

Your First Meeting on the SEC's New Investment Adviser Marketing Rule Should Address These Topics

The U.S. Securities Exchange Commission's has issued its new modernized Advertising Rule that is intended to replace the existing Advertising and Cash Solicitation Rules. The SEC release relating to the new Advertising Rule is a 430 page behemoth that will create a significant change to the manner in which advisers conduct their advertising and marketing activities.

Financial advisers have reason to welcome the new rule, which represents a long-awaited and much-needed modernization of an antiquated rule that dates back to 1961 when fax machines, email, and online media didn't yet exist. The new rule is meant to provide consolidated and clear guidance, support the change to a principle-based regulation practice, and lead toward a fair and balanced approach to adviser advertising. The new rule modifies the definition of "advertisement" to be more evergreen in light of ever-changing technology and notably, the definition does not apply to communications directed to only one person.

You can review the new rule in its entirety [here](#) and the corresponding SEC release [here](#).

The new rule is scheduled to go into effect 60 days after it is published in the Federal Register, with a mandatory compliance date to take effect 18 months thereafter.

Let's take a look at aspects of the new rule that should be high on the discussion list for your firm's next meeting involving Marketing and Compliance.

The Supervisory Review Process

A noteworthy change under the new rule is that Investment advisers will no longer be required to have ALL marketing materials pre-reviewed by Compliance before use. The elimination of the broad "pre-use review" obligation is notable; however, advisers should still determine whether doing so is prudent for their businesses or simply a step that is preferred by the Compliance function.

To help ease the previously required task of seeking formal pre-use compliance review for live oral communications, the new rule would no longer require compliance preapproval for live broadcasts on radio, television, or social media. The new rule gives advisers the latitude to assign ad approval responsibility to any qualified employee with the stipulations that the reviewer be knowledgeable about the new rule's requirements and that the employee who creates the ad should not be the same person who approves it.

Compliance departments should have a smartly designed process when it comes to approving advertisements. Firms must maintain written records of how ads are reviewed and approved to allow a more efficient review of marketing practices by the SEC's examination staff.

Performance Advertising

The new rule allows the use of testimonials, endorsements, performance results, and third-party ratings as long as advisers use appropriate disclosures to help investors evaluate claims made by the adviser. Any ad that includes an endorsement or testimonial must disclose whether the person providing it was or is being compensated.

Advertisements that present gross performance must provide clients access to a schedule of fees and expenses used to calculate net performance and must be presented over the customary 1-, 5-, and 10-year (or since-inception) time periods. The new rule permits advisers to use hypothetical performance, including the back-tested performance of an investment strategy in prior time periods when the strategy was not yet implemented or used to manage client accounts.

The often-debated use of back-tested performance in marketing material is subject to the adoption and implementation of policies and procedures to ensure any such performance information is relevant to the specific situation and not just “cherry picked” by the adviser.

A Word About Solicitors

Under the new rule, the SEC no longer considers any solicitor to be an associated person of an investment adviser and therefore will not require individual registration under the Advisers Act. However, the SEC did leave open the possibility that a registration will be necessary. The new rule requires that any solicitor or other promoter must determine whether it is subject to statutory or regulatory requirements under Federal or state law, including the requirement to register as an investment adviser and/or as a broker-dealer.

Compliance officers should take time to revisit the changes to how parties conducting what we know today as cash solicitation activities are treated under the new rule. Importantly, the new rule extends the definition of solicitor to include persons who solicit investors in private funds.

Change Brings Opportunity

The SEC’s new advertising rule reflects years, if not decades, of discussion among advisers and regulators in an attempt to keep the advertising and marketing statutes on pace with the evolving ways we communicate. Absorbing the new rule and creating relevant policies and procedures for your firm will take time, too.

The professionals at Jacko Law Group can help. To schedule a consultation, please call 619.298.2880 or email info@jackolg.com.