

Corporate Finance and Registration

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Bulletin Articles on Advertising Review and SEC Policy Releases

- Q4, 2019: “*Non-GAAP Financial Measures in Advertising*” available at https://www.com.ohio.gov/documents/secu_Bulletin2019FourthQuarter.pdf
- Q1, 2020: “*Private Indexes in Advertising and Non-Traded REIT Valuations*” available at https://www.com.ohio.gov/documents/secu_Bulletin2020FirstQuarter.pdf.
- Q2, 2020: “*Registration Section Review of Issuer Advertising*” and “*Reg BI Now In Effect*” available at https://www.com.ohio.gov/documents/secu_Bulletin2020SecondQuarter.pdf.



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Bulletin Article: Advertising Review

- “Registration Section Review of Issuer Advertising” explained both the process and the principles the Division applies to the review.
- Registered issuers required to file with the Division
- Standard - standard of review is investor-focused and prohibits material that would tend to deceive investors
 - Apply SEC and FINRA principles-balance risks and rewards



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Advertising Standards, pt 2.

- Article contains tips and best practices for submitting materials
- What to expect from receiving and responding to Division comments.
- Broad principles, each with specific examples that the Division has seen (example on following slide).



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Advertising standards, pt 3

- Example:
 - Principle: May not make false or unreliable claims
 - Examples:
 - Claiming something to the effect of “every penny goes into our properties” or “all investments go to church loans” when the prospectus discloses the issuer has the discretion to make other investments.
 - Presenting an investment as a savings account or using terms that may confuse investors into thinking they are investing with a bank.
 - Disclosing the investment as simple or discouraging a review of the prospectus.
 - Advertising that distributions are tax free or they reduce taxes when the distributions are, in fact, merely a return of capital.



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Bulletin Article #2: Non-GAAP Financial Measures in Advertising

- Division requiring issuers to accompany non-GAAP financial metric with the most directly comparable GAAP financial measure and a reconciliation between the two.
- Precedent: Regulation G and Item 10(e) of Regulation S-K; SEC enforcement officials; and the Canadian Securities Administrator.
- Example: REITs might advertise Net Asset Value (NAV), Cash Available for Distribution, and Modified Funds from Operations, among others. Each of these is a non-GAAP measure.



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Disclosure of Select Financial Information

- The Division believes it is misleading to advertise select GAAP financial information, or to exaggerate the prominence of certain financial measures.
- For example, the Division would issue an objection to an issuer prominently advertising total asset growth but refraining from disclosing that the is from an increase in leverage.
- Another example: an issuer that discloses an increase in its board set distribution rate without revealing it also incurred net losses, or significant expenses.



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Bulletin Article #3: Private Indexes in Non-traded REIT advertising

- Division objects to many uses of private indices in investor or retail-use sales literature.
- NTRs: typically limited liquidity, coupled with limited or no market pricing and often marketed and sold to seniors
- Skepticism towards claims of no or limited volatility
- Cautionary information presented justifies removal of material.
- Other reasons of concerns are contained in the article.



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Bulletin Article #4: Reg BI Now In Effect

- Conduct Standards in flux
- Reg BI, state conduct standards, DOL
- Directly affects brokers- but what effect does this have on Offering Materials/Registration?
- Conduct standards by broker dealers may affect whether some broker-dealers decide to recommend these offerings to customers.
- Ohio Revised Code section 1707.44(L)



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Reg BI Now In Effect

- The Division is asking issuers of high-cost, high-risk, and complex products that have retained (or reserved the right to retain) broker-dealers to incorporate changes
- Cover page/legend disclosure
- Suitability Section updates
- Subscription Agreement Changes
- Risk Factors



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Additional Issues: COVID Disclosure

- The effect of prospective disclosure vs. materialized disclosure
- Importance of interim financials in a pandemic



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Reg D Review

- COVID has reduced paper filings- more using EFD now than previously
- Still an issue with unlicensed finder's-future effect of SEC proposed rules?
- Harmonization Release



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