Utah Division of Securities

Investment Adviser Marketing Regulations Examination Guide

Introduction

The Utah Division of Securities (the "Division") is conducting a focused examination of all state-registered investment advisers (generally, "RIA"; specifically, "you", "your") currently licensed to transact business in Utah. The examination covers statutes, rules, and policies governing RIA marketing, referrals, and other client development efforts. As an RIA, you are required to participate in this examination. Completion of the examination requires that you submit a signed *Examination Submission Form* on or before thirty (30) days from the date on your *Examination Cover Letter*.[1] All responses must reflect the RIA's circumstances as of the date of its examination submission.

Information regarding the examination questions found in the *Examination Submission Form* can be found in this *Examination Guide*. Again, submit responses to the examination questions only on the *Examination Submission Form* which is online. The link to the form is provided at the end of this guide. Answer all questions truthfully and completely. False or misleading responses or responses that omit material information are unlawful.[2]

This *Examination Guide* draws information from the Investment Advisers Act of 1940 ("IAA") and its related rules, Securities and Exchange Commission ("SEC") guidance, the Utah Uniform Securities Act (the "Utah Act") and its related rules, and Division policy.

The information provided is intended to educate RIAs, their owners, designated officials, and investment adviser representatives ("IAR") regarding Utah regulations surrounding marketing and advertising. The material provided in this *Examination Guide* should not be considered legal, compliance consulting, or business consulting advice.

The Division does not and cannot act as your or your associated individuals:

- legal adviser or counsel;
- regulatory compliance officer, adviser, or consultant; OR
- business consultant.

Operating a regulatory compliant RIA is the responsibility of the RIA and its owner(s), designated officials, and licensed or unlicensed employees. Persons or entities cannot shift the burden of individual or entity compliance to the Division.

Why is the Division focusing on investment adviser marketing regulations?

Utah is a competitive market for investment advisers and other financial professionals. According to one source, Utah has been among the states with the most financial advisers[3] per capita in the

[1] The Division is conducting this examination under authority granted by § 61-1-5 of the Utah Uniform Securities Act ("Utah Act"). Participation in this examination is mandatory. Failure to submit a response constitutes a dishonest or unethical business practice under Utah Administrative Code ("UAC") Rule 164-6-1g(E)(23) and may result in sanctions or loss of licensure.

[2] Utah Act §§ 61-1-5 and 61-1-16 make it unlawful to make any statement that is false or misleading or omit information necessary to make another statement not false or misleading, in any material respect in examination documents filed with the Division. The *Examination Submission Form* is considered a filed examination document.

[3] Financial adviser here included broker-dealer agents.

United States.[4] At the time of writing, there are approximately 1794 total RIAs registered or notice filed in Utah.[5] Of this number, 254 are Utah state-registered RIAs leaving 1544 RIA who have notice filed with the Division and are registered with the SEC as their primary regulator.[6] Collectively, there are 7,277 investment adviser representatives ("IAR"s) associated with these firms registered in Utah. With the high number of RIAs and IARs, advertising and marketing can be an important part of building new RIA businesses and the continued success of established RIAs.

RIAs have become increasingly creative in their messaging and are using all available channels to reach new clients. Developments in the digital marketing sphere such as online reviews, Google maps ratings, social media endorsements, targeted and geofenced advertisements, podcasts, and news-sponsored stories, have added new methods for RIAs to reach potential clients. The new methods join the established methods such as cold-calling, word-of-mouth recommendations, dinner seminars, and print media client development methods.

With the development of these new methods of advertising, questions have arisen as to what information can be shared, how it can be disseminated, and who can receive compensation for their participation in marketing campaigns and efforts. Further, the statutes and rules governing RIA marketing efforts and the individuals involved in those marketing efforts have changed—including the addition of advertisement-related disclosures in Form ADV, Part 1A, Item 5. RIAs have continued to reach out to the Division seeking clarification regarding these questions and the new rules.

The Division seeks to address some of these questions and provide some clarity regarding the new rules in this sphere through this examination. Unfortunately, the borders and boundaries of the new rules may not be entirely clear yet and will become clearer as further guidance, no-action relief, and enforcement actions bring the limits of these rules into focus.

What are the rules and regulations governing investment adviser marketing efforts?

Utah Rule 164-6-1g(E)(13) makes it a dishonest and unethical business practice for a state-registered RIA to "publish[], circulat[e] or distribut[e] any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940." Because the Utah rule expressly references SEC Rule 206(4)-1, state-registered RIAs must comply with the federal rule. Failure to follow the requirements of SEC Rule 206(4)-1 may result in Division examination and sanctions.[7]

In December 2020, the SEC significantly changed two rules governing RIA advertising: the SEC's Advertising Rule, formerly Rule 206(4)-1, and the SEC's Cash Solicitation Rule, formerly SEC Rule 206(4)-3, replacing both rules and all related SEC no-action letters and guidance with the a new Rule 206(4)-1 dubbed "the Marketing Rule".[8] Changes to these rules were made in an attempt to modernize regulations for new technologies and methods of RIA advertising. The Marketing Rule focuses on five principle areas of advertising: performance advertising representations, testimonials and endorsements, third-party ratings and reports, the use of social media, and payments to

[4] https://smartasset.com/data-studies/states-with-the-most-financial-advisors-per-capita-2021-study (last accessed January 2, 2025) (noting that Utah had the second highest concentration of financial advisers per capita).
[5] https://www.investmentadviser.org/wp-content/uploads/2024/06/Snapshot2024_State_by_State_v4.pdf (last accessed November 20, 2024) (report from the Investment Adviser Association).
[6] Information taken from a Division run IARD report on January 2, 2025. RIAs that are required to register with the SEC under the National Securities Markets Improvement Act (NSMIA) Public Law 104-290, (1996) are also required to notice file with the state where they intend to conduct business. 1544 federally covered RIAs have notice filed with the Division.
[7] See Utah Securities Act § 61-1-6(2)(a)(ii).
[8] SEC Investment Adviser Marketing Rule Adopting Release, https://www.sec.gov/files/rules/final/2020/ia-5653.pdf (SEC final rule, adopting and explaining the reasons for adoption).

promoters and solicitors for their help in generating business. The effective date for the rule was May 4, 2021 and the final compliance deadline for the rule was November 4, 2022.

Marketing Generally
1. Did the firm engage in any marketing efforts in 2024?
2. If yes, what types of marketing efforts did the firm engage in during 2024? Circle all that apply: direct mail, email outreach, dinner seminars, educational seminars, refer-a-friend type efforts, cold calling, newsletters, referral networking, social media efforts, review generation on Google or other platforms, third-party lead generators, purchased digital advertisements, radio advertisements, television advertisements, newspapers advertisements, none of the above, Other.
3. Will the firm engage in any marketing efforts in 2025?
4. If yes, what types of marketing efforts does the firm plan on engaging in during 2025? Circle all that apply: direct mail, email outreach, dinner seminars, educational seminars, refer-a-friend type efforts, cold calling, newsletters, referral networking, social media efforts, review generation on Google or other platforms, third-party lead generators, purchased digital advertisements, radio advertisements, television advertisements, newspapers advertisements, none of the above, Other.
5. Did the firm hire a third-party advertising agency or consultant in 2024 to assist in the firm's advertising efforts?
6. Will the firm hire a third-party advertising agency or consultant in 2025 to assist in the firm's advertising efforts?

Please review the following information before answering questions 1-6 above.

What is considered an advertisement under the Marketing Rule?

The Marketing Rule considers two broad types of communications to be advertisements. The first is an offer of advisory services to new or existing clients and the second is a compensated endorsement or testimonial.

The first type of advertisement involves direct or indirect communication to more than one person that offers advisory services with regard to securities or specific types of private funds the adviser manages.[9] If this communication contains hypothetical performance information, then it can be considered an advertisement even if directed to a single person or entity.[10] Whether an indirect communication will be attributed to an RIA is a facts and circumstances analysis that will consider the RIA's participation in creating or disseminating the communication, if the RIA authorized another party to create the communication, or other similar factors.

Notably, the SEC has excluded from the first type of advertisement live, extemporaneous, and oral communications; and information that an RIA has to communicate in a regulatory filing. Communications that contain hypothetical performance are not advertisements if they were

[9] Private fund here is defined in the IAA as those funds relying on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 and not pooled investment vehicles generally.
[10] 17 CFR 275.206(4)-1(e)(i).

provided in response to an unsolicited request by a potential or current client or investor or were provided as part of a one-on-one communication.

According to the SEC's Adopting Release guidance on the Marketing Rule, communications are considered "one-on-one" if they take place between one adviser and one client.[11] Clients that share the same household are considered one client for the purpose of determining if a communication is one-on-one.

General market commentary directed to current clients and investors and other routine communications such as current performance statements would likely not be considered advertisements if the communications do not offer new services or provide unsolicited hypothetical performance. Articles published for a mass audience concerning general market information would also not be considered advertisements if they do not offer the IA's services.

The second type of communications considered to be advertisements are endorsements or testimonials for which an RIA provides any form of compensation.[12] The Adopting Release uses the term "promoters" for persons offering endorsements and testimonials under the Marketing Rule.[13] The endorsement or testimonial can be written or oral and directed to one or more people. Compensation includes all cash and non-cash compensation. Non-cash compensation may include gifts, entertainment such as sports or movie tickets, use of property, vacations, or other perks given as part of refer-a-friend programs. Cash compensation would include actual cash payments or reductions or waiver of fees. Uncompensated testimonials used in an advertisement or endorsed by the IA (e.g. re-posted) also need to follow the general prohibitions of the Marketing Rule.

Ultimately, whether compensation for an endorsement or testimonial has been given is a facts and circumstances analysis that will consider the expectations of both parties, the timing of payments, and other factors.

What does the Marketing Rule say about social media?

In the Adopting Release, the SEC indicated that social media posts of RIA-associated persons could be considered RIA communications as it may be difficult for a reasonable person to differentiate between the RIA and its associated persons. Therefore, some social media posts by associated persons may be considered advertisements and must comply with the Marketing Rule. RIAs should have policies and procedures in place to outline the appropriate use of social media by employees. Specifically, RIAs should be aware of the rules governing testimonials and endorsements.

A client's uncompensated posts to a client's own page or third-party pages are not ads. Posts to the RIA's page, or a page where the RIA has editing power are not ads if the RIA does not curate the comments in its favor. If an RIA curates the comments, it is taking responsibility of the information and may be "endorsing" the comments. Reposting a comment to the RIA's page is advertising. If the social media comments could be considered advertising, an RIA must treat them as advertisements under the Marketing Rule.

RIAs may choose to remove reviews that contain racist, sexist, or otherwise offensive content. If an RIA chooses to do remove such content it must have clear written policies and procedures regarding the grounds that would lead to a review's removal for offensiveness. In addition, the

[11] In this guide, the term client includes investors.
[12] 17 CFR 275.206(4)-1(e)(ii).
[13] The Marketing Rule merged the former Advertising Rule and Cash Solicitation Rule. Prior to the adoption of the Marketing Rule, the Utah Act, did not adopt by reference the Cash Solicitation Rule, which is in conflict with the Utah Act. The Cash Solicitation Rule allowed for compensation of solicitors who are not licensed IARs. However, with the adoption of the Marketing Rule the term solicitor has been replaced with promoter, which is used to refer to both compensated and uncompensated individuals who promote the advisory services of the RIA.

adviser should keep copies of the removed review and circumstances surrounding its removal in the firm's books and records.

What are the major subjects covered by the Marketing Rule?

The Marketing Rule covers 5 major areas and includes a section of general prohibitions. The areas covered are: performance data in advertising, testimonials and endorsements, third-party ratings and reports, social media, and payments to promoters. Utah rules covering payments to promoters substantially differ from those outlined in the Marketing Rule. They are discussed later in this guide. RIAs should fully understand the use of compensated promoters and its consequences to avoid potential regulatory sanctions.

What are the general prohibitions of the Marketing Rule?

The Marketing Rule contains seven general prohibitions that govern all advertisements.[14] The intent of these provisions is to ensure that advertisements are true, fair, balanced, and accurate. Unsurprisingly, the first prohibition contains familiar language from the general anti-fraud provisions in other acts.[15] The remaining prohibitions go beyond fraud prevention and deal with the accuracy of the advertisements and are intended to assure that a full picture with proper context is presented. The general prohibitions are:

1. Material Misstatements and Omissions. "An advertisement may not include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading."[16] This provision mirrors the other anti-fraud provisions of the IAA and the Utah Act and prohibits RIAs from making statements that are not true or omitting information that would be needed for the audience to understand another, earlier statement correctly. Context is important when determining whether a given statement or omission is "misleading".

   Examples of misleading information in advertisements might include an RIA providing positive performance information but not disclosing that comparable securities had much higher returns or that the RIA underperformed the market. Another example that the Division has seen is an RIA who failed to disclose that the Google reviews praising the business were not clients, even though they claimed to be, rather they were part of the RIA's networking group. RIAs should carefully consider the understanding and impact of their statements from their clients' point of view. A "material fact" is a fact that would be considered relevant and important to an investor in making their decision to invest or follow the RIA's advice.

2. Facts that can be substantiated. "An advertisement may not include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Commission." As stated, RIAs must have a reasonable basis to believe that they can find information to support the claims they make in their advertising. The Division may ask RIAs to substantiate claims of fact included in their advertising. RIAs should carefully consider the information they include in their advertisements and keep records supporting their assertions as a best practice. Further, RIAs should consider the language they use in presenting opinions of their own and be clear they are not presenting their opinion as a fact that they believe can be substantiated. The SEC has noted that facts covered by this rule would include examples such as the number

[14] 17 CFR 275.206(4)-1(a)(1)-(7).
[15] See for example IAA §206, Utah Act § 61-1-1, and UAC R164-6g(E)(8).
[16] 17 CFR 275.206(4)-1(a)(1).

and type of certifications an IAR has, how many investment products a third-party manager offers, or claims about performance. These are facts capable of being verified upon request.

3. Misleading information. "An advertisement may not include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser." This provision prohibits RIAs from making a series of true statements that would cause a reasonable investor to conclude or infer from those statements something that is materially false. RIAs should look at their advertising materials and determine how they would be interpreted by a potential client. One example that the Division has encountered during various examinations is the use of language that implies that an RIA with only one IAR and an administrative assistant, who is unable to provide investment advisory services, is actually part of a larger team of IARs by using "our group" or "our team" or using the plural pronouns "we" and "us" when discussing investment advisory services.

   The Adopting Release notes that the rule does not require that an RIA present an equal number of positive and negative testimonials or otherwise balance positive information with an equal number of negative pieces of information. Rather, the RIA must look at the advertisement as a whole and determine whether the conclusion an investor would take from the advertisement is true, balanced, and fair. It also suggests that general disclaimer language is not enough to meet advisers' obligations under this rule.

   Other examples of violations of this rule include an RIA stating that it has over 100 customers who have been with the firm for more than 10 years but omits that the firm has a high client turnover and these 100 clients do not represent the majority of the clientele. For newer advisers, statements that say "all" of the RIA's clients were profitable during the last quarter could be misleading if the RIA only had two or three clients.

4. Benefits and risks must be sufficiently disclosed. "An advertisement may not discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits." All investments come with risks and tradeoffs and the Marketing Rule requires full disclosure of these considerations along with any potential benefits of an RIA's strategy or approach. The SEC indicates that extensive boilerplate disclosures would not meet this obligation. RIAs are not required to disclose every potential risk or trade-off; rather, the rule requires a discussion of the material risks and material trade-offs.

5. Cherry-picking prohibition. "An advertisement may not include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced." This prohibition is aimed at preventing "cherry-picking" where an RIA may include in advertisements only their best past recommendations and results. Further, an RIA may not use case studies to illustrate how their particular approach or strategy could potentially work.

6. Performance periods. "An advertisement may not include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced." Some examples that would violate the rule include: presenting performance results from a short period of time (e.g. two months), presenting performance results over inconsistent periods of time, highlighting an unusually good performance stretch and only putting in a footnote that the results were not typical, or failing to include market information that would help an investor understand the performance in context.

7. Catch-all. "An advertisement may not otherwise be materially misleading." This prohibition reminds the adviser that any materially misleading information not previously discussed is still a violation of the Marketing Rules.

Testimonials and Endorsements
7. Does the firm use testimonials or endorsements in its marketing efforts as defined by the Marketing Rule, including those found in reviews and social media posts?
8. Do the firm's written policies and procedures address the proper use of testimonials and endorsements in advertising, including the use of social media by employees?
9. Has the firm given any form of compensation to persons posting reviews, giving referrals, providing third-party ratings, or otherwise participating in any firm marketing efforts?

Please read the following information before answering questions 7-9 above.

What are the rules surrounding testimonials and endorsements?

Although the rules regarding the use of testimonials and endorsements have changed substantially with the adoption of the Marketing Rule at the federal level, RIAs should understand that the Utah Act and Administrative Code prohibit certain conduct otherwise permitted by the Marketing Rule as written, specifically in regard to the payment of promoters. The SEC stated in its Adopting Release that "a promoter also must determine whether it is subject to certain state laws and certain FINRA rules, including any applicable state licensing requirements applicable to individuals."[17]

Utah Act §61-1-13(1)(r)(B)(IV) and Utah Admirative Rule R164-4-2(G)(4) require any individual that receives compensation for providing a testimonial or referral to be licensed with the Division as an IAR. As such, the Utah Act does not allow RIAs to compensate promoters, either directly or indirectly, unless they are licensed as IARs and supervised by the compensating RIA.

The following discussion outlines the Marketing Rule as it is written, which includes requirements applicable to compensated promoters, even though these arrangements are prohibited in Utah. This discussion is provided so that RIAs may understand the SEC's rule as written.

The Marketing Rule defines an endorsement as any statement by a person who is not a current client of the RIA and a testimonial is any statement by a current client that does any of the following:

- indicates approval, support, or recommendation of the RIA or its employees,
- solicits directly or indirectly, any person to be a client of the RIA, or
- refers any current or prospective client to be the client of the RIA.[18]

[17] Adopting Release, page 57, footnote 173. The full text of the footnote states, "Most states impose registration, licensing, or qualification requirements on investment adviser representatives who have a place of business in the state, regardless of whether the investment adviser is registered with the Commission or the state. See Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011), available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf, at 86. See also rule 203A-3(a)(1) (definition of "investment adviser representative"). In some states, a third-party solicitor will be subject to state qualification requirements to the extent state investment adviser statutes apply to solicitors. See Release 1633, supra footnote 4, at text accompanying n.125."

[18] 17 CFR 275.206(4)-1(e)(5) and (17). The SEC indicates that these definitions are broad and intended to include "refer-a-friend" programs, referral networks, efforts of lead generators, blogger reviews, and referrals by professionals such as accountants or lawyers. However, merely selling a client list

Under the Marketing Rule, an RIA may not use, or pay for, a testimonial or endorsement in an advertisement unless the RIA complies with all of the following requirements. First, the advertisement itself must "clearly and prominently" communicate that the endorsement was given by a non-client or that the testimonial was given by a current client. Second, it must "clearly and prominently" disclose that compensation was given for the promotion. And, third, the advertisement must "clearly and prominently" provide a brief statement of the promoter's material conflicts of interest. As a reminder, the Utah Act and its rules, do not allow for the compensation of promoters who are not licensed.

Each of the disclosures above must be given at the time the endorsement or testimonial is used. Further, if compensated, the material terms of the compensation must be disclosed as well, but do not have to be included in the advertisement itself if a link to the disclosure is provided. Full disclosure of the promoter's conflicts of interest due to their relationship with the IA must also be available through a link. The rule does not require that the name of the promoter be provided in the advertisement.

RIAs have a duty to ensure their compliance with the Marketing Rule and Utah law. An RIA must have a reasonable belief that the endorsement or testimonial complies with the rules outlined above and must have a written agreement with the promoter describing their activities and compensation. A written agreement is not required if no compensation is paid.

RIAs may not use endorsements or testimonials of persons who are ineligible at the time the promotion is used. A person is ineligible if they have been subject to a disqualifying event. Disqualifying events include: a criminal conviction involving securities, fraud, or deceit; a fraudulent filing or willful violation of securities laws; a final order by a state authority, federal banking agency or the CFTC; an order barring participation in the securities industry by the SEC or the Division; or a cease and desist order concerning selling unregistered securities.

RIAs may use the endorsements and testimonies of its affiliated persons without providing the disclosures above, but must still ensure compliance with the Marketing Rule.

RIAs may choose to remove reviews that contain racist, sexist, or otherwise offensive content. If an RIA chooses to do remove such content it must have clear written policies and procedures regarding the grounds that would lead to a review's removal for offensiveness. In addition, the adviser should keep copies of the removed review and circumstances surrounding its removal in the firm's books and records.

What are the rules governing the use of third-party ratings?

RIAs may wish to use third-party ratings of their services or performance in their advertising. Third-party ratings are those provided by persons unrelated to the RIA that provide such ratings in the ordinary course of the third-party's business. For example, Morningstar rates mutual funds. The Marketing Rule allows for the use of these rating so long as the RIA performs due diligence that includes understanding the methods used to form the rating and believes the rating is fair based on the method used. If an RIA uses a third-party rating, it must disclose the date of the rating and the period of time it was based on, the identity of the third-party, and any compensation that the RIA paid to use the rating, if applicable.

These disclosure requirements are to help investors understand and weigh the significance of the rating. For example, some third-party rating services are provided by advertising companies for a fee. The advertising company will create as many categories and sub-categories as needed to ensure that paying businesses win a high rating. These are of little value to investors when

of potential investors to an RIA would likely not be viewed as an endorsement or testimony without other statements or efforts.

compared to third-party ratings from industry watchdogs, analysts, or professional rating agencies that operate in the financial space such as Morningstar or Moody's.

Performance Data Representations
10. Does the firm use performance representations in its marketing efforts?
11. Does the firm keep records of all data used to calculate performance representations?
12. Do the firm's written policies and procedures address the use of performance representations in marketing efforts?
13. Does the firm provide hypothetical performance representations in its marketing efforts?

Please read the following information before answering questions 10-13 above.

What is required if you use performance data in your advertising?

RIAs who choose to include performance data in their advertisements must follow the performance provisions of the Marketing Rule § 206(4)-1(d) and (e) in addition to General Provision 6 discussed above. These rules are intended to ensure that performance data is presented in a fair, accurate, and unmanipulated way and avoiding "cherry-picking" of results. Investors should be able to assess the information free from distortion and make meaningful comparisons between RIAs' performance.[19] Further, RIAs are also required to disclose whether they use performance results in their marketing in Form ADV, Part 1A, Item 5(L).[20]

The performance provisions focus on three areas: the use of gross versus net performance data, data time ranges, and hypothetical performance data.

Gross and Net performance data. RIAs who choose to include performance data in their advertisements and would like to present gross performance data must also present the net performance data in the same advertisement with "at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance" data.[21] For example, an advertisement could not prominently present gross returns and then in a footnote provide net returns or provide the net returns in smaller text under the gross returns. The purpose of including both gross and net figures is to communicate to the client or investor what the investor would actually receive as a return, rather than only what could have been achieved on a compound basis without the performance drag of fees and expenses.

The Marketing Rule further requires that the date ranges covered by the gross and net performance representations must be the same and each data set must use the same type of return and

[19] When using performance data in advertising, General Prohibition 6 requires that the advertisement "not include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced."
[20] See Form ADV, Part 1A, Item 5(L) and The Instructions for Form ADV, Glossary of Terms, 1 Advertisement. pg 26. The instructions can be found here https://www.sec.gov/files/formadv-instructions.pdf, last accessed January 2, 2025. A copy of Form ADV, Part 1A can be found at https://www.sec.gov/files/formadv-part1a_1.pdf.
[21] 17 CFR 275.206(4)-1(d)(1)(i).

calculation methodology. For example, an RIA could not provide gross returns based on a yearly basis while providing net return information based on a quarterly basis.

Gross performance under the rule simply means the performance of a portfolio without deduction of any relevant fees or expenses. The rule does not require RIAs to use any particular calculation method such as money-weighted or time-weighted returns.

Net performance under the rule means that the adviser must deduct all fees and expenses the client or investor would have paid during the performance period when calculating performance return. Fees and expenses include advisory fees, fees paid on the underlying investment vehicle (such as fund fees in a fund of funds model), and payments made by the investment adviser that the client must reimburse. Internal capital gains taxes experienced by the portfolio must also be included. However, net performance may exclude custodian fees if the custodian is a third party.

If an RIA uses a tiered fee model, then the RIA must use the fee associated with the highest fee charged to the targeted audience of the advertisement. For example, if an RIA has a multitiered fee structure and is targeting high net worth individuals in its advertisements, the net calculations presented in the advertisement must be based on the highest fees charged to high-net worth individuals.

Appropriate Performance Date Ranges. RIAs must use 1-, 5-, and 10-year date ranges when calculating their performance returns. However, if the portfolio did not exist for a given period, then the RIA must use data since the inception of the portfolio. Each time period must be given the same prominence and must end on the same calendar date. The end date should be no less recent that the most recent end of year date. RIAs can present other date ranges if they also present the 1-, 5-, and 10-year date ranges. The intent of this provision is to provide uniformity and standardization to performance data presentation and allow investors to more easily compare performance among various investments.

Using Hypothetical Performance Representations. At times, an RIA may wish to advertise a portfolio strategy or model that it has not used before, provide performance data based on back testing, or present future performance targets or projections. In such situations, the RIA will not have actual data to support performance representation and may wish to provide hypothetical performance data. The Marketing Rule allows the use of hypothetical performance representations under strict conditions. This is a departure from the previous Advertising Rule which did not allow hypothetical performance representations.

RIAs using hypothetical performance must "adopt and implement [written] policies and procedures reasonably designed to ensure that the information presented is relevant to the likely financial situation and investment of objectives of the intended audience of the advertisement."[22] Further, the advertisement must include sufficient information as to allow the targeted investor to understand what assumptions and criteria were used in making the hypothetical performance calculation. The RIA must also sufficiently disclose the risks and limitations of using the hypothetical performance in making investment decisions. In the Adopting Release, the SEC said it is unlikely that an RIA will be able to fulfill these requirements in an advertisement to the general public where the audience is essentially unknown.

When considering the risks and limitations, the SEC stated "[r]isk information should also include any known reasons why the hypothetical performance might differ from actual performance of a portfolio," such as where the "hypothetical performance does not reflect cash flows into or out of the portfolio."

However, RIAs should note that interactive predictive tools that clients can use, such as software that generates Monte Carlo type future return analysis, are generally not considered to be hypothetical performance if the RIA provides a description of the criteria and methodology used by

[22] 17 CFR 275.206(4)-1(d)(6)(i).

the tool, explains that results may vary with each use or over time, describes the universe of investments considered in the analysis and why they were selected, explains that other strategies may have similar or superior characteristics, and, finally, discloses that the tool generates outcomes that are hypothetical in nature.

No Division Approval. The Division does not require RIAs to submit advertisements for Division review prior to their use and will not review any submitted prior to their use. Therefore, advertisements cannot indicate that they have been reviewed by the Division or the SEC or that they have been endorsed by the Division or SEC. RIAs may not include the Seal of the Division in their advertisements or otherwise imply Division approval.

Marketing Recordkeeping
14. Does the firm have written policies and procedures that govern the retention of marketing materials?
15. Has the firm adequately disclosed its advertising efforts on Form ADV, Part 1, Item 5?

Please read the following information before answering questions 14-15 above.

What records do RIAs have to keep regarding their advertising?

With the adoption of the Marketing Rule, the SEC also updated SEC Rule 204-2 which outlines the books and records requirement for investment advisers under the IAA. Utah Act § 61-1-5(1)(a) and Administrative Code R164-5-1(D)(1) require that RIAs also follow these rules by adoption. RIAs must keep the following records:

- A copy of each advertisement or other communication distributed, directly or indirectly, to 10 or more persons.[23] These must be kept for 5 years total.[24]
- Original written communications sent or received regarding the performance of managed accounts or securities recommendations.[25]
- For oral advertisements, a copy of any written or recorded materials used by the RIA in connection with the oral advertisement. For example, for a dinner seminar, any sign-in sheets, PowerPoint presentations, hand-outs, fliers, brochures, scripts, etc. would need to be kept.
- For compensated testimonials and endorsements, the RIA must keep a record of any relevant disclosures and bills or invoices paid.[26] These must be kept for 5 years total.[27]
- A copy of any questionnaire or survey used in a third-party rating included or appearing in any advertisement.[28] These must be kept for 5 years total.[29]

[23] 17 CFR 204-2(a)(7)(iv) and (a)(11).
[24] 17 CFR 204-2(e)(3)(i).
[25] 17 CFR 204-2(a)(7).
[26] 17 CFR 204-2(a)(5) and (11)(i)(A)(2).
[27] 17 CFR 204-2(e)(3)(i).
[28] 17 CFR 204-2(a)(11)(ii).
[29] 17 CFR 204-2(e)(3)(i).

- A copy of all disclosures provided to clients or investors pursuant to the Marketing Rule performance provisions, unless they are contained in the advertisement itself.[30]
- Documentation substantiating the RIA's reasonable basis for believe that a testimonial or endorsement or third-party recommendation complies with the Marketing Rule.[31]
- All documents necessary to support the calculation of the performance of any managed accounts, portfolios, or recommendations presented in any notice, circular, or advertisement.[32] These must be kept for 5 years total.[33]

What should RIAs do to ensure compliance with the Marketing Rule?

After reviewing this examination reference guide, RIAs may take the following efforts to ensure compliance with the Marketing Rule:

- Review written policies and procedures to ensure that they address the use of performance data in advertising, if applicable, the use of testimonials and endorsements, social media policies, and the updated record retention requirements.
- For performance representations, written policies and procedures should focus on data collection, calculations, presentation, recordkeeping, and review processes. In addition, RIAs should review existing advertising efforts with an eye to prevent cherry-picking and the inclusion of all necessary disclosures.
- Larger RIAs may consider assigning a specific individual or team to oversee the review and approval process of advertisements and social media content of associated persons.
- Ensure that the firm is meeting the recordkeeping requirements associated with the Marketing Rule and complete any missing records.
- Review the required disclosures in any advertisements to make sure they are clear and conspicuous. All performance disclosures must indicate the calculation methods, time periods, and any limitations or qualifications. Testimonials and endorsements must disclose conflicts of interest including the relationship between the RIA and the promoter.
- Ensure that promoters are not compensated, directly or indirectly, unless they are licensed as IARs. Utah does not have a de minimis level of compensation.
- Develop and execute an adequate training process to teach staff and IARs how to comply with the Marketing Rule and avoid violations.
- Consult with competent legal counsel or consultants regarding advertising and the Marketing Rule.

Where can I find additional information about the Marketing Rule?

For a more in-depth discussion of the SEC's Marketing Rule, consider consulting the following resources:

- SEC's Adopting Release: The official release provides detailed information about the rule and its requirements. The release is 430 pages long and contains analysis and explanation

[30] 17 CFR 204-2(a)(15)(i).
[31] 17 CFR 204-2(a)(15)(ii).
[32] 17 CFR 204-2(a)(16).
[33] 17 CFR 204-2(e)(3)(i).

from the SEC. A hyperlink to the Adopting Release can be found in the References Cited section below.

- SEC's Division of Examinations Risk Alerts: These alerts highlight common compliance issues and provide guidance for investment advisers often involving the Marketing Rule. Risk Alerts can be found here: https://www.sec.gov/compliance/risk-alerts. See especially the Risk Alert of April 17, 2024 which outlines the finding of SEC sweep examinations regarding Marketing Rule compliance which can be found here: https://www.sec.gov/files/exams-risk-alert-marketing-observation-2024.pdf
- Utah Division of Securities Risk Alerts: The Division from time to time will release Risk Alerts that deal with various topics. Division Risk Alerts can be found here: https://securities.utah.gov/industry-compliance/risk-alerts/
- Legal Counsel or Competent Consultants: Competent counsel and consultants will be up to date on the evolution of the Marketing Rule interpretation and enforcement.
- Law Firm Publications: Many law firms publish articles and blog posts that provide analysis and practical advice on the Marketing Rule and compliance.

Conclusion

This completes the examination instruction guide. Please complete the examination submission form using this link to a Google Form with the examination questions. [34] You will automatically receive a copy of your answers for your records to the email address you enter on the Google Form. Please complete all fields and answer all questions for an error-free submission. For questions that refer to the firm's policies and procedures, you should rectify any applicable deficiencies before submission. If you have trouble with the Google Form submission, contact your assigned examiner identified in the Examination Cover Letter.

The Division is providing you with 30 days from the date of your Examination Cover Letter to submit the Examination Submission Form. However, if you are unable to comply with this deadline, contact the securities examiner as soon as possible and before the 30-day deadline expires. The Division will work with you to ensure a timely completion of the examination.

Should you have questions, please contact your assigned examiner. The Division thanks you in advance for your cooperation with this Special Examination.

References Cited

A – Text of the Marketing Rule: https://www.law.cornell.edu/cfr/text/17/275.206(4)-1

B – SEC's Final Investment Adviser Marketing Rule and Adopting Release: https://www.sec.gov/files/rules/final/2020/ia-5653.pdf

C – The Utah Uniform Securities Act: https://le.utah.gov/xcode/Title61/Chapter1/61-1.html

D – The Utah Administrative Code: https://www.law.cornell.edu/regulations/utah/commerce/title-R164

E – Text of the Books and Records Rule: https://www.law.cornell.edu/cfr/text/17/275.204-2

[34] If the hyperlink doesn't work, you may type this into your browser: https://forms.gle/eyp8MaTMZKthhBzx5.