

Investment Advisors Act New Marketing Rule

By: Michelle Atlas-Quinn

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What is an Advertisement?



1. Any direct or indirect communication an investment adviser makes to **more than one person**;
2. Any direct or indirect communication an investment adviser makes to **one or more persons** if the communication includes **hypothetical performance** or **offers new advisory services** current clients.
3. Any endorsement or testimonial for which an adviser provides direct or indirect cash or non-cash compensation including reduced advisory fees, sales awards or prizes, directed brokerage or gifts and entertainment provided in exchange for testimonials and endorsements

Prohibited Statements



- Untrue material statements
- Omitting material facts
- Unsubstantiated material statements of fact
- Untrue or misleading implications or inferences
- Discussion of any potential benefits without fair and balanced treatment of material risks or limitations
- “Cherry-picking”
- Advertisements that are otherwise misleading

A “testimonial” is any statement by a current client :

- About the client’s experience with the investment adviser or its supervised persons;
- That directly or indirectly solicits any current or prospective client to be a client of the investment adviser; or
- That refers any current or prospective client to be a client of the investment adviser.

An “Endorsement” is any statement by a person other than a current client that:

- Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s experience with the investment adviser or its supervised persons;
- Directly or indirectly solicits any current or prospective client to be a client of the investment adviser; or
- refers any current or prospective client to be a client of the investment adviser.

Examples



- Websites of lead-generation firms or adviser referral networks (endorsement)
- A blogger's website review of an adviser's advisory service (endorsement or testimonial)
- A lawyer or other service provider that refers an investor to an adviser, even infrequently, depending on the facts and circumstances (endorsement or testimonial)

- A “clear and prominent” disclosure;
- Written agreement if the compensation exceeds \$1,000 in one year
- The person must not be an “ineligible person”
 - Ten year look back period
 - Only applies to those compensated in excess of \$1,000
- Oversight
- Other disclosures;

Timing and Responsibility



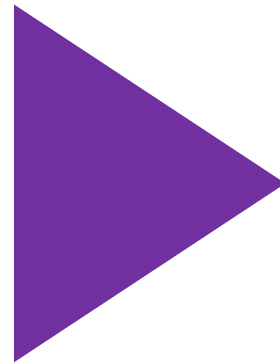
The required disclosures should be provided at the time such testimonial or endorsement is disseminated.



Adviser must have a reasonable belief that the solicitor is providing these disclosures.

Exemptions

A testimonial or endorsement by the investment adviser's supervised persons or a person that controls, is controlled by, or is under common control with the investment adviser is not required to have a written agreement



Provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or potential client

- Gross and Net Performance
- Prescribed Time Periods
- “Related Performance”
- “Extracted Performance”
- “Hypothetical Performance”
- “Predecessor Performance”

Hypothetical Performance Requirements



POLICIES AND
PROCEDURES



CRITERIA AND
ASSUMPTIONS

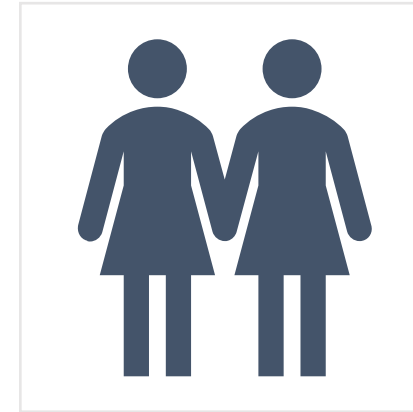


RISKS AND LIMITATIONS

Exclusions from Hypothetical Performance



In response to an unsolicited
investor request



To a private fund investor in a on-
on-one communication

Third-Party Ratings



- Third-Party Rating: a rating or ranking of an investment adviser provided by a person who is not a related person, and such person provides such ratings or rankings in the ordinary course of its business.
- Allowed subject to the general prohibitions and certain disclosure requirements.

Using Social Media



- **Entanglement**

- Entanglement occurs when an adviser is involved with the preparation of third-party communication. While allowing “likes,” reviews and online comments on a firm’s social media and webpages is now permitted under the new Marketing Rule, this presents issues of entanglement.

- **Adoption**

- Adoption occurs when the adviser or an employee explicitly or implicitly endorses or approves of third-party information after its publication.
- Retweeting, reposting, or directing traffic to third-party communication are all forms of adoption.
- Hyperlinking to a third-party webpage or quoting third-party content are other examples of adoption.

- **Due Diligence Requirement:**
 - Reasonable basis for believing any questionnaire or survey used in preparation of the rating is designed so it is equally easy for participants to provide favorable and unfavorable responses, and not designed to produce a predetermined result.
- **Disclosure: Clearly and Prominently**
 - (i) the date on which the rating was given and the time period covered;
 - (ii) the identity of the third party that created the rating, and
 - (iii) if applicable, that the Advisor has compensated the rating provider, directly or indirectly, in connection with obtaining or using the rating.
- **Ensure Not Generally Prohibited**

- Old rule Ten to New rule One:
 - Maintain any advertisement to **more** than one person or, if hypothetical performance is used, to **one or more persons**
- Samples or templates
 - Any brochure or form document that is to be used as a template for one-on-one communication constitutes an advertisement even if it is only handed out during one-on-one meetings.
- Oral Advertisements:
 - May retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement
- Performance:
 - Advisers will be required documents necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any portfolios
 - For Hypothetical Performance, will be required to maintain supporting records including who the “intended audience is”
- Third-Party Ratings and Testimonials/Endorsements:
 - Reasonable belief documentation
 - Questionnaires and Surveys

Questions?



- Please schedule a call with the compliance analyst and attorney assigned to your team to discuss any of these issues further.