

THREE WAYS INVESTMENT ADVISERS CAN MARKET WITH COMPLIANCE IN MIND

For investment advisers, marketing and regulatory compliance have never made great bedfellows. Marketing without due regard to compliance poses significant legal and reputational risks that can undermine temporary marketing gains. At the same time, fear of compliance missteps often holds firms back from getting their best story out to the marketplace. The result? Every adviser appears the same, and growth is fully dependent on word of mouth referrals.

There is a middle ground, however. Even while complying with the Securities and Exchange Commission's expansive rules on marketing communications (which the SEC buckets under "advertising"), there is still plenty of opportunity for firms to use common, effective marketing tools to showcase their strengths.

The SEC released a [compliance risk alert](#) in September 2017 to call attention to frequent missteps. Among the top most common pitfalls were misrepresenting performance, touting dated awards or rankings, and failing to update lapsed credentials.

The reality is that these and other compliance issues are wholly avoidable – but success requires vigilance, diligence, and a good dose of forethought. The Holy Grail is a marketing program that works in harmony with compliance requirements to convey an effective message.

And without a message and corresponding marketing plan, advisers will quickly encounter barriers to growth. Formalized marketing – even on a conservative scale – is crucial for those striving to break

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through thresholds of higher assets under management and build a business that can sustain momentum when periods of market lift subside.

Indeed, a recent study on [successful investment adviser](#) practices noted that among those managing more than \$250 million, 78 percent have changed their marketing strategies to attract the next generation of investors, compared with only 59 percent of all other advisers.

In order to reach a new segment of clients, advisers must update both the language they use and the marketing channels they employ to convey their unique strengths. That means reshaping materials, engaging on social media, and speaking out on the subjects that are top of mind for their clients and prospects – all within the SEC compliance framework.

Knowing the rules, of course, is the first step. The definition of “advertising” in Rule 206(4)-1 (the “Advertising Rule”) of

the Investment Advisers Act is expansive – it includes almost all materials that an investment adviser shares with more than one person, whether shared in writing, on social media or through a presentation. Marketing materials fall in the advertising bucket if they include analyses or reports concerning securities or could be used to assist in determining which securities to buy and sell, or mention of any other investment advisory services related to securities. The Advertising Rule is interpreted broadly. When in doubt, advisers should assume that any materials intended for an audience of more than one will be considered advertising (although it’s important to note that materials prepared for one-on-one use must follow other applicable rules).

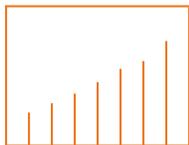
As firms pursue marketing initiatives that help them differentiate in a crowded marketplace, they should create a clear compliance policy based on the SEC guidelines. Here are three central marketing elements and related compliance approaches that provide a starting point:

MARKETING ELEMENT #01 **BRANDED MATERIALS**

A professional look and feel is crucial for advisers who want to grow the business beyond their immediate network. Early introductions often involve the handing off of marketing materials in the form of one-page fact sheets about the firm or specific service lines that may be relevant (i.e., estate planning, assisting with exit strategies for business owners). In all of these cases, the onus is on the adviser to craft a compelling message and leave prospects with a real sense of who their team is and why they’re the best choice. The firm may be award-winning. The core portfolio may have outperformed benchmarks for years. There may be compelling case studies that show the impact the advisers can make

in complex situations. Finding appropriate ways to share this information within the requirements of the Advertising Rule can be tricky, but it is possible. Compliance should play a front and center role in developing effective and compelling materials.

The overarching principle of the Advertising Rule is that advertising may not be false or misleading. The applicability of the rule is far-reaching and, while we can't cover everything that the rule touches in this article, below are a few key topics that are important to keep in mind when designing a marketing approach:



Performance Results: The SEC is particularly concerned about how advisers present past investment performance. Advisers need to make sure that performance results accurately net out advisory fees, any comparisons to benchmarks clearly disclose the differences between the benchmarks and the adviser's portfolio, and any use of hypothetical performance is accompanied by detailed disclosure about how the performance was calculated.



Cherry-Picking: Advisers who want to share specific stock selections or investment recommendations are entering a thorny area. The SEC is concerned with advisers misleading clients or potential clients by choosing to highlight the adviser's best recommendations while leaving out the underperformers. This is not permitted and there are specific requirements for referring to past recommendations. For example, advisers who want to share specific recommendations may be able to do so as long as they share a balanced view of their recommendations (e.g., by showing the five worst performers alongside the five best performers).



Testimonials: In general, testimonials and endorsements by past clients are prohibited under the Advertising Rule. When it comes to completing due diligence questionnaires and requests for proposals, advisers will want to be careful in how they provide references. For example, client lists should be compiled without using performance data to determine which clients to include on the list, the adviser should include information on which criteria were used to determine the client list, and a disclaimer stating that "it is not known whether the listed clients approve or disapprove of the adviser" should be included.

MARKETING ELEMENT #02

SOCIAL MEDIA

A huge swath of advisers remains skeptical of social media – but the next generation of investors is not. According to the [Pew Research Center](#), LinkedIn is par for the course for 33 percent of those aged 34-49, and over 50 percent of college graduates use the platform. While Twitter is less ubiquitous, it is favored by 30 percent of adults who make more than \$75,000 per year.

For advisers who are looking to build awareness among millennials or are engaged in specific strategies like impact investing, social media is a natural venue for showcasing their expertise. As with all marketing, though, they must shape the online conversation with compliance in mind. As a general rule of thumb, all of the Advertising Rule’s requirements apply online just as they do to printed materials. Sometimes this can be easy to miss because of the way we all use social media these days. For example, if someone posts a recommendation in the LinkedIn profile of an investment adviser, is that a testimonial in violation of the Advertising Rule?

To be sure, social media can be an important part of an investment adviser’s outreach, but applying the appropriate compliance controls to social media requires marketing professionals to work closely with experienced attorneys and technology providers. For example, although an adviser is not permitted to ask its clients to post positive reviews on the adviser’s own website or social media page, under certain circumstances an adviser may publish reviews that were posted to an independent social media site, as long as all of the reviews are published.

MARKETING ELEMENT #03

NEWS COVERAGE

One of the most effective pieces of marketing material often originates outside the firm. When a respected publication features an adviser or firm in its coverage, the third party credibility can help turn a skeptical prospect into an enthusiastic client.

In one case, a Longview Strategies client was in contention to manage a large endowment; the prospect was hesitant due to the lower profile of the advisory firm. In answer to the question “Why should we trust you?,” the adviser delivered a Barron’s article in which the firm’s approach was singled out as the way of the future. That exchange set the prospect’s mind at ease and played a role in winning the business.

Using exposure in the media as part of the marketing package, however, raises some sticking points. References to third-party awards, rankings and publications was a focus of the SEC's latest release on advertising. The SEC is concerned that advisers are using such third-party sources in misleading ways. For example, advisers included stale rankings in their advertising materials or awards that were the result of advisers paying a fee to participate. Advisers can use third-party rankings that are truly independent from the adviser, but such rankings need to be current and independent. As with other areas of advertising practices, well-crafted disclosures can help ensure that such materials comply with the Advertising Rule and applicable guidelines.

The rules on advertising are broad and complex and, although we have provided a brief overview in this article, advisers should consult knowledgeable attorneys for guidance on specific marketing materials. Advisers undertaking capital raising activities, whether as fund sponsors or broker-dealers, will need to ensure that concurrent marketing activities are also mindful of other federal and state laws. We know that when investment advisers, marketing professionals and attorneys work hand in hand, advisers can reach existing and potential clients with clear, powerful, compliant communications.

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