



## RISK ALERT

DIVISION OF EXAMINATIONS

April 17, 2024

### Initial Observations Regarding Advisers Act Marketing Rule Compliance\*

#### I. Introduction

The Division of Examinations is issuing this Risk Alert to provide investment advisers, investors, and other market participants with information regarding investment advisers' compliance with amended Rule 206(4)-1 (the "Marketing Rule") under the Investment Advisers Act of 1940 ("Advisers Act").<sup>1</sup> While the Division continues to focus on advisers' compliance with the Marketing Rule,<sup>2</sup> the staff is sharing these preliminary observations to encourage accurate completion of the Marketing Rule items contained in Form ADV and to promote compliance with Advisers Act Rule 206(4)-7 (the "Compliance Rule"), Advisers Act Rule 204-2 (the "Books and Records Rule"), and the Marketing Rule's "General Prohibitions."<sup>3</sup>

#### II. Observations Regarding Compliance Rule, Books and Records Rule and Form ADV

The staff reviewed whether investment advisers had adopted and implemented written policies and procedures reasonably designed to prevent violations by the advisers and their supervised persons of the Advisers Act and the rules thereunder, including the Marketing Rule.<sup>4</sup>

\* This Risk Alert represents the views of the staff of the Division of Examinations (the "Division"). This Risk Alert is not a rule, regulation, or statement of the Securities and Exchange Commission (the "SEC" or the "Commission"). The Commission has neither approved nor disapproved the content of this Risk Alert. This Risk Alert, like all staff statements, has no legal force or effect; it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

<sup>1</sup> See Division, [FY2024 Priorities](#) and [FY2023 Priorities](#). See also, SEC, [Final Rule: Investment Adviser Marketing](#), Rel. No. IA-5653 (Dec. 20, 2020) ("[Marketing Rule Adopting Release](#)") (adopting amendments under the Advisers Act to update the rules that govern adviser marketing).

<sup>2</sup> See Division, Risk Alert: [Examinations Focused on Additional Areas of the Adviser Marketing Rule](#) (June 8, 2023) (highlighting the Division's initial marketing rule focus areas of policies and procedures, the substantiation requirement, performance advertising, and books and records and emphasizing the Division's focus on compliance with the Marketing Rule's general prohibitions as a component of any examination that includes a review of advisers' marketing practices, as well as additional areas of focus, including the use of testimonials and endorsements, third-party ratings, and the accuracy of Form ADV disclosures). See also [Risk Alert: Examinations Focused on New Investment Adviser Marketing Rule](#) (Sept. 19, 2022) (reinforcing the Division's focus on advisers' marketing practices, including policies and procedures, substantiation requirements, performance advertising, and books and records).

<sup>3</sup> The General Prohibitions are located in subsections (a)(1) through (a)(7) of the Marketing Rule. The Marketing Rule applies to investment advisers registered or required to be registered with the SEC under [Section 203](#) of the Advisers Act. This Risk Alert does not address all observed deficiencies related to the Marketing Rule. In addition, deficiencies described in this Risk Alert may also be deficiencies under other parts of the Marketing Rule or under the Advisers Act.

<sup>4</sup> See [Marketing Rule Adopting Release](#), *supra* note 1 at footnote 112 (The Commission stated that "Advisers should address their marketing practices in their policies and procedures under the compliance rule.") See also *id.* a 239 (The Commission

## A. Compliance Rule

The staff observed that advisers' compliance policies and procedures typically included processes to comply with the Marketing Rule. The staff also observed that advisers typically provided training for relevant staff on the Marketing Rule requirements and the advisers' corresponding marketing policies and procedures. In general, advisers that updated their written marketing-related policies and procedures typically established a process for reviewing advertisements. Many of these advisers also required preapproval of advertisements before dissemination.<sup>5</sup>

The staff, however, observed instances where advisers' policies and procedures were not reasonably designed or implemented to address compliance with the Marketing Rule, which resulted in gaps for preventing violations of the Marketing Rule, Books and Records Rule, or both. For example, the staff observed policies and procedures that:

- Consisted only of general descriptions and expectations related to the Marketing Rule.<sup>6</sup>
- Did not address applicable marketing channels utilized by the advisers, such as websites and social media.
- Were informal rather than in writing.
- Were incomplete, not updated, or partially updated for certain applicable marketing topics.
- Were not tailored to address advisers' specific advertisements (*e.g.*, policies and procedures to address the General Prohibitions, and advertising requirements for testimonials, endorsements, and third-party ratings utilized by advisers in advertisements).
- Did not adequately address the preservation and maintenance of advertisements and related documents, such as copies of any questionnaires or surveys used in the preparation of a third-party rating (in the event the adviser has received such documents) included or appearing in any advertisement.

---

stated that "... for these compliance policies and procedures to be effective, they should include objective and testable means reasonably designed to prevent violations of the final rule in the advertisements the adviser disseminates. Advisers can establish such... objective and testable compliance policies and procedures through a variety of tools.").

<sup>5</sup> See *id.* (Although the Division observed that many advisers required preapproval of advertisements before dissemination, the [Marketing Rule Adopting Release](#) states that advisers may test through a variety of tools, including, for example, "reviewing a sample of advertisements based on risk or pre-approving templates.").

<sup>6</sup> See SEC, [Compliance Programs of Investment Companies and Investment Advisers](#), Rel. No. IA-2204 (Dec. 24, 2003) (The Commission stated that "policies and procedures should be designed to prevent violations from occurring, detect violations that have occurred, and correct promptly any violations that have occurred." (Internal citations omitted.) As part of this process, "[w]here appropriate, advisers' policies and procedures should employ, among other methods of detection, compliance tests that analyze information over time in order to identify unusual patterns.").

- Were updated to reflect the Marketing Rule but were not implemented. For example, the staff observed advisers' policies that required net of fees performance to be included with any performance advertisement; however, the staff observed those same advisers including only gross performance in advertisements.

## **B. Books and Records Rule**

The staff observed that advisers typically had updated their policies and procedures to reflect Marketing Rule-related books and records maintenance and preservation requirements. Nevertheless, the staff observed Marketing Rule-related books and records deficiencies, including:

- Advisers completed questionnaires or surveys used in the preparation of a third-party rating but did not maintain a copy of such questionnaires.<sup>7</sup>
- Advisers did not maintain copies of information posted to social media.<sup>8</sup>
- Advisers did not maintain documentation to support performance claims included in advertisements.<sup>9</sup>

## **C. Observations Related to Form ADV**

The staff observed, at the time of their examinations, that many advisers had updated their Form ADVs, including: (1) Part 1A, Item 5.L related to advertising; and (2) Part 2A, Item 14 brochure disclosures related to advertising (*e.g.*, client referrals and other compensation), when applicable.

However, the staff also observed Marketing Rule-related deficiencies on Form ADV, such as advisers that inaccurately reported on Form ADV, Part 1A, that their advertisements did not include:

- Third-party ratings, when their websites included third-party ratings or social media posts that touted the firms as being ranked in certain third-party ratings.
- Performance results, when performance results were included in their marketing materials.
- Hypothetical performance, when hypothetical performance was included in advertisements.

The staff also observed advisers using outdated language in their Form ADVs referencing provisions of the prior Cash Solicitation Rule (Advisers Act Rule 206(4)-3), inaccurately

---

<sup>7</sup> See Advisers Act [Rule 204-2\(a\)\(11\)\(ii\)](#).

<sup>8</sup> See Advisers Act [Rule 204-2\(a\)\(11\)\(i\)](#).

<sup>9</sup> See Advisers Act [Rule 204-2\(a\)\(16\)](#).

indicating that no referral arrangements existed, and omitting material terms and compensation of referral arrangements on Form ADV, Part 2A, Item 14.

### III. Observations Regarding Compliance with the Marketing Rule's General Prohibitions

The staff's review for Marketing Rule compliance assessed whether advisers that advertise violated any of the following General Prohibitions:<sup>10</sup>

- Including an untrue statement of a material fact or omitting a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading.
- Including a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Commission.
- Including information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the adviser.
- Discussing any potential benefits to clients or investors connected with or resulting from the adviser's services or methods of operation without providing fair and balanced treatment of any associated material risks or limitations.
- Referencing specific investment advice provided by the adviser in a manner that is not fair and balanced.
- Including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced.
- Providing information that is otherwise materially misleading.

#### A. Observations Related to the Marketing Rule's General Prohibitions

The staff observed the following deficiencies related to the Marketing Rule's General Prohibitions:<sup>11</sup>

Untrue statements of material fact<sup>12</sup> and unsubstantiated statements of material fact.<sup>13</sup> The staff observed advertisements that included statements of material fact that appeared to be untrue. In

---

<sup>10</sup> See Advisers Act [Rule 206\(4\)-1\(a\)](#).

<sup>11</sup> See Advisers Act [Rule 206\(4\)-1\(a\)](#). While the staff references the General Prohibitions, these findings may be violations of multiple prohibitions in the Marketing Rule and other provisions of the Advisers Act.

<sup>12</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(1\)](#).

<sup>13</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(2\)](#) (prohibits advertisements that "[i]nclude a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Commission."). See also [Marketing Rule Adopting Release](#), *supra* note 1, p. 71 (the Commission stated "[a]dvisers would be able to demonstrate this reasonable belief in a number of ways. For example, they could make a record contemporaneous with the advertisement demonstrating the basis for their belief. An adviser might also choose to implement policies and procedures to address how

such instances, the advisers typically ceased disseminating the advertisements or removed the untrue statements. In some cases the advisers acknowledged that the statements of material fact were likely untrue after being unable to substantiate the statements upon demand by the staff during examinations, which also constituted a violation of [Rule 206\(4\)-1\(a\)\(2\)](#) of the Marketing Rule. For example:

- Advertisements stating that the advisers were “free of all conflicts,” when actual conflicts existed.
- Advertisements stating material facts about the advisers’ businesses that were inaccurate, including: (1) statements that a network of personnel perform advisory services for clients when a sole individual performs such services; and (2) statements representing erroneous adviser personnel qualifications, such as their education, experience, and professional designations.
- Advertisements describing material facts about advisory services or products offered that were inaccurate, including: (1) referencing certain investment mandates of the advisers in advertisements when there were no such mandates used by the firms (*e.g.*, ESG mandates);<sup>14</sup> (2) claiming that investment processes were validated by professional institutions when they were not; (3) stating that the adviser considered certain risk tolerances when recommending investment strategies when all clients were placed into the same strategy without consideration of risk tolerances; (4) referencing a list of approved securities that did not exist; (5) referencing formalized securities screening processes that did not exist; and (6) misrepresenting the advisers’ client base, such as describing the adviser as a “private fund adviser” when the firm did not advise any private funds.
- Advertisements publicizing the receipt of certain awards or accolades that were not received.

*Omission of material facts or misleading inference.* The staff observed advertisements that appeared to omit material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading.<sup>15</sup> The staff also observed advertisements that included information that could have reasonably caused untrue or misleading implications or inferences to be drawn concerning material facts relating to the advisers.<sup>16</sup> For example:

---

this requirement is met. However, if an adviser is unable to substantiate the material claims of fact made in an advertisement when the Commission demands it, we will presume that the adviser did not have a reasonable basis for its belief.”)

<sup>14</sup> See Division, Risk Alert: [The Division of Examinations’ Review of ESG Investing](#) (April 9, 2021) (The Division uses the term “ESG” in the broadest sense to encompass terms such as “socially responsible investing,” “sustainable,” “green,” “ethical,” “impact,” or “good governance” to the extent they describe environmental, social, and/or governance factors that may be considered when making an investment decision.).

<sup>15</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(1\)](#).

<sup>16</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(3\)](#).

- Advertisements contained statements that advisers were different from other advisers because they acted in the “best interest of clients,” without disclosing that all investment advisers have a fiduciary duty to act in their clients’ best interests.
- Advertisements recommended certain investments (*e.g.*, on podcasts or websites) without disclosing the conflicts of interest attributed to the compensation paid to or received by the advisers for such recommendations.
- Advertisements that contained untrue or misleading claims, such as: (1) stating that the advisers were “seen on” national media, implying appearances in national news media, without disclosing that the “appearances” were in fact paid advertisements; and (2) advertising images of celebrities in marketing materials in a manner that implied the celebrities endorsed the firms when such celebrities did not endorse the firms.
- Advertisements that contained untrue or misleading performance claims, including: (1) advertising cumulative profits that the advisers believed were not achievable or were impossible to achieve without unlimited money to invest, (2) presenting performance information that did not provide adequate disclosure regarding the share classes included in the performance returns, (3) using lower fees in calculations for net of fees performance returns than were offered to the intended audience, and (4) omitting material information regarding fees and expenses used in calculating returns.
- Advertisements cited SEC registration beyond factual statements as to advisers’ registration status in a way to imply 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. The staff also observed advisers including the SEC logo on their websites with the purpose of implying that the websites or the advisers had been approved or endorsed by the SEC.
- Advertisements contained third-party ratings: (1) implying the advisers were the sole top recipients of certain awards when the awards went to multiple recipients or the advisers were not the top recipients; and (2) indicating that the advisers were highly rated by various organizations without disclosing that the methodologies for such ratings were based primarily or solely on factors that were not related to the quality of investment advice, such as assets under management, the number of clients, or that adviser personnel nominated fellow employees for such awards.<sup>17</sup>
- Advertisements included testimonials that were misleading. For example, advisers included testimonials from clients of a third-party product on the advisers’ websites without any disclosures explaining the context of the testimonials, implying that the testimonials were about the advisers’ services rather than the third-party product.

---

<sup>17</sup> See [Marketing Rule Adopting Release](#), *supra* note 1 at 163 (The Commission stated, “an adviser’s advertisement would be misleading if it indicates that the adviser is rated highly without disclosing that the rating is based solely on a criterion, such as assets under management, that may not relate to the quality of the investment advice.”).

- Performance advertisements contained information that was misleading, such as:
  - Benchmark index comparisons that did not define the index or provide sufficient context to enable an understanding of the basis for such comparison or disclose that the benchmark performance did not include reinvestment of dividends.<sup>18</sup>
  - Performance presentations that contained: (1) outdated market data information only (e.g., market data from more than five years prior); or (2) investment products that were no longer available to clients and included lower investment costs than were available.
  - Statements or presentations regarding: (1) advisers' performance track record with securities that were not purchased by the advisers in a similar manner in their clients' accounts; (2) claims that the advisers achieved above average performance results without clarifying that the advisers did not yet have clients or performance track records; and (3) investment recommendations containing performance information that did not include disclosures to provide context to the presentations, such as advertising performance during time periods when most investors would have experienced the advertised performance returns because of general market performance.<sup>19</sup>

*Fair and balanced treatment of material risks or limitations.*<sup>20</sup> The staff observed advertisements that included statements about the potential benefits connected with the advisers' services or methods of operation that did not appear to provide fair and balanced treatment of any material risks or material limitations associated with the potential benefits. For example, the 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.*<sup>21</sup> The 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. The staff also observed advisers that had not established criteria in their policies and procedures to ensure references to specific investment advice shown in advertisements were provided in a fair and balanced manner.

---

<sup>18</sup> See *id.* at 168 (The Commission stated, "advisers should evaluate the particular facts and circumstances that may be relevant to investors, including the assumptions, factors, and conditions that contributed to the performance, and include appropriate disclosures or other information such that the advertisement does not violate the prohibitions in paragraph (a) of the final rule or other applicable law. Depending on the facts and circumstances, disclosures may include: (1) the material conditions, objectives, and investment strategies used to obtain the results portrayed; (2) whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; (3) the effect of material market or economic conditions on the results portrayed; (4) the possibility of loss; and (5) the material facts relevant to any comparison made to the results of an index or other benchmark.").

<sup>19</sup> See *id.*

<sup>20</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(4\)](#).

<sup>21</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(5\)](#).

*Inclusion or exclusion of performance results or time periods in manners that were not fair and balanced.*<sup>22</sup> The staff observed advertisements that included or excluded certain performance results or presented performance time periods in manners that were not fair and balanced. For example:

- Advertisements that did not disclose the time period or did not disclose whether the returns were calculated for the same time period as additional performance information included in the same advertisement.
- Advertisements that included or excluded certain performance results in manners that were not fair and balanced, such as advertisements that included the performance of only realized investment information in the total net return figure and excluded unrealized investments.

*Advertisements that were otherwise materially misleading.*<sup>23</sup> The staff observed advertisements that appeared to otherwise be materially misleading, such as presenting disclosures in an unreadable font on websites or in videos.

#### **IV. Conclusion**

In sharing these staff observations, the Division encourages advisers to reflect upon their own practices, policies, and procedures and to implement any appropriate modifications to their training, supervisory, oversight, and compliance programs.

---

*This Risk Alert is intended to highlight for firms risks and issues that Division staff has identified. In addition, this Risk Alert describes risks that firms may consider to (1) assess their supervisory, compliance, and/or other risk management systems related to these risks, and (2) make any changes, as may be appropriate, to address or strengthen such systems. Other risks besides those described in this Risk Alert may be appropriate to consider, and some issues discussed in this Risk Alert may not be relevant to a particular firm's business. The adequacy of supervisory, compliance and other risk management systems can be determined only with reference to the profile of each specific firm and other facts and circumstances.*

---

<sup>22</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(6\)](#).

<sup>23</sup> See Advisers Act [Rule 206\(4\)-1\(a\)\(7\)](#).