SIDLEY

SIDLEY UPDATE

SEC Adopts New Investment Adviser Marketing Rule

January 4, 2021

On December 22, 2020, the U.S. Securities and Exchange Commission (SEC or Commission) adopted amendments to modernize rules under the Investment Advisers Act of 1940 addressing investment adviser advertisements and payments to solicitors.[1] The SEC says that the effect is to create a single "marketing rule" to supersede currently separate advertising and cash solicitation rules. The amendments are intended to reflect changes in technology, changes in investor expectations, and the evolution of industry practices since the existing rules were adopted in 1961 and 1979. The amendments apply to all investment advisers registered, or required to be registered, with the SEC.

Our Take. While the amendments were adopted by a unanimous Commission, four Commissioners also issued statements expressing reservations and concerns along with their approval of the final rule. This reflects the twin realities of the rulemaking. First, the amendments are badly needed; the rules that the marketing rule will replace have become dated, inconsistent with current industry practice and, at times, borderline unworkable. Second, the amendments present something for everyone to like or dislike. While the final rule drops or relaxes some provisions from the original proposals[1] that deeply concerned the industry, advisers and marketers still face significant new complexities. Key observations include:

- The new marketing rule applies to all investment advisers registered, or required to be registered, with the SEC. They do not apply to advisers not required to register with the SEC, such as exempt reporting advisers.

- The amendments and the related adopting release set out in one place the SEC's positions on various presentations of investment performance in connection with the marketing of securities advisory services and investments in "private funds,"[2] superseding a panoply of SEC staff guidance. The new rule does not apply to the marketing of registered investment companies or business development companies, which continues to be regulated separately.

- The amendments replace a number of the current advertising rule's flat restrictions with generally more flexible provisions but also replace the current rule's broad antifraud

[1] Sidley's prior update summarizing the proposed amendments to the advertising and cash solicitation rules can be found at: https://www.sidley.com/en/insights/newsupdates/2019/11/sec-proposes-amendments-to-advisers-act-advertising-and-cash-solicitation-rules.

restriction with a series of more specific requirements (e.g., relating to diligence, oversight, and disclosure).

- The amendments and the related adopting release address several interpretive issues with social media, which provide flexibility for advisers to expand social media activity.

- The amendments expand the definition of advertising such that a marketing piece for a single person that includes hypothetical investment performance can be an advertisement, and activity of a third party can be attributed to the adviser as "indirect" advertising.

- The amendments broaden the solicitor rule to regulate both noncash compensation and solicitation of private fund investors (neither of which is covered under the current rule).

- Important changes from the proposed version of the amendments are that the final rules

    - *Do not* include a "pre-use" review requirement

    - *Do not* distinguish between "retail" and "non-retail" communications, although the rules still reflect the SEC's expectation that communications will be tailored to the needs of their intended audience

    - *Do not* apply to communications for a single prospective client or private fund investor, so that the longstanding exception from the definition of advertising for single-use communications is retained (again, except for advertisements that include hypothetical performance)

- The rule takes effect 60 days after publication in the *Federal Register* and then provides for an 18-month transition period.

Roadmap to This Sidley Update

The new rule is complex and lengthy. The accompanying adopting release is over 400 pages. There will be much for lawyers, compliance officers, marketing staff, and others to absorb.

The purpose of this Sidley Update is to provide a broad overview, with particular focus on areas where the rules either change current practice or deviate from the initial proposal. We first summarize the scope of the rule, with a focus on the new definition of an advertisement (Section I). We then review the rule's "general prohibitions" (Section II), followed by its treatment of testimonials, endorsements, and solicitation (Section III), third-party rankings (Section IV), case studies and specific investment advice (Section V), and investment performance (Section VI). We conclude with an overview of other provisions, including amendments to Form ADV and recordkeeping (Section VII).

I. Scope of the New Rule: What Is an Advertisement?

The rule's definition of an "advertisement" is key to understanding its scope. The first prong of

that definition, which addresses what traditionally have been considered advertising communications, refers to an advertisement as

> 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.

The second prong, which addresses testimonials, endorsements, and solicitation activity, adds to the definition and further includes

> any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly ....

Exclusions. Formally excluded from the definition of an advertisement (and thus outside the scope of the rule) are

- Extemporaneous, live oral communications (only excluded from the first prong of the definition)
- 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 (excluded from both prongs of the definition)
- Communication that includes hypothetical performance provided (1) in response to an unsolicited request from a prospective or current client or investor in a private fund or (2) to a prospective or current investor in a private fund in a one-on-one communication (excluded only from the first prong of the definition)

The adopting release also establishes *de facto* exclusions (not enumerated in the rule itself but detailed in the release):

- Account statements and other ordinary service communications with current clients or current investors (because the first prong of the definition is limited to communications for "new investment advisory services" and with "prospective investors")[3]
- Statements about an advisory firm's culture, philanthropy, or community activity (because there is no "offering" of advisory services, but this only applies to the first prong of the definition)
- Brand content, educational material, and market commentary (because there is no "offering" of advisory services, again for purposes of the first prong)[4]
- Information included in a fund's private placement memorandum (PPM) about the material terms, objectives, and risks of a fund offering (because the content is separately regulated under other antifraud requirements of the federal securities laws)[5]

"Direct or indirect" communications. In what will be one of its more controversial elements, the SEC subjects both direct and indirect communications to the rule. The release applies an adoption or entanglement standard under which advertising can be attributed to the adviser (as an "indirect communication") if the adviser (i) implicitly or explicitly endorses or approves the information (adoption) or (ii) involves itself in the preparation of the information (entanglement).

RICs and BDCs. The proposed amendments included a tailored exclusion for registered investment companies (RICs) and business development companies (BDCs). Because the new rule applies only to "private funds" (and not to "pooled investment vehicles" more generally), no special exclusion for RICs or BDCs is required. They are wholly out of scope. That said, RICs and BDCs have historically relied on various SEC staff guidance that is being superseded by the amendments. Presumably RICs and BDCs will look to the amendments "by analogy" when applying that guidance going forward.

II. General Prohibitions

In an expansion relative to the current rule opposed by many commenters, the new rule broadly prohibits the following kinds of statements:

- ***Untrue material statements and omissions.*** Prohibiting any advertisement that includes any untrue statement of a material fact, or that omits 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.
- ***Unsubstantiated material statements of fact.*** Requiring adviser to have a reasonable basis to believe they can substantiate material claims of fact.
- ***Untrue or misleading implications or inferences.*** Prohibiting information reasonably likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact.
- ***Discussion of any potential benefits without fair and balanced treatment of material risks or material limitations***.
- ***"Cherry-picking"*** including in connection with (i) references to specific investment advice provided by the investment adviser where such investment advice is not presented in a fair and balanced manner or (ii) the inclusion or exclusion of performance results, or presentation of performance time periods, in a manner that is not fair and balanced.
- ***Advertisements that are otherwise materially misleading.***

III. Conditions on Testimonials, Endorsements, and Solicitation Activity

Providing more flexibility than the current rule, the new rule permits the use of testimonials, endorsements, and third-party ratings, subject to certain disclosures and other tailored conditions.

This section of the rule merges the current advertising rule with the current cash solicitation rule, covering solicitation activity under the definitions of testimonials and endorsements and applying the specific requirements described below. The rule defines testimonials and endorsements as follows:

> ***Testimonial –*** 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
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> ***Endorsement –*** 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

What is an endorsement or testimonial? The adopting release offers examples of activities likely to be an endorsement or testimonial (provided such activities involve direct or indirect compensation), including

- Websites of lead-generation firms or adviser referral networks (endorsement)
- A blogger's website review of an adviser's advisory service (endorsement or testimonial)
- A lawyer or other service provider that refers an investor to an adviser, even infrequently, depending on the facts and circumstances (endorsement or testimonial)

Exclusions. The release also offers examples of activities likely not to meet the definition of an endorsement or testimonial, including:

- An adviser pays a third-party marketing service or news publication to prepare content for and/or disseminate a communication.
- A noninvestor sells an adviser a list containing the names and contact information of prospective investors.

The SEC confirms that complete or partial client lists that do no more than identify certain of the adviser's clients or private fund investors are not treated as testimonials for purposes of the rule.

Private funds. Currently the cash solicitation rule applies only to the solicitation of advisory clients. Over the objections of many commenters who opposed applying solicitation rules to private fund investors, the SEC did just that, covering private funds — and thus solicitation of private fund investors — under the new terms governing testimonials and endorsements. The change will require, among other things, the amendment of placement agreements with placement agents for private funds and corresponding compliance policies to comply with the new rule.

Cash and noncash compensation. Again over the objections of many commenters, the rule requires disclosure of both cash and noncash compensation (whereas the current solicitation rule is triggered only by cash compensation). Examples of noncash compensation in the adopting release are reduced advisory fees, fee waivers, directed brokerage, sales awards, prizes, gifts and entertainment, and training and education meetings where attendance is provided in exchange for solicitation activities.

Compliance with this provision may be complex to administer; many items enumerated here may be an ordinary part of a relationship between an adviser and a purported solicitor and may not represent "compensation" for any specific activity. As one example that commenters called out, it is common for an anchor investor in a private fund to receive favorable fee terms and also to have a role in introducing other investors. Is that anchor investor then a compensated solicitor? To date, an anchor relationship generally has not been considered in that light. The SEC did not directly address the question but emphasizes in the adopting release that these are questions of fact and generally turn on the "mutual understanding" of the parties.

Disclosure requirement. Mirroring elements of the current solicitation rule, certain information must be disclosed in connection with a testimonial or endorsement, which for these purposes now includes any solicitation within the scope of the rule.

- ***"Clear and prominent."*** Clear and prominent disclosures should be included within the testimonial or endorsement itself (or at the same time as an oral testimonial or endorsement) to identify and address (i) whether the person making a testimonial or endorsement is a client or private fund investor; (ii) that cash or noncash compensation has been provided in connection with the testimonial or endorsement, if applicable; and (iii) material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from a relationship with the adviser (e.g., statement that the testimonial or endorsement was provided by an affiliate of the adviser).
- ***Additional detail.*** Additional required disclosure includes (i) 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 (ii) a description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the relationship with the adviser and/or from the compensation arrangement.
- ***Timing and responsibility.*** The required disclosures should be provided at the time such testimonial or endorsement is disseminated in all cases. Either the adviser or the solicitor may make the required disclosures (under the current cash solicitation rule, these disclosures must be made by the solicitor). If the adviser does not make the disclosures, it must have a reasonable belief that the solicitor is doing so.

Adviser oversight. With respect to any compensated testimonial or endorsement, the rule requires the adviser have a reasonable basis for believing the testimonial or endorsement complies with the rule. Similar to the current cash solicitation rule, the adviser is required to have a written agreement with any person giving a compensated testimonial or endorsement that describes the agreed-on activities and terms of compensation.

Disqualified persons. The new rule prohibits an adviser from compensating a person, directly or indirectly, for a testimonial or endorsement (and thus, solicitation) if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is subject to an SEC opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the federal securities laws or that the person giving the testimonial or endorsement is subject to an enumerated "disqualifying event." This provision is broader than the current cash solicitation rule in that it now applies to all compensated testimonials and endorsements, not just solicitations. It is also broader in that if the ineligible person is an entity, the disqualification extends to the entity's employees, officers, directors, general partners, and elected managers (as applicable). Unlike the current cash solicitation rule, certain actions by the Commodity Futures Trading Commission and self-regulatory organizations also are disqualifying. The rule applies a 10-year look-back period to all disqualifying events.

Partial exemptions. The rule includes a series of partial exemptions from these conditions.

- ***Advisory affiliates.*** Similar to the current cash solicitation rule, the rule contains a partial exemption for testimonials or endorsements provided by persons who are employees of, or otherwise affiliated with, the adviser. This is a partial exemption because the testimonial or endorsement will be exempt from the rule's disclosure requirements but not the adviser oversight and disqualification provisions. For the exemption to apply, the affiliation must be either disclosed to the client or investor or "readily apparent."
- ***De minimis payments.*** Like the proposed solicitation rule, the rule adds an exception to the disqualification provisions for testimonials and endorsements for zero or *de minimis* payments (less than $1,000 during the preceding 12 months). This is also a partial exemption because the testimonial or endorsement will be exempt from the rule's disclosure requirements but not the adviser oversight and disqualification provisions.
- ***Broker-dealers.*** U.S.-registered broker-dealers are exempt from the new rule's disqualification provisions provided they are not subject to statutory disqualification under the Securities Exchange Act of 1934, as amended. Registered broker-dealers also are exempt from the disclosure provisions when providing a testimonial or endorsement to a retail customer that is a recommendation subject to Regulation BI. Further, a registered broker-dealer soliciting a nonretail customer (as defined in Regulation BI) is partially exempt from the disclosure requirements and is subject only to those identified above under the "clear and prominent" heading.
- ***Regulation D "covered persons."*** Similar to the partial exemption for registered broker-dealers, persons covered under rule 506(d) of Regulation D are exempt from the rule's disqualification provisions, provided the person's involvement would not disqualify the offering under that rule.

No exemptions for impersonal investment advice and nonprofit programs. Unlike the current cash solicitation rule and the proposed rule, the new rule does not provide a partial exemption for promoters who refer investors for the provision of impersonal investment advice. Nor is there an exemption for nonprofit programs.

Other changes. The new rule eliminates some requirements of the current cash solicitation rule:

- The adviser no longer needs to obtain a written acknowledgement from each referred client that the client has received the required disclosures from the solicitor.
- A solicitor no longer needs to deliver a copy of the adviser's brochure (Form ADV Part 2A) to the prospective client.

IV. Third-Party Ratings

The new rule prohibits including third-party ratings in advertisements unless they comply with the rule's general prohibitions and the following additional requirements.

"Third-party." The rating must be provided by a person who is not a related person (as defined in Form ADV) of the adviser and who provides ratings or rankings in the ordinary course of business.

Due diligence requirement. The 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.

Disclosure requirement. The adviser must clearly and prominently disclose, or reasonably believe that the third-party rating clearly and prominently discloses, (i) the date on which the rating was given and the time period covered, (ii) the identity of the third party that created the rating, and, (iii) if applicable, that the adviser has compensated the rating provider, directly or indirectly, in connection with obtaining or using the rating.

V. Case Studies and Other Specific Investment Advice

The new rule generally allows references to specific investment advice (including case studies) where such investment advice is presented in a fair and balanced manner. To avoid "cherry picking," the rule requires advertisements that include specific investment advice to be presented in a manner that is fair and balanced, according to factors that will vary based on the facts and circumstances, including the nature and sophistication of the audience. The rule does not require the specific provision of a list of prior investment recommendations, and the adopting release provides several helpful examples of alternative approaches.

The provision applies to any reference to specific investment advice, regardless of whether the investment advice remains current or occurred in the past and whether or not the advice was profitable. In the adopting release, the SEC clarified that the methods described in past staff no-action letters for presenting past specific recommendations (such as providing an equal number of the biggest performance contributors and detractors) would not be the only ways to satisfy the fair-and-balanced standard.

VI. Advertising Investment Performance

As noted, the rule's general prohibitions prohibit an adviser from including or excluding performance results, or presenting time periods for performance, in a manner that is not fair and balanced. Factors relevant to whether an advertisement's reference to performance

information is presented in a fair and balanced manner will vary based on the facts and circumstances. For example, presenting performance results over a very short period of time (e.g., two months) or over inconsistent periods of time generally would not be fair and balanced, in the SEC's view.

The rule also includes specific requirements and restrictions for certain types of performance advertising. These sections of the rule generally track existing SEC staff guidance and reflect an effort by the SEC to consolidate investment performance requirements in one place.[6]

Gross and net performance. The new rule requires advisers to include performance results net of fees and expenses in any advertisement that also includes gross performance results. Net performance results must be given equal prominence to, and be calculated over the same time period using the same methodology as, gross performance. In a departure from the proposed rule, the rule applies the net performance requirement to all advertisements, not only to retail advertisements, but will not require advisers advertising net performance to provide a schedule of fees.

Prescribed time periods. The performance results in advertisements are required to cover one-, five- and 10-year periods (or life of the portfolio, if shorter). While the new rule generally applies these time periods for all advertisements (rather than just to retail advertisements as proposed), there is an exception from the prescribed time periods for private funds.

Statements about Commission approval. The new rule prohibits any statement, express or implied, that the SEC has approved or reviewed the calculation or presentation of performance results.

Related performance. "Related performance" refers to the presentation of performance results of portfolios managed by an investment adviser that have substantially similar investment policies, objectives, and strategies as those of the services being promoted in an advertisement (related portfolios). The rule allows advertisements to include related performance as long as such performance includes all related portfolios. The rule, however, generally allows related performance to exclude any related portfolios as long as the advertised performance results are not materially higher than they would be if all related portfolios had been included. The rule allows advisers to report related performance either as a composite aggregation of all portfolios falling within stated criteria (e.g., a composite constructed to meet the CFA Institute's GIPS standards) or on a portfolio-by-portfolio basis. The SEC declined commenters' requests to permit advertisements of a single representative account (e.g., a "flagship fund") not subject to the prescribed conditions but explained that an adviser could present the performance of a single portfolio (without also providing the performance of other related portfolios) if the performance presented is not materially higher than if all related portfolios had been included, and the performance does not violate the rule's general prohibitions.

Extracted performance. "Extracted performance" refers to the performance results of a subset of investments extracted from a portfolio. The rule prohibits an adviser from presenting extracted performance in an advertisement unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was

extracted. Contrary to current market practice, the rule defines "extracted performance" to include only results extracted from a single portfolio so that results extracted from multiple portfolios will be "hypothetical performance" rather than "extracted performance."

Hypothetical performance. "Hypothetical performance" refers to performance results that were not actually achieved by any portfolio of the adviser. As adopted, the rule's definition of "hypothetical performance" specifically includes, but is not limited to,

- Model performance[7]
- Backtested performance[8]
- Targeted or projected performance returns[9]
- Performance extracted from multiple portfolios

The new rule permits the presentation of hypothetical performance in advertisements under certain conditions intended to address the potential for hypothetical performance to mislead. An adviser using hypothetical performance is required to

- Adopt and implement 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
- Provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the hypothetical performance
- Provide (or, when the intended audience is an investor in a private fund, offer to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using hypothetical performance in making investment decisions

In a departure from the proposal, the rule clarifies that reasonably designed policies and procedures need not address each recipient's particular circumstances; rather, the adviser must make a reasonable judgment about the likely investment objectives and financial situation of the advertisement's *intended audience*. The SEC further clarified that it does not expect advisers to disclose proprietary or confidential information when satisfying the condition that criteria used and assumptions made should be included. Rather, a general description of the methodology should suffice.

As a reminder, certain hypothetical performance presentations are broadly excluded from the rule (and therefore subject primarily to general antifraud requirements).[10] These are

- Communications with hypothetical performance when given in response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the adviser, or
- Communications with hypothetical performance when given to a prospective or current investor in a private fund advised by the adviser in a one-on-one communication.

Predecessor performance. The rule defines "predecessor performance" to mean investment performance achieved by an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance. The SEC determined that

in addition to the general prohibitions of the rule, there should be explicit guardrails on predecessor performance, as follows:

- ***Primarily responsible.*** The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser.
- ***Sufficiently similar accounts.*** 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.
- ***Managed in a substantially similar manner.*** 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 elsewhere in the rule.
- ***Relevant disclosures.*** The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

While these requirements largely track existing SEC staff guidance, advisers have taken a variety of views on predecessor performance that may require adjustment to fit fully within the rule.

VII. Other Provisions

Review and approval of advertisements. Unlike the proposed rule, the rule will not require review and approval of advertisements by a designated employee of the adviser prior to use. The SEC believes an adviser's existing obligations under the compliance rule (Rule 206(4)-7) will allow an adviser to tailor its compliance program to its own advertising practices to prevent, detect, and correct violations.[11]

Amendments to Form ADV. The SEC adopted amendments to Form ADV that require advisers to state whether any of their advertisements include performance results, a reference to specific investment advice, testimonials, endorsements, or third-party ratings, among other information related to these advertising practices.

Staff no-action letters. Because the SEC is rescinding the existing cash solicitation rule, SEC staff no-action letters that address that rule will be "nullified." The SEC will make available a further list of no-action letters and other staff guidance that will be withdrawn.[12]

Recordkeeping. The SEC adopted amendments to the books and records rule (Rule 204-2) that require advisers to make and keep certain records regarding all advertisements they disseminate, with certain accommodations for complying with this provision in the case of oral advertisements. This expands the current books and records rule, which requires advisers to retain only advertisements sent to 10 or more persons. In response to comments received, the SEC clarified that electronic mail archives are an acceptable method of maintaining records of advertisements.

[1] See "Investment Adviser Marketing," Investment Advisers Act Release No. 5653 (Dec. 22, 2020), available at https://www.sec.gov/rules/final/2020/ia-5653.pdf (adopting release). See also "Investment Adviser Advertisements; Compensation for Solicitations," Investment Advisers Act Release No. 5407 (Nov. 4, 2019), available at https://www.sec.gov/rules/proposed/2019/ia-5407.pdf (proposing release).
[2] The rule defines "private fund" the same way as Section 202(a)(29) of the Advisers Act, i.e., an issuer that would be an investment company, as defined in Section 3 of the Investment Company Act of 1940, but for Section 3(c)(1) or 3(c)(7) of that Act.
[3] This would not be case when service materials for current clients or investors are used for marketing to new clients or investors, as "investor letters" frequently are.
[4] Adding color to this point, the SEC says that a white paper might be partially an advertisement and partially not, saying "we would view an article or white paper that provides general market commentary and concludes with a description of how the adviser's securities-related services can help prospective investors invest in the market as offering the adviser's services. Accordingly, that portion of the white paper would be an advertisement."
[5] Here again the SEC adds color, saying that "Whether particular information included in a PPM constitutes an advertisement of the adviser depends on the relevant facts and circumstances. For example, if a PPM contained related performance information of separate accounts the adviser manages, that related performance information is likely to constitute an advertisement."
[6] Financial Industry Regulatory Authority (FINRA) rules relating to hypothetical, related, and predecessor performance have not changed. Advisers that use broker-dealers (affiliated or unaffiliated) to market their funds will need to consider the applicability of FINRA rules to their advertisements.
[7] Although the rule does not specifically define "model performance," the SEC explained that such term should be read more broadly than in the proposing release to include, but not be limited to, performance generated by the following types of models: (i) those where the adviser applies the same investment strategy to actual investor accounts but where the adviser makes slight adjustments to the model (e.g., allocation and weighting) to accommodate different investor investment objectives; (ii) computer generated models; and (iii) those the adviser creates or purchases from model providers that are not used for actual investors.
[8] "Backtested performance" is achieved by application of an adviser's investment strategy to data from prior time periods when the strategy was not actually used during those time periods.
[9] "Targeted returns" reflect an adviser's aspirational performance target; i.e., the returns that adviser is seeking to achieve over a particular period of time. "Projected returns" reflect an adviser's performance estimate; i.e., the returns the adviser believes can be achieved using the advertised investment services.
[10] Interactive investor tools that present the likelihood of different outcomes when certain investments or strategies are selected are excluded from the definition of hypothetical performance, subject to a separate, tailored set of disclosure requirements.
[11] Investment advisers that are also registered as commodity pool operators or commodity trading advisors and that are members of the National Futures Association (NFA) are subject to NFA rules that require promotional material to be reviewed and approved by a supervisory employee prior to its first use.
[12] The SEC's Division of Investment Management maintains and periodically updates a list of modified or withdrawn staff statements. This list can be found at www.sec.gov/divisions/investment/im-modified-withdrawn-staff-statements.

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