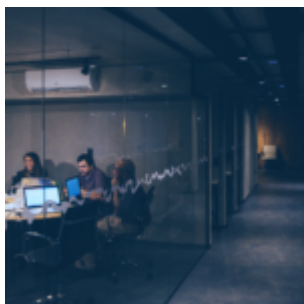


Experts Share the Biggest Confusion About the SEC New Marketing Rules



In December 2020, the SEC announced sweeping changes to the way it regulates marketing and advertising. As part of its announcement, the Commission provided advisors with a grace period in which to adjust their policies and procedures to meet new expectations.

Enforcement of the new SEC marketing rule began in November 2022, but confusion remains. The rule makes substantial changes to how advisors can communicate with clients and prospects, and after many years of familiarity with the old standards, there's been a learning curve for some advisors.

We reached out to expert compliance consultants in our network to learn what they're seeing out in the field. They identified some common points of confusion among financial advisors, plus they shared tips for how to address any gaps between old policies and new expectations.

SEC New Marketing Rule Substantial Change 1: Testimonials and Endorsements

One of the most significant amendments in the SEC new marketing rule is the Commission's point of view on testimonials, endorsements, and third-party ratings.

While testimonials and endorsements are now permitted under the new SEC marketing rule, there are restrictions around how this messaging may be used

and the types of disclosure required.

Jason Ewasko and Tina Mitchell of Core Compliance highlight the novelty of new guidance as a potential point of confusion. They note, “The use of testimonials and endorsements promises to be an area of scrutiny given that it simply hasn’t been done for so many years and suddenly it’s on the table.”

They continue, “It will be interesting to see how effectively advisors meet the disclosure requirements as pertaining to the use of testimonials, and whether any advisors go overboard with the substantive content of the testimonials, even when using the proper disclosures.”

Ian Meiksins of Key Bridge Compliance identifies the question of compensation as one worthy of scrutiny: “Advisors will need to pay close attention to whether they compensate (directly or indirectly) for any of these [testimonials, endorsements, or third-party ratings]. The updated definition of an endorsement may also impact solicitation arrangements, and some agreements may have to be altered to comply.”

Finally, **Melinda “Mimi” LeGaye of MGL Consulting** reminds advisors of the importance of creating firm-wide clarity around what constitutes a testimonial or endorsement. She says, “Firms and access persons need to be clear on the new definitions of what a testimonial is and an endorsement is, and that they can be used, provided certain conditions are satisfied, under the new rule.”

SEC New Marketing Rule Substantive Change 2: Performance Presentation

Another component of the new SEC marketing rule that experts believe may cause confusion is the way in which performance presentation must be handled.

Meiksins points to the particulars in gross versus net and hypothetical performance. He says, “A big change likely to trip up many advisors is the use of performance numbers in marketing materials, specifically as it relates to gross versus net and hypothetical performance. Firms can now only show gross of fee performance if shown side-by-side with net of fee performance. Hypothetical performance, including model performance, can’t be mass marketed, even with

the proper disclosure.”

Janaya Moscony of SEC Compliance Consultants adds that performance presentation may become even more confusing when considering the distinction between the messaging in advertising and ongoing client communications: “How [these expectations apply] can vary depending upon a firm’s business, such as a venture capital firm providing gross IRRs in discussing individual deals or a manager of managers illustrating portfolio construction recommendations.”

She continues, “A key thing to remember in these scenarios is that, even in the absence of a bright line test for whether given content is advertising, it is at the very least subject to the broad anti-fraud provisions of the Advisers Act. To the extent that the Advertising Rule prescribes key constraints for advisors to avoid releasing misleading information, it generally makes sense for the firm to consider the broadest potential use for the material and construct the content and disclosures accordingly.”

Understanding the substantive changes in the SEC new marketing rule is a crucial first step, but just as important is knowing what to do next to ensure your firm meets the Commission’s new expectations.

Our compliance consultants share the steps CCOs, firm leadership, and advisors can take to ensure compliance in our tip sheet: “How the New Marketing Rule Impacts Your Compliance Program: Risks & What Firms Can Do To Mitigate Them.” You can download the full tip sheet [here](#).