



## RISK ALERT

DIVISION OF EXAMINATIONS

September 19, 2022

### Examinations Focused on the New Investment Adviser Marketing Rule<sup>1</sup>

#### I. Introduction

On December 22, 2020, the Securities and Exchange Commission (SEC or Commission) adopted reforms under the Investment Advisers Act of 1940 (Advisers Act) to modernize rules that govern investment adviser advertisements and payments to solicitors. The amendments created a single rule that replaced the previous advertising and cash solicitation rules.<sup>2</sup> The Division of Examinations is publishing this Risk Alert to inform SEC-registered investment advisers (investment advisers or advisers), including advisers to private funds, about upcoming review areas during examinations focused on amended Advisers Act Rule 206(4)-1 (Marketing Rule).

The compliance date for the Marketing Rule is November 4, 2022 (Compliance Date).<sup>3</sup> As of the Compliance Date, investment advisers may no longer choose to comply with the previous advertising and cash solicitation rules. In addition, as of the Compliance Date, the staff is withdrawing certain staff statements relating to the previous advertising and cash solicitation rules.<sup>4</sup> Any advertisements disseminated on or after the Compliance Date by advisers registered or required to be registered with the Commission are subject to the Marketing Rule.

Advisers should consider whether they need to update or revise their written policies and procedures, as required by Advisers Act Rule 206(4)-7, to ensure they are reasonably designed to prevent violations by the advisers and their supervised persons of the Marketing Rule. In addition, Advisers Act Rule 204-2 (Books and Records Rule), as amended, will require investment advisers to make and keep certain records, such as records of all advertisements they disseminate, including certain internal working papers, performance related information, and documentation for oral advertisements, testimonials, and endorsements.

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<sup>1</sup> This Risk Alert represents the views of the staff of the Division of Examinations, formerly known as the Office of Compliance Inspections and Examinations or OCIE (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> [Marketing Rule Adopting Release](#), No. IA-5653 (December 22, 2020).

<sup>3</sup> The Marketing Rule became effective on May 4, 2021, with an 18-month transition period until the Compliance Date. Early compliance is permitted so long as the adviser complies with the Marketing Rule in its entirety from the time of election.

<sup>4</sup> [IM Information Update](#), 2021-10 (October 2021).

## **II. Initial Marketing Rule Exam Initiatives and Areas of Review**

The staff will conduct a number of specific national initiatives, as well as a broad review through the examination process, for compliance with the Marketing Rule that will include, but will not be limited to, the following areas:

### ***Marketing Rule Policies and Procedures***

The staff will 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. In the Marketing Rule Adopting Release, the Commission stated its belief 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."<sup>5</sup> Examples of objective and testable means could include, but are not limited to, conducting an internal pre-review and approval of advertisements, reviewing a sample of advertisements based on risk, or pre-approving templates.<sup>6</sup>

### ***Substantiation Requirement***

The staff will review whether investment advisers have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements. The Marketing Rule 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."

In the Marketing Rule Adopting Release, 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 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>7</sup>

### ***Performance Advertising Requirements***

The staff will review whether investment advisers are in compliance with performance advertising requirements in the Marketing Rule, including the prohibitions on including the following in an advertisement:

- gross performance, unless the advertisement also presents net performance;

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<sup>5</sup> [Marketing Rule Adopting Release](#), No. IA-5653 (December 22, 2020).

<sup>6</sup> Id.

<sup>7</sup> Id. (Footnote 221 omitted).

- any performance results, unless they are provided for specific time periods (not applicable to the performance of private funds);
- any statement that the Commission has approved or reviewed any calculation or presentation of performance results;
- 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;
- 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;
- 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
- 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. In addition, the advertising adviser must include all relevant disclosures clearly and prominently in the advertisement.

### ***Books and Records***

In connection with the Marketing Rule, the Commission adopted amendments to the Books and Records Rule. The staff will review for compliance with these requirements. In addition, the Commission amended Form ADV to require advisers to provide additional information regarding their marketing practices. The staff reminds advisers of their obligations to accurately complete these questions in their next annual Form ADV amendment.<sup>8</sup>

### **III. Conclusion**

In sharing initial 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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<sup>8</sup> *Id.* “Advisers filing Form ADV after a[n] ... eighteen-month transition period from the effective date of the rule will be required to complete the amended form. Importantly, Form ADV does not require an adviser to update responses to Item 5 promptly by filing an other-than-annual amendment, and if an adviser submits an other-than-annual amendment, the adviser is not required to update its response to Item 5 even if the response has become inaccurate. Therefore, each adviser is only responsible for filing an amended form that includes responses to the amended questions in Item 5 in its next annual updating amendment that is filed after the eighteen-month transition period.”

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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 (i) assess their supervisory, compliance, and/or other risk management systems related to these risks, and (ii) 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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