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October 28, 2022

TO: ICI Members

SUBJECTS: Advertising  
Alternative Investments  
Compliance  
Disclosure  
Fund Accounting & Financial Reporting  
Investment Advisers  
Recordkeeping

RE: SEC's Division of Examinations Issues Risk Alert Regarding Investment Adviser Marketing Rule

In December 2020, the SEC adopted rule amendments that replaced the existing Investment Advisers Act advertising and cash solicitation rules for investment advisers and private funds with a single, combined "Marketing Rule."<sup>[1]</sup> The new Marketing Rule does not apply to advertisements about registered investment companies or BDCs. However, for adviser and private fund advertisements, the rulemaking:

- creates a merged marketing rule to cover advertisements, testimonials, endorsements, and solicitations;
- provides general prohibitions against misleading advertisements;
- conditionally allows flexibility in reporting performance, including related, extracted, and hypothetical performance and the use of interactive analysis tools and predecessor performance;
- generally permits the use of testimonials, endorsements (which include referral and solicitation activity), and third-party ratings, subject to conditions; and
- provides guidance on advisers' use of social media and the extraterritorial application of the rule.<sup>[2]</sup>

The compliance date for the Marketing Rule is November 4, 2022.

Earlier this week, the SEC's Division of Examinations issued a risk alert regarding examinations focused on the Marketing Rule ("Risk Alert").<sup>[3]</sup>

The Risk Alert states that advisers should consider whether they need to update or revise their written policies and procedures to ensure that they are reasonably designed to prevent violations of the Marketing Rule by advisers and their supervised persons. The Risk Alert also reminds advisers that related amendments to Rule 204-2 under the Investment Advisers Act (Books and Records Rule) will require advisers to make and keep certain additional records.

The Risk Alert states that the staff will conduct a number of specific national initiatives, as well as a broad review through the examination process, for compliance with the Marketing Rule. Those initiatives and review will include, but will not be limited to, consideration of the following areas:

- the adoption and implementation of written Marketing Rule policies and procedures<sup>[4]</sup>
- compliance with the requirement that advisers have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements (the substantiation requirement);<sup>[5]</sup>

- compliance with requirements related to the inclusion of performance data in advertisements<sup>[6]</sup> and
- compliance with related amendments to the Books and Records Rule.

The Risk Alert also reminds advisers of their obligations to accurately respond to related new Form ADV questions regarding marketing practices in their next annual Form ADV amendment.

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## Notes

[1] *Investment Adviser Marketing*, IA Release No. 5653 (Dec. 22, 2020), available at <https://www.sec.gov/rules/final/2020/ia-5653.pdf> ("Adopting Release").

[2] For a more detailed summary of the Marketing Rule, see ICI Memo to Members No. 33016: <https://www.ici.org/memo33016>.

[3] *Examinations Focused on the New Investment Adviser Marketing Rule*, SEC Division of Examinations (Sept. 19, 2022), available at <https://www.sec.gov/files/exams-risk-alert-marketing-rule.pdf>.

[4] Quoting the Adopting Release, the Risk Alert emphasizes that "for these compliance policies and procedures to be effective, they should include objective and testable means reasonably designed to prevent violations of the final rule in the advertisements the adviser disseminates." The Risk Alert then provides, as examples of "objective and testable means," "conducting an internal pre-review and approval of advertisements, reviewing a sample of advertisements based on risk, or pre-approving templates."

[5] Quoting the Adopting Release, the Risk Alert reiterates that "[a]dvisers would be able to demonstrate this reasonable belief in a number of ways. For example, they could make a record contemporaneous with the advertisement demonstrating the basis for their belief. An adviser might also choose to implement policies and procedures to address how this requirement is met. However, if an adviser is unable to substantiate the material claims of fact made in an advertisement when the Commission demands it, we will presume that the adviser did not have a reasonable basis for its belief."

[6] In this regard, the Risk Alert mentions gross performance, performance results generally, related performance, extracted performance, hypothetical performance, and predecessor performance.