

SEC Settles with Five Investment Advisers for Marketing Rule Violations

by David Tang and Michael Schmieder

The SEC recently settled charges against five registered investment advisers for violations of the marketing rule ("Marketing Rule") under the Investment Advisers Act of 1940 ("Advisers Act").^[1]

Under the Marketing Rule, registered investment advisers are prohibited from including any hypothetical performance in their advertisements unless, among other things, 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 of the advertisement.^[2] In adopting this requirement, the SEC observed that advisers generally would not be able to include hypothetical performance in advertisements directed to a mass audience or intended for general circulation because an adviser generally could not form any expectations about their financial situation or investment objectives.^[3] The SEC found all five advisers advertised hypothetical performance on their respective websites without adopting or implementing the appropriate policies and procedures required by the Marketing Rule.

One of the five advisers committed further Marketing Rule violations, including making false and misleading statements in advertisements, advertising misleading model performance, being unable to substantiate performance shown in its advertisements, and failing to enter into written agreements with persons that it compensated for endorsements.

Without admitting or denying the SEC's findings, the advisers consented to the SEC's order stating that they violated the Advisers Act and agreed to pay \$220,000 in combined penalties. Four of the advisers paid lower civil money penalties that reflected certain corrective steps taken by these advisers prior to being contacted by the SEC.

Dorsey Observations

These actions speak to the SEC's continued enforcement of the Marketing Rule, including requirements regarding hypothetical performance, the substantiation of material

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- David Tang
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statements of fact, compensated endorsements, and the general prohibition against false and misleading statements. This is the second set of cases as part of the SEC's ongoing Marketing Rule sweep.^[4] In September 2023, nine investment advisers agreed to settle charges of Marketing Rule violations with the SEC and pay \$850,000 in combined penalties.

Dorsey's compliance services are available to assist advisers with compliance with the Marketing Rule.

[1] See SEC Press Release "SEC Charges Five Investment Advisers for Marketing Rule Violations" available at https://www.sec.gov/news/press-release/2024-46?utm_medium=email&utm_source=govdelivery.

[2] See Rule 206(4)-1(d)(6)(i) under the Investment Advisers Act of 1940.

[3] See SEC Final Rule Release "Investment Adviser Marketing" (Release No. IA-5653) at page 220 available at <https://www.sec.gov/files/rules/final/2020/ia-5653.pdf>.

[4] See SEC Press Release "SEC Sweep into Marketing Rule Violations Results in Charges Against Nine Investment Advisers" available at <https://www.sec.gov/news/press-release/2023-173>.