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VIA E-MAIL

To Our Investment Adviser Clients and Other Friends

Re: Upcoming Compliance Deadline for SEC Marketing Rule Compliance

The November 4, 2022 deadline for compliance with [Rule 204\(4\)-1](#) (the “Marketing Rule”) under the Investment Advisers Act of 1940 (the “Advisers Act”) is quickly approaching for advisers registered with the Securities and Exchange Commission (the “SEC”). The Marketing Rule overhauled the SEC’s framework governing advertising and solicitation. Our prior client alert, [New SEC Marketing Rule for Investment Advisers](#), summarizes the Marketing Rule and compliance recommendations for a few common scenarios (investor letters, one-on-one presentations and conversations, case studies and incorporating returns of predecessor funds).

This alert is not intended as specific or complete advice and is subject to change. For further assistance, please contact any of the Shartsis Friese attorneys in the [Investment Funds & Advisers Group](#).

Exempt Reporting Advisers & State-Registered Advisers

Although exempt reporting advisers and state-registered advisers are not subject to the Marketing Rule, those advisers have fiduciary obligations and must comply with Advisers Act anti-fraud rules, effectively requiring them to avoid making misleading statements in advertisements, (for example, by cherry-picking performance information when soliciting investors). These advisers should use the Marketing Rule as a source of guidance for complying with these obligations. Accordingly, they should review their marketing materials in light of the Marketing Rule’s “principals based” standards, the express performance prohibitions prescribed by the Marketing Rule and the SEC’s latest insights on social media content included in the adopting release for the Marketing Rule.

SEC-Registered Adviser Policies and Procedures

SEC-registered advisers must adopt and implement written policies and procedures reasonably designed to prevent the adviser and its supervised persons from violating the Marketing Rule. Advisers need to update their policies and procedures by **November 4, 2022**. In addition to replacing outdated content and updating an adviser’s recordkeeping procedures, advisers using specific marketing approaches should include additional policies and consult with counsel or their compliance provider to customize their Marketing Rule compliance approach. Marketing Rule issues that may warrant customization include the following:

- Advisers using hypothetical performance in advertisements must have policies reasonably designed to ensure the hypothetical performance is relevant to the likely financial situation and investment objectives of the advertisement's intended audience.
- Advisers with associated persons who are active on social media should review their policies to ensure that they are reasonably designed to prevent the use of that person's social media account for marketing the adviser's advisory services, (otherwise such content may be deemed the adviser's own advertising subject to the Marketing Rule).
- Advisers using compensated testimonials and endorsements must have a reasonable basis for believing that such testimonials or endorsements comply with the Marketing Rule. Certain requirements added to the adviser's policies and procedures can help establish that reasonable basis.
- Advisers active on social media that have enabled the use of third-party reviews and comments on their firm social media pages should carefully consider the circumstances in which third-party content may be deemed advertisements of the adviser and, as appropriate, adopt neutral policies governing that content.

Compliance Considerations for Endorsements and Testimonials

The SEC previously banned client testimonials and third-party endorsements from adviser marketing materials as potentially misleading. In a notable shift, the Marketing Rule now allows both compensated and uncompensated testimonials and endorsements.

Compliance requirements for testimonials and endorsements vary based on factors such as amount of compensation at issue (which may include non-cash benefits, like a reduction in advisory fees) and who provided the testimonial or endorsement. Advisers desiring to begin using testimonials and endorsements in their marketing materials should consider developing a testimonial and endorsement compliance checklist to evaluate which disclosures and other requirements may apply under different circumstances.

The Marketing Rule also rescinded Advisers Act Rule 206(4)-3 (the "Cash Solicitation Rule"). Placement agents and third-party solicitors who provide compensated referrals are now treated as providing compensated endorsements under the Marketing Rule. Advisers should review all existing agreements with placement agents and third-party solicitors and consult with counsel to amend agreements in light of new Marketing Rule requirements, as those agreements were likely originally drafted to comply with the now-rescinded Cash Solicitation Rule.

Before embracing the use of online testimonial reviews, advisers should consult with counsel to consider compliance practicalities. Unsolicited client online reviews about an adviser, such as reviews and comments of a testimonial nature appearing on the adviser's LinkedIn profile, can be deemed to have been adopted by the adviser under certain circumstances, which may lead to unintended and problematic consequences, including violations of the Marketing Rule or other securities laws.

Performance Disclosures

The Marketing Rule includes specific requirements and restrictions for certain types of performance advertising, as described in our prior client alert, [New SEC Marketing Rule for Investment Advisers](#). The SEC is withdrawing some of its no-action letters that have been the basis of historical performance advertising requirements.¹ Advisers should review all marketing materials currently in use for compliance with the Marketing Rule. For example content representing hypothetical performance, related performance, extracted performance, composite performance or gross performance may need to be removed unless certain additional disclosure is added.

Form ADV

The SEC has amended Form ADV Part 1A, Item 5 with a new “Marketing Activities” section. With respect to their next annual amendments to Form ADV, advisers will be required to indicate on Form ADV whether their advertisements include various characteristics regulated under the Marketing Rule, such as hypothetical performance, testimonials, predecessor performance or third party ratings.

Advisers will also need to review their Part 2A Brochure to see if their response to Item 14 (Client Referrals and Other Compensation) should be updated. Item 14 of the Form ADV Part 2A requires disclosure of the compensation arrangement to any person who is not a supervised person of the adviser for “client” referrals (now considered either a testimonial or endorsement). “Client” in Form ADV is defined as any of the adviser’s investment advisory clients, such as a private fund or separate account managed by the adviser, but “client” does not otherwise include individual investors of a fund. Many advisers may have included in their Part 2A Brochures that if they entered into a client referral compensation arrangement, the adviser would comply with the requirements of the now-rescinded Cash Solicitation Rule. In that case, the statutory cross reference to the Cash Solicitation Rule will need to be updated in the adviser’s next amendment to its Part 2A Brochure. Arrangements with respect to a promoter’s solicitation of investors (who do not meet the definition of “client”) for only private funds are not currently required to be added to the adviser’s response to Item 14.

Conclusion

Advisers should not delay in updating their compliance policies and procedures and pursuing the action items noted above. The [SEC Risk Alert released September 19, 2022](#) explains the SEC’s intention to focus upcoming adviser examinations on the Marketing Rule. Areas highlighted for SEC review include (1) updated policies and procedures for the Marketing Rule, (2) compliance with the requirement that no advertisement contain a material statement of fact that the adviser does not have a reasonable basis for believing it can substantiate with evidence (opinions do not require substantiation), (3) performance advertising requirements, and (4) compliance with new recordkeeping requirements.

¹ For a list of withdrawn SEC no-action letters, visit the SEC Division of Investment Management website at <https://www.sec.gov/divisions/investment/im-modified-withdrawn-staff-statements>.

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Please contact one of the Shartsis Friese attorneys in the [Investment Funds & Advisers Group](#) if you need assistance with complying with the Marketing Rule.

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