

MEMO# 35696

May 3, 2024

SEC Division of Examinations Issues Risk Alert Regarding Advisers Act Marketing Rule Compliance

[35696]

May 02, 2024

TO: ICI Members

Advertising Compliance Advisory Committee

Investment Advisers Committee

Retail SMA Advisory Committee SUBJECTS: Advertising
Compliance

Investment Advisers RE: SEC Division of Examinations Issues Risk Alert Regarding Advisers
Act Marketing Rule Compliance

On April 17, the staff ("staff") of the SEC's Division of Examinations ("Division") published a risk alert ("Risk Alert") setting forth the staff's observations regarding compliance with the Investment Advisers Act Marketing Rule (Rule 206(4)-1).[\[1\]](#) The Risk Alert states that the Division continues to focus on compliance with the Marketing Rule.

Observations Regarding Compliance Policies and Procedures

The Risk Alert notes the staff's observations that advisers' compliance policies and procedures typically included processes to comply with the Marketing Rule and that advisers generally provided training for relevant staff. It states that advisers that updated their written marketing-related policies and procedures typically established a process for reviewing advertisements and require preapproval of advertisements before dissemination.

The Risk Alert also lists examples of adviser policies and procedures that, in the staff's view, were not reasonably designed or implemented to address compliance with the Marketing Rule. These examples include, among others, policies and procedures that: included only general descriptions and expectations related to the Marketing Rule; did not address applicable marketing channels such as websites and social media; were not in writing; were incomplete or not fully updated; were not appropriately tailored; did not adequately address recordkeeping requirements; or were not implemented.

Observations Regarding Recordkeeping

The Risk Alert also lists certain Marketing Rule-related books and records deficiencies that

the staff has observed, including failures to maintain: copies of certain questionnaires or surveys used in the preparation of a third-party rating; copies of information posted on social media; and documentation to support performance claims.

Observations Regarding Form ADV Disclosures

The Risk Alert states that the staff has also observed certain Marketing Rule-related deficiencies on Form ADV, including inaccurate reporting regarding advisers' use of third-party ratings, performance results and hypothetical performance in advertisements. The Risk Alert notes that the staff has also observed advisers using certain outdated language in their Form ADV disclosure.

Observations Regarding the General Prohibitions of the Marketing Rule

The Risk Alert states that the staff observed deficiencies related to the Marketing Rule's general prohibitions (set forth in Rule 206(4)-1(a)) in the following areas:

- Untrue statements of material fact and unsubstantiated statements of material fact. The Risk Alert lists as examples:
 - Advertisements stating that advisers were "free of all conflicts," when actual conflicts existed;
 - Advertisements stating material facts about the advisers' businesses that were inaccurate;
 - Advertisements describing material facts about advisory services or products offered that were inaccurate; and
 - Advertisements publicizing the receipt of certain awards or accolades that were not received.
- Omission of material facts or misleading inference. The Risk Alert lists as examples:
 - Advertisements containing statements that advisers were different from other advisers because they acted in the "best interest of clients," without disclosing that all advisers have a fiduciary duty to act in their clients' best interests;
 - Advertisements recommending certain investments without disclosing the conflicts of interest related to the compensation paid for such recommendations;
 - Advertisements containing untrue or misleading claims, including performance claims;
 - Advertisements citing SEC registration and implying that SEC registration was representative of a particular level of skill or ability, or that the SEC had approved or passed upon the advisers' business practices;
 - Advertisements containing misleading statements about third-party ratings or testimonials; and
 - Advertisements containing misleading performance information.
- Fair and balanced treatment of material risks or limitations. The Risk Alert states that the staff observed advertisements that included statements about potential benefits but did not appear to provide fair and balanced treatment of any material risks or material limitations of the advisers' services.
- References to specific investment advice that were not presented in a fair and balanced manner. The Risk Alert states that the staff observed advertisements that included only the most profitable investments or excluded certain investments without providing sufficient information and context.
- Inclusion or exclusion of performance results or time periods in manners that were not fair and balanced. The Risk Alert lists as examples:
 - Advertisements failing to disclose the time period or whether the returns were

- calculated for the same time period as additional performance information in the same advertisement; and
- Advertisements including the performance of only realized investment information in the total net return figure and excluding unrealized investments.
- Advertisements that were otherwise materially misleading. The Risk Alert states, as an example, advertisements presenting disclosures in an unreadable font on websites or in videos.

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Notes

[1] Initial Observations Regarding Advisers Act Marketing Rule Compliance, SEC Division of Examinations Risk Alert (Apr. 17, 2024), available at <https://www.sec.gov/files/exams-risk-alert-marketing-observation-2024.pdf>.

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