

MEMO# 35698

May 3, 2024

SEC Charges Five Investment Advisers with Marketing Rule Violations

[35698]

May 03, 2024

TO: ICI Members

Advertising Compliance Advisory Committee

Investment Advisers Committee

Retail SMA Advisory Committee SUBJECTS: Advertising
Compliance

Investment Advisers RE: SEC Charges Five Investment Advisers with Marketing Rule
Violations

On April 12, the SEC announced that it had charged five investment advisers^[1] with violations of Rule 206(4)-1 under the Investment Advisers Act ("Marketing Rule") for "advertis[ing] hypothetical performance to the general public on their websites without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of each advertisement's intended audience."^[2] These actions resulted in fines totaling \$200,000.

This is the second batch of cases that the SEC has brought as part of an ongoing targeted sweep involving Marketing Rule violations.^[3] The SEC's findings against these firms and the sanctions imposed are summarized below.

Legal Background on Use of Hypothetical Performance

Each order sets forth the following legal background related to the use of hypothetical performance under the Marketing Rule:

"Under the Amended Marketing Rule, registered investment advisers are prohibited from including any hypothetical performance in their advertisements unless, among other things, the adviser "[a]dopts and implements policies and procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement." See Advisers Act Rule 205(4)-1(d)(6)(i)."

The orders state that "advisers generally would not be able to include hypothetical performance in advertisements directed to a mass audience or intended for general

circulation" because "an adviser generally could not form any expectations about their financial situation or investment objectives."

The SEC's Findings

In settling these actions, the respondents did not admit or deny the SEC's findings.

Advertising Hypothetical Performance on a Public Website

The SEC found that each of the five investment advisers had published advertisements that included hypothetical performance on its public website. The hypothetical performance was based on performance derived from model portfolios and/or performance that was backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The SEC found that each investment adviser had disseminated the advertisements with hypothetical performance to a mass audience and that each adviser had failed to adopt and implement policies and procedures reasonably designed to ensure that the performance was relevant to the likely financial situation and investment objectives of the intended audience. As a result, the SEC found that each adviser had willfully violated Section 206(4) of the Investment Advisers Act and Rule 206(4)-1(d) thereunder.

Additional Violations of Regulatory Requirements

The SEC found that one of the advisers[\[4\]](#) had also violated other regulatory requirements. The adviser's additional Marketing Rule violations included:

- Disseminating advertisements on its public website and social media sites that contained false and misleading statements;
- Advertising on its public website certain factsheets that included misleading model portfolio performance;
- Making material statements of fact in certain advertisements without being able to produce substantiating documents; and
- Paying more than \$1,000 to each of two unaffiliated accounting firms for endorsements to obtain clients through referrals without a written agreement with either firm.

The SEC also found that this adviser:

- Made misleading statements to the adviser's investment company client ("Fund") regarding the performance of a tracking account that it advised, which the Fund then incorporated in its prospectus;[\[5\]](#)
- Failed to keep copies of advertisements published on its public website and did not maintain records or documents necessary to form the basis for or demonstrate the calculation of the model portfolio performance included in the factsheets on the adviser's public website;[\[6\]](#) and
- Failed to implement certain of its compliance policies and procedures and failed to conduct an annual review of the adequacy of its investment advisory compliance programs or the effectiveness of its implementation.[\[7\]](#)

Remedial Efforts

The orders noted that the four firms that had violations related only to their use of hypothetical performance had removed the relevant advertisements from their public website before being contacted by the SEC staff in these matters.

The relevant order noted that the firm that had additional violations had promptly removed relevant advertisements, voluntarily terminated its existing referral arrangements and/or had reduced them to writing, voluntarily notified the Fund of the inaccurate and misleading performance information, and voluntarily retained a compliance consultant to conduct an annual compliance review, conduct compliance training, review and revise the adviser's compliance manual.

Sanctions Imposed

Based upon the above findings and violations, each of the five firms was censured, ordered to cease and desist from further violations, and ordered to pay a civil money penalty, and agreed to undertakings requiring them to evaluate, update and review for the effectiveness of their implementation, the firm's relevant policies and procedures. The civil money penalties for the four firms that had violations related only to their use of hypothetical performance were \$20,000 or \$30,000. The civil money penalty for the firm that had additional violations was \$100,000.

Erica Evans
Assistant General Counsel

Notes

[1] The respondents in these actions are, in alphabetical order: Bradesco Global Advisors Inc., Credicorp Capital Advisors LLC, GeaSphere LLC, InSight Securities Inc. and Monex Asset Management Inc.

[2] The SEC's press release announcing these enforcement proceedings is available at https://www.sec.gov/news/press-release/2024-46?utm_medium=email&utm_source=govdelivery. The press release includes a link to each order issued by the SEC in this matter (the "orders").

[3] The SEC's press release announcing the initial batch of enforcement proceedings in September 2023 is available at <https://www.sec.gov/news/press-release/2023-173>. The press release includes a link to each order issued by the SEC at that time.

[4] See the order involving GeaSphere LLC.

[5] As a result of this conduct, the SEC found that the adviser violated Section 34(b) of the Investment Company Act, as well as Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and Section 206(2) of the Advisers Act.

[6] As a result of this conduct, the SEC found that the adviser violated Section 204 of the Advisers Act and Rule 204-2(a)(11) and (16) thereunder.

[7] As a result of this conduct, the SEC found that the adviser violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

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