Legal Alert 11/04/22

MCINTYRE | LEMON

SEC'S Marketing Rule Compliance Date – November 4, 2022

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SEC MARKETING RULE – RULE 206(4)-1

In December 2020, the SEC materially reformed rules governing the marketing practices of investment advisers, including rules governing an adviser's fund-raising efforts for private investment funds – funds excluded from regulation under the Investment Company Act of 1940 ("1940 Act").[1]

NOVEMBER 4 COMPLIANCE DATE

The compliance date of **November 4, 2022** for this new rule regime is fast approaching. Namely, an adviser should have compliance policies and procedures in place (or in process) by Friday, November 4. Additionally, advisers will need to consider any new disclosures required by the new rules for the upcoming annual update season this coming March, 2023.

CONTACT US

Do not hesitate to contact C. Dirk Peterson at dpeterson@mcintyrelemon.com or at (202) 659-3905 with questions or assistance.

HIGHLIGHTS

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

- Replacing the current advertising rule, Rule 206(4)-1 under the Investment Advisers Act of 1940 ("Advisers Act"), and the cash solicitation rule, Rule 206(4)-3 under the Advisers Act, with a new, integrated marketing rule.

- 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.

[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").

- 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.

- 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.

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