

SEC Issues Additional Guidance on Investment Adviser Examinations and Compliance With the Marketing Rule

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The Securities and Exchange Commission (SEC) routinely prepares Risk Alerts to provide helpful information to federally registered investment advisors (advisers). On June 8, the SEC released a **Risk Alert** that described additional areas of review related to the SEC's criteria for examining advisors and private funds for their compliance with Rule 206(4)-1 (Marketing Rule) under the Investment Advisers Act of 1940 (Advisers Act), expanding the exam areas previously identified in its **Sept. 19, 2022 Risk Alert**. This client alert provides a brief overview of the additional Marketing Rule Exam areas that the SEC identified in the recent publication.

Previously Identified Marketing Rule Exam Areas of Review

On Sept. 19, 2022, the SEC published a Risk Alert describing initial areas of review. Four broad areas were identified in this Risk Alert:

1. Policies and procedures (whether advisors have adopted and implemented written policies and procedures reasonably designed to prevent violations of the Marketing Rule)
2. Substantiation requirement (whether advisors have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements)
3. Performance advertising requirements (whether advisors comply with the performance advertising requirements of the Marketing Rule)
4. Books and records (whether advisors comply with the Advisers Act's requirement to keep certain records)

In addition to continued review pursuant to the abovementioned areas, the SEC provided additional areas of review in the June 8 Risk Alert.

Additional Marketing Rule Exam Areas

In evaluating an adviser's compliance with the Marketing Rule, the SEC will examine the adviser's 1) disclosures in connection with testimonials and endorsements, 2) safeguards prior to using third-party ratings, and 3) disclosures on the SEC's amended Form ADV, including but not limited to the facts listed below.

1. Testimonials and Endorsements

- Whether an adviser provided a clear and prominent disclosure of whether a person giving the testimonial or endorsement (promoter) is a client or an investor
- Whether an adviser disclosed whether a promoter is compensated
- Whether an adviser disclosed a promoter's material conflicts of interest
- Whether an adviser had a reasonable basis for believing that the testimonials or endorsements comply with the Marketing Rule
- Whether a written agreement has been entered into with a promoter, unless it was for a de minimis amount
- Whether an adviser knew or reasonably should have known the promoter was ineligible to act as a promoter

2. Third-Party Ratings

- Whether an adviser provided, or reasonably believed that the third-party rating provides, clear and prominent disclosure of 1) the date on which the rating was given and the period of time upon which the rating was based, 2) the identity of the third party that created and tabulated the rating, and 3) if applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating

- Whether an adviser had a reasonable basis for believing that questionnaires or surveys used in the preparation of a third-party rating 1) made it equally easy for participants to provide favorable and unfavorable responses, and 2) were not designed or prepared to produce a predetermined result

3. Form ADV

- The SEC has amended Form ADV to add questions relating to an adviser's marketing practices.
- An adviser's annual Form ADV amendment will be reviewed for the advisor's responses to questions relating to marketing practices.

The SEC encourages advisers to review its practices, policies, and procedures in order to implement any appropriate modifications to remain in compliance with the Marketing Rule.

For further information, guidance, and clarity on how advisers can satisfactorily implement action items identified in the SEC's recent Risk Alert, please reach out to the authors—**Scott Moss**, partner in Lowenstein Sandler's Investment Management Group and chair of the firm's Fund Regulatory & Compliance Group, and **Yvette Yun**, associate in Lowenstein Sandler's Corporate Group—or reach out directly to your regular Lowenstein Sandler contact.

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