

The background of the slide is a photograph of a modern glass skyscraper. A vertical yellow bar is on the left side. The Mayer Brown logo is in the top left. The text '15th Annual Investment Management Regulatory University' is centered in white, and 'WEBINAR SERIES' is below it. The date 'September 14, 2021' is in the bottom right, and the title 'Highlights of the Advisers Act New Marketing Rule' is at the bottom.

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15TH ANNUAL

Investment Management Regulatory University

WEBINAR SERIES

September 14, 2021

Highlights of the Advisers Act New Marketing Rule

Speakers



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Overview

- Marketing Rule under the Advisers Act replaces and updates the prior Advertising Rule, which was passed in 1961
 - Modernizes prior rule by providing clarity on how the rule will apply to evolving technology and communication platforms.
 - Includes principles-based components based on prior SEC staff guidance with respect to advertising practices
 - Provides conditional expansion of prior prohibited practices under certain limited circumstances (e.g., testimonials) and expands coverage in other areas (particularly in the definition of an “advertisement”)
 - Cash Solicitation Rule (Rule 206(4)-3) is being rescinded and combined into the Marketing Rule (though with certain revisions)
 - Also amends Advisers Act’s recordkeeping requirements and certain Form ADV disclosure requirements with respect to advertisements



Compliance Deadline

- While the Marketing Rule formally went into effect on May 4, 2021, advisers do not have to be in compliance until November 4, 2022
- An adviser may choose to comply with the amended Marketing Rule in its entirety at any time between the May 4, 2021 – November 4, 2022 compliance period
- Until an adviser transitions to the amended Marketing Rule, the adviser would continue to comply with the previous Advertising and Cash Solicitation Rules and look to the staff's positions under those rules
- However, once transitioned, advisers need to comply with the Marketing Rule in its entirety and cannot "cherry pick" the provisions they choose to comply with in advance while relying on the old rule for the other provisions
- "Game of Thrones" rule – you are either fully in or out, there is no middle ground!



Agenda

- Definition of “Advertisement”
- Seven Prohibitions/Principles
- Performance
- Testimonials/Endorsements



Definition of "Advertisement"

- Definition has two prongs:
 - the first prong applies to advertisements and communications directed to prospective and current clients and investors in private funds advised by the adviser
 - the second prong applies to certain testimonials and endorsements for which the adviser provides direct or indirect compensation (which include solicitation arrangements)

Definition of Advertisement: The First Prong

- An advertisement includes any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance (as defined in the rule), that offers the investment adviser's investment advisory services with regard to securities to prospective (not current) clients or investors in a private fund advised by the investment adviser or offers new (or additional) investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser
- Excludes:
 - Extemporaneous, live (i.e., not previously prepared or recorded), oral communications;
 - 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 (e.g., Form ADV, Form CRS, certain information in PPMs); or
 - A communication that includes hypothetical performance that is provided: (i) in response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser; or (ii) to a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication.



Seven Prohibitions/Principles

- The Seven Deadly Sins – An advertisement may not...
 1. Include an untrue statement of a material fact, or omit a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading;
 2. Include 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. Include 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. Discuss any potential benefits without providing fair and balanced treatment of any associated material risks or limitations;
 5. Include a reference to specific investment advice provided by the adviser that is not presented in a fair and balanced manner;
 6. Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
 7. Otherwise be materially misleading



Seven Prohibitions/Principles: A New Frontier?

- Generally, compliance with the seven principles will be based on a facts and circumstances analysis though prior SEC staff guidance may be useful or helpful in determining certain provisions (e.g., whether an advertisement is “fair and balanced”)

Performance

- Three general prohibitions:
 1. Any presentation of gross performance, unless the advertisement also presents net performance:
 - With at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and
 - Calculated over the same time period, and using the same type of return and methodology, as the gross performance.
 2. Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes 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....
 3. Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Commission.



Performance

- Special Requirements
 - Related Performance
 - Extracted Performance
 - Hypothetical Performance
 - Predecessor Performance



Performance: Related Performance

- May not include any related portfolios (i.e., meaning a portfolio with substantially similar investment policies, objectives and strategies as those of the services being offered in the advertisement) unless *all* related portfolios are included.
- Limited exception: may exclude any related portfolios if excluding the portfolio(s): does not result in materially higher performance than if all related portfolios were included and does not alter applicable standardized time periods, if applicable.



Performance: Extracted Performance

- May not include any extracted performance unless providing, or offering to provide promptly, performance results of the total portfolio from which the performance was extracted.
- Must also disclose whether the extraction reflects an allocation of cash held by the entire portfolio, the effect of such allocation (or absence) on the performance results shown.



Performance: Hypothetical Performance

- Treatment of “target” returns and projections
- Required policies and procedures
 - Be mindful of the audience (retail vs. institutional)
- Disclose criteria and assumptions underlying the calculations
- Provide (or, for investors in a private fund, provides, 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



Performance: Predecessor Performance

- Largely a codification of prior guidance
- “Primarily responsible” standard
- Inclusion of all “sufficiently similar” accounts (with limited exclusion similar to related performance)
- Required disclosure
- Supporting documents and records



Testimonials and Endorsements

- Cash Solicitation Rule (Rule 206(4)-3) rescinded but certain concepts have been imported into the Marketing Rule
- Solicitation/marketing arrangements for adviser's advisory services are now considered either endorsements (if solicitor is a third party) or testimonials (if solicitor is a client/investor)
- Existing solicitation arrangement agreements will need to be amended to comply with new requirements by compliance date



Testimonials and Endorsements: What's Notable for Fund Managers?

- Solicitation arrangements, testimonials and endorsements involving investors to private funds advised by the adviser are now included in the scope of the rule (farewell, Mayer Brown no-action letter!)
- SEC-registered brokers do not need to comply with certain disclosure requirements (but they will still apply to foreign unregistered placement agents)
- Reg. D bad actor disqualification applies in lieu of the “disqualifying event” definition in the rule



Upcoming Webinars in this series

- September 21, 2021: Enforcement Trends Affecting Investment Advisers and Other Fiduciaries
- September 30, 2021: Attorney Conduct Rules & Escalation of Issues



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