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CLIENT ALERT

SEC Staff Issues Two New FAQs on Marketing Rule

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On January 15, 2026, 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").[1] The staff previously published FAQs related to the Marketing Rule, most recently in March 2025.[2] The newly published FAQs address questions related to: (1) the use of model fees in the presentation of net performance in an advertisement; and (2) when a final order from a self-regulatory organization ("SRO") (as defined in Form ADV) is a "disqualifying event" for purposes of the Marketing Rule's prohibition on an investment adviser paying compensation for a testimonial or endorsement.

1 *Marketing Compliance Frequently Asked Questions*, available here.

2 For other Willkie Farr & Gallagher LLP alerts on the adoption of the Marketing Rule and on SEC staff guidance related to the Marketing Rule that include additional information about the Marketing Rule, *see SEC Staff Issues New FAQs on Marketing Rule*, available here; *Reminder: The Marketing Rule's Upcoming November 4, 2022 Compliance Date*, available here; *SEC Adopts Investment Adviser Marketing Rule to Update Its Advertising and Solicitation Rules*, available here.

1. Use of Model Fees in Net Performance

The Marketing Rule requires, among other things, that net performance of a portfolio presented in an advertisement include either (i) a portfolio's performance after the deduction of all fees and expenses actually paid by a client or investor or (ii) the portfolio's performance after the deduction of a model fee, subject to certain conditions.

The first new FAQ addresses whether an investment adviser would violate the general prohibitions of the Marketing Rule by advertising the net performance of a portfolio that reflects the deduction of the actual fees charged to that portfolio when the fees to be charged to the advertisement's intended audience are anticipated to be higher than the actual fees charged to that portfolio.

The SEC staff indicated that the general prohibitions of the Marketing Rule do not necessarily require an adviser to use model fees in calculating net performance in this circumstance. Instead, the FAQ confirms that whether the use of actual fees to calculate net performance could violate those general prohibitions depends on the facts and circumstances of a specific advertisement, including, but not limited to, relevant disclosures. The FAQ also confirms that advisers can use various means to illustrate the effect of differences between the actual fees charged to a portfolio and the anticipated fees to be charged to the intended audience on the presented performance.

2. Testimonials and Endorsements – Disqualification for SRO Final Orders

The Marketing Rule prohibits an investment adviser from compensating a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is subject to any disqualifying event within the 10 years prior to the person disseminating the endorsement or testimonial. As defined in the Marketing Rule, disqualifying events include certain final orders issued by the SEC, the Commodity Futures Trading Commission, or an SRO. Disqualifying events exclude, however, an SEC order or opinion that does not bar, suspend, or prohibit the person subject to the order from acting in any capacity under the federal securities laws, provided that the person is in compliance with the terms of the opinion or order, and the advertisement includes certain disclosures about the disciplinary event.

The second new FAQ provides that a final order by an SRO of the type described in section 203(e)(9)[3] will not be treated as a disqualifying event; provided that:

1. The sole reason the person is an ineligible person (as defined in the Marketing Rule) is the SRO's final order;

2. The SRO did not expel or suspend the person from membership, bar or suspend the person from association with other members, or prohibit the person from acting in any capacity;

[3] Such orders include those that: (A) bar such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or (B) constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

3. The person is in compliance with the terms of the SRO's final order, including, but not limited to, paying disgorgement, prejudgment interest, civil or administrative penalties, and fines; and

4. For a period of 10 years following the date of such final order, any advertisement containing the testimonial or endorsement discloses that the person providing the testimonial or endorsement is subject to an SRO order, and includes the order, or a link to the order on the SRO's website or other public disclosure system, if available.

Conclusion

The recent FAQs provide helpful guidance confirming that advisers have flexibility in advertising net performance of a portfolio that is calculated using actual fees charged to that portfolio and better aligning the exclusion of final orders issued by an SRO with the exclusion of final orders issued by the SEC from the definition of "disqualifying event" in the Marketing Rule. The new FAQs on the Marketing Rule appear to reflect a staff approach of providing flexibility to advisers with respect to certain interpretive questions under the Marketing Rule, similar to the 2025 FAQs.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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