POLICY STATEMENT

GUIDANCE ON INVESTMENT ADVISER ADVERTISEMENTS
&
SOLICITORS FOR INVESTMENT ADVISERS AND FEDERAL COVERED ADVISERS[1]

DECEMBER 2022

On December, 22, 2020, the Securities and Exchange Commission (the "SEC") adopted updated advertising requirements for federal covered advisers and replaced the cash solicitation rule.[2] The new rules became effective on May 4, 2021 with enforcement of the rules on November 4, 2022. As a result of these changes, the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (the "Division") is issuing the following guidance for investment advisers registered in the Commonwealth of Massachusetts to assist advisers in complying with the Massachusetts Uniform Securities Act, Mass. Gen. Laws c. 110A (the "Act"), and the regulations promulgated thereunder at 950 Mass. Code Regs. 10.00 - 14.413 (the "Regulations").

A. INVESTMENT ADVISER ADVERTISEMENTS

What rules govern investment adviser marketing and advertising in Massachusetts?

Advertisements in Massachusetts are subject to the requirements of the SEC's updated marketing rule,[3] which includes general prohibitions against advertisements containing materially misleading information and defines what constitutes an advertisement. Advertisements are also subject to certain additional restrictions under the Regulations, such as:

- Advisers must keep books and records subject to the requirements of Rule 204-2 of the Advisers' Act ("Rule 204-2") [17 CFR 275.204-(2)].[4]

- Advisers must ensure that any advertised content does not misrepresent the qualifications of the adviser, its representatives, or any employees, the nature of the advisory services being offered, or the fees charged for such services.[5]

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[1] This policy statement replaces the Division's Guidance on the Use of Social Media by Investment Advisers December 2019 policy statement.
[2] The cash solicitation rule was found at 17 CFR 275.206(4)-3.
[3] 15 USC § 80b-6; 17 CFR. § 275.206(4)-1(a). Rule 206(4)-1 is incorporated by reference into the Regulations. See 950 Mass. Code Regs. 12.205(9)(b)(1).
[4] 950 Mass. Code Regs. 12.205(7)(1)(a).
[5] 950 Mass. Code Regs. 12.205(9)(c)8.

- Advisers may not provide a report or recommendation to any client prepared by someone other than the adviser without disclosing that fact.[6]

- Advisers may not guarantee a client that a specific result will be achieved as a result of the advice rendered.[7]

- Advisers may not disclose the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client.[8]

- For advisers who maintain a website available to the public or to the advisers' clients, the advisers' Table of Fees for Services must be available and easily accessible on the website.[9]

- Advisers must establish and maintain a system to supervise the activities of its investment adviser representatives and other employees to ensure compliance with the Act and Regulations.[10]

What constitutes an advertisement?

The SEC's new rule defines an *advertisement*[11] as:

- Any direct or indirect communication an investment adviser makes to more than one person, or one or more persons if the communication includes hypothetical performance, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the adviser; or

- Any direct or indirect communication offering new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, subject to certain exclusions.[12]

Advertisement also includes any endorsement or testimonial for which the adviser provides compensation, directly or indirectly, with the exclusion of certain statutorily or regulatorily required communications.[13]

An *endorsement*[14] means any statement by a person other than a current client or investor in a private fund advised by the adviser that:

- Indicates approval, support or recommendation of the investment adviser or its supervised persons or describes their experience with the investment adviser or its supervised persons;

- Directly or indirectly solicits[15] any current or prospective client or investor to be a client of or an investor in a private fund advised by the adviser; or

- Refers any current or prospective client or investor to be a client of or an investor in a private fund advised by the adviser.

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[6] 950 Mass. Code Regs. 12.205(9)(c)9.
[7] 950 Mass. Code Regs. 12.205(9)(c)12.
[8] 950 Mass. Code Regs. 12.205(9)(c)13.
[9] 950 Mass. Code Regs. 12.205(8)(f).
[10] 950 Mass. Code Regs. 12.205(10)(a).
[11] 17 CFR § 275.206(4)-1(e)(1).
[12] 17 CFR § 275.206(4)-1(e)(1)(i)(A)-(C).
[13] 17 CFR § 275.206(4)-1(e)(1)(ii).
[14] 17 CFR § 275.206(4)-1(e)(5).
[15] Refer to Section B of this policy statement titled: Solicitors for Investment Advisers and Federal Covered Advisers.

A *testimonial*[16] means any statement by a current client or investor in a private fund advised by the investment adviser that:

- Is about the client or investor's experience with the adviser or its supervised persons;
- Directly or indirectly solicits[17] any current or prospective client or investor to be a client of or an investor in a private fund advised by the adviser; or
- Refers any current or prospective client or investor to be a client of or an investor in a private fund advised by the adviser.

Is social media advertising?

Communications attributable to the adviser offering an adviser's investment advisory services on a publicly-accessible social media account are advertising of the adviser.[18] Whether social media content is attributable to an adviser is based upon a review of the particular facts and circumstances. An adviser is generally responsible for a communication regardless of who created or disseminated the communication if the adviser has participated in the creation or dissemination of the communication or authorized the communication. A communication may also be attributed to an adviser if the adviser adopts or entangles themselves with the communication as discussed below. Many state-registered advisers are sole proprietors that discuss the services provided in independent accounts that are in the name of the representative of the firm. Communication through these accounts may also be considered advertising of the firm.

What are the advertising rules that apply to an adviser's social media use?

Social media uses that are deemed advertising of the adviser are subject to the same regulatory requirements as other forms of advertising, including recordkeeping requirements and the prohibition of false or misleading statements.[19] The Division's requirements also include Rule 204-2 which is incorporated in the Regulations.[20] Among other things, advisers shall maintain and preserve books and records relating to their investment advisory business in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the investment adviser.[21] Additionally, advisers must maintain a correspondence file or log identifying all correspondence disseminated to or received from clients or prospective clients in connection with the business of the investment adviser.[22]

Interactive sites that are subject to constant change may raise special recordkeeping complications. While the Division does not recommend or attest to the sufficiency of any one service or manner of recordkeeping, the Division is aware that technology providers currently offer advisers assistance in addressing recordkeeping requirements related to social media content.[23]

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[16] 17 CFR § 275.206(4)-1(e)(17).
[17] Refer to Section B of this policy statement titled: Solicitors for Investment Advisers and Federal Covered Advisers.
[18] This is also true of social media accounts maintained by investment adviser representatives of the firm when the accounts are used at least in part to advertise investment advisory services.
[19] 950 Mass. Code Regs. 12.205(7).
[20] 950 Mass. Code Regs. 12.205(7)(a)(1).
[21] 17 CFR 275.204-2(e)(3)(i); 950 Mass. Code Regs. 12.205(7)(c).
[22] 950 Mass. Code Regs. 12.205(7)(a).
[23] Social media advertising must be maintained in a manner allowing for easy access for reasonable periodic, special, or other examinations by the Division staff. Copies can be retained in either paper or electronic form. See 950 Mass. Code Regs. 12.205(7)(b)-(c).

What are the social media disclosure requirements of Form ADV?

As of October 1, 2018, Form ADV Part 1A, Item 1I, requires advisers to indicate whether they have websites or accounts on publicly available social media platforms. Item 1I directs advisers to list on Section 1I of Schedule D all the addresses of the firm's accounts on publicly available social media platforms whose content is controlled by the adviser –including, but not limited to, Twitter, Facebook, and LinkedIn. If a website address serves as a portal through which to access other information published on the web, the adviser may list the portal(s) alone. Individual addresses of employee emails or accounts need not be provided.

Are there other Form ADV requirements associated with the new marketing rule?

As of May 4, 2021, Form ADV, Part 1A includes a section 5L, which contains eight yes-or-no questions about the types of advertisements used by the adviser. The questions address whether or not an adviser's advertisements include performance results, testimonials, endorsements and third-party ratings and if the adviser provides any compensation in connection with their advertising.

When is an adviser responsible for content posted online?

An adviser is responsible for social media content authored by itself, or by a third party if the content is attributable to the adviser. In general, an adviser may be responsible for content authored by a third party if the adviser (a) paid for or was otherwise involved in the creation of the content ("entanglement") or (b) explicitly or implicitly endorsed or approved the content after its publication ("adoption").

Whether third-party content is entangled with or adopted by the adviser depends on the particular facts and circumstances, for instance:

- *Linked information.* Users of social media often introduce hyperlinks to third-party sites. An adviser may be responsible for linked content if the adviser knows or has a reason to know that the content includes false or misleading information. Further, an adviser is accountable for linked content through adoption and entanglement.

- *Selectively Removing Content.* An adviser that uses social media and that selectively deletes or sorts third-party material unfavorable to the adviser while continuing to display favorable content may be deemed to adopt the remaining content. Advisers are cautioned to develop and periodically review policies and procedures regarding third-party content and criteria for content removal.

- *"Liking" or "Sharing" Content.* An adviser that merely permits the use of "like" or "share" features on a third-party website or social media platform generally would not entangle the adviser with this third-party content.

- *Solicited Recommendations on LinkedIn.* LinkedIn by default allows users to solicit others for recommendations. Such recommendations are posted on the user's LinkedIn profile. Recommendations are likely to be considered entangled with the adviser and, depending on the nature of the solicitation, they may constitute testimonials or endorsements subject to additional disclosure requirements (see below).

- *Edits to third-party content.* An adviser generally entangles itself with the communication of a third party unless the edits are solely based on pre-established, objective criteria, such as removing profanity or offensive statements, that are documented in the adviser's policies and procedures and are not designed to favor or disfavor the adviser.

What restrictions govern an investment advisers' use of Endorsements and Testimonials in Advertising?

In addition to the requirements for all other forms of advertising, testimonials and endorsements are subject to additional requirements. Testimonials and endorsements that do not meet all of these additional requirements are prohibited unless exempted.[24] Additionally, at the time the testimonial or endorsement is disseminated, advisers must disclose or reasonably believe that the source of the testimonial or endorsement clearly and prominently discloses:

- That the testimonial was given by a current client or investor and that the endorsement was given by a person other than a current client or investor, as applicable;
- Whether cash or non-cash compensation was provided for the testimonial or endorsement, if applicable; and
- A brief statement of any material conflicts of interest on the part of the source of the testimonial or endorsement due to its relationship with the adviser.

Advisers also must disclose the material terms of any direct or indirect compensation arrangement, including a description of the compensation provided or to be provided for the testimonial or endorsement as well as a description of any material conflicts of interest on the part of the source of the testimonial or endorsement arising from their relationship with the adviser or the compensation arrangement. Special attention and consideration must be given to the role of social media "influencers" or "finfluencers" and the relationship of same to registered entities will be evaluated according to a facts and circumstances analysis.

What other advertising rules should be given particular attention before using social media?

- *Performance Reporting*. The Division has identified instances in which advisers have used social media to communicate performance reporting of the adviser in the form of a composite or model portfolio. Advisers are reminded that performance advertising is subject to specific restrictions under Rule 206(4)-1 and should consider the appropriate medium for disseminating this type of data. For example, social media sites with character limits, such as Twitter, may be an inappropriate medium for performance advertising because of particular challenges to full and fair disclosure of all material information.
- *Third-Party Ratings*. Third-party ratings are generally prohibited unless the adviser has a reasonable basis to believe that the information used to provide the rating was collected to make it equally easy for a participant to provide favorable and unfavorable responses and that it was not designed or prepared to produce any predetermined result. Advisers presenting third-party ratings must also disclose or have a reasonable belief that the rating clearly and prominently discloses the date and time period of the rating, the identity of the third party that provided the rating and any indirect or direct compensation provided to the third party for the rating.[25]
- *"Cherry Picking" Past Recommendations*. Advertising that directly or indirectly refers to the adviser's past specific profitable recommendations are prohibited unless presented with sufficient information and context to evaluate the merits of the recommendations in a fair and balanced manner.

  The Division has identified specific instances in which an investment adviser routinely listed security-specific past recommendations on a medium similar to Twitter called "Stock Twits." Such

[24] Exemptions can be found at 17 CFR 275.206(4)-1(b)(4).
[25] 17 CFR 275.206(4)-1(c).

discussions may be inappropriate because, as discussed above, Twitter messages are limited to 280 characters and present particular challenges to fair and balanced disclosure of all material information.

How can advisers enhance their social media compliance?

- An adviser may establish guidelines that restrict the types of permitted publications by the adviser or solicitors, such as restricting business-related postings to official business accounts (*e.g.* the adviser's Facebook or Twitter accounts), outlining the types of permitted or restricted content (*e.g.* prohibiting recommendations), and designating personnel for approving or publishing social media content.

- An adviser may prohibit employees from posting business-related content on their personal or third-party accounts.

- An adviser may consider using periodic, daily, or real-time monitoring of social media content, determined by the extent of the adviser's social media use and the nature of its publications.

- An adviser may consider providing training to all employees regarding its social media policies.

How can an adviser enhance its social media compliance with respect to third-party content?

- An adviser should review its social media presence on a periodic basis and ensure that any content that could be considered non-compliant is removed or hidden from view promptly. Daily reviews would be considered reasonable, and less frequent reviews may be reasonable, depending upon the traffic of the site and the type of social media site (*i.e.* Twitter vs. LinkedIn).

- An adviser should be aware of the potential issues associated with adoption and entanglement. Many of these potential issues can be mitigated by avoiding the solicitation of third-party content or linking to third-party content that the adviser has not thoroughly reviewed.

- An adviser should clearly and prominently disclose whether the source of any testimonial or endorsement is a client or investor and any compensation and conflicts of interest associated with the endorsement or testimonial.

B. SOLICITORS OF INVESTMENT ADVISERS AND FEDERAL COVERED ADVISERS

What rules govern solicitors in Massachusetts?

The Act defines an investment adviser representative as any person who "solicits, offers or negotiates for the sale of or sells investment advisory services"[26] and is employed by or associated with an investment adviser that is registered or required to be registered in Massachusetts.

Do solicitors for a state-registered investment adviser need to register as an investment adviser representative in Massachusetts?

Yes. Solicitation for compensation on behalf of a state-registered investment adviser will require registration as a representative of that adviser.[27]

[26] Mass. Gen. Laws c. 110A, § 401(n)(A)(iv).

[27] If the solicitor does not provide any investment advice and solicits on behalf of only one investment adviser, he or she may seek a waiver from the examination or certification requirements. 950 Mass. Code Regs. 12.205(4)(c).

Do solicitors for an SEC-registered investment adviser need to register as an investment adviser representative in Massachusetts?

Yes. Since a solicitor does not usually meet the federal definition of investment adviser representative[28] the solicitor would not typically register as an investment adviser representative of the SEC-registered investment adviser. However, absent an exclusion from the definition of investment adviser in Massachusetts,[29] the solicitor must register as a state-registered investment adviser ***and*** as an investment adviser representative of his or her investment adviser.[30]

What is the registration process for solicitors in Massachusetts?

Since solicitors are required to register as an investment adviser representative, a complete investment adviser representative application requires the following:[31]

- Filing of a Form U4 for the individual with an investment adviser that is registered or notice filed in Massachusetts;
- Paying a registration fee of $50;
- Meeting the examination requirements;[32] and
- Submitting a Criminal Offender Record Information ("CORI") Acknowledgement Form to the Division.

Can investment advisers pay for client[33] solicitations?

Investment advisers required to be registered pursuant to the Act[34] shall not pay a cash fee, directly or indirectly, to a solicitor unless:

- The solicitor is registered as an investment adviser representative;
- The cash fee is paid pursuant to a written agreement between the adviser and the solicitor containing:
    - A description of the solicitation activities and the compensation to be received;
    - An undertaking by the solicitor to act in a manner consistent with the instructions of the investment adviser and the provisions of the Act; and
    - A requirement that the solicitor provide the client with a copy of the investment adviser's Form ADV Part 2 and the solicitor's written disclosure document; and

[28] 17 CFR § 275.203A-3.
[29] Mass. Gen. Laws c. 110A, § 401(m)
[30] Although a solicitor does not usually meet the federal definition of investment adviser representative, the SEC-registered investment adviser may choose to file an investment adviser representative registration application for the solicitor and assume supervision of the solicitor. In doing so, the solicitor would not need to register as a state-registered investment adviser.
[31] 950 Mass. Code Regs. 12.205(2)(d)1.a.-d.
[32] See Fn. 27.
[33] "Client" as used herein shall refer to clients and prospective clients.
[34] Mass. Gen. Laws c. 110A, § 401(m).

- The solicitor's written disclosure document contains:
    - The names of the solicitor and investment adviser;
    - The nature of the relationship, including any affiliation between the solicitor and investment adviser;
    - A statement that the solicitor will be compensated for solicitation services by the investment adviser;
    - The terms of the compensation agreement, including a description of the compensation that was or will be paid to the solicitor; and
    - The amount that the client will be charged in addition to the advisory fee for compensating the solicitor.

The investment adviser must receive from the client a signed and dated acknowledgement from the client of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

The investment adviser must retain[35] a copy of the following:

- Written agreement between the investment adviser and solicitor;
- Written solicitor disclosure document; and
- Signed and dated acknowledgement from the client of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

Effective December 2022.

[35] See the Division's record keeping requirements pursuant to 950 Mass. Code Regs. 12.205(7)(a).