

SEC RISK ALERT HIGHLIGHTS EXAMINATION PRATFALLS UNDER THE MARKETING RULE

On December 16, the staff of the Division of Examinations (the “Division”) within the U.S. Securities and Exchange Commission (the “SEC”) issued a [risk alert](#) (the “Risk Alert”) describing observations from examinations of registered investment advisers (“RIAs”) regarding compliance with the SEC’s Marketing Rule, particularly with respect to (i) testimonials and endorsements and (ii) third-party ratings.

The staff of the Division of Examinations (the “Division”) within the U.S. Securities and Exchange Commission (the “SEC”) on December 16 released a (the “Risk Alert”) outlining observations from examinations of registered investment advisers (“RIAs”) as regards compliance with the Marketing Rule – and, in particular, the use of (i) testimonials and endorsements and (ii) third-party ratings.

Adopted in December 2020, the Marketing Rule replaced the former Advertising Rule (old Rule 206(4)-1) and Cash Solicitation Rule (old Rule 206(4)-3) with a single, consolidated rule, Rule 206(4)-1 under the Investment Advisers Act of 1940 (the “Advisers Act”). The rule was intended to modernize and clarify standards governing adviser marketing and advertising, and RIAs were required to comply beginning in November 2022. Marketing Rule compliance has remained a sustained examination focus for the Division since that time.

Although the Marketing Rule applies only to RIAs (and not to exempt reporting advisers), many of its concepts provide useful touchstones for disclosure best practices across the advisory industry.

Testimonials and Endorsements

The Marketing Rule permits testimonials and endorsements – previously prohibited under the former Advertising Rule – subject to specific conditions. It is therefore unsurprising that this remains an area of the Division’s focus. Broadly, a “testimonial”¹ is a statement by a

¹ Rule 206(4)-1(e)(17) defines “testimonial” as “any statement by a current client or investor in a private fund advised by the investment adviser: (i) about the client or investor’s experience with the investment adviser or its supervised persons; (ii) that directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) that refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.”

current client or investor, while an “endorsement”² is a statement by a non-client third party (which may include, in many cases, placement agents or other promoters).³

Rule 206(4)-1(b) sets forth the requirements for testimonials and endorsements. Chief among them are disclosure requirements – an RIA must disclose (or reasonably believe the person giving the testimonial/endorsement discloses):

1. clearly and prominently that (A) the testimonial/endorsement was given by a current client/investor or otherwise, as applicable; (B) that cash or non-cash compensation was provided for the testimonial/endorsement, if applicable; and (C) a brief statement of any material conflicts of interest;
2. material terms of any compensation arrangement, including a description of the compensation provided to the person for the testimonial/endorsement; and
3. a description of any material conflicts of interest on the part of the person giving the testimonial/endorsement resulting from the RIA’s relationship with such person and/or any compensation arrangement.⁴

The staff observed that the most common issue was failure to provide the requisite disclosures at the time the testimonial/endorsement was disseminated. The staff also observed that disclosures were often not “clear and prominent.” Disclosures should be at least as prominent as the testimonial/endorsement. For example, advisers sometimes relied on hyperlinks or used smaller or lighter font than the testimonial/endorsement to which they related.

The staff also found that disclosures frequently described compensation arrangements in generic terms but omitted the material terms of those arrangements. In addition, advisers often failed to identify material conflicts and did not adequately disclose affiliation status between promoters and advisers when relevant.

In addition, RIAs must have (i) a reasonable basis for believing that the testimonial/endorsement complies with the Marketing Rule and (ii) a written agreement

² Rule 206(4)-1(e)(5) defines “endorsement” as “any statement by a person other than a current client or investor in a private fund advised by the investment adviser that: (i) 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; (ii) directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.”

³ Since the adoption of the Marketing Rule, the use of placement agents by RIAs has required additional care and disclosure, and it has been important for RIAs to bear Marketing Rule guidelines in mind throughout the entire relationship, starting with engagement agreements and through the entire solicitation process.

⁴ Rule 206(4)-1(b)(1).

with any person giving a testimonial/endorsement that describes the agreed-upon activities and the terms of compensation.⁵

The staff observed that RIAs routinely did not comply with the “reasonable basis” requirement, either due to shortfalls in their compliance policies and procedures or in their written agreements with promoters. The staff also noted recurring confusion regarding the *de minimis* compensation exception, which permits somewhat lighter disclosures. The exception is limited to \$1,000 in aggregate during a 12-month period, not \$1,000 per instance of compensation.

Finally, RIAs may not compensate persons for testimonials/endorsements if they know (or should know with reasonable care) that such persons are ineligible at the time, such as promoters who were disqualified due to their disciplinary histories.⁶ The staff observed instances in which advisers compensated promoters who were disqualified based on disciplinary action by state securities regulators.

Third-Party Ratings

The Marketing Rule also includes special rules for the use of third-party ratings. It is common for private fund sponsors, for example, to cite top-quartile performance with respect to a certain third-party benchmark.

In order to do so, though, an RIA must have a reasonable basis for believing that any questionnaire or survey used in the preparation of the rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses and is not designed or prepared to produce any predetermined result.⁷

The Division’s staff observed that many advisers did not meet this due diligence requirement. The staff notes that advisers should typically (i) review publicly disclosed information about third-party questionnaires or survey methodologies, (ii) obtain the questionnaires or surveys used the rating’s preparation and (iii) seek representations from the third-party rating agency regarding general aspects of how the questionnaires or surveys were designed, structured and administered. The staff observed this issue arising in a range of materials, including websites, social media, pitch books, press releases, and email communications.

⁵ Rule 206(4)-1(b)(2).

⁶ Rule 206(4)-1(b)(3).

⁷ Rule 206(4)-1(c)(1).

As with testimonials and endorsements, the Marketing Rule sets forth disclosure requirements, including clear and prominent disclosure of (i) the date on which the rating was given and the period of time upon which the rating was based, (ii) the identity of the third party that created and tabulated the rating and (iii) as applicable, the compensation provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

The staff found that advisers often omitted some or all of these disclosures or failed to reasonably believe that the third party made the disclosures clearly and prominently. This issue was especially common where advisers linked to third-party websites but neither the adviser nor the third party included appropriate disclosures.

The staff observed that advisers included ratings with reference to a range of years in which the adviser was the recipient of the third-party rating but not the additional required date and time period requirements. Advisers also placed third-party logos in their advertisements that did not clearly and prominently identify the third party; placed disclosures at the bottom of their websites; and, as with testimonials and endorsements, often used hyperlinks for disclosures.

Conclusion

The transition from the former Advertising Rule to the Marketing Rule has raised persistent practical questions as advisers continue to implement and refine compliance programs. The recent release is the fourth risk Marketing Rule alert issued by the Division since the rule's adoption – prior alerts included (i) a [September 2022 alert](#) just prior to the rule's compliance date, (ii) a [June 2023 alert](#) detailing areas of examination emphasis and (iii) an [April 2024 alert](#) focusing on the Marketing Rule's intersections with the general Advisers Act compliance rule (Rule 206(4)-7) and the books and records rule (Rule 204-2). In addition, the staff of the Division of Investment Management has provided a set of [Frequently Asked Questions](#), most recently updated in March 2025.

Shulman Rogers regularly represents investment advisers in connection with SEC examinations across a broad range of products and strategies, and we continue to monitor developments as the SEC and the industry work through ongoing Marketing Rule compliance issues.

Please reach out to [Scott Museles](#), [Kimberly Mann](#) or [Kevin Lees](#) at Shulman Rogers if you have any questions.

DISCLAIMER: The contents of this Alert are for informational purposes only and do not constitute legal advice. If you have any questions about this Alert, please contact the Shulman Rogers attorney with whom you regularly work.

