

SEC Advertising Rules

Summary of SEC Guidance Around Advertising and Marketing by Registered Investment Advisers, under historical rules and other interpretative guidance as compared to the SEC’s new rule addressing advertising and solicitation (“Rule”), which become effective on November 4, 2022.



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Topic	Historical Regime	New Regime
Definition of Advertisement	<ul style="list-style-type: none">Covers written communications to more than one personExcludes oral communications, responses to unsolicited inquiries and private fund marketing materials	<ul style="list-style-type: none">First prong of definition relates to traditional advertisements covered under the old rule and includes any direct or indirect communication made to more than one person that offers investment advisory services to prospective clients <u>or prospective private fund investors</u>, or offers new investment advisory services to current clients <u>or current private fund investors</u>. Also includes communications to one or more persons if the communication includes hypothetical performance<ul style="list-style-type: none">Specifically excludes:<ul style="list-style-type: none">live oral communications (<i>not</i> scripts or recorded presentations)regulatory filings; general educational material, market commentary or “brand” content; communications designed to retain current clientsa communication that includes hypothetical performance provided in response to an unsolicited request or provided to a prospective or current private fund investor in a one-on-one communicationSecond prong of definition covers paid (cash and non-cash) testimonials and endorsements. This prong also captures activity traditionally considered solicitation under the current Cash Solicitation Rule (which is being rescinded) and <u>placement agents for private funds</u>
Testimonials	<ul style="list-style-type: none">Not definedBroadly prohibited	<ul style="list-style-type: none">Specifically defined to include any statement by a current client or private fund investor:<ul style="list-style-type: none">About its experience with the adviser and its supervised persons,That directly or indirectly solicits any current or prospective client to become a client (or private fund investor) for an adviser, orThat refers any current or prospective client to become a client (or private fund investor) for an adviserIn general, permissible for advisers to use, <u>provided</u> certain conditions are met (see discussion below)
Endorsements	<ul style="list-style-type: none">Not defined or separately addressed	<ul style="list-style-type: none">Defined as essentially the same as testimonial, but is made by a non-client or non-private fund investorIncludes any statement that indicates approval, support, or recommendation of the adviser or its personnel or describes that person’s experience with the adviser or its personnelTreated in the same manner as testimonials (see line above)
Solicitations	<ul style="list-style-type: none">“Cash Solicitation Rule” (SEC Rule 206(4)-3) governs with respect to cash payments for solicitation activities with respect to investment advisory clientsDoes <u>not</u> cover non-cash paymentsDoes <u>not</u> cover solicitation of private fund investors	<ul style="list-style-type: none">Cash Solicitation Rule rescinded<u>However</u>, solicitation activities are covered as advertisements under the second prong of the advertising definitionIncludes cash and non-cash compensation <u>and solicitation of private fund investors</u>
Testimonials, Endorsements, and Solicitations: Cash and Non-Cash Compensation	<ul style="list-style-type: none">Cash Solicitation Rule only applies with respect to cash payments	<ul style="list-style-type: none">Second prong of advertisement definition is triggered by any form of compensation, cash or non-cashCompensation includes: fees based on assets under management, flat or hourly fees, reduced advisory fees or fee waivers, directed brokerage paid to brokers for soliciting investors, sales awards or other prizes, and gifts, outings or other forms of entertainmentIncludes de minimis compensation, but some requirements under the Rule do not apply if compensation is only <i>de minimis</i> (\$1,000 or less)
Testimonials, Endorsements, and Solicitations: Conditions	<ul style="list-style-type: none">Testimonials/endorsements prohibitedSolicitation must comply with Cash Solicitation Rule, where applicable	<ul style="list-style-type: none">Testimonial/endorsement must comply with certain conditions that <u>vary based on whether person providing it is being compensated</u>Conditions fall into the following general categories:<ul style="list-style-type: none">Specific disclosures are providedOversight and compliance functionsWritten agreement between adviser and third-party promoterIn some cases, whether person providing testimonial/endorsement is subject to certain disqualificationsCertain requirements under Rule do not apply if statements are made by persons with readily apparent affiliations to adviserCertain requirements/conditions under Rule do not apply to testimonials and endorsements made by registered broker-dealers not subject to disqualification under the Securities Exchange Act of 1934, <u>provided</u> statements are subject to Regulation Best Interest treatment

Topic	Historical Regime	New Regime
General Antifraud Considerations	<ul style="list-style-type: none">• Untrue statements or omissions are expressly prohibited• Based on general antifraud principals and SEC guidance:<ul style="list-style-type: none">– Should not include misleading implications or inferences or unsubstantiated statements of fact– Risks and limitations should be treated in a fair and balanced manner– Past specific recommendations were only permitted under specific no-action letter guidance	<ul style="list-style-type: none">• Untrue statements or omissions remain expressly prohibited• Contains explicit guidance prohibiting use of misleading implications or inferences and unsubstantiated statements of <u>material</u> fact• Generally, all information in ads must be presented in a “fair and balanced” manner• Past specific recommendations are generally permitted, <u>provided</u> they are presented in fair and balanced manner (i.e., no “cherry picking”)
Performance (Generally)	<ul style="list-style-type: none">• Required to include “net of fees” except in one-on-one presentations to sophisticated clients• No specific timeframes required• Prohibited from indicating SEC has reviewed or approved calculation and presentation of performance	<ul style="list-style-type: none">• <u>Always</u> required to include “net of fees” performance in advertisements; any presentation of gross performance must also include the net performance with at least equal prominence and covering the same period• Required to include one, five and ten year performance (or since inception, if shorter), <u>except for private funds</u> (no specific timeframe required)• Prohibited from indicating SEC has reviewed or approved calculation and presentation of performance
Performance: Related Performance	<ul style="list-style-type: none">• Not directly addressed as general matter• Registered investment companies can use related performance for a limited period if substantially similar and disclosed	<ul style="list-style-type: none">• Permitted to present performance of one or more portfolios with substantially similar investment policies, objectives, and strategies as those of services offered in advertisement, <u>unless</u> poorer related performance is excluded or excluded performance alters the presentation of performance over the prescribed time periods
Performance: Extracted Performance	<ul style="list-style-type: none">• Not directly addressed	<ul style="list-style-type: none">• Permitted to present performance results of a subset of investment extracted from a portfolio, <u>provided</u> offer is made to provide performance for all investments in such portfolio
Performance: Hypothetical Performance	<ul style="list-style-type: none">• Covered under guidance on “model” performance• Permitted subject to explicit disclosures on limitations	<ul style="list-style-type: none">• Permitted to present performance results that were not actually achieved by any portfolio of the adviser, <u>provided</u>:<ul style="list-style-type: none">– Procedures in place relating to use of hypothetical performance– Sufficient disclosure made regarding criteria and assumptions– Disclosure of risks and limitations– Generally, <u>not included in mass marketing</u>• Interactive analytic tools are <u>not</u> covered• Specifically addresses three different types of hypothetical performance: model performance, back-tested performance, and targets and projections
Performance/Track Record: Portability	<ul style="list-style-type: none">• Concept not specifically defined• Track record and performance “portable” to new firm if:<ul style="list-style-type: none">– Personnel at prior and new firm play same roles– Strategies are identified– Sufficient disclosure is included	<ul style="list-style-type: none">• Specifically defines the concept• Track record and performance “portable” to new firm, <u>provided</u>:<ul style="list-style-type: none">– Personnel primarily responsible for the performance manage the accounts and are clearly identified– Includes all similarly managed accounts at prior firm– Sufficient disclosure is included
ADV Disclosure	<ul style="list-style-type: none">• Marketing primarily covered by website listing (Item 1) and cash solicitation disclosure (Item 8)	<ul style="list-style-type: none">• Addition of Item 5, subsection L (“Marketing Activities”), requiring yes or no answers to questions about advertising practices
Recordkeeping	<ul style="list-style-type: none">• Must maintain advertising materials and records supporting performance presented in advertising	<ul style="list-style-type: none">• Expanded recordkeeping requirements to cover:<ul style="list-style-type: none">– All advertisements– Predecessor performance materials– Testimonials– Required disclosures– Workpapers supporting performance presentation– Documentation regarding intended audience

SOURCE: Securities and Exchange Commission, Final Rule, *Investment Adviser Marketing*, SEC Release No. IA-5653 (to be codified at 17 C.F.R. Parts 275 and 279), available at <https://www.sec.gov/rules/final/2020/ia-5653.pdf>.

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