

SEC's Division of Examinations Highlights Importance of Compliance Policies and Procedures in Risk Alert Regarding the Advisers Act Marketing Rule

September 21, 2022

On September 19, 2022, the Division of Examinations (“EXAMS”) of the Securities and Exchange Commission (the “SEC”) published a [risk alert](#) (the “Risk Alert”) previewing EXAMS’ anticipated review areas in examinations of SEC-registered investment advisers, including advisers to private funds, under the new Marketing Rule.¹

As of the compliance date for the Marketing Rule on November 4, 2022, registered investment advisers must comply with the rule’s new provisions and have in place appropriate written compliance policies and procedures covering new obligations imposed by the rule. EXAMS intends to conduct a coordinated review of registered advisers’ compliance with the Marketing Rule through compliance sweeps and other initiatives that will begin shortly after the compliance date.

Given the broad series of Marketing Rule-focused national examination sweeps that are contemplated, it is unlikely that EXAMS will provide an overview of its findings and observations until sometime in 2023, at the earliest.² We also do not expect policy staff in the Division of Investment Management to issue any further interpretive guidance or FAQs pertaining to the Marketing Rule before the November 4 compliance date. Therefore, as discussed in more detail below, it is particularly important for registered advisers to prepare now by educating themselves on the new requirements and making any necessary updates to their marketing materials and policies and procedures.

Areas of Focus. The Risk Alert identifies several key areas of focus that EXAMS expects to cover in its broad compliance sweeps. These include:

- Advertising disseminated since the November 4, 2022 compliance date, in particular:
 - compliance with substantiation requirements

¹ Amendments to Rule 206(4)-1 under the Investment Advisers Act of 1940 adopted on December 22, 2020 (the “Marketing Rule”).

² This process is expected to be handled at the national, not the regional level. We expect that this will provide consistency in EXAMS’ observations of practices, but may delay the issuance of EXAMS’ observations.

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- performance data, including net performance obligations and compliance with requirements relating to extracted performance, hypothetical performance, and predecessor performance
 - The sufficiency of policies and procedures in place that seek to ensure compliance with the Marketing Rule; and
 - Compliance with the Marketing Rule’s books and records requirements.

What Advisers Should Do Now. With the compliance date rapidly approaching, sponsors should assess their practices with respect to marketing. In particular, advisers should consider the topics highlighted below and determine whether, in light of their firm’s particular practices, additional changes to their policies or marketing materials may be necessary.

- **Current marketing materials:** advisers should review any marketing materials that will be made available to prospective investors after the compliance date, and make any updates needed to satisfy the requirements of the Marketing Rule. Consider that not only marketing decks and similar materials may fall within the scope of the Marketing Rule; information about the adviser and earlier funds contained in data rooms accessible to prospective investors, and marketing materials used by placement agents may also be “advertisements.”
- **Compliance manuals:** advisers should also seek to ensure that their written compliance policies and procedures reflect any updates needed to comply with the Marketing Rule. Among others, advisers should document their policies with respect to (i) presenting hypothetical performance data in marketing materials and otherwise complying with the hypothetical performance requirements; (ii) having a reasonable basis to believe that the adviser can substantiate material statements of facts in advertisements, potentially through the implementation of contemporaneous recordkeeping; (iii) establishing procedures for calculating gross and net performance figures, including the methodologies used, assumptions and criteria for calculations, and comparable methods; (iv) the oversight of placement agents and other third-parties that provide compensated endorsements; and (v) preventing and identifying violations of the Marketing Rule.
- **Books and Records:** advisers should assess whether they are in compliance with the new provisions of the Advisers Act books and records requirements under Rule 204-2 under the Act adopted as a result of the new Marketing Rule.

Please do not hesitate to contact us with any questions.

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