REVAMPED: CHANGING REGULATION OF ENDORSEMENTS, TESTIMONIALS, AND SOLICITATION ARRANGEMENTS UNDER THE SEC'S NEW MARKETING RULE

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The Securities and Exchange Commission's ("SEC") recent amendments to Investment Advisers Act of 1940 ("Advisers Act") Rule 206(4)-1 (the "Marketing Rule") overhaul the regulatory framework governing use by investment advisers of testi-

monials and endorsements in advertisements and payment by investment advisers of compensation for testimonials and endorsements, including under traditional solicitation arrangements. The SEC merged existing Rule 206(4)-1 (the "Advertising Rule") and Rule 206(4)-3 (the "Cash Solicitation Rule") into the consolidated Marketing Rule, which offers greater flexibility in marketing arrangements with some tradeoffs and complexity.

We discussed the Marketing Rule's application to the use of performance advertising in an article that appeared in the February 2021 edition of *Wall Street Lawyer*.[1] This article discusses the aspects of the Marketing Rule governing testimonials and endorsements, including in the context of solicitation arrangements. The effective date of the Marketing Rule is May 4, 2021, and the compliance date is November 4, 2022.

Definitions of Testimonial and Endorsement

The Marketing Rule prohibits an adviser from using an advertisement that includes a testimonial or endorsement or providing compensation, directly or indirectly, for a testimonial or endorsement, unless the adviser complies with the Marketing Rule's conditions. Unlike the current Advertising Rule, which outright prohibits the use of testimonials in advertisements, the Marketing Rule allows the use of testimonials and endorsements subject to certain conditions. The Marketing Rule also absorbs the concept of solicitation into the definitions of testimonial and endorsement. The Marketing Rule creates new definitions for both testimonial and endorsement, as follows:

- A "testimonial" is defined as "any statement by a current client or investor in a private fund advised by the investment adviser: (i) About the client or investor's experience with the investment adviser or its supervised persons; (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."
- An "endorsement" is defined as "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; (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."

Comparison of Definitions

	Testimonial	Endorsement
Maker of Statements	Current client or private fund investor	Others
Substance of Statements		
• About the maker's experience with the adviser or its supervised persons	✓	
• Indicates approval, support, or recommendation of the adviser or its supervised persons or describes that person's experience with them		✓
• 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 adviser	✓	✓
• Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the adviser	✓	✓

As the definitions of testimonial and endorsement are relatively broad, firms should consider whether existing arrangements might implicate the Marketing Rule, including whether arrangements that were previously prohibited might now be permissible and vice versa.

Arrangements That Might Be Problematic

- Private Funds. Arrangements governing solicitation of investors in private funds, which were not subject to the Cash Solicitation Rule under the SEC staff's Mayer Brown no-action letter, will be subject to the Marketing Rule. The extent to which the Marketing Rule extends to existing placement agent arrangements, offerings by adviser personnel as "associated persons" of a private fund issuer under Securities Exchange Act of 1934 Rule 3a4-1, so-called "cap intro" arrangements, and other fundraising arrangements will likely turn on the facts and future guidance from the SEC and its staff. Even if no clarifying guidance is published, or depending on the substance of any such guidance from the SEC and its staff, private funds and the intermediaries involved in the sale of private fund interests should review the contractual arrangements and disclosure to ensure that they are in compliance with the Marketing Rule, taking reasoned positions as necessary in doing so.

- Non-Cash Compensation. Payments of non-cash compensation will be subject to the Marketing Rule, whereas the Cash Solicitation Rule only applies to the payment of cash compensation. For purposes of the Marketing Rule, the SEC stated that non-cash compensation includes "non-cash rewards" and "directed brokerage that compensates brokers for soliciting investors, sales awards or other prizes, gifts and entertainment, such as outings, tours, or other forms of entertainment that an adviser provides as compensation for testimonials and endorsements." The SEC also stated that non-cash compensation would not include attendance at training and education meetings, including company-sponsored meetings such as annual conferences, if attendance at these meetings or trainings is not provided in exchange for solicitation activities.

- Arrangements with Non-Profit Organizations. The Marketing Rule will not have an exemption for non-profit organizations. This will impact solicitors (and advisers) that rely on staff no-action relief, such as that granted to the National Football League Players Association, from the cash solicitation rule for non-profit organizations that established referral programs as the no-action letters will be nullified after rescission of the cash solicitation rule.[2]

Arrangements That Might Now Be Permissible

- Testimonials. Testimonials are permitted under the Marketing Rule. It appears that a communication that meets the definition of advertisement and includes a testimonial or endorsement would be an advertisement subject to the Marketing Rule, including gratuitous testimonials and endorsements contained in communications made by the investment adviser. If the adviser provides compensation directly or indirectly to the maker of the testimonial or endorsement ("promoter") for the testimonial or endorsement, the adviser is responsible under the Marketing Rule regardless of whether the adviser or the promoter disseminates a testimonial or endorsement.

- Refer-a-Friend Programs. The Marketing Rule will apply to all compensated "refer-a-friend" programs—programs under which clients can refer their "friends" in exchange for some benefit (such as cash payments, discounts or other perks). However, if payments under the program involve no compensation or fall under the $1,000 *de minimis* compensation exemption (discussed below), the adviser would not be

required to have a written agreement with the promoter or comply with the disqualification provisions.[3]

- Lead-Generation Firms and Adviser Referral Networks. In adopting the Marketing Rule, the SEC discussed two examples of lead-generation firms and adviser referral networks (collectively, "operators") that would likely fall within the scope of the Marketing Rule. The first involved networks operated by non-investors where an adviser compensates the operator to solicit investors for, or refer investors to, the adviser. The second involved for-profit or non-profit entities that make third-party advisory services (such as model portfolio providers) accessible to investors, but that do not promote or recommend particular services or products accessible on the platform. The SEC stated that, in both examples, the operator's network likely comes within the Marketing Rule's definition of endorsement. According to the SEC, "[a]n operator may tout the advisers included in its network, and/or guarantee that the advisers meet the network's eligibility criteria. In addition, because operators typically offer to 'match' an investor with one or more advisers compensating it to participate in the network, operators typically engage in solicitation or referral activities."

- Third-Party Ratings. An investment adviser can include third-party ratings in an advertisement if the adviser complies with the Marketing Rule's general prohibitions and additional conditions. The adviser must have "a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result." In addition, the adviser must "clearly and prominently disclose[], or . . . reasonably believe[] that the third-party rating clearly and prominently discloses: (i) The date on which the rating was given and the period of time upon which the rating was based; (ii) The identity of the third party that created and tabulated the rating; and (iii) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating."[4]

- Compensated Blogs. If an adviser directly or indirectly compensates a blogger for a website review of the adviser's advisory service that indicates approval, support, or a recommendation of the adviser or describes the blogger's experience with the adviser, the review would be a testimonial or endorsement subject to the Marketing Rule.

- Lawyers and Other Service Providers. The SEC stated that a lawyer or other service provider that refers an investor to an adviser, even infrequently, may also implicate provisions of the Marketing Rule governing testimonials and endorsements depending on the facts and circumstances. This means that the so-called "professional alliance" programs operated by many of the wirehouses likely would be subject to the Marketing Rule as they are now typically subject to the existing Cash Solicitation Rule.

Other Activities of Note

- Third-Party Marketing Services and News Publications. The SEC clarified that it would not treat payments to third-party marketing services or news publications to prepare content for or disseminate a communication as an endorsement, even though the communication would be an advertisement subject to the Marketing Rule. This means that such communica-

tions would not be subject to the conditions for testimonials and endorsements discussed below. However, where an adviser has participated in the creation or dissemination of an advertisement, or where an adviser has authorized a communication, the communication would be an advertisement subject to the Marketing Rule. The SEC stated that it would generally view any advertisement about an adviser distributed or prepared by an adviser's related person to be an indirect communication of the adviser subject to the Marketing Rule. The SEC recognized that there may be situations where, based on the circumstances, marketing materials might not be attributed to an adviser. For example, "[i]f an adviser provides comments on a marketing piece, but a third party does not accept the adviser's comments or the third party makes unauthorized modifications, the adviser will not be responsible for the third party's subsequent modifications that were made independently of the adviser and that the adviser did not approve."[5] The SEC stated that it would not view whether the adviser authorized the dissemination as dispositive, but that it would be considered part of the analysis.

- Lists of Prospective Clients and Investors. The SEC stated that it would not treat client lists that do no more than identify certain of the adviser's clients or private fund investors as testimonials without regard to whether the clients had given their permission to be listed. The SEC also said that "a non-investor selling an adviser a list containing the names and contact information of prospective investors typically would not, without more, meet the definition of endorsement."[6] In the SEC's view, this "activity typically would not fall within the plain text of the definition of endorsement (*e.g.*, the seller does not indicate approval, support, or recommendation of the investment adviser, or describe its experience with the adviser, or engage in the solicitation or referral activities. . .)."[7]

- Investment Consultant Administering Requests for Proposals ("RFPs"). The SEC also said that it would not treat as an endorsement subject to the Marketing Rule arrangements pursuant to which an investment consultant conducts an RFP on behalf of an investor where the investment consultant's fees are to be paid by the selected adviser or private fund general partner. Here, the SEC stated that, "[t]hough a quid pro quo is not always determinative of whether the compensation element . . . of the definition of advertisement is satisfied, these facts suggest a lack of quid pro quo and, without more, would not implicate the second prong of the definition. The adviser in this scenario will likely also not implicate the first prong of the definition of advertisement because the adviser is not making a direct or indirect communication to more than one person that offers the investment adviser's investment advisory services with regard to securities to investors."[8] While not specifically addressed by the SEC, these same arrangements exist with consultants administering RFPs for separate account clients.

Conditions for Using Testimonials and Endorsements

In addition to complying with the general prohibitions of the Marketing Rule, unless a partial exemption applies, an advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with four conditions: (1) disclosure, including certain clear and prominent disclosures, as well as other more detailed disclosures; (2) adviser oversight and compliance; (3) a written agreement

between the adviser and the promoter providing the testimonial or endorsement; and (4) absence of disqualification on the part of the promoter.

Disclosure Requirements

The Marketing Rule requires that an adviser either itself disclose, or have a reasonable belief that the promoter giving the testimonial or endorsement will disclose, at the time the testimonial or endorsement is disseminated, the following:

- Clear and prominent summary disclosure (A) that the testimonial was given by a current client or investor, or that the endorsement was given by a person other than a current client or investor, as applicable; (B) that cash or non-cash compensation was provided for the testimonial or endorsement, if applicable; and (C) that it includes a brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person.

- Other disclosure, which need not be clear and prominent, of the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.

- Other disclosure, which need not be clear and prominent, that includes a more detailed description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person and/or any compensation arrangement.

If the adviser does not itself provide the disclosures, it must have a reasonable belief that the promoter discloses the required information. In order to have a reasonable belief, an adviser may provide the required disclosures to the promoter and then seek to confirm that the promoter has actually provided the disclosures to investors, or may include provisions in its written agreement with the promoter that require the promoter to provide the required disclosures to investors, with some level of follow-up on the part of the adviser.

The disclosures are not required to be in writing and can be provided orally. Whether provided orally or in writing, the adviser is required to maintain true, accurate, and current copies of each advertisement. The SEC clarified that in the case of an oral compensated testimonial or endorsement, the adviser may make and keep a record of the disclosures provided, in lieu of recording and retaining the entire oral testimonial or endorsement. The SEC further noted that, if the required disclosures are provided orally, the record does not necessarily have to be an audio recording of the oral disclosures, but must contain a memorialization of the fact that the oral disclosures were provided, the substance of what was provided, and when the disclosures were made. As far as timing, the SEC provided clarification that records of oral disclosures may be made either prior to or at the time of the dissemination of a testimonial or endorsement. For example, advisers may retain records of a script of disclosures provided orally. Advisers may want to consider the risks associated with relying on oral disclosure and whether promoters can be relied on to consistently and accurately maintain records that such disclosures have been appropriately made, both in terms of substance and timing. Advisers may find it preferable to follow a written disclosure process where practical, so as to minimize questions from regulators about what was and was not said, particularly considering that the current Cash Solicitation Rule already imposes a written disclosure regime with which advisers have had to comply.

The SEC stated that the clear and prominent

disclosures should be "succinct," and may be part of a layered approach that is elsewhere supplemented by disclosure of the material terms of any compensation arrangement and material conflicts of interest. According to the SEC, in order to be clear and prominent, the disclosures must be "at least as prominent" as the testimonial or endorsement, meaning that such disclosures must be within the testimonial or endorsement itself, or, in the case of an oral testimonial or endorsement, provided at the same time. In order for written disclosures to satisfy the clear and prominent requirement, the SEC noted that the disclosures should appear "close" to the associated statement so that the statement and the disclosures can be read at the same time, and should not be disclosed in a separate location to which the reader is referred. Given the brevity of the disclosures that must be clearly and prominently disclosed under the Marketing Rule, advisers should be able to draft succinct template disclosures that could be easily tailored to the particular testimonial or endorsement and included on the same page. Additional, more detailed disclosures might then be provided through pages that follow, in the back of a slide deck, via hyperlinks, or in a supplementary document, for example.

According to the SEC, the disclosure of material terms of any compensation arrangement should be sufficiently tailored so as to include only information about the specific compensation arrangement and should not include blanket disclosure of all the adviser's compensation arrangements with promoters. In addition, only the "material" terms of a compensation arrangement need be disclosed, not every detail. The SEC stated that the intention of this disclosure is to "help convey to the investor the nature and magnitude of the person's incentive to refer the investor to the adviser." In addition, the SEC stated that it would be relevant for investors to know that, if true, they would pay increased advisory fees for becoming a client as a result of the promoter's testimonial or endorsement, and that if the amount of increased fees for the investor is known or could reasonably be obtained, then such amount should be disclosed. The Adopting Release also discusses the SEC's expectations for disclosures of different types of compensation arrangements, including payment of trailing fees, a percentage of advisory fees, third-party expenses, non-cash compensation, directed brokerage, and other indirect compensation.

- Trailing Fees. In the SEC's view, trailing fees (*i.e.*, fees that are continuing) that are contingent on the investor's relationship with the adviser continuing for a specified period of time present additional considerations in evaluating the promoter's incentives. The SEC stated its belief that it would be relevant to an investor to know that a promoter continues to receive compensation after the investor becomes a client of, or private fund investor with, the adviser, as well as the period of time over which the promoter continues to receive compensation for such solicitation, and that a longer trailing period can present a greater incentive to solicit the investor.

- Percentage of Advisory Fees. If the compensation takes the form of a percentage of the total advisory fee over a period of time, then the advertisement should disclose such percentage and time period.

- Third-Party Expenses. If payment of third-party expenses is part of the compensation arrangement for the testimonial or endorsement, then such payment should be disclosed.

- Non-Cash Compensation. The disclosures should include the amount of non-cash compensation if the value of the non-cash compensation is readily ascertainable.

- Directed Brokerage. An adviser may have a directed brokerage arrangement with a third-

party brokerage firm, in which the adviser will direct brokerage to the firm as compensation for the firm's solicitation of clients for, or referral of clients to, the adviser. In these cases, the SEC believes that the adviser or firm should disclose the material terms of this arrangement, including, as applicable: a brief description of the compensation provided or to be provided to the firm, including the range of commissions that the firm charges for investors directed to it by the adviser; that the solicitation or referral is contingent on the firm receiving a particular threshold of directed brokerage (and other services, if applicable) from the adviser and; that the adviser's directed brokerage activities would extend to other clients such as the solicited client's friends and family.

- Other Indirect Compensation. According to the SEC, the adviser or individual will need to include this compensation in its disclosures arrangements in which the adviser compensates a solicitor's related person for a solicitation (such as an employer or another entity that is associated with the individual) or if the solicitor refers clients to advisers that recommend the solicitor's or its affiliates' proprietary investment products or recommend products that have revenue sharing or other pecuniary arrangements with the solicitor or its affiliates.

Finally, the SEC noted, however, that where compensation is payable on dissemination of the testimonial or endorsement or is deferred or contingent on the occurrence of a future event, such as an investor's continuation or renewal of its advisory relationship, then that would be a material term that warrants disclosure.

Adviser Oversight and Compliance and Written Agreement Requirements

The Marketing Rule requires an investment adviser to have a reasonable basis for believing, depending on the facts and circumstances, that a testimonial or endorsement complies with the requirements of the Marketing Rule, and also to have a written agreement with any person giving a compensated testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of compensation, subject to certain exemptions discussed below. The SEC suggested that to establish a reasonable basis, an adviser might periodically make inquiries of solicited investors, implement policies and procedures, or include certain terms in the written agreement with the promoter. However, the SEC noted that having a written agreement would not by itself establish a reasonable belief of compliance. Unlike the Cash Solicitation Rule, the Marketing Rule will not require that the written agreement obligate the promoter to deliver the adviser's Form ADV brochure or that the promoter itself deliver a separate disclosure document, and receive a client's signed acknowledgement, as required by the Cash Solicitation Rule.

Disqualification

An adviser will not be able to compensate a promoter, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the promoter giving the testimonial or endorsement is, at that time, ineligible under the Marketing Rule. However, this prohibition will not disqualify a promoter for a matter that occurred prior to the effective date of the Marketing Rule, provided the matter would not have disqualified the promoter under the current Cash Solicitation Rule. Importantly, the disqualification provision applies only to persons who provide compensated testimonials or endorsements. Accordingly, advisers will technically be able to advertise endorsements or testimonials of "bad actors," so long as the bad actors are purely altruistic and do not receive any cash or non-cash compensation.

Under the Marketing Rule, an "ineligible person" means a person who is subject to a disqualifying SEC action or is subject to any disqualifying event. The concept of an "ineligible person" is also broadly applied where the promoter is an entity, such that the promoter firm would be ineligible if any of the following persons was subject to a disqualifying event: (i) any employee, officer, or director of the promoter firm and any other individuals with similar status or functions within the scope of association with the promoter firm; (ii) if the promoter firm is a partnership, all general partners of the promoter firm; and (iii) if the promoter firm is a limited liability company managed by elected managers, all elected managers of the promoter firm.[9] The SEC stated that the Marketing Rule should not apply to a disqualified person's "control affiliates."

Advisers will be required to act with reasonable care in determining whether a promoter is not an ineligible person. The SEC noted that a reasonable care standard reduces the likelihood that advisers will inadvertently violate the Marketing Rule, while still appropriately protecting the market from the paid endorsements or testimonials of bad actors. Although the Marketing Rule will not require continuous monitoring of the eligibility of compensated promoters, the SEC indicated that some level of monitoring would be required to exercise reasonable care, which would depend on the particular facts and circumstances. Accordingly, advisers that rely on testimonials or endorsements to promote their advisory services and private funds should consider what level of ongoing monitoring would be appropriate to ensure that such promoters remain eligible under the Marketing Rule. Periodic attestations for promoters, inquiries as part of an adviser's vendor diligence procedures, and periodic legal searches for names of promoters and key persons at promoter firms could all be considered.

Applicable Exemptions

The SEC adopted a number of exemptions from certain of the required conditions applicable to the use of compensated testimonials or endorsements. The exemptions apply to testimonials or endorsements provided by (1) promoters that receive no compensation or de minimis compensation; (2) certain affiliated persons of the adviser; (3) broker-dealers making a recommendation subject to Regulation Best Interest; (4) broker-dealers making a testimonial or endorsement to a non-retail customer, as defined by Regulation Best Interest; and (5) certain "covered persons" under rule 506(d) of Regulation D with respect to Rule 506 securities private offerings.

Notably, and consistent with the proposed rule, the SEC adopted a *de minimis* exemption for solicitation activities (compensated testimonials or endorsements) in instances where a promoter receives compensation below a threshold amount. However, in response to concerns raised by commenters, the SEC increased this threshold to $1,000 (the proposed level was $100). Accordingly, the disqualification provisions discussed above will not apply if an investment adviser provides compensation to a promoter of a total of $1,000 or less (or the equivalent value in non-cash compensation) during the preceding 12 months. The Marketing Rule does not include exemptions for impersonal investment advice or non-profit programs, and the prior SEC staff no-action letters regarding non-profit programs "will be nullified following the rescission of the solicitation rule."

Summary of Exemptions

Situation	Clear and Prominent Disclosure of Summary Information	Additional Disclosure of Material Terms of Compensation & Conflicts	Adviser Oversight & Compliance	Adviser Must Have a Written Agreement with Promoter	Promoter Must Be Eligible and Cannot Be Disqualified (i.e., not a bad actor)
No Compensation or De Minimis Compensation	*Required*	*Required*	*Required*	*Not applicable*	*Not applicable*

Situation	Clear and Prominent Disclosure of Summary Information	Additional Disclosure of Material Terms of Compensation & Conflicts	Adviser Oversight & Compliance	Adviser Must Have a Written Agreement with Promoter	Promoter Must Be Eligible and Cannot Be Disqualified (i.e., not a bad actor)
Promoter Is an Affiliated Person of Adviser	*Not applicable*	*Not applicable*	*Required*	*Not applicable*	*Required*
Promoter Is a Broker-Dealer Making a Recommendation Under Reg BI	*Not applicable*	*Not applicable*	*Required*	*Required*	*Not applicable if broker-dealer is SEC-registered and not disqualified*
Promoter Is a Broker-Dealer Making a Testimonial or Endorsement to a Non-Retail Customer	*Not applicable*	*Not applicable*	*Required*	*Required*	
Testimonial or Endorsement Regarding Reg D Offering	*Required*	*Required*	*Required*	*Required*	*Not applicable*

Conclusion

In adopting the Marketing Rule, the SEC declined to grandfather all ongoing solicitation arrangements entered into prior to the Marketing Rule's effective date.[10] As a result, existing arrangements must be restructured or amended under the Marketing Rule, although the new requirements should not affect the economics of current arrangements and in most cases should result in more limited responsibilities being placed on solicitors (*e.g.*, no Form ADV Part 2A delivery or separate disclosure document delivery and acknowledgment requirements). It will take a lot of work to comply with the Marketing Rule by the compliance date (which will not be before November 2022). In addition to reviewing advertisements and performance materials under those aspects of the Marketing Rule, investment advisers will need to identify arrangements that are testimonials or endorsements subject to the Marketing Rule, amend existing agreements or enter into new agreements, and update policies and procedures. Investment advisers may find the transition to the Marketing Rule easier if they start developing a transition plan in the near term that will address both existing arrangements and new arrangements that are entered into prior to the compliance date.

ENDNOTES:

[1]"Modernizing Regulation of Performance Advertising: SEC's New Marketing Rule Provides Greater Leeway and Transparency But Potential Traps Remain," *Wall Street Lawyer*, February 2021, Vol. 25, No. 2.

[2]*See* National Football League Players Association, SEC Staff No-Action Letter (Jan. 25, 2002); Excellence in Advertising, Limited, SEC Staff No-Action Letter (Nov. 13, 1986); International Association for Financial Planning, SEC Staff No-Action Letter (June 1, 1998).

[3]Investment Adviser Marketing, Investment Advisers Act Release No. 5653, 86 Fed. Reg. 13024, 13036 (March 5, 2021). ("While the final marketing rule will apply to all compensated refer-a-friend programs (regardless of the form of compensation), we expect that many advisers that engage in these programs will fall under the de minimis exemption, and be subject to fewer conditions than other compensated testimonials and endorsements.").

[4]Advisers Act Rule 206(4)-1(c). *See* DALBAR, Inc., SEC Staff No-Action Letter (Mar. 24, 1998). Prior to the December 22, 2020 amendments, Rule 206(4)-1 did not explicitly address third-party ratings. In DALBAR, however, the SEC staff classified third-party ratings as testimonials, but still took a no-action position on such ratings under certain conditions, and outlined several considerations for investment advisers distributing third-party ratings. We note that DALBAR is one of several no-action letters the SEC indicated its staff would be reviewing for possible withdrawal under the new rule.

[5]Investment Adviser Marketing, 86 Fed. Reg. at 13030.

[6]Investment Adviser Marketing, 86 Fed. Reg. at 13038.

[7]Investment Adviser Marketing, 86 Fed. Reg. at

13038.

[8]Investment Adviser Marketing, 86 Fed. Reg. at 13038 n. 164.

[9]A disqualifying event is any of the following events that occurred within 10 years prior to the person disseminating an endorsement or testimonial: (i) A conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act; (ii) A conviction by a court of competent jurisdiction within the United States of engaging in any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act; (iii) The entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms), of the type described in paragraph (9) of section 203(e) of the Act; (iv) The entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and (v) A Commission order that a person cease and desist from committing or causing a violation or future violation of: (A) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C.A. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. 78j(b)) and 17 C.F.R. 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C.A. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C.A. 80b-6(1)), or any other rule or regulation thereunder; or (B) Section 5 of the Securities Act of 1933 (15 U.S.C.A. 77e). A disqualifying event does not include an event described in paragraphs (e)(4)(i) through (v) of the above with respect to a person that is also subject to: (A) An order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C.A. 80a-3) with respect to such event; or (B) A Commission opinion or order with respect to such event that is not a disqualifying Commission action; provided that for each applicable type of order or opinion described in paragraphs (e)(4)(vi)(A) and (B) of this section: (1) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and (2) For a period of 10 years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to a Commission order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission's website.

[10] Investment Adviser Marketing, 86 Fed. Reg. at 13060 (stating "we disagree with some commenters who requested that we grandfather all ongoing solicitation arrangements entered into prior to the final rule's effective date").