

## SEC Risk Alert Marketing Rule Compliance Risk Alert

In April 2024, the Securities and Exchange Commission (**SEC**) Examination Division published a risk alert providing information regarding investment advisers' compliance with amended Rule 206(4)-1 (the **Marketing Rule**) under the Investment Advisers Act of 1940. This alert followed a prior risk alert in June 2023 and noted observations from SEC examinations since the November 2022 Marketing Rule compliance date. Marketing Rule compliance has been a stated priority for the SEC's examination program for fiscal years 2023 and 2024, with examination targets selected, in part, from investment adviser responses to Form ADV questions on marketing activities. It is important to note that while the Marketing Rule only applies to registered investment advisers (**RIAs**), many of the deficiencies noted in the risk alert are similarly problematic under Rule 206(4)-8 (the **Private Fund Anti-Fraud Rule**), which is also applicable to exempt reporting advisers (**ERAs**). The following are observations highlighted in the risk alert.

### Compliance Rule / Books & Records / Form ADV

- **Compliance Rule** – Adviser compliance policies and procedures typically had been updated to include procedures to comply with the Marketing Rule, with established processes for reviewing and pre-approval advertisements prior to dissemination.
  - **Compliance Training** – Advisers typically provide training for relevant staff on Marketing Rule requirements and the firm's marketing policies and procedures.
  - **Compliance Policy Violations** – In some instances, advisers' policies and procedures were not reasonably designed or implemented to effectively address compliance with the Marketing Rule, including the following concerns:
    - *Efficacy* – Policies that were informal but not written, incomplete, not updated or partially updated, or included only general descriptions of the Marketing Rule without sufficient procedures for compliance.
    - *Customization* – Policies that were not tailored to the adviser's specific advertising and marketing practices or that did not address the marketing channels (such as websites and social media) used by the adviser.
    - *Implementation* – Policies that were not effectively implemented. For example, the policies required net-of-fee performance to be included in performance advertisements, but only gross performance was included.

- **Books & Records Rule** – Advisers typically had updated policies and procedures to reflect required books and records to be maintained in connection with the Marketing Rule.
  - **Books & Records Deficiencies** – Failure to maintain (i) completed questionnaires or surveys used in the preparation of third-party ratings; (ii) copies of information posted to social media; and (iii) documentation to support performance claims in advertisements.
- **Form ADV** – Many advisers had updated Form ADV Part 1A, Item 5.L. to reflect advertising practices and Part 2A, Item 14 related to advertising, client referrals, and other compensation, when applicable.
  - **Form ADV Part 1 Deficiencies** – Failure to accurately report in Part 1 that advertisements included (i) third-party ratings when websites and included ratings or social media posts touted the firm as being ranked in such ratings; (ii) performance results, when performance was included in marketing materials; and (iii) hypothetical performance, when such performance was included in advertisements.
  - **Form ADV Part 2 Deficiencies** – (i) use of outdated language in Form ADV referencing the prior Cash Solicitation Rule (Rule 206(4)-3); (ii) inaccurately indicating that no referral arrangements existed; and (iii) omitting material terms and compensation of referral arrangements.

### Compliance with Marketing Rule Provisions

Examiners reviewed for compliance with the provisions of the marketing rule and noted examples of deficiencies with respect to the prohibitions and requirements under the Marketing Rule, as follows:

- **General Prohibitions**
  - **Untrue or Unsubstantiated Statements of Material Fact** – (i) statements noting the absence of conflicts that existed; (ii) erroneous information about the number or qualifications of adviser personnel; (iii) inaccurate information about the adviser’s client base; (iv) inaccurate information regarding investment processes, including ESG and other mandates, investment screening processes, risk tolerances and validations; and (v) claims of awards or accolades that were not received.
  - **Omissions of Material Fact & Misleading Inferences** – (i) overselling the duty to act in the client’s best interest without disclosing that all advisers are subject to such fiduciary duty; (ii) failure to clearly identify compensation paid to celebrities or others, or received by the adviser from others, with respect to

securities recommendations or endorsements; and (iii) implying that SEC registration represented approval or endorsement by the SEC.

- **Misleading References to Third-Party Ratings** – (i) implying the adviser was the sole recipient of top awards when there were multiple recipients or the adviser was not the top recipient; (ii) indicating the adviser was highly rated by various organizations without disclosing methodologies or factors unrelated to investment advice (e.g., AUM or number of clients); and (iii) not disclosing that adviser personnel nominated fellow employees for awards.
- **Misleading Testimonials** – including testimonials from clients of a third-party product on the adviser’s website implying that they were testimonials about the adviser’s services.
- **Otherwise Materially Misleading** – presenting disclosures in an unreadable font on websites or in videos.
- **Performance Presentations**
  - **Misleading Performance Claims** – (i) advertising cumulative profits that were not achievable or impossible to achieve without unlimited money to invest; (ii) presenting without adequate disclosure regarding included share classes; (iii) using lower fees in net calculations than those offered to the intended audience; and (iv) omitting material information regarding fees and expenses used in calculating returns.
  - **Unbalanced Treatment of Material Risks or Limitations** – including statements on social media about potential benefits of advisers’ services or operations that were not balanced by material risks or limitations associated with such benefits.
  - **Unbalanced References to Specific Investments** – (i) reporting only the most profitable investments; (ii) specifically excluding certain lower-performing, unprofitable, or written investments without sufficient information or context; and (iii) failure to establish criteria in policies and procedures to ensure references to specific investors were fair and balanced.
  - **Performance Selection & Time Periods** – (i) failure to disclose performance time periods; (ii) outdated market data information (e.g., more than 5 years old); (iii) performance calculated over different time periods or not disclosing whether returns were calculated for the same time period; and (iv) including only realized investments while excluding unrealized investments.

See Risk Alert Announcement – <https://www.sec.gov/exams/announcement/risk-alert-041724>

See Risk Alert - [exams-risk-alert-marketing-observation-2024.pdf \(sec.gov\)](#)