

Regulatory Alert

Regulatory Insights for Financial Services

June 2023

SEC Examinations Risk Alert: Marketing Rule

KPMG Regulatory Insight:

- Priority as a “significant focus area” for examinations in 2023.
- Expanding examination focus, with new areas including testimonials and endorsements, third-party ratings, and Form ADV disclosures.
- Continued attention to “fair and balanced” statements in all marketing-related materials and advertisements (including web sites) as well as the ability to demonstrate substantiation of material statements.

The SEC Division of Examinations (Exams) issued a [Risk Alert](#) that is intended to inform investment advisers, including advisers to private funds (collectively, advisers), about areas of emphasis during examinations focused on the “Marketing Rule” (i.e., amended Rule 206(4)-1 under the Investment Advisers Act of 1940). Amendments to the Marketing Rule became effective on May 4, 2021 with compliance required by November 4, 2022 (see KPMG Regulatory Alert, [here](#)). Exams identified compliance with the Marketing Rule as an examination priority and “significant focus area” in 2023.

The Risk Alert discusses the following areas of examination focus under the Marketing Rule:

- Expanded Areas of Emphasis
- Continuing Exam Areas of Review

Details from each of these areas are highlighted below.

Expanded Areas of Emphasis

Seven months after the compliance date of the Marketing Rule, the SEC is alerting advisers that it is expanding its examinations reviews to include focused examinations as well as broad reviews of:

- *Testimonials and Endorsements* in advertisements, including whether:

- Clear and prominent disclosures are provided regarding whether the person giving the testimonial or endorsement (“promoter”) is a client or investor, is compensated, and if there are material conflicts of interest.
- The adviser has a reasonable basis to believe that a testimonial or endorsement complies with requirements of the Marketing Rule.
- Written agreements are entered into, where required.
- “Ineligible persons” are being compensated for testimonials or endorsements.

- *Third-Party Ratings* in advertisements, including whether:

- The adviser provides, or reasonably believes a third-party rating provides, disclosure of:
 - The date on which the rating was given and the period of time upon which the rating was based.
 - The identity of the third-party that created and tabulated the rating.
 - Compensation, if any, provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

- Questionnaires or surveys used in preparation of a third-party rating meet certain conditions, such as the adviser having a reasonable basis for believing that a questionnaire or survey is structured fairly and not designed or prepared to produce any predetermined result.
- *Annual Form ADV filings*, including whether information regarding the advisers marketing practices is accurately completed.

Continuing Exam Areas of Review

Exams staff state that the areas of review previously identified in a September 2022 [Risk Alert](#) will continue to be in focus:

- *Policies and procedures*, including advisers' adoption and implementation of written policies and procedures reasonably designed to prevent violations of the Advisers Act or related rules, including the Marketing Rule.
- *Substantiation requirement*, including advisers' ability to demonstrate they have a "reasonable basis" for believing they will be able to substantiate material statements of fact in advertisements.
- *Performance advertising requirements*, including advisers' compliance with related prohibitions.
- *Books and records*, including advisers' compliance with Advisers Act Rule 204-2 (as amended) that requires

advisers to make and keep certain records (e.g., records of advertisements disseminated, performance related information, and documentation for oral advertisements, testimonials, and endorsements).

Further, Exams staff will also continue to focus on whether advisers have disseminated advertisements that violate general prohibitions, including those against:

- Untrue statements of material facts or omissions of material facts necessary to make the statements made not misleading.
- Material statements of fact that the adviser does not have a reasonable basis for believing it can substantiate upon demand by the SEC.
- Information that could reasonably cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the adviser.
- Including or excluding performance results, or presenting performance time periods, in an unfair or unbalanced manner.

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