On December 22, 2020, the U.S. Securities and Exchange Commission ("**SEC**") adopted amendments to Rule 206(4)-1 (the "**Marketing Rule**") under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**").[1] The Marketing Rule streamlines the regulatory framework for advertising and solicitation practices of registered investment advisers. This summary compares key elements of the current version of Rule 206(4)-1 (the "**Advertising Rule**") to the new Marketing Rule and discusses certain practical impacts of the Marketing Rule on investment adviser marketing practices.

Topic	Advertising Rule	Marketing Rule	Practical Impact
Scope of Rule	• The Advertising Rule regulates advertisements made by investment advisers registered under the Advisers Act. Cash solicitation is regulated under a separate rule, Rule 206(4)-3 under the Advisers Act (the "**Cash Solicitation Rule**"). • The Advertising Rule sets forth four specific prohibitions and an anti-fraud framework. Most SEC advertising guidance is found in no-action letters or other SEC staff guidance.	• The Marketing Rule replaces and merges into a single rule the Advertising Rule and Cash Solicitation Rule. • The Marketing Rule contains both principles-based anti-fraud standards and specific prohibitions on performance presentation, testimonials and endorsements, and other topics, consolidating SEC staff guidance into a comprehensive rule. • Investment advisers registered under the Advisers Act must come into compliance with the Marketing Rule by November 4, 2022.	• As the Marketing Rule integrates prior SEC staff guidance, the SEC will nullify or withdraw substantially all related no-action letters and other SEC staff guidance, or portions thereof, as of the Marketing Rule's compliance date (November 4, 2022). • Advisers should use the 18-month transition period to review marketing practices and determine whether they are relying on no-action relief from either the Advertising Rule or Cash Solicitation Rule that is superseded by the Marketing Rule and take steps to transition into compliance with the Marketing Rule. • The Marketing Rule also introduces many new requirements that will require additional or new procedures, as discussed below.

1 *See* Investment Adviser Marketing, SEC Release No. IA-5653 (Dec. 23, 2020) [86 FR 13024 (Mar. 5, 2021)] (the "**Adopting Release**").

Topic	Advertising Rule	Marketing Rule	Practical Impact
Definition of Advertisement	"Advertisement" includes any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers investment advisory services.	"Advertisement" includes: • 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 ("**Prong 1"**); and • Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly ("**Prong 2"**).	• Material is only considered an "advertisement" to the extent that it offers the adviser's investment advisory services. Material that is designed to raise the adviser's profile or that provides only general commentary on financial markets will not constitute an advertisement. • In connection with the integration of the Cash Solicitation Rule into the Marketing Rule, advisers will be responsible for the communications of compensated promoters as well as their own communications.
Private Funds	The Advertising Rule does not explicitly reference private funds, but the anti-fraud standards of the Advisers Act apply to advisers when communicating with private fund investors. The SEC staff often references the Advertising Rule and related guidance when considering whether communications to private fund investors are misleading.	The Marketing Rule explicitly includes communications by or on behalf of the adviser to investors in private funds, generally capturing communications to prospective investors in private funds, defined as funds relying on the 3(c)(1) or 3(c)(7) exception of the Investment Company Act of 1940.	• The Marketing Rule provides limited relief from certain of the more prescriptive provisions of the Rule to private fund managers. • Information contained in a private placement memorandum ("**PPM"**) regarding the material terms, objectives, and risks of the fund offering will not be considered an advertisement; however, content in a PPM that goes beyond such statements to promote the investment advisory services of the adviser will be subject to the Marketing Rule.

Topic	Advertising Rule	Marketing Rule	Practical Impact
Direct or Indirect Communications	The Advertising Rule applies to any advertisement that an adviser directly or indirectly publishes, circulates, or distributes.	The Marketing Rule continues to apply to direct and indirect advertisements of an adviser. • For Prong 1 advertisements, third-party materials will be attributable to the adviser if an adviser either: (i) "adopts" the information—i.e., the adviser explicitly or implicitly endorses or approves the information, or (ii) "entangles" itself in the communication—i.e., the adviser involves itself in the third party's preparation of the information.[2] • The Marketing Rule also scopes in other indirect communications under Prong 2 advertisements by including compensated testimonials and endorsements made by third parties.	• For Prong 1 advertisements, the Marketing Rule's retention of "directly or indirectly" is intended to be consistent with the current practice under the Advertising Rule. Third-party communications may constitute advertisements to the extent the adviser either approves of the information or comments on the information prior to dissemination. • For Prong 2 advertisements, an adviser should consider whether it will compensate third parties for providing testimonials or endorsements. These types of indirect statements have been generally prohibited by the Advertising Rule (or subject to the Cash Solicitation Rule), but will now be permitted under the Marketing Rule subject to certain conditions.
Social Media	The Advertising Rule does not explicitly reference social media. However, recent SEC guidance indicated the SEC staff's view that the Advertising Rule's prohibition of testimonials implicated many common social media practices, including posts involving third-party commentary or reviews about the adviser.[3] Rule 206(4)-1(a)(5) also generally prohibits misleading statements in an advertisement, which applies to statements made by an adviser on social media.	The Marketing Rule permits an adviser to use testimonials and endorsements and specifically mentions the use of social media in the Adopting Release. Social media advertising is subject to the Marketing Rule's general prohibitions, and, if applicable, additional restrictions on testimonials and endorsements. The Adopting Release provides guidance on specific social media topics, including hyperlinking and social media use by an adviser's supervised person.	• Advisers should consider whether they will expand their use of social media marketing in light of the Marketing Rule's more permissive approach to testimonials and endorsements. • If advisers intend to engage in such marketing, they should consider the Marketing Rule's specific conditions applicable to those practices and adopt and implement appropriate policies and procedures.

[2] The Adopting Release's discussion of this "adoption and entanglement" concept draws extensively from existing SEC guidance regarding public statements made by companies under the Securities Exchange Act of 1934.

[3] *See* IM Guidance Update 2014-04 at 2 (Mar. 2014).

Topic	Advertising Rule	Marketing Rule	Practical Impact
			• Specifically, for example, an adviser should consider whether to adopt and implement policies and procedures regarding its associated persons' use of social media accounts. In the Adopting Release, the SEC stated that it would not consider statements by an associated person on his or her personal social media account as an advertisement of the adviser, provided that the adviser has adopted and implemented such policies and procedures.
Compensated Testimonials and Endorsements	The Advertising Rule explicitly prohibits the use of testimonials in adviser advertisements. SEC staff guidance suggests that third-party statements endorsing an adviser may be prohibited testimonials for purposes of the Advertising Rule.[4] Other statements made by third parties that refer or endorse an adviser are subject to the Cash Solicitation Rule.	The Marketing Rule permits compensated testimonials and endorsements and treats them as "advertisements" for purposes of the Rule. The Marketing Rule subjects these statements to the Rule's general prohibitions, in addition to specific provisions for disclosure, oversight and compliance, and disqualification. A testimonial or endorsement must clearly and prominently disclose: • That it was given by a current client or private fund investor, if applicable; • That cash or non-cash compensation was provided for the testimonial or endorsement, if applicable; and • 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.	Advisers will be able to engage in a variety of new marketing activities involving compensated testimonials and endorsements, subject to several conditions on these activities. In addition, an adviser is liable for third-party content, including testimonials and endorsements, to the same extent that it would be liable for content it produced itself. Before engaging in these types of marketing activity, advisers should: • Identify whether third-party statements will meet the definitions of testimonial or endorsement. Most statements by solicitors currently subject to the Cash Solicitation Rule will meet these definitions; • Design and implement appropriate policies and procedures, including for the oversight of third-party promoters;

[4] *See* IM Guidance Update 2014-04 at 2 (Mar. 2014) (citing DALBAR, Inc., SEC Staff No-Action letter (Mar. 24, 1998)).

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		A testimonial or endorsement must also disclose the material terms of any compensation arrangements with the third-party promoter and other information about conflicts of interest. These disclosures are not subject to the clear and prominent standard.	• Carefully draft agreements to govern the adviser's arrangement with third-party promoters; • Assess whether third-party promoters are subject to disqualification under the Marketing Rule; • Draft relevant disclosures that comply with the Marketing Rule; and • Train compliance personnel on the Marketing Rule and the adviser's new policies and procedures, such as how to oversee third-party promoters.
Uncompensated Testimonials and Endorsements	See "Compensated Testimonials and Endorsements" above. The Advertising Rule does not distinguish between compensated and uncompensated testimonials and endorsements, although certain communications made by third parties that refer or endorse an adviser are subject to the Cash Solicitation Rule.	The Marketing Rule permits uncompensated testimonials and endorsements and treats them as "advertisements" only if they fall into Prong 1 of the definition—i.e., if the adviser includes them in an advertisement, it directly or indirectly disseminates. Such testimonials and endorsements are subject to fewer conditions than compensated testimonials and endorsements.	Advisers that incorporate uncompensated testimonials and endorsements into their own advertisements should consider how the Marketing Rule's general prohibitions, in addition to the Rule's specific conditions, apply to these statements.
Exclusions and Exceptions from the Definition of Advertisement	As discussed in more detail below, the following are not considered advertisements under the Advertising Rule: • In person, telephone, or other oral conversations; • Responses to unsolicited requests; • Regular account statements and reports sent only to existing clients; and • Academic whitepapers.	As discussed in more detail below, the following are excluded from the definition of advertisement. With respect to Prong 1: • Extemporaneous, live, oral communications, regardless of whether they are broadcast; and • Presentation of hypothetical performance if the communication is (i) in response to an unsolicited client request, or (ii) to a private fund investor in a one-on-one communication.	Advisers should carefully review their communications with prospective investors and clients as well as current investors and clients to ensure compliance with the Marketing Rule. Advisers should be particularly mindful of the Marketing Rule's treatment of hypothetical performance, which is subject to a confusing "exception from the exception." Prong 1 of the definition generally excludes one-on-one communications, except for communications including hypothetical performance, unless the hypothetical performance is provided in

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		With respect to Prong 1 and Prong 2: Information contained in statutory or regulatory notices or filings.	response to an unsolicited request from a client or investor or to a private fund investor in a one-on-one communication.
Oral Communications	In person, telephone, or other oral conversations are not advertisements.	Extemporaneous, live, oral communications, regardless of whether they are broadcast, are not advertisements under Prong 1 of the Marketing Rule. These communications may be advertisements under Prong 2 of the Marketing Rule.	Although extemporaneous oral communications are exempted from Prong 1 advertisements, any written scripts, recordings, or accompanying written presentations might constitute an advertisement. This exemption also does not apply to extemporaneous, live written communications, such as texts or electronic chats.
Unsolicited Requests	• Any written communication that does no more than respond to an unsolicited request by a client, prospective client, or consultant for specific information is not an advertisement. • A solicited request would be the result of, for example, any affirmative effort by an adviser that is intended or designed to induce a client, prospective client, or consultant to request the adviser to provide past specific recommendations, or an advertisement indicating that the adviser is willing to provide past specific recommendations upon request.	• Any communication that does no more than respond to an unsolicited request by a client, prospective client, or consultant for specific information is not an advertisement under the Marketing Rule due to the exclusion for one-on-one communications. • The definition of advertisement in Prong 1 does exclude an adviser's responses to an unsolicited investor request for hypothetical performance information.	Any time hypothetical performance is included in a communication, it will constitute an advertisement unless the material is provided in response to an unsolicited client request or to a private fund investor in a one-on-one communication. Accordingly, hypothetical performance information included in communications to separately managed account clients must comply with the requirements of the Marketing Rule unless such separately managed account client makes an unsolicited request for such hypothetical information.
One-on-One Communications	One-on-one communications are excluded from the definition of advertisement.	• Prong 1 of the definition generally excludes communications to one person; however, communications including hypothetical performance are advertisements even if provided to only one person unless provided in response to	• The SEC clarified that the one-on-one exclusion applies to communications with multiple natural persons representing a single entity or account. • Bulk emails or algorithm-based messages that are nominally directed at or "addressed to" only one person but are in

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		an unsolicited investor request or to a private fund investor. • Prong 2 of the definition (regarding compensated testimonials and endorsements) applies to communications to a single person.	fact widely disseminated to numerous investors do not meet the one-on-one requirements and are considered advertisements under the Marketing Rule. Similarly, customizing a template presentation or mass mailing by filling in the name of an investor and/or including other basic information about the investor would not constitute a one-on-one communication. • Advisers should develop a process to identify the new types of one-on-one communications that meet the Marketing Rule's definition of advertisement.
Notices and Filings	Not addressed.	Information contained in statutory or regulatory notices or filings is not an advertisement under Prong 1 or Prong 2 of the definition; provided such information is reasonably designed to satisfy the requirements of the notice or filing.	Advisers should review statutory and regulatory notices and filings to ensure any content that is an advertisement complies with the Marketing Rule.
Client Reporting	Generally not advertisements, but have been treated as such by SEC staff if designed or used to retain existing clients or offer new advisory services to existing clients.	Generally not advertisements. The Marketing Rule defines advertisements as communications that offer advisory services to potential clients and investors as well as communications offering new or additional advisory services to current prospective client and investors.	Advisers should ensure client reporting does not offer new or additional advisory services without complying with the Marketing Rule.
Brand Content/Whitepapers	Academic articles that discuss portfolio management methodology, but do not offer advisory services are not advertisements.	Brand content designed to raise the profile of an adviser generally, but not offering any investment advisory services, typically would not be considered an "advertisement" under the Marketing Rule.	Whitepapers and other types of general commentary on investment strategies, asset classes, and market or regulatory developments that do not include references to the services of the adviser generally would not be an advertisement. However, if the discussion includes aspects of the advisory

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			services provided by the adviser, this portion of the material would be subject to the Marketing Rule.
General Prohibitions	• Antifraud rules prohibit untrue statements of material fact. • The Advertising Rule's "catch-all" antifraud provision prohibits advertisements that are otherwise false or misleading.	Sets forth seven principles-based prohibitions, providing a more specific set of principles than the anti-fraud provisions of the Advertising Rule.	• The seven principles-based prohibitions provide advisers with additional guidelines to exercise judgment and discretion to tailor advertisements to an adviser's marketing needs. • Advisers should consider all relevant facts, including the type and amount of disclosure, as well as the sophistication of the audience. For example, communications prepared for retail clients may require additional disclosures or preclude inclusion of certain types of information as compared to communications prepared for institutional clients.
Definitions of Testimonials and Endorsements	• SEC staff has consistently interpreted "testimonial" to include a "statement of a client's experience with, or endorsement of, an investment adviser."[5] • Testimonials are not restricted to statements about the adviser's performance and may include statements regarding an adviser's character, diligence, or sensitivity to client needs.[6] • Because the SEC has characterized any statement of a client's experience with the adviser as a "testimonial," partial client lists	The definitions of testimonial and endorsement essentially cover the same types of statements, except that a testimonial is a statement by a current client or private fund investor; whereas an endorsement is a statement by a person *other* than a current client or private fund investor: A **testimonial** is "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	• The Marketing Rule will permit advisers to engage in a variety of new marketing activities. Nevertheless, as discussed above, advisers should be mindful of the practical and regulatory implications for engaging in such activities. • The definitions of testimonials and endorsements also include: ○ Opinions or statements by persons about the investment advisory expertise or capabilities of the adviser or its supervised persons; and

5 *See* IM Guidance Update 2014-04 at 2 (Mar. 2014) (citing Cambiar Investors, Inc., SEC Staff No-Action Letter (Aug. 28, 1997)).
6 *See* Gallagher and Associates, Ltd., SEC Staff No-Action Letter (July 10, 1995).

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	may be testimonials if selected based on performance based criteria.[7]	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." An **endorsement** is 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.	○ Statements in an advertisement about an adviser or its supervised person's qualities (e.g., trustworthiness, diligence, or judgment).
Third-Party Ratings	Not explicitly addressed by the Advertising Rule, but permitted if not a "testimonial," subject to certain conditions and disclosure requirements.[8]	• Permitted if the adviser has a reasonable basis for believing that any questionnaire or survey used in preparation of the rating (i) is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and (ii) is not designed or prepared to produce any predetermined result (the "**due diligence requirement**").	• To be a third-party rating, the rating must be provided by a third party that is not a "related person"[9] of the adviser and that provides such ratings or rankings in the ordinary course of its business. • Advisers may continue to use third-party ratings in their advertisements, so long as the adviser can comply with the disclosure and the due diligence requirements.

7 *See* Cambiar Investors, Inc., SEC Staff No-Action Letter (Aug. 28, 2997); *see also* Denver Investment Advisors, Inc., SEC Staff No-Action Letter (July 30, 1993).
8 *See* DALBAR, Inc., SEC Staff No-Action Letter (Mar. 24, 1998); *see* Investment Adviser Association, SEC Staff No-Action Letter (Dec. 2, 2005).
9 A "related person" means any advisory affiliate and any person that is under common control with your firm. *See* Form ADV Glossary of Terms.

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		• The material must disclose clearly and prominently, or the adviser must reasonably believe 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.	• Advisers should ensure that third-party ratings included in an advertisement also satisfy the general prohibitions of the Marketing Rule. For example, advisers should continue to ensure that stale third-party ratings (i.e., those provided over one-year prior) are not included in advertisements.
Past Specific Recommendations	Discussion of past specific recommendation(s) without providing a full list of past recommendations for the preceding year is prohibited by the Advertising Rule with limited exceptions (e.g., Top five/Bottom five performers and recommendations selected with objective, non-performance based criteria) provided in SEC staff no-action letter guidance.[10]	• Unlike the Advertising Rule, the Marketing Rule permits advertisements that include references to "specific investment advice provided by the investment adviser."[11] Such advertisements must be presented in a "fair and balanced" manner and are subject to the Marketing Rule's other general prohibitions. • The Adopting Release also indicated that the principles from the TCW Letter and Franklin Letter are examples of how to present past specific recommendations in a fair and balanced manner but are not the exclusive means to comply with this standard.	• The Marketing Rule has removed the Advertising Rule's *per se* prohibition of advertisements that include past specific recommendations. • An adviser may now include in advertisements materials that highlight examples of the adviser's investment process or thesis (e.g., "case studies"), subject to the Marketing Rule's general prohibitions, including the fair and balanced standard. • Whether an advertisement containing specific investment advice satisfies the fair and balanced standard will depend on several factors, including the sophistication level of the client or investor and relevant disclosures.

[10] *See* TCW Group, SEC Staff No-Action Letter (Nov. 7, 2008) ("**TCW Letter**"); *see also* Franklin Management, Inc., SEC Staff No-Action Letter (Dec. 10, 1998) ("**Franklin Letter**"). Despite the plain language of the Advertising Rule, SEC staff has taken the position that an adviser may not provide a partial list of past specific recommendations accompanied by an offer to provide a complete list. Therefore, an advertisement must contain either a list of all the adviser's recommendations for the past year or offer to provide the complete list of those recommendations. *See, e.g.*, J.D. Minnick & Co., SEC Staff No-Action Letter (Apr. 30, 1975).

[11] Although the Adopting Release uses the phrase "specific investment advice" interchangeably with "past specific recommendations," the Marketing Rule's formulation no longer restricts this concept to "past" investment advice.

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Gross Performance	Not explicitly addressed by the Advertising Rule, but gross performance may be shown (i) side-by-side with net performance, or (ii) in one-on-one presentations to sophisticated prospective investors or consultants with certain disclosures.[12]	Gross performance must be accompanied by net performance that is calculated over the same time period and using the same type of return and methodology and presented with equal prominence in a format designed to facilitate comparison with gross performance.	Essentially, net performance is required regardless of the intended audience. Technically, a one-on-one communication that includes gross only performance could still be excluded from the definition of "advertisement" (assuming that it does not include hypothetical performance), but an adviser would need to ensure such communication was sufficiently tailored to the recipient to ensure it is a *bona fide* one-on-one communication under the Marketing Rule.
Model Fees	Not explicitly addressed by the Advertising Rule, but permitted if the model fees are equal to the highest fee charged to any account managed for the performance period.[13]	Permitted in two circumstances: • When the resulting net performance figures are not higher than they would have been if the actual fee(s) had been deducted; or • If the model fee is equal to the highest fee charged to the intended audience.	Advisers now have more flexibility when determining a model fee, but should also consider whether the application of actual fees or any proposed model fee may violate the general antifraud prohibitions of the Marketing Rule.
Related Performance	Not explicitly addressed by the Advertising Rule, but related performance is permitted subject to certain disclosures to ensure the information is not fraudulent or misleading, including the extent to which the investment strategy of the related portfolio differs from strategy of the portfolio to which it is being compared.[14]	• Permitted only if the related performance includes all portfolios with substantially similar investment policies, objectives, and strategies ("**related portfolios**"). • May exclude a related portfolio if: (i) the advertised performance results are not materially higher than if all related portfolios had been included, and (ii) the exclusion does not alter the presentation of the applicable prescribed time period.	• Advisers may continue to show a single fund track record despite managing other funds with a similar strategy. However, if the adviser wishes to show the prior performance of one or more funds with a similar strategy, it must comply with the related performance requirements under the Marketing Rule. • When determining whether a portfolio constitutes a "related portfolio" for purposes of complying with the related

12 *See* Investment Company Institute, SEC Staff No-Action Letter (May 5, 1988); *see* Association for Investment Management and Research, SEC Staff No-Action Letter (Dec. 18, 1996).

13 *See* J. P. Morgan Investment Management, Inc., SEC Staff No-Action Letter (May 7, 1996).

14 *See, e.g.*, Clover Capital Mgmt., Inc., SEC Staff No-Action Letter (Oct. 28, 1986) ("**Clover Letter**").

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			performance requirements, advisers may apply the same criteria used to construct composites for purposes of the Global Investment Performance Standards ("**GIPS**").
Representative Accounts	Not explicitly addressed by the Advertising Rule, although the use of a representative account is permitted subject to certain disclosures to ensure the information is not fraudulent or misleading.[15]	The Marketing Rule does not explicitly permit advisers to present the performance of representative accounts, as some commenters had urged. In the Adopting Release, the SEC expressed concerns about risks of cherry-picking related portfolios with higher-than usual returns.	• Essentially, use of a representative account is prohibited unless the performance of the representative account is: (i) not materially higher than the performance of all accounts managed in a substantially similar manner; (ii) the presentation of the representative account would not impact the adviser's ability to show performance for one-, five-, and ten-year periods, as applicable; and (iii) adequate records are maintained to support both of the preceding determinations. • The SEC did state in the Adopting Release that an adviser "may present the results of a single representative account (such as a flagship fund) or a subset of related portfolios alongside the required related performance so long as the advertisement would otherwise comply with the general prohibitions" under the Marketing Rule.
Hypothetical Performance	Not explicitly addressed by the Advertising Rule, but permitted subject to certain disclosures to ensure the information is not fraudulent or misleading.[16] (Predominantly	Defined broadly as performance results that were not actually achieved by any portfolio of the adviser. Prohibited unless the adviser:	• Advisers must consider their prior experiences with particular types of investors when designing reasonable policies and procedures that will

[15] *See* In the Matter of Valicenti Advisory Services, Inc., and Vincent R. Valicenti, SEC Release No. IA-1774 (Nov. 18, 1998) (Comm. Op.) (finding that an adviser's advertisement was misleading for purposes of the Advertising Rule because it included performance of a composite of accounts managed to a certain investment strategy but failed to disclose that the composite excluded lower performing accounts following that same strategy).

[16] *See, e.g.*, Clover Letter, *supra* footnote 14.

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	understood to refer to backtested performance). Backtested returns should only be presented to sophisticated (*i.e.,* non-retail) clients.[17]	• 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; • Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the hypothetical performance; and • Provides sufficient information to enable the intended audience to understand the risks and limitations of using hypothetical performance in making investment decisions.	distinguish among investor types for purposes of determining when hypothetical performance may be presented. • While no sophistication standard is imposed by the Marketing Rule, the SEC states in the Adopting Release that it intends for advertisements including hypothetical performance information to only be distributed to investors who have access to the resources to independently analyze the information and who have the financial expertise to understand the risks and limitations of these types of presentations. • Notably, performance generated by an "investment analysis tool" as such term is defined Financial Industry Regulatory Authority ("**FINRA**") Rule 2214 is excluded from the definition of hypothetical performance, so long as the client or investor inputs the information into the tool personally or provides the adviser with the information to input into the tool.
Model Performance	Not explicitly addressed by the Advertising Rule, but permitted subject to certain disclosures to ensure the information is not fraudulent or misleading.[18]	Model performance is defined as hypothetical performance and is subject to the requirements set forth above under "Hypothetical Performance."	Model performance may not be presented unless the requirements applicable to hypothetical performance are met.
Targeted and Projected Performance	Not explicitly addressed by the Advertising Rule, but permitted subject to certain	Targeted performance and projected performance are defined as hypothetical performance and therefore are subject to the	• Targeted and projected performance may not be presented unless the requirements applicable to hypothetical performance are

[17] *See In re* LBS Capital Management, Inc., SEC Release No. IA-1644 (July 18, 1997) (stating that in concluding that an advertisement containing backtested performance was misleading, the SEC considered that the advertisement was distributed to existing and prospective retail clients).

[18] *See id.*; *see also* Investment Company Institute, SEC Staff No-Action Letter (Sept. 23, 1988).

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	disclosures to ensure the information is not fraudulent or misleading.[19]	requirements set forth above under "Hypothetical Performance."	met. This includes the requirement to adopt and implement policies and procedures reasonably designed to ensure that the target performance is relevant to the likely financial situation and investment objectives of the intended audience. As such, advisers may find it difficult to present the performance of targeted and projected on their websites. • The SEC noted the disclosure burden associated with presenting target performance would likely be lighter than for other types of hypothetical performance.
Extracted Performance	Not addressed.	Permitted, if the performance results of the total portfolio from which the performance was extracted is provided or offered to be promptly provided. • Unlike the industry definition of carve-out, extracted performance is defined as a subset of investments from a single portfolio.	• Although the Marketing Rule does not prohibit the presentation of a composite of carve-outs from multiple portfolios in an advertisement (e.g., carve-out performance that complies with GIPS), such a composite would be considered hypothetical performance under the Marketing Rule and subject to the additional requirements that apply to advertisements containing hypothetical information. As such, advisers may find it difficult to present the performance of composites that contain carve-outs on their websites.
Performance Time Periods	No prescribed time periods for performance, although cherry-picking time periods may be fraudulent or misleading under the Advertising Rule.[20]	The Marketing Rule prohibits the presentation of performance results of any portfolio or any composite aggregation of related portfolios, other than any private fund, in advertisements	• Advisers may still present additional performance for time periods other than those prescribed by the Marketing Rule, such as the annual performance required

19 *See* Clover Letter, *supra* footnote 14.

20 *See* In the Matter of Locke Capital Management, Inc., SEC Release No. AP 3-14457 (Feb. 6, 2012) (ALJ decision) (finding that an investment adviser's advertisement violated the Advertising Rule because it had, among other things, presented performance information over certain time periods that was false or misleading).

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		unless the results for one-, five-, and ten-year periods are presented as well (or if portfolio did not exist for given period, since inception).	in a GIPS Composite Report. However, an advertisement may not include or exclude performance results or present performance time periods, in a manner that is not fair and balanced. • Unlike other items that are subject to an "equal prominence" standard (*e.g.*, gross/net performance), it appears that the Marketing Rule only requires a presentation include the prescribed time periods and not present them on every page of a multi-page advertisement. • Advisers may need to review current marketing materials and revise their performance calculations to meet this requirement.
Portability	Not explicitly addressed by the Advertising Rule. The SEC staff instead addressed portability in a series of no-action letters.[21]	Codifies the SEC's prior no-action letter positions, adopting four explicit requirements for the presentation of predecessor investment performance: • The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser; • 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;	• To the extent that more than one person was primarily responsible for achieving the prior performance, a substantial identity of such group of persons must continue to manage the accounts at the advertising adviser. • The SEC did not specifically address the portability of testimonials, endorsements, third-party ratings, or specific investment advice in the Marketing Rule, but the Adopting Release states that the portability of this information depends on the application of the general prohibitions, which would prohibit an adviser from using

[21] *See* Horizon Asset Management, LLC, SEC Staff No-Action Letter (Sept. 13, 1996); *see also* Great Lakes Advisers, Inc., SEC Staff No-Action Letter (Apr. 3, 1992) ("**Great Lakes Letter**").

Topic	Advertising Rule	Marketing Rule	Practical Impact
		• 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 the required one-, five-, and ten-year time periods, as applicable; and • The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.	outdated testimonials, endorsements, and third-party ratings in most cases.
Layered Disclosures	Not explicitly addressed by the Advertising Rule. The SEC and its staff have historically taken the position that all disclosures must appear within the four corners of the advertisement.[22]	The Adopting Release explains that disclosures that are not subject to "clear and prominent standard" can be included in a layered disclosure; however, each layer of such disclosure must independently satisfy the "fair and balanced" standard.	• Hyperlinks, QR codes, mouse-over popup windows, or other similar practices are permitted to provide additional content so long as such practices do not render the communication misleading or obscure important information. • Certain specific disclosures must be presented clearly and prominently (see "Compensated Testimonials and Endorsements," "Third Party Ratings," and "Portability" above); these disclosures generally must not be detached from the material to which they relate.
Recordkeeping *Generally*	Advisers must keep a record of advertisements circulated to 10 or more persons.	In connection with the Marketing Rule, the SEC also adopted related amendments to Rule 204-2 (the "**Recordkeeping Rule**"). Under the amended Recordkeeping Rule, advisers must make and keep records of all advertisements, as well as records related to	The Marketing Rule expands the scope of the recordkeeping requirement to include all advertisements disseminated to more than one person or that include hypothetical performance.

[22] *See, e.g.*, In the Matter of Alpha Fiduciary, Inc. and Arthur Doglione, SEC Release No. IA-4283 (Nov. 30, 2015) (settled order) (finding that an investment adviser's advertisement was misleading under the Advertising Rule because it contained hypothetical performance, but the relevant disclosures were "imprecise . . . and not on the same page as the hypothetical performance data").

Topic	Advertising Rule	Marketing Rule	Practical Impact
		hypothetical performance, testimonials, endorsements, third-party ratings, and actual performance, including back-up documentation that substantiates material facts included in advertisements.	
Performance Records	Advisers must retain records necessary to form the basis for and demonstrate the calculation of performance for all managed accounts or securities recommendations distributed to any single person.	• Advisers must retain records necessary to form the basis for and demonstrate the calculation of performance for all managed accounts, portfolios, or securities recommendations distributed to any single person. • In addition, advisers must keep copies of all information provided or offered under the hypothetical performance provisions of the Marketing Rule.	Advisers will need to ensure they have the documents to demonstrate the calculation of every portfolio and all information to support hypothetical performance, including its calculation and the intended audience of the hypothetical performance presented.
Predecessor Performance Records	Not explicitly addressed by the Advertising Rule, but no-action letter provides guidance on required records.[23] Due to contractual or privacy restrictions, advisers often recreate predecessor performance from publicly available information or audit or verification statements.	An adviser seeking to present the performance of a prior firm must have all original records necessary to substantiate the performance presented.	Advisers will need to review records for predecessor performance to confirm they can substantiate performance in accordance with the Marketing Rule. If not, an adviser must cease presentation of the predecessor performance on (or before if an early adopter) the Marketing Rule's compliance date on November 4, 2022.
Oral Advertisement Records	The definition of "advertisement" does not include oral communications between an investment adviser and a client or prospective client.	In the case of a compensated oral testimonial or endorsement, the adviser must: • Create and retain a record of the oral testimonial or endorsement; • Maintain a copy of the written disclosures provided in connection with the oral testimonial or endorsement; or	Advisers should consider whether they intend to compensate third parties for oral testimonials or endorsements. If so, they must decide whether they plan to create a record of such oral conversations or instead will maintain a record of the written

[23] *See* Great Lakes Letter, *supra* footnote 21 (explaining that a successor adviser's use of predecessor performance data is subject to Rule 204-2(a)(16) under the Advisers Act, which requires an adviser to keep all documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts that the adviser uses in advertisements or other communications distributed to 10 or more persons).

Topic	Advertising Rule	Marketing Rule	Practical Impact
		• If the disclosures are provided orally, create a record noting when the disclosures were provided and the substance of what was provided.	disclosures provided in connection with those conversations.
Third-Party Ratings Records	The Advertising Rule did not explicitly address records of third-party ratings, but if they are included in an advertisement, they are subject to the general recordkeeping requirements.	The amended Recordkeeping Rule requires that an adviser: • Retain a copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement; and • Make and keep a record documenting that the adviser 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.	The survey/questionnaire recordkeeping requirement only applies if the adviser in fact obtains such survey or questionnaire in connection with the due diligence requirement. However, an adviser satisfying the due diligence requirement by other means should keep records of the information used to formulate a reasonable belief that the questionnaire or survey used in preparation of the rating: (i) is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and (ii) is not designed or prepared to produce any predetermined result.
Testimonial/Endorsement Records	The Advertising Rule explicitly prohibits the use of testimonials in adviser advertisements. While endorsements are not explicitly prohibited, SEC staff guidance suggests that third-party statements endorsing an adviser may be prohibited testimonials for purposes of the Advertising Rule.[24]	In connection with an adviser's use of testimonials or endorsements, the Recordkeeping Rule requires the following: • Retain a record of any disclosures provided to clients, if not included in the advertisement. • Retain documentation of the investment adviser's determination that it has a reasonable basis for believing that a testimonial or endorsement complies with the Marketing Rule.	If advisers intend to use third-party testimonials and endorsements, they should determine how they will maintain records of those testimonials and endorsements, especially when the third-party promoters make statements directly to potential clients or investors.

[24] *See* IM Guidance Update 2014-04 at 2 (Mar. 2014) (citing DALBAR, Inc., SEC Staff No-Action Letter (Mar. 24, 1998)).

Topic	Advertising Rule	Marketing Rule	Practical Impact
		• Retain a record of the names of all persons who are an 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.	
Form ADV	Advisers are required to disclose in Item 1.I of Form ADV Part 1A all adviser-controlled accounts on public social media pages (e.g., Twitter, LinkedIn, Facebook, etc.).	In connection with the Marketing Rule, the SEC also adopted amendments to Form ADV. New Item 5.L of Form ADV Part 1A will require advisers to disclose whether their advertisements include performance results, specific investment advice, testimonials, endorsements, third-party ratings, and hypothetical performance and predecessor performance. In addition, advisers that include testimonials, endorsements, or third-party ratings in their advertisements must disclose whether they have paid any cash or non-cash compensation in connection with their use.	Advisers will only be required to complete new Item 5.L in their annual updating amendments due after the Marketing Rule's compliance date (November 4, 2022). Consequently, most advisers with December 31 fiscal year-ends will not complete the new Item 5.L until their annual updates are filed in March 2023.