

SEC staff issues two new FAQs regarding compliance with Advisers Act marketing rule

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The new FAQs clarify when extracted performance and certain portfolio or investment characteristics may be presented on a gross basis in an advertisement, without also being presented on a net basis.

On March 19, 2025, SEC staff (the Staff) updated its [FAQs](#) regarding compliance with Rule 206(4)-1 under the Advisers Act (the Marketing Rule) with responses to two new questions relating to the presentation of gross and net performance.

The first new question addressed whether an adviser, when presenting extracted performance calculated on a gross basis in an advertisement, must also present such extracted performance on a net basis. In its response, the Staff noted that:

when an adviser prominently displays the gross and net performance of the total portfolio from which an extract was extracted, calculated pursuant to the requirements of the marketing rule and presented in a manner that is not otherwise materially misleading, and appropriate information accompanies the gross performance of the extract, there is little risk that presenting only the gross performance of an extract will be misleading.

The Staff's response indicated that an adviser may present gross performance of an extract in an advertisement without presenting the corresponding net performance of such extract, if:

- Such extracted performance is clearly identified as gross performance (e.g., discloses that the extracted performance does not reflect the deduction of all fees and expenses that an investor paid or would have paid, and refers the reader to the presentation of the total portfolio's gross and net performance to clarify the overall effect of fees);
- Such extracted performance is accompanied by a presentation of the total portfolio's gross and net performance consistent with Marketing Rule requirements;
- 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 (e.g., gross and net performance of the total portfolio is presented prior to the extracted performance); and
- 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. The Staff acknowledged that the time periods of extracted performance may not easily align with the time periods required (except for private funds) under Rule 206(4)-1(d)(2), and indicated that such extracted performance may be presented over "a single, clearly disclosed period."

The second new question in the FAQs addressed whether an adviser, when presenting certain portfolio or investments 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) in an advertisement calculated on a gross basis, must also present such characteristics on a net basis. The Staff clarified that its position as stated in this response does not apply to: total return, time-weighted return, return on investment, internal rate of return, multiple on invested capital, or total

value to paid in capital.

In its response, the Staff acknowledged that calculating certain portfolio or investments characteristics net of fees and expenses “may be impossible or lead to misleading or confusing results” and noted that:

when an adviser prominently displays the gross and net performance of the total portfolio calculated pursuant to the requirements of the marketing rule and presented in a manner that is not otherwise materially misleading, and provides appropriate accompanying information about the characteristic and how it is calculated, there is little risk that prospective clients and prospective investors will be misled about the impact of fees and expenses on their returns when viewing such a characteristic.

The Staff’s response indicated that an adviser may present such characteristics on a gross basis in an advertisement without presenting the corresponding net calculation of such characteristics, if:

- Such characteristic is clearly identified as being calculated without the deduction of fees and expenses (e.g., discloses that such characteristic does not reflect the deduction of all fees and expenses that an investor paid or would have paid, and refers the reader to the presentation of the total portfolio’s gross and net performance to clarify the overall effect of fees).
- Such characteristic is accompanied by a presentation of the total portfolio’s gross and net performance consistent with Marketing Rule requirements;
- 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, such characteristic (e.g., gross and net performance of the total portfolio is presented prior to the characteristic); and
- 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 acknowledged that the time periods of the calculation of such characteristic may not easily align with the time periods required (except for private funds) under Rule 206(4)-1(d)(2), and indicated that such characteristic may be presented over “a single, clearly disclosed period.”

The Staff’s response also notes that any advertisement that presents the gross performance of extracts or portfolio or investment characteristics calculated on a gross basis in accordance with the two new FAQs described above remains subject to the general prohibitions under Rule 206(4)-1(a), as well as sections 206(1) and 206(2) of the Advisers Act.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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