

New EXAMS Guidance – Next Steps for Private Fund Managers

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On June 8, 2023, the SEC Division of Examinations staff (EXAMS) published a **risk alert** focused on the new Marketing Rule (Rule 206(4)-1 under the Investment Advisers Act of 1940). While this new risk alert largely mirrors **earlier guidance** from EXAMS, there are several takeaways for private fund managers to consider.

Considering the new risk alert alongside our experiences in numerous ongoing SEC examinations, we suggest that registered investment advisers consider the following steps:

- *Collect All “Advertisements.”* Response periods for initial productions continue to shorten, and it is now common for the initial request to cover all “advertisements” used or circulated since November 4, 2022. Fund managers would be well advised to maintain a comprehensive, and continuously updated, folder with all “advertisements” and other marketing materials used since that date.
- *Assess Testimonials and Endorsements.* The new risk alert focuses on “testimonials” and “endorsements” (the Marketing Rule definitions of which are broader than might be expected). Investment advisers should consider flagging, at the approval stage, all marketing materials that contain testimonials or endorsements, and maintaining a log to allow them to be produced upon request. In addition, EXAMS may require that the adviser demonstrate the following for all testimonials and endorsements.
 - Appropriate disclosures were provided to recipients.
 - Oversight and approval conditions were met.
 - Where required, the requisite written agreements were entered into.
 - No ineligible persons were compensated for testimonials or endorsements.

It should go without saying that concurrently documenting these four elements during the approval process will save many hours of stress during an actual examination.

- *Review Third-Party Ratings.* If an “advertisement” utilizes third-party ratings or rankings, the investment adviser should be prepared to show that:
 - All required disclosures were timely made and were clear and prominent; and
 - Any questionnaires or surveys used in preparation of a third-party rating or ranking satisfy the requirements of the Marketing Rule.
- *Double Check the ADV.* EXAMS also emphasized that it will review whether an investment adviser has accurately responded to new Item 5.L. in Part 1A of its Form ADV, which requires additional information regarding the adviser’s marketing practices.

With so many examinations open, it would be premature to identify which Marketing Rule issues have garnered the lion’s share of EXAMS’ attention; however, the 2022 ESG examination sweep may be instructive. Deficiency

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letters in those ESG exams largely focused on demonstrable gaps between affirmative statements made in marketing materials and the adviser's documented support of those statements, relying on general anti-fraud and fiduciary principles. With the new Marketing Rule's substantiation obligations and its "fair and balanced" requirement, it will be even easier for the Staff to cite advisers for any daylight between a claim in an advertisement and the corresponding documentation.

With the broadening scope and shortened response times we are increasingly seeing on exams, preparing materials and responses in advance will almost certainly allow Compliance personnel to devote more time and energy to responses that are unique to the adviser's business and investment program, and to spend less time responding to broad but predictable requests.

If you need assistance or have questions regarding this alert, please contact your Akin relationship attorney or one of the authors.

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