



Compliance Deadline for New SEC Investment Adviser Marketing Rules Nears

The modernization of the framework governing the marketing, advertising and cash solicitation practices of investment advisers registered or required to be registered with the US Securities and Exchange Commission (the “SEC”) was approved on December 22, 2020 and went into effect on May 4, 2022. The SEC gave investment advisers until November 4, 2022 to comply with the changes to the Investment Advisers Act of 1940 (the “Advisers Act”).

SEC-registered investment advisers, including advisers to private funds and private fund placement agent arrangements, should be aware of, and where applicable, seek to comply with, the following:

- **Marketing Efforts:** Advisers Act 206(4)-1 (the “New Rule”) repeals both the prior rule governing advertising, Rule 206(4)-1, and the rule relating to cash payments to solicitors, Rule 206(4)-3, and combines them into one, with multiple changes (as highlighted herein).
 - **Advertisements:** The scope of communication that is considered to be an “advertisement” has been expanded and now includes both direct and indirect communications (e.g., social media comments), including non-written communications (e.g., pre-recorded videos) and those communications that are “promoted” by an investment adviser. Under the New Rule, an investment adviser is responsible for the accuracy of any third-party communication that it references or promotes.
 - **Testimonials and Endorsements:** Subject to certain requirements and disclosures, investment advisers are now permitted to include testimonials (i.e., a favorable statement by a client) and endorsements (i.e., favorable statements by non-clients) in their marketing and advertisement materials.
 - **Written Agreement Exception:** Promoters giving a testimonial or endorsement that receive no compensation or a total compensation of One Thousand Dollars (\$1,000.00) or less during a twelve (12) month period, as well as affiliates (so long as certain disclosures are made), are now exempt from the requirement to have a written agreement in place with the investment adviser.
 - **Certain specific prohibitions that existed in the prior rules have been replaced with a set of seven principles-based, general prohibitions that will apply to all advertisements. The general prohibitions are as follows:**

1. 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;
 2. 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 SEC;
 3. 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;
 4. discussing any potential benefits without providing fair and balanced treatment of any associated material risks or limitations;
 5. referencing specific investment advice provided by the adviser that is not presented in a fair and balanced manner;
 6. including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced; and
 7. including information that is otherwise materially misleading.
- *Books and Records:* Advisers Act Rule 204-2 now requires that investment advisers make and keep certain records, including records of all disseminated advertisements, certain internal working documents and documentation related to oral advertisements, testimonials and endorsements.
 - *Form ADV:* Investment Adviser Form ADV, the form used by investment advisers to register with the SEC, now requires additional advertising and marketing-related disclosure, including a requirement to disclose specific information about the investment adviser's compensation of promoters, and use of prior recommendations, testimonials, endorsements, and third-party rankings.

On September 19, 2022, the SEC published a risk alert entitled, "*Examinations Focused on the New Investment Adviser Marketing Rule*," which made clear that the SEC intends to immediately begin investigations and enforcement of the New Rule. So what should investment advisers expect and what steps should they take – whether immediately or in the future – to ensure compliance? Further, what are the repercussions for those that do not comply by the November 4, 2022 deadline?

Investment advisers must take precautions, including making certain disclosures, when marketing their services and should familiarize themselves with the revised rules before communicating outward. If an investment adviser has not yet done so, it is time to immediately implement policies and procedure, update compliance manuals and review current and future solicitation/promoter agreements. Those who do not comply by the compliance deadline will be subject to penalties, including monetary fines.

This RMF news alert seeks to highlight some of the key changes to the Advisers Act. However, potentially impacted parties should speak with counsel about the specifics of the law and any modifications that should be made to its marketing, promoting and book keeping efforts, including implementing possible training, enhanced recording, oversight, and compliance-related programs.

Earlier this year, the SEC also proposed a series of rules related to transparency, cybersecurity and investor-facing reporting requirements for private fund investment advisers – all of which are at various stages of review and public comment. If you have any questions about the impact of the SEC's new rules or the proposed rules, please contact:

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