

SEC Overhauls Its Marketing Rules for Registered Investment Advisers

On December 22, 2020, the U.S. Securities and Exchange Commission (SEC) adopted amended Rule 206(4)-1 under the Investment Advisers Act of 1940 to replace its existing advertising rule (prior Rule 206(4)-1) and solicitation rule (prior Rule 206(4)-3). The amended rule represents a substantial update of the prior rules to reflect current marketing practices and new technologies. This alert briefly summarizes the most important aspects of the amended rule. All SEC registered investment advisers will need to update their compliance policies and procedures to reflect the amended rule. In order to give advisers time to prepare for the amended rule's requirements, it does not take effect until 18 months after its effective date (which is 60 days after publication in the Federal Register).

Summary of Amended Rule

Amended Rule 206(4)-1 merges the SEC's separate advertising and solicitation rules into one more comprehensive marketing rule. Key features of the amended rule include the following:

Expanded Definition of Advertisement

This definition broadly encompasses an adviser's marketing activity for investment advisory services with respect to securities. It includes direct and indirect communications and may include third-party information if an adviser adopts such information or involves itself in its preparation. The definition excludes one-on-one communications, except for compensated testimonials and endorsements and certain communications that include hypothetical performance information. Other exclusions include communications designed to retain existing investors and extemporaneous, live, oral communications. The SEC also provided guidance regarding the use of social media.

Principles-Based General Prohibitions

The amended rule includes seven general prohibitions that apply to all advertisements. In any advertisement, an adviser may not:

- include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading;

POSTED:

Feb 5, 2021

RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

RELATED SERVICES:

[Securities](#)

<https://www.reinhartlaw.com/services/securities>

RELATED PEOPLE:

[Benjamin G. Lombard](#)

<https://www.reinhartlaw.com/people/benjamin-lombard>

- 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;
- 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 to clients or investors connected with or resulting from the adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
- include a reference to specific investment advice provided by the adviser where such investment advice is not presented in a manner that is fair and balanced;
- include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
- otherwise be materially misleading.

Testimonials and Endorsements

The amended rule will permit an advertisement to include testimonials and endorsements, subject generally to the following conditions: required disclosures; adviser oversight and compliance, including a written agreement for certain promoters; and, in some cases, disqualification provisions. The SEC adopted partial exemptions for *de minimis* compensation, affiliated personnel, registered broker-dealers and certain persons to the extent they are covered by Rule 506(d) of Regulation D under the Securities Act of 1933 with respect to a securities offering. The definition of an "endorsement" includes solicitation activities that were previously covered under the prior solicitation rule.

Third-Party Ratings

An advertisement may include a third-party rating, if the adviser forms a reasonable belief that the third-party rating clearly and prominently discloses certain information.

Performance Advertising

The amended rule will apply to performance advertising and will require presentation of net performance information whenever gross performance is presented and performance data over specific periods. In addition, the amended



rule will impose requirements on advisers that display related performance, extracted performance, hypothetical performance and predecessor performance.

Recordkeeping and Form ADV

The SEC also amended its recordkeeping rule and Form ADV to reflect the amended marketing rule and enhance the data available to support the SEC's enforcement and examination functions. The amended rule will not expressly require advisers to review and approve their advertisements prior to dissemination.

Next Steps

Although there are more than 18 months until the amended rule takes effect, registered investment advisers will need plenty of time to update their policies and procedures. That process should start well before the effective date. Some of the areas on which advisers should focus include: procedures to review and approve the methods of distributing an advertisement; policies for an adviser to avoid adopting or entangling itself with third party content such as through reviewing and commenting on such content or hyperlinking to such content; social media policies for personnel including training; website policies; obtaining and maintaining evidence needed to support material facts in advertisements; policies to comply with the new endorsement and solicitation rules; and policies to avoid cherry-picking or otherwise presenting misleading performance information in advertisements.

If you have any questions about the amended rules, changes to your policies and procedures or other securities law matters, please contact [Benjamin Lombard](#), another member of the [Reinhart Securities Team](#) or your Reinhart attorney.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.