

# Recent SEC Risk Alert Informs Advisors of Focus Areas for Upcoming Examinations Under Marketing Rule

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On June 8, 2023, the US Securities and Exchange Commission's (SEC) Division of Examinations (DOE) published a risk alert informing advisors of focus areas during examinations for the Marketing Rule.

## Initial Areas of Review for Marketing Rule

The DOE previously announced it would prioritize the following areas during examinations:

- *Policies and Procedures.* Advisors are required to adopt and implement policies and procedures reasonably designed to prevent violations of the Advisors Act.
- *Substantiation Requirement.* Advisors must have a reasonable basis for believing they can support material statements of fact in their advertisements.
- *Performance Advertising Requirements.* Performance advertising, including extracted and hypothetical performance, must comply with the Marketing Rule, e.g., presenting net performance whenever gross performance is presented.
- *Books and Records.* Advisors Act Rule 204-2 mandates that advisors make and keep certain required records.
- *Form ADV.* The SEC has amended Form ADV to require additional information about an advisor's marketing practices.

The DOE will continue to focus on these areas, as well as the dissemination of advertisements that violate certain general prohibitions. As a result, advisors should review their websites and other marketing materials to ensure compliance with the Marketing Rule.

## Additional Areas of Review for Marketing Rule

In addition to the initial areas of review, the DOE is also emphasizing compliance with the following aspects of the Marketing Rule:

- *Testimonials and Endorsements.* Advertisements that include testimonials and endorsements must contain certain disclosures and reasonably comply with the Marketing Rule's requirements that the advisor:
  - has a reasonable basis for believing that any testimonials or endorsements used in its marketing materials comply with the Marketing Rule;
  - has ensured written agreements are in place for situations that require them (e.g., agreements with certain promoters); and
  - has not compensated an ineligible person for an endorsement or testimonial who is prohibited from acting as a promoter.
- *Third-Party Ratings.* Advisors must provide clear and prominent disclosures with third-party ratings included in advertisements, such as:
  - the date on which the rating was given and the time period upon which the rating was based;
  - the identity of the third party that created and tabulated the rating; and
  - if applicable, that the advisor has provided compensation in connection with obtaining or using the third-party rating.

Additionally, advisors must have a reasonable basis for believing the questionnaires or surveys used to prepare any third-party ratings meet the Marketing Rule's requirements, such as that the questionnaire or survey is structured to make it equally easy for a participant to provide favorable and unfavorable responses and is not designed or prepared to produce a predetermined result.

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