

Last-minute Tips to Be Ready for the SEC's New IA Ad Rule



**Regulatory
Compliance Watch**

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Our Experts

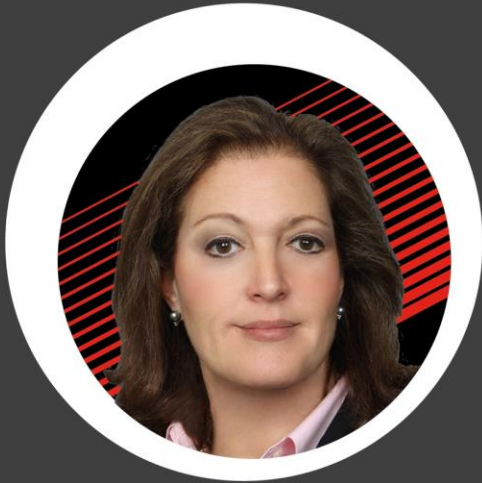


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Our Goal



RCW Publisher Carl Ayers

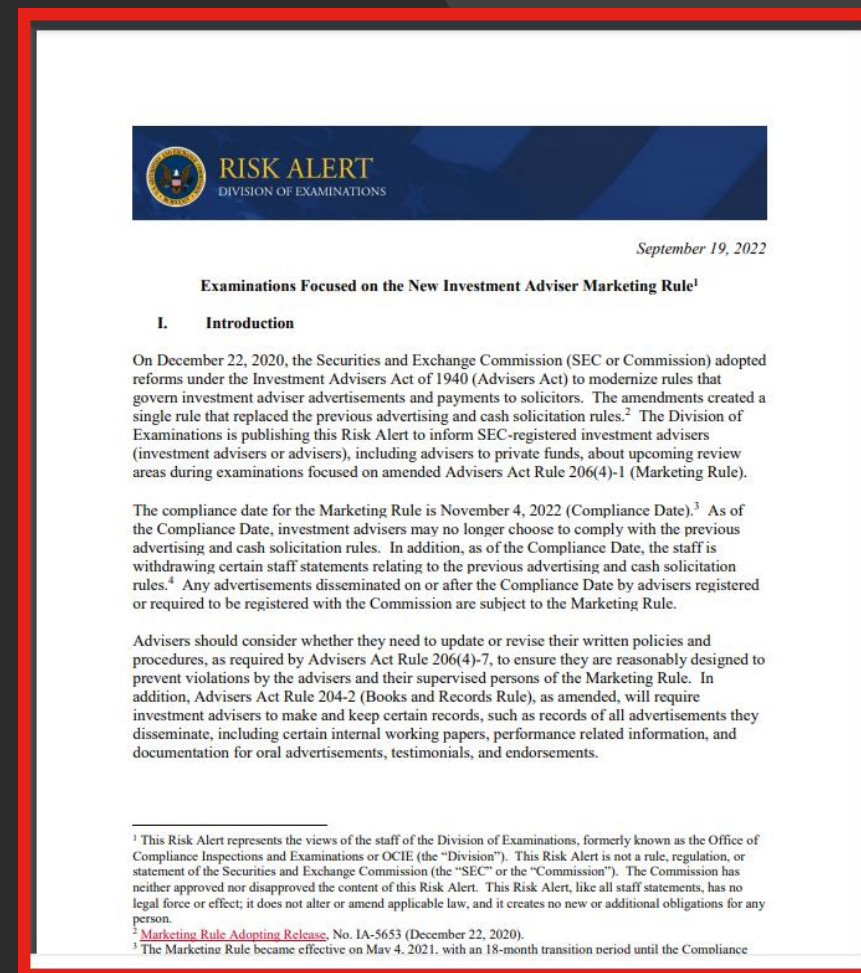
To Help You Take
Action in the
Remaining Weeks
Before the Rule
Takes Effect So You
Can Comply in Time

Our Agenda

- DOE's Latest Risk Alert
- Where Should You Be 5 Weeks Before the Rule Takes Effect
- What Craig and Sam have Done to Get Ready
- New P&Ps/CCO Role
- Testimonials
- Social Media
- Performance Advertising/Hypothetical Ads
- Substantiating Advertising Claims
- Predecessor Performance
- Use of Promoters
- SEC exams
- Final Takeaways

New DOE Risk Alert

- DOE Vows “a number of specific national initiatives” after the New Rule Takes Effect Nov. 4th
- Be Able to Substantiate Material Statements Made in Ads
- Have “objective and testable means” to Show your Ad P&Ps are Reasonable
- Expect Scrutiny of Performance, Hypothetical Ads and Use of Predecessor Performance.
- Keep Records, Answer Form ADV Questions





Michael Caccese

Brief Overview of New SEC IA Rule

- Compliance Date: Nov. 4, 2022
 1. Changes 60-year-old Regime
 2. Permits Testimonials
 3. Solicitors Become “Promoters” Fall under Endorsement Rules
 4. Captures Private Fund Advisers
 5. New Requirements for Performance/Hypothetical Ads
 6. Green Lights Social Media Use
 7. Adds Recordkeeping Duties
 8. New Disclosures Required
 9. Adds New Form ADV Questions
 10. Performance Portability
 11. Use of Third-Party Ratings

Where Advisers currently are in the compliance step

Areas of uncertainty under the Marketing Rule

- Attribution
- Yield
- Extracted performance
- Portability (affiliated and unaffiliated)
- Compensated and non-compensated endorsers / affiliated / independent contractors

Net/Gross Performance

- Placement
- Frequency
- Model Fees

1, 5, 10 years

- Placement

Private Funds

- PPM reviews
- Application to BD marketing materials
- IRR calculations

Marketing Rule v. GIPS

- Model fees
- Composites/non-fee paying accounts
- Carve outs

Marketing Rule and GIPS 2020

- The Marketing Rule defers to GIPS with respect to the identification of related portfolios
- However, there are several key differences between the two:

	Marketing Rule Requirement	GIPS Standards Requirement
Net Performance	Requires net returns; can present gross returns under certain conditions.	Do not require net returns, except for wrap composites when transactional fees cannot be estimated; no conditions on presentation of gross returns.
Time Periods	Must present 1-, 5-, and 10-year returns (the prescribed time periods).	For time-weighted returns, annual returns are required. For money-weighted returns, a single annualized since-inception money-weighted return is required.
Composite and Related Performance	Related performance may be composite performance or performance of each related portfolio; may exclude some related portfolios.	Composites are required when marketing strategy performance; must include all portfolios that meet composite definition.
Carve-Outs and Extracted Performance	Must present or offer to promptly provide performance of the total portfolio that the extracted performance is taken from.	Do not need to present performance of the total portfolio that the carve-out is taken from.
Predecessor Performance	If portability tests are no longer met, the ported performance may no longer be used.	Once the portability tests are met, the prior performance becomes the performance of the new or acquiring firm.

Guidance on Social Media

Third-Party Content on Adviser Controlled Media

- Sorting
- Editing
- Involvement in preparation

Associated Person Communication on Personal Media

- Focus on supervision and compliance efforts
- Training
- Attestations
- Review

Posts that pre-date the compliance date will be “frozen,” and should not be liked, shared or commented on

New policies and procedures regarding social media practices may be required:

- In the Adopting Release for the Marketing Rule, the SEC indicated that investment advisers should consider adopting and implementing policies and procedures reasonably designed to prevent the marketing of advisory services with regard to securities on an **associated person's** social media accounts
- The Adopting Release stated that an adviser's edits to third party content **would not** result in attribution of that communication to the adviser if the edits are based on **pre-established, objective criteria** that are documented in the

Craig's Approach

- Breakdown the Implementation in Four Phases:
 1. Draft Policies and Procedures
 2. Create or Modify Worksheets
 3. Set a Date for Implementation and Training
 4. Perform Testing and Monitoring
- Generally, it is Advisable to Build in as much Continuity with the Old Rule as Possible
- Become Accustomed to Dealing with Marketing Beyond Written Materials and Disclosures, including Online Reviews, Social Media, Chatrooms and Video Communications



Craig Watanabe

Craig's Approach

- Address the Concepts of Adoption and Entanglement in Your Policies and Training
- Become Familiar with the “Clear and Prominent” Disclosure Requirement and Learn to Write Layered Disclosures
- Turn to Helpful Tools from Regulatory Compliance Watch:
 - Template Marketing Rule Policies and Procedures
 - Marketing Disclosure Library



Craig Watanabe

Sam's Approach

- Firm decided to adopt rule early
 - Weighed desire to utilize testimonials against need to implement the entire rule
 - Concluded that value of testimonials outweighed the impact of complying with the rules as a whole
- Worked with outside compliance consultant to understand and implement the rule
 - Revised policies and procedures
 - Explained implications to firm
 - As a firm, decided how we wanted to utilize testimonials



Sam Puathasnanon

Sam's Approach

- Engaged our marketing team to develop a testimonial strategy
 - We identified and approached potential client candidates
 - We developed a questionnaire asking for short narrative responses regarding their client experience
 - Marketing team helped us craft the testimonials in a manner that complemented our existing strategy
 - Sought approval from clients on final product



Sam Puathasnanon



Stephanie Monaco

Endorsements and Promoters

Testimonials and Endorsements

- Cash Solicitation Rule (Rule 206(4)-3) rescinded but certain concepts have been imported into the Marketing Rule
- Solicitation/marketing arrangements for adviser's advisory services are now considered either endorsements (if solicitor is a third party) or testimonials (if solicitor is a client/investor)
- Arrangements in which either cash or non-cash compensation is paid to a solicitor will be subject to certain disclosure, disqualification and written agreement requirements
- Existing solicitation arrangement agreements will need to be amended to comply with new requirements by compliance date



Stephanie Monaco

Endorsements and Promoters

Testimonials and Endorsements: What's Notable Under the New Rule?

- Solicitation arrangements, testimonials and endorsements involving investors to private funds advised by a registered adviser are now included in the scope of the rule
- Disclosure Requirements at time of solicitation:
 1. Clear and prominent disclosure that: (i) the solicitor is or is not a client/investor; (ii) that cash or non-cash compensation is being paid; and (iii) brief statement on material conflicts associated with solicitor's relationship with the adviser
 2. Disclosure of the material compensation terms and a more fulsome description of material conflicts of interest associated with the solicitor's relationship with the adviser and/or the compensation arrangement
- Written agreement between solicitor and adviser
- Solicitor subject to disqualification requirements
- Adviser has to have a reasonable basis that the solicitor is complying with the above requirements.



Stephanie Monaco

Endorsements and Promoters

Testimonials and Endorsements: Exceptions for Broker-Dealers

- SEC registered broker-dealers may use certain exemptions depending on the circumstances:
 - Exemption from both prongs of the disclosure requirements **if** the solicitation is a Regulation BI recommendation (Regulation BI applies to “retail” customers (generally natural persons) and would not apply to institutional recommendations)
 - Only the “clear and prominent” disclosures will apply in the case of non-retail customers (institutional)
 - Reg. D bad actor disqualification applies in lieu of the “disqualifying event” definition in the rule
 - Registered broker-dealers are also exempt for disqualification provisions if not subject to an Exchange Act statutory disqualification
- Foreign unregistered placement agents cannot use these exemptions since they are not SEC registered broker-dealers

Final Takeaways

Do You Have More Questions?

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