

SEC Marketing Rule: A 30-Day Compliance Plan

The substantive provisions of the new Marketing Rule come into effect for all private fund managers, fund sponsors and other investment advisers registered with the U.S. Securities and Exchange Commission in one month (i.e., on November 4, 2022).

- The bad news is that few advisers are prepared to comply with this rule, notwithstanding the 18-month transition period provided for in the rule.
- The good news is that all advisers can take some comfort in the fact that they are not alone in this final sprint to compliance.

It is essential, however, that all registered investment advisers formulate and execute on a compliance plan.

Here are some points to consider and include in such a plan and a suggested timeline for RIAs over the next several weeks:

Timing	Item
As Soon as Possible	Get educated! If you are not fluent in the various topics we discuss below, review the adopting release , read the EXAMS risk alert and watch our video series .
Week of October 3	Review current and anticipated outreach materials with the investor relations and marketing teams; divide the materials into “advertisements” (which are covered by the Marketing Rule) and non-advertisements (which may not be covered).
Week of October 3	Prepare a list of all entities performing actions that fall within the new definition of “endorsement” ¹ and then: <ul style="list-style-type: none"> • Consider how to treat placement agents, other solicitors and prime brokers; include non-U.S. entities in this analysis. • If the adviser has not already done so, contact each covered entity to assess its interpretation of the Marketing Rule, its assessment of whether and how the rule covers

¹ Under the new Marketing Rule, an endorsement means any statement other than an investor or current client that (i) 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, (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) 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. A similar definition applies for testimonials, except that a testimonial or endorsement is from a current investor or client. A compensated endorsement or testimonial or one included in an RIA’s advertisements is an “advertisement” subject to the rule, and no advertisement may include any testimonials or endorsements unless it complies with certain required disclosure, adviser oversight and bad actor disqualification requirements, subject to certain exemptions.

Timing	Item
	<p>them and their activities, and their plan for compliance.</p> <ul style="list-style-type: none"> • Discuss these responses with internal and external counsel. • Negotiate amended agreements, ensuring that the “endorsements” points are addressed (e.g., requirements for conflicts and fee disclosures to prospective investors and clients, representations on policies and procedures, diligence information or access).
Week of October 3	<p>Determine how the firm will handle the substantiation requirement of the rule (i.e., a prohibition on 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”).</p> <ul style="list-style-type: none"> • Note that in a September 19 Risk Alert, the SEC’s examination staff highlighted this point and the <i>de facto</i> safe harbor of preparing and retaining “a record contemporaneous with the advertisement demonstrating the basis for their belief.”² • Also note that the amendments to the books and records retention requirements overlap with this requirement, as that rule now requires the preservation of “documentation substantiating the adviser’s reasonable basis for believing that a testimonial or endorsement” (or a third-party rating) is compliant with the Marketing Rule. • We have prepared approval checklists for advisers to use in this effort. Please contact your Akin Gump lawyer for a copy.
Week of October 3	<p>Review existing marketing policies, procedures and practices covering activity in the non-U.S. markets to identify any conflicts with the new procedures being adopted to comply with the Marketing Rule.</p>
Week of October 10	<p>Finalize a new marketing policy.</p> <ul style="list-style-type: none"> • Note that the current “market” for such policies is to be fairly comprehensive in describing the new rule, the seven prohibitions and other material aspects of the rule. In light of the fluid nature of this new environment, many managers are addressing the new rule in separate desk procedures of varying formalities. • While there is no “one size fits all” policy, we are working with clients to implement new policies in a timely manner.
Week of October 10	<p>Review the revised books and records requirements, which include items such as:</p> <ul style="list-style-type: none"> • Requirements to keep a copy of each advertisement directly or indirectly disseminated. • Retention requirements for compensated oral endorsements. • The testimonial, endorsement and third-party rating requirements highlighted earlier. • A record of who the “intended audience” is for hypothetical and certain other performance presentations.
Week of October 17	<p>Finalize the adviser’s position on how it will comply with the Marketing Rule’s prohibition on including, in any advertisement, a “presentation of gross performance, unless the advertisement also presents net performance”³ with equal prominence, calculated in a similar manner.</p> <ul style="list-style-type: none"> • Discuss how case studies, private equity portfolios and similar topics will be addressed. • Involve internal and external counsel, and the investor relations and marketing teams, in

² See [alert](#).

³ The Marketing Rule defines “net performance” as “the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees[.]”

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	these discussions.
Week of October 24	Finalize all covered solicitation/placement agreement amendments.
Week of October 24	Hold a formal training for all firm personnel involved in the marketing and solicitation function.
Week of October 24	If appropriate, brief the board of directors of each fund that will be materially changing its investor reporting and outreach materials and obtain any approvals that are appropriate.
Week of October 31	Close out any loose ends from the above.
Week of October 31	Focus on the corresponding changes made to the Form ADV ⁴ ; prepare a mock-up of responses to these new questions and circulate for internal review.

Obviously, the Marketing Rule presents a new construct for the SEC, and particularly for its Division of Examinations. Advisers (and their legal and compliance departments) should pay attention to formal and informal indications of changes in practice and expectations — and be prepared to pivot quickly in response to new information.

Contact Information

If you need assistance or have questions regarding this alert, please contact your Akin Gump relationship attorney or one of the authors.

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⁴ The SEC added new questions to Item 5 of Part 1A of Form ADV relating to whether an RIA's advertisements include performance results, a reference to specific investment advice, testimonials, endorsements, third party rating, hypotheticals or predecessor performance. Information in Item 5 is not required to be updated outside of the annual amendment "even if your responses to those items have become inaccurate." See Item 5L of ADV Part 1A available [here](#).