

December 28, 2020

SEC Modernizes and Combines Investment Adviser Advertising and Cash Solicitation Rules

On December 22, 2020, the SEC adopted amendments to the advertising and cash solicitation rules ([available here](#)) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), along with corresponding amendments to the books and records rules and Form ADV.

The amendments create a merged rule (the “Marketing Rule”) that replaces both the investment adviser advertising rule in Rule 206(4)-1 (the “Old Advertising Rule”) and the cash solicitation rule in Rule 206(4)-3 (the “Old Solicitation Rule”) under the Advisers Act, neither of which had been substantively revised since their initial adoption in the 1960s. The Marketing Rule is intended to modernize the regulatory regime to reflect changes in the investment advisory market and means of communication by creating rules that are evergreen and can evolve with changing technologies.

The Marketing Rule moves to a more principles-based approach focused on advertisements not being “fair and balanced” and not materially misleading based on facts and circumstances. Many of the new requirements of the Marketing Rule and practices discussed in the adopting release are already best practices in the private funds industry; so while some changes will be necessary and some additional flexibility has been granted, the Marketing Rule is not expected to mark a sea change in the industry.

The following are certain highlights of the Marketing Rule and its application to private fund advisers. A more detailed summary of the Marketing Rule, including a comparison against the Old Advertising Rule and the Old Solicitation Rule, is attached as [Annex A](#) and [Annex B](#), respectively.

Definition of “Advertisement”

The Marketing Rule defines advertisement as:

- (1) any direct or indirect communication an investment adviser makes to more than one person (or to just one person if the communication involves hypothetical performance), that (x) offers the adviser’s investment advisory services with regard to securities to prospective clients or prospective private fund investors, or (y) offers *new* investment advisory services with regard to securities to current clients or current private fund investors; in each case, excluding:
 - (a) extemporaneous, live, oral communications (but not any scripts or prepared materials for such a communication);
 - (b) information contained in a statutory or regulatory notice, filing or other required communication that is reasonably designed to satisfy the requirements thereof; and

-
- (c) communications that include hypothetical performance provided either (x) in response to an unsolicited request for such information from a prospective or current client or private fund investor; or (y) to a prospective or current private fund investor in a one-on-one communication; and
- (2) any endorsement or testimonial (to one or more persons) for which an adviser provides cash or non-cash compensation, directly or indirectly, **excluding** information contained in a statutory or regulatory notice, filing or other required communication that is reasonably designed to satisfy the requirements thereof.

The first prong of the definition relates to traditional advertisement activities previously captured by the Old Advertisement Rule. The second prong is intended to pick up traditional testimonial and endorsement activities previously addressed under the Old Advertisement Rule as well as solicitation activities previously addressed under the Old Solicitation Rule by defining “endorsement” to include solicitation or referrals of current or prospective clients or private fund investors.

General Prohibitions

The Marketing Rule prohibits the following in any advertisement:

- any untrue statement of a material fact, or omission of a material fact necessary to make the statement, in light of the circumstances in which it was made, not misleading (i.e., a “10b-5” standard);
- 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;
- information that is reasonably likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
- discussion of potential benefits to clients or investors in connection with the investment adviser’s services or methods without a fair and balanced discussion of any material risks or limitations associated with the potential benefits;
- reference to specific investment advice provided by the investment adviser where such advice is not presented in a fair and balanced manner;
- performance results that include or exclude certain results or time periods in a manner that is not fair and balanced; and
- otherwise being materially misleading.

These prohibitions apply to all advertisements; advertisements subject to additional specific requirements discussed below will still need to be held to these overarching standards.

Performance

The Marketing Rule incorporates many of the principles that applied to performance advertising in the line of no-action letter guidance under the Old Advertising Rule, but gives investment advisers incrementally more flexibility by taking a more principles-based approach and not limiting advisers to the specific requirements of the no-action letter guidance.

Under the Marketing Rule:

- gross performance must be accompanied by net performance presented with equal prominence in a format designed to facilitate comparison with gross performance;
- performance results, *other than performance results of a private fund*, must be presented over one-, five-, and ten-year time periods with equal prominence;
- any express or implied statement that the calculation or presentation of performance results has been approved or reviewed by the SEC is prohibited;
- if performance results from any related portfolio (*i.e.*, a portfolio with substantially similar investment policies, objectives, and strategies as that being offered in the advertisement) is included, the performance of all related portfolios must be included, subject to certain exceptions;
- extracted performance (*i.e.*, performance of a subset of a single portfolio) is permitted so long as the advertisement provides, or offers to provide promptly, performance results of the total portfolio;
- hypothetical performance (*i.e.*, performance results that were not actually achieved by any *portfolio of the adviser*¹) *may be presented only if the adviser (x) 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, and (y) provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the hypothetical performance; and
- predecessor performance (*i.e.*, performance of a portfolio that was not advised at all times during the relevant period by the advertising adviser) is permitted only if (x) there is sufficient similarity with regard to the personnel and accounts at the predecessor adviser and the personnel and accounts at the advertising adviser that the prior performance would provide relevant information to clients or investors; (y) all relevant prior accounts are included, subject to certain exceptions, and (z) certain required disclosures are included clearly and prominently.

¹ Hypothetical performance includes, without limitation, performance of model portfolios, backtested performance, and targeted or projected performance, but does not include interactive analysis tools that produce simulations and statistical analyses or predecessor performance (which is subject to its own requirements).

Testimonials, Endorsements and Third-Party Ratings

The Marketing Rule gives additional flexibility in using testimonials (from clients) and endorsements (from non-clients) and provides additional structure around the use of third-party ratings, in each case, subject to certain requirements intended to ensure that their use is not misleading.

Withdrawal of Prior No-Action Letters

Certain previously issued no-action letters regarding the Old Advertising Rule and the Old Solicitation Rule will be withdrawn as the guidance provided in those letters either is incorporated into the Marketing Rule or will no longer apply. A list of withdrawn no-action letters will be (but has not yet been) published on the SEC's website.

The SEC does note in the adopting release that the guidance in certain prior no-action letters may continue to be useful as examples of practices that the Staff would consider "fair and balanced" or "not misleading", but emphasizes that those no action letters are no longer considered prescriptive.

Books and Records Rule; Form ADV; Policies and Procedures

Rule 204-2 under the Advisers Act is being amended to reflect new requirements under the Marketing Rule, including expanding record keeping requirements to all advertisements. Form ADV is also being amended to include questions regarding an adviser's advertising practices.

Investment advisers will need to update their compliance policies and procedures to reflect the Marketing Rule in general as well as its particular requirements. Importantly, the adopting release indicates that for related compliance policies and procedures to be effective, they should include "objective and testable means reasonably designed" to prevent violation of the Marketing Rule.

Effective Date

The Marketing Rule will be effective 60 days after publication in the Federal Register. Advisers will have an 18-month transition period after the effective date to bring their marketing materials into compliance with the Marketing Rule.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Victoria S. Forrester
+1-212-373-3595
vforrester@paulweiss.com

Matthew B. Goldstein
+1-212-373-3970
mgoldstein@paulweiss.com

Udi Grofman
+1-212-373-3918
ugrofman@paulweiss.com

Amran Hussein
+1-212-373-3580
ahussein@paulweiss.com

Conrad van Loggerenberg
+1-212-373-3395
cvanloggerenberg@paulweiss.com

Marco V. Masotti
+1-212-373-3034
mvasotti@paulweiss.com

Lindsey L. Wiersma
+1-212-373-3777
lwiersma@paulweiss.com

Philip A. Heimowitz
+1-212-373-3518
pheimowitz@paulweiss.com

Caitlin T. Kelly
+1-202-223-7342
ctkelly@paulweiss.com

Jyoti Sharma
+1-212-373-3712
jsharma@paulweiss.com

Marian S. Shin
+1-212-373-3511
mshin@paulweiss.com

Maury Slevin
+1-212-373-3009
mslevin@paulweiss.com

Erica Temel
+1-212-373-3187
etemel@paulweiss.com

Karen J. Hughes
+1-212-373-3759
khughes@paulweiss.com

Associates Gili Farhadian-Sagiv and Werner van der Westhuizen contributed to this Client Memorandum.

Overview of Differences between the Old Advertising Rule and the New Marketing Rule

	Old Advertising Rule	New Marketing Rule
<p>Definition of “Advertisement” <i>General Definition</i></p>	<ul style="list-style-type: none"> ▪ Defined as: Communications by the adviser, addressed to more than one person, which offer investment advisory services to clients. 	<ul style="list-style-type: none"> ▪ Defined as: <ol style="list-style-type: none"> (1) Any direct or indirect communication an investment adviser makes to more than one person (or to just one person if the communication involves hypothetical performance), that (x) offers the adviser’s investment advisory services with regard to securities to prospective clients or prospective private fund investors, or (y) offers <i>new</i> investment advisory services with regard to securities to current clients or current private fund investors; in each case, <u>excluding</u>: <ol style="list-style-type: none"> (a) extemporaneous, live, oral communications (but not any scripts or prepared materials for such a communication); (b) information contained in a statutory or regulatory notice, filing or other required communication that is reasonably designed to satisfy the requirements thereof; and (c) communications that include hypothetical performance provided either (x) in response to an unsolicited request for such information from a prospective or current client or private fund investor; or (y) to a prospective or current private fund investor in a one-on-one communication; and (1) any endorsement or testimonial for which an adviser provides cash or non-cash compensation directly or indirectly, <u>excluding</u> information contained in a statutory or regulatory notice, filing or other required communication that is reasonably designed to satisfy the requirements thereof. ▪ Note that “advertisement” in the Marketing Rule includes communications to <i>current</i> clients or private fund investors only to the extent that relates to new advisory services. Communications about <i>existing</i> advisory services or private fund investments (<i>e.g.</i>, account statements, transaction reports, presentations at annual investor meetings and similar materials), are not “advertisements,” even if they are intended to retain the client or private fund investor (although they do remain subject to the general anti-fraud rule). ▪ Note that because any solicitation or referral of a prospective or current investor is included in the definition of “endorsement,” clause

	Old Advertising Rule	New Marketing Rule
		<p>(2) makes communications by a placement agent, that solicits or refers clients or private fund investors, advertisements of the adviser which are subject to all of the advertising rules and the adviser's compliance and oversight functions.</p> <ul style="list-style-type: none"> As discussed in the adopting release, because a PPM is a required communication, information provided in a PPM about material terms, objectives and risk of a fund offering will generally not be considered an advertisement, but other information included in a PPM could constitute an advertisement of the adviser, depending on the relevant facts and circumstances (e.g., related performance information). Additionally, pitch books and similar communications that may accompany a PPM are likely to constitute advertisements.
<i>Current and Prospective Clients and Investors</i>	<ul style="list-style-type: none"> On its terms, applicable only to communications with current or prospective clients (but not investors in private funds). However, it has generally been the private funds industry's practice to apply the rule to private fund investors as well. 	<ul style="list-style-type: none"> Applicable to communications with current or prospective clients and investors in private funds.
<i>Services Offered</i>	<ul style="list-style-type: none"> Applicable to communications intended to retain existing clients as well as to offers of services to prospective clients. 	<ul style="list-style-type: none"> Applies to communications that offer advisory services to potential clients and investors as well as to communications offering <i>new</i> or <i>additional</i> advisory services to current prospective client and investors.
<i>Forms of Communication</i>	<ul style="list-style-type: none"> Applicable to specific forms of communication (e.g., written; radio; television). 	<ul style="list-style-type: none"> Applicable to a broad range of communications (e.g., emails, text messages, video files, blogs, podcasts and social media), focusing on <i>goal</i> rather than <i>form</i> of communication.
<i>Communications to One Person</i>	<ul style="list-style-type: none"> Applies only to communications to more than one person. 	<ul style="list-style-type: none"> The first prong of the definition generally applies only to communications to more than one person (whether a single natural person or household or multiple natural persons representing, employed by, or owning a single entity or account); <ul style="list-style-type: none"> however, communications including hypothetical performance are advertisements even if provided to only one person unless provided in response to an unsolicited investor request or to a private fund investor. The second prong of the definition (regarding testimonials and endorsements) applies to communications to a single person, as further discussed in Annex B.

	Old Advertising Rule	New Marketing Rule
<i>Direct and Indirect Communications</i>	<ul style="list-style-type: none"> ▪ Does not generally apply to third-party content, such as articles by independent third-parties published without the involvement of the adviser; however, once an adviser references such independent article or provides reprints of it, essentially using it for its own purposes, the content may be attributable to the adviser as an advertisement. 	<ul style="list-style-type: none"> ▪ Includes “direct or indirect” communications by the adviser, including certain communications by third parties that are attributable to the adviser. ▪ Whether a particular communication is attributable to an adviser is a facts and circumstances determination, including (1) whether the adviser has explicitly or implicitly endorsed or approved the information after its publication (“adoption”) or (2) the extent to which the adviser has involved itself in the preparation of the information (“entanglement”). ▪ Note that the adopting release includes specific guidance for adviser’s online presence and use of social media in this context.
<i>Communications Not Intended to Offer Advisory Services</i>		<ul style="list-style-type: none"> ▪ Does not include communications intended to raise the general profile of the adviser without offering investment advisory services with regard to securities, educational communications providing general information about investing or general market commentary.
General Prohibitions	<ul style="list-style-type: none"> ▪ Antifraud rules prohibit advertisements that contain untrue statements of material fact. ▪ Catch-all provision prohibits advertisements that are otherwise false or misleading. ▪ SEC does not need to prove scienter; negligence is sufficient. 	<ul style="list-style-type: none"> ▪ Generally, all information is required to be presented in a “<i>fair and balanced</i>” manner. ▪ The Marketing Rule prohibits the following in any advertisement: <ol style="list-style-type: none"> (1) any untrue statement of a material fact, or omission of a material fact necessary to make the statement, in light of the circumstances in which it was made, not misleading (<i>i.e.</i>, a “10b-5” standard); (2) 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) information that is reasonably likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser; (4) discussion of potential benefits to clients or investors in connection with the investment adviser’s services or methods without a fair and balanced discussion of any material risks or limitations associated with the potential benefits; (5) reference to specific investment advice provided by the investment adviser where such advice is not presented in a fair and balanced manner; (6) performance results that include or exclude certain results or time periods in a manner that is not fair and balanced; and (7) otherwise being materially misleading.

	Old Advertising Rule	New Marketing Rule
		<ul style="list-style-type: none"> ▪ SEC does not need to prove scienter; negligence is sufficient.
Performance Advertising	<ul style="list-style-type: none"> ▪ Prohibits presentation of performance results that contains false or misleading statements. ▪ Allows the use of references to past specific recommendations (which were, or would have been, profitable), subject to conditions and specific disclosure requirements. ▪ A number of no-action letters prescribed specific requirements with regard to advertisements using performance results, including (among others): <ul style="list-style-type: none"> ▪ Clover Capital Management (October 28, 1986) – use of performance information in advertisement, whether actual or model performance, is misleading without certain disclosures, such as describing the effect of market conditions on the results; ▪ Great Lakes Advisors, Inc. (April 3, 1992) – an adviser’s use of a predecessor’s performance results in advertisement is misleading if another individual, other than the successor’s portfolio manager, played a significant part in achieving such results; ▪ J.P. Morgan Investment Management (May 7, 1996) – calculation of advertised net performance during a certain period may use the maximum fees charged, even if some investors paid lower rates during this period; ▪ Horizon Asset Management, LLC (September 13, 1996) – presenting an adviser’s past performance under a different fund in an advertisement is not misleading if both previous and current accounts are managed by the same persons and are substantially similar; ▪ Franklin Management, Inc. (December 10, 1998) – displaying certain, but not all, performance results is allowed if the criteria used is non-performance based and is used consistently, <i>i.e.</i>, 	<ul style="list-style-type: none"> ▪ Presentation of performance results remains subject to the general prohibitions described above, along with the following requirements: <ul style="list-style-type: none"> ▪ Gross performance must be accompanied by net performance, calculated over the same time period and using the same type of return and methodology, presented with equal prominence in a format designed to facilitate comparison with gross performance. <p>The adopting release includes a non-exhaustive list of fees and expenses to be considered in calculating net performance (<i>e.g.</i>, the deduction of private fund fees (including performance-based fees and performance allocations) and expenses that the investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant fund);</p> ▪ Performance results, <i>other than performance results of a private fund</i>, must be presented over one-, five- and ten-year time periods with equal prominence (performance for other periods may be provided in addition to performance for the three prescribed periods); ▪ Any express or implied statement that the calculation or presentation of performance results has been approved or reviewed by the SEC is prohibited; ▪ If performance results from any related portfolio (<i>i.e.</i>, a portfolio with substantially similar investment policies, objectives and strategies as that being offered in the advertisement) is included, the performance of all related portfolios must be included, <u>however</u>, related portfolios may be excluded if (x) the advertised performance results are not materially higher than if all related portfolios had been included, and (y) the exclusion does not alter the presentation of any applicable prescribed time period; ▪ Extracted performance (<i>i.e.</i>, performance of a subset of a single portfolio) is permitted so long as the advertisement provides, or offers to provide promptly, performance results of the total portfolio; <p>The adopting release does not provide prescribed disclosures for references to specific investment advice; such information should be presented in a manner that is tailored to be “fair and balanced” based on facts and circumstances (<i>e.g.</i>, it would not be fair and balanced for an adviser to present case studies only reflecting</p>

	Old Advertising Rule	New Marketing Rule
	<p>practice is not considered prohibited “cherry-picking”; and</p> <ul style="list-style-type: none"> ▪ The TCW Group, Inc. (November 7, 2008) – use of best and worst performance results in advertising is allowed, if presented in equal number and prominence, using a consistent methodology. 	<p>profitable investments when the portfolio also included losing investments);</p> <ul style="list-style-type: none"> ▪ Hypothetical performance (<i>i.e.</i>, performance results that were not actually achieved by any portfolio of the adviser²) may be presented only if the adviser (x) 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, and (y) provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the hypothetical performance; and ▪ Predecessor performance (<i>i.e.</i>, performance of a portfolio that was not advised at all times during the relevant period by the advertising adviser) is permitted only if (x) there is sufficient similarity with regard to the personnel and accounts at the predecessor adviser and the personnel and accounts at the advertising adviser that the prior performance would provide relevant information to clients or investors; (y) all relevant prior accounts are included, subject to certain exceptions, and (z) certain required disclosures are included clearly and prominently, including that the performance results were from accounts managed at another adviser.
Third-Party Ratings	<ul style="list-style-type: none"> ▪ Does not expressly address third-party ratings. 	<ul style="list-style-type: none"> ▪ An advertisement may include a third-party rating, only if the investment adviser: <ol style="list-style-type: none"> (1) has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and (2) clearly and prominently discloses, or the investment adviser reasonably believes that the third-party rating clearly and prominently discloses, (a) the date on which the rating was given and the period of time upon which the rating was based, (b) the identity of the third party that created and tabulated the rating, and (c) if applicable, that compensation has been provided directly or indirectly by the adviser.

² Hypothetical performance includes, without limitation, performance of model portfolios, backtested performance and targeted or projected performance, but does not include interactive analysis tools that produce simulations and statistical analyses or predecessor performance (which is subject to its own requirements).

	Old Advertising Rule	New Marketing Rule
		<ul style="list-style-type: none"> ▪ By definition, a third-party rating must be produced by someone who is not a related person of the adviser and who provides such ratings or rankings in the ordinary course of its business.
Testimonials and Endorsements	<ul style="list-style-type: none"> ▪ Testimonials prohibited; endorsements not addressed. 	<ul style="list-style-type: none"> ▪ Both testimonials (from clients) and endorsements (from non-clients) are permitted, subject to certain requirements intended to ensure that their use is not misleading. ▪ Certain uncompensated testimonials and endorsements may be captured by the first prong of the definition, and would therefore be subject to the general prohibitions and require appropriate disclosure as well as the adviser's oversight. ▪ See <u>Annex B</u> below for more detail.
Record-Keeping; Form ADV Disclosure	<ul style="list-style-type: none"> ▪ Advisers must keep a record of advertisements sent to 10 or more persons. 	<ul style="list-style-type: none"> ▪ Records of all advertisements disseminated must be kept. ▪ For oral advertisement, the adviser may retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement; if the advertisement includes a compensated oral testimonial or endorsement, the adviser may, instead of recording and retaining the advertisement, keep a record of the disclosures provided to investors. ▪ Supporting materials for certain calculations presented in advertisements must also be retained. ▪ A copy of any questionnaire or survey used in the preparation of a third-party rating, as well as materials that allow the adviser to demonstrate the adviser's reasonable belief that testimonials, endorsements and third-party ratings are compliant with the Marketing Rule. ▪ Documentation of communications relating to, and substantiation for, predecessor performance must be retained. ▪ New subsection added to Part 1A of Form ADV, requiring additional disclosure regarding the adviser's advertising practices (e.g., use of performance results, testimonials, endorsements and third-party ratings); advisers will only be required to update responses to these questions in their annual updating amendments due after the effective date. Other than annual amendments to this item will not be required.

Overview of Differences between the Old Solicitation Rule and the New Marketing Rule

	Old Solicitation Rule	New Marketing Rule
Scope of Rule	<ul style="list-style-type: none"> ▪ A solicitor is any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser. ▪ Determination is based on facts and circumstances of solicitation activities. 	<ul style="list-style-type: none"> ▪ Solicitation activities are included in the definition of “advertisement” under the second prong of that definition which picks up any testimonial or endorsement, with “endorsement” being defined to include solicitation or referrals of current or prospective clients or private fund investors for which an adviser provides cash or non-cash compensation directly or indirectly. ▪ Note that, as confirmed by the adopting release, this makes a placement agent an endorser and communications by the placement agent become advertisements of the adviser, subject to the adviser’s compliance and oversight functions. ▪ Excludes information contained in a statutory or regulatory notice, filing or other required communication; <i>does not exclude</i> extemporaneous, live, oral communications, one-on-one communications or communications that include hypothetical performance information. ▪ Use is subject to the general advertising prohibitions (described in Annex A).
Audience of Solicitation Activities	<ul style="list-style-type: none"> ▪ Applies to solicitation activities directed at existing and prospective clients. ▪ Mayer Brown LLP (July 28, 2008) exempted solicitations of investors in private funds managed by the adviser from the scope of the rule (explaining that the rule only applies to direct clients of the adviser, which, in the case of a private fund, is the private fund itself). 	<ul style="list-style-type: none"> ▪ Expands to solicitation and referral of prospective and existing clients <i>and</i> private fund investors.
Compensation Involved	<ul style="list-style-type: none"> ▪ Applies to direct and indirect cash payments. 	<ul style="list-style-type: none"> ▪ Applies to <i>any</i> form of direct or indirect cash and non-cash compensation for endorsements or testimonials (e.g., cross-referrals and discounted advisory services).
Required Disclosure <i>Content of Disclosure</i>	<ul style="list-style-type: none"> ▪ Solicitor must provide a separate disclosure, including the adviser and solicitor’s names, relationship, compensation arrangement. 	<ul style="list-style-type: none"> ▪ An advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the adviser discloses, or reasonably

	Old Solicitation Rule	New Marketing Rule
		<p>believe that the person giving the testimonial or endorsement discloses, at the time the testimonial or endorsement is disseminated:</p> <ol style="list-style-type: none"> (1) clearly and prominently (x) that the testimonial was given by a current client or private fund investor, and the endorsement was given by a person other than a current client or private fund investor, as applicable, (y) that cash or non-cash compensation was provided for the testimonial or endorsement, if applicable, and (z) a brief statement of any material conflict of interest on the part of the person giving the testimonial or endorsement resulting from the adviser’s relationship with such person; (2) the material terms of any compensation arrangements; and (3) a description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the adviser’s relationship with such person and/or any compensation arrangement. <ul style="list-style-type: none"> ▪ “Material terms” of the compensation agreement that would need to be disclosed may include, for example: (1) the specific value of the cash or non-cash compensation involved, and (2) whether the rate of compensation is dependent on the performance of the adviser and is therefore likely to affect the promoter’s incentives in promoting the adviser.
<i>Written Disclosure</i>	<ul style="list-style-type: none"> ▪ The disclosure must be written. 	<ul style="list-style-type: none"> ▪ The disclosure does not have to be written (e.g., electronic or oral disclosures are acceptable).
<i>Party Providing the Disclosure</i>	<ul style="list-style-type: none"> ▪ Disclosure must be given by the <i>solicitor</i>. 	<ul style="list-style-type: none"> ▪ The adviser must provide the disclosures or reasonably believe that the person giving the testimonial or endorsement provides the disclosures.
<i>Delivery of Adviser’s Brochure</i>	<ul style="list-style-type: none"> ▪ The solicitor must deliver the brochure (Part 2 of Form ADV) to clients as part of the disclosure. 	<ul style="list-style-type: none"> ▪ The requirement to deliver the brochure as part of the disclosure was eliminated.
Agreement	<ul style="list-style-type: none"> ▪ Requires a written agreement between the solicitor and the adviser, in which the solicitor agrees to provide the solicitation disclosure to clients. 	<ul style="list-style-type: none"> ▪ A written agreement must be entered into between the adviser and any person giving a testimonial or endorsement that describes the scope of the agreed upon activities and the terms of the compensation for those activities (subject to a <i>de minimis</i> threshold and aside from certain affiliates).
General Compliance	<ul style="list-style-type: none"> ▪ Solicitor required to obtain a signed acknowledgment from the client for receiving the solicitor’s disclosure. ▪ Additional compliance requirements for solicitation activities involving governmental entities (explicit 	<ul style="list-style-type: none"> ▪ Adviser must have a reasonable basis for believing that the testimonial or endorsement complies with the requirements of the Marketing Rule. ▪ The determination of what would constitute a reasonable basis for belief will depend on the facts and circumstances (e.g., to form reasonable belief, the adviser can periodically make inquiries of a

	Old Solicitation Rule	New Marketing Rule
	reminders of fiduciary duties with respect to solicitation of government entities).	<p>sample of the investors solicited or referred by a promoter to assess whether the promoter’s statements comply with the rule).</p> <ul style="list-style-type: none"> ▪ Eliminates certain compliance requirements, including the requirement to obtain written client acknowledgment.
Disqualifications		<ul style="list-style-type: none"> ▪ Advisers are prohibited from using certain <i>compensated</i> testimonials and endorsements made by certain “bad actors” and other ineligible persons (e.g., a person who is subject to an SEC opinion or order barring, suspending or prohibiting such person from acting in any capacity under the Federal securities laws). ▪ For persons who are “covered persons” with respect to a Reg. D offering in connection with the advertisement (including, for example, a placement agent), the Reg. D disqualification list will apply.
Exemptions		
<i>Impersonal Investment Advice</i>	<ul style="list-style-type: none"> ▪ Partial exemption for solicitors that refer investors as part of an impersonal investment advice. 	<ul style="list-style-type: none"> ▪ No exemption for solicitation activities for impersonal investment advice.
<i>In-House Solicitors</i>	<ul style="list-style-type: none"> ▪ Partial exemption for in-house solicitors and affiliate solicitors, provided that the nature of the affiliation is disclosed 	<ul style="list-style-type: none"> ▪ Partial exemption still applies for an adviser’s affiliated personnel; provided that the affiliation between the adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the adviser documents such person’s status at the time the testimonial or endorsement is disseminated. ▪ Partial exemption for broker-dealers registered with the SEC waiving the conflicts disclosure requirement where Reg BI applies, provided they are not subject to statutory disqualification under the Exchange Act.
<i>De Minimis Compensation</i>	<ul style="list-style-type: none"> ▪ No <i>de minimis</i> exemption. 	<ul style="list-style-type: none"> ▪ Endorsements or testimonials that are uncompensated or for which compensation is <i>de minimis</i> compensation (up to \$1,000 over 12 months) are not subject to the disqualification provisions or the written agreement requirement, but must comply with the disclosure and oversight requirements.

* * *