

SEC Staff Issues Observations on Adviser Marketing Rule Examinations

April 23, 2024 | Client Alert

The Division of Examinations (Examinations) of the U.S. Securities and Exchange Commission (SEC) [issued its observations](#) (Risk Alert) on April 17 in light of its review of investment advisers' compliance with Rule 206(4)-1 under the Investment Advisers Act of 1940 (Marketing Rule).¹ Examinations staff shared its preliminary observations regarding the completion of the Marketing Rule items contained in Form ADV and compliance with Rule 206(4)-7 (Compliance Rule), Rule 204-2 (Recordkeeping Rule) and the Marketing Rule's general prohibitions.

Observations Regarding Compliance Rule, Recordkeeping Rule and Form ADV

While Examinations staff generally observed that advisers had adopted and implemented policies and procedures relating to the Marketing Rule, provided compliance training for relevant staff and established procedures for reviewing advertisements, Examinations staff also observed instances of inadequate policies and procedures. Such inadequacies included, for example, policies and procedures that:

- Consisted only of general descriptions of the Marketing Rule that were not designed to prevent, detect and correct violations.
- Failed to address all marketing channels utilized by the adviser.
- Were not tailored to address advisers' specific advertisements.
- Reflected the Marketing Rule but lacked implementation of the policies and procedures as written.

Examinations staff also observed recordkeeping deficiencies, such as failure to maintain copies of third-party rating questionnaires, information posted to social media and documentation to support performance claims.

Finally, Examinations staff observed inconsistencies between what was reported on Form ADV with respect to the advisers' marketing practices and the advisers' actual marketing practices. For example, advisers inaccurately reported on Form ADV that their advertisements did not include third-party ratings, performance results and hypothetical performance when, in fact, such advisers included such elements in their advertisements.

¹ [Division of Examinations, "Initial Observations Regarding Advisers Act Marketing Rule Compliance"](#) (April 17, 2024).

Observations Regarding Marketing Rule's General Prohibitions

The Risk Alert reflected Examinations staff's focus on assessing whether advisers' advertisements violated any of the Marketing Rule's general prohibitions. The staff observed the following violations:

- **Untrue statements of material fact and unsubstantiated statements of material fact.** Examinations staff observed advertisements that included statements of material fact that appeared to be untrue and advisers that acknowledged that statements of material fact were likely untrue after being unable to substantiate the statements upon the staff's demand. The staff's observations included advertisements that had:
 - Inaccurate statements of advisory personnel, including misrepresentations of personnel qualifications and professional designations.
 - Inaccurate descriptions of advisory services or products, including misrepresentations of investment mandates, investment processes, consideration of risk tolerances, approved securities, formalized securities screening processes and the adviser's client base.
 - The receipt of awards or accolades that were not received.
- **Omission of material facts or misleading inference.** Examinations staff observed the omission of material facts and the inclusion of information in advertisements that could have reasonably caused untrue or misleading implications or inferences to be drawn regarding material facts relating to the advisers. The staff's observations included advertisements that:
 - Recommended certain investments without disclosing the conflicts of interest attributed to compensation received by the adviser for making such recommendations.
 - Stated that advisers appeared on national media without disclosing that such appearances were paid advertisements.
 - Presented performance information without adequate disclosure regarding the share classes included in the performance returns.
 - Implied that SEC registration was representative of a particular level of skill or ability or that the SEC had either approved or passed upon the advisers' business practices.
 - Included testimonials from clients of a third-party product on the advisers' websites without any disclosure explaining the context of the testimonials.
 - Included performance presentations that failed to include adequate disclosures regarding benchmark index comparisons, updated performance data and the full context of the performance track record presented.
- **Lack of fair and balanced treatment of material risks or limitations.** Examinations staff observed advertisements on social media that highlighted performance information without also disclosing the material risks and limitations associated with the potential benefits.
- **References to specific investment advice that were not presented in a fair and balanced manner.** Examinations staff observations included advertisements that only showed the most profitable investments without providing sufficient context and advisers that had not established criteria in their policies and procedures to ensure that references to specific investments were presented in a fair and balanced manner.

- **Inclusion or exclusion of performance results or time periods in manners that were not fair and balanced.** For example, advertisements that:
 - Failed to disclose the time period or whether the returns were calculated for the same time period as other performance information included in the same advertisement.
 - Included the performance of only realized investment information in the total net return figure and excluded unrealized investments.
- **Otherwise materially misleading.** Examinations staff observed advertisements that were otherwise materially misleading, such as presenting disclosures in unreadable font on websites or in videos.

Considerations for Advisers

In light of the Risk Alert, advisers should consider and review their practices, policies and procedures for compliance with the Marketing Rule and implement any necessary modifications to address the concerns raised by Examinations staff.

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