Being an SEC Registered Adviser: *the Marketing Rule*

January 15, 2026

CompliGlobe Limited

COMPLIGLOBE
THE WORLD'S REGULATORY ADVISER™

The Marketing Rule*

- Applies to an investment adviser that is SEC registered ("RIA") or required to be registered
- Excludes a Private Fund Adviser – "ERA" – and state-registered firms
- Reaches
  - prospects for and clients with a separately managed account ("SMA"), discretionary or non-discretionary (advisory)
  - prospective investors and current investors in a private fund
- Revised two prong definition of what is and what is not "advertising"
  - *First Prong* covers only written communications with hypotheticals, no compensation
  - *Second Prong* for *testimonials* or *endorsements* with all forms of compensation, direct or indirect, cash or non-cash
- Form ADV Part 1 Item 5.L disclosures to provide information on marketing practices
- Cash solicitation rule rescinded and folded into amended Rule 206(4)-1
- Seven general prohibitions govern advertising
- Sets forth permitted and proscribed practices for performance information
- Amended Rule 204-2 books and records requirements
- Updated the Form ADV Glossary of Terms

* Materials are based on the Marketing Rule adopting release, the rule as amended and related SEC and SEC Staff materials, including FAQs

(cont'd)

- Withdrew no-action letters and guidance on advertising and cash solicitation
- A solicitation arrangement covers all forms of compensation, not just cash compensation
- Includes exceptions for *de minimis* payments and certain non-profit programs
- Enumerates the types of disciplinary events that would trigger the rule's disqualification provisions

"Investment Adviser Marketing", Advisers Act Release 5653 ("*Release 5653*"), March 5, 2021, 86 F.R. 13024 https://www.govinfo.gov/content/pkg/FR-2021-03-05/pdf/2020-28868.pdf (adopting release, amended rule, Form ADV amendments and amended Form ADV Glossary of Terms)

"Investment Adviser Marketing": Rule 206(4)-1

Marketing Rule FAQs: Marketing Compliance - FAQs (updated January 15, 2026)

Defined terms are in *italics*

Quotes taken from the Marketing Release, the Marketing Rule or the Form ADV Glossary of Terms

Every adviser is a fiduciary

*"[I]*nvestment advisers are fiduciaries of their clients, and therefore owe them "an affirmative duty of utmost good faith."

SEC v Capital Gains Research Bureau, 375 U.S. 180 (1963)

- Fiduciary duties of loyalty and care
- SEC uses Advisers Act Section 206 as a tool to enforce an adviser's fiduciary obligations
- Must supervise Supervised Persons/Access Persons, sub-advisers and participating affiliates – and third parties that provide certain services to you
- Review and compliance-clear all advertising
  - Advertising under Rule 206(4)-1 and the Advisers Act antifraud provisions
  - Non-advertising under Section 206 and Rule 206(4)-8

Fiduciary duties of loyalty and care (SEC)*

- The duty of care includes, among other things
  - duty to provide advice that is in the best interest of the client: suitability and a reasonable basis for recommendations
  - duty to seek best execution
  - duty to provide advice and monitoring over the course of the relationship

- The duty of loyalty requires that an adviser not place its own interest ahead of its client's interests
  - full and fair disclosure of all material facts relating to the advisory relationship
  - eliminate or at least make full and fair disclosure of all conflicts of interest and the means to address (mitigate) them

"Commission Interpretation Regarding Standard of Conduct for Investment Advisers", 84 FR 33669 (July 12, 2019), https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf; see also Staff Bulletins

Considerations apart from the Marketing Rule …

- In addition to Advisers Act Rule 206(4)-1, consider applicable antifraud provisions of the other federal securities laws, the Commodity Exchange Act ("CEA") and the rules thereunder, and FINRA and NFA rules
- All materials must be materially correct with no material misstatements or omissions; no half truths
- Not only intent, but in certain instances, negligence, will confer liability
  - Securities Act of 1933 Sections 12 and 17(a) and certain rules thereunder, including Rule 156
  - Securities Exchange Act of 1934 Section 10(b) and Rule 10b-5 thereunder
  - Advisers Act Sections 206(1), (2) and (4) and the rules thereunder, in particular, Rule 206(4)-8
  - For an SEC registered fund ("RIC"), the provisions of the Investment Company Act of 1940 and the rules thereunder
  - Where a broker-dealer ("BD") is involved in offering for sale the securities of a private fund or a RIC, FINRA rules
  - If you state that you are GIPS compliant, you must be and be able to prove it
  - Are you a registered CTA or a CPO for a pooled investment vehicle caught under the CEA? Consider and comply with provisions of this law, CFTC Regulations and NFA Compliance rules

Caveats regarding private fund advertising

- "The final rule covers marketing activities by investment advisers to clients and prospective clients as well as investors and prospective investors in private funds that those advisers manage." *Marketing Release*, 86 F.R. 13025 (fn. 5)
- "Presentations of private fund performance are subject to the general antifraud provisions of the federal securities laws and the general prohibitions in the Marketing Rule, including the prohibition of including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced." *Marketing Release*, 86 F.R. 13024 at 13097
- In addition to Advisers Act Section 206, "… communications to investors in private funds are subject to various statutory and regulatory antifraud provisions, such as rule 206(4)–8 under the Advisers Act, section 17(a) of the Securities Act, section 10(b) of the Exchange Act and rule 10b–5 thereunder." *Marketing Release*, 86 F.R. 13024 at 13073
- An investment adviser that prepares materials for a feeder fund or a fund underlying a fund of funds may be held liable for breaches of the general prohibitions
- Unlawful to do indirectly that which cannot be done directly – Advisers Act Section 208(d)
- PPMs, account statements, transaction reports and similar statements – deemed not to be advertising
- Pitch books and other, similar materials "could fall within the definition of an advertisement"
- Deal rooms
  - Themselves are not an *advertisement*
  - Posted contents and communications would be if they satisfy either prong of the definition

The general prohibitions – "principles-based"

These apply to every *advertisement*. An *advertisement* cannot:

1. "Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading;
2. 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;
3. Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
4. Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
5. Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
6. Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
7. Otherwise be materially misleading."

- Each statement is measured on its own, vs the totality of all statements in the context in which it is made
- Each statement must be substantiated and records kept to support same

Advertising – *First Prong*

Essentially, the previous version of this rule …

"Any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes *hypothetical performance*, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a *private fund* advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a *private fund* advised by the investment adviser … ".

Elements of the *First Prong*

1. "Any direct or indirect communication

2. an investment adviser makes
   i. to more than one person, or
   i. to one or more persons if the communication includes *hypothetical performance,*

3. that offers the investment adviser's investment advisory services with regard to securities
   i. to prospective clients [for a discretionary or non-discretionary (advisory) SMA]
   ii. or [prospective] investors in a *private fund* advised by the investment adviser

   or

4. or offers new investment advisory services with regard to securities
   i. to current [SMA] clients
   ii. or investors in a *private fund* advised by the investment adviser … "

What is *not* advertising under the *First Prong*

1. "Extemporaneous, live, oral communications;

2. Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or

3. A communication that includes *hypothetical performance* that is provided:

    i. In response to an unsolicited request for such information from a prospective or current client or investor in a *private fund* advised by the investment adviser; or
    ii. To a prospective or current investor in a *private fund* advised by the investment adviser in a one-on-one communication … "

4. Per the *Marketing Release*, also excluded are

    i. communications designed to "retain existing investors"
    ii. communications concerning a RIC or business development company

Guidance on the *First Prong*

1. "Extemporaneous" means live; oral means oral/spoken (close captions are ok)
   i. not recorded – but recordings are advertising
   ii. Advance materials, notes, speeches, slides, talking points are advertising
2. Unsolicited means *bona fide* unsolicited – keep records to prove this
3. *Bona fide o*ne-on-ones with no hypothetical performance not advertising
4. Prospects must "affirmatively" ask for hypothetical performance information in a *bona fide* unsolicited request – can't tease, hint, invite or do any affirmative act w/r/t the prospect to ask for it
5. Includes uncompensated *testimonials* and *endorsements* via *adoption* and *entanglement*
6. One-on-one exclusion applies regardless of whether the communication goes to one natural person with an account or multiple persons representing a single entity or account (or household) – excludes entities
7. "… communications that appear to be personalized to single investors and are "addressed to" only one person, but are actually widely disseminated to multiple persons" – such as e-mails, text message or social media blasts/postings: these *are* advertising
8. Indirect means: what is given or approved for dissemination by others, or third-party statements – includes Related Persons
9. Includes advertising disseminated by any means
10. Once hypotheticals (including forecasts and projections) come in, its advertising
11. Adding a name to a template or a mass mailing – is advertising
12. Bespoke materials about a person's account – excluded
13. Duplicated inserts are caught

Advertising – Second Prong

Essentially, a re-write of the rescinded cash solicitation rule …

"Any *endorsement* or *testimonial* for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication."

Elements of the *Second Prong*

1. "Any *endorsement*

2. or *testimonial*

3. for which an investment adviser provides compensation, directly or indirectly

4. but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication."

Guidance on the *Second Prong: testimonials* and *endorsements*

1. "*Testimonial*" – any statement by a current SMA client or private fund investor about their experience with the investment adviser or its Supervised Persons
2. "*Endorsement*" – a statement by any person other than the above that (a) indicates approval, support or recommendation of an RIA or its Supervised Persons, (b) directly or indirectly solicits a current or prospective client or investor to be a client of or an investor in a private fund the RIA advises or (c) refers a current or prospective client or investor to be a client of, or investor in a private fund the RIA advises
3. Includes oral communications and one-on-one communications
4. Includes opinions, statements about expertise, qualities or capabilities and quotes in an *advertisement*
5. Blogger's website review of the investment adviser's services are a *testimonial* or *endorsement* – and with payment, would be an *advertisement* under the *Second Prong*
6. "A lawyer or other service provider that refers an investor to an adviser, even infrequently" – facts and circumstances, endorsement and likely to be an *advertisement* under the Second Prong
7. Client lists that *only* identify SMA clients or private fund investors are not treated as testimonials
8. No guidance on naming members of advisory boards or upstream funding company owners/investors
9. Operators of referral networks, consultants, model portfolio providers, platforms, matching services: this generally involves solicitation or referral activities and an endorsement, so statements are caught
10. Includes solicitation and referral activities
    i. A statement by such a person may be a *testimonial* or an *endorsement*
    ii. Can include an unaffiliated fund of funds or a feeder fund for a master fund

Guidance on the *Second Prong: testimonials* and *endorsements* (cont'd)

12. Paying a marketing service or news publication to prepare content for issue – generally not an *endorsement* under the *Second Prong*
13. Non-investor selling the investment adviser a list with names and contact details – finder's activity
    i. Generally, not an *endorsement* under the *Second Prong*
    ii. Might well be an *advertisement* under the *First Prong*
    iii. Caution: might involve the non-investor in activities within the definition of "broker" in Exchange Act Section 3(a)(4), SEC Staff no-action letters and enforcement actions thereunder

Guidance on the *Second Prong:* cash and non-cash compensation

1. Any form of compensation triggers the *Second Prong*
2. Direct or indirect
3. Paid by the investment adviser or its parent company
4. To third party marketing companies, promoters, directed brokerage arrangements
5. Cash or non-cash: fees, retainer fees, trailer fees, hourly fees, reduced advisory fees, fee waivers, sales rewards, prizes, gifts and entertainment, retrocessions, fees paid to a third-party for them to promote the investment adviser's business and any other form of cash compensation or a non-cash reward – and includes "directed brokerage that compensates brokers for soliciting investors …"
6. Excludes: regular salary or bonuses paid for their normal work – investment advisory services or clerical, support or other functions
7. Must disclose materials terms of the compensation arrangement, when and how paid, contingent on what, &c - clearly and prominently
8. Timing
    i. Looks to a *quid pro quo*
    ii. Marketing Release did not give parameters or a time frame, no "bright lines"

Testimonials and *endorsements*

Rule: Can't issue a *testimonial* or *endorsement* and can't provide compensation, directly or indirectly for same, unless you comply with the following three requirements

1. **Required disclosures**: investment adviser must disclose, or reasonably believe [must have proof] that the person giving the *testimonial* or *endorsement* [investment adviser or promoter] discloses the following at the time the *testimonial* or *endorsement* is disseminated – clearly and prominently "within it", written or electronic with it
   a) that the *testimonial* was given by a current client or investor, and the *endorsement* was given by a person other than a current client or investor, as applicable
   b) that cash or non-cash compensation was provided for the *testimonial* or *endorsement*, if applicable [*The material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement]*
   c) a brief statement of any material conflicts of interest on the part of the person giving the *testimonial* or *endorsement* resulting from the investment adviser's relationship with such person [*A description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person and/or any compensation arrangement*]

Testimonials and endorsements (cont'd)

2. **Oversight, compliance and written agreement**: investment adviser must have

   a) a reasonable basis for believing that the *testimonial* or *endorsement* complies with the requirements of the Marketing Rule, and

   b) a written agreement with any person giving a *testimonial* or *endorsement* that describes the scope of the agreed-upon activities and the terms of compensation for those activities

   This includes "covered persons" under Regulation D Rule 506(d) who are not exempt from this obligation

3. **No disqualification**: investment adviser may not compensate a person, directly or indirectly, for a *testimonial* or *endorsement* if it knows, or in the exercise of reasonable care should know, that the person giving the *testimonial* or *endorsement* is an *ineligible person* at the time the *testimonial* or *endorsement* is disseminated

Exemptions from *testimonial* and *endorsement* provisions

1. A *testimonial* or *endorsement that is* disseminated for no compensation or *de minimis compensation* is not required to comply with the "written agreement" requirement and the "disqualification" provision. The "oversight requirement" is always applicable
2. A *testimonial* or *endorsement* by the investment adviser's partners, officers, directors, employees or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person, is not required to comply with the "required disclosure" requirement and the "written agreement" requirement – *as long as* the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or the investor at the time the *testimonial* or *endorsement* is disseminated and the investment adviser documents such person's status at the time the *testimonial* or *endorsement* is disseminated
3. A *testimonial* or *endorsement* issued by an SEC registered BD is exempt from only the following
   i. The "required disclosures" requirement if the *testimonial* or *endorsement* is subject to Reg BI
   ii. The "required disclosures" and "conflicts of interest" requirements if the recipient is not a retail customer as defined in Reg BI
   iii. The "disqualification" requirement if the BD is not subject to a statutory disqualification
   iv. A *testimonial* or *endorsement* by a person that is covered by rule 506(d) of the Securities Act of 1933 for a Rule 506 private placement and whose involvement would not disqualify the offering under that rule is not required to comply with the "disqualification" requirement

Exemptions (cont'd)

4. Supervised Persons or affiliates
   i. Must be supervised
   ii. the affiliation must be readily apparent (facts and circumstances) or disclosed at the time the *testimonial* or *endorsement* is given
   iii. must be documented contemporaneously
   iv. Independent contractors should be supervised
   v. When affiliates give a *testimonial* or *endorsement*, investment adviser must have reasonable basis to believe that it complies with the Marketing Rule and must document same, but does not need the written agreement
5. *De minimis compensation*
   i. If $0 or *de minimis compensation*, no written agreement but requires oversight and compliance requirement – best practice is to document same
   ii. Aggregate of $1,000 over a 12-month period
6. BDs: Must supervise them w/r/t *testimonials* or *endorsements* they issue for the investment adviser

Marketing rule FAQs: disqualification from SRO final rule order*

"Q: Would the staff recommend enforcement action if an [RIA] compensates a person for a testimonial or endorsement when that person was subject to the entry of a final order by [an SRO] of the type described in section 203(e)(9) of the Advisers Act within the prior 10 years *and* that person has not been barred or otherwise suspended from acting in any capacity under the rules of that self-regulatory organization?

A: Rule 206(4)-1(b)(3) prohibits an investment adviser from compensating a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is subject to any disqualifying event (as defined in the marketing rule) within 10 years prior to the person disseminating an endorsement or testimonial. Such an event includes the entry of any final order by a self-regulatory organization (as defined in the Form ADV Glossary of Terms) based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

The definition of "disqualifying event" excludes a Commission order or opinion that does not bar, suspend, or prohibit the person subject to the order from acting in any capacity under the federal securities laws, provided that the person is in compliance with the terms of the opinion or order, and the advertisement includes certain disclosures about the disciplinary event. The Commission explained that it adopted this exclusion because, "when the Commission has issued an opinion or order with respect to a person's disqualifying conduct but not barred or suspended the person or prohibited the person from acting in any capacity under the federal securities laws, it is appropriate to . . . permit such person to engage in activities related to compensated testimonials and endorsements," provided that certain conditions are met.

Following this rationale, if a self-regulatory organization has issued an order with respect to a person's disqualifying conduct but did not bar or suspend the person or prohibit such person from acting in any capacity in connection with that disqualifying conduct, the staff will not recommend enforcement action if such person engages in activities related to compensated testimonials or endorsements, provided the same conditions are satisfied.

Specifically, the staff would not recommend enforcement action to the Commission under Rule 206(4)-1(b)(3) if an investment adviser compensates a person for a testimonial or endorsement who the adviser knows, or in the exercise of reasonable care should know, was subject to the entry of a final order by a self-regulatory organization of the type described in section 203(e)(9) within 10 years prior to the person disseminating an endorsement or testimonial, provided that: 1. The sole reason the person is an ineligible person (as defined in the marketing rule) is the self-regulatory organization's final order; 2. The self-regulatory organization did not expel or suspend the person from membership, bar or suspend the person from association with other members, or prohibit the person from acting in any capacity; 3. The person is in compliance with the terms of the self-regulatory organization's final order, including, but not limited to, paying disgorgement, prejudgment interest, civil or administrative penalties, and fines; and 4. For a period of 10 years following the date of such final order, any advertisement containing the testimonial or endorsement discloses that the person providing the testimonial or endorsement is subject to a self-regulatory organization order, and includes the order, or a link to the order on the self-regulatory organization's website or other public disclosure system, if available."

* Marketing Rule FAQs: Marketing Compliance - FAQs (updated January 15, 2026)

Content, brand content, educational communications

" … general educational communications that rely on public information and do not reference specific advisory products or services offered by the adviser would not qualify as advertisements"

- Generic, profile raising and not SMA- or private fund-specific, strategy or performance communications
- Cannot include or reference investment advisory services, private fund performance, &c.
- General market commentary and statements in interviews – if to "inform current and prospective investors" in SMAs and private funds of "market and regulatory developments in the broader financial ecosystem" and that does not help prospective investors invest or use the investment adviser's services

Anti-cherry-picking provisions

References to specific investment advice

1. Goes to investment advice that is current or in the past, whether or not acted upon, reflected portfolio holdings or was profitable – discretionary and non-discretionary
2. Must be presented in a fair and balanced manner, must present "sufficient information and context to evaluate the merits of that advice"
3. A thought piece might be permissible if it includes disclosures with "appropriate contextual information" to evaluate the recommendations
4. Providing a list of investments or case studies
    i. Consider facts and circumstances, use, venue and timing
    ii. The criteria used to select "should produce fair and balanced results"
    iii. Consistent application across measurement time periods
    iv. "… may wish to apply non-performance related selection criteria across portfolio holdings"
5. Appropriate period of time
6. Can't depend on a footnote or disclaimer to "clarify" or "explain"
7. Where further information is necessary to assess performance, can't fail to provide this or invite the recipient to request further it

Third party ratings

1. Given by any person that is not a *Related Person*
2. The investment adviser must have a reasonable basis for believing that any questionnaire or survey used in the preparation of the *third-party 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
3. The investment adviser must clearly and prominently disclose* or reasonably believes (must keep records to substantiate) that the *third-party rating* clearly and prominently discloses**
   i. the date on which the rating was given and the period upon which the rating was based
   ii. the identity of the third party that created and tabulated the rating
   iii. if applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the *third-party rating*

* Not in a hyperlink

** all three of these

Social media and instant messaging

1. Generally, materials posted on social media may be advertising
   i. Basis is attribution to the investment adviser
   ii. Includes hyperlinks and materials accessed via the "envelope theory" - consider hyperlinks under the "*attribution*" and "*entanglement*" concepts
   iii. Liability if the investment adviser knows or has reason to know the *advertisement* breaches a general prohibition
2. Investment adviser's own materials on its website or social media pages - advertising
3. Third party posts on the investment adviser's website or social media pages: if posted "as is", not edited, changed, sorted, altered, &c, the investment adviser is not involved in the preparation and does not give an endorsement or acceptance, generally not deemed to be advertising
4. Third-party website
   i. Guidance in the Marketing Release states that the investment adviser may say "like", "share", or "endorse"
   ii. Investment adviser cannot take affirmative steps to involve itself in the preparation of the materials – if it does, then those comments are attributed to the investment adviser
5. Associated person social media accounts
   i. Facts and circumstances test measured under the investment adviser's WPPs that prevent such postings, so they would not be advertising
   ii. Strict compliance with "like", "share", or "endorse" (as above)
   iii. But the associated person might face liability for certain postings beyond this, and it may be advertising …

Social media (cont'd)

6. Cannot use social media posts to tout or discuss an offering of securities, directly or indirectly, without disclosing compensation – *SEC v Kardashian*, Admin Proc 3-21197 (October 3, 2022) (touted cryptocurrency offering without disclosing compensation, https://www.sec.gov/litigation/admin/2022/33-11116.pdf
7. Do not use personal devices, personal social media or personal instant messaging (WhatsApp, Twitter, Instagram, &c) for client or work purposes – see "SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures", Press Release 2022-174 (September 27, 2022), with links to related enforcement actions/orders, https://www.sec.gov/news/press-release/2022-174

Performance: net, net and gross side by side …

1. Can show (i) only net or (ii) net and gross, side by side, but in a format designed to facilitate comparison
2. Cannot mix gross internal rate of return and net internal rate of return
3. Defined with reference to a *portfolio* or a portion of a *portfolio*: *p*erformance or *extracted performance*
4. Calculated with the same methodology over the same time period
   i. One-, five- and 10-year time period, which "… must end on a date that is no less recent than the most recent calendar year-end, rather than the most recent practicable date"
   ii. Ends on a date that is no less recent than the most recent calendar year-end
   iii. For GIPS, use GIPS 10-year standard

   SEC Staff Guidance (March 19, 2025): "The staff would not object if you are unable to calculate your one-, five-, and ten-year performance data in accordance with rule 206(4)-1(d)(2) immediately following a calendar year-end and you use performance information that is at least as current as the interim performance information in an advertisement until you can comply with the calendar year-end requirement. … [A] reasonable period of time to calculate performance results based on the most recent calendar year-end generally would not exceed one month. The interim performance information remains subject to the other provisions of the marketing rule, including the general prohibitions."
5. Applies to all performance results, including *gross performance* and *net performance*, and including any composite aggregation of related portfolios
6. If the relevant portfolio did not exist for a prescribed period, investment adviser must present performance information for the life of the portfolio
7. Time period requirements apply for SMA portfolios, not private funds – the latter disclosures are subject to the general prohibitions and the antifraud provisions noted above

Performance: net, net and gross side by side … (cont'd)

9. An *advertisement* cannot include any presentation of *gross performance*, or *extracted performance*, unless it also presents *net performance*
   i. with at least equal prominence to in a format designed to facilitate comparison with, the *gross performance* – no highlights and
   ii. calculated over the same time using the same type of return and methodology as *gross performance* Disclosures for net and gross must comply w/ the general prohibitions

   Based on the facts and circumstances, "… disclosures may include: (1) the material conditions, objectives, and investment strategies used to obtain the results portrayed; (2) whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; (3) the effect of material market or economic conditions on the results portrayed; (4) the possibility of loss; and (5) the material facts relevant to any comparison made to the results of an index or other benchmark"
10. Model fees – must satisfy the "equal to the highest [fee] charged to the intended audience" requirement
11. Steps
    i. Define portfolio or portion of a portfolio
    ii. Determine fees and expenses an SMA client or private fund investor has paid or would have paid
    iii. Deduct #ii from #i to arrive at *net performance*

Use of model fees: January 15, 2025, Staff Guidance*

"Q: Would an investment adviser violate the general prohibitions of Rule 206(4)-1(a) by advertising the net performance of a portfolio that reflects the deduction of the actual fees charged to the portfolio ("actual fees"), when the fees to be charged to the advertisement's intended audience ("anticipated fees") are anticipated to be higher than the actual fees charged?

A: The marketing rule's definition of "net performance" includes (i) a portfolio's performance after the deduction of all fees and expenses actually paid by a client or investor, and (ii) the portfolio's performance after the deduction of a model fee, subject to certain conditions. In some circumstances, however, it may be inconsistent with the rule's general prohibitions to solely present net performance reflecting actual fees.

Specifically, footnote 590 of the [*Marketing Release*] focuses on differences between actual fees charged historically and the anticipated fees to be charged. It states that, when presenting net performance in an advertisement, "[i]f the fee to be charged to the intended audience is anticipated to be higher than the actual fees charged, the adviser must use a model fee that reflects the anticipated fee to be charged in order not to violate the rule's general prohibitions."

Some advisers in this situation have interpreted footnote 590 [of the *Marketing Release*] to categorically require the presentation of net performance calculated using a model fee and to prohibit the presentation of net performance calculated using actual fees.

The Commission noted in the adopting release that the general prohibitions are intended to "provide appropriate flexibility and regulatory certainty for advisers considering how to market their investment advisory services" and "[i]n applying the general prohibitions, an adviser should consider the facts and circumstances of each advertisement." In the staff's view, whether the use of actual fees violates the general prohibitions depends on all of the facts and circumstances of a specific advertisement, including, but not limited to, relevant disclosures. The staff's view is that advisers may use various means to illustrate the effect of differences between actual fees and anticipated fees on performance.""

* Marketing Rule FAQs: Marketing Compliance - FAQs (updated January 15, 2026)

Performance: portfolio or composite aggregation

An *advertisement* cannot include

"any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the *advertisement* includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period"

Can’t say SEC approved

No *advertisement* may contain a statement or lead a person to believe that that the calculation or presentation of performance results in the *advertisement* has been approved or reviewed by the SEC [or the SEC Staff]

Related performance

1. No *advertisement* may include *related performance* unless it includes all *related portfolios* – a facts and circumstances test
2. The presentation of *related performance* is a "composite aggregation of all portfolios within stated criteria" and subject to the general prohibitions
3. Whether a *portfolio* is a *related portfolio* is a facts and circumstances analysis
4. *Related performance* may exclude any *related portfolios* only if
   i. the advertised performance results are not "materially higher than" if all *related portfolios* had been included and
   ii. the exclusion of any *related portfolio* does not alter the presentation of any applicable time periods – namely, the one-, five- and ten-year periods
5. Disclose all material facts – size, basis on which managed, strategies, investment objectives, market conditions, size of portfolio and restrictions
6. Substantially similar: facts and circumstances, going to investment objectives, policies, strategies, restrictions and size
7. Can present results of a single representative account or a subset of a *related portfolio* alongside required *related performance* "so long as the advertisement would otherwise comply with the general prohibitions"

Extracted performance

1. An *advertisement* may include *extracted performance* only if the *advertisement* provides, or offers to provide promptly, the performance results of the total *portfolio* from which the performance was extracted
2. Applies only a *portfolio*
3. An extract, according to the SEC Staff in March 2025 Guidance, is "[d]isplaying the performance of one investment or a group of investments in a private fund or other portfolio."
4. Cannot extract performance from a composite of multiple *portfolios* because this is not a subset of investments extracted from a *portfolio* and it does not reflect holdings of an SMA or a private fund
5. Must make clear disclosure of the extract and when an investment adviser shows gross performance it must also show net performance

SEC Staff Guidance (March 19, 2025): "[T]he staff would not recommend enforcement action to the [SEC] under rule 206(4)-1(d)(1) if an adviser displays the gross performance of an extract in an advertisement without including corresponding net performance of the extract, if:[3] the (1) the extracted performance is clearly identified as gross performance;[4] (2) the extracted performance is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the rule;[5] (3) the gross and net performance of the total portfolio is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the extracted performance;[6] and (4) the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the extracted performance is calculated. Because time periods over which extracts are calculated may not easily align with the time periods required by Rule 206(4)-1(d)(2), the staff would not recommend enforcement action to the Commission under Rule 206(4)-1(d)(2) if the extracted performance presented as described above was calculated over a single, clearly disclosed period.[7] The staff notes that any advertisement that presents the gross performance of one or more extracts in accordance with this FAQ remains subject to the general prohibitions of Rule 206(4)-1(a) (as well as section 206(1) and 206(2) of the Advisers Act)."

Hypothetical performance

1. *Hypothetical performance* are results not actually achieved by an investment adviser and are one of the following*
   i. Model performance: generally, reflects: the *Clover* no-action letter criteria; computer generated models and models an investment adviser creates or purchases from model providers that are not used for actual clients or investors
   ii. Backtested performance: performance "backtested by the application of a strategy to market data from prior periods when the strategy was not actually used during those periods"
   iii. Targeted returns: reflect the investment adviser's aspirational goals, generally used as a benchmark or to describe an investment strategy or objective to measure success
   iv. Projected returns: reflect a performance estimate, established by mathematical modeling and is based on historical data and assumptions
2. Marketing Rule applies to targeted and projected returns "with respect to any portfolio or to the investment advisory services to with regard to securities offered in the advertisement"
3. Investment analysis tools: "… the final rule will exclude the performance generated by investment analysis tools from the definition of hypothetical performance and will import a definition of "investment analysis tool" from FINRA Rule 2214 with slight modifications", which is "an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices". Current or prospective investor must use the tool – input or provide data to input.
4. " … the following would not be considered hypothetical performance under the [Marketing Rule]:
   i. a presentation of performance that illustrates how a portfolio allocated 60% to equities and 40% to bonds would have performed over the past 50 years as compared to a portfolio composed of 40% equities and 60% bonds."
   ii. Indexed-based data which is "informative to investors as a benchmarking tool"

* Terms defined in the *Marketing Release*

Hypothetical performance (cont'd)

5. An *advertisement* may not include *hypothetical performance* unless the investment adviser
   i. adopts and implements written policies and procedures reasonably designed [Advisers Act Rule 206(4)-7] to ensure that the *hypothetical performance* is relevant to the likely financial situation and investment objectives of the intended audience [with resources and financial expertise] of the *advertisement* [WPPs should require that the investment adviser keep records to substantiate this]
   ii. provides sufficient information [provide the calculations] to enable the intended audience to understand the criteria used and assumptions made in calculating such *hypothetical performance*
   iii. provides (for an investor in a *private fund,* offers to provide promptly) sufficient information [criteria and assumptions] to enable the prospect to understand the risks and limitations of using *hypothetical performance* in making investment decisions – and if this is satisfied the conditions with respect to portfolio or composite aggregation, related performance and extracted performance do not apply
6. Interactive analysis tools can use used if the investment adviser complies with the following and has an appropriate disclaimer:

   "(1) provides a description of the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;

   (2) explains that the results may vary with each use and over time;

   (3) if applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

   (4) discloses that the tool generates outcomes that are hypothetical in nature."

Predecessor performance

No *advertisement* may include *predecessor performance* unless

1. The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser
2. The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors
3. All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods - one-, five-, and ten-year periods
4. The *advertisement* clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity

Amendments to Form ADV and books and records

1. Form ADV Part 1 Item 5.L – update in the annual amendment, answer "yes" or "no" Qs
   i. Must state whether any *advertisements* include performance results
   ii. Must state whether *advertisements* include *testimonials*, *endorsements* or *third-party ratings*
   iii. Must state whether the investment adviser pays or otherwise provides cash or *non-cash compensation*, directly or indirectly
   iv. Must state whether advertisements have *hypothetical performance* and *predecessor performance*
2. Rule 204-2, the books and records rule, amended to require an investment adviser to keep the following
   i. Records of *advertisements*, clearances/rejections, calculations, supporting data, &c
   ii. Records of compensation of any type, communications with third parties
   iii. Records of communications to prospects, SMA clients and private fund investors
   iv. Records of affiliates and promoters, and document their status
   v. Communications received or sent concerning *predecessor performance*
   vi. For *hypothetical performance* and *model performance* – records of the intended audience

   – E-mail archives are deemed to be an acceptable method to keep advertisements disseminated to clients or investors
   – Can use cloud storage or a third-party vendor

Compliance considerations

An adviser is responsible for ensuring that its advertisements comply with the rule, regardless of who creates or disseminates them

1. Must have written policies and procedures ("WPPs") reasonably designed … Advisers Act Rule 206(4)-7
   i. Must be clear, concise and not open to interpretation
   ii. Supervise and exercise oversight
   iii. Compliance train staff
   iv. Take swift action when breaches occur
2. Monitor, test and address issues as they arise
3. Validate via annual review
4. Consider Division of Examination Risk Alerts, including the Risk Alert on exams for implementation of the Marketing Rule, https://www.sec.gov/exams, and NFA and FINRA pronouncements
5. Take on board the "lessons learned" from enforcement actions and court cases
6. Promoter status under the Advisers Act as an RIA and the Exchange Act as a broker-dealer – facts and circumstances
7. Re "untrue or misleading implication or inference": a general language disclaimer "would not overcome this general prohibition"
8. Disclaimers have limited, if any, effect
9. Exercise oversight over third parties and document reviews
10. Compliance clear all materials – even if not advertising – and document the clearance process
    i. Non-advertising is cleared against the materially correct standard in Advisers Act Section 206 and the antifraud provisions of other applicable federal and state laws

Compliance (cont'd)

11. Calculation methodologies should be clear, easy to understand and explain
12. Disclosures must be simple, clear and prominent
13. Keep records and complete files
    i. Must have original records to prove performance calculations and advertising
    ii. Records must cover the entire measuring period of advertised performance
    iii. Date of publication starts the record retention period
14. No estimates/results from "spreadsheet portfolios"
15. Supervise third parties that distribute advertising or any other materials

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