

SEC Staff Issues New FAQs on Marketing Rule

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On March 19, 2025, the staff of the Securities and Exchange Commission (the “SEC” or the “Commission”) published two new FAQs related to Rule 206(4)-1 (the “Marketing Rule”) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”).² The FAQs provide further guidance on when an investment adviser can (1) display gross performance of one investment or group of investments from a private fund or portfolio without including corresponding net performance and (2) present one or more gross characteristics of a portfolio or investment without including the corresponding net characteristics.

Background

The Marketing Rule requires, among other things, that the presentation of gross performance in an advertisement is (1) presented with at least equal prominence to, and in a format designed to facilitate comparison with, the net performance and (2) calculated over the same time period and using the same type of return and methodology as

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² Marketing Compliance Frequently Asked Questions, available [here](#).

the net performance.³ Since its adoption, the Marketing Rule has generated many questions regarding how advisers should present certain types of performance, including whether advisers can display the gross performance of one investment or a group of investments within a portfolio, without also showing the corresponding net performance of such investment or group of investments. In January 2023, the staff of the Division of Investment Management (the “Staff”) issued an FAQ stating that the performance of one investment or a group of investments is an example of “extracted performance” under the Marketing Rule and accordingly, any presentation of such performance must include both gross and net performance calculations. In the newly published FAQs, the Staff further clarifies and replaces its prior guidance on the presentation of both gross and net extracted performance, as well as clarifies when an adviser may present one or more gross characteristics of an investment, without including the corresponding net characteristics.

New SEC Staff Guidance

The newly published FAQs from the Staff first answer the question of when an adviser can display the gross performance of one investment or a group of investments from a private fund or other portfolio, without also showing the corresponding net performance of such single investment or group of investments. The Staff went further to say that its guidance would apply to an extract from a composite of all related portfolios, while noting that an extract from a composite of portfolios also may be considered hypothetical performance. In its guidance, the Staff clarified that it would not recommend enforcement action if an adviser displayed gross extracted performance in an advertisement without displaying corresponding net performance of the extract, as long as the following conditions are met:

1. the extracted performance is clearly identified as gross performance;
2. the extracted performance is accompanied by a presentation of the total portfolio’s gross and net performance consistent with the requirements of the rule;
3. the gross and net performance of the total portfolio is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the extracted performance;⁴ and
4. the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the extracted performance is calculated.

³ See Investment Adviser Marketing, Investment Advisers Act Release No. 5653 (Dec. 22, 2020), available [here](#). For other alerts on the Marketing Rule that include more detailed information about the Marketing Rule’s compliance requirements, see SEC Adopts Investment Adviser Marketing Rule to Update Its Advertising and Solicitation Rules, available [here](#); Reminder: The Marketing Rule’s Upcoming November 4, 2022 Compliance date, available [here](#).

⁴ The Staff further clarified that in its view, the gross and net performance of the total portfolio does not need to be presented on the same page of the advertisement as the extracted performance, provided that the presentation facilitates comparison between the gross and net performance of the total portfolio and the extracted performance. For example, presenting the gross and net performance of the total portfolio prior to the extracted performance in the advertisement could also facilitate such comparisons and help ensure they are presented with at least equal prominence to the performance of the extract.

The FAQ also provides that, in the case of an extract from a representative account, an adviser could satisfy the above conditions if the adviser provides the gross and net performance of a composite aggregation of all of the representative account's related portfolios, rather than the gross and net performance of the total representative account from which the extract was taken. The Staff further clarified that it would not recommend enforcement action if the extracted performance, presented as described above, was calculated over a single, clearly disclosed period rather than including the one-, five- and ten-year periods required under Rule 206(4)-1(d)(2) of the Advisers Act, though the performance of the total portfolio must comply with the time period requirements, as applicable.

The second FAQ acknowledges that advisers may be confused about whether certain characteristics (e.g., yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio, the Sortino ratio, and other similar metrics) constitute "performance" under the Marketing Rule. The FAQ says that this guidance would not apply to metrics such as total return, time-weighted return, return of investment, internal rate of return, multiple on invested capital, or total value to paid in capital, regardless of how those metrics are labelled. The guidance acknowledges that even if such characteristics qualified as performance, calculating the characteristics net of fees and expenses may be impossible or lead to misleading and confusing results. In its guidance, the Staff clarified that it would not recommend enforcement action if an adviser presents gross characteristics of a portfolio or investment in an advertisement without including the corresponding net characteristics in the advertisement, as long as the adviser provides appropriate accompanying information about the characteristic and how it is calculated, and the following conditions are met:

1. the gross characteristic is clearly identified as being calculated without the deduction of fees and expenses;
2. the characteristic is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the rule;⁵
3. the total portfolio's gross and net performance is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the gross characteristic; and
4. the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the characteristic is calculated.

The Staff further clarified that it would not recommend enforcement action if the characteristic, presented as described above, was calculated over a single, clearly disclosed period rather than including the one-, five- and ten-year periods required under Rule 206(4)-1(d)(2) of the Advisers Act, though the performance of the total portfolio must comply with the time period requirements, as applicable.

⁵ The Staff explained that the view expressed in its FAQ also applies to characteristics calculated based on the performance of (i) a composite aggregation of related portfolios, (ii) a representative account, (iii) a subset of a portfolio (i.e., extracted performance), and (iv) a subset extracted from a composite aggregation of related portfolios, provided that the characteristics are presented in a manner consistent with the FAQ. In the case of a characteristic calculated using a representative account, the Staff believes that the adviser could satisfy the positions stated in the FAQ if the gross characteristic was accompanied by the gross and net performance of a composite aggregation of all of the representative account's related portfolios (rather than the gross and net performance of the total representative account) in a manner consistent with the positions of the FAQ.

Conclusion

Since its adoption, the Marketing Rule has generated numerous questions, including many related to the presentation of gross and net performance. The new FAQs provide helpful guidance with respect to two common types of information often included in marketing materials, regarding which industry participants often have struggled to apply the language in the Marketing Rule and prior Staff guidance. The new FAQs on the Marketing Rule also may reflect an increased willingness of the SEC and the Staff to provide interpretive, no-action, or other guidance with respect to SEC rules.

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