

# SEC Adopts Modernized Marketing Rule for Investment Advisers

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On December 22, 2020, the Securities and Exchange Commission announced it had finalized reforms under the Investment Advisers Act to modernize rules that govern investment adviser advertisements and payments to solicitors. The amendments create a single rule that replaces the current advertising and cash solicitation rules. The final rule is designed to comprehensively and efficiently regulate investment advisers' marketing communications.

The rule replaces the current advertising rule's broadly drawn limitations with principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice, and includes tailored requirements for certain types of advertisements. For example, the rule will require advisers to standardize certain parts of a performance presentation in order to help investors evaluate and compare investment opportunities, and will include tailored requirements for certain types of performance presentations. Advertisements that include third-party ratings will be required to include specific disclosures to prevent them from being misleading. The rule also will permit the use of testimonials and endorsements, which include traditional referral and solicitation activity, subject to certain conditions.

The Commission also adopted related amendments to the investment adviser registration form and the books and records rule. The staff of the Division of Investment Management also expects to withdraw no-action letters and other guidance addressing the application of the advertising and cash solicitation rules. A list of the letters will be available on SEC.gov.

The marketing rule, amended books and records rule, and related Form ADV amendments, will be published on the Commission's website and in the Federal Register. All will be effective 60 days after publication in the Federal Register. The Commission has adopted a compliance date that is 18

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months after the effective date to give advisers a transition period to comply with the amendments.

The Commission's news release is found below, and the link to the final rule can be found [here](#).

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## FACT SHEET

### Investment Adviser Marketing

Dec. 22, 2020

#### Highlights

On Tuesday, Dec. 22, 2020, the Commission announced it had finalized reforms to modernize rules that govern investment adviser advertisements and compensation to solicitors under the Investment Advisers Act of 1940. Neither rule has been amended significantly since its adoption over forty years ago.

The amendments create a single rule that draws from and replaces the current advertising and cash solicitation rules, Rule 206(4)-1 and Rule 206(4)-3, respectively. The final rule is designed to comprehensively and efficiently regulate advisers' marketing communications. The Commission has also made related amendments to Form ADV, the investment adviser registration form, and Rule 204-2, the books and records rule.

### The Marketing Rule Under the Act

The amendments to Rule 206(4)-1 will replace the broadly drawn limitations and prescriptive or duplicative elements in the current rules with more principles-based provisions, as described below.

- **Definition of Advertisement.** The amended definition of "advertisement" contains two prongs: one that captures communications traditionally covered by the advertising rule and another that governs solicitation activities previously covered by the cash solicitation rule.
  - First, the definition includes any direct or indirect communication an investment adviser makes that: (i) offers the investment adviser's investment advisory services with regard to securities to prospective clients or private fund investors, or (ii) offers new investment advisory services with regard to securities to current clients or private fund investors. The first prong of the definition excludes most one-on-one communications and contains certain other exclusions.
  - Second, the definition generally includes any endorsement or testimonial for which an adviser provides cash and non-cash compensation directly or indirectly (e.g., directed brokerage, awards or other prizes, and reduced advisory fees).
- **General Prohibitions.** The marketing rule will prohibit the following advertising practices:
  - making an untrue statement of a material fact, or omitting a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading;

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- making 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 Commission;
  - 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 without providing fair and balanced treatment of any associated material risks or limitations;
  - referencing specific investment advice provided by the adviser that 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; and
  - including information that is otherwise materially misleading.
- **Testimonials and Endorsements.** The marketing rule prohibits the use of testimonials and endorsements in an advertisement, unless the adviser satisfies certain disclosure, oversight, and disqualification provisions:
    - *Disclosure.* Advertisements must clearly and prominently disclose whether the person giving the testimonial or endorsement (the “promoter”) is a client and whether the promoter is compensated. Additional disclosures are required regarding compensation and conflicts of interest. There are exceptions from the disclosure requirements for SEC-registered broker-dealers under certain circumstances. The rule will eliminate the current rule’s requirement that the adviser obtain from each investor acknowledgements of receipt of the disclosures.
    - *Oversight and Written Agreement.* An adviser that uses testimonials or endorsements in an advertisement must oversee compliance with the marketing rule. An adviser also must enter into a written agreement with promoters, except where the promoter is an affiliate of the adviser or the promoter receives de minimis compensation (i.e., \$1,000 or less, or the equivalent value in non-cash compensation, during the preceding twelve months).
    - *Disqualification.* The rule prohibits certain “bad actors” from acting as promoters, subject to exceptions where other disqualification provisions apply.
  - **Third-Party Ratings.** The rule prohibits the use of third-party ratings in an advertisement, unless the adviser provides disclosures and satisfies certain criteria pertaining to the preparation of the rating.
  - **Performance Information Generally.** The rule prohibits including in any advertisement:
    - gross performance, unless the advertisement also presents net performance;
    - any performance results, unless they are provided for specific time periods in most circumstances;

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- any statement that the Commission has approved or reviewed any calculation or presentation of performance results;
  - performance results from fewer than all portfolios with substantially similar investment policies, objectives, and strategies as those being offered in the advertisement, with limited exceptions;
  - performance results of a subset of investments extracted from a portfolio, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio;
  - hypothetical performance (which does not include performance generated by interactive analysis tools), unless the adviser adopts and implements policies and procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience and the adviser provides certain information underlying the hypothetical performance; and
  - predecessor performance, unless there is appropriate similarity with regard to the personnel and accounts at the predecessor adviser and the personnel and accounts at the advertising adviser. In addition, the advertising adviser must include all relevant disclosures clearly and prominently in the advertisement.

## **Amendments to the Books and Records Rule and Form ADV**

In connection with the marketing rule amendments and merger of the current advertising and cash solicitation rules, the Commission also adopted amendments to the books and records rule. In addition, the Commission amended Form ADV to require advisers to provide additional information regarding their marketing practices to help facilitate the Commission's inspection and enforcement capabilities.

## **Withdrawal of Staff Guidance**

The staff of the Division of Investment Management will withdraw no-action letters and other guidance addressing the application of the advertising and cash solicitation rules as those positions are either incorporated into the final rule or will no longer apply. A list of the letters will be available on the Commission's website.

## **What's Next?**

The marketing rule, amended books and records rule, and related Form ADV amendments, will be published on the Commission's website and in the Federal Register. All will be effective 60 days after publication in the Federal Register. The Commission has adopted a compliance date that is 18 months after the effective date to give advisers a transition period to comply with the amendments.

The Commission recognizes that this amended rule replaces an outdated and patchwork regime on which advisers have relied for decades. While the rule reflects current best practices in marketing, it may result in practice changes for advisers, including private fund advisers. In order to assist advisers with planning for compliance with this new rule, we encourage advisers to actively engage

with Commission staff as questions arise in planning for implementation. You may send your questions by email to [IM-Rules@sec.gov](mailto:IM-Rules@sec.gov).

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National Law Review, Volume X, Number 357

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