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SEC Publishes Risk Alert Highlighting Focus on New Marketing Rule

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On September 19, 2022, the Securities and Exchange Commission's Division of Examinations (the "SEC") published a Risk Alert announcing its intent to conduct examinations focused on compliance with Rule 206(4)-1 (the "Marketing Rule") under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). As a reminder, the compliance date for the Marketing Rule is November 4, 2022. The Marketing Rule applies to marketing activities and the use of placement agents/solicitors by investment advisors registered under the Advisers Act. The Marketing Rule replaces pre-existing rules on advertising activities and a considerable body of related no-action letter guidance.

In the Risk Alert, the SEC noted its focus on the following:

1. *Marketing Rule Policies and Procedures.* The SEC will be conducting exams to "review whether investment advisers have adopted and implemented written policies and procedures that are reasonably designed to prevent violations by the advisers and their supervised persons of the Advisers Act and the rules thereunder, including the Marketing Rule."
2. *Substantiation Requirement.* The SEC's examination staff "will review whether investment advisers have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements." This may require advisers to implement additional policies and procedures to confirm all facts included in marketing materials and retain supporting evidence in their records.
3. *Performance Advertising Requirements.* The Risk Alert included a reminder regarding various prohibitions under the Marketing Rule when advertising performance, including the following:
 - a. gross performance, unless the advertisement also presents net performance;
 - b. performance results, unless they are provided for specific time periods (not applicable to the performance of private funds);
 - c. any statement that the Commission has approved or reviewed any calculation or presentation of performance results;
 - d. to the extent an advertisement includes the performance of portfolios other than the portfolio being advertised, performance results from fewer than all portfolios with

- substantially similar investment policies, objectives, and strategies as the portfolio being offered in the advertisement, with limited exceptions;
- e. performance results of a subset of investments extracted from a portfolio, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio;
 - f. hypothetical performance, unless the adviser adopts 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 and the adviser provides certain additional information; and
 - g. predecessor performance, unless the personnel primarily responsible for achieving the prior performance manage accounts at the advertising adviser and the accounts that were managed by those personnel at the predecessor adviser are sufficiently similar to the accounts that they manage at the advertising adviser.
4. *Books and Records.* The SEC will also be focused on advisers' compliance with books and records requirements under the Advisers Act, which require certain materials to be retained for specified time periods.

In sharing these areas of focus for new examinations, the SEC is encouraging investment advisers to review and consider their practices, policies, and procedures on these key elements of the Marketing Rule.

See the text of the SEC's Risk Alert here: [exams-risk-alert-marketing-rule.pdf \(sec.gov\)](#)



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