Proskauer

SEC Revises Marketing Rule for Registered Investment Advisers

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On December 22, 2020, the Securities and Exchange Commission ("SEC") adopted amendments to existing Rule 206(4)-1 (the "Advertising Rule") and rescinded Rule 206(4)-3 (the "Cash Solicitation Rule") under the Investment Advisers Act of 1940 ("Advisers Act"). The SEC also made related amendments to Form ADV and Rule 204-2, the books and records rule.

The SEC received more than 90 comment letters on the proposal, resulting in significant revisions to the original proposed rule.[1] The new Rule 206(4)-1 applies to all advisers registered with the SEC. The changes made by the SEC in large part reflect the body of interpretation that has grown up around the current Advertising Rule, which was adopted in 1962. In some cases, the changes reflect best practices adopted by many advisers over time. Nonetheless there are some significant changes that will affect many advisers, requiring all firms to review their current policies, procedures and practices.

The new rule will be effective 60 days after publication in the Federal Register. However, the SEC has adopted a compliance date that is 18 months after the effective date in order to give advisers a transition period to comply with the amendments. Advisers will therefore have the option of complying with either the old rules or the new rule during the 18-month transition period.

Overview

The new rule:

- merges the Cash Solicitation Rule into the existing Advertising Rule, so that all activities regulated under both rules will now be subject to a single Marketing Rule, Rule 206(4)-1;
- explicitly extends the scope of the new rule to investors in private funds, so that private fund marketing materials must conform to the rule;
- eliminates certain *per se* prohibitions in the current rule, including the prohibitions on testimonials and past specific recommendations, and replaces them with several

new “principles based” requirements;

- creates several new general prohibitions against misleading advertisements; and
- adds new requirements for presentation of performance information in advertisements.

In a departure from the proposed rule, the new rule does not require review or approval of marketing materials before dissemination, does not distinguish between advertisements designed for retail and institutional clients and does not extend the rule to communications that are designed solely to retain existing clients. These proposed changes would have significantly changed current practices.

The SEC staff is also withdrawing many of the staff no-action letters that have interpreted the old Advertising Rule. Many of the principles set forth in those letters have been incorporated into the new rule and the 430-page adopting release that accompanied the rule.[2]

Definition of “Advertisement”

The new rule amends the definition of “advertisement” in important ways. While all communications by an investment adviser are subject to the anti-fraud provisions of the Advisers Act, only those that meet the definition of “advertisement” are subject to the specific provisions of the new rule. However, the new rule addresses more types of advertising practices than the prior rule.

The amended definition has two prongs. The first prong, which captures traditional advertisements, includes any direct or indirect communication that an investment adviser makes to more than one person, and which:

- offers securities advisory services to prospective clients or investors in a private fund advised by the investment adviser, or
- offers new investment advisory services to current clients or investors in a private fund advised by the investment adviser.[3]

The definition includes communications made to just one person if the communication includes hypothetical performance, unless the communication is provided in response to an unsolicited request, or to a prospective or current investor in a private fund.[4]

Social Media. By describing an advertisement as a communication disseminated by any means, rather than the current Advertising Rule's dated reference to circulars, publications and radio or television, the SEC intends to cover all types of electronic communications, including e-mails, websites and social media. This reflects the SEC's modern interpretation of the current Advertising Rule.

Indirect Communications. The first prong of the new definition of "advertisement" includes both an adviser's direct and its indirect communications "by or on behalf of the adviser by a third person." Whether a communication is considered made by the adviser is determined by "facts and circumstances."[5] Thus, communications disseminated by placement agents, consultants, other advisers, broker-dealers, funds-of-funds or a related person of the adviser, that are provided by the adviser or which the adviser has participated in creating or has authorized, may be considered an advertisement. Communications by third parties where the adviser has not participated in or authorized the creation or dissemination of the advertisement, however, would generally not be considered to be made "by or on behalf of the adviser."

Communications Sent to More Than One Person. In response to comments, the SEC limited the scope of the first prong of the rule to communications sent to more than one person (as the current Advertising Rule does), unless the communication contains hypothetical performance. This exception reflects the SEC's concerns with the use of hypothetical performance.

Exclusions. Excluded from the first prong of the definition are any:

1. extemporaneous, live, oral communications (but not any accompanying scripts, slides, chats, etc.);
2. information contained in a statutory or regulatory notice, filing or other required communication (*e.g.*, Form ADV), provided that such information is reasonably designed to satisfy the requirements of such notice, filing or other required communication; and
3. communications that include hypothetical performance that are provided (i) in response to an unsolicited investor request or (ii) to a private fund investor in a one-on-one communication.[6]

Solicitation Activities. The second prong of the definition includes compensated testimonials and endorsements for which the adviser provides direct or indirect compensation.[7] While capturing some traditional advertisements, this prong is designed primarily to include the activities of paid solicitors (of advisers) and placement agents (of private funds). Unlike the first prong, one-on-one and oral communications are deemed to be advertisements, and thus the second prong applies to traditional solicitation activities that may be carried on individually with prospective clients or private fund investors.

- A "*testimonial*" is defined as a statement by a current or former client or private fund investor about their experience with the adviser, the solicitation of a prospective investor in a private fund or a referral of a prospective client to the adviser or a private fund.[8]
- An "*endorsement*" includes any statement by a person other than a current client or private fund investor (*g.*, a placement agent) that indicates approval, support, or recommendation of the investment adviser or describes that person's experience with the investment adviser or its supervised persons.[9]

Whether an adviser provides direct or indirect compensation is determined based on facts and circumstances and could, under appropriate circumstances, include gifts.

Private Funds. The definition of advertisement (in both prongs) includes promotional materials sent to prospective investors in hedge funds, private equity funds and other private funds managed by an adviser, although private fund investors are not "clients" of the adviser. Private funds are funds that rely on the exclusions in Section 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, but not other types of pooled investment vehicles such as mutual funds and business development companies.[10]

The SEC confirmed that private placement memoranda, account statements, transaction reports and annual reports should not generally be considered advertisements, but pitch books and other marketing material accompanying private placement memoranda would. However, the SEC indicated that if promotional material (such as past performance information) is included in private placement memoranda, account statements or periodic reports, then the SEC will view the material as an advertisement subject to the new rule.[11]

General Prohibitions

The current Advertising Rule has prohibited advertisements that contain untrue statements of a material fact, or which are otherwise false or misleading.[12] The SEC has brought almost all of its Advisers Act marketing-related enforcement actions under this provision. The new rule retains this provision and adds six new general prohibitions:

- *Unsubstantiated Material Statements of Fact.* Advertisements may not contain a material statement of fact that an investment adviser does not have a reasonable basis for believing that it will be able to provide substantiation on demand by the SEC.[13] This provision shifts the burden of proof for demonstrating the accuracy of material statements in an advertisement from the SEC to the adviser, and will likely require advisers to keep records to support material statements made in advertisements. The SEC will not have to demonstrate that statements are materially misleading, but merely that the adviser failed to be able to demonstrate that they are not. The SEC stated that opinions are not statements of fact.
- *Untrue or Misleading Implications or Inferences.* Advertisements may not include any statements that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser.[14] According to the SEC, this provision is designed to address statements that, while literally true, have the potential to create misleading impressions by recipients.
- *Failure to Provide Fair and Balanced Treatment of Material Risks or Other Limitations.* The new rule prohibits advertisements that discuss any potential benefits to clients or private fund investors connected with or resulting from the investment adviser's services or methods of operation without providing a fair and balanced treatment of any associated material risks or other limitations associated with the potential benefits.[15]
- *References to Specific Past Investment Advice and Performance Results.* The SEC replaced the current prohibition against the use of past specific recommendations in advertisements, unless the adviser also disclosed all recommendations made during the last two years, with a new prohibition on the use of past specific recommendations that are not presented in a manner that is "fair and balanced."[16] The SEC did not, however, provide meaningful guidance as to how the term "fair and balanced" will be interpreted and applied in practice. The new provision is accompanied by a new recordkeeping provision and is not limited (as is the current rule) to recommendations that would have been profitable.
- *Performance Information.* The new rule prohibits advertisements that contain performance results or performance time periods that are not presented in a "fair

and balanced" manner.[17]

- *Otherwise Misleading.* Finally, the new rule contains a catch-all provision prohibiting advertisements that are otherwise materially misleading.[18]

Each of these provisions may be violated by mere negligence, *i.e.*, the SEC need not prove scienter to prevail in an enforcement action.

Testimonials, Endorsements and Solicitations

The new rule prohibits advisers from including a testimonial in an advertisement or directly or indirectly compensating persons who provide testimonials or endorsements without complying with certain conditions, which are largely drawn from the existing Cash Solicitation Rule.

Disclosure. The SEC eliminated the requirement in the current Cash Solicitation Rule for delivery of a separate solicitor disclosure statement, but replaced it with a general requirement that comparable disclosure be provided to all prospective clients or investors who are solicited.[19]

The new rule requires that an adviser must provide the disclosure, or reasonably believe that the person giving the testimonial or endorsement discloses, clearly and prominently, (i) whether the person giving the testimonial or endorsement is a client or a non-client, (ii) that compensation was paid for the testimonial or endorsement, if applicable, (iii) a brief statement of any material conflicts of interests of the person giving the testimonial; and (iv) for certain solicitors, material terms of any compensation arrangement. The disclosure must be delivered at the time the testimonial or endorsement is disseminated in an advertisement (if not included in the advertisement) as well as a solicitation.

Oversight and Compliance. All testimonials and endorsements will be subject to oversight and compliance by the adviser. The new rule requires the investment adviser to have a reasonable basis for believing that a testimonial or endorsement complies with the rule (by, for example, making periodic inquiries to clients regarding whether a solicitor is providing the required disclosures).

Written Agreement. The adviser must enter into a written agreement with any person giving a *compensated* testimonial or endorsement that describes the scope of the agreed-upon solicitation activities.

Disqualification of "Bad Actors." The new rule contains disqualification provisions which prohibit an adviser from compensating a person, directly or indirectly, for any testimonial or endorsement if the adviser knows, or, in the exercise of reasonable care, should have known, that the person is an ineligible person at the time the testimonial or endorsement is disseminated.[20] The rule defines an "ineligible person" to mean a person that, within the previous 10 years, was subject to a disqualifying SEC action or disqualifying event set forth in the rule.[21]

Exemptions. The rule contains four partial exemptions from the written agreement and disqualification conditions for use of compensated testimonials and endorsements.

- *De Minimis Compensation*. Advisers need not enter into a written agreement with persons giving testimonials or endorsements who receive compensation of less than $1,000.
- *Related Persons*. Advisory affiliates (*g.*, affiliates, partners, officers and employees) are also exempt from the written agreement requirement in circumstance where the affiliation with the adviser is readily apparent.
- *Broker-Dealers.* Registered broker-dealers that are not subject to disqualification under the Exchange Act are exempt from the disqualification provisions but are still generally subject to the disclosure requirements; and
- *Regulation D Offerings*. Persons providing the testimonial or endorsement are not subject to the disqualification provisions if they are not disqualified from participating in the Regulation D offering that relates to the testimonial or endorsement being provided.[22]

Third-Party Ratings

Advisers may use third-party ratings and rankings in advertisements subject to the Marketing Rule's general prohibitions. Their use is also subject to certain additional requirements as described below.

- *Third Parties*. The rating or ranking must be provided by a person who is not a related person of the adviser and who provides ratings or ranking in the ordinary course of its business;
- *Due Diligence.* The adviser must have a reasonable basis to believe that the methodology used to create the rating makes it equally easy for a participant to provide favorable and unfavorable responses and is not designed or prepared to produce any predetermined result; and

- *Disclosure Requirements.* Advertisements must contain clear and prominent disclosures about the date of the rating, the identity of the party that gave the rating or ranking, and, if applicable, any compensation paid for obtaining or using the rating.[23]

Performance Advertising

The new rule imposes specific requirements on advertisements that include performance information. The rule does not prescribe standardized methods of calculating performance (as the SEC has required for mutual funds) but rather identifies elements of presentations that "raise special concerns" to the SEC.

The SEC will continue to evaluate whether methods of calculation or presentation are misleading or otherwise violate the new rule under the general prohibitions discussed above, including advertisements that contain performance results or performance time periods that are not presented in a "fair and balanced" manner.[24] The SEC indicated that, when using performance in an advertisement, advisers should specifically describe the type of performance presented (*i.e.*, what is included in the return).[25]

Net Performance. The new rule prohibits any presentation of gross performance unless the advertisement also presents net performance with at least equal prominence to the presentation of gross performance.[26] In addition, the net performance must be calculated over the same time period using the same type of return and methodology as gross performance.[27] Unlike the proposed rule, this provision applies to all advertisements, and not only to retail investors. The SEC thus codified one of the most significant requirements of the 1986 *Clover Capital* no-action letter.[28] The adopting release explains that the other guidance provided in that letter, depending upon the facts and circumstances, may also continue to apply (*e.g.*, disclosure regarding the effect of material market or economic conditions).

Model Fees. An adviser may use a model fee to calculate net returns if it reflects the higher of (i) the highest fee it historically has charged or (ii) the highest fee it proposes to charge to the "intended audience."[29]

Prescribed Time Periods. The new rule prohibits the presentation of performance results of any portfolio or any composite aggregation of related portfolios (other than a private fund) in advertisements unless also accompanied by the results for one-, five- and ten-year periods. Each must be presented with equal prominence and end on a date that is no less recent than the most recent calendar-year end. If the portfolio was not in existence for the full duration of any of these three periods, the lifetime of the portfolio can be substituted.[30]

Private Funds. The SEC did not require private fund performance to conform to the one-, five- and ten-year uniform time periods, agreeing with commenters' assertion that in some circumstances showing very recent performance would be misleading. Thus, sponsors of private funds are free to choose the time periods for which performance is presented, subject to the presentation of performance being "fair and balanced," and therefore presumably not selecting odd, but especially favorable, time periods.

Related Performance. The new rule requires that advertisements that contain performance results of related accounts or portfolios include the performance of all similar accounts or portfolios, unless the exclusion of an account or portfolio would not result in materially higher performance than if the account or portfolio had been included.[31] Each adviser may create its own criteria for a composite; this provision is limited to material omissions from the composite. The SEC has over the years brought enforcement actions and issued deficiency letters to advisers who engaged in "cherry-picking" of accounts or portfolios included in performance information.

Extracted Performance. The new rule also addresses the use of "extracted performance," which is the presentation of a portion of investment performance extracted from a single actual account.[32] For example, an adviser that manages a general senior debt fund, but is marketing a new fund focused specifically on commercial real estate loans, may wish to "extract" the performance of commercial real estate loans from its broader senior debt portfolio in order to demonstrate its abilities in that specific sector.

An advertisement containing extracted performance must also provide, or offer to provide, the results of the total portfolio from which the performance was extracted.[33] The new rule does not prohibit an adviser from presenting a composite of extracts of multiple portfolios, including composite performance from multiple portfolios. However, such a presentation would be treated as hypothetical performance and would be subject to the provisions discussed below for advertisements containing hypothetical performance.[34]

Statements of Commission Approval or Review. The new rule prohibits any advertisement that includes a statement, whether express or implied, that the calculation or presentation of performance results has been reviewed or approved by the SEC.[35]

Hypothetical Performance. The new rule also prohibits the use of hypothetical performance in advertisements unless certain conditions are met. The SEC explained that these conditions are designed to limit the distribution of hypothetical performance to investors who "have access to the resources to independently analyze this information and who have the financial expertise to understand the risks and limitations of this type of performance."[36]

- *Definition of Hypothetical Performance*. Hypothetical performance includes results that were not actually achieved by any one portfolio,[37] and explicitly includes:
    1. *Model Performance*, *e.g.*, performance of model portfolios in which there was no actual trading or holding of investments.
    2. *Backtested Performance*, *e.g.*, by the application of an investment strategy to data from prior time periods when the strategy was not actually employed. In explaining its concern with backtested performance, the SEC noted that it "pose[s] a high risk of misleading investors since, in many cases, [it] may be readily optimized through hindsight."[38]
    3. *Targeted or Projected Returns.* The SEC describes performance targets as aspirational and used as a benchmark, while estimated performance is a prediction based on historical experience and assumptions.[39] Performance targets include targeted performance or returns of the advisory *seervices* or funds offered by the adviser, and not projections of general market performance or conditions.[40]

- *Conditions for Use*. Hypothetical performance may not be used in an advertisement unless the investment adviser:

1. adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement;

2. provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and

3. provides, or if the intended audience is investors in a private fund provides, or offers 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.

- *Practical Implications*. The SEC believes these conditions, with their focus on "the intended audience," will be met in most cases only when the advertisement is provided to investors with the "resources and financial expertise" to assess the hypothetical performance. This will create significant compliance risk for advisers that use hypothetical or target returns in advertisements targeted to the retail market, while giving some comfort to advisers using them for marketing presentations to institutional and other professional investors accompanied by significant disclosure and supported by sufficient documentation.
- *Predecessor Performance*. The new rule codifies prior SEC staff no-action letters that address the circumstances under which an adviser may use another adviser's performance to market itself. Under the new rule, an adviser may not use predecessor performance in an advertisement unless:
    1. the person or persons who were primarily responsible for achieving the prior performance results (*e.g.*, making the investment decisions) manage the applicable accounts at the advertising adviser. Where a committee managed the group of investments, the committee comprising a "substantial identity" of the membership must manage the applicable accounts at the adviser advertising the performance;

    2. the accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser;

    3. all accounts that were managed in a substantially similar manner are presented unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods required by the final rule;

4. the advertisement includes, clearly and prominently, all relevant disclosures, including that the performance results were from accounts managed at another entity,[41] and
5. the use of predecessor performance must be accompanied by sufficient disclosure to satisfy the general prohibitions.

Amendments to Form ADV

The SEC adopted amendments to Form ADV to add a subsection L to Item 5 of Part 1A ("Marketing Activities") to require information about an adviser's use of testimonials, endorsements, third-party ratings and previous investment advice. Specifically, Item 5 will require an adviser to state whether any of its advertisements include:

- performance results, hypothetical performance, or predecessor performance;
- testimonials, endorsements or a third-party rating, and if so, whether the adviser pays or otherwise provides compensation, directly or indirectly, in connection with their use; and
- a reference to specific investment advice provided by the adviser (regardless of whether it would have been profitable).

The new reporting items are designed to better permit SEC staff to identify perceived compliance risks. They will need to be updated only annually.

Recordkeeping

The SEC also adopted related amendments to Rule 204-2 (the "Recordkeeping Rule") that will require investment advisers to make and keep records of all advertisements (as defined in the new rule) they disseminate, including materials generated in connection with certain oral communications, with two exceptions.[42] The current rule only requires advertisements to be kept if they are disseminated to ten or more persons.

The adopting release addresses three special situations in connection with the record retention requirements:

- First, in the case of oral statements that are advertisements, an adviser may, instead of recording and retaining the advertisement, retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement.

- Second, if an adviser's advertisement includes a compensated oral testimonial or endorsement, the adviser may, instead of recording and retaining the advertisement, make and keep a record of the disclosures provided to investors in connection with such oral testimonial or endorsement.
- Third, if the required disclosures with respect to a testimonial or endorsement are not included in the advertisement itself, then the adviser must retain copies of such separate disclosures provided to investors.

There are a significant number of new specialized recordkeeping requirements. Advisers must make or retain:

- originals of all written communications received and copies of all written communications sent by an investment adviser relating to predecessor performance and the performance or rate of return of any portfolios;
- documentation to support performance calculations (including predecessor performance);
- copies of any questionnaire or survey used in preparation of a third-party rating (in the event the adviser obtains a copy of the questionnaire or survey);
- if not included in a testimonial or endorsement, a record of disclosures provided to the client;
- documentation substantiating the adviser's reasonable basis for believing that a testimonial, endorsement or third-party rating complies with the applicable tailored requirements of the Marketing Rule and copies of any written agreement made with promoters;
- a record of certain affiliated personnel of the adviser, to parallel an exemption for certain affiliated personnel from the compensated testimonials and endorsements compliance requirements; and
- a record of who is the "intended audience" for any advertisement containing hypothetical performance or utilizing model fee structures.

Conclusion

As the current Advertising Rule has been augmented by roughly 200 letters of historical guidance from the SEC staff, certain of the staff no-action letters will be withdrawn in connection with the new rule as those positions are either incorporated into the new rule or will no longer apply. Accordingly, advisers will need to determine which of their existing marketing practices will need to be changed to conform to the new rule.

The SEC has increasingly cited registered investment advisers in both formal administrative proceedings and examination deficiency letters for having inadequate compliance policies and procedures. Given the frequency in which the adopting release notes the need for advisers to adopt and implement reasonable policies and procedures to promote compliance with the new or amended requirements, it should be expected that the staff of the SEC's Division of Examinations will be monitoring advisers' compliance programs closely during the transition period and noting any perceived deficiencies once the compliance date arrives.

Finally, managers reporting to the SEC as exempt reporting advisers should consider the final rule to be instructive in designing their own marketing materials, as the SEC staff have stated that they view Rule 206(4)-1 (which by its scope only applies to registered investment advisers) to be relevant to the application of the anti-fraud provisions under the Advisers Act, which apply to all investment advisers, whether registered or not.

[1] The Proskauer comment letter was cited 13 times in the final release, including in connection with some of the key proposals that were not ultimately adopted.

[2] Advisers Act Rel. No. 5653 (Dec. 22, 2020).

[3] Final Rule 206(4)-1(e)(1)(i).

[4] Final Rule 206(4)-1(e)(1)(i)(C).

[5] Adopting Release at 19.

[6] Final Rule 206(4)-1(e)(1)(i)(A).

[7] Final Rule 206(4)-1(e)(2).

[8] Final Rule 206(4)-1(e)(17).

[9] Final Rule 206(4)-1(e)(5).

[10] Final Rule 206(4)-1(e)(13).

[11] Adopting Release at n. 194.

[12] Rule 206(4)-1(a)(5).

[13] Final Rule 206(4)-1(a)(2).

[14] Final Rule 206(4)-1(a)(3).

[15] Final Rule 206(4)-1(a)(4).

[16] Final Rule 206(4)-1(a)(5).

[17] Final Rule 206(4)-1(a)(6).

[18] Final Rule 206(4)-1(a)(7).

[19] Final Rule 206(4)-1(b).

[20] Final Rule 206(4)-1(b)(3).

[21] Final Rule 206(4)-1(e)(9).

[22] Final Rule 206(4)-1(b)(4).

[23] Final Rule 206(4)-1(c).

[24] Final Rule 206(4)-1(a)(6).

[25] Adopting Release at 171.

[26] Final Rule 206(4)-1(d)(1). The rule includes definitions of “gross performance” and “net performance.” Rule 206(4)-1(e)(7) and (10).

[27] Final Rule 206(4)-1(d)(1)(ii).

[28] Clover Capital Mgmt. (Oct. 28, 1986).

[29] Final Rule 206(4)-1(e)(10)(ii). This provision reflects a 1996 SEC staff no-action letter *J.P. Morgan Investment Mgmt., Inc.* (May 7, 1996).

[30] Final Rule 206(4)-1(d)(2).

[31] Final Rule 206(4)-1(d)(4) and (e)(14) and (15). The provision does not apply to the past performance of a portfolio (*i.e.*, the fund) itself.

[32] Final Rule 206(4)-1(e)(6) (defining “extracted performance”).

[33] Final Rule 206(4)-1(d)(5).

[34] Adopting Release at 198.

[35] Final Rule 206(4)-1(d)(3).

[36] Adopting Release at 200.

[37] Final Rule 206(4)-1(e)(8).

[38] Adopting Release at 201.

[39] Final Rule 206(4)-1(e)(8).

[40] Adopting Release at 214.

[41] Amended Rule 206(4)-1(d)(7).

[42] Amended Rule 204-2(a)(11).

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