

# Regulatory and Enforcement Alert

## SEC Marketing Rule Settlements Total 10 Before One Year Anniversary of Compliance Date

September 12, 2023

On September 11, 2023, [the SEC announced settled charges](#) against nine registered investment advisers for violations of the Amended Marketing Rule (“Marketing Rule”) for advertising hypothetical performance to the general public on their websites without adopting and/or implementing policies and procedures required by the Marketing Rule. The advisers settled to anti-fraud charges (Section 206(4) of the Advisers Act) and violations of the performance section of the Marketing Rule (Rule 206(4)1-d). Two of the nine advisers also settled to related record-keeping violations. The advisers paid civil penalties ranging from \$50,000 to \$175,000 each, for a total amount of \$850,000 in combined penalties.

The relevant portion of the Marketing Rule, adopted in December 2020 which mandated compliance as of November 4, 2022, provides that a registered investment adviser is prohibited from including any hypothetical performance in its advertisements unless, among other things, it “[a]dopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement.”

Yesterday’s Orders generally found that the advisers failed to adopt and implement policies and procedures designed to ensure just that—*i.e.*, that the hypothetical performance (such as back-tested performance and models) was relevant to the likely financial situation and investment objectives of the intended audience—and as a result the advisers disseminated hypothetical performance in advertisements to a mass audience (*i.e.*, not limited to sophisticated investors or particular intended audience).

In the accompanying [press release](#), Enforcement Director Grewal made clear that enforcement efforts continue with respect to investment advisers whose hypothetical performance advertisements are disseminated without appropriate policies in place, noting that “hypothetical performance advertisements may present an elevated risk for prospective investors whose likely financial situation and investment objectives don’t match the advertised investment strategy.”

These nine settlements follow [the first Marketing Rule case](#) that the SEC filed on August 21, 2023, against an investment adviser for misrepresenting hypothetical performance. Together, the ten settlements were announced before the one year anniversary of the compliance date last year of November 4, 2022.

## Takeaways

- Registered investment advisers should ensure hypothetical performance in advertisements is relevant to the likely financial situation and investment objectives of the intended audience, and carefully review any performance that may be directed to a mass audience; this requirement applies in all instances but is particularly acute when targeting potential retail investors.
- Registered investment advisers should ensure they have adequate policies adopting the Marketing Rule and that the policies are tailored to its business so as to be implemented effectively.
- The SEC continues to show its ability to leverage data analytics to sift through large pools of data and promptly identify potential violations.
- The SEC is eager to police compliance with the hypothetical performance provisions of the Marketing Rule through enforcement actions, rather than solely through deficiencies in examinations.
- These actions could potentially signal the SEC's willingness to police compliance with other aspects of the Marketing Rule through enforcement actions.

## Conclusion

Taken together, there have been ten Marketing Rule settlements to date—all before the one year anniversary of the compliance date last year of November 4, 2022. The settled Orders note the compliance date was 18 months after the Marketing Rule's adoption date, implying the Commission's view that advisers had sufficient time to come into compliance. Sponsors should promptly ensure their policies, disclosures, and practices are in compliance with the Marketing Rule. Looking ahead, and beyond the Marketing Rule, sponsors should prepare for timely compliance with additional new rules, such as the recently adopted Private Funds Rules (pending any definitive changes from the ongoing litigation).

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