at the time of dissemination is intended to create a "meaningful impact on investors" or clients, and the Release emphasizes that "electronic or oral" delivery is necessary for the Marketing Rule to provide the flexibility and adaptation to achieve this more real-time disclosure.[41]

The Release emphasizes that the basic required disclosures can be "provided succinctly", while other disclosure (i.e., not required by the Marketing Rule) could be provided via hyperlinks or in a separate disclosure document.

If the adviser does not provide the required disclosures, then the adviser must have a reasonable basis for believing that such disclosure was provided to the investor/client. An adviser can demonstrate its reasonable belief by providing the required disclosure to the promoter and confirming that the promoter provided such disclosure to the client/investor, or by including reference to this requirement in a written agreement with the promoter. (If a promoter's statement is disseminated by a third-party, the adviser should retain these records as well.) If the statement was provided orally, then the adviser can make and keep records of the disclosures only without the entire statement; however its format, substance and date of dissemination must be maintained. It is noted that even disclosure not required to be disclosed using the clear and prominent

---

[38] The Release states that "there should be explicit disclosure that the promoter, due to such compensation, has an incentive to recommend the adviser, resulting in a material conflict of interest."

The proposed solicitation rule would have required disclosure of "potential material conflicts of interest", but such disclosure could have been burdensome and lengthy for advisers. The proposed solicitation rule also required disclosure of the amount of any additional cost to the investor resulting from the promoter's statements, and while no longer an explicit requirement here, such information if known (or reasonably knowable) to the adviser is disclosed as part of the material terms of the compensation arrangement. The Marketing Rule also differs from the current solicitation rule, which requires that the solicitor state whether the client will pay a specific fee to the adviser in addition to the advisory fee, and whether the client will pay higher advisory fees than other clients (and the difference in such fees) because of the solicitor's referral.

[39] The clear and prominent standard discussed here applies to other required disclosures that must be stated clearly and prominently as required by the Marketing Rule. The Release also states this formulation is consistent with the Federal Trade Commission's guidance regarding disclosure that is "integral to the claim" to accompany it to prevent deception.

[40] The Release contemplates a reader viewing an advertisement on a mobile device "could be automatically redirected to the required disclosure before viewing the substance of an advertisement", so complying with this standard might "necessitate formatting and tailoring based on the form of communication."

[41] The proposed solicitor rule would have allowed in the instance of a mass communication for a separate disclosure statement to follow as soon as reasonably practicable, but this proposal was not adopted. The Release emphasizes that the staff "continue to believe the timing of disclosures is important" and that if disclosures are not provided simultaneously, they "may not have the same impact on investors." Similarly, the proposed solicitation rule also proposed keeping the separate disclosure statement in the current solicitor's rule, but this was abandoned for the more practical and effective "clear and prominent" standard.

standard can also be disclosed within the advertisement, but if not, such other disclosures must also be maintained.

2. Adviser Oversight

If an advertisement contains a testimonial or endorsement, then the adviser must have a reasonable basis for believing that the testimonial or endorsement complies with the requirements of the Marketing Rule.[42] How to form a reasonable basis will depend upon the facts and circumstances, but the Release explains that forming "a reasonable basis could involve" periodically sampling investors for compliance of promoter statements, implementing policies and procedures that form such a basis, or including a term in applicable written agreements (e.g., adviser pre-review of statements, limits on contents of those statements) to assist in forming such a basis.

In not providing further detail as to the required compliance and oversight, the SEC is taking a principals-based approach that "leverages" the Compliance Rule, and "believe[s] that the oversight provision will protect investors' interests by requiring advisers to monitor third-party statements that constitute adviser advertisements (whether compensated or uncompensated) for compliance with the rule's requirements, especially when the adviser does not disseminate the testimonials or endorsements."

3. Written Agreement

If an advertisement contains a testimonial or endorsement and is over the *de minimis* threshold (see below), then the adviser must have a written agreement with the promoter that describes the scope of the agreed-upon activities and the terms of compensation for those activities, aside from certain affiliates. Note there is no longer an explicit requirement to deliver Form ADV Part 2A because the SEC viewed it as duplicative of the adviser's existing obligation.

D. Disqualification Provisions

An adviser may not directly or indirectly compensate a promoter for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the promoter is an "ineligible person" at the time the testimonial or endorsement is disseminated. This prohibition does not disqualify any person for any matter occurring prior to the Marketing Rule's effective date (May 4, 2021), if such matter would not have disqualified such person under the existing cash solicitation rule's disqualification provisions.

Under the Marketing Rule, an "ineligible person" is any person subject to a "disqualifying Commission action" or a "disqualifying event," and includes certain persons related to the ineligible person.[43] A "disqualifying Commission Action" is an SEC opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the federal securities laws. A "disqualifying event" is any of several enumerated events, including certain convictions and orders, that occurred within 10 years prior to

---

[42] The proposed solicitor rule would have required an undertaking that the solicitor comply with Advisers Act sections 206(1), (2) and (4), as memorialized in a written agreement. While the Release recognizes "that explicitly requiring advisers to oversee third-party advertisements for compliance with the specific restrictions and requirements in the [M]arketing [R]ule, rather than the broader anti-fraud provisions, more appropriately and precisely addresses the risks posed by such advertisements." This new requirement replaces the current solicitor rule requirement that unaffiliated solicitors agree to perform their duties in a manger consistent with the Advisers Act and its rules as memorialized in a written agreement.

[43] Specifically: (i) any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; (ii) if the ineligible person is a partnership, all general partners; and (iii) if the ineligible person is a limited liability company managed by elected managers, all elected managers.

the person disseminating an endorsement or testimonial.[44] The definition of "disqualifying event" also contains certain exclusions.[45]

E. Exemptions

The Marketing Rule provides certain exemptions related to testimonials and endorsements that provide a partial exemption under certain circumstances from the conditions and disqualification provisions discussed above.

1. No Compensation or De Minimis Compensation

A testimonial or endorsement disseminated for no compensation or *de minimis* compensation[46] is not required to comply with the written agreement requirement or the disqualification provisions. The *de minimis* threshold is $1,000 (or the equivalent value in non-cash compensation) over the preceding 12-month period for all promoters (professional and non-professional). While "minimal compensation may still create conflicts", the Release states that the SEC believes that "a partial exemption is necessary because it could be overly burdensome for advisers and persons providing testimonials or endorsements for *de minimis* compensation to comply with the rule's disqualification provisions," and the incentive to risk or defraud is reduced with a *de minimis* fee.

2. Affiliated Promoters

A testimonial or endorsement by the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person ("affiliated persons") is not required to comply with the disclosure or written agreement requirements, provided that the affiliation between the adviser and such person is "readily apparent" to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and that the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated. The SEC explained that "when an investor is aware that a person endorsing the adviser is affiliated with the adviser, disclosures are not necessary to inform the investor of the person's bias in recommending such adviser."

What is "readily apparent" depends upon the facts and circumstances, but some examples include when an "in-house solicitor shares the same name as the advisory firm", the promoter "operates under the same name brand as the adviser", the promoter is identified in communications as related to the adviser, or a

---

[44] Under the Marketing Rule, a disqualifying event is any of the following events that occurred within 10 years prior to the person disseminating an endorsement or testimonial: (i) a conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in Advisers Act Section 203(e)(2)(A)–(D); (ii) a conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in Advisers Act Section 203(e)(1), (5), or (6); (iii) the entry of any final order by any entity described in Advisers Act Section 203(e)(9) [*i.e.*, certain state securities, banking and insurance regulators, appropriate federal banking agencies, and the National Credit Union Administration], or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms), of the type described in Advisers Act Section 203(e)(9); (iv) the entry of an order, judgment or decree described in Advisers Act Section 203(e)(4), and still in effect, by any court of competent jurisdiction within the United States; and (v) an SEC order that a person cease and desist from committing or causing a violation or future violation of (A) any scienter-based fraud provision of the Federal securities laws, or (B) Section 5 of the Securities Act of 1933.

[45] Under the Marketing Rule, a disqualifying event does not include any of the convictions or orders otherwise defined as a disqualifying event with respect to a person that is also subject to: (i) an order pursuant to Investment Company Act of 1940 Section 9(c) with respect to such event; or (ii) an SEC opinion or order with respect to such event that is not a disqualifying Commission action. In each case, for each applicable type of order or opinion described in these exclusions: (1) the person must be in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and (2) for a period of 10 years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to an SEC order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the SEC's website.

[46] Under the Marketing Rule, *de minimis* compensation means compensation paid to a person for providing a testimonial or endorsement of a total of $1,000 or less (or the equivalent value in non-cash compensation) during the preceding 12 months.

business card disseminated at the time of the testimonial or endorsement that "clearly and prominently states the person is a representative of the adviser." While other circumstances could show the same affiliation, a disclosure in Form ADV Part 2A does not create such a presumption as the "client may not have read the" brochure prior to the promoter's statement. In addition, certain circumstances are not readily apparent (e.g., promoter using own name or brand in its marketing activities, omitting the name of the adviser or less prominently including the adviser's name).

Additionally, with respect to independent contractors, if an adviser "exercises substantially the same level of supervision and control over an independent contractor as the adviser exercises over its own employees with respect to its marketing activities, the partial exemption would be available."

Advisers will also be required to document the affiliated person's status "contemporaneously" with dissemination of the statement (e.g., a new and separate form to document status, or existing corporate records, employee payroll, CRD or other licensing for investment adviser representations so long as these records are kept current). While there is not a monitoring provision related to an affiliated person's status, the adviser "could conduct periodic inquiries to confirm" that the promoter's statements made in reliance on this exemption are by affiliated persons.

While not subject to the required disclosure or written agreement, affiliated promoters' advisers will still be subject to adviser oversight provision and will need a reasonable basis for believing that the testimonial or endorsement complies with the Marketing Rule.[47]

3. Broker-Dealers

A testimonial or endorsement by an SEC-registered broker-dealer is not required to comply with: (i) the disclosure requirements if the testimonial or endorsement is a recommendation subject to Regulation Best Interest under the Securities Exchange Act of 1934 ("Exchange Act"); (ii) the requirements to disclose the material terms of any compensation arrangement and the material conflicts of interest resulting from the adviser's relationship with the promoter and/or any compensation arrangement if the testimonial or endorsement is provided to a person that is not a "retail customer" as defined in Regulation Best Interest; and (iii) the disqualification provisions if the broker-dealer is not subject to a statutory disqualification as defined under Exchange Act Section 3(a)(39).

The Marketing Rule recognizes the existing regulatory regime governing broker-dealers, including with respect to disclosures provided when a registered broker-dealer is involved in the sale of interests in a pooled investment vehicle. However, an adviser will be required to provide oversight over a registered-broker dealer distributing shares in a private placement, including its written agreement requirement. A written private placement agreement would be expected to meet this requirement.

Without a specific exemption as stated above, an adviser should "reasonably ensure that a registered broker-dealer providing a testimonial or endorsement for the adviser is complying with" the Marketing Rule, as applicable. Even so, an adviser would be required to fully comply with the oversight and compliance provisions related to testimonials and endorsements under the Marketing Rule, including its written agreement requirement.

---

[47] The Release explains this is "particularly with respect to certain affiliates that may not be subject to the adviser's compliance policies and procedures."

4. Reg D "Bad Actors"

A testimonial or endorsement by a person covered under the "bad actor" provisions of Regulation D with respect to a Rule 506 securities offering and whose involvement would not disqualify the offering under Rule 506 is not subject to the Marketing Rule's disqualification provisions. Regulation D Rule 506 "covered persons" include the issuer, its predecessors and affiliated issuers; directors, general partners, and managing members of the issuer; executive officers of the issuer, and other officers of the issuer that participate in the offering; beneficial owners of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; promoters connected to the issuer in any capacity at the time of sale; for pooled investment fund issuers, the fund's investment manager and any general partner, managing member, director, executive officer or other officer participating in the offering of any such investment manager; and persons compensated for soliciting investors, including any general partner, managing member, director, executive officer or other officer participating in the offering of any such solicitor.

The exemption here uses similar reasoning, that the existing "bad actor" provisions are "sufficiently similar" and "serve the same policy goal" as the Marketing Rule's disqualification provisions.

Even so, to the extent a covered persons activities fall within the scope of the Marketing Rule, they will be subject to all of its conditions (except the disqualification provisions related to testimonials and endorsements).

VII. Third-Party Ratings

The term "third-party rating" is defined in the Marketing Rule to mean a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of its business. Under the Marketing Rule, an advertisement may include any third-party rating only if the adviser:

- Has a reasonable basis for believing that any questionnaire or survey used to prepare the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and

- Clearly and prominently discloses, or the investment adviser reasonably believes that the third-party rating clearly and prominently discloses: (i) the date on which the rating was given and the period of time upon which the rating was based; (ii) the identity of the third party that created and tabulated the rating; and (iii) that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating, if applicable.

VIII. Performance Advertising

The Marketing Rule's general prohibitions prohibit an investment adviser from including or excluding performance results, or presenting time periods for performance, in a manner that is not fair and balanced. These general prohibitions are intended to prevent an investment adviser from cherry-picking profitable stock selections or misleading performance results. Determining whether such performance advertisements are fair and balanced depends on the particular facts and circumstances.

In addition, the Marketing Rule codifies, and in a number of cases changes, the SEC's and staff's positions on several perennial issues in performance advertising, as discussed in more detail below, which concern: the use of gross- and net-of-fees performance; the time periods for performance presentations; statements regarding SEC approval; related performance; extracted performance; hypothetical performance; and predecessor performance.

Unlike the Proposed Rule, the SEC did not adopt separate requirements for performance advertisements disseminated to retail and non-retail investors.[48] Nevertheless, performance advertisements are required to be tailored to the needs of the intended audience, particularly with respect to the presentation of hypothetical performance.

Gross and Net Performance. Gross-of-fees performance may not be used in any advertisement unless the advertisement also presents net-of-fees performance: (i) with at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and (ii) calculated over the same time period, and using the same type of return and methodology, as the gross-of-fees performance. The Marketing Rule codifies previous SEC staff guidance regarding the presentation of gross performance in equal prominence with net performance.[49] Further, the Marketing Rule requires the presentation of net performance regardless of the intended audience, which is a significant departure from previous SEC staff guidance and industry practice with respect to sophisticated institutional investors.[50]

The SEC stated in the Release that an investment adviser should evaluate the particular facts and circumstances relevant to each prospective retail and non-retail investor and include appropriate disclosures or other information that, depending on the facts and circumstances, include clear and prominent disclosures to prospective retail and non-retail investors that clarify the assumptions, factors and conditions that contributed to performance and the effect of fees on the performance.[51] According to the SEC, such disclosures may include, but are not limited to:

- material conditions, objectives and investment strategies used to obtain the performance results;
- whether and to what extent the performance figures reflect the reinvestment of dividends and other earnings;
- the effect of material market or economic conditions on the performance results;
- the possibility of loss; and
- material facts relevant to an index or other benchmark comparison made to the performance results.

---

48 *See* Investment Adviser Advertisements; Compensation for Solicitations, Release No. IA-5407 (Nov. 4, 2019) (Proposed Rule). The Proposed Rule distinguished between advertisements for which an investment adviser has adopted and implemented policies and procedures reasonably designed to ensure that the advertisements are disseminated solely to Non-Retail Persons as "Non-Retail Advertisements" and all other advertisements as "Retail Advertisements."

49 *See* Association for Investment Management and Research, SEC Staff No-Action Letter (Oct. 28, 1986). The SEC staff provided no-action relief for an adviser to include gross performance provided that gross and net performance are both presented with equal prominence in a format designed to facilitate ease of comparison and are accompanied by appropriate disclosure explaining how the performance figures were calculated.

50 *See* Investment Company Institute, SEC Staff No-Action Letter (Sept. 23, 1988). The SEC staff previously provided no-action relief for an adviser to use gross performance in one-on-one settings provided the advertisement is accompanied by certain warnings and disclosures such as that the performance figure does not include the deduction of investment advisory fees and the investment advisory fees are described in Part 2 of the adviser's Form ADV.

51 *See* Clover Capital Management, Inc., SEC Staff No-Action Letter (Oct. 28, 1986) ("Clover Capital No-Action Letter"). The SEC staff previously outlined the disclosures an advertisement should provide, including the effect of material market or economic conditions on the results portrayed; deduction of advisory fees, brokerage and other expenses; to what extent results, if any, reflect the reinvestment of dividends and other earnings; possibility of loss; material facts relevant to a comparison of model or other performance with an index; material changes in the conditions, objectives, or investment strategies of the model portfolio and the effect of those changes; and limitations in model performance prominently, including that it is hypothetical and not a guarantee of results.

Under the Marketing Rule, "gross performance" means the performance results of a "portfolio"[52] (or portions of a portfolio that are included in "extracted performance,"[53] if applicable) before the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio. Examples of "gross performance" would include (i) extracted performance that presents a subset of investments from a portfolio; or (ii) if the performance presented only deducts certain fees and expenses (*i.e.*, deduction of transaction fees and expenses only).

"Net performance" is defined similarly, except to be after the deduction of fees and expenses that a client or investor has paid or would have paid.

The Marketing Rule does not prescribe a specific calculation methodology for calculating gross and net performance. However, the same time period, type of return, and calculation methodology should be applied consistently across gross and net performance figures. The following examples provide certain types of fees and expenses to be considered in the calculation of net performance, as applicable:

- Fees and expenses <u>required</u> to be deducted from the calculation of net performance
    - performance-fee based fees;
    - performance allocations that a client or investor has paid or would have paid;
    - payments by the investment adviser for which the client or investor reimburses the investment adviser; and
    - custodial fees, if the (i) investment adviser provides custodial services and charges a separate fee for such services or (ii) custodial fees included in a single fee paid to the investment adviser (*e.g.*, wrap fee program).
- Fees and expenses <u>not required</u> to be deducted from the calculation of net performance
    - administrative fees the investment adviser agrees to bear (*e.g.*, as a result of negotiations with investors in a private fund); and
    - capital gains taxes paid outside of the portfolio.
- Fees and expenses that <u>may be excluded</u> from the calculation of net performance
    - custodial fees paid to a bank or third-party custodian for safekeeping funds and securities, provided a client or investor does not pay the investment adviser for such custodial services.
- Fees and expenses that <u>may be deducted</u> from the calculation of net performance

---

[52] The Marketing Rule defines "portfolio" to mean a group of investments managed by the investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliate (as defined in the Form ADV Glossary of Terms).

[53] Under the Marketing Rule, "extracted performance" means the performance results of a subset of investments extracted from a portfolio.

- a model fee, only if (i) the deduction of a model fee would result in performance figures that are no higher than if the actual fee had been deducted; or (ii) the deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.

An investment adviser should include relevant disclosures summarizing the elements and relevant factors included in the calculation of gross and net performance returns included in an advertisement.

Time Periods. Performance results of any portfolio or composite aggregation of related portfolios (other than performance results of any private fund)[54] must include performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end, except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.[55] An investment adviser may be required to present performance results of a more recent date than the most recent calendar-year end to comply with the Marketing Rule's general prohibitions.[56] An investment adviser should include relevant disclosure concerning the time period of the performance presented in such advertisement.

Statements Regarding SEC Approval. Performance advertising may not contain any express or implied statement that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the SEC.[57]

Related Performance. Under the Marketing Rule, "related performance" means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria. Related performance may be used only if the presentation includes all related portfolios. The Marketing Rule defines "related portfolio" as "a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement"[58] and requires a facts and circumstances determination.[59] Notably, private fund advisers may exclude prior private fund performance in its related performance if, over time, relevant financial markets or investment advisory personnel change such that the earlier private fund's investment policies, objectives and strategies are no longer substantially similar to the fund being marketed.

---

[54] The exception for private funds applies with respect to performance advertising for any type of private fund. The SEC noted that although it did not mandate "presentation of performance for any specific time periods for [private] funds, presentations of private fund performance are subject to the general antifraud provisions of the Federal securities laws and the general prohibitions in the [Marketing Rule], including the prohibition of including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced." *See* Release at 183.

[55] The SEC noted that the time period information "would aid investors in comparing different performance advertisements and reduce the risk that advisers would present performance based on cherry-picked periods." *See* Release at 181.

[56] The SEC explained that "it could be misleading for an adviser to present performance returns as of the most recent calendar year-end if more timely quarter-end performance is available and events have occurred since that time that would have a significant negative effect on the adviser's performance." *See* Release at 184.

[57] An example of a prohibited statement regarding SEC approval would be that the "performance results are prepared in compliance with the [SEC]'s requirements on performance presentations in advertisements." *See* Release at 185.

[58] Rule 206(4)-1(e)(15).

[59] The SEC stated that it is "not prescribing a specific numerical or percentage threshold for materiality or immateriality as part of this requirement. Instead, based on the facts and circumstances, if the results of excluding the related portfolio would be material to a reasonable client or investor, the portfolio should not be excluded." *See* Release at n. 632. For example, an adviser could determine that a portfolio "with material client constraints" is not a related portfolio; however, "different fees and expenses alone" would not allow an adviser to conclude that a portfolio is not a related portfolio. *See* Release at 193

Related performance may exclude one or more related portfolios if: (i) the advertised performance results are not materially higher than if all related portfolios had been included; and (ii) the exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by the Marketing Rule.[60] The first condition that performance results are "not materially higher" is a change from the Proposed Rule (that the advertised performance be "no higher")[61] to allow flexibility for advisers in situations where immaterial differences in performance could arise due to the performance calculation methodology or "between the different prescribed time periods."[62]

As stated above, advisers can present related performance on (i) a portfolio-by-portfolio basis[63] or (ii) as a composite aggregation of all portfolios falling within stated criteria.[64] Once the stated criteria for a composite is established by the investment adviser, all related portfolios meeting such criteria must be included in the composite. Presentations in either format are subject to the general prohibitions of the Marketing Rule, including the prohibition on omitting material facts necessary to make the presentation not misleading.[65] Investment advisers are permitted to present the results of a single representative account (*e.g.*, flagship fund) or subset of related portfolios but only alongside the required related performance presentation.

Ultimately, the SEC stated that it believes that its approach to related performance will provide flexibility to advisers in presenting related portfolios, but will avoid cherry-picking and the exclusion of certain portfolios solely on the basis of poor performance.

Extracted Performance. As previously noted, "extracted performance" is defined in the Marketing Rule to mean the performance results of a subset of investments extracted from a portfolio.[66] Extracted performance may be used in an advertisement only if the advertisement provides, or offers to provide promptly, the performance results of the entire portfolio from which the performance was extracted. The SEC clarified that the presentation of a composite of extracts from multiple portfolios would not be considered extracted performance because it is not a subset of investments extracted from a *single* portfolio and, as such, would be treated as hypothetical performance and subject to additional requirements, as explained further below.[67]

The SEC emphasized the value of extracted performance to investors regarding performance achieved and performance attribution within a portfolio. In addition, the general prohibitions and antifraud principles of

---

60 Advisers may choose to present performance without excluding any related portfolios and still comply with the Marketing Rule. *See* Release at 188.

61 The Proposed Rule would have allowed exclusion of a related portfolio if the advertised performance results were "no higher than" if all related portfolios had been included. *See* Proposed Rule at 145.

62 *See* Release at 189.

63 The SEC noted that "[p]resenting related performance results on a portfolio-by-portfolio basis may illustrate for the audience the differences in performance achieved by the investment adviser in managing portfolios having substantially similar investment policies, objectives, and strategies." *See* Release at 191.

64 Unlike the Proposed Rule, the Marketing Rule refers to the presentation of related performance as "a composite aggregation," rather than "one or more composite aggregations." *See* Release at 194.

65 For example, an advertisement presenting related performance on a portfolio-by-portfolio basis could be potentially misleading if it does not disclose the size of the portfolios and the basis on which the adviser selected the portfolios. *See* Release at 191. Additionally, the SEC noted that an advertisement presenting related performance in a composite would be false or misleading where the composite is represented as including all portfolios in the strategy being advertised but excludes some portfolios falling within the stated criteria or is otherwise manipulated by the adviser. *See* Release at 194-95.

66 For example, an investment adviser managing a multi-strategy portfolio would be able to extract performance from investments of one of the several strategies in the multi-strategy portfolio (*e.g.*, fixed-income investments) to advertise a new portfolio of only fixed-income investments. *See* Release at 197.

67 The SEC noted that "this type of composite performance presentation may not reflect the holdings of any actual investor" and "reflects a hypothetical portfolio," which could raise cherry-picking concerns. *See* Release at 198.

the Marketing Rule apply to presentations of extracted performance and appropriate disclosures should be tailored to intended audience.[68]

In a response to a "Frequently Asked Question" published on Jan. 11, 2022, the SEC staff stated that it believes that "displaying the performance of one investment or a group of investments in a private fund is an example of extracted performance under the new marketing rule." Accordingly, it is the staff's position that an adviser "may not show gross performance of one investment or a group of investments without also showing the net performance of that single investment or group of investments, respectively."[69]

Hypothetical Performance.

The Marketing Rule permits investment advisers to advertise hypothetical performance in both retail and non-retail advertisements. However, the SEC stated that it intends for hypothetical performance only to be distributed to investors who have access to the resources to (i) independently analyze the information and (ii) who have the financial expertise to understand the risks and limitations (collectively, the "investors who have the resources and financial expertise").

Type of Hypothetical Performance

Under the Marketing Rule, hypothetical performance is defined as performance results that were not actually achieved by any portfolio of the investment adviser, and which includes, but is not limited to:

- **Model performance**. Hypothetical performance includes performance derived from "model portfolios." Model performance will include, but is not limited to, performance generated by the following types of models:

    - models described in the Clover Capital No-Action Letter where the investment adviser applies the same investment strategy to actual investor accounts, but where the investment adviser makes slight adjustments to the model (*e.g.*, allocation and weighting) to accommodate different investor investment objectives[70];

    - computer generated models; and

    - models the investment adviser creates or purchases from model providers that are not used for actual investors.

    Under the Marketing Rule, an investment adviser that serves as a model provider to wrap fee accounts or provides models to other, end-user advisers is also subject to the hypothetical performance conditions noted below.

---

[68] For example, the SEC stated that it would "view it as misleading for an adviser to present extracted performance without disclosing that it represents a subset of a portfolio's investments (an omission of a material fact). Similarly, we would view it as misleading to include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced, and able to be substantiated in accordance with the general prohibitions. In addition, an extract would likely be false or misleading where it excludes investments that fall within the represented selection criteria. *See* Release at n. 664. Further, the SEC stated that it would consider it to be misleading to present extracted performance "without disclosing whether it 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." *See* Release at 200.

[69] *See* Marketing Compliance Frequently Asked Questions, SEC Division of Investment Management (Jan. 11, 2023).

[70] *See* Clover Capital No-Action Letter. The Marketing Rule clarifies that the types of model performance in the Clover Capital No-Action Letter include, among other things: "performance results generated by a 'model' portfolio with the same investment philosophy used for client accounts and 'consist[ing] of the same securities' recommended by the adviser to its clients during the same time period, 'with variances in specific client objectives being addressed via the asset allocation process (i.e., the relative weighting of stocks, bonds, and cash equivalents in each account).'" *See* Release at n. 684.

- **Backtested performance**. Hypothetical performance includes performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. Backtested performance will apply to presentations of both market and non-market data in advertisements.[71]

- **Targeted or projected performance returns**. Hypothetical performance includes targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement. The SEC did not define "target performance" or "projected performance," but stated that it "generally would consider a target or projection to be any type of performance that an advertisement presents as results that could be achieved, are likely to be achieved, or may be achieved in the future by the investment adviser with respect to an investor." Targeted performance reflects an investment adviser's aspirational performance goals, whereas projected performance reflects an investment adviser's performance estimate, which is often based on historical data and assumptions and established through mathematical modeling.

The Release states that "hypothetical performance" does not include:

- actual performance of proprietary portfolios and seed capital portfolios[72];

- projections of general market performance or economic conditions;

- certain interactive analysis tools[73];

- index used as a performance benchmark in an advertisement (*e.g.*, an actual portfolio tracks an index); and

- "predecessor performance" displayed in compliance with the Marketing Rule.

Hypothetical Performance Conditions

Hypothetical performance is permitted in advertisements, provided that the investment adviser satisfies three conditions. These three conditions for presentation of hypothetical performance form a principles-based framework, which provides the investment adviser the discretion to tailor the policies and procedures and disclosure to the intended audience and type of hypothetical performance included in the advertisement

---

[71] The SEC noted that an example of non-market data would be data from other portfolios managed by the investment adviser. *See* Release at 211.

[72] In order for seed capital portfolios to not be considered "hypothetical performance," the adviser must invest an amount of seed capital that is sufficient to demonstrate that the adviser is not attempting to do indirectly what it is prohibited from doing directly, or otherwise be able to demonstrate that the strategy is reasonably intended to be offered to investors. *See* Release at 204.

[73] The interactive analysis tools are those where a client or investor, or prospective client or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser: (1) provides a description of the criteria and methodology used, including the investment analysis tool's limitations and key assumptions; (2) explains that the results may vary with each use and over time; (3) 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 so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and (4) discloses that the tool generates outcomes that are hypothetical in nature. *See* Release at 214-15.

to satisfy the requirements of the Marketing Rule.[74] Additionally, hypothetical performance presented in an advertisement may not include an untrue statement of material fact[75] or be considered materially misleading.[76]

An investment adviser is required to (i) adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement ("Policies and Procedures"); (ii) provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance ("Criteria and Assumptions"); and (iii) provide (or, if the intended audience is an investor in a private fund, provide, or offer to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions ("Risk Information").

- **Policies and Procedures**. The reasonably designed policies and procedures do not need to address each recipient's particular circumstances. Rather, an investment adviser must make a reasonable judgment about the likely investment objectives and financial situation of the advertisement's intended audience by taking into account the investment adviser's past experience with the intended audience, including, but not limited to: "previous investments with the adviser, net worth or investing experience if that information is available to the adviser, certain regulatory defined categories (*e.g.*, qualified purchasers or qualified clients), or whether the intended audience includes only natural persons or only institutions."[77] If an investment adviser that does not have prior experience to inform their determination of the intended audience, the investment adviser can rely on other resources, including information they have gathered from potential investors (*e.g.*, questionnaires, surveys, or conversations) and academic research. The policies and procedures should include relevant disclosure that the investment adviser's dissemination seeks to be limited to the intended audience.

- **Criteria and Assumptions**. An investment adviser must include a general description of the methodology used, which does not need to include information that would allow the intended audience to replicate the hypothetical performance, such as proprietary or confidential information.[78] However, assumptions underlying hypothetical performance that informed the model should be disclosed.

- **Risk Information**. The Marketing Rule requires the investment adviser to provide the risks and limitations of such hypothetical performance to retail and non-retail investors. However, the Marketing Rule does not require an investment adviser to provide private fund investors with information related to the risks and limitations associated with hypothetical performance and can

---

74 For example, the SEC noted that if "an adviser believes that model performance is less likely to mislead the intended audience, the adviser may decide that less-stringent policies and procedures are required under the first condition, and that the required disclosures may differ and be more limited than those required for backtested performance." *See* Release at 208.

75 An example the SEC provided for an advertisement including an untrue statement of material fact is "if the advertised hypothetical performance reflected the application of rules, criteria, assumptions, or general methodologies that were materially different from those stated or applied in the underlying information of such hypothetical performance." *See* Release at 227.

76 One example the SEC provided for an advertisement that would be considered materially misleading is if the advertisement "present[ed] hypothetical performance that discusses any potential benefits resulting from the adviser's methods of operation without providing fair and balanced discussion of any associated material risks or material limitations associated with the potential benefits." *See* Release at 227.

77 *See* Release at 221.

78 An example of the information an investment adviser should provide regarding an assumption of hypothetical targeted or projected returns includes "the adviser's view of the likelihood of a given event occurring." *See* Release at 224.

merely offer to promptly provide such information. The SEC noted that an investment adviser should provide information that would apply to (i) hypothetical performance generally and (ii) the specific hypothetical performance presented in the advertisement. Further, risk information should disclose any known explanations why the portfolio's hypothetical performance may differ from the portfolio's actual performance (*e.g.*, hypothetical performance does not reflect cash flows into or out of the portfolio).

As discussed above, hypothetical performance may only be provided to investors who have the requisite resources and financial expertise and, as such, advertisements directed to a mass audience or intended for general circulation may not include hypothetical performance.[79] The presentation of hypothetical performance in an advertisement does not need to comply with the conditions of performance related to time periods, related performance or extracted performance.

Predecessor Performance.

The Marketing Rule explicitly addresses predecessor performance, a significant change from the Proposed Rule. "Predecessor performance" is defined as investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance. Specifically, predecessor performance may be included in an advertisement only when: (i) the person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser; (ii) the accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors; (iii) all accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed under the Marketing Rule; and (iv) the advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

The SEC stated that a person or group of persons is "primarily responsible" for achieving predecessor performance if the person makes or the group makes investment decisions. An investment adviser may want to consider and assess the authority and influence each person had in making investment decisions to achieve the predecessor performance results.

An investment adviser may determine the scope of the accounts that are managed in a "substantially similar manner" by evaluating accounts that have substantially similar investment policies, objectives, and strategies.

Relevant disclosures required to be clearly and prominently displayed must include that the performance results were generated from accounts managed at another entity. The investment adviser must also have the books and records to support the predecessor performance in order to substantiate all material statements of fact contained in an advertisement.

As discussed further below, the SEC withdrew several no-action letters concerning portability of investment adviser performance. However, several no-action letters related to portability of investment adviser

---

[79] The SEC noted that "providing hypothetical performance to an investor that does not have access to the resources and financial expertise needed to assess the hypothetical performance and underlying information could mislead the investor to believe something about the adviser's experience or ability that is unwarranted." *See* Release at 220.

performance were retained, concerning registered fund advertisements and filings[80] and incubator accounts.[81]

IX. Amendments to Form ADV and the Advisers Act Recordkeeping Rule

In connection with adopting the Marketing Rule, Form ADV Part 1A was amended by adding Item 5.L. "Marketing Activities," which will require certain disclosures concerning the adviser's marketing practices. The Glossary of Terms was revised in light of definitions adopted in the Marketing Rule. Certain technical amendments were made to the Form ADV instructions. The Advisers Act recordkeeping rule (Rule 204-2) was also updated in light of the adoption of the Marketing Rule.

X. Staff No-Action Letters

The SEC reviewed certain no-action letters to ascertain whether any of the letters should be withdrawn upon the adoption of the Marketing Rule. As a result of this review, no-action letters related to the solicitation rule were nullified because the SEC is rescinding the solicitation rule. The SEC also decided to terminate an order granting exemptive relief under Rule 206(4)-3.[82] In addition, as of the compliance date of the final rules, the SEC withdrew residual no-action letters and other staff guidance. A list of withdrawn letters is available on the SEC's website.

The SEC also considered nullifying solicitor disqualification letters. The SEC acknowledged that, if the letters were to remain in force, certain solicitors could continue soliciting as long as they comply with conditions enumerated in the relevant no-action letter. The SEC emphasized that most of these no-action letters relate to events that occurred more than ten years before the effective date of the Marketing Rule, and therefore (i) would not be disqualifying events under the Rule[83] and (ii) would render nullification of such letters void. However, nullification of solicitor disqualification no-action letters pertaining to events within ten years of the effective date of the Marketing Rule could disqualify such solicitors under the Rule. To avoid such a scenario, the SEC stated that it will take a no-action position with respect to the events described in such letters in order to prevent disqualification of these solicitors under the Marketing Rule. In the SEC's view, after several years, the events described in these letters will have occurred more than ten years prior, so these letters will be phased out, at which time advisers can rely fully upon the Marketing Rule.

XI. Effective and Compliance Date

The Marketing Rule and related amendments provide for an 18-month transition period following effectiveness. The Marketing Rule became effective on May 4, 2021, and the deadline for compliance was November 4, 2022. Because Item 5 of Form ADV does not require advisers to update responses by filing an other-than-annual amendment, advisers can wait until their next annual updating amendment filed after the compliance date to ensure that Item 5 reflects answers to the amended questions under the Advisers Act recordkeeping rule (Rule 204-2).

---

80 *See* MassMutual Institutional Funds, SEC Staff No-Action Letter (Sept. 28, 1995). The SEC staff permitted a newly formed registered investment company containing multiple series, which was the successor to unregistered insurance company separate accounts, to include the performance of the predecessor accounts in the prospectus and advertisements for the relevant successor fund, subject to primary conditions, factors and/or representations.

81 *See* Dr. William Greene, SEC Staff No-Action Letter (Feb. 3, 1997).

82 Adopting Release at n. 831.

83 Final Rule 206(4)-1(e)(4).