HEADSPACE

November 30, 2024

Shaking the Magic 8 Ball: A Biennial Retrospective on the Marketing Rule

EXECUTIVE SUMMARY

- Even with its relative newness still, the Marketing Rule has received considerable commentary and attention from the SEC since its November 2022 compliance date. While this commentary and attention have been voluminous and accumulated rapidly, they also afford investment managers with ample source material for guidance on how to administer their own advertising practices and policies & procedures.
- All topics within the Marketing Rule have garnered attention from the SEC to one degree or another (e.g. performance, testimonials and endorsements, third-party ratings, unsubstantiated claims, etc.). However, when looking at focuses of enforcement matters in particular, the use and dissemination of hypothetical performance (specifically on an investment manager's public website) has represented the clear majority topic. The runner-up is investment managers being unable to substantiate a variety of claims in their advertisements.
- Additionally, when examining the 27 Marketing Rule enforcement actions that have settled since November 2022, data regarding fine amounts affords investment managers with a rough but not insignificant window into how the SEC determines fines for Marketing Rule actions. The enforcement matters suggest that, subject to particular facts circumstances, an investment manager could generally expect a fine representing .01%-.04% of AUM, with fines potentially amounting to 0.2% of AUM when numerous types of Marketing Rule violations are noted in a single action.
- While the data on enforcement action fines can aid investment managers and their Compliance professionals in forecasting potential risk, it is feasible to avoid such scenarios altogether through fine-tuning various practices. Such measures can include: regular reviews of public website pages, augmented policy & procedure testing, robust maintenance of records supporting claims made in advertisements, focused Form ADV reviews, use of detailed advertising review checklists, and prudent use of data.

INTRODUCTION

I'm not sure I'd call it teary eyed nostalgia or sentimentality that prompted this month's essay (though I admit I can be prone to both). But something about this month marking the two-year anniversary of the Marketing Rule's November 2022 compliance date seemed to make for a fitting reason to look back and explore how the Rule has played out since. It's been an active two years, to say the least. Since the Marketing Rule took effect, the SEC has levied fines totaling nearly $4 million against 27 different firms for various violations thereof, with amounts ranging from $20,000 all the way up to $850,000, and ensnared firms ranging from $42 million to $5.2 billion in assets under management. SEC staff have also issued three formal pieces of guidance regarding the Rule in this time, and there have been various remarks from Chair Gensler himself. In many respects, with the volume of activity surrounding the Marketing Rule, and the dimensionality of it, it feels like being peppered with responses from a Magic 8 Ball, some of which may be more helpful or well-received than others.

This month's essay is intended to take this multidimensional and rapidly accumulated body of information and consolidate and make sense of it for your use (and I hope interest). To that end, this month's essay is structured to accomplish the following:

- Share common risks, deficiencies, and violations SEC staff and the SEC have noted in the course of examining registrants and enforcing the Marketing Rule ***(pp. 3-6)***;
- Identify Marketing Rule topics and conduct that appear to be points of focus in SEC enforcement actions in particular ***(p. 6)***
- Enable registrants to more closely approximate the amount of potential fine exposure through examining data for the 27 Marketing Rule actions that have occurred since ***(pp. 7-8);***
- Provide investment managers with more fine-tuned measures that can mitigate the risk of Marketing Rule violations ***(p. 10)***.

Additionally, taking a page out of the SEC's playbook and using a layered approach, I have also included the following appendices as helpful aids for those who may have a desire or need to delve further into some of the things touched upon in the main body of this essay:

- **Appendix A**, which providers a refresher on the more notable aspects of the Marketing Rule;
- **Appendix A.1**, which provides a list of types of materials that typically do and do not constitute "advertising" under the Rule;
- **Appendix B**, which provides detailed information on the 27 Marketing Rule enforcement actions mentioned above; and
- **Appendix C**, which provides an example of the structure and content of an advertising review checklist an investment manager could employ and repurpose across multiple Marketing Rule topics.

And so . . . shake-shake. 🎱

🎱 *MAGIC 8 BALL SAYS: "MY REPLY IS NO* 🎱
COMMON RISKS, OBSERVATIONS & VIOLATIONS

Risk alerts and guidance SEC staff issued shortly after the adoption of the Marketing Rule and issued in the years since provide investment managers with a reasonably reliable roadmap for what the SEC's areas of focus and concern are for Marketing Rule compliance. Corresponding enforcement actions since the Rule's adoption also provide clarity and particularity regarding the types of practices investment managers should seek to avoid.

Overall. In September 2022, two months before the Marketing Rule's compliance date, SEC staff issued a risk alert identifying those aspects of the Rule it would be paying particular attention to when examining registrants. In June 2023, SEC staff issued another risk alert identifying and reinforcing areas of examination focus. These focal points are consistent with the topics the SEC took time to note specifically in its press release accompanying the adoption of the Marketing Rule (a summary of which I have selected for inclusion in **Appendix A** for those who may be in need of a quick refresher on the Rule). Subsequent to these two examination alerts, SEC staff also shared observations regarding common deficiencies found while examining investment managers' marketing and advertising practices. And of course, a number of enforcement matters, as mentioned at the outset of this essay, have occurred as well. The table below is meant to highlight and summarize (though still comprehensively) particular advertising practices various investment managers have employed that SEC staff and the SEC have determined to be problematic or violative of the provisions of the Marketing Rule.

EXAMPLE MARKETING RULE DEFICIENCIES & VIOLATIONS

Policies & Procedures	• Consisted only of general descriptions and expectations related to the Marketing Rule • Did not address applicable marketing channels utilized by the investment managers, such as websites and social media • Were informal rather than in writing • Were incomplete, not updated, or partially updated for certain applicable marketing topics • Were not tailored to address investment managers' specific advertisements (e.g., policies and procedures to address the General Prohibitions, and advertising requirements for testimonials, endorsements, and third-party ratings utilized by investment managers in advertisements) • Did not adequately address the preservation and maintenance of advertisements and related documents, such as copies of any questionnaires or surveys used in the preparation of a third-party rating (in the event the investment manager has received such documents) included or appearing in any advertisement
Books & Records	• Completed questionnaires or surveys used in the preparation of a third-party rating but did not maintain a copy of such questionnaires • Did not maintain copies of information posted to social media • Did not maintain documentation to support performance claims included in advertisements
Endorsements	• Stated investment managers were "seen on" national media, implying appearances in national news media, without disclosing that the "appearances" were in fact paid advertisements • Included images of celebrities in marketing materials in a manner that implied the celebrities endorsed the firms when such celebrities did not endorse the firms
Substantiation	• Represented that "[i]n the latest measure, the models are outperforming IMF forecasts by 34%, and the platform keeps improving" but was unable to produce records substantiating the claim • Disseminated advertisement in which it claimed principal "had been named one of the top wealth managers by the readers of *San Diego Magazine* for 14 consecutive years" without being able to substantiate that material statement of fact

EXAMPLE MARKETING RULE DEFICIENCIES & VIOLATIONS *(CONTINUED)*

Untrue Statements or Omissions or Otherwise Misleading	• Stated that the investment managers were "free of all conflicts," when actual conflicts existed • Stated material facts about the investment managers' businesses that were inaccurate, including: o Statements that a network of personnel perform advisory services for clients when a sole individual performs such services o Statements representing erroneous investment manager personnel qualifications, such as their education, experience, and professional designations • Described material facts about advisory services or products offered that were inaccurate, including o Referencing certain investment mandates of the investment managers in advertisements when there were no such mandates used by the firms (e.g., ESG mandates) o Claiming that investment processes were validated by professional institutions when they were not o Stating that the investment manager considered certain risk tolerances when recommending investment strategies when all clients were placed into the same strategy without consideration of risk tolerances o Referencing a list of approved securities that did not exist o Referencing formalized securities screening processes that did not exist o Misrepresenting the investment managers' client base, such as describing the investment manager as a "private fund investment manager" when the firm did not advise any private funds • Publicized the receipt of certain awards or accolades that were not received • Statements that investment managers were different from other investment managers because they acted in the "best interest of clients," without disclosing that all investment managers have a fiduciary duty to act in their clients' best interests • Recommended certain investments (e.g., on podcasts or websites) without disclosing the conflicts of interest attributed to the compensation paid to or received by the investment managers for such recommendations • Cited SEC registration beyond factual statements as to investment managers' registration status in a way to imply that SEC registration was representative of a particular level of skill or ability, or that the SEC had either approved or passed upon the investment managers' business practices • Included SEC logo on their websites with the purpose of implying that the websites or the investment managers had been approved or endorsed by the SEC • Presenting disclosures on websites or videos in fonts or sizes that were unreadable

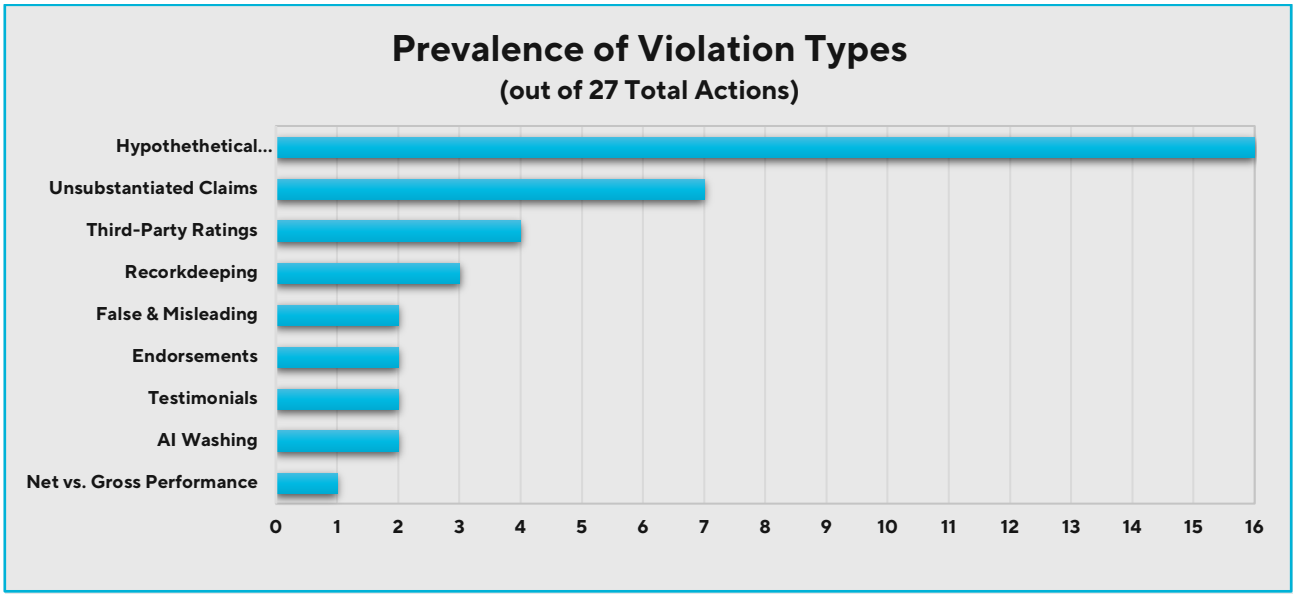
EXAMPLE MARKETING RULE DEFICIENCIES & VIOLATIONS *(CONTINUED)*

Performance	• Advertised cumulative profits that the investment managers believed were not achievable or were impossible to achieve without unlimited money to invest • Presented performance information that did not provide adequate disclosure regarding the share classes included in the performance returns • Used lower fees in calculations for net of fees performance returns than were offered to the intended audience • Omitted material information regarding fees and expenses used in calculating returns • Advertised hypothetical performance on public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience • Did not disclose the time period or did not disclose whether the returns were calculated for the same time period as additional performance information included in the same advertisement • Included or excluded certain performance results in manners that were not fair and balanced, such as advertisements that included the performance of only realized investment information in the total net return figure and excluded unrealized investments • Advertised models would have outperformed a "Global 60/40 Benchmark" for the years 2015 through 2022, which predated the investment manager's founding
Testimonials	• Included testimonials from clients of a third-party product on the investment managers' websites without any disclosures explaining the context of the testimonials, implying that the testimonials were about the investment managers' services rather than the third-party product
Third-Party Ratings	• Materials Implied investment managers were the sole top recipients of certain awards when the awards went to multiple recipients or the investment managers were not the top recipients • Materials indicated investment managers were highly rated by various organizations without disclosing that the methodologies for such ratings were based primarily or solely on factors that were not related to the quality of investment advice, such as assets under management, the number of clients, or that investment manager personnel nominated fellow employees for such awards

EXAMPLE MARKETING RULE DEFICIENCIES & VIOLATIONS *(CONTINUED)*

Form ADV	• Reported on Form ADV, Part 1A, that investment managers' advertisements did not include: o Third-party ratings, when their websites included third-party ratings or social media posts that touted the firms as being ranked in certain third-party ratings. o Performance results, when performance results were included in their marketing materials. o Hypothetical performance, when hypothetical performance was included in advertisements.
AI Washing	• Represented use of artificial intelligence and machine learning to analyze retail clients' spending and social media data to inform investment advice when, in fact, no such data was being used in the investment process

Enforcement Matters. While the foregoing table is meant to summarize observations and findings the SEC and SEC staff have made across a variety of aspects of the Marketing Rule, when looking at practices that resulted in enforcement actions, a more precise picture comes into focus. In evaluating the 27 Marketing Rule enforcement actions, the aspect of the Rule the SEC most commonly addresses and notes is use of hypothetical performance (in particular on websites). As seen in the below chart, hypothetical performance appeared, exclusively or in part, in 16 out the 27 actions. The next closest topic was unsubstantiated, followed by a relatively close cluster of others.

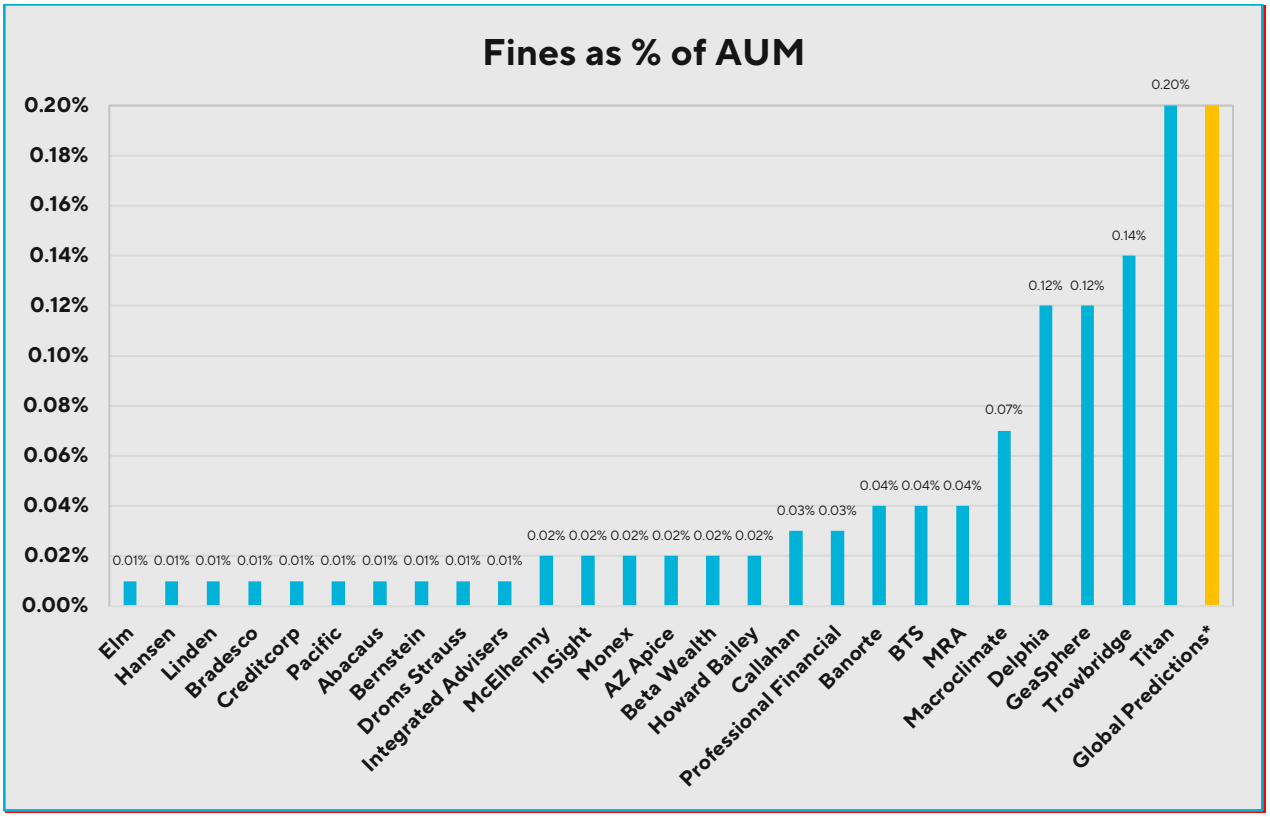


Accordingly, when using hypothetical performance in advertising materials (particularly on websites), investment managers should be acutely aware the level of scrutiny it has received from the SEC thus far. Additionally, managers should also be sure that any claims made in their advertising materials can be reasonably substantiated. Last, managers should also be acutely aware of information posted on their websites generally, as many of the problematic practices the SEC cites in these actions are website-based. **Appendix B** provides additional detail regarding the particular facts and circumstances underlying each of these 27 actions.

MAGIC 8 BALL SAYS: "YOU MAY RELY ON IT" . . . SORT OF WHAT THE FINE DATA SAYS

In examining the fine amounts in the 27 enforcement actions and certain factors in relation thereto, a somewhat consistent pattern and forecasting mechanism emerges. While it should not be taken as an absolute, this pattern and mechanism can allow investment managers and their Compliance personnel to assess what their financial exposure would potentially be in light of any problematic practices they may be employing. It can also serve as an advocacy tool should an investment manager ever find itself in the unfortunate situation of settlement discussions with the SEC.

Fines as Percentage of AUM. As mentioned in the Introduction of this essay, for the 27 enforcement matters, the fine and registrant sizes vary to a fair degree. Fines range from $20,000 all the way up to $850,000, and ensnared firms ranging from $42 million to $5.2 billion in assets under management. Viewed through the lens of fines as a percentage of assets under management, the range includes fines as low as .01% of assets under management, up to .20% of assets under management. Notwithstanding this superficial disparateness, a closer look at the data, as the below table that shows the fine amounts in percentages of assets, suggests a greater degree of consistency:

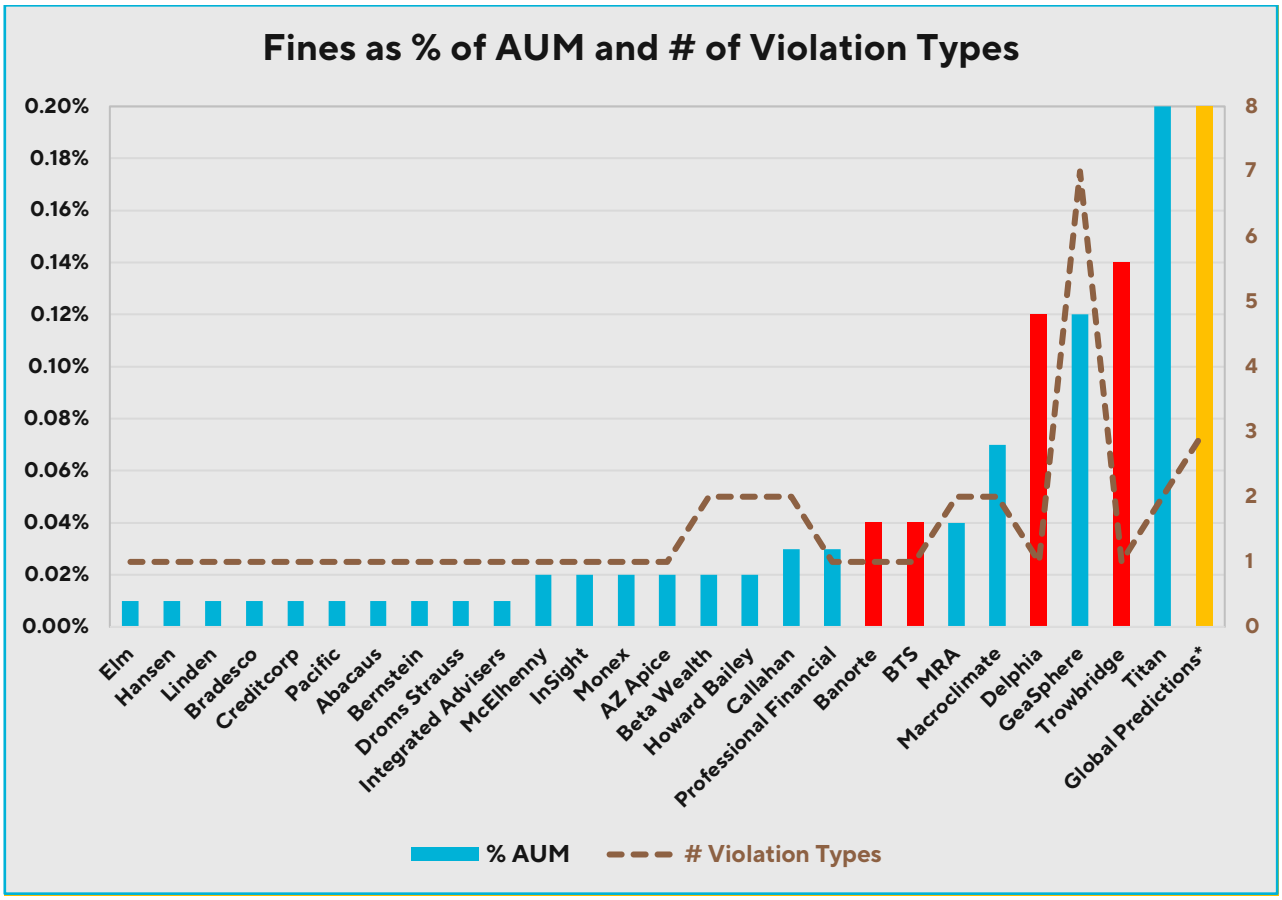


** Global Predictions did not have any regulatory assets under management given the nature of its business. Therefore, ascribing a fine as a percentage of its assets was not mathematically possible.*

When unpacking these figures, a few notable aspects can be observed. Notwithstanding the range(s) mentioned previously, the mode fine (i.e. the fine amount that appears most often in the series) is .01% of assets under management (representing 10 out of the 27 actions). The average fine amount correlates to a .04% of assets under management, and the median fine amount correlates to .02% of assets. If an investment manager wished to roughly predict what their financial exposure may be in connection with potentially

problematic advertising practices, one could conceivably forecast something in the .01%-.04% range, recognizing that .2% is still a possibility.

Fines as a Percentage of AUM & Number of Violation Types. An investment manager, however, does not need to necessarily settle for this type of crude forecasting pattern and mechanism. In fact, given some of the apparent outliers in the above table, it begs the question what may be driving those fines that represent a greater percentage of assets. While it is difficult to calculate the number of different violations in the actions given the SEC often notes conduct that merely serves as example of problematic practices, one is able to at least count the number of different aspects of the Marketing Rule the actions cover. As such, I decided to ask whether the number of different types of violations could possibly account for those fines that fall above the mode, median, and average figures noted above. The following graph depicts the intersection of these two factors (i.e. percentage of assets under management and number of violation types):



Unpacking the above graph, it seems an investment manager could potentially forecast that, if the manager only has one type of problematic Marketing Rule practice, its fine amount would likely correlate to .01%-.02% of their assets, and that as the number of different types of violations increases, so does the percentage amount of assets under management for the fine. By what factor, exactly, is more challenging to pinpoint. As the above graph illustrates, as the number of violation types increases beyond two, there does not appear to be the same relatively consistent degree of correlation between number of violation types and percentage of fine amounts as there appears when number of violation types are two are less.

Of course, there are other imperfections and unexplainable points in the above data that should prompt an investment manager to proceed with caution when attempting to forecast potential financial exposure relative to their advertising practices, at least when they believe they may have potential issues with more than

two topics. First, in the Trowbridge matter, Trowbridge only had one type of violation – hypothetical performance – and the fact pattern is virtually identical to the McElhenny, Linden, and Elm matters. And yet, Trowbridge's fine represented .14% of its assets under management, whereas the other registrants' fines represented .01%-.02%. The Banorte and BTS matters also have a similarly perplexing complexion. Three, the severity of the violation, the SEC's perceived degree of an importance of a particular topic, and any number of other qualitative factors can undermine reliable forecasting. For example, in the Delphia matter, there was only one type of violation – AI washing – but it resulted in a fine amount correlating to .12% of assets under management. Presumably this is due to AI washing being a particularly passionate topic for Chair Gensler, who on numerous occasions has remarked how seriously the SEC will treat the topic. Whether and/or when the SEC or SEC staff decide to place similar levels of importance on other topics is of course inherently unpredictable. And last, 27 actions is not necessarily a statistically significant sample size, particularly when within those actions the type of conduct focused on by the SEC is predominantly hypothetical performance, potentially making how the SEC may handle other violation types less certain.

Notwithstanding these and other challenges in this data, the data observations do not seem entirely useless. First, there does appear to be a relatively confined range of fine percentages (.01%-.2%) amid a notable range of number of violation categories (ranging all the way up to one manager experiencing seven different violation types in a single action, six of which related to the Marketing Rule). Two, for the majority of actions (albeit a simple 18 out of 27), the SEC only found one type of problematic practice relative to the Marketing Rule, and only three of those actions (Trowbridge, Banorte, and BTS) represent outliers relative to their fine amounts correlating to percentage of assets. For those three outlier actions, it is notable that they occurred in September 2023, which represented the SEC's first true wave of Marketing Rule enforcement actions. This could suggest the SEC itself may have still been in the process of creating a reasonably consistent approach to determining fine amounts. And three, part of what can account for different fine percentages notwithstanding seemingly similar conduct and practices is a manager's ability to negotiate with SEC. On this end, the data and observations noted in the above graph can equip a manager with information that could prove beneficial should a manager ever find themselves in enforcement settlement discussions with the SEC.

MAGIC 8 BALL SAYS: "CONCENTRATE AND ASK AGAIN"
FINE TUNING MITIGATING MEASURES

With the information made available regarding how the SEC and SEC staff approach administering the Marketing Rule, a number of refined measures emerge for investment managers to employ. These measures could potentially reduce the risk of Marketing Rule violations and corresponding regulatory exposure.

Between the three risk alerts the SEC has published since the Marketing Rule's adoption, various statements by the SEC Chair, and the 27 enforcement actions that have occurred since the Rule's compliance date, there is an ample body of "lessons learned" that should guide investment managers in how they implement and administer the Rule in their own shops. These alerts, statements, and actions speak to "lessons learned" more at the thematic level. However, the below is meant to identify more fine-tuned, practical measures investment managers can employ to increase their chances of compliance with the Rule and reduce potential regulatory vulnerability in light of the recent landscape.

FINE-TUNED MITIGATING MEASURES

Augmented Policy & Procedure Testing	• Do not wait until the annual 206(4)-7 Compliance review to test the adequacy of design and operating effectiveness of policies & procedures. Instead, consider treating the Marketing Rule as a higher risk Compliance program topic and testing corresponding policies & procedures, or at least certain provisions therein, on a more frequent basis, such as semi-annually, quarterly, or even monthly depending on how much advertising content your firm produces.
Periodic Website Reviews	• As a sub-part of an investment manager's 206(4)-7 testing, consider regularly reviewing websites to ensure there is no content that violates their policies & procedures or the Marketing Rule. Given how much website content featured in the 27 enforcement matters, this seems highly advisable. Website content in particular may also be appropriate for a stricter pre-approval requirement by Compliance, as opposed to sample-based, retroactive back-testing of advertisements.
Books & Records and Substantiation	• Verify books & records policies & procedures require not just the retention of all advertisements for the Marketing Rule's retention period, but also that evidence substantiating claims and statements made in such advertisements also be retained. Verifying whether claims and statements can be substantiated, and if applicable, evidenced, should also be a sub-party of an investment manager's 206(4)-7 testing.
Use of Detailed Review Checklists	• For each aspect of the Marketing Rule that would be applicable to an investment manager's own marketing practices, create a checklist to guide reviewers through their review of materials. That way, reviewers will be able to easily and confidently verify whether certain types of marketing pieces (e.g. performance, testimonials, third party ratings, etc.) satisfy all of the applicable elements of the Marketing Rule. **Appendix C** provides an example of what such a checklist could look like for a selected Marketing Rule topic. Even with various advertising review technologies on the market, such technologies can often be limited on finer points of the Marketing Rule.
Focused Form ADV Reviews	• As part of the annual Form ADV update, pay particular attention to the sections pertaining to the Marketing Rule that seek information on marketing practices. Ensure statements in the Form ADV are consistent with actual marketing practices of the manager.
Prudent Use of Data	• Subject to the cautionary notes mentioned previously, consider comparing any testing observations to the findings and fine data in the 27 enforcement actions that have occurred to-date. Such comparisons could afford managers a sense of what their regulatory exposure might be as a result of any deficient practices detected in their own testing and can help them prioritize and redirect resources to self-cure accordingly. Such data can also be used by an investment manager's Compliance professionals to advocate to and educate management on any control changes or resource needs that may be warranted.

MAGIC 8 BALL SAYS: "SIGNS POINT TO YES"

PARTING THOUGHTS

As I similarly remarked in an essay examining the SEC's electronic communications enforcement actions, one could spend the better part of a year analyzing the more microscopic nature of all of Marketing Rule enforcement matters, and also look at them from different angles than what I have done. Additionally, and as I've also commented before, as with any set of data, there are outliers in what I've examined that serve as counterpoints to the general themes and trends I've noted, or that at least continue to confound and puzzle. However, I do think there is some degree of consistency to it that can be used by investment managers to have some sense of what their ultimate financial risk could be for Marketing Rule violations, which is a particularly useful tool to have for Compliance professionals within organizations. The data can also aid a manager in ensuring a fair and equitable settlement with the SEC should a manager ever find itself in such crosshairs. Hopefully, however, that doesn't come to pass, and given the abundance of examples of problematic practices that are publicly available, avoidance seems feasible (particularly with the change in the POTUS administration). Of course, when humans are involved – with their beliefs and motivations and other attributes – one can never be absolutely certain.

Thinking about the future, I very much welcome others looking at the data discussed in this essay and advancing and evolving any other potential use it may have. I also think it may be worth our industry inquiring with SEC staff regarding what to expect from a Marketing Rule enforcement perspective in light of the new POTUS administration. We could even press for an explanation of rationales for fine amounts – and in contexts beyond the Marketing Rule. In fielding those types of questions, I think SEC staff responses have been relatively consistent over time, and perhaps the Magic 8 Ball may sum them up best: "Reply hazy, try again."

Well, maybe we should.

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Thanks for reading.

APPENDIX A – NOTABLE MARKETING RULE PROVISIONS

NOTABLE MARKETING RULE PROVISIONS

"Advertisement" Definition	• **First Type:** Any direct or indirect communication an investment manager makes that:
	  ○ Offers the investment manager's investment advisory services with regard to securities to prospective clients or private fund investors, OR
	  ○ Offers new investment advisory services with regard to securities to current clients or private fund investors. The first prong of the definition excludes most one-on-one communications and contains certain other exclusions
	• **Second Type:** Any endorsement or testimonial for which an investment manager provides cash and non-cash compensation directly or indirectly (e.g., directed brokerage, awards or other prizes, and reduced advisory fees)
	• **Appendix A:** Please refer to **Appendix A.1** for a table of common examples investment managers routinely encounter and whether they generally would or would not constitute an "advertisement" for purposes of the Marketing Rule

General Prohibitions	• **Untrue Statements or Omissions:** Making an untrue statement of a material fact, or omitting a material fact necessary to make the statement made, in light of the circumstances under which it was made, not misleading • **Unsubstantiated Statements:** Making a material statement of fact that the investment manager does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC • **Misleading Implications:** Including information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment manager • **Fair & Balanced – Benefits:** Discussing any potential benefits without providing fair and balanced treatment of any associated material risks or limitations • **Fair & Balanced – Advice:** Referencing specific investment advice provided by the investment manager that is not presented in a fair and balanced manner • **Fair & Balanced – Performance:** Including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced • **Otherwise Misleading:** Including information that is otherwise materially misleading

NOTABLE MARKETING RULE PROVISIONS (*CONTINUED*)

Performance	• Prohibits use of any of the following in an advertisement: ○ **Gross Performance:** Gross performance, unless the advertisement also presents net performance ○ **Performance Results:** Any performance results, unless they are provided for specific time periods in most circumstances ○ **SEC Approval:** Any statement that the Commission has approved or reviewed any calculation or presentation of performance results ○ **Selective Performance:** Performance results from fewer than all portfolios with substantially similar investment policies, objectives, and strategies as those being offered in the advertisement, with limited exceptions ○ **Extracted Performance:** Performance results of a subset of investments extracted from a portfolio, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio ○ **Hypothetical Performance:** Hypothetical performance (which does not include performance generated by interactive analysis tools), unless the investment manager adopts and implements policies and procedures reasonably designed to ensure that the performance is relevant to the likely financial situation and investment objectives of the intended audience and the investment manager provides certain information underlying the hypothetical performance ○ **Predecessor Performance:** Predecessor performance, unless there is appropriate similarity with regard to the personnel and accounts at the predecessor investment manager and the personnel and accounts at the advertising investment manager
Testimonials & Endorsements	• **Disclosure:** Must clearly and prominently disclose whether the person giving the testimonial or endorsement is a client and whether the promoter is compensated – additional disclosures are required regarding compensation and conflicts of interest. • **Oversight and Written Agreement:** Must enter into written agreement with promoters, except where the promoter is an affiliate of the investment manager or the promoter receives de minimis compensation (i.e., $1,000 or less, or the equivalent value in non-cash compensation, during the preceding 12 months).
Third-Party Ratings	• Prohibits use of third-party ratings in an advertisement, unless the investment manager provides disclosures and satisfies certain criteria pertaining to the preparation of the rating (e.g. disclosing the date the rating was given, whether the investment manager provided compensation in connection with obtaining the rating, etc.)

APPENDIX A.1 – NON-EXHAUSTIVE "ADVERTISEMENT" EXAMPLES

ADVERTISEMENTS	NON-ADVERTISEMENTS
• Templates and stock presentations • Communications to existing investors that market new strategies or private funds • Website content and social media posts that promote an investment manager's advisory services • Information provided to consultant databases (when intended for distribution by the consultant) • Promotional materials made available to prospective investors in data rooms • Slides, scripts, or other written materials used in connection with speaking engagements that promote the investment manager or its private funds • Published recordings of webcasts or other speaking engagements that promote the investment manager or its private funds • GIPS® Reports • Compensated testimonials and endorsements made on behalf of the investment manager or its private funds • Uncompensated testimonials and endorsements included in advertisements	• Correspondence and reporting to existing clients about their investments (e.g., account statements, transaction reports, and other individualized correspondence) • Tailored responses to unsolicited requests for information • Bona fide one-on-one communications (including communications to multiple individuals at a single entity) that do not contain hypothetical performance (unless provided to a current or prospective private fund investor) • Brand content that does not promote the investment manager's services • Whitepapers/educational material (that do not promote the investment manager or reference specific investment strategies or products) • General market commentary (including during press interviews). • Communications to investors and prospective investors in registered investment companies

APPENDIX B – MARKETING RULE ENFORCEMENT DATA & EXAMPLES

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
August 2023	**Titan**	**$548M**	$850K	• Hypothetical Performance • Other non-Marketing Rule violations	• The investment manager advertised hypothetical performance without having adopted and implemented policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience and by failing to provide certain information underlying the hypothetical performance advertised. • The investment manager published hypothetical performance results that did not comply with the Marketing Rule and were materially misleading in violation of Investment managers Act Section 206(2). As an example, for the Titan Crypto strategy, the website at certain points advertised an "annualized return" of 2,700 percent. But in these and subsequent advertisements, the investment manager failed to present material criteria used and assumptions made in calculating its hypothetical performance projection, including sufficient information to allow the intended audience-which consisted of retail investors-to appreciate the significant risks and limitations associated with this hypothetical performance projection. For example, the investment manager did not disclose in the advertisements that the 2,700 percent annualized return was based on a purely hypothetical account in which no actual trading had occurred, that this annualized return had been extrapolated from a period of only three weeks (from August 10, 2021 to August 31, 2021), that the hypothetical return for this three-week period was calculated at twenty-one percent, that the projected 2,700 percent annualized return was based on the assumption that the Titan Crypto strategy would continuously generate a twenty-one percent return every three weeks for an entire year, or the investment manager's views as to the likelihood that this assumption would bear out. The advertisements also did not disclose whether the hypothetical projection was net of fees and expenses. • The investment manager provided certain information about the assumptions it used to calculate the hypothetical annualized return, and certain risks, but this information was not as clear and prominent as the highlighted 2,700 percent annualized return. In fact, this additional information was not even provided in the advertisements. Investors could click on these links

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
					and obtain some information about the assumptions used to calculate the hypothetical performance, and the attendant risks. Even though the investment manager directed the advertisement to a mass audience, the advertisement itself included no information to alert retail investors of the necessity of clicking on the embedded links to view vital information about the criteria, assumptions, risks, and limitations of the hypothetical performance results the investment manager advertised. For example, if a client accessed the embedded links, general disclosures appeared stating that the annualized return calculation was based on "short-term results" and was "not indicative of future expectations." In addition, there was some explanation that the hypothetical 2,700 percent annualized return was calculated using an extended internal rate of return (XIRR) calculator and was performed over a year-long period, based on an account balance of $10,000 for an investor with an aggressive risk profile. • The embedded links also failed to disclose the significant risks associated with the annualized return calculation, including that it was highly unlikely that the Titan Crypto strategy would continuously deliver a twenty-one percent return every three weeks for an entire year. Titan's advertisement did not present the hypothetical projected performance in a fair and balanced way, or in a way that was not materially misleading.
September 2023	**Banorte**	**$139M**	$50K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The investment manager's website included hypothetical performance that consisted of performance derived from model portfolios. The advertisements on the website were disseminated to the general public rather than to a particular intended audience.
September 2023	**BTS**	**$377M**	$135K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The investment manager's website included hypothetical performance that consisted of performance derived from model portfolios. The advertisements

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
					on the website were disseminated to the general public rather than to a particular intended audience.
September 2023	**Elm**	**$1.28B**	$175K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's website advertisements included hypothetical performance that consisted of performance derived from model portfolios and performance that was backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The advertisements on the website were disseminated to the general public rather than to a particular intended audience.
September 2023	**Hansen**	**$196M**	$25K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's website advertisement included hypothetical performance that consisted of performance that was backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The advertisement on the website was disseminated to the general public rather than to a particular intended audience.
September 2023	**Linden**	**$1.14B**	$135K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience.

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
					• The investment manager's website advertisements included hypothetical performance that consisted of performance derived from model portfolios and performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The advertisements on the website were disseminated to the general public rather than to a particular intended audience.
September 2023	**Macroclimate**	**$158M**	$100K	• Hypothetical Performance • Recordkeeping	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's website advertisements included hypothetical performance that consisted of performance derived from model portfolios and performance that was backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The advertisements on the website were disseminated to the general public rather than to a particular intended audience. • The investment manager was unable to produce a copy of each advertisement reflecting performance that it disseminated.
September 2023	**McElhenny**	**$400M**	$60K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's advertisements included hypothetical performance that was backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods.

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September 2023	**Trowbridge**	**$42M**	$60K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's website advertisements included hypothetical performance that consisted of performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods. The advertisements on the website were disseminated to the general public rather than to a particular intended audience.
September 2023	**MRA**	**$213M**	$85K	• Hypothetical Performance • Recordkeeping	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. • The investment manager's website advertisements included hypothetical performance that consisted of performance derived from model portfolios. The advertisements on the website were disseminated to the general public rather than to a particular intended audience. • The investment manager was unable to produce a copy of each advertisement reflecting performance that it disseminated.
March 2024	**Delphia**	**$187M**	$225K	• AI Washing	• The investment manager represented that it used artificial intelligence and machine learning to analyze its retail clients' spending and social media data to inform its investment advice when, in fact, no such data was being used in its investment process. • The investment manager failed to adopt and implement policies necessary to ensure that advertisements that Delphia published, circulated, or distributed were accurate and did not contain misleading or untrue statements.

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					• The investment manager had a number of employees and consultants involved in their advertising review and approval process. The investment manager failed to lay out a clear advertising review and approval process, either in its policies and procedures or otherwise, that would enable its personnel and consultants to understand their respective roles and responsibilities in that process. • In a December 2019 press release, the investment manager claimed that it was "the first investment manager to convert personal data into a renewable source of investable capital . . . that will allow consumers to invest in the stock market using their personal data." The investment manager further stated that it "uses machine learning to analyze the collective data shared by its members to make intelligent investment decisions." Starting in November 2020 through August 2023, the investment manager's website claimed that it "turns your data into an unfair investing advantage" and that it "put[s] collective data to work to make our artificial intelligence smarter so it can predict which companies and trends are about to make it big and invest in them before everyone else." Each of these statements was false and misleading because the investment manager had not developed the represented capabilities. These statements were material because the investment manager had represented to current and prospective clients that its use of client data as inputs into its investing algorithms was a key differentiating characteristic from other managers. • The investment manager also informed the SEC Division of Examinations in October 2021 that it would review all current marketing and regulatory disclosure documents and take action to correct any false and misleading statements regarding the use of client data. The investment manager also created the role of Compliance Manager for its compliance team and retained two outside compliance consulting firms. Additionally, the investment manager took certain further actions to correct various statements. regarding the use of client data. Specifically, in communications with certain investors, it noted that client data was not being used as a data source for its algorithms because it had not yet collected enough client data to provide meaningful insights. The investment manager nonetheless continued to make certain false and misleading statements in advertisements regarding the use of client data in various formats through August 2023. For example, investors who joined the investment manager in 2021 and 2022 were sent an email communication stating that their data was "helping train [its] algorithm

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					for pursuing ever better returns" and that the investment manager "will pool your data with everyone else's to power our algorithm." In addition, a social media post made in 2022, which remained until 2023, provided that the investment manager's "proprietary algorithm uses the data being invested by our members, so we can make stock selections across thousands of publicly traded companies up to seven financial quarters in the future." Also, a press release in November 2022 claimed that its "proprietary algorithms combine the data invested by its members with commercially available data, to make predictions across thousands of publicly traded companies up to two years into the future."
March 2024	**Global Predictions**	**None**	$175K	• AI Washing • Unsubstantiated Claims • Testimonials	• The investment manager made false and misleading claims about its use of artificial intelligence ("AI"), its status as the "first regulated AI financial advisor," and the services that it offered. • For example, the investment manager claimed on its public website that its technology incorporated "[e]xpert AI-driven forecasts," when in fact it did not. The investment manager also inaccurately claimed to be the "first regulated AI financial advisor" on its public website, in emails to current and prospective clients, and on various social media sites and, in turn, could not produce documents to substantiate this claim. • The investment manager was also unable to substantiate performance claims upon demand by the SEC. • The investment manager also represented on its public website a demonstrative graphic of its user interface including hypothetical performance that was not based on actual client data, with no disclosure that the hypothetical performance presented did not reflect an actual client account and was for illustrative purposes only. • The investment manager also represented that "[i]n the latest measure, the models are outperforming IMF forecasts by 34%, and the platform keeps improving" with no disclosure regarding when the analysis was conducted or what the 34% figure referred to, and that it "outperforms major economic benchmarks like the IMF World Economic Outlook," with no disclosure identifying what other "major economic benchmarks" were used. In reality, the investment manager's claims referred to its relative error rate and only compared its models to

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					the IMF World Economic Outlook benchmark. Additionally, these claims were based on an analysis that Global Predictions conducted in December 2021, though the claims remained publicly available for approximately two years after the analysis was conducted. The investment manager was unable to produce records substantiating its claim that its "models outperform IMF forecasts by 34%[.]" • In addition, Global Predictions advertised on its public website and on YouTube hypothetical performance to the general public, rather than to a particular intended audience. Specifically, Global Predictions advertised that its models would have outperformed a "Global 60/40 Benchmark" for the years 2015 through 2022, which predated Global Predictions' founding, and that its models offer a "+3-6% boost to returns." • In addition, the investment manager failed to implement certain of its compliance policies and procedures relating to its marketing activities. • The investment manager failed to disclose material conflicts of interest resulting from its relationships with certain individuals giving testimonials.
April 2024	**Bradesco**	**$200M**	$20K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The website advertisements included hypothetical performance that consisted of performance derived from model portfolios.
April 2024	**Creditcorp`**	**$516M**	$30K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The website advertisements included hypothetical performance that consisted of performance derived from model portfolios.

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April 2024	**GeaSphere**	**$86M**	$100K	• False & Misleading Statements • Net vs. Gross Performance • Unsubstantiated Claims • Hypothetical Performance • Endorsements • Recordkeeping • Other Non-Marketing Rule Violations	• On its public website and on various social media sites, the investment manager included a promotional video called "The GeaSphere Difference" that made false and misleading statements. Those statements included claims that, unlike clients of other investment managers who invest in mutual funds and pay the fund's management fees as well as advisory fees to their investment managers, the investment manager does not "charge clients twice." In fact, individual clients of the investment manager who invested in the Fund also paid both a fund management fee, which was a percentage of the value of their investment in the Fund, and an advisory fee to the investment manager, which was a percentage of the value of their assets managed by the investment manager, including any amounts invested in the Fund. The video also claimed falsely that money invested with the investment manager "is never commingled with other clients the way it is with mutual funds." In fact, the investment manager's clients' money invested in the Fund was commingled with that of other Fund investors, including other clients of the investment manager • The investment manager also advertised certain factsheets on its public website that depicted misleading model portfolio performance in one or more of the following ways. *First*, some of the factsheets compared the model portfolio performance to the S&P 500 Index as a benchmark, yet the factsheets showed the benchmark's price returns rather than showing total returns with dividends reinvested, which was how the model portfolio performance was calculated. *Second*, although the investment manager used tracking accounts to calculate the performance shown in the factsheets, these factsheets presented performance that was consistently inaccurate, in some cases overstated and in some cases understated. *Third*, certain factsheets presented gross performance without also presenting net performance. • The investment manager was not able to produce records substantiating the performance shown in the factsheets and was not able to substantiate the claim made in "The GeaSphere Difference" video that its models "outperform[ed] the market over most time frames, even as we assume less risk over those same periods. • The investment manager advertised a Price to Full Cash Flow (PFCF) Dow Portfolio, which showed backtested performance results for the years 1950 to 2009, prior to the strategy's commencement in 2011.

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
					• After the Compliance Date of the Marketing Rule, the investment manager also paid more than $1,000 to each of two unaffiliated accounting firms for endorsements to obtain clients through referrals. However, the investment manager did not have a written agreement with either firm providing the endorsements. • The investment manager's compliance manual required that the Chief Compliance Officer review and approve all marketing materials in writing prior to dissemination and maintain a log of any such approvals. In addition, the investment manager's compliance manual required any person giving an endorsement for compensation to provide referred individuals with certain disclosures and required the investment manager to obtain written confirmation that the referred individual did in fact receive the disclosures. The investment manager failed to implement any of these policies and procedures.
April 2024	**InSight**	**$126M**	$20K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The website advertisements included hypothetical performance that consisted of performance derived from model portfolios.
April 2024	**Monex**	**$160M**	$30K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. The website advertisements included hypothetical performance that consisted of performance derived from model portfolios.
August 2024	**Pacific**	**$3.7B**	$437K	• Hypothetical Performance	• The investment manager advertised hypothetical performance on its public website without adopting and implementing policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives

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					of the intended audience. The website advertisements included hypothetical performance that consisted of performance derived from model portfolios.
September 2024	**Abacus**	**$1.68B**	$150K	• Third-Party Ratings	• The investment manager disseminated an advertisement containing an untrue statement of material fact regarding third-party ratings the advertisement stated Abacus had received. • Further, the investment manager disseminated an advertisement containing third-party ratings that did not clearly and prominently disclose the date on which the rating was given and the period of time upon which the rating was based. • The investment manager disseminated an advertisement on its public website that included an untrue statement of a material fact. Specifically, the investment manager stated in an advertisement on its website that it was rated a "Top 12 Financial Advisor" by *Barron's* when, in fact, the investment manager was rated a "Top 1200 Financial Advisor" by *Barron's*. In addition, the investment manager misstated the title of a third-party rating it received, identifying itself as a "Top 100 Women's Advisor" rather than correctly identifying the rating as "Top 100 Women Financial Advisors;" this misstatement suggested the rating related to investment advice provided to women instead of an award for female investment managers. • In addition, the investment manager disseminated an advertisement on its public website containing a third-party rating without clearly and prominently disclosing the date on which the rating was given and the period of time upon which the rating was based. Specifically, the investment manager included in an advertisement on its website that it received the "Pacesetter Impact Award" from Schwab, the "Future 50 Award" from *Citywire RIA*, and was named a "Top 300 Registered Investment Advisor" from *The Financial Times* without specifying the years when these third-party ratings were received or the time period upon which the rating was based. These third-party ratings were received in 2007, 2019, and 2020, respectively.
September 2024	**AZ APice**	**$345M**	$70K	• Unsubstantiated Claims	• The investment manager disseminated an advertisement in which it claimed it provided investment advice that was "free from conflicts of interest" and "conflict-free" without providing any context for this claim. The investment manager recognizes and discloses various conflicts

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					of interest inherent in its role as an investment manager, including conflicts of interest disclosed in its Form ADV Part 2A brochure. As a result, it lacked a reasonable basis for believing that it would be able to substantiate the claims of conflict-free investment advice upon demand by the SEC.
September 2024	**Bernstein**	**$5.2B**	$295K	• Third-Party Ratings	• The investment manager disseminated an advertisement containing two third-party ratings that did not clearly and prominently disclose the date on which the ratings were given and the period of time upon which the ratings were based. advertisement on its public website containing two third-party ratings that did not clearly and prominently disclose the date on which the rating was given and the period of time upon which the rating was based. Specifically, the website stated its principal, who is the firm's Chief Investment Officer and head of its investment committee, was named one of *Fortune Magazine's* "All-Star Analysts" and one of *Smart Money Magazine's* "Power 30" without disclosing the date the third-party ratings were given or the time period upon which they were based. Richard Bernstein Advisors' principal received the "All-Star Analyst" rating in 2001 and 2002, and the "Power 30" rating in 2002 and 2004.
September 2024	**Beta Wealth**	**$399M**	$80K	• Third-Party Ratings • Unsubstantiated Claims	• The investment manager disseminated an advertisement containing a third- party rating that did not clearly and prominently disclose the date on which the rating was given and the period of time upon which the rating was based. • Further, the investment manager disseminated an advertisement in which it claimed Beta Wealth's principal "had been named one of the top wealth managers by the readers of *San Diego Magazine* for 14 consecutive years" without being able to substantiate that material statement of fact. • The investment manager's public website contained a third-party rating that did not clearly and prominently disclose the date on which the rating was given and the period of time upon which the rating was based. Specifically, website identified the investment manager as a "*Barron's* Top Advisor" without disclosing the date the third-party rating was given or the time period upon which it was based. The investment manager attained the *Barron's* third-party rating in 2018 and has not attained it since.

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
					• The investment manager's public website contained the material statement of fact that its CEO and Senior Wealth Manager "has been named one of the top wealth managers by the readers of *San Diego Magazine* for 14 consecutive years." However, the investment manager could not substantiate that this individual had, in fact, achieved that rating for 14 consecutive years. Further, rather than being selected by readers of *San Diego Magazine*, Beta Wealth was selected by a third-party company using a methodology that did not incorporate input from readers of *San Diego Magazine*. As a result, Beta Wealth lacked a reasonable basis for believing it would be able to substantiate upon demand by the SEC this material statement of fact in its advertisement.
September 2024	**Callahan**	**$248M**	$85K	• False & Misleading Statement • Unsubstantiated Claims	• The investment manager's public website contained an untrue statement of a material fact. Specifically, the investment manager published an advertisement on its website in which it described itself as a "Member" of "Fiduciary Firm." However, the investment manager was not a "Member" of "Fiduciary Firm," as "Fiduciary Firm" is a non-existent organization. The advertisement included a purported logo for this non-existent organization. • The investment manager public website contained the material statement of fact that it "serve[s] individuals and institutions independently, with no conflict of interest" without providing any context for this claim. However, the investment manager has recognized various conflicts of interest inherent in its role as an investment manager, including conflicts of interest disclosed in its Form ADV Part 2A brochure. As a result, the investment manager lacked a reasonable basis for believing it would be able to substantiate upon demand by the SEC the material statement of fact in its advertisement that "[w]e serve individuals and institutions independently, with no conflict of interest."
September 2024	**Droms Strauss**	**$676M**	$85K	• Unsubstantiated Claims	• The investment manager disseminated an advertisement in which it claimed that one of its investment manager representatives provided investment advice that was free from conflicts of interest without providing any context for this claim. The investment manager discloses various conflicts of interest and efforts to mitigate them in its Form ADV Part 2A brochure that applied

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					to the investment manager representative. As a result, Droms Strauss lacked a reasonable basis for believing it would be able to substantiate.
September 2024	**Howard Bailey**	**$463M**	$90K	• Endorsements • Testimonials	• The investment manager made communications via public websites of a university's" Athletic Program" and other third parties, the Athletic Program's and the investment manager own social media platforms, online videos, physical objects such as bags and flags, and the Athletic Program's arena jumbotron that identified the investment manager as the "Official Wealth Management Partner of [the Athletic Program,]" often with the Athletic Program logo. The Athletic Program was not a current client of the investment manager. This statement constituted an endorsement because it is a statement by a person other than a current client that indicates approval, support, or recommendation of the investment manager. The endorsement constituted an advertisement because the investment manager provided compensation for the endorsement the investment manager directly and indirectly disseminated numerous advertisements containing this endorsement that did not include required disclosures, including that the endorsement was given by a person other than a current client, that cash compensation was provided for the endorsement, and any material conflicts of interest resulting from the compensation arrangement. In directly and indirectly disseminating these endorsements without the required disclosures, • "Testimonials" in which the investment manager displayed select quotations from individuals expressing a positive view of the firm. The investment manager claimed that these statements were testimonials, but the quotations presented included one "testimonial" from a person who was no longer a client of the firm and another purported testimonial from a person who the firm was unable to verify had ever been a client. Because these statements were provided by persons other than current clients, they constituted endorsements, not testimonials. By failing to provide clear and prominent disclosure in advertisements that contained these endorsements that they were given by persons other than a current client, the investment manager again violated Rule 206(4)-1(b)(1).

DATE	FIRM	AUM	FINE	VIOLATION TOPIC(S)	VIOLATION EXAMPLE(S)
September 2024	**Integrated Investment managers**	**$4.2B**	$325K	• Unsubstantiated Claims	• The investment manager disseminated an advertisement in which it claimed to provide investment advice that put the client first by "aligning incentives and eliminating conflicts of interest," without providing any context for this claim. The investment manager recognizes various conflicts of interest inherent in the role as an investment manager, including conflicts of interest disclosed in its Form ADV Part 2A brochures. • The investment manager's public website said "a true fiduciary that puts the client first by aligning incentives and eliminating conflicts of interest" without providing any context for this claim. However, the investment manager has recognized various conflicts of interest inherent in providing investment advisory services, including conflicts of interest disclosed in its Form ADV Part 2A brochures.
September 2024	**Professional Financial**	**$191M**	$60K	• Third-Party Ratings	• An advertisement on the investment manager's public website contained a third-party rating that did not clearly and prominently disclose the date on which the rating was given and the period of time upon which the rating was based. Specifically, the investment manager's website identified its principal, who provided investment advice to clients, as being recognized by *Reuters AdvisePoint* as one of 500 "Top Investment managers" in the United States. Certain "Wealth Planning Reports" provided to clients and certain prospective clients contained a similar statement. These advertisements did not disclose that the investment manager's principal received the award more than 16 years ago in November 2007.

APPENDIX C – SAMPLE MARKETING RULE REVIEW CHECKLIST: TESTIMONIALS & ENDORSEMENTS

DISCLOSURES

☐ **At the time of dissemination, have disclosed, or do we reasonably believe the person giving the testimonial or endorsement has disclosed:**

- ***Clear & Prominent Disclosures:***
  - That the testimonial was given by a current client or investor, or the endorsement was given by a person other than a current client or investor (as applicable)?
  - That cash or non-cash compensation was provided for the testimonial or endorsement (if applicable)?
  - A brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment manager's relationship with such person and/or compensation arrangement (if applicable)?
- ***Other Disclosures:***
  - The material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement?
  - A description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment manager's relationship with such person and/or any compensation arrangement.?

ADDITIONAL CRITERIA FOR COMPENSATED TESTIMONIALS & ENDORSEMENTS GREATER THAN $1,000

☐ Do we have a written agreement with the person giving the testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of compensation for those activities?

☐ Do we reasonably believe the person giving the testimonial or endorsement is not an "ineligible person" at the time the testimonial or endorsement is disseminated?

GENERAL MARKETING RULE CONSIDERATIONS

☐ **Do we have a reasonable basis for believing that the testimonial or endorsement complies with the other requirements of the Marketing Rule?**

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