Legal Landscape at a Glance:

An Overview of Key Considerations for Fintech-Related Marketing

There are several key areas of regulatory focus for fintech-related marketing. For an overview of the applicable guidance, *click on the topics listed below.*[1]

Key Topics:

- False or misleading content
- Services provided and other key terms
- Risks and conflicts
- Fees
- Statements about insurance or other customer asset protection
- Use of past performance
- Use of hypothetical returns
- Interactive Tools
- Testimonials and Endorsements

[1]The information provided in this publication provides high-level guidance and is not intended to be legal advice. The rules and guidance discussed have additional nuances and complexities that are not included here, there are additional rules and regulatory guidance that may apply to any particular advertising campaign, and any analysis of the regulatory compliance of a particular ad will always depend on the facts involved.

Guidance Area: False or Misleading Content

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Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• No "puffery." • Adviser must be able to substantiate statements made in advertising. • No guarantees of returns or principal protection. • No "cherry picking" of successful past recommendations. • Must include adequate disclosures and cannot bury those disclosures in other content.	• Must not make any false, exaggerated, unwarranted, promissory, or misleading statement or claim in any communication. • No promissory claims, including guarantees of returns. • Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return, and yield inherent to investments. • Must be based on principles of fair dealing and good faith. • Must consider the nature of the audience to which the communication will be directed and provide details and explanations appropriate to the audience.	• Must not be misleading or inaccurate. • Must not misrepresent the applicable deposit contract. • Must not use the word "profit" in referring to interest paid on an account.	• No deceptive statements or omissions of facts that are material to a consumer's decision to buy or use a service. • Must have adequate support for advertising claims at the time the claim is made (e.g., don't say consumers may earn up to x amount in benefits when only one percent of customers are eligible to receive that amount). • No "dark patterns" that can trick or manipulate consumers into buying or keeping products or services (e.g., burying material terms).

Guidance Area: Services Provided and Other Key Terms

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Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Must accurately describe services provided by the adviser. • Ensure material terms and disclosures are clear and conspicuous and not buried in other text or graphics.	• Must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. • Must not suggest that a broker-dealer is an investment adviser unless it is registered as such. • Must not say something "may" occur if it actually is occurring (e.g., do not say the broker-dealer may receive payment for order flow if it is receiving those payments).	• Must use the term "annual percentage yield" (APY) if a rate of return is advertised. • Must include additional disclosures if an APY is advertised and any of the following are applicable: variable rates, minimum balance, minimum opening deposit, fees that could reduce the earnings on the account, features of time accounts, and bonuses. • Must not advertise that a particular service will be provided in connection with an account if there is no intention or ability to provide the service. • Must not use misleading ads for any overdraft services (such as stating that a deposit account can be overdrawn and have a negative balance, when the account agreement requires the account be promptly returned to a positive balance).	• Must not misrepresent consumers' level of access to their funds (e.g., falsely stating 24/7 access). • Ensure material terms and advertising disclosures are clearly and conspicuously disclosed. • If a potential disclosure contradicts any material claims, the disclosure will not be sufficient; the claim itself must be modified.

Guidance Area: Risks and Conflicts

Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Must provide fair and balanced treatment of risks and conflicts along with discussion of potential benefits. • Must not say a conflict "may" exist if it in fact does exist.	• Must include a discussion of risks along with potential benefits. • If the communication is or contains a recommendation relating to a securities transaction, it must disclose and/or address any conflicts of interest related to such recommendation.		

Guidance Area: Fees

Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Fees must be described thoroughly and accurately. • Claims regarding fees must be accompanied by clear disclosure of the types of fees that may be charged. • If using performance advertising, must include performance net of fees. • Cannot state that services are "free" unless they are completely free—even indirect fees or fees to affiliates can count.	• Fees must be described thoroughly and accurately. • Claims regarding fees must be accompanied by clear disclosure of the types of fees that may be charged. • Must not use misleading ads claiming no fees or no fees of a certain type (e.g., "no account opening fee") without an explanation of what other account fees, fund expenses, brokerage commissions, service fees, or other fees may apply.	• Must not describe the account as "free" or "no cost" (or similar terms) if any maintenance or activity fees may be imposed (such as fees for exceeding transaction limitations or failing to maintain a minimum balance).	• Must not use bait-and-switch pricing tactics (e.g., advertising prices that fail to include mandatory fees). • Ensure any disclosures regarding fees are made clearly and conspicuously (e.g., in close proximity to any claims about pricing, not in hover-effects or links). • Claims regarding the absence of fees (e.g., no late fees, no hidden fees, no interest, etc.) must be carefully vetted for accuracy.

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Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Do not state that advisory accounts are subject to FDIC or SIPC[2] insurance unless they clearly are (this is particularly important for companies that offer other services, such as deposit services, that may be subject to FDIC insurance). • Do not state that advisory accounts are subject to net capital requirements or other forms of protection.	• In any advertisement, include required SIPC disclosures.[3] • Broker-dealers who are SIPC members must advise all new customers, in writing at the opening of an account and then annually, that they may obtain information about SIPC by contacting SIPC. The broker-dealer must also provide the website address and telephone number of SIPC. • Must not suggest that SIPC coverage exists for assets that are not protected by it.[4] • Must not suggest that SIPC coverage exists for excluded losses, including investment losses.[5]	• Do not state that an uninsured deposit is insured. • If advertising deposit insurance, fintech companies that partner with banks to offer deposit accounts must also identify the name of the FDIC-insured partner bank.	• Must not falsely state or otherwise mislead consumers into believing their deposits are insured or that the company maintains sufficient reserves to meet customer obligations.

[2]The Federal Deposit Insurance Corporation (FDIC) protects consumers against the loss of deposit products at FDIC-insured banks and saving associations if those institutions were to fail financially. Deposit products are covered for up to $250,000 per depositor, per insured bank, for each account ownership category at a bank and include checking accounts, negotiable order of withdrawal accounts, savings accounts, money market deposit accounts, time deposits such as certificates of deposit, cashier's checks, money orders, and other official items issued by a bank. The Securities Investor Protection Corporation (SIPC) protects against the loss of cash and securities—such as stocks and bonds—held by a customer at an SIPC-member brokerage firm. The limit of SIPC protection is $500,000, which includes a $250,000 limit for cash. SIPC coverage does not protect customers against the decline in value of their securities or against losses due to a broker's bad investment advice, or for recommending inappropriate investments.

[3]These include presenting 1) the official SIPC symbol; 2) "Member of the Securities Investor Protection Corporation"; 3) "Member of SIPC, which protects securities customers of its members up to $500,000 (including $250,000 for claims for cash). Explanatory brochure available upon request or at www.sipc.org"; or 4) "Member of SIPC. Securities in your account protected up to $500,000. For details, please see www.sipc.org."

[4]These include (among others) commodities or futures contracts, unregistered investment contracts, unregistered limited partnership interests, fixed annuity contracts, most types of crypto assets, cash placed in the account solely for the purpose of earning interest, and cash in a bank sweep program.

[5]Examples of excluded losses are a decline in value of customer securities, custody-related fraud or misrepresentations such as being sold worthless stock or other securities, losses due to a broker's poor investment advice, claims of churning, or losses of any assets held outside a SIPC-member brokerage firm.

Guidance Area: Use of Past Performance

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Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Cannot "cherry pick" more profitable recommendations or time periods. • Must include performance data for the history of the account and specified sub-periods (e.g., the past one-, five-, and 10-year period for a portfolio). • Gross performance must be accompanied by performance data net of fees. • Include a statement that past performance does not guarantee future results. • Additional requirements apply for certain types of past performance, including related, extracted, and predecessor performance.[6]	Must not do any of the following: • Predict or project performance; • Imply that past performance will recur; or • Make any exaggerated or unwarranted claim, opinion, or forecast.		• Cannot make claims about potential profits or earnings without evidence that the results described are representative of what customers will generally achieve. • Cannot make performance claims that apply only to certain types of users or under certain conditions.

[6]These include, at a high level, that the use of related performance must include all portfolios with substantially similar investment objectives; the use of extracted performance may only be used if the ad provides or offers to provide the performance results of the total portfolio; and predecessor performance may only be used if the predecessor accounts are sufficiently similar to the current accounts and the same person is primarily responsible for achieving performance at the advertising adviser that was responsible at the predecessor firm.

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• Permissible subject to restrictions, including that the ads contain information describing the criteria used and assumptions made in calculating the projected performance and information about risks and limitations of using hypothetical performance. • Must be targeted to an audience for whom the projected performance is relevant (e.g., not the general public).	• Generally prohibited subject to certain exceptions.[7]		

[7]These, for example, do not prohibit i) a hypothetical illustration of mathematical principles, as long as it does not predict or project the performance of an investment or investment strategy; ii) a price target, provided it has a reasonable basis, is accompanied by disclosure as to the valuation methods by which the target was calculated, and is accompanied by disclosure concerning the risks that may impede achievement of the target; and iii) an investment analysis tool subject to the requirements discussed under "Interactive Tools" in this table. Note that FINRA has released a proposed amendment to FINRA Rule 2210 that would create a new, narrowly tailored exception to the prohibition on performance projections used by broker-dealers. This proposed exception would allow a member to project the performance of, or provide a targeted return for, a security or asset allocation or other investment strategy in an institutional communication or a communication distributed solely to "qualified purchasers" as defined in the Investment Company Act of 1940 that promotes or recommends specified nonpublic offerings, subject to certain investor protection obligations. This proposed change has been published by the SEC for further comment at the time of the release of this publication.

Guidance Area: Interactive Tools

Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions
• Interactive tools are not necessarily covered by guidance related to projected performance, as long as the adviser describes the criteria and methodology used, explains that the results may vary with each use and over time, describes the universe of investments if applicable, and discloses that the tool generates hypothetical outcomes.	• An investment tool must be accompanied by required disclosures related to its methodology and associated risks.[8]		

[8]For example, the broker must describe the criteria and methodology used, including the tool's limitations and key assumptions; explain that results may vary with each use and over time; and, if applicable, describe the universe of investments considered in the analysis, explain how the tool determines which securities to select, disclose whether the tool favors certain securities, explain the reason for the selectivity if so, and state that other investments not considered may have characteristics similar or superior to those being analyzed. The broker must also include the following text with the tool: "IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results."

Guidance Area: Testimonials and Endorsements

Advisers Act Guidance	Exchange Act/FINRA Guidance	Regulations and Guidance Relevant to Deposit Accounts	FTC Guidance for Non-Bank Financial Institutions

• Where there is compensation greater than $1,000 for a testimonial or endorsement, it must be provided under a written agreement with the recipient of the fee.
• Testimonials and endorsements must clearly and prominently disclose whether they are given by a client or private fund investor, any compensation exceeding $1,000, and a brief statement of any material conflicts of interest arising from the adviser's relationship with the testimonial or endorsement source.
• Required disclosures also include the material terms of any compensation arrangement and any material conflicts of interest on the part of the person giving the testimonial or endorsement.
• Certain "bad actors" cannot be compensated for providing a testimonial or endorsement.
	• Testimonials concerning a technical aspect of investment must be made by a person with the knowledge and experience to form a valid opinion.
	• Testimonials related to the investment advice or performance of a broker-dealer or its products must prominently disclose the following:
	  ▪ the testimonial may not be representative of the experience of other customers;
	  ▪ the testimonial is no guarantee of future performance or success; and
	  ▪ if more than $100 in value is paid, that it is a paid testimonial.
		• Should generally ensure that information communicated is accurate and not misleading.	• Ensure that endorsement marketing campaigns comply with the FTC's updated Endorsement Guides and consult the FTC's updated FAQs.[9]
			• Must not misrepresent that an endorser is an actual, current, or recent user of a given product or service.
			• When using endorsers, consider implementing a compliance program including written policies, training, and contracts, and monitor and enforce violations of those policies.

[9]For more information about the FTC's updated Endorsement Guides, please see our client alert, "What's in a Review? The FTC's Updated Endorsement Guides and Proposed New Rule on Consumer Review."