

SEC Risk Alert Cites Frequent Advertising Rule Compliance Issues

On September 14, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a [Risk Alert](#) detailing the most frequent Advertising Rule¹ compliance issues identified in examinations of registered advisers. The Staff's examination efforts were in connection with an initiative focused on over 1,000 SEC registered advisers' advertising materials, which OCIE launched in 2016 to ensure that advertisements of accolades disclosed material facts.

Most Frequent Advertising Deficiencies

- misleading performance results that did not follow previous SEC guidance regarding the deduction of fees, comparisons to benchmarks, and hypothetical and back-tested performance results;
- materials that cherry-picked past profitable performance, or included some but not all recommendations in order to illustrate a particular investment strategy, but did not provide the more fulsome list of performance or meet the other requirements of the Advertising Rule;
- lack of compliance policies and procedures reasonably designed to prevent deficient advertising practices, including appropriate centralized reviews and approvals of advertising materials prior to distribution;
- use of misleading third party rankings or awards, such as those that lacked material facts, were outdated or were based on selection criteria that were not disclosed in the materials;
- use of misleading professional designations, such as those that have lapsed; and
- use of prohibited advisory client testimonials, including on websites or social media.

Ongoing Private Equity Focus

OCIE Staff has cited a number of related deficiencies on recent exams of private equity managers, including:

¹ Advisers Act Rule 206(4)-1.

- miscalculation (or failure to disclose method of calculation) of performance, such as a failure to disclose that a fund-level “net” performance number includes investors paying no- or reduced-fee and carry;
- use of prior firm track record when investment personnel were not primarily responsible for the cited investments;
- failure to disclose specific material risks;
- inaccuracies or inconsistencies in materials;
- use of superlative language without supporting authority and/or objective basis; and
- lack of required backup records for performance information.

In light of the ongoing SEC focus these matters, managers should continue to review advertising materials and practices in light of their Advisers Act obligations.

If you have any questions about the matters addressed in this *Kirkland AIM*, please contact the following Kirkland attorneys or your regular Kirkland contact.

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Tier 1 Investment Fund
Formation and Management:
Private Equity Funds

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