

# Regulatory Alert

## Regulatory Insights for Financial Services

April 2024

### Risk Alert: SEC Marketing Rule Compliance

#### KPMG Insights:

- **More Exams and Enforcements:** Continued Marketing Rule Risk Alerts (coupled with recent enforcement actions) clearly signal heightened supervisory focus.
- **Beyond a General Policy:** Expectations for tailored incorporation of the Marketing Rule into policies and procedures, and that such policies/procedures have been put into practice.
- **Prove and Disclose:** Clear need for clarity in disclosures (Form ADV), as well as the need to maintain copies and documentation to support marketing claims.
- **True, Fair and Balanced:** Avoidance of potentially untrue, unsubstantiated, misleading statements or omissions, etc.—expanding fairness principles across marketing and advertising.

The Securities and Exchange Commission's (SEC) Division of Examinations issues a [Risk Alert](#) to investment advisers, investors, and other market participants regarding areas of examination emphasis and observations on compliance with amended Rule 206(4)-1 (the "Marketing Rule") under the Investment Advisers Act of 1940.

As part of the continued focus on the Marketing Rule, the Risk Alert also provides observations of Marketing Rule-related compliance with and/or reporting on the:

1. Compliance Rule (Advisers Act Rule 206(4)-7)
2. Books and Records Rule (Advisers Act Rule 204-2)
3. General Prohibitions of the Marketing Rule
4. Form ADV Marketing Rule items

#### Examiner Observations Related to Marketing Rule Compliance and Reporting

Observations from SEC examinations of investment advisers' compliance with the Marketing Rule identified areas for improvement, including:

1. **Compliance Rule:** Policies and procedures should be specific, relevant to the marketing channels utilized, complete and current, implemented, consistent with the documentation requirements, and tailored to the adviser's specific advertisements.
2. **Books and Records Rule:** Necessary documentation (and copies, where applicable) should be preserved and maintained, including records such as completed questionnaires or surveys used in the preparation of a third-party rating, copies of information posted to social media, and supporting data for performance claims included in advertisements.
3. **General Prohibitions:** Advertising may not contain statements or information that is generally prohibited, including:

- *Untrue or unsubstantiated statements of material fact*, such as advertisements that contain statements that are untrue or lack a reasonable basis (observations include statements related to conflicts of interest, product or service offerings, awards and accolades).
- *Omissions of material facts or misleading inference*, where advertisements appear to omit material facts necessary to make the statements made not misleading (observations include performance claims, third-party ratings, testimonials).
- *Not providing fair and balanced treatment of material risks or limitations*, such as when the advertisement includes statements about the potential benefits connected with the adviser's services but does not appear to provide fair and balanced treatment of any material risks or limitations associated with the potential benefits.
- *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*.
- *Advertisements that were otherwise materially misleading*, such as an unreadable font on websites or in videos.

4. **Form ADV:** Accuracy of reporting on marketing practices in Form ADV, particularly around the use of third-party ratings, performance results, and hypothetical performance in advertisements.

### Applicability and Scope

The Marketing Rule applies to all SEC-registered investment advisers and regulates advisers' marketing communications, including through traditional advertising methods and digital communications (e.g., websites, social media platforms). As part of the final rulemaking, the SEC also adopted amendments to Form ADV (the investment adviser registration form) and the Books and Records Rule.

The SEC has previously highlighted the Marketing Rule in two Examinations Risk Alerts (see KPMG Regulatory Alert, [here](#)), most recently emphasizing expanding areas of focus, including testimonials and endorsements, third-party ratings, and Form ADV disclosures in addition to ongoing areas of review, including policies and procedures, performance advertising, books and records, and the general prohibitions.

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