

Investment Advisor Alert: Deadline Approaching to Implement New Marketing Rule

On November 4, 2022, investment advisors are required to have revised their policies and procedures to comply with the new “marketing rule”. The marketing rule amends Rule 206(4)-1 of the Investment Advisers Act of 1940 by imposing increased regulations on advertisements by investment advisors. The SEC’s objective in amending the rule is to impose further restrictions designed to prevent the publication of fraudulent or deceptive advertisements by requiring that advertisements contain fair and balanced information to clients. In sum, the rule regulates the content of advertisements, the use of testimonials and endorsements, third-party sources, and performance data published in advertisements.

The marketing rule is designed to benefit clients by requiring an advertisement to include certain information to allow a client to discern the potential benefits and risks of a particular investment portfolio. If using testimonials or endorsements, advisors must clearly state their relationship with the individual providing the testimonial or endorsement, whether compensation was paid for the testimonial or endorsement, and disclose conflicts of interest, if any. If an advertisement contains survey results, the survey itself must have been conducted fairly by, for example, allowing for both favorable and unfavorable responses, and the advertisement of the survey results must include the date and time span of the survey, specific information about any third-party rating, and whether any compensation was paid to the third party. Additionally, the rule limits portfolio performance statistics published in an advertisement by prohibiting gross performance statistics unless net performance statistics are also reported, and prohibiting the extraction of data regarding a portfolio without providing the total performance data for the portfolio. With few exceptions, advertisements can neither contain hypothetical data nor previous performance results.

Advisors risk violating the rule if their advertisements do not meet all the criteria of the marketing rule. To comply with the rule, advisors should begin by thoroughly reviewing their advertisements to ensure they include all the information required by the rule, and do not make any false or misleading claims. Advisors must confirm that all third-party ratings, endorsements, and testimonials meet the rule’s criteria. Advisors must have a written agreement with anyone who provides a testimonial on the advisor’s behalf, and the agreement must specify the compensation paid for the testimonial and the activities performed by the individual providing the testimonial. Additionally, Rule 204-2 has been amended to require advisors to retain a record of all testimonials, endorsements, third-party ratings, and performance data.

For advice on complying with the marketing rule, please contact Michael P. Shaw, Esq. at Michael@TheShawLawGroup.com, 410-323-4293, or 202-664-0765.

[Posted on LinkedIn and ProVisors on 07/07/2022]