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Marketing and Advertising by Investment Advisers – Always a Timely Topic

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Communicating with prospective clients and investors is a critical component of many advisers' business development programs. SEC-registered investment advisers will likely engage in marketing and/or advertising activities that require knowledge of and compliance with Rule 206(4)-1 (the "Advertising Rule") under the Investment Advisers Act of 1940 (the "Advisers Act"). In addition, advisers should ensure their marketing and advertising practices comply with SEC guidance concerning advertising and marketing issues. Marketing materials used to communicate with prospective clients and investors include presentation (or pitch) books, requests for proposals, due diligence questionnaires, quarterly newsletters, strategy fact sheets, and the adviser's website, to name a few.

In this article, I discuss the Advisers Act requirements and SEC guidance relating to an investment adviser's use of marketing/advertising materials with prospective clients and investors. I will also provide a summary of the SEC's recent risk alert addressing advertising issues, and then highlight recent amendments to the books and records rule concerning performance returns.

The Advertising Rule

The Advertising Rule prohibits investment advisers from distributing advertisements that contain any or all of the following content:

- A testimonial of any kind concerning the investment adviser, or relating to the advice or services provided by the adviser
- Past specific recommendations of the investment adviser that were or would have been profitable, unless the adviser provides all recommendations for the preceding year with certain disclosures
- Graphs, charts, formulas, or other devices which advisers represent as being able to determine which securities to buy or sell
- Statements to the effect that any report, analysis, or other service will be provided free of charge, unless these items will be provided entirely free and without any obligation
- Any statements that are untrue regarding a material fact or which are otherwise false or misleading

The Advertising Rule defines an advertisement as

> any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

However, in a letter to the *Investment Counsel Association of America, Inc.* (March 1, 2004), SEC staff indicated

> that a written communication by an investment adviser that does no more than respond to an unsolicited request by a client, prospective client or consultant for specific information about the adviser's past specific recommendations is not an "advertisement."

SEC staff further elaborated as follows:

> "We also believe that a written communication by an investment adviser to its existing clients generally would not be an advertisement within the meaning of rule 206(4)-1(b) merely because it discusses the adviser's past specific recommendations concerning securities that are or were recently held by each of those clients. In general, written communications by advisersto their existing clients about the performanceof the securities in their accounts not are offers of investment advisory services but are part of the adviser's advisory services. If, however, the context in which the past specific recommendations are presented by the investment adviser to an existing client suggests that a purpose of the communication is to offer advisory services, we would conclude that the communication was an advertisement."

For example, if an investment adviser managing client portfolios using two strategies, large capitalization value ("LCV") and small capitalization growth ("SCG"), sends its LCV quarterly newsletter which discusses the performance

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of the portfolio's holdings to a client only invested in an SCG portfolio, the SEC would consider that an advertisement.

Testimonials

As noted above, the Advertising Rule prohibits the use of testimonials in advertisements because they can imply or infer falsely or in a misleading manner that the experience of the individual providing the testimonial typifies the experience of all the adviser's clients. For example, a direct quote from a client stating his or her approval of the adviser would count as a client testimonial under the Advertising Rule.

In social media, such testimonials can take a different form. A January 2012 Office of Compliance Inspections and Examinations ("OCIE") National Examination Risk Alert titled "Investment Adviser Use of Social Media" states

> The term "testimonial" is not defined in Rule 206(4)-1(a)(1), but SEC staff consistently interprets that term to include a statement of a client's experience with, or endorsement of, an investment adviser. Therefore, the staff believes that, depending on the facts and circumstances, the use of "social plug-ins" such as the "like" button could be a testimonial under the Advisers Act.

The SEC Division of Investment Management's IM Guidance Update March 2014 titled "Guidance on the Testimonial Rule and Social Media" states the following:

> Depending on the facts and circumstances, public commentary made directly by a client about his or her own experience with, or endorsement of, an investment adviser or a statement made by a third party about a client's experience with, or endorsement of, an investment adviser may be a testimonial.

As a result, advisers should reduce their risk of violating the Advertising Rule by implementing a policy requiring employees to disable the endorsement feature on websites like LinkedIn.

Past Specific Recommendations ("PSRs")

As part of marketing presentations such as pitch books, advisers often like to demonstrate their research process using case studies of actual portfolio holdings (current or past) that describe how the adviser made the determination to invest in a particular company. In other instances, advisers may demonstrate their investment style by including in pitch books a selective list of current or past holdings that may or may not include performance. If advisers' advertising materials include PSRs that were or would have been profitable, Rule 206(4)-1(a)(2) requires advisers to provide all recommendations made over the preceding year, accompanied by certain disclosures and cautionary language. Advisers may violate Rule 206(4)-1(a)(5) if they provide a selective list of profitable current holdings in an adviser's marketing presentation. The SEC could consider such "cherry-picking" false or misleading.

Interestingly, the SEC staff indicated the following in a letter to *Dow Theory Forecasts, Inc.* (November 7, 1985):

> Rule 206(4)-1(a)(2) under the Act does not permit an advertisement which refers to selected past recommendations of an investment adviser which were or would have been profitable to any person, even if the advertisement offers to provide a list of all recommendations made by the adviser within the past year.

The SEC has provided some flexibility for advisers that wish to discuss current and past portfolio holdings in marketing presentations, however. In a letter to *Franklin Management, Inc.* (December 10, 1998) ("*Franklin*"), SEC staff indicated that an adviser may include PSRs and current recommendations in marketing materials provided that the adviser

- uses objective, non-performance-based criteria to select the PSRs or current recommendations;
- uses the same selection criteria for each time period (e.g., monthly, quarterly);
- does not discuss directly or indirectly the amount of profits or losses realized or unrealized on the specific securities; and
- maintains records to support the selection criteria.

Many advisers comply with *Franklin* by using their top 10 portfolio holdings by market value as non-performance-based selection criteria.

In a letter to *The TCW Group, Inc.* (November 7, 2008) ("*TCW*"), SEC staff indicated that advisers could also advertise the holdings that contributed most positively and most negatively to an adviser's investment performance over a designated period. To comply with TCW, advisers must, among other things, ensure that

- the performance calculation consistently takes into account the weighting of every holding in each representative account that contributed to that account's performance during the measurement period, and that the holdings presented consistently reflect the results of the calculation;
- the presentation shows at least 10 holdings divided equally between those holdings that contributed most positively and most negatively to the performance returns;
- each presentation of holdings is consistent from measurement period to measurement period in terms of the information and number of holdings included;
- each presentation provides the average weight of the holdings during the measurement period and the contribution these holdings made to the representative account's return;
- each page presenting representative holdings discloses how an investor or prospective investor can obtain the performance calculation methodology and documentation showing every holding's contribution to the overall account's performance during the measurement period; an
- each page containing a presentation of holdings provides the following disclosures in close proximity to the performance information:
  - "The holdings identified do not represent all securities purchased, sold, or recommended for advisory clients;" and
  - "Past performance does not guarantee future results."

Advisers that intend to discuss portfolio holdings in their marketing presentations should review *Franklin* and *TCW* to ensure consistency with SEC guidance.

Performance Disclosures

Advisers often provide performance results for their investment strategies when they market their investment advisory services. Such disclosures must comply with specific requirements highlighted in various SEC staff letters. In general, advisers must show all performance metrics net of fees when they include them in marketing presentations considered to be advertisements. Under certain circumstances, advisers may include gross-of-fees performance information. Advisers should consider labeling performance results displayed in every chart, graph, or table as gross or net of fees. The adviser must also include all required disclosures on the same page as the performance figures or insert a reference (link) to the page containing these required disclosures.

The SEC has provided guidance on using performance results in advertising and marketing materials. In a letter to *Clover Capital Management, Inc.* (October 28, 1986) ("*Clover*"), SEC staff indicated that Rule 206(4)-1(a)(5) prohibits an advertisement that, among other things,

- does not disclose the effect of material market or economic conditions on the returns shown (e.g., if an adviser discloses that its strategy has appreciated 25% over the period but does not disclose that the general market was up 35% during that same period);
- shows performance that does not reflect the deduction of advisory fees and other expenses (net of fees);
- fails to disclose the way in which dividends and interest are treated;
- suggests or makes claims about profit potential without also disclosing the possibility of loss (e.g., disclosures should state that past performance may not be indicative of future results);
- compares returns to an index without disclosing the material facts relevant to the comparison;
- does not disclose any material conditions, objectives, or investment strategies used to obtain the performance results presented; or
- does not disclose prominently, if applicable, that the performance results presented relate only to a select group of the adviser's clients, along with the methodology for making the selection and the effect of this methodology on the results presented, if material.

In cases where an adviser discloses performance results of a model portfolio, *Clover* includes additional disclosure requirements that should be reviewed and included, where applicable.

Additionally, in a letter to *J.P. Morgan Investment Management, Inc.* (May 7, 1996) ("*JPMIM*"), SEC staff indicated advisers could advertise performance of a composite using the highest fee charged to an account in the composite or a higher model fee. Specifically, *JPMIM* states

> When an adviser advertises performance that is no higher than that which reflects the deduction of actual fees, there appears to be little chance that an investor would be misled. In our view, therefore, assuming appropriate accompanying disclosure, Rule 206(4)-1(a)(5) does not prohibit an adviser from advertising performance that reflects the deduction of a model fee when doing so would result in performance figures that are no higher than those that would have resulted if actual fees had been deducted.

In certain situations, advisers may want to present performance results on a gross-of-fees basis to prospective clients. In a letter to *Association for Investment Management and Research* (December 18, 1996), SEC staff indicated that advisers may show gross-of-fees performance in an advertisement if it appears in equal prominence with net-of-fees performance. In another letter to the *Investment Company Institute* (September 23, 1988) ("*ICI*"), SEC staff indicated that advisers could show gross-of-fees-only performance results to a wealthy prospective client or institution in a one-on-one presentation as long as the adviser provides at the same time, in writing,

- disclosure that performance figures do not reflect the deduction of advisory fees;
- disclosure that client returns will be reduced by investment advisory fees and other expenses that may be incurred during account management;
- disclosure that the adviser's investment advisory fees are described in its Form ADV, Part 2A; and
- a representative example (e.g., a table, graph, chart, or narrative) of how an investment advisory fee, compounded over a period of years, will affect the total value of a client's portfolio.

Hypothetical/Backtested Performance

In some situations, advisers that historically have managed portfolios using one strategy (e.g., large-capitalization growth) see opportunities in another market segment (e.g., small-capitalization growth) and seek to market this new strategy to prospective clients. Without an actual performance track record, an adviser may create a hypothetical/backtested track record that illustrates how a portfolio would have performed had it existed over a period of time (e.g., five or 10 years). However, performance results generated from such backtested models may draw increased regulatory scrutiny because investors have no guarantee that the adviser would have used the signals generated by these methods in real time. Instead, advisers could generate such performance results with the benefit of hindsight and adjust their models to fit the data. Since the SEC has no way to independently verify an adviser's proprietary trading system to substantiate the results presented, it considers reporting results based on this method subject to abuse.

With this in mind, advisers that use hypothetical/backtested performance in marketing materials should include the following disclosures (see *In the Matter of Patricia Owen-Michel, Release No. IA-1584* (September 27, 1996):

- A disclosure indicating the results do not represent the results of actual trading using client assets, but were calculated by retroactively applying a model designed with the benefit of hindsight
- A disclosure describing any limitations inherent in the backtested model
- A disclosure that the returns should not be considered indicative of the skill of the adviser

- A disclosure that clients may experience a loss
- A disclosure that the results may not reflect the impact of material market or economic factors that mighthave influenced the backtested model if it had actually been in use during the period
- If applicable, a disclosure that during the period in question the adviser was either not managing money, or was not managing money according to the strategy depicted
- A disclosure that the backtesting applies to a described or specific strategy that the client accounts will follow, or a description of what the difference will be if the strategy is not followed
- Any additional disclosures required to ensure the SEC does not consider the presentation potentially false or misleading (e.g., *Clover* disclosures)

Portability of Investment Performance Achieved at another Investment Adviser

Investment advisers often hire experienced portfolio managers that have generated performance results while employed at another adviser. The acquiring firm may want to continue advertising the performance generated by the new portfolio manager at his or her previous advisory firm. In a letter to *Horizon Asset Management, LLC* (September 13, 1996), SEC staff indicated that advertising such results would not be considered misleading under Rule 206(4)-1(a)(5) provided that

- the individuals managing the accounts at the adviser were also primarily responsible for achieving the prior performance results;
- accounts managed at the previous firm were so similar to accounts currently under management that the performance generated at the prior firm provides relevant information to prospective clients;
- the adviser advertises all accounts managed in a similar manner, unless the exclusion of any account would not result in materially higher performance;
- the advertisement is consistent with SEC staff interpretations with respect to performance advertisements; and
- the advertisement includes all relevant disclosures, including one stating that the performance results provided were achieved at another investment advisory firm.

In a letter to *Great Lakes Advisors, Inc.* (April 3, 1992), the SEC staff indicated that if the previous adviser made portfolio management decisions via a committee, a successor adviser whose portfolio management decisions are also made by committee may use the performance achieved at the previous adviser without being misleading if it demonstrates "a substantial identity of personnel among the predecessor's and successor's committees." Also, in order to continue advertising performance from a predecessor entity, advisers must maintain all records in compliance with Rule 204-2(a)(16).

Representative or Partial Client Lists

On occasion, investment advisers may want to provide a list of clients in marketing materials to demonstrate to prospective clients the caliber of their current clientele and thus establish credibility. In a letter to *Denver Investment Advisers, Inc.* (July 30, 1993), SEC staff indicated that investment advisers would be allowed to disclose partial client lists under the following conditions:

- Advisers cannot use performance-based criteria to determine which clients to include on the list.
- Advisers must include a disclaimer that states, "It is not known whether the listed clients approve or disapprove of Denver Investment Advisers or the advisory services provided."
- Each client list will include a statement describing the objective criteria used to select the clients listed.

Also, in a letter to *Cambiar Investors, Inc.* (August 28, 1997), SEC staff indicated advisers could provide a partial client list as long as the list "is not presented in a false or misleading manner and the advertisement contains no untrue statement of material fact and is not otherwise false or misleading." To protect client confidentiality, advisers should always obtain written permission before disclosing their clients' names in any marketing presentation.

Ratings and Rankings

In a letter to *DALBAR, Inc.* (March 24, 1998), SEC staff indicated that the distribution by investment advisers of advertising materials containing reprints of a research firm's investment adviser ratings would be considered "testimonials" under the Advertising Rule.

However, the SEC staff agreed not to recommend enforcement action based on the view that such materials do not raise the types of concerns that the rule was designed to prevent. The SEC staff noted the following factors supporting this conclusion:

- The ratings would not emphasize favorable client responses or ignore unfavorable ones.
- The ratings would represent all, or a statistically valid sample, of the responses of an adviser's or investment adviser representative's ("IAR") clients.
- The questionnaire distributed to clients would not be prepared to produce any predetermined favorable results.
- The questionnaire should be designed to make it equally easy for a client to provide negative or positive responses.
- The research firm would not provide any subjective analysis of the questionnaire results, but instead would assign numerical ratings after averaging the client responses for each adviser or IAR.

The SEC staff conditioned its position on the following representations:

- Participating advisers and IARs would meet certain eligibility criteria reasonably designed to ensure that a participating adviser or IAR has an established and significant history, and no record of regulatory sanctions.
- The research firm would not be affiliated with any participating adviser or IAR.
- The research firm would survey all, or a statistically valid sample, of a participating adviser's or IAR's clients.

- All participating advisers and IARs would be charged the same fee, paid in advance.
- The research firm would not issue ratings to an adviser or IAR unless the ratings are statistically valid with respect to that adviser or IAR.
- Survey results published by the research firm would contain information that clearly identifies the percentage of survey participants who have received each designation and the total number of survey participants.

In addition, the SEC staff provided a list of factors for investment advisers to consider when proposing to distribute ratings:

- Whether the advertisement discloses the criteria on which the rating was based;
- Whether an adviser or IAR advertises any favorable rating without disclosing any facts that the adviser or IAR knows would call into question the validity of the rating or the appropriateness of advertising the rating (e.g., the adviser or IAR knows that it has been the subject of numerous client complaints relating to the rating category or in areas not included in the survey);
- Whether an adviser or IAR advertises any favorable rating without also disclosing any unfavorable rating of the adviser or IAR (or the adviser that employs the IAR);
- Whether the advertisement states or implies that an adviser or IAR was the top-rated adviser or IAR in a category when it was not rated first in that category;
- Whether, in disclosing an adviser's or IAR's rating or designation, the advertisement clearly and prominently discloses the category for which the rating was calculated or designation determined, the number of advisers or IARs surveyed in that category, and the percentage of advisers or IARs that received that rating or designation;
- Whether the advertisement discloses that the rating may not be representative of any one client's experience because the rating reflects an average of all, or a sample of all, of the experiences of the adviser's or IAR's clients;
- Whether the advertisement discloses that the rating is not indicative of the adviser's or IAR's future performance; and
- Whether the advertisement discloses prominently who created and conducted the survey, and that advisers and IARs paid a fee to participate in the survey.

Items Considered Potentially False and Misleading

As noted above, the Advertising Rule prohibits any advertisement that "contains any untrue statement of a material fact, or which is otherwise false or misleading." This definition covers many types of statements, terms, or practices that may appear in an adviser's marketing materials or advertisements. Here are three examples:

Use of Superlative Language – The SEC has indicated that an adviser's use of words such as "superior," "exceptional," "best", "proven," and other "superlative language" in advertisements to describe its performance or other firm attributes may lead clients to believe that such adviser is the only firm capable of providing adequate advisory services, or to infer something about future investment results that may not be warranted. Additionally, use of this superlative language may lead prospective clients or investors to conclude erroneously that they cannot find comparable opportunities elsewhere. For example, statements such as "XYZ Adviser has a proven ability to preserve wealth and grow clients' investment capital," or "XYZ Adviser has generated superior investment returns for its clients during all market cycles" should be avoided. Investment advisers should avoid using superlative language in their marketing materials unless they have robust documentation to support such claims.

Use of Subjective Terms such as "Substantial" and "Significant" – In statements such as "XYZ Adviser intends to position its portfolios to earn substantial returns over a three-to-five-year period," or "XYZ Adviser has committed significant resources to its research staff," the SEC may deem use of the words "substantial" and "significant" false or misleading due to their subjective nature or due to the lack of further definition. By their nature, such words can mean different things to different prospective clients. What one prospective client may deem to be substantial or significant, another may not. Therefore, the SEC may consider statements such as these misleading under Rule 206(4)-1(a)(5). Advisers should avoid using subjective language in their marketing materials unless they provide a more specific definition of the term or terms used.

Referring to an Adviser as an "RIA" or "Registered Investment Adviser" – In a letter to *Securities and Syndication Review* (February 16, 1984), SEC staff stated "Whether the use of the phrase 'Registered Investment Adviser' in any particular case is misleading would depend upon how it is used. Because (1) the initials 'RIA' or 'R.I.A.' have, as far as we know, no generally understood meaning, (2) initials after a name usually indicate a degree or a licensed professional position for which there are certain qualifications, and (3) there are no qualifications for becoming a registered investment adviser, the use of such initials following a name would also be misleading."

The SEC addressed this issue further in *Release No. IA-3060* (October 12, 2010), noting that "if an adviser refers to itself as a 'registered investment adviser,' it also must include a disclaimer that registration does not imply a certain level of skill or training." Footnote 29 in the same release states, "We have observed that the emphasis on SEC registration, in some advisers' marketing materials, appears to suggest that registration either carries some official imprimatur or indicates that the adviser has attained a particular level of skill or ability. Section 208(a) of the Advisers Act [15 U.S.C. 80b-8(a)] makes such suggestions unlawful." If advisers choose to refer to themselves as registered investment advisers in their advertising and marketing materials, they should always include the following disclaimer: "Registration does not imply a certain level of skill or training."

OCIE Risk Alert

On September 14, 2017, the OCIE issued a National Exam Program Risk Alert ("Risk Alert") titled "The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers." The Risk Alert identifies the most frequent advertising compliance issues resulting from 1,000 investment adviser examinations over a two-year period. The OCIE also conducted 70 examinations in 2016 under the "Touting Initiative," focusing on investment advisers' use of awards, ranking listings and professional designations ("accolades") in its marketing materials. OCIE's goal in issuing this Risk Alert is to provide investment advisers with guidance "in adopting and implementing effective compliance programs."

Most Frequent Advertising Rule Compliance Issues

- **Misleading Performance Results** – 1) Advisers presented performance results without deducting advisory fees. 2) Advisers compared their performance results to a benchmark without disclosing any limitations of such comparisons. 3) Advisers included hypothetical and backtested performance results in their advertisements, but did not explain how they generated these returns, and omitted other potentially material disclosures regarding these performance results.
- **Misleading One-on-One Presentations** – 1) Advisers presented performance results gross of fees in certain one-on-one presentations, but did not include the potentially relevant disclosures included in ICI. 2) In some one-on-one presentations subject to the Advertising Rule, advisers did not disclose that the advertised performance results did not reflect the deduction of advisory fees, and that such fees and other expenses would reduce client returns.
- **Misleading Claim of Compliance with Voluntary Performance Standards** – Advisers included misleading claims of compliance with voluntary performance standards. SEC staff noted in certain instances that the performance results may not adhere to such performance standards' guidelines (e.g., the Global Investment Performance Standards (GIPS®)).
- **Cherry-Picked Profitable Stock Selections** – Advisers have cherry-picked certain stocks to present in their advertisements, including selecting only profitable stocks or recommendations for inclusion in various marketing materials, without complying with Rule 206(4)-1(a)(2). (If an adviser wants to present past specific profitable recommendations in its advertisements, the adviser must also include all recommendations made during the previous 12 months, with certain required disclosures.)
- **Misleading Selection of Recommendations** – Advisers created advertisements that contained "misleading selections of investment recommendations." In some instances, in order to illustrate a particular investment strategy, advisers selectively disclosed past specific investment recommendations. These advertisements did not comply with Rule 206(4)-1(a)(2) and did not satisfy the requirements included in Franklin and TCW.
- **Compliance Policies and Procedures** – Rule 206(4)-7(a) requires all registered investment advisers to "adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act." According to the Risk Alert, "OCIE staff observed advisers that did not appear to have compliance policies and procedures reasonably designed to prevent deficient advertising practices." Specifically, OCIE staff noted some advisers did not have policies and procedures relating to
    - the advertising and marketing materials review and approval process prior to distribution;
    - the criteria for including and excluding accounts from performance calculations when using composites; and
    - the confirmation of the accuracy of performance results in compliance with the Advertising Rule.

Summary of Examination Observations from the Touting Initiative

- **Misleading Use of Third-Party Rankings or Awards** – Advisers included potentially misleading third-party rankings or awards in their advertisements. OCIE staff observed that advisers published these rankings and awards without providing facts that would be material to the readers in evaluating these rankings and awards. For example:
    - Advisers obtained accolades via the submission of potentially false or misleading information.
    - Advisers published marketing materials that included rankings that were several years old, which could potentially misrepresent the adviser's current status.
    - Advisers published rankings or awards without disclosing the selection criteria, who conducted the survey, and that advisers paid a fee to participate in the survey.
- **Misleading Use of Professional Designations** – The Risk Alert also identifies instances in advertisements and Form ADV Part 2B where advisers included potentially false or misleading information regarding
    - professional designations that have lapsed; or
    - the minimum qualifications to attain the professional designation, as required by the Form ADV instructions.
- **Testimonials** – Advisers included potentially prohibited testimonials and endorsements on the advisers' websites, social media pages and other marketing materials.

OCIE staff noted that the steps advisers took to correct the issues highlighted in this Risk Alert included removing misleading language from their advertisements and adding appropriate disclosures to prevent the SEC from considering the advertisements misleading.

Advisers Act Books and Records Rule Amendments

The SEC adopted two amendments to Rule 204-2 which became effective as of October 1, 2017:

- Rule 204-2(a)(7)(iv) requires advisers to maintain documentation of all written communications that discuss "the performance or rate of return of any or all managed accounts or securities recommendations." (This is a new category of communications that the SEC now requires advisers to maintain.)
- Rule 204-2(a)(16) now requires advisers to retain documentation to support the calculation of performance provided to any person. (Previously, advisers only needed to retain documentation supporting performance information distributed to 10 or more persons.)

Conclusion

The SEC will continue to evaluate investment advisers' marketing and advertising materials for compliance with the Advertising Rule and for consistency with SEC guidance. Advisers should review their marketing and advertising materials in light of the recent Risk Alert, and make any necessary revisions to ensure compliance with the Advertising Rule and related guidance provided in the SEC no-action letters noted above.