SEC charges FinTech investment adviser Titan for misrepresenting hypothetical performance of investments (and other violations)

On August 21, 2023, the Securities and Exchange Commission (the "SEC") announced the settlement of charges against Titan Global Capital Management USA LLC, a New York-based FinTech investment adviser ("Titan"), pursuant to Section 206(4)-1 (the "Marketing Rule") under the U.S. Investment Advisers Act of 1940 (the "Advisers Act"). Among other things, Titan was charged with marketing its Titan Crypto strategy using misleading hypothetical performance. This case is the first reported by the SEC under the Marketing Rule, which became effective on May 4, 2021.

Titan operates a technology investment platform that offers multiple investment strategies, including its "Titan Crypto" strategy. Titan advertises that it provides personalized investment advice through its mobile app. Its client base primarily consists of retail investors.

Under the Marketing Rule, an advertisement may not:

- Contain an untrue statement of material fact or omit a material fact necessary to make the statement not misleading;
- Include a material statement of fact if the adviser does not reasonably believe it can substantiate that statement;
- Include information reasonably likely to cause an untrue or misleading implication;
- Discuss potential benefits without a balanced discussion of the risks;
- Refer to specific prior investment advice of the adviser, unless it is presented in a fair and balanced manner;
- Include or exclude performance results, or performance time periods, in a manner that is not fair and balanced; or
- Otherwise be materially misleading.

The SEC found that Titan violated the Marketing Rule, as well as Section 206(2) of the Investment Advisers Act, by including materially misleading statements on its website regarding the hypothetical performance of the Titan Crypto strategy. For example, it advertised "annualized" performance as high as 2,700%, but failed to include material information about how the annualized return was calculated. Specifically, Titan did not disclose that the performance was for a purely hypothetical account in which no actual trading had occurred, and that the "annualized" return had been extrapolated from a period of only three weeks and assumed that the performance would continue at the same rate for an entire year. Titan also failed to provide information in its advertisements about the risks and limitations of using hypothetical performance in making investment decisions as required by the Marketing Rule.

Additionally, the SEC found that Titan (1) made conflicting disclosures to clients about how Titan custodied crypto assets; (2) included in its client advisory agreements liability disclaimer language that created the false impression that clients had waived non-waivable causes of action against Titan; and (3) contrary to representations, failed to adopt policies and procedures concerning employee personal trading in crypto assets. The order also states that Titan self-reported to the SEC staff that it had failed to ensure that client signatures were obtained for certain types of transactions in client accounts.

Titan cooperated with the investigation, accepted the SEC's order stating its violation of the Advisers Act, and agreed to a cease-and-desist order, censure, and payment. It neither admitted nor denied the SEC's findings. Consequently, Titan will pay $192,454 in disgorgement, prejudgment interest, and a $850,000 civil penalty, which will be given to affected clients.

This settlement gives an indication of how the SEC will be enforcing the Marketing Rule, and demonstrates the SEC's focus on crypto investment advisers.

Feel free to reach out to any of us with questions on this.

Daniel A. Wuersch: daniel.wuersch@wg-law.com | (212) 509-4722

Travis Gering travis.gering@wg-law.com | (212) 509-4723

Janet R. Murtha: janet.murtha@wg-law.com | (212) 509-6314

Jake Brown: jake.brown@wg-law.com | (212) 509-4741

Christiane Rosenbaum: christiane.rosenbaum@wg-law.com | (212) 509-6316