DORSEY

DORSEY + WHITNEY LLP

SEC Issues Guidance on Investment Adviser Advertising Rule

On September 14, 2017, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a new Risk Alert[1] outlining the most frequent compliance issues relating to Rule 206(4)-1 (the "Advertising Rule") under the Investment Advisers Act of 1940 (the "Advisers Act"). OCIE identified these compliance deficiencies as part of its 2016 "Touting Initiative", which included examinations of nearly 70 registered investment advisers on their use of accolades in marketing materials. The Touting Initiative was launched in response to the regularity with which OCIE encountered the use of accolades in advertisements without disclosure of materials facts surrounding them.

The Risk Alert summarizes OCIE's examination observations from its Touting Initiative and encourages advisers to examine the adequacy of disclosures they provide to clients when including accolades in their marketing materials. Examples of accolades OCIE found to be problematic include:

- Misleading use of third party rankings or awards;
- Misleading use of professional designations; and
- Prohibited use of testimonials.

In addition to deficiencies stemming from the use of accolades, the Risk Alert also lists the following as the most frequent Advertising Rule compliance issues in OCIE's examination of investment advisers:

- Misleading Performance Results;
- Misleading One-on-One Presentations;
- Misleading Claims of Compliance with Voluntary Performance Standards;
- Cherry-Picked Profitable Stock Selections;
- Misleading Selection of Recommendations; and
- Advertising Rule Compliance Policies and Procedures.

In response to OCIE examinations where the above-discussed deficiencies were identified, investment advisers elected either to remove the misleading language from

Related Capabilities

- Investment Management
- Securities & Financial Services Litigation & Enforcement
- Financial Services Regulatory

their advertisements or to add appropriate disclosures that were designed to prevent the advertisements from being misleading. With these Advertising Rule compliance issues in mind, we recommend investment advisers review their compliance programs and practices to ensure that any existing and potential deficiencies are detected and that proper remedial actions are taken.

This Risk Alert is one in a series recently issued by OCIE this year to assist investment advisers in adopting and implementing effective compliance programs. In February 2017, OCIE issued a Risk Alert[2] on the most frequent exam compliance topics identified in investment adviser examinations. In August 2017, OCIE issued a Risk Alert[3] on Observations from Cybersecurity Examinations. For more information on OCIE's February and August 2017 Risk Alerts, please refer to our related client alerts.[4, 5]

Additional Resources

For a more in depth conversation on common compliance issues and SEC examination hot topics for investment advisers, we invite you to join Dorsey & Whitney LLP's Private Funds Symposium on September 27, 2017.[6] One of our seven discussion panels will focus on Private Fund Investment Adviser Regulation and Enforcement and will include coverage on the recent SEC Risk Alerts and guidance. For more information, please contact Genna Garver.

[1] https://www.sec.gov/ocie/Article/risk-alert-advertising.pdf

[2] https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf

[3] https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf

[4] https://www.dorsey.com/newsresources/publications/client-alerts/2017/02/common-compliance-issues-for-investment-advisers

[5] https://www.dorsey.com/newsresources/publications/client-alerts/2017/08/sec-cybersecurity-risk-alert

[6] https://www.dorsey.com/newsresources/events/event/2017/09/dorsey-annual-private-funds-symposium