

# SEC EXAMS Alert Highlights Investment Adviser Marketing Rule Exam Deficiencies

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*April 24, 2024*

On April 18, 2024, the U.S. Securities and Exchange Commission (SEC) Division of Examinations (EXAMS) issued a Risk Alert summarizing the staff's preliminary observations from examinations involving the compliance by registered investment advisers with Rule 206(4)-1 of the Investment Advisers Act of 1940, as amended (the Marketing Rule). This Risk Alert was published on the heels of the SEC's latest round of Marketing Rule [enforcement settlements](#), including settlements with five investment advisers for Marketing Rule violations related to the use of hypothetical performance.

The Risk Alert primarily addresses the "general prohibition" provisions of the Marketing Rule, in addition to the requirements relating to (1) adopting and implementing policies and procedures; (2) maintaining books and records; and (3) completing Form ADV questions regarding advertisements, specifically those including actual performance and hypothetical performance.

EXAMS noted that its staff observed and provided specific details regarding deficiencies in the following areas:

- Untrue and unsubstantiated statements of material fact regarding the adviser's business;
- Misleading inferences or omission of material facts relating to conflicts, endorsements, performance claims, third party ratings, testimonials, and performance information;
- Fair and balanced treatment of material risks or limitations;
- References to specific investment advice that were not presented in a fair and balanced manner;
- Inclusion or exclusion of performance results or time periods in manners that were not fair and balanced; and
- Advertisements that were otherwise materially misleading as a result of font size, visibility of disclosures, etc. particularly on websites and in videos.

The Risk Alert underscores the SEC's focus on advertisements and Marketing Rule compliance and highlights the need for registered investment advisers to "reflect upon their own practices, policies, and procedures and to implement any appropriate modifications to their training, supervisory, oversight, and compliance programs." However, the Risk Alert does not offer any further interpretations of the provisions of the Marketing Rule or clarifications on the Marketing Rule FAQs previously issued by the SEC's Division of Investment Management.

## CONTACTS

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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