Holland & Hart

New Investment Adviser Marketing Rule Now in Effect



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The transition period for recently adopted changes intended to modernize rules that govern investment adviser advertisements and compensation of solicitors has expired (effective November 4, 2022). The new rules revise and combine rules governing advertisements and compensation of solicitors into a single rule, referred to as the "**Marketing Rule**," and make related changes to Form ADV and books and records requirements. Effective as of the compliance date, key no-action letters regarding advertising and payment of solicitors were withdrawn or modified to reflect the new rules.

Immediate Action

If advisers have not done so already, they should:

- Review existing marketing materials for compliance and maintain internal processes and procedures to ensure all marketing, advertising, and sales materials (or any materials that may contain the same information) are in compliance
- Be prepared to substantiate statements of fact included in marketing materials and maintain original records necessary to do so
- Ensure that personnel who are involved in the preparation of any marketing, advertising, or sales materials receive appropriate training regarding the rules
- Implement procedures to avoid having any promoters who are bad actors
- Maintain record-keeping, internal controls, and data-gathering processes and procedures to support performance-related communications

To Whom Does This Apply

The Marketing Rule applies to any investment adviser that is registered or required to be registered with the Securities and Exchange Commission (the "**SEC**") under the Investment Advisers Act of 1940 and that directly or indirectly disseminates an advertisement.

Definition of "Advertisement"

The revised definition of advertisement:

- Includes any direct or indirect communication an investment



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adviser makes that offers the investment adviser's investment advisory services with regard to securities to prospective clients or private fund investors, or offers new or additional investment advisory services with regard to securities to current clients or private fund investors
    - But excludes most one-on-one communications (unless hypothetical performance is provided, other than in response to an unsolicited investor request or to a private fund investor); extemporaneous, live, or oral communications; or information contained in a statutory or regulatory notice, filing or other similar required communication
- Includes any endorsement or testimonial for which an adviser provides cash or non-cash compensation directly or indirectly (e.g., directed brokerage, awards, or reduced advisory fees), including oral and one-on-one endorsements and testimonials, but excluding information contained in a statutory or regulatory notice
- Defines "hypothetical performance" as performance results not actually achieved by any portfolio of the adviser, including model performance, backtested performance, and target or projected performance returns

Prohibited Advertising Practices

The Marketing Rule includes principles-based prohibitions on types of activities that could be false or misleading. An advertisement may not:

- Include an untrue statement of a material fact or omit to state a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading
- Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate on demand by the SEC
- 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
- Discuss any potential benefits without providing fair and balanced treatment of any associated material risks or limitations
- Reference specific investment advice provided by the adviser that is not presented in a fair and balanced manner
- Include or exclude performance results, or presenting performance time periods, in a manner that is not fair and balanced
- Otherwise be materially misleading

Prohibited Use of Performance Information

Performance information may be used so long as it does not include:

- *Presentations of gross performance*, unless net performance is

presented with equal or greater prominence and in a format designed to facilitate comparison with the gross performance, calculated over the same time period and using the same type of return and methodology as the gross performance.

- *Any performance results* (other than for private funds), unless performance results of the same portfolio or composite aggregation of related portfolios, as applicable, for one-, five-, and 10-year periods, are presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end. If the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
- *Any express or implied statement* by the investment adviser that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the SEC.
- *Any related performance*, unless it includes all related portfolios, provided that related performance may exclude any related portfolios if: (i) the advertised performance results are not materially higher than if all related portfolios had been included and (ii) the exclusion of any related portfolio does not alter the presentation of any applicable time periods.
- *Any extracted performance*, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- *Any hypothetical performance*, unless the investment adviser: (i) 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; (ii) provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and (iii) provides (or, if the intended audience is an investor 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.
- *Any predecessor performance*, unless: (i) the person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser; (ii) the accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors; (iii) all accounts that were managed in a substantially similar manner are advertised, 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; and (iv) the advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

Prohibited Testimonials, Endorsements, and Ratings

The Marketing Rule also prohibits advertisements that contain testimonials, endorsements, or third-party ratings, unless certain conditions are met.

- Testimonials and endorsements may be used if they satisfy certain disclosure, oversight, and disqualification provisions, including (i) that the adviser have a written agreement with any promotor; (ii) prominent disclosure of information regarding compensation, conflicts of interest, and whether a promotor is a client or private fund investor; and (iii) a prohibition on promotors who are "bad actors" under the rules, including those with convictions or orders from the SEC in connection with violations of certain securities laws.
- Third-party ratings may be used in an advertisement, so long as the adviser provides disclosures and satisfies certain criteria pertaining to the preparation of the rating.

Recordkeeping Requirements

Investment advisers must make and keep copies of all advertisements they disseminate, directly or indirectly. For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement. For compensated oral testimonials and endorsements, the adviser may instead make and keep a record of the disclosures provided to clients or investors. The amendments also incorporate new requirements for making and keeping records related to performance information, testimonials, endorsements, and third-party ratings.

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