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CLIENT ALERT

SEC Division of Examinations Issues Risk Alert Regarding Advisers Act Marketing Rule Compliance

January 5, 2026

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The SEC's Division of Examinations published a new risk alert on December 16, 2025 (the "Risk Alert") highlighting additional Staff observations regarding investment advisers' compliance with certain provisions of Rule 206(4)-1 (the "Marketing Rule") under the Investment Advisers Act of 1940 (the "Advisers Act")[1]—specifically the conditions for testimonials and endorsements set forth in Rule 206(4)-1(b) (the "Testimonials and Endorsements Provisions") and third-party ratings in Rule 206(4)-1(c) (the "Third-Party Ratings Provisions").

The Risk Alert was published five years after the SEC amended the Marketing Rule,[2] and more than a year after the Division issued its first risk alert sharing the Staff's observations regarding Marketing Rule compliance.[3] In that

1 *Additional Observations Regarding Advisers' Compliance with the Advisers Act Marketing Rule* (Dec. 16, 2025), available here.

2 *Final Rule: Investment Adviser Marketing*, Advisers Act Rel. No. 5653 (Dec. 22, 2020), available here.

3 *See Initial Observations Regarding Advisers Act Marketing Rule Compliance*, Division of Examinations (Apr. 17, 2024), available here. For a discussion of the *Initial Observations*, please see the Willkie Farr & Gallagher LLP Client Alert, available here.

risk alert, the Division noted advisers' failures to adopt and implement appropriate written policies designed to prevent violations of the Marketing Rule, advertisements that failed to comply with the general prohibitions in the Marketing Rule, and books and records and Form ADV deficiencies related to the Marketing Rule. The 2025 Risk Alert expands upon the discussion of testimonials, endorsements and third-party ratings in the prior alert.

Generally, the Staff observed that some advisers used third-party ratings in advertisements without complying with applicable requirements of the Marketing Rule. The Staff also noted that, although many advisers updated their compliance policies and procedures to address the use of testimonials and endorsements or third-party ratings, others did not, and some that had updated policies failed to implement them, resulting in noncompliant advertisements disseminated via websites (including d/b/a websites), social media, marketing brochures or pitchbooks, press releases, newsletters, blogs, and other channels.

A. Observations Related to the Testimonials and Endorsements Provisions

Under the Marketing Rule's Testimonials and Endorsements Provisions, registered advisers must satisfy certain disclosure and oversight requirements to be able to include testimonials and endorsements in their advertisements.[4] Specifically, advisers must clearly and prominently disclose in any advertisement that includes a testimonial or endorsement whether the person providing it (the "promoter") is a client and whether the promoter is compensated. When using testimonials or endorsements, advisers must oversee compliance with the Marketing Rule and enter into a written agreement with the promoters, except where a promoter is an affiliate of the adviser or receives *de minimis* compensation (i.e., $1,000 or less, or the equivalent non-cash value, during the preceding twelve months).

Advisers are also prohibited from compensating certain ineligible persons for providing testimonials or endorsements.

Based on the Staff's observations, the most common reason that an endorsement or testimonial was noncompliant was that the adviser did not provide the required disclosures at the time the testimonial or endorsement was disseminated, such as those on advisers' websites, including those using alternative business names of their supervised persons (d/b/a websites), through the use of lead-generation firms or social media influencers, or through advisers' "refer-a-friend" programs (where current clients referred their adviser in exchange for *de minimis* compensation). Advisers, in some instances, did not recognize certain "refer-a-friend" programs as an endorsement or testimonial subject to the rule. Additionally, the Staff noted that some advisers were utilizing testimonials or endorsements in advertisements without updating or implementing their written compliance policies and procedures to comply with Rule 206(4)-7 under the Advisers Act.

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[4] Advisers should be aware that the Commodity Futures Trading Commission Rule 4.41 includes similar restrictions. That rule governs the advertising activities of both registered and unregistered commodity pool operators and commodity trading advisors and their principals. *See* 17 CFR § 4.41(a)(3).

The Staff categorized their observations into six main categories:

1. Clear and Prominent Disclosures

The Staff observed that, in many instances, advisers' advertisements did not include one or more of the required clear and prominent disclosures, such as whether the promoter was a current client of or an investor in a private fund advised by the investment adviser and, as applicable, whether the promoter received cash or non-cash compensation or had a material conflict of interest. The Staff also observed instances where disclosures were provided but not presented in a clear and prominent manner. For example, certain advisers relied on hyperlinked disclosures instead of including the required clear and prominent disclosures within or immediately adjacent to the testimonial or endorsement itself, and disclosures were sometimes rendered less prominent by appearing in smaller or lighter font than the related testimonial or endorsement.

In addition, the Staff identified advisers that incorporated current-client testimonials or former-client endorsements from third-party websites into their own websites without clearly and prominently disclosing that the statements were provided by current or former clients. Finally, the Staff observed that some advisers provided compensation, including gift cards, to clients, to incentivize reviews on third-party platforms, but did not find a reasonable basis for believing that the reviewer complied with the applicable disclosure requirements.

2. Disclosure of Material Terms of Compensation Arrangements

The Staff observed instances where advisers did not disclose the material terms of compensation arrangements, including descriptions of the compensation provided directly or indirectly to promoters, and noted advisers providing generic disclosures about compensation arrangements that omitted material information. For example, there were instances in which advisers disclosed that promoters, including social media influencers, received compensation for client referrals but omitted material information about the terms of the referral payments.

3. Disclosure of Material Conflicts

The Staff observed advisers that did not disclose material conflicts resulting from the advisers' relationships with promoters or the compensation arrangements for the testimonials or endorsements. For example, the Staff observed instances in which advisers did not disclose material conflicts resulting from promoters, including clients, who had financial interests in the promoted advisers, or who were principals or officers of other advisory firms that had sub-advisory or other significant arrangements with the promoted advisers.

4. Oversight and Compliance

The Staff observed advisers that did not satisfy the Marketing Rule's oversight and compliance requirements, including the obligation to have a reasonable basis for believing that a testimonial or endorsement complies with

the Testimonials and Endorsements Provisions (the "reasonable basis for belief requirement"), and the obligation to have a written agreement with a paid promoter. In particular, the Staff observed:

- Advisers that were unaware that certain arrangements involved statements constituting an endorsement under the rule, or were unable to demonstrate compliance because the advisers' compliance policies and procedures, written agreements with promoters, or related documentation did not enable the adviser to satisfy the reasonable basis for belief requirement.

- Advisers that failed to enter into, or to maintain, written agreements with promoters receiving compensation above the *de minimis* threshold, or used agreements that did not fully describe the scope of the promotional activities or the terms of compensation as required by the Marketing Rule.

- Advisers that incorrectly claimed the arrangements met the exemption for *de minimis* compensation because each payment to the promoter was less than $1,000, whereas the total compensation to the promoter exceeded $1,000 during the preceding 12 months and therefore the arrangement did not meet the *de minimis* exemption.

5. Ineligible Persons

The Staff noted instances in which advisers compensated ineligible persons for endorsements and knew, or in the exercise of reasonable care should have known, that the promoters were ineligible persons when the endorsements were disseminated. This included instances in which advisers still compensated promoters who were disqualified due to their disciplinary histories with state securities regulators.

6. Promoters Affiliated With the Adviser

The Staff observed instances in which advisers used affiliated promoters that did not meet the disclosure and written agreement requirements or the exemption from those requirements for testimonials or endorsements by certain individuals associated with the advisers. In one example, the affiliation between an adviser and a promoter was not readily apparent or disclosed to clients or investors at the time testimonials or endorsements were disseminated and, instead, was disclosed only when prospective clients or investors were introduced to the adviser.

B. Observations Related to the Third-Party Ratings Provisions

The Third-Party Ratings Provisions prohibit an adviser from using third-party ratings in advertisements, unless the adviser has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating meets certain criteria, including that third-party ratings are structured to make it equally easy for a participant to provide favorable and unfavorable responses and are not designed to produce any predetermined results (the "due diligence requirement"). Advisers must also clearly and prominently disclose, or reasonably believe that third-party ratings clearly and prominently disclose: (1) the date on which the rating was given and the period

of time upon which the rating was based; (2) the identity of the third party that created and tabulated the rating; and (3) if applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

The Staff categorized their observations into two main categories:

1. Due Diligence

The Staff observed that advisers used several methods to demonstrate that they complied with the requirement to have a reasonable basis for believing that the questionnaires or surveys used to prepare the third-party ratings were structured to make it equally easy for participants to provide favorable and unfavorable responses and were not designed to produce predetermined results. For example, advisers typically: (1) reviewed publicly disclosed information about third-party questionnaire or survey methodologies; (2) obtained the questionnaires or surveys used in preparing the rating; and/or (3) sought representations from the third-party rating agencies regarding general aspects of how the questionnaires or surveys were designed, structured, and administered. However, the Staff also observed advisers that had neither developed policies and procedures to satisfy the due diligence requirement nor taken other steps to meet it, such as obtaining or reviewing the questionnaires or surveys used to prepare the ratings, and therefore did not appear to have sufficient information to form a reasonable basis about the design or structure of questionnaires or surveys.

2. Clear and Prominent Disclosures

The Staff observed instances where advisers did not provide some or all of the required clear and prominent disclosures and did not appear to have a reasonable basis for believing that the third-party ratings themselves made such disclosures. For example, the Staff observed:

- Advisers including links to third-party websites within their advertisements, but not including the required disclosures in the advertisements nor the third parties' websites.
- Third-party ratings not clearly and prominently identifying the date on which the ratings were given and the period of time upon which the ratings were based.
- Third-party ratings that identified a range of years in which the adviser purportedly received the rating, whereas the dates included a year in which the adviser did not receive the award.
- Advisers placing third-party rating logos in advertisements without clearly and prominently identifying the third party that created and tabulated the ratings, either as part of the logo or elsewhere in the advertisement.
- Advisers providing compensation to obtain or use third-party ratings without including the required disclosures, such as paying rating providers but not disclosing payments the adviser made for use of the

providers' logos, reprints of the ratings, or priority placement and upgraded exposure in the providers' advertisements.

- Advisers failing to disclose payments to third-party rating providers for referrals, including paying to place links on the providers' websites that displayed award recipients.
- Advisers paying providers fees to be considered for the ratings but not disclosing such payments where the ratings were posted.
- Advisers not providing the required disclosures in a clear and prominent manner, such as by using hyperlinks or smaller text for disclosures, or placing the disclosures at the bottom of web pages away from the ratings.

C. Conclusion

The Risk Alert demonstrates that Marketing Rule compliance continues to be an area of focus for the Division and, together with the Division's prior risk alert, demonstrates that registered advisers can expect the Staff to assess compliance with all aspects of the Marketing Rule. The Risk Alert offers further insight into the range of issues that the Staff has observed as common deficiencies. The Risk Alert provides an important reminder to advisers to reflect upon their compliance policies and procedures with respect to the Marketing Rule and to implement any necessary or appropriate modifications to their compliance programs.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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