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Performance Related Books and Records Rule Amendments

The SEC focuses closely on the calculation and distribution of performance information, including through examinations of investment advisers conducted by the Office of Compliance Inspections and Examinations. There have been multiple recent SEC enforcement settlements and complaints that allege falsified performance information (see SEC commentary regarding [QED Benchmark Management LLC, January 28, 2016](#), [AssetMark, et al., August 25, 2016](#), and [Block and McAlister, September 8, 2016](#)).

To facilitate the SEC staff's examination and scrutiny of investment advisers' performance claims, the SEC recently adopted amendments (the "**Amendments**") to Rule 204-2 of the Investment Advisers Act of 1940, as amended (the "**Books and Records Rule**"). The Amendments require investment advisers to maintain additional records of performance calculations and performance-related communications to any person (including one-on-one communications). The Amendments are effective with respect to any communication or material that is distributed or circulated after October 1, 2017, regardless of whether such communications or materials relate to prior performance.

The material requirements of the Amendments are described in more detail below. The entire adopting release can be found at <https://www.sec.gov/rules/final/2016/ia-4509.pdf>.

The Amendments:

- (1) **Remove the 10-Person Threshold For Retaining Communications.** The Amendments modify the Books and Records Rule to require the retention of supporting documentation for performance calculations or rates of return used in any written communication that is distributed, directly or indirectly, to any person (which now includes, for example, one-on-one communications). Previously, the Books and Records Rule only required the retention of such supporting documentation for communications that were distributed to 10 or more persons.
- (2) **Require Retention of Additional Written Materials Related to Performance.** The Amendments expand the scope of Rule 204-2(a)(7) to require the retention of originals of all written communication received and copies of all written communications sent by investment advisers related to performance or rates of return of any managed accounts or securities recommendations.

Practical Next Steps

To comply with the Amendments, investment advisers will have to modify existing practices, especially in relation to the retention of communications (and associated performance calculations) provided to limited groups of investors. Investment advisers should review their electronic and hardcopy record retention policies and contracts with third-party service providers to ensure that all correspondence (including emails) relating to the calculation of, and communications about, performance (regardless of the number of recipients) is captured, backed up and maintained in accordance with the requirements and timeframes in the Books and Records Rule.

If you have any questions or comments, please contact one of the attorneys in the Investment Funds & Advisers Group at Shartsis Frieese LLP: [John Broadhurst](#), [Geoff Haynes](#), [Chris Rupright](#), [Carolyn Reiser](#), [Neil Koren](#), [Jim Frolik](#), [Christina Hamilton](#), [Joan Grant](#), [Lyn Roberts](#), [Anthony Caldwell](#), [David Suozzi](#) or [Kathryn Miller](#).

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