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Investment Funds & Private Capital

SEC Department of Examinations Issues Risk Alert on Marketing Rule Deficiencies

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Last week, the Securities and Exchange Commission’s Division of Examinations (“DOE”) issued a Risk Alert (the “Alert”) entitled “[Initial Observations Regarding Advisers Act Marketing Rule Compliance](#).” The Alert describes several common deficiencies observed by DOE staff regarding registered investment advisers’ compliance with the recently revised Rule 206(4)-1 (the “Marketing Rule”)¹ under the Investment Advisers Act of 1940 (“Advisers Act”). The examples identified include deficiencies with respect to an adviser’s (i) Marketing Rule–related compliance policies under Advisers Act Rule 206(4)-7 (the “Compliance Rule”)²; (ii) Marketing Rule–related recordkeeping under Advisers Act Rule 204-2 (the “Books and Records Rule”)³; and (iii) the Marketing Rule’s “General Prohibitions.”

Why it matters:

The Alert is the latest in a series of SEC Risk Alerts⁴ and enforcement actions⁵ targeting the marketing activities of registered investment advisers. The Alert serves to put investment advisers “on notice” as to the DOE’s focus on Marketing Rule compliance. Advisers should familiarize themselves with each of the deficiencies mentioned in the Alert—a selection of which is summarized below—and ensure all advertisements disseminated are reviewed with these and other Marketing Rule–related compliance considerations in mind.

¹ The SEC replaced the old Rule 206(4)-1 “Advertising Rule” with the Marketing Rule ([17 CFR § 275.206\(4\)-1 - Investment adviser marketing](#)), which became effective in November 2022. For our summary of the Marketing Rule see [SEC Proposes to Modernize the Advertising and Cash Solicitation Rules for Investment Advisers](#).

² See [17 CFR § 275.206\(4\)-7 - Compliance procedures and practices](#).

³ See [17 CFR § 275.204-2 - Books and records to be maintained by investment advisers](#).

⁴ See [Risk Alert: Examinations Focused on Additional Areas of the Adviser Marketing Rule](#) (June 8, 2023) (noting DOE’s initial Marketing Rule focus on policies and procedures, the substantiation requirement, performance advertising, books and records and general prohibitions) and [Risk Alert: Examinations Focused on New Investment Adviser Marketing Rule](#) (Sept. 19, 2022) (reinforcing DOE’s focus on advisers’ marketing practices, including policies and procedures, substantiation requirements, performance advertising, and books and records).

⁵ For examples of recent SEC enforcement actions targeting investment advisers for their marketing practices, please see [SEC Enforcement Continues Thematic Focus on Hypothetical Performance](#), [Investment Funds & Private Capital Market Insights: SEC Charges Nine Investment Advisers for Advertising Hypothetical Performance to the General Public Without Adopting Policies and Procedures](#), and [SEC Charges FinTech Adviser for Misrepresenting Hypothetical Crypto Performance Resulting in Million Dollar “Marketing Rule” Enforcement](#).

Summary of Key Deficiencies Cited:

Key deficiencies identified in the Alert include alleged non-compliance in the following areas:

Compliance Rule

The Alert describes a number of inadequacies relating to adviser Marketing Rule–related compliance policies, including that such policies:

- included only general descriptions of Marketing Rule provisions;
- did not address all of an adviser’s applicable marketing channels (e.g., websites and social media);
- were informal and not in writing;
- were incomplete or only partially updated;
- were not tailored to address the elements of the Marketing Rule applicable to an adviser’s actual advertisements;
- did not adequately address recordkeeping requirements; and
- were updated but not implemented effectively.

Books and Records Rule

The Alert reports three common deficiencies under the Books and Records Rule, including:

- advisers completing questionnaires or surveys used in the preparation of a third-party rating without maintaining a copy of such questionnaires;
- advisers not maintaining copies of information posted to social media; and
- advisers not maintaining documentation to support performance claims included in advertisements.

General Prohibitions

The Alert recounts common deficiencies that staff identified with respect to the seven principles-based General Prohibitions, including:

- *advertisements containing untrue or unsubstantiated statements of material fact*— Examples identified by staff include advertisements stating that the advisers were “free of all conflicts,” when actual conflicts existed; stating material facts about the advisers’ businesses that were inaccurate; describing material facts about advisory services or products offered that were inaccurate; and publicizing the receipt of certain awards or accolades that were not received.
- *advertisements omitting material facts or creating a misleading inference*—Examples include advertising performance that contained (A) benchmark index comparisons that did not define the index or provide sufficient context, or disclose that the benchmark performance did not include reinvestment of dividends; (B) outdated market data information only (e.g., market data from more than five years prior) or investment products that were no longer available to clients and included lower investment costs than products that were available; or (C) (i) performance track record with securities that were not purchased by the advisers in a similar manner in their clients’ accounts; (ii) claims the adviser achieved above average performance results without clarifying the adviser did not yet have clients or performance track records; and (iii) investment recommendations containing performance information that did not include disclosures to provide context to the presentations.
- *advertisements not presenting a fair and balanced treatment of material risks*—Staff observed advertisements on social media that highlighted performance information without also disclosing the material risks and limitations associated with the potential benefits.

- *advertisements containing references to investment advice not presented in a fair and balanced manner*—Staff observed advertisements that included only the most profitable investments or specifically excluded certain investments without providing sufficient information and context to evaluate the rationale, such as investments that were written off as a loss or were lower-performing investments.
- *advertisements presenting performance results in a manner that is not fair and balanced*—Staff found deficiencies such as not disclosing the relevant time period for the performance data or including the performance of only realized investments in the total net return figure and excluding unrealized investments.
- *advertisements that were “otherwise materially misleading”*—Staff observed advertisements that appeared otherwise to be materially misleading, such as presenting disclosures in an unreadable font on websites or in videos.

Key Takeaways:

- The SEC continues to be squarely focused on marketing activities by investment advisers.
- Advisers are “on notice” as to all of the deficiencies identified in the Alert. Although many advisers undertook a comprehensive review of their marketing materials in the lead-up to the implementation of the new Marketing Rule, advisers should continue to take a fresh look at all marketing materials in light of the ongoing SEC guidance and DOE pronouncements.
- Updating advertising policies and procedures for the new Marketing Rule is merely the beginning of compliance efforts. Advisers should ensure that policies are tailored to the firm’s specific advertisements, practices and business model, and that the policies are actually implemented and followed. As an example, staff has observed advisers that have adopted policies requiring net performance to be included with gross performance, but disseminate advertisements that show gross performance only. The Alert also positively refers to advisers who provide training for relevant staff, establish a process for reviewing advertisements and require preapproval of advertisements before dissemination.
- The Marketing Rule broadened the scope of various recordkeeping requirements related to marketing activities. Although many advisers have enhanced their data gathering and retention in this area, recordkeeping is an area that is both easy for advisers to overlook and easy for the DOE to police. Advisers should review for potential gaps relating to new recordkeeping obligations, including with respect to the specific areas cited by the DOE in the Alert.
- The cited deficiencies demonstrate the breadth of the General Prohibitions and the Marketing Rule generally, and the abundant opportunities for DOE staff to find faults in lengthy pitch decks, private placement memoranda and other marketing materials.

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