

## New Investment Adviser Marketing Rules Take Effect May 4, 2021

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March 8, 2021

On December 22, 2020, the SEC adopted amended Rule 206(4)-1 under the Investment Advisers Act of 1940, updating the rules governing investment adviser marketing ("Marketing Rules"). The new Rule replaces the currently separate advertising and cash solicitation rules and will take effect May 4, 2021. Investment advisers subject to the Marketing Rules have 18 months thereafter to bring their marketing practices into compliance.

### What does this mean for investment advisers?

All investment advisers required to be registered with the SEC are subject to the Marketing Rules and will need to update their advertising practices and recordkeeping policies. The new rule is lengthy and complex, and advisers should consult with their attorneys to ensure full compliance. The Marketing Rules prohibit several types of marketing practices and regulate the use of testimonials, endorsements, third-party ratings and performance advertising. The full text of the Marketing Rules can be found [here](#).

**Definition.** Under the Marketing Rules, "advertising" includes any direct or indirect communication an investment adviser makes that either (1) offers the investment adviser's investment advisory services with regard to securities to prospective clients or private fund advisers, or (2) offers new investment advisory services with regard to securities to current clients or private fund investors. The first prong excludes most one-on-one communications and certain other communications.

**Endorsements and Testimonials.** The Marketing Rules further expand the definition of advertising to include any endorsement or testimonial for which an investment adviser provides cash or non-cash compensation directly or indirectly. Such endorsements and testimonials are subject to disclosure, oversight, and disqualification provisions.

- **Disclosure provisions:** require clear and prominent disclosure on whether the person giving the testimonial or endorsement (the "promoter") is a client or private fund investor, whether and how the promoter is being compensated, and any material conflicts of interest arising out of the relationship with the adviser or the compensation arrangement.
- **Oversight and Compliance provisions:** require the adviser to have a written agreement with the promoter and a reasonable basis for believing any testimonials or endorsement will be in compliance with the Rule. Advisers are prohibited (with exceptions) from compensating any promoter who is subject to an enumerated "disqualifying event" or a "disqualifying Commission Action."
- **Exemptions:** this part of the rule includes a number of partial exemptions, including a *de minimis* exemption for endorsements and testimonials that are compensated with \$1000 or less during the preceding twelve months (exempted *only* from disqualification and written-agreement requirements).

**Third-Party Ratings.** Advertisements that include third-party ratings under the Marketing Rules must comply with the general prohibitions and additionally meet the following conditions:

- the provider may not be a related person (as defined in Form ADV) and must provide rankings or ratings in the ordinary course of business;

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- the adviser must have a reasonable basis for believing that any survey or questionnaire used by provider is not designed to produce a pre-determined result; and
- the rating must clearly and prominently disclose the time period covered and the date on which the rating was given, the identity of the provider, and whether provider was compensated.

**General Prohibitions.** The Marketing Rules include many general prohibitions of certain marketing practices. These prohibitions seek to curtail fraudulent, deceptive, or manipulative acts. Thus, an advertisement may not: 1) include untrue material statements and omissions; 2) include unsubstantiated material statements of fact; 3) include untrue or misleading implications or inferences; 4) discuss potential benefits from the adviser's services or methods without a fair and balanced treatment of material risks or limitations; or 5) include a reference to specific investment advice by the adviser unless it is presented in a fair and balanced manner.

**Performance Results.** Advertisements that include performance results must be presented in a fair and balanced manner. The Marketing Rules require that gross and net performance are presented with at least equal prominence, calculated over the same time period and using the same type of return and methodology. The new rule further determines prescribed time periods, prohibits the adviser from making statements about Commission review or approval, and regulates the use of related, extracted, hypothetical, and predecessor performance.

**Recordkeeping.** Advisers must also make and keep records of *all* advertisements (as opposed to advertisements sent to ten or more persons, the threshold under the prior rule). Advisers will also be required to provide information about their use of performance results, testimonials, endorsements, third-party ratings, and references to specific investment advice in advertisements on their Form ADV.

We encourage you to consult with the authors of this e-alert or your Miller Canfield attorney if you have questions about the new SEC Marketing Rules.