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SEC Reforms Investment Advisers Act Regulation of Marketing Practices - By: C. Dirk Peterson

I. New Rule 206(4)-1 – Adviser Marketing

A. Introduction

The Securities and Exchange Commission ("SEC" or "Commission") delivered on highly anticipated regulatory reforms relevant to the marketing practices of investment advisers registered pursuant to, and regulated by, the Investment Advisers Act of 1940 ("Advisers Act").

The Commission's recently adopted marketing regulations, codified in Rule 206(4)-1 under the Advisers Act, modernize the Commission's current advertising regulatory regime established over a half-century ago by replacing the current advertising rule and replacing and rescinding the Commission's 41-year old cash-solicitation rule. In their place is a new integrated marketing rule.

The reforms significantly re-order the definition of "advertisement," establish prudential rules for advertisements using a regime of specific antifraud proscriptions and fair and balanced standards, and prescribe specific conditions on the use of testimonials, endorsements, third-party ratings, and performance track records.

The SEC also amended Form ADV, the Commission's registration and disclosure form for investment advisers, to elicit disclosure specifically about an adviser's advertisements of performance, specific investment recommendations, testimonials, endorsements, and third-party ratings. The SEC also adopted conforming changes to its adviser books and records requirements (Rule 204-2 under the Advisers Act) pertaining to adviser advertisements.

B. Highlights

Some of the key takeaways from the Commission's rulemaking include:

- Replacing the current advertising rule, Rule 206(4)-1, and the cash solicitation rule, Rule 206(4)-3, with a new, integrated marketing rule that regulates advertisements and solicitations of interests in private investment funds.[1]

- Permitting testimonials and endorsements of an investment adviser and regulating them with a regime of conflicts management.

- Treating referrals of advisory business, including the offer or solicitation of interests in private investment funds, as testimonials and/or endorsements subject to conditions on disclosure, oversight, and eligibility.

- Treating most one-on-one communications (other than testimonials, endorsements, and certain types of hypothetical performance presentations) as communications in the ordinary course of a client relationship and not as "advertisements" subject to the new marketing rule.

- Modifying a previous proposal to limit the final rule solely to advertisements and solicitations of investors in "private investment funds," thus not extending the new marketing rule by its terms to, not only registered investment companies and business development companies, but other investment funds structured in reliance on other exclusions from the definition of investment company under the 1940 Act (*e.g.*, privately offered real-estate investment funds structured in reliance on Section 3(c)(5)(C) of the 1940 Act).

1 A private investment fund for purposes of the new rule refers to privately offered investment funds excluded from the definition of "investment company" by Section 3(c)(1) or by Section 3(c)(7) of the Investment Company Act of 1940 ("1940 Act").

- Confirming that one-on-one hypothetical performance presentations would be "advertisements" unless they are made in response to unsolicited requests or in the context of one-on-one hypothetical performance presentations to private fund investors, in which case they are to be regulated solely under general antifraud standards.
- Confirming that the contents of private offering memoranda delivered to prospective private fund investors are to be regulated solely under general antifraud standards unless they contain related performance to the fund adviser's management of a separately managed account, in which case the PPM would most likely be an "advertisement."
- Confirming that certain communications with existing private fund investors, such as fund account statements, transaction reports, including fund performance, and similar investor reports are to be regulated solely under general antifraud standards, not as "advertisements."
- Confirming a negligence standard for violations of the new marketing rule.
- Codifying material aspects of the SEC staff's no-action positions regarding the permissible advertisement of third-party numerical ratings.
- Codifying in significant part the collection of SEC staff no-action positions regarding, and making clarifying enhancements to, the permissible advertisement of various types of an adviser's performance track record.
- Exempting private investment funds from having to state performance in accordance with the rule's standardized one, five, and ten-year periods.
- Characterizing model portfolio performance as hypothetical performance and conditionally permitting a client's use of interactive analytical tools outside of the restrictions, particularly the client sophistication standards, applicable to hypothetical performance advertisements.

C. Effective Date and Compliance Date

The SEC adopted Rule 206(4)-1 under the Advisers Act on December 22, 2020, with an effective date of 60 days from publication in the Federal Register and a compliance date of 18 months from the effective date. As of the publication of this Legal Alert, the Federal Register has not yet published the Commission's adoption of Rule 206(4)-1, nor the amendments to Form ADV or Rule 204-2. We will advise on the precise effective and compliance dates when they become available, as well as the SEC staff's treatment of relevant no-action letters noted herein.

The pre-effective and transition periods will enable investment advisers to review their written policies and procedures on advertising and marketing to: (1) address business practices in compliance with the new marketing rule, (2) review existing marketing practices to address the possible use of testimonials and endorsements, (3) modify, if necessary, policies on performance presentations, especially policies pertinent to clients receiving hypothetical performance, (4) make any necessary updated disclosures on Form ADV for the next annual update following the compliance date, and (5) review current, and potentially new, referral, solicitation, and private placement arrangements.

D. Contact Us

For more information on this Legal Alert and the Commission's new marketing reforms, do not hesitate to contact C. Dirk Peterson at (202) 659-3905 or at dpeterson@mcintyrelf.com.

II. The Scope of the Marketing Rule

A. Definition of Advertisement

Unless excluded, the rule applies specific antifraud proscriptions and fair and balanced standards to: (1) any direct and indirect communications of an adviser's securities advisory services directed to more than one prospective client or prospective investor in a private investment fund advised by the adviser; and (2) any notifications of an adviser's new securities advisory services provided to existing clients or existing investors in a private investment fund advised by the adviser. Additional conditions of the rule apply to an adviser's use of: (1) testimonials and endorsements, including solicitations and referrals of an adviser's services and offerings of private fund interests, (2) third-party ratings, and (3) performance advertisements not otherwise excluded from the definition of "advertisement."

The new marketing rule expressly excludes from the definition of "advertisement" the following: (1) extemporaneous, live, oral communications unless a testimonial or an endorsement; (2) information contained in communications, testimonials, and endorsements otherwise required by statutory or regulatory notice, filing, or other required communications to the extent the communication is reasonably tailored to comply with the applicable statutory and regulatory requirements; (3) any unsolicited hypothetical performance information; and (4) all one-on-one performance presentations, including hypothetical performance (solicited or otherwise) directed to prospective or existing investors in a private investment fund advised by the adviser.

According to the SEC, the scope of the new marketing rule is not intended by its terms to cover most one-on-one communications, such as ordinary course communications between an adviser and existing clients or fund investors. In the Commission's view, however, prepared materials and/or scripts accompanying oral presentations of an adviser's securities expertise would under most conceivable circumstances satisfy the definition of "advertisement."

Nor is the rule intended to extend to general communications of branding, investment education, and market commentary. Of course, the Advisers Act antifraud prohibitions nonetheless regulate all types of public communications, including those expressly excluded from the rule's specific coverage.

B. Reach of Marketing Rule

The reach of the new marketing rule is purposefully broad in order to capture promotions of an adviser's business or sponsored private investment funds via e-mail, text and instant messaging, podcasts, blogs, digital communications (*e.g.*, "robo advisers"), social media, not just by means of traditional newsprint, television, and radio advertising. It also reaches indirect marketing of an adviser's services by intermediaries and third parties, such as by sponsors of adviser platforms, feeder fund structures, wrap programs, and 529 plans.

The rule by its terms, however, is limited to advertisements of the adviser's securities services. Thus, the marketing of an adviser's expertise with respect to non-securities asset classes, such as fixed insurance, real estate, and loans, should not be covered by the rule unless otherwise conveyed via testimonial or endorsement.

The SEC also appears to require a level of specificity to an adviser's advertising content, such that generic branding content, event sponsorship, investment education, and market commentary should not fall under the new marketing rule absent more specificity of an adviser's securities management expertise.

III. Substantive Provisions of the Marketing Rule

A. Specific Antifraud Proscriptions and Fair and Balanced Standards

The new marketing rule replaces express prohibitions set forth in the Commission's current advertising rule[2] with seven specific antifraud proscriptions. To a certain extent, the new marketing rule clarifies that which should already be evident, namely that an adviser's advertisements are nonetheless subject to antifraud standards under the Advisers Act.

Unlike, general antifraud, however, scienter will not be a condition to the SEC proving a violation of the rule's specific antifraud proscriptions. Negligence will be sufficient.

2 The Commission's current advertising rule prohibits the following content in adviser advertising: (1) testimonials, (2) past specific recommendations in the absence of a list of all specific recommendations over the past year, (3) references to graphs, charts, or similar devices as themselves sufficient to convey investment advice absent prominent disclosures of the limitations of the graph, chart, or device, (4) statements that reports, analysis, or other service is furnished free of charge unless actually furnished with no obligations or conditions, and (5) untrue, misleading, or false statements of material fact. These specific prohibitions have been replaced with the rule's specific antifraud proscriptions.

Although more prescriptive than general antifraud, the seven antifraud proscriptions nonetheless seem redundant to general antifraud standards. For example, the new marketing rule expressly prohibits materially misleading statements or material omissions, including unsubstantiated statements of material fact. The new marketing rule perhaps adds a more precise application of general antifraud by borrowing a fair and balanced standard from the advertising requirements of the Financial Industry Regulatory Authority ("FINRA") relevant to broker-dealer advertising, although the SEC falls short of expressly borrowing FINRA's interpretations to edify any application of the rule's fair and balanced standard. What is clear, is advertisements of specific investment recommendations, the benefits and risks of the adviser's securities advisory services, and performance are subject to a fair and balanced standard in order to protect against cherry-picking only favorable results or attributes of investment experience.

How an advertisement achieves a fair and balanced presentation is up to the adviser guided by the rule's specific antifraud proscriptions, SEC administrative actions, and relevant, current staff no-action positions.

B. Testimonials and Endorsements

1. Meaning of Testimonial and Endorsement

By adopting the new marketing rule, the SEC significantly departed from its historical resistance to testimonials, now permitting them for the first time by rulemaking. For over 50 years, the SEC prohibited the use of testimonials on the theory that they were inherently misleading because by their "very nature [they] emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable."[3] Thus, the new marketing rule potentially eliminates difficult line-drawing distinguishing impermissible testimonials from acceptable promotions by defining testimonials and regulating their use through a system of conflicts-of-interest management.

The rule defines a "testimonial" to mean "any statement by a current client or investor in a private fund advised by the client: (i) About the client or investor's experience with the investment adviser or its supervised persons [(*e.g.*, partners, officers, directors, employees)]; (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."

In this way, the new marketing rule incorporates aspects of the Commission's cash solicitation rule (Rule 206(4)-3), which historically regulated cash referrals of an adviser's direct asset management business, and extends it to offerings of private investment fund interests where an investor would not typically enter into an asset management agreement directly with the adviser as client.[4] The new marketing rule also regulates endorsements and similarly incorporates principles of the cash solicitation rule when promoters make paid endorsements.

An "endorsement" for these purposes means "any statement by a person other than a current client or investor in a private fund advised by the investment adviser that: (i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons;

3 Investment Advisers Act Release No. 121 (Nov. 2, 1961) (adopting, among other things, the testimonial prohibition in the Commission's advertising rule). Previously, the staff addressed the permissibility of testimonials through the no-action process and, although undefined by rule, the Commission's staff interpreted a testimonial generally to mean a statement of a client's experience with, or endorsement of, an investment adviser. *See, e.g., DALBAR, Inc.* SEC No-Action Letter (pub. avail. March 24, 1998); *Cambiar Investors, Inc.,* SEC No-Action Letter (pub. avail. Aug. 28, 1997); *CIGNA Securities, Inc.,* SEC No-Action Letter (pub. avail. Sept. 10, 1991); and *Denver Investment Advisors, Inc.*, SEC No-Action Letter (pub. avail. July 30, 1993).

4 The SEC staff previously clarified that Rule 206(4)-3 did not apply to cash payments to placement agents and other solicitors participating in an offering or solicitation of interests in "investment funds" advised by an investment adviser. *See Mayer Brown LLP,* SEC Staff No-Action Letter (pub. avail. July 28, 2008). The new marketing rule replaces this staff no-action position and now applies principles of the cash solicitation rule to offers and solicitations of interests of an investment fund advised by the adviser. Offerings of other investment funds, those not deemed to be private in reliance on Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, are not subject to the new marketing rule. Therefore, their offerings continue to be subject to general antifraud standards.

(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."

The distinction from a testimonial at first blush is subtle, namely a testimonial applies to existing clients/investors who are in a position to speak of their actual experience with an adviser and an endorsement applies to non-clients/investors who are "hired hands," as it were, and whose relationship with the adviser is significantly promotional. With knowledge of this distinction, a prospective client or investor theoretically can assign the weight or influence of a testimonial versus an endorsement.

2. Managing Conflicts of Interest

Like Rule 206(4)-3, the new marketing rule seeks to manage potential conflicts of interest where a promoter is incentivized directly or indirectly to recommend, solicit, refer, or endorse an investment adviser or a private investment fund advised by the adviser. In contrast to Rule 206(4)-3, the new marketing rule is not limited to conflicts raised solely by cash incentives. The new marketing rule also extends to payments of non-cash incentives for recommending, soliciting, or endorsing an investment adviser's services or investment in a private investment fund advised by the adviser.

Thus, the rule applies to a broad spectrum of obvious incentives, such as transaction and asset-based fees, flat or hourly fees, retainers, and "any other methods of cash compensation." Less obvious incentives covered by the rule include reduced or waived management fees, directed brokerage, reimbursements for third-party expenses, sales awards or other prizes, gifts and entertainment, such as outings, tours, or other forms of entertainment paid to promoters and solicitors. According to the SEC, non-cash compensation will not generally include adviser-sponsored training, education, or annual meetings to the extent not in exchange for testimonials or endorsements, including solicitation activities.

Depending on the types of payment streams, and the nature of a promoter or solicitor's activities, investment adviser and/or broker-dealer status issues may be raised. These federal and state law status issues clearly are not regulated by the new marketing rule. An adviser nonetheless should be attuned to status issues in order to reasonably ensure the overall compliance of its solicitation programs to protect against exposure to potential rescission and/or aiding and abetting issues.[5]

(a). Disclosure

The rule's regulation of testimonials and endorsements, including referrals or solicitations of private investment funds, manages conflicts of interest, in part, through a detailed disclosure regime. In the case of paid testimonials and endorsements, the theory is that prominent and targeted disclosure acts as a remedy to any misconceptions that a solicitor's testimonial or endorsement is necessarily disinterested.

The rule prescribes the following disclosure requirements at the time of a testimonial or an endorsement:

- A clear and prominent statement of the nature of the person providing the testimonial (existing client or existing private-fund investor) or endorsement (no current client or investor relationship).

- A clear and prominent statement of the existence of any cash or non-cash compensation paid for the testimonial or endorsement. To the extent paid, additional disclosure is required of the material terms of the arrangement, including the amount of cash compensation, description of any non-cash incentives and value, if readily ascertainable, and any material conflicts raised by the relationship between a promoter and the adviser and/or the terms of payment arrangement.

5 For example, Section 29(b) of the Securities Exchange Act of 1934 ("Exchange Act") could potentially grant rescission rights to limited partners of a private investment fund, if they were placed, offered, or solicited fund interests by an unregistered promoter that, as a result of the solicitation, should have been registered with the SEC as a broker-dealer.

- A brief, but clear and prominent, statement of any material conflicts of interest raised by the testimonial or endorsement.

The disclosure obligations effectively apply to arrangements with third-party promoters, not (if apparent), internal promotions by so-called "associated persons" of an adviser, meaning those persons internal to the adviser's operations, such as officers, directors, partners, and employees, or control affiliates of the adviser (and their associated persons) who would at face value be expected in the ordinary course to promote or endorse the adviser's business. For broker-dealers recommending private-fund interests to eligible high net-worth individuals, they need only comply with the disclosure regime established by Regulation Best Interest under the Exchange Act. Also for broker-dealers, the specific terms of compensations would be expected to be governed by Regulation Best Interest and/or the Commission's confirmation rule (Rule 10b-10 under the Exchange Act).

(b). Compliance Oversight and Agreements

In light of the conflicts of interest, the new marketing rule obligates an adviser that is the subject of a paid testimonial or an endorsement to establish an oversight and compliance program providing a reasonable basis that any testimonial or endorsement complies with the rule, as well as to memorialize these arrangements in an agreement allocating roles and responsibilities and payment terms. Unpaid testimonials and endorsements, or those subject to *de minimis* payments, as defined by the rule, are not subject to the rule's oversight requirements.

Although the rule gives advisers flexibility to establish their oversight programs and agreements, the compliance challenges are nonetheless significant. At a minimum, a compliance program would need to apply to internal and third-party promotions, address who is responsible for delivering required disclosures, and specify the means, format, and timing of delivery of required disclosures. Compliance oversight would also need to establish a reasonable means of verification of disclosure delivery and compliance with the rule. An adviser's oversight program should establish a means of vetting all paid promoters to ensure that disqualified promoters, as discussed below, do not participate in any third-party marketing program of the adviser. Solicitation programs would need to address potential broker-dealer and/or investment adviser status issues to reasonably ensure promoters and solicitors are either properly registered, as applicable, or not in need of registration based on their participation.

Agreements with third-party promoters should be an extension of the adviser's compliance and oversight program, allocate responsibilities, and make necessary representations and certifications of participation eligibility.

(c). Disqualified Promoters

The new marketing rule eliminates one particular conflict of interest. It prohibits payments to certain "ineligible persons" who are disqualified from participating in testimonials and endorsements because they are the subject of an order or opinion of the SEC barring, suspending, or prohibiting them from acting in any capacity under the federal securities laws or are persons who, within the past ten years, were subject to a detailed laundry list of disciplinary actions, such as (but not limited to) statutory disqualifications prescribed by the Advisers Act or disciplinary orders issued by the Commodity Futures Trading Commission.

Broker-dealers, acting in the capacity of a promoter, are disqualified only insofar as they are subject to statutory disqualification as specifically defined by the Exchange Act, not the rule. For offerings of private investment funds relying exclusively on Rule 506 of Regulation D under the Securities Act of 1933 ("1933 Act"), the bad actor provisions of Rule 506(d) govern eligibility under the new marketing rule.

C. Third-Party Ratings

The new marketing rule essentially codifies a staff no-action position permitting the use of independent third-party ratings.[6] Therefore, the rule regulates an investment adviser's use of ratings and rankings prepared in the ordinary course of business by organizations entirely independent of the adviser. An advertisement of a third-party rating must comply with the rule's specific antifraud proscriptions and fair and balanced standards, and a condition that requires methodology producing the rating not predetermine a favorable result. That is, the adviser must reasonably believe the ratings methodology equally gathers favorable and unfavorable responses in producing a rating. This condition requires an adviser to perform an assessment of a provider's rating methodology short of insisting on obtaining proprietary and confidential data from the provider.

An adviser, therefore, should make determinations of the reasonableness of its review and consider memorializing its assessment review in policies and procedures covering the use of third-party ratings.

The rule also conditions the use of third-party ratings by requiring clear and prominent disclosure of: (1) the date of the rating and period covered by the rating, (2) the identity of the rating provider, and (3), if applicable, the existence of any compensation (cash or non-cash) paid directly or indirectly by the adviser to obtain the rating.

D. Performance Presentations

The new marketing rule essentially codifies a collection of significant staff no-action positions dating as far back as the mid-1980s that apply well-settled principles and conditions to permissible presentations of an adviser's performance track record. Very generally, the rule establishes specific conditions that: (1) apply to the use of gross and net performance, related performance, predecessor performance, extracted performance, and hypothetical performance; (2) prescribe standardized periods of presenting performance to all but private investment fund advertisements; and (3) prohibit any inference that the SEC has endorsed a performance presentation simply because the adviser has complied with requirements of the rule.

1. Types of Permissible Performance

(a). Gross and Net Performance

The new marketing rule requires any advertisement of gross performance (no deductions of fees and expenses) be accompanied in prominence by net performance (deductions of fees and expenses). This condition codifies longstanding requirements set forth in a staff no-action letter.[7] That is, the rule prescribes conditions intended to ensure a presentation conveys an "apples-to-apples" comparison between gross and net performance results, meaning an adviser must use the same calculation methodology and relevant period for each of a gross and net-of-fees performance presentation. These conditions generally reflect the SEC staff's longstanding position that, if gross performance is used, a side-by-side comparison with net performance is necessary to convey a more fulsome and accurate view of the compounding impact of fees and expenses on future performance.

The rule's specific antifraud proscriptions and fair and balanced standards nonetheless will govern the look and feel of gross and net performance presentations and the disclosures necessary to ensure they are not misleading.

6 *See, e.g., DALBAR, Inc.,* SEC Staff No-Action Letter (pub. avail. March 24, 1998).

7 *See Investment Company Institute,* SEC No-Action Letter (pub. avail. Sept. 23, 1988).

Notably, the SEC abandoned its previous proposal that would have applied the rule differently depending if the advisory client was "retail" or "institutional." The final rule makes no such distinctions and applies equally to all end-users. Also notable, the make-up of a presentation net of fees and expenses need not include custodian fees paid to banks or, for example, broker-dealers for the safekeeping of funds and securities. In the case of gross and net performance comparisons of model portfolios, the rule permits net performance presentations to include model fees and expenses.

(b). Related Performance

The new marketing rule permits the use of performance of related separately managed accounts or private investment funds managed by an adviser either on a portfolio-by-portfolio basis or in a composite of related portfolios. To prevent "cherry picking" only favorable performance, the rule requires under most circumstances that all related portfolios be included in the performance calculation. Again, the rule requires an "apples-to-apples" basis for comparison, meaning that the portfolios must have "substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement."

The rule largely leaves open for the adviser to determine the relative relatedness of its various accounts. An adviser, however, could not exclude poor performing related portfolios on the basis of different fees and expenses across otherwise related portfolios. These differences by themselves are not sufficiently unrelated absent a truly different management style. In contrast, changed market conditions or changes in portfolio management teams over time might contribute to a management style that was substantively different from portfolios that may have had similar investment objectives, but over the long term, had to employ different management styles.

(c). Extracted Performance

An adviser may use the performance of a subset of investments of a portfolio (so-called "extracted performance") only insofar as the performance results of the entire portfolio are available. For example, an adviser may wish to highlight its management of equity securities by extracting those from a diversified portfolio containing other classes of securities in order to highlight expertise in managing equity portfolios. An adviser may also extract fees and expenses relevant solely to the management of an extracted portfolio in a comparison of gross and net performance.

(d). Hypothetical Performance

The new marketing rule permits the advertisement of hypothetical performance (*i.e.*, performance not actually achieved by a portfolio managed by the adviser)[8] under conditions that require relevance of the presentation to the intended audience and sufficient context to an understanding of the assumptions used in creating hypothetical performance and their risks and limitations to an investment decision. As noted previously, only general antifraud, not the rule, applies to unsolicited requests for hypothetical performance or one-on-one hypothetical performance presentations between an adviser and investors in a private investment fund advised by the adviser.

As a practical matter, the conditions of use strongly appear to limit the distribution of hypothetical performance exclusively to sophisticated (non-retail) clients in keeping with ensuring the intended audience has "resources and financial expertise" to assess the meaning and risks of hypothetical performance. In short, the rule requires what has been the case historically, namely that hypothetical performance not be mass produced and delivered to financially unsophisticated clients.

[8] Under the rule, hypothetical performance includes back-tested performance, model portfolio performance, and targeted or projected returns of a portfolio. It is does not include analytical tools in which clients are able to simulate various investment scenarios to the extent key disclosures about the tools are made; nor does it include predecessor performance, as described herein.

(e). Predecessor Performance

The specific conditions of advertising predecessor performance codify longstanding practices generally permitting the portability of a performance track record from one adviser to another.[9] Aside from the permissions and conditions the new marketing rule prescribe, the portability of a portfolio manager's or management team's track record raises issues of ownership of the track record and the willingness of a predecessor adviser to agree to release its rights to the track record in an asset sale or as any condition to the transfer of one or more portfolio managers to a different investment adviser. That is, all of the conditions of the rule may be satisfied but an adviser may still find itself in legal jeopardy if it has not secured clarity on the rights to the performance track record. Any clarification of rights also would need to address the transfer of records necessary to substantiate accuracy of the track record.

The conditions of the rule present no new or novel burdens on the use of predecessor performance. That is, the portfolio manager or management team primarily responsible for a performance track record must be those responsible for managing the accounts at the successor in accordance with a substantially similar investment management style. These conditions reasonably ensure an apples-to-apples comparison of the performance from adviser to adviser. Disclosure that predecessor performance was achieved at a different adviser must accompany any presentations containing predecessor performance.

2. Standardized Periods of Performance

Under the new rule, performance presentations, other than those for private investment funds, must follow a standardized schedule of one, five, and ten-year periods. This condition should be generally understood in the industry, inasmuch as these particular periods are codified in Rule 482 under the 1933 Act and used by mutual fund advisers presenting a mutual fund's performance track record. The SEC merely extends these standardized periods to most other types of portfolios on the theory that these periods provide a standardized presentation of long and short-term performance. Portfolios in existence for periods shorter than the one, five, or ten-year periods must present the track record for the life of the portfolio. For example, a portfolio in existence for six years must present one, five, and six-year performance.

Private investment funds are not subject to standardized performance periods under the rule. The SEC drew from evidence in the private equity context that these standardized periods have little to no relevance in the private equity context given the structure and operation of private equity funds (namely, organizational expenses or the absence of full investment at the early stage disproportionately affect performance than at the later stages). Like all advertisements, presentations in the private investment fund context must, in any case, comply with the rule's specific antifraud proscriptions and fair and balanced standards, as well general antifraud.

IV. Treatment of SEC Staff No-Action Letters

As noted herein, the new marketing rule codifies key SEC staff no-action positions dating back decades. Over the transition period, the staff is expected to withdraw, or retain in whole or in part, those relevant positions. The SEC nullified no-action positions relevant to Rule 206(4)-3 in light of it rescinding Rule 206(4)-3, except a narrow class of no-action positions permitting certain statutorily disqualified solicitors to comply with Rule 206(4)-3 should the disqualification not have expired during the new marketing rule's ten-year sunset provisions on ineligibility.

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[9] *See, e.g., Horizon Asset Management, LLC,* SEC No-Action Letter (pub. avail. Sept. 13, 1996); and *Great Lakes Advisors, Inc.,* SEC No-Action Letter (Apr. 3, 1992).

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