

## SEC Risk Alert: EXAMS to Focus on New Advisers Act Marketing Rule

SEPTEMBER 29, 2022

On September 19, 2022, the Division of Examinations (“EXAMS”) of the Securities and Exchange Commission (“SEC”) released a Risk Alert (“Risk Alert”)<sup>[1]</sup> relating to the new investment adviser Marketing Rule, Rule 206(4)-1 (the “Rule”), under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), which the SEC adopted on December 22, 2020. Among other things, the Rule amends the prior Rule 206(4)-1 (the prior Advertising Rule) under the Advisers Act and replaces the prior Rule 206(4)-3 (the prior Solicitation Rule), which had not been substantively updated since their adoption in 1961 and 1979, respectively. The Rule also implements amendments to Form ADV and certain books and records requirement set forth in Rule 204-2 under the Advisers Act.

Registered investment advisers must comply with the Rule beginning on November 4, 2022. Winston & Strawn LLP’s prior summary of the Rule is available [here](#).

EXAMS released the Risk Alert to remind such investment advisers, including advisers to private funds, about potential review areas during examinations relating to the Rule. EXAMS noted that it will conduct a number of specific national initiatives and engage in reviews during the examination process for compliance with the Rule.

Significant areas of focus by EXAMS during such examinations include, but will not necessarily be limited to, Marketing Rule Policies and Procedures, Substantiation Requirement, Performance Advertising Requirements, and Books and Records.

### Marketing Rule Policies and Procedures

EXAMS intends to review whether investment advisers have adopted and implemented written policies and procedures that are reasonably designed to prevent violations of the Rule. The Risk Alert reminds investment advisers that policies and procedures should “include objective and testable means reasonably designed to prevent violations of [the Rule] in the advertisements the adviser disseminates.” The Risk Alert further elaborates that “such 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.”

# Substantiation Requirement

EXAMS intends to review whether investment advisers have a reasonable basis for believing that they can substantiate any material statements of fact that may be set forth in their advertisements. Methods for substantiating material statements of fact in an advertisement could include contemporaneous records demonstrating the basis for the adviser's belief, and implementing policies and procedures to address how the adviser will substantiate any such belief. Investment advisers that are unable to substantiate a material claim of fact will be presumed to have lacked a reasonable basis for believing such material statement of fact.

## Performance Advertising Requirements

Performance advertising has been an area of continued focus of the SEC. The Rule includes certain mandates, and codifies certain SEC guidance that had previously been set forth in various no-action letters. The Risk Alert provides that EXAMS will continue to focus on performance advertising to confirm compliance with the Rule, "including the prohibitions on including the following in an advertisement:

- providing gross performance, unless net performance is also presented;
- providing any performance results, unless they are provided for specific time periods (a restriction that is not applicable to the performance of private funds);
- any statement that the SEC has approved or reviewed any 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."

## Books and Records

Finally, the Risk Alert reminds investment advisers of their obligations under the amendments to the Advisers Act books and records rule<sup>[2]</sup> and new Form ADV disclosure requirements that were implemented under the Rule, and that EXAMS will conduct reviews for compliance with these requirements.<sup>3</sup>

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We can be available at your convenience to discuss the matters addressed in the Risk Alert, including assisting you with reviews of your compliance policies and procedures, as well as other ways such matters may affect your business.

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<sup>[1]</sup> EXAMS's Risk Alert is available at <https://www.sec.gov/files/exams-risk-alert-marketing-rule.pdf>.

<sup>[2]</sup> Such amendments to the books and records rule include a new requirement that investment advisers retain records of all advertisements they disseminate, rather than only advertisements they sent to ten or more persons under the old version of the books and records rule, and certain retention records relating to testimonials and endorsements, which are permitted under the Rule, but subject to certain compliance obligations.

Investment advisers will be required to answer new questions relating to the Rule in their next annual Form ADV amendment.

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