



# RISK ALERT

DIVISION OF EXAMINATIONS

June 8, 2023

## Examinations Focused on Additional Areas of the Adviser Marketing Rule<sup>1</sup>

### I. Introduction

The Division of Examinations is publishing this Risk Alert to inform investment advisers registered or required to be registered with the SEC (“advisers”), including advisers to private funds, about additional areas of emphasis during examinations focused on amended Rule 206(4)-1 (the “Marketing Rule”) under the Investment Advisers Act of 1940 (“Advisers Act”).<sup>2</sup> On September 19, 2022, the Division published a Risk Alert describing the initial areas of review related to examining advisers for compliance with the Marketing Rule.<sup>3</sup> While the staff’s focus on these areas continues, the staff is also increasing its focus on other Marketing Rule-related areas during examinations.

### II. Initial Marketing Rule Exam Areas of Review

As previously announced, the staff has been reviewing the following areas:

- *Policies and procedures*, such as whether 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.
- *Substantiation requirement*, such as whether advisers have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements.
- *Performance advertising requirements*, including whether advisers are in compliance with performance advertising requirements in the Marketing Rule.
- *Books and records*, such as whether advisers are in compliance with Advisers Act Rule 204-2, as amended, that requires advisers to make and keep certain records, such as

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<sup>1</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>2</sup> See [Marketing Rule Adopting Release](#), Rel. No. IA-5653 (Dec. 22, 2020).

<sup>3</sup> See Division of Examinations, [Risk Alert: Examinations Focused on the New Investment Adviser Marketing Rule](#).

records of all advertisements they disseminate, including certain internal working papers, performance related information, and documentation for oral advertisements, testimonials, and endorsements.

The staff's focus on these areas continues. The Division encourages advisers to review their websites and other marketing materials for compliance with the Marketing Rule, including ensuring that they have a reasonable basis for believing they will be able to substantiate material statements of fact and that their performance advertising, including extracted performance and hypothetical performance, complies with the requirements of the Marketing Rule.

The Division also encourages advisers to review whether they 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.

### **III. Continuing Review for Compliance with the General Prohibitions**

As a component of examinations that include a review of advisers' marketing practices, the staff has, and will continue to, focus on whether advisers have disseminated advertisements that violate any of the following general prohibitions:

- 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; or
- including information that is otherwise materially misleading.

#### **IV. Additional Marketing Rule Areas of Emphasis**

The staff also is conducting focused examinations, as well as broad reviews, for compliance with other aspects of the Marketing Rule, which include, but are not limited to:

##### ***Testimonials and Endorsements***

The staff is reviewing whether advisers are in compliance with the Marketing Rule requirements regarding the use of testimonials and endorsements in an advertisement, including whether:

- *Disclosures are provided*, including clear and prominent disclosure of whether the person giving the testimonial or endorsement (the “promoter”) is a client or investor, that the promoter is compensated, if applicable, and of material conflicts of interest.
- *Oversight conditions are met*, such as whether advisers have a reasonable basis for believing that the testimonials or endorsements disseminated comply with the requirements of the Marketing Rule.
- *Written agreements are entered into*, where required, such as written agreements with promoters, unless the promoters are applicable affiliates of the advisers and such affiliation is readily apparent or disclosed or the promoters receive *de minimis* compensation (i.e., \$1,000 or less, or the equivalent value in non-cash compensation, during the preceding twelve months).
- *Ineligible persons have been compensated for testimonials or endorsements*, if the adviser knew or reasonably should have known the person was ineligible, including certain “bad actors” that are prohibited from acting as promoters, unless such promoters meet the conditions for exemptions.

##### ***Third-Party Ratings***

The staff will review whether advisers are in compliance with the Marketing Rule requirements regarding the use of third-party ratings in advertisements, including:

- *The adviser provides, or reasonably believes that the third-party rating provides, clear and prominent disclosure of:* (i) the date on which the rating was given and the period of time upon which the rating was based; (ii) the identity of the third party that created and tabulated the rating; and (iii) if applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.
- *Questionnaires or surveys used in preparation of a third-party rating meet certain conditions*, such as that the adviser has a reasonable basis for believing that such questionnaire or survey is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result.

## ***Form ADV***

The Commission amended Form ADV to require advisers to provide additional information regarding their marketing practices. The staff will review whether advisers accurately completed these questions in their annual Form ADV amendments.

### **V. Conclusion**

In sharing additional examination review areas for the Marketing Rule, 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.

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*This Risk Alert is intended to highlight for firms risks and issues that EXAMS 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.*

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