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Title 17

§ 275.206(4)-1 Investment adviser marketing.

As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)), it is unlawful for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3), directly or indirectly, to disseminate any advertisement that violates any of paragraphs (a) through (d) of this section.

- (a) **General prohibitions.** An advertisement may not:
- (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.
- (b) **Testimonials and endorsements.** An advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the conditions in paragraphs (b)(1) through (3) of this section, subject to the exemptions in paragraph (b)(4) of this section.
- (1) **Required disclosures.** The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:
 - (i) Clearly and prominently:
 - (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; and

- (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;
- (ii) 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*; and
- (iii) 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.
- (2) **Adviser oversight and compliance.** The investment adviser must have:
- (i) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this section, and
- (ii) 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.
- (3) **Disqualification.** An investment adviser may not compensate 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 an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under § 275.206(4)-3(a)(1)(ii) of this chapter, as in effect prior to May 4, 2021.
- (4) **Exemptions.**
- (i) A testimonial or endorsement disseminated for no compensation or *de minimis compensation* is not required to comply with paragraphs (b)(2)(ii) and (3) of this section;
- (ii) A testimonial or endorsement by the investment adviser's partners, officers, directors, or 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 paragraphs (b)(1) and (2)(ii) of this section, provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or 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;
- (iii) A testimonial or endorsement by a broker or dealer registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(a)) is not required to comply with:
- (A) Paragraph (b)(1) of this section if the testimonial or endorsement is a recommendation subject to § 240.15l-1 of this chapter (Regulation Best Interest) under that Act;
- (B) Paragraphs (b)(1)(ii) and (iii) of this section if the testimonial or endorsement is provided to a person that is not a retail customer (as that term is defined in § 240.15l-1 of this chapter (Regulation Best Interest) under the Securities Exchange Act of 1934 (15 U.S.C. 78o(a))); and
- (C) Paragraph (b)(3) of this section if the broker or dealer is not subject to statutory disqualification, as defined under section 3(a)(39) of that Act; and

- (iv) A testimonial or endorsement by a person that is covered by rule 506(d) of Regulation D under the Securities Act of 1933 (§ 230.506(d) of this chapter) with respect to a rule 506 securities offering under the Securities Act of 1933 (§ 230.506 of this chapter) and whose involvement would not disqualify the offering under that rule is not required to comply with paragraph (b)(3) of this section.
- (c) **Third-party ratings.** An advertisement may not include any third-party rating, unless the investment adviser:
 - (1) Has 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; and
 - (2) Clearly and prominently discloses, or the investment adviser reasonably believes that the third-party rating clearly and prominently discloses:
 - (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) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.
- (d) **Performance.** An investment adviser may not include in any advertisement:
 - (1) Any presentation of gross performance, unless the advertisement also presents net performance:
 - (i) With at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and
 - (ii) Calculated over the same time period, and using the same type of return and methodology, as the gross performance.
 - (2) 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.
 - (3) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Commission.
 - (4) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios 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 prescribed by paragraph (d)(2) of this section.
 - (5) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
 - (6) Any hypothetical performance unless the investment adviser:

- (i) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement;
 - (ii) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
 - (iii) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in paragraphs (d)(2), (4), and (5) of this section.
- (7) Any predecessor performance unless:
- (i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser;
 - (ii) 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;
 - (iii) 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 prescribed in paragraph (d)(2) of this section; and
 - (iv) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.
- (e) **Definitions.** For purposes of this section:
- (1) **Advertisement** means:
- (i) 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, but does not include:
 - (A) Extemporaneous, live, oral communications;
 - (B) 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
 - (C) A communication that includes hypothetical performance that is provided:
 - (1) 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
 - (2) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and
 - (ii) 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.

- (2) ***De minimis compensation*** means compensation paid to a person for providing a *testimonial* or *endorsement* of a total of \$1,000 or less (or the equivalent value in non-cash compensation) during the preceding 12 months.
- (3) A *disqualifying Commission action* means a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws.
- (4) A *disqualifying event* is any of the following events that occurred within ten years prior to the person disseminating an endorsement or testimonial:
- (i) A conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act;
 - (ii) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act;
 - (iii) The entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the Act;
 - (iv) The entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and
 - (v) A Commission order that a person cease and desist from committing or causing a violation or future violation of:
 - (A) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or
 - (B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e);
 - (vi) A disqualifying event does not include an event described in paragraphs (e)(4)(i) through (v) of this section with respect to a person that is also subject to:
 - (A) An order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event; or
 - (B) A Commission opinion or order with respect to such event that is not a disqualifying Commission action; provided that for each applicable type of order or opinion described in paragraphs (e)(4)(vi)(A) and (B) of this section:
 - (1) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and
 - (2) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject

to a Commission order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission's website.

- (5) **Endorsement** means 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.
- (6) **Extracted performance** means the performance results of a subset of investments extracted from a portfolio.
- (7) **Gross performance** means the performance results of a portfolio (or portions of a *portfolio* that are included in extracted performance, if applicable) before 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.
- (8) **Hypothetical performance** means performance results that were not actually achieved by any portfolio of the investment adviser.
- (i) Hypothetical performance includes, but is not limited to:
 - (A) Performance derived from model portfolios;
 - (B) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and
 - (C) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement, however:
 - (ii) Hypothetical performance does not include:
 - (A) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce 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; provided that the investment adviser:
 - (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; or

- (B) Predecessor performance that is displayed in compliance with paragraph (d)(7) of this section.
- (9) **Ineligible person** means a person who is subject to a disqualifying Commission action or is subject to any disqualifying event, and the following persons with respect to the ineligible person:
- (i) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person;
 - (ii) If the ineligible person is a partnership, all general partners; and
 - (iii) If the ineligible person is a limited liability company managed by elected managers, all elected managers.
- (10) **Net performance** means 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, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:
- (i) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and/or
 - (ii) If using a model fee, must reflect one of the following:
 - (A) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
 - (B) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (11) **Portfolio** means a group of investments managed by the investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliate (as defined in the Form ADV Glossary of Terms).
- (12) **Predecessor performance** means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.
- (13) **Private fund** has the same meaning as in section 202(a)(29) of the Act.
- (14) **Related performance** means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
- (15) **Related portfolio** means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.
- (16) **Supervised person** has the same meaning as in section 202(a)(25) of the Act.
- (17) **Testimonial** means 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.
- (18) **Third-party rating** means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of its business.

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