

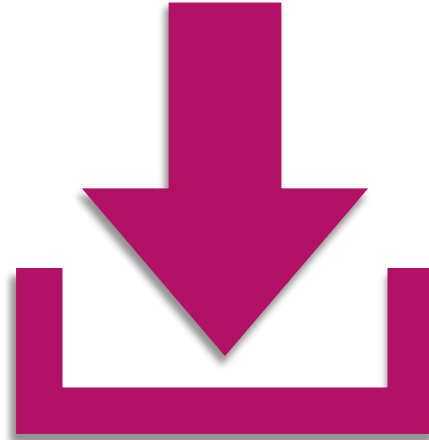


Navigating the SEC's New Marketing Rule:

RECENT GUIDANCE AND ENFORCEMENT ACTIONS

Download Our Slides

<https://www.ria-compliance-consultants.com/sec-marketing-rule>



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Investment Adviser Rep Continuing Education

This Course Has Been Submitted
to NASAA For 1 Hour of IAR CE
Under the Products & Practices
Category, But It Is Not Yet
Approved

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- ▶ **Login** - You must be logged in during the presentation under your email address.
- ▶ **View Entire Presentation** – You are required to watch the entire live presentation the course.
- ▶ **Attendance Codes** - As you watch the presentation, you will receive two attendance codes, each containing three alphanumeric characters. Save these codes. You will need to enter the full six-character attendance code prior to accessing the final quiz.
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Content Questions & Technical Help

If you have questions about the content of this course or need technical help, please contact us via the email address below:

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Course Overview

- Background
- Recent Enforcement
Actions by SEC
- Guidance from SEC's
Division of Examinations
- Questions & Answers

Limitations & Exclusions

Limited to Investment Adviser Firms Registered with SEC



Does Not Address Requirements of State Registered Investment Advisers



Assumes Basic Understanding of SEC's Marketing Rule (Course Isn't Comprehensive Review)

Regulatory Resources

- ▶ SEC Rule 206(4)-1 @ [https://www.law.cornell.edu/cfr/text/17/275.206\(4\)-1](https://www.law.cornell.edu/cfr/text/17/275.206(4)-1)
- ▶ SEC Final Rule Release (12/22/2020) @ <https://www.sec.gov/files/rules/final/2020/ia-5653.pdf>
- ▶ SEC Risk Alert: Examinations Focused on Additional Areas of the Adviser Marketing Rule (06/08/2023) @ <https://www.sec.gov/files/risk-alert-marketing-rule-announcement-phase-3-060823.pdf>
- ▶ SEC Risk Alert: Initial Observations Regarding Advisers Act Marketing Rule Compliance (04/17/2024) @ <https://www.sec.gov/compliance/risk-alerts/risk-alert-041724>
- ▶ SEC Press Release: SEC Sweep into Marketing Rule Violations Results in Charges Against Nine Investment Advisers (09/11/2023) @ <https://www.sec.gov/newsroom/press-releases/2023-173>
- ▶ SEC Press Release: SEC Charges Five Investment Advisers for Marketing Rule Violations (04/12/2024) @ <https://www.sec.gov/newsroom/press-releases/2024-46>
- ▶ SEC Press Release: SEC Charges Nine Investment Advisers in Ongoing Sweep into Marketing Rule Violations (09/14/2024) @ <https://www.sec.gov/newsroom/press-releases/2024-121>

SEC's New Marketing Rule Applies to All SEC Registered Investment Advisers

- ▶ Applies to Following:
 - Investment Adviser Registered with SEC
 - Includes SEC RIAs to Private Funds & Investors in Such Funds
 - Investment Adviser Required to Be Registered with SEC
- ▶ Excluded:
 - Exempt Reporting Advisers
 - State Registered Investment Advisers
 - However, Some States Are Following SEC's Marketing Rule



Prohibitions Under SEC's New Marketing Rule

- ▶ **Making an untrue statement of a material fact, or omitting a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading;**
- ▶ Making 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 SEC;
- ▶ **Including 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 adviser;**
- ▶ Discussing any potential benefits without providing fair and balanced treatment of any associated material risks or limitations;
- ▶ Referencing specific investment advice provided by the adviser that is not presented in a fair and balanced manner;
- ▶ Including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced; and
- ▶ **Including information that is otherwise materially misleading.**

SEC's New Marketing Rule – Testimonial/Endorsement

- ▶ Client Testimonials Are No Longer Prohibited But Rather Are Regulated Along with Third-Party Endorsements (f/k/a Solicitors)
- ▶ Client Testimonial or Third-Party Endorsement:
 - Subject to Clear & Prominent Disclosure At Time of Testimonial/Endorsement
 - Regarding Status of Party Giving Testimonial/Endorsement, Compensation (Cash & Non-Cash) Provided & Any Conflicts of Interest
 - Written Agreement (Only Applies to Testimonial/Endorsement for Cash/Non-Cash Compensation > \$1,000 During Past 12 Months)
 - Person Giving Testimonial/Endorsement Isn't Subject to Disqualifying Event (Only Applies to Testimonial/Endorsement for Cash/Non-Cash Compensation > \$1,000 During Past 12 Months)

Third-Party Ratings Requirements

- **Structured For Balanced Responses:** Adviser Must Ensure Questionnaire Allows Both Favorable And Unfavorable Responses Equally And Is Not Designed For Predetermined Results
- **Clear And Prominent Disclosures:**
 - Date And Time Period Of Rating.
 - Identity Of Third Party That Created And Tabulated Rating
 - Disclosure Of Any Compensation Related To Rating

Prohibited Performance Advertising Practices

Gross Performance: Cannot be presented without net performance.

Time Periods: Must include specific performance periods.

SEC Approval: No claims that the SEC approved performance calculations.

Selective Portfolios: Cannot exclude portfolios with similar strategies, unless explicitly disclosed.

Extracted Performance: Must provide or offer full portfolio performance if showing subsets.

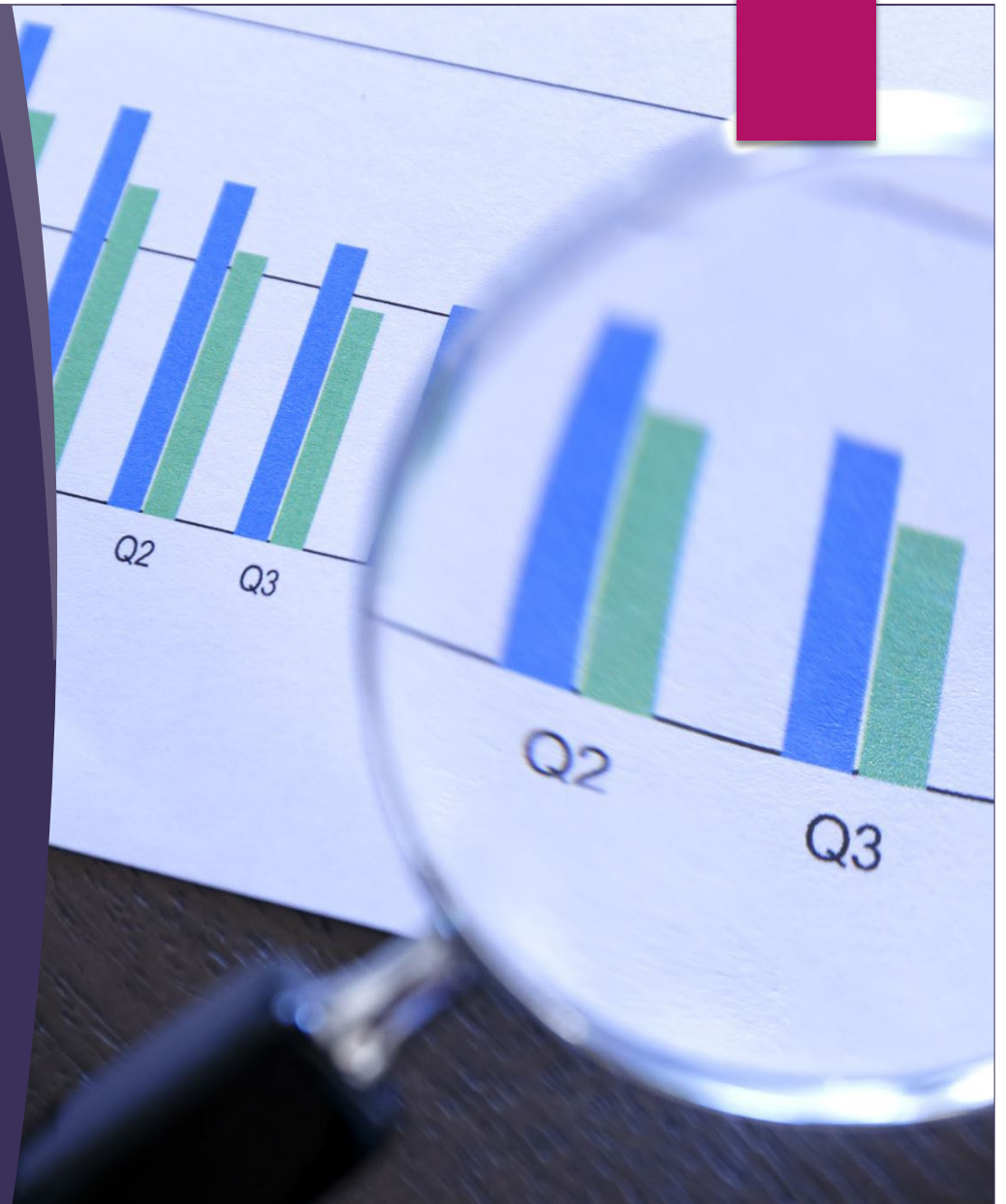
Hypothetical Performance: Requires policies ensuring relevance to the audience and underlying data disclosure.

Predecessor Performance: Must ensure personnel/account similarity with proper disclosures.

Presentation of Net Performance

Any presentation of **gross** performance in an advertisement is **prohibited** unless 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.



Hypothetical Performance

- ▶ Hypothetical Performance Is Generally Prohibited Subject to Certain Conditions
 - ▶ Adoption policies & procedures reasonably designed to ensure that the hypothetical performance information is relevant to the likely financial situation and investment objectives of the advertisement's intended audience
 - ▶ Only be distributed to investors who have access to the resources to independently analyze info and who have the financial expertise to understand the risks and limitations of these types of presentations
 - ▶ Must provide additional information about the hypothetical performance that is tailored to the audience receiving the advertisement, such that the intended audience has sufficient information to understand the criteria, assumptions, risks, and limitations

Not Intended For General Public

“We believe that advisers generally would not be able to include hypothetical performance in advertisements directed to a mass audience or intended for general circulation.”

Overview of Recent SEC Enforcement Actions

SEC Settled Charges
Against 9 Firms for
Allegedly Violating
Marketing Rule

Fines Totaled \$1,240,000
For 9 Firms Ranging From
\$65,000 to \$325,000

Enforcement Actions on Claims of Conflict-Free

Misleading Conflict-Free Claims:

- Advertised As “Conflict-Free” And Providing “Unbiased” Service But Failed To Provide Context Or Disclose Conflicts Of Interest, Which Were Acknowledged In Form ADV Part 2A
- Claimed To Serve Clients “Independently, With No Conflict Of Interest” But Failed To Disclose Inherent Conflicts Of Interest, Which Were Acknowledged In Form ADV Part 2A
- Advertised That Adviser Provided “Conflict-Free Advice” But Failed To Disclose Inherent Conflicts Of Interest, Which Were Acknowledged In Form ADV Part 2A
- Advertised As “A True Fiduciary That Puts Client First By Aligning Incentives And Eliminating Conflicts Of Interest” But Failed To Disclose Conflicts, Which Were Recognized In Form ADV Part 2A

Key Takeaway: Firms Should Avoid Blanket Statements Such As Conflict-Free

Enforcement Actions

Endorsements & Testimonials

- Endorsement Lacking Disclosures:
 - o Advertised As "Official Wealth Management Partner" Of Athletic Program, Which Was Not A Client, And Failed To Disclose That Endorsement Was By Non-Client And Paid For By Adviser In Videos And On Social Media, And Physical Objects (Bags And Flags)
- Misleading Testimonial:
 - o Firm's Website Included Positive Quotes Labeled As "Testimonials"
 - o Included Quotes From Former Client & Another Whose Client Status Could Not Be Confirmed
 - o Firm Did Not Provide Clear And Prominent Disclosures Indicating That These Quotes Were From Non-Clients

Enforcement Actions on Third-Party Ratings

- ✓ **Misrepresentation Of Ranking:** Advertised As A “Top 12 Financial Advisor” By Barron’s, When Correct Ranking Was “Top 1200 Financial Advisor.”
- ✓ **Misleading Award Title:** Incorrectly Stated “Top 100 Women’s Advisor” Suggesting Advice For Women, Instead Of “Top 100 Women Financial Advisors” Award For Female Advisers.
- ✓ **Failure To Disclose Rating Dates:**
 - Advertised Third-Party Awards Without Clearly Disclosing Dates & Periods For Which Ratings Were Based (Received In 2007, 2019 & 2020)
 - Advertised Third-Party Ratings, Including “All-Star Analyst” (2001, 2002) & “Power 30” (2002, 2004), Without Prominently Disclosing Dates Awarded

Enforcement Actions on Third-Party Ratings



Failure to Disclose Rating Date: Advertised as a "Barron's Top Advisor" without providing the date of the rating or the time period it covered, which was attained in 2018 and not since.



Unsubstantiated Claims: Advertised CEO Was Named A Top Wealth Manager For 14 Consecutive Years, But Could Not Substantiate Claim



Misleading Source: Stated Award Was From Readers Of *San Diego Magazine*, But Was Actually Selected By A Third-Party Company Using A Different Methodology



Failure To Disclose Award Date: Advertised Principal As "Top Adviser" In U.S. But Failed To Disclose The Award Was From Over 16 Years Ago

SEC Risk Alert
(04/17/2024)

Division of Examinations Shared
Preliminary Observations
Regarding Investment Advisers
Compliance With Rule 206(4)-1

Policies & Procedures

Advisers Must Tailor Policies To Address Specific Marketing Practices

Policies Must Cover Social Media, Websites, And Other Digital Channels

Procedures Should Include Regular Testing And Monitoring For Violations

Formal, Written Policies Are Necessary, Not Informal Or Verbal Guidance

Books and Records

- ▶ Advisers Should Retain Complete Documentation Of Marketing Materials
- ▶ Social Media Posts And Surveys Must Be Maintained For Record-Keeping
- ▶ Performance Claims Should Be Substantiated With Supporting Documents
- ▶ All Third-Party Ratings Used In Ads Must Have Proper Documentation

Form ADV Disclosure

Form ADV Part 1A Must
Accurately Reflect Marketing
Practices

Advisers Must Ensure Promoter
(Referral) Arrangements Are Fully
Disclosed In Form ADV Part 2A

Outdated References To The
Prior Cash Solicitation Rule
Should Be Removed

Form ADV Updates

- ▶ Form ADV Part 1 Item 5, Sub-Section L
 - An adviser will be required to state whether any of its advertisements include performance results, a reference to specific investment advice, testimonials, endorsements, or third-party ratings
 - An adviser will be required to state yes or no as to whether the adviser pays or otherwise provides cash or non-cash compensation, directly or indirectly, in connection with the use of testimonials, endorsements, or third-party ratings
- ▶ Form ADV Part 2A Item 14
 - Remove Reference to Rule 206(4)-3
 - Add Description of New Promoter Arrangements

General Prohibitions On False Advertising

Untrue Statements	Avoid Including Untrue Or Misleading Material Facts
Substantiation	Ensure All Facts Can Be Substantiated Upon SEC Demand
Implications	Prevent Misleading Implications About Material Facts
Balanced	Discuss Potential Benefits With Balanced Risk Disclosures
Specific Advice	Only Reference Past Specific Advice Fairly And With Balance
Performance	Only Present Performance Data In A Fair & Balanced Way
Misleading	Avoid Providing Any Materially Misleading Information

Examples of Untrue Statements

- **Untrue Statements:** Ads Falsely Claimed Advisers Were Free Of Conflicts.
- **Inaccurate Business Facts:** Ads Misrepresented Personnel Qualifications And Adviser Services
- **Inaccurate Product Claims:** Ads Referenced Investment Mandates And Processes That Didn't Exist
- **Misleading Client Descriptions:** Ads Inaccurately Described Adviser As Serving Private Funds
- **False Accolades:** Ads Falsely Publicized Unearned Awards



Examples of Omissions & Misleading Inferences

- **Best Interest:** Claiming Uniqueness For Acting In Clients' Best Interest Without Disclosing All Investment Advisers Have Fiduciary Duty
- **Conflicts Of Interest:** Recommending Investments Without Disclosing Conflicts Due To Compensation Paid
- **False Media Claims:** Implying Media Appearances Were Unpaid Or Using Celebrity Endorsements Without Permission
- **Misleading Performance:**
 - Claiming Cumulative Profits That Were Unachievable Without Unlimited Capital
 - Failing To Disclose Share Classes In Performance Information
 - Using Lower Fees In Net Performance Calculations Than Offered To Clients
 - Omitting Key Details About Fees And Expenses In Performance Returns

Examples of Omissions & Misleading Inferences

- **SEC Registration:** Misusing SEC Registration Or Logo To Imply Endorsement Or Skill Level
- **Third-Party Ratings:**
 - Implying Advisers Were Sole Top Recipients When Awards Were Shared
 - Failing To Disclose Ratings Were Based On Irrelevant Factors Like Assets Under Management Or Self-Nominated Personnel
- **Testimonials:** Misusing Third-Party Testimonials Without Context, Implying Endorsement Of Adviser Services

Misleading Performance Advertising

Benchmark Comparisons Lacked Definitions Or Failed To Disclose Missing Reinvestment Of Dividends

Performance Presentations Used Outdated Data Or Included Unavailable Products With Lower Costs

Exaggerated Adviser's Track Records Showing Securities Not Purchased For Clients

Claims Of Above-Average Performance Lacked Context, Including For Advisers With No Clients and No Track Records

Investment Recommendations Lacked Sufficient Disclosures To Provide Context, Often Showcasing Performance During Favorable Market Periods

Performance Time Periods Were Not Disclosed Or Consistent

Excluded Unrealized Investments From Total Returns

Performance Advertising Disclosure

Depending On Circumstances, Disclosures May Include:

- (1) Material Conditions, Objectives, And Investment Strategies Used To Obtain The Results Portrayed;
- (2) Whether And To What Extent The Results Portrayed Reflect The Reinvestment Of Dividends And Other Earnings;
- (3) Effect Of Material Market Or Economic Conditions On The Results Portrayed;
- (4) Possibility Of Loss; And
- (5) Material Facts Relevant To Any Comparison Made To Index Or Benchmark

Use Of Testimonials & Endorsements

Advisers Must Disclose Clearly & Prominently If Promoter Is Compensated

Adviser Must Disclose Clearly & Prominently Whether Promoter Is Client

If Testimonial or Endorsement Is Compensated, Must Enter Into Written Agreement

Client Testimonials & Endorsements Should Not Be Used Out Of Context Or Misleadingly

Use of Third-Party Ratings

Rule Requires Following **Clear and Prominent** Disclosures

- Date On Which Rating Was Given & Period Of Time Upon Which Rating Was Based
- Identity Of Third Party That Created & Tabulated Rating
- If Compensation Has Been Provided Directly Or Indirectly By Adviser

Ratings Should Be Accompanied By Clear Disclosure Of Criteria

Misleading Formats

Advertisements
Used Unreadable
Font In Disclosures
On Websites.

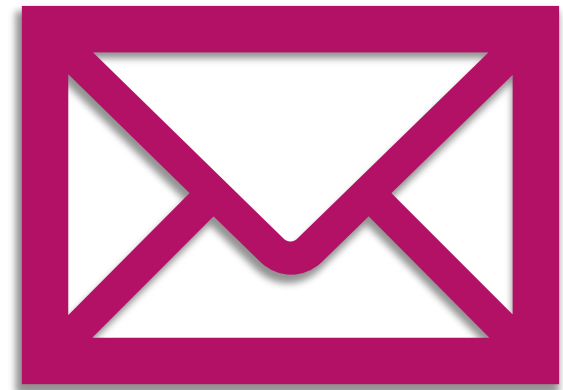
Videos Contained
Disclosures That
Were Difficult To
Read

Presentation Of
Information Was
Misleading Due To
Poor Visibility

Questions

Please submit any question online or email with any questions about the content of this course.

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Thank You

