

The New Adviser Marketing Rule: Division of Examinations Alert

The Division of Examinations issued a Risk Alert on September 19, 2022 focused on Advisers Act Rule 206(4)-1, the Advertising Rule, adopted on December 22, 2020. The Rule becomes effective on November 4, 2022. Advisers can adopt the Rule prior to that date if all of its provisions are included in the advisers' policies and procedures.

The new Marketing Rule replaced a number of rules with what is now one Rule. The Risk Alert begins by cautioning advisers to consider "whether they need to update or revise their written policies and procedures" to make sure that they not only reflect the teachings of the new Rule but also properly implement them. The Division cautions that advisers should also review the impact of the new Rule on other books and records provisions as well as Form ADV.

The Risk Alert is divided into four key areas:

1. **The Rule policies and procedures:** Here the Division focuses on two key themes of the new Marketing Rule – objective and testable policies and procedures. Specifically, in the Rule release the Commission stated its belief 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 . . ." Thus, for example, an adviser might conduct pre-review testing to ensure compliance.
2. **Substantiation requirement:** Key to any reasonable belief of the adviser is the ability to offer substantiation for the belief. Having a reasonable basis for a belief is essentially a function of the objective and testable notions discussed above. The Commission described it this way in the Release: the adviser "could make a record contemporaneous with the advertisement demonstrating the basis for their belief. The Adviser might also choose to implement policies and procedures to address how this requirement is met." If the adviser cannot substantiate its claims, the Risk Alert notes that the Division will presume the adviser did not have a reasonable belief.
3. **Performance advertising requirements:** Part of complying with the Marketing Rule which the Division will test is complying its prohibitions. Those include:
 1. Using gross performance in an advertisement unless it also includes net

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performance;

2. Including performance results unless they are for specific time periods, although this does not apply to private funds;
3. Making any statement that the Commission has approved or reviewed the calculation, presentation or results;
4. If the advertisement includes the performance of portfolios other than the one being advertised, including performance results from fewer than all portfolios with similar investment policies, with limited exceptions;

The focus of the Alert is to encourage advisers to carefully reflect on their policies and procedures in the area in view of the new Marketing Rule.