

Practice Update

SEC's Latest Marketing Rule Guidance: Key Takeaways for Advisers

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On March 19, 2025, the Securities and Exchange Commission's (SEC) Division of Investment Management updated its Marketing Compliance Frequently Asked Questions (FAQ) to address industry confusion that has arisen in the wake of the adoption of amendments to rule 206(4)-1 under the Investment Advisers Act of 1940 in December 2020 (the Marketing Rule). In short, the updated responses attempt to address confusion that many investment advisers (particularly those advising private funds) have faced when presenting (1) certain extracted performance and (2) certain portfolio characteristics and risk metrics. The updated responses displace previous SEC staff commentary on compliance with the Marketing Rule.

Background

Generally, the new Marketing Rule has caused considerable confusion for registered investment advisers since its adoption in 2020. At the time of adoption, the former chair of the SEC under the first Trump administration, Jay Clayton, intended for the new Marketing Rule to modernize the SEC's old advertising and cash solicitation rules that generally had governed investment adviser advertisements and payments to solicitors. He remarked:

The marketing rule reflects important updates to the traditional advertising and solicitation regimes,

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which have not been amended for decades, despite our evolving financial markets and technology.... This comprehensive framework for regulating advisers' marketing communications recognizes the increasing use of electronic media and mobile communications and will serve to improve the quality of information available to investors. The new rule provides for an extended compliance period intended to provide advisers with a sufficient transition period, including to enable consultation with the Commission's expert staff.[1]

Following Clayton's departure, Biden-appointee Gary Gensler would subsequently oversee the issuance of four FAQs on the Marketing Rule during his tenure as SEC Chair. Fund managers were particularly affected by January 2023 guidance that required such managers to report net and gross performance, even when presenting performance of an individual portfolio investment or group of portfolio investments of a private fund (often shown as a "case study" by private fund advisers).[2] Since then, the necessity for clarity across the industry — particularly for registered private fund advisers — has grown tremendously.

The Updated Guidance

Fortunately, the two new FAQs attempt to address the former issues of displaying certain investment performance in advertisements.

Extracted Performance

Advisers may now advertise the performance of individual investments (i.e., extracted performance) on a gross basis as long as the net and gross performance of the entire portfolio are also included "with at least equal prominence" in the advertisement and the advertisement meets the following conditions:[3]

1. the gross extracted performance must be clearly identified as gross performance;

2. the gross extracted performance must be accompanied by a presentation of the *total portfolio's gross and net performance* consistent with the requirements of the rule (e.g., to show the effect of fees);
3. the gross and net performance of the total portfolio must be presented *with at least equal prominence to*, and in a manner designed to facilitate comparison with, the gross extracted performance; and
4. the gross and net performance of the total portfolio must be calculated over a period that includes the entire period over which the gross extracted performance is calculated.[4]

As mentioned above, where previous guidance required that gross performance of individual positions also be displayed on a net basis (which private fund managers, in particular, often needed to estimate), the updated guidance allows an advertisement to include such extracted performance on a gross basis (so long as the additional requirements set forth below are satisfied).

Portfolio Characteristics

Additionally (or alternatively), the updated guidance allows an advertisement to include certain portfolio characteristics and risk metrics that may be considered “performance” on a gross basis without including the corresponding net characteristic(s) so long as the additional requirements set forth below are satisfied:

1. the gross characteristic is clearly identified as being calculated without the deduction of fees and expenses;
2. the characteristic must be accompanied by a presentation of the *total portfolio's gross and net performance* consistent with the requirements of the rule (e.g., to show the effect of fees);

3. the gross and net performance of the total portfolio must be 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 must be calculated over a period that includes the entire period over which the characteristic is calculated.[5]

The FAQ notes that “portfolio or investment characteristics” covers a wide range of investment portfolio information, and thus advisers may have difficulty distinguishing between “performance” characteristics and other characteristics under the Marketing Rule. The SEC staff declined to take a position on whether a particular characteristic or attribute is considered “performance” under the Marketing Rule but confirmed that if a characteristic or attribute is not “performance,” it would be outside of the scope of the Marketing Rule.

The FAQ acknowledges that time periods over which characteristics are calculated may not easily align with the time periods required by Rule 206(4)-1(d)(2) and therefore, provides no-action relief if the characteristic presented as described above is calculated over a single, clearly disclosed period. The FAQ also notes that any advertisement that presents characteristics in accordance with the FAQ remains otherwise subject to the general Marketing Rule and anti-fraud provisions of the Investment Advisers Act of 1940.

What This Means for Private Fund Advisers

Under certain circumstances, private fund advisers are now able to show extracted performance relating to a fund they manage (such as the performance of a single portfolio company investment) on a gross basis in an advertisement, as long as the conditions described above are met, including that the overall portfolio performance be shown on a gross *and* net basis with “equal prominence” and “in a manner

designed to facilitate comparison” in the same advertisement.

The FAQs further note that “equal prominence” and “in a manner designed to facilitate comparison” does not strictly require that portfolio performance be included side-by-side or even on the same page as the extracted performance or characteristics.^[6] Including the portfolio performance prior to the extract or characteristic is likely sufficient (e.g., on the preceding page). In practice, advisers should avoid including portfolio performance at the end of a presentation.

Conclusion

These updates to the Marketing Rule guidance should not only provide advisers with increased flexibility in advertising performance, but they also may indicate that the SEC is more willing to consider industry feedback. Lack of guidance on the Marketing Rule has been a continuing concern for advisers over the past few years, and this updated guidance suggests that the agency’s Division of Investment Management may be more responsive to industry concerns than it has been since the Marketing Rule’s 2020 adoption.

[1] Press Release: SEC Adopts Modernized Marketing Rule for Investment Advisers, (Dec. 2020), <https://www.sec.gov/newsroom/press-releases/2020-334>.

[2] The current question remains the same as it did in January 2023, “Q. When an adviser displays the gross performance of one investment or a group of investments from a private fund or other portfolio, must the adviser show the net performance of such single investment or group of investments?” Where the earlier guidance answered the question, “Yes,” the March 19, 2025 guidance has updated the response as discussed above.

[3] See Marketing Compliance Frequently Asked Questions, (Mar. 2025), https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/marketing-compliance-frequently-asked-questions?utm_medium=email&utm_source=govdelivery.

[4] *Id.*

[5] *Id.*

[6] *Id.*

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