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SEC Charges Advisers with Marketing Rule Violations Regarding Statements about Performance and Use of AI, including Inability to Substantiate Marketing Claims upon Demand

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On March 18, 2024, the SEC announced settlements¹ related to charges under the Advisers Act Marketing Rule against two investment advisers for statements regarding their performance and use of artificial intelligence (AI).

Specifically, one order alleged that statements made by an investment adviser in advertisements regarding its performance could not be substantiated upon demand by the Commission. The order also alleged that the adviser purported to be the “first regulated AI financial advisor” but also was unable to substantiate this statement upon demand.

The SEC alleged that another adviser made statements in its SEC filings, a press release, and on its website that it was using AI and machine learning to “put collective [client] data to work” in order to help the adviser “predict which companies and trends are about to make it big and invest in them before everyone else does.” The SEC alleged that these statements were false and misleading because the adviser did not possess the AI and machine learning capabilities that it claimed it had.

The SEC cited the advisers’ actions as violations of Section 206(2)² and the new Marketing Rule (Rule 206(4)-1).³ The SEC also alleged that the advisers failed to adopt and implement policies and procedures under the Advisers Act Compliance Rule (Rule 206(4)-7).⁴

These settlements reflect the SEC’s focus on the Marketing Rule, including the rule’s substantiation requirement, and investment advisers’ claims regarding the use of AI in their investment processes.⁵ Advisers should review whether their policies and procedures are reasonably tailored to their marketing activities, including the rule’s requirement that an adviser have a reasonable basis for believing it will be able to substantiate statements of material fact in its advertisements upon demand by the Commission.

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¹ A press release related to the charges is available [here](#). The full SEC Orders can be found [here](#) and [here](#).

² Section 206(2) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly, to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.

³ Rule 206(4)-1 under Section 206(4) of the Advisers Act prohibits any registered investment adviser from, directly or indirectly, disseminating any advertisement that, among other things, includes any untrue statement of material fact, or omits to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading or include 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 adviser.

⁴ Rule 206(4)-7 under Section 206(4) of the Advisers Act requires registered investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

⁵ In January, 2024, the SEC released an Investor Alert regarding the use of AI and Investment Fraud, which can be found [here](#).

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