

CLIENT ALERT

# Reminder: The Marketing Rule's Upcoming November 4, 2022 Compliance Date

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## AUTHORS

**Adam Aderton** | **James E. Anderson** | **Benjamin B. Allensworth** | **Justin L. Browder**  
**Anne C. Choe** | **Aliceson (Kristy) Littman** | **Jakob Edson**

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The SEC's Division of Examinations recently published a risk alert to remind registered investment advisers about the Marketing Rule's November 4, 2022 compliance date and to highlight important items for investment advisers as they come into compliance with the Marketing Rule.<sup>1</sup> The Division's risk alert indicates that compliance with the Marketing Rule will be a prompt focus in upcoming examinations. As a result, compliance with the Marketing Rule may be subject to SEC scrutiny shortly after the compliance date.

## Background

The Marketing Rule, adopted by the Securities and Exchange Commission on December 22, 2020, replaces two separate rules that currently govern investment adviser advertising practices and solicitation arrangements. The Marketing Rule became effective on May 4, 2021, with an 18-month transition period. Investment advisers registered, or required to be registered, with the SEC must comply with the Marketing Rule by November 4, 2022. The Marketing Rule represents a significant regulatory development for the asset management industry, including managers of private funds, and imposes many new and detailed compliance requirements on investment advisers when engaging in marketing activities. We

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<sup>1</sup> Examinations Focused on the New Investment Adviser Marketing Rule, The Division of Examinations Risk Alert (Sept. 19, 2022), available [here](#).

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previously published an alert on the Marketing Rule that includes more detailed information about the rule's compliance requirements.<sup>2</sup> The recent risk alert highlights important considerations in light of the looming compliance date.

### Important Considerations

#### *Reviewing and Revising Investment Adviser Compliance Policies and Procedures*

The risk alert reminds investment advisers that they should consider whether to update or revise their written policies and procedures, as required by Rule 206(4)-7 under the Advisers Act. Policies and procedures must be reasonably designed to prevent violations of the Marketing Rule by advisers and their supervised persons. The risk alert highlights the Adopting Release's reference to "objective and testable means reasonably designed to prevent violations." Upcoming exams initiatives may focus on this, and the SEC provides some examples of objective and testable means, including (i) conducting an internal pre-review and approval of advertisements, (ii) reviewing a sample of advertisements based on risk, or (iii) pre-approving templates. All registered investment advisers should expect that their compliance policies and procedures will be evaluated in light of the Marketing Rule's new requirements. In particular, under the Marketing Rule, investment advisers that use hypothetical performance in advertisements must adopt policies and procedures with regard to the use of hypothetical performance to ensure that the hypothetical performance information is relevant to the financial situation and investment objectives of the advertisement's intended audience.<sup>3</sup>

#### *Books and Records*

The risk alert notes that the SEC staff will review an investment adviser's compliance with Rule 204-2 under the Advisers Act (the "Books and Records Rule"). The SEC amended the Books and Records Rule to align it with the Marketing Rule, and the risk alert reminds advisers that they must make and keep records of all advertisements they disseminate, including certain internal working papers, performance-related information, and documentation for oral advertisements, testimonials, and endorsements. Advisers are also reminded to amend their Form ADV to provide additional information concerning marketing practices. Advisers should expect that their recordkeeping and Form ADV amendments will be evaluated in particular with respect to the new provisions of the Books and Records Rule.

#### *Reviewing and Revising Existing Marketing Materials*

The risk alert states that the SEC staff will review whether investment advisers have a reasonable basis for substantiating material statements of fact in advertisements as required by the Marketing Rule.<sup>4</sup> The risk alert states that advisers would

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<sup>2</sup> SEC Adopts Investment Adviser Marketing Rule to Update Its Advertising and Solicitation Rules, available [here](#); see also Investment Adviser Marketing, Investment Advisers Act Release No. 5653 (Dec. 22, 2020) (the "Adopting Release"), available [here](#).

<sup>3</sup> See Adopting Release at 200.

<sup>4</sup> Marketing Rule 206(4)-1(a)(2) prohibits advertisements that 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 Commission.

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be able to demonstrate compliance, for example, by making a record contemporaneous with the advertisement demonstrating the basis for their belief. Advisers may choose to implement policies and procedures to address how to meet this requirement. If an adviser is unable to substantiate the material claims of fact made in an advertisement when the SEC demands it, the risk alert states that the SEC staff will presume that the adviser did not have a reasonable basis for its belief.

In addition, the risk alert states that the SEC staff will review whether investment advisers are in compliance with performance advertising requirements in the Marketing Rule, including the following prohibitions:

- Presenting gross performance, unless the advertisement also presents net performance;
- Showing performance results without providing results for specific time periods (not applicable to the performance of private funds);
- Stating that the Commission has approved or reviewed any calculation or presentation of performance results;
- Showing performance results of portfolios other than the portfolio being advertised unless performance of all portfolios with substantially similar investment policies, objectives, and strategies is included in the advertisement, with limited exceptions;
- Presenting performance results of a subset of investments extracted from a portfolio, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio;
- Presenting hypothetical performance, unless the adviser adopts and implements policies and procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience and provides certain required information; and
- Showing predecessor performance, unless the personnel primarily responsible for achieving the prior performance manage accounts at the advertising adviser and the accounts that were managed by those personnel at the predecessor adviser are sufficiently similar to the accounts that they manage at the advertising adviser. In addition, the advertising adviser must include all relevant disclosures clearly and prominently in the advertisement.

The risk alert highlights the expectation of prompt compliance with the Marketing Rule after the compliance date, with special attention to performance information.

While not specifically addressed in the risk alert, the use of website and social media content and communications is likely to be an area of SEC scrutiny. In addition, because the definition of "advertisement" has been broadened to include both

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traditional advertising and compensated testimonials and endorsements, materials not subject to the previous advertising and solicitation rules are now within the scope of the Marketing Rule. Moreover, certain marketing activities that were prohibited under the previous rules are now permitted under the Marketing Rule (e.g., testimonials). After the compliance date, social media activities by an investment adviser and its associated persons (and an adviser's policies and procedures related to social media) must satisfy the Marketing Rule, including the Adopting Release's guidance on "adoption" and "entanglement," as applicable to the online activities of third parties.

### *Marketing Rule Training*

The risk alert encourages advisers to implement any appropriate modifications to their training programs.

### *Monitor for Additional Guidance*

The SEC staff issued two FAQs on the Marketing Rule on April 14, 2021.<sup>5</sup> Although there has been no indication that the SEC staff will issue additional FAQs before the November 4, 2022 compliance date, investment advisers should monitor for additional FAQs or other formal or informal guidance that may be issued by the SEC staff.

### *Updating Form ADV*

In connection with adopting the Marketing Rule, the SEC amended Item 5 of Form ADV Part 1A to elicit additional information regarding an investment adviser's marketing practices. New subsection L requires an adviser to address separately whether its advertisements include testimonials, endorsements, and third-party ratings, and to state whether any of its advertisements include hypothetical performance and predecessor performance.<sup>6</sup> Investment advisers will be required to update responses to these questions in their annual updating amendment only.<sup>7</sup> As a result, an investment adviser will only be responsible for filing an amended Form ADV that includes responses to the amended questions in Item 5 in its next annual updating amendment that is filed after November 4, 2022. For advisers with a fiscal year that ends on December 31, the new Item 5.L will need to be completed for the annual amendment required to be filed by March 31, 2023. In the risk alert, the SEC staff reminds advisers of their obligations to accurately complete these questions in their next annual Form ADV amendment.

### *Reviewing and Revising Referral and Solicitation Agreements*

Although not explicitly discussed in the risk alert, under the Marketing Rule, compensated testimonials and endorsements include traditional referral and solicitation activity and private fund marketing activities. The inclusion of the referral or solicitation of private fund investors in the scope of the Marketing Rule marks a significant change in the regulation of

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<sup>5</sup> Marketing Compliance Frequently Asked Questions, available [here](#).

<sup>6</sup> Adopting Release at 242-43.

<sup>7</sup> Adopting Release at 242.

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these activities. Registered investment advisers for both separately managed accounts and private funds should have solicitation and private fund placement agreements consistent with the Marketing Rule by the compliance date.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Adam Aderton**

202 303 1224

aaderton@willkie.com

**James E. Anderson**

202 303 1114

janderson@willkie.com

**Benjamin B. Allensworth Justin L. Browder**

202 303 1273

ballensworth@willkie.com

202 303 1264

jbrowder@willkie.com

**Anne C. Choe**

202 303 1285

achoe@willkie.com

**Aliceson (Kristy) Littman Jakob Edson**

202 303 1209

aklittman@willkie.com

202 303 1163

jedson@willkie.com

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