

Client Alert

Real Estate & Funds

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New Marketing Rule FAQs Facilitate Compliance on Net Performance

On March 19, 2025, the SEC Staff published two Marketing Rule FAQs that address some of the more challenging aspects of the Marketing Ruleⁱ requirement to present net performance information. Specifically, the FAQs provide a more workable path forward for applying the Marketing Rule's net performance requirement to presentations of: (i) performance information for a single investment or a group of investments (an "extract"), and (ii) certain portfolio or investment characteristics (e.g., dividend yield or contribution to return).

The two FAQs, previewed by the SEC Staff at the Investment Adviser Association conference on March 7, are important and practical relief for marketing by SEC-registered investment advisers.

I. PRESENTATION OF PERFORMANCE INFORMATION FOR CASE STUDIES AND OTHER PORTFOLIO EXTRACTS ON A GROSS BASIS ONLY

1. Background

Displaying the performance of one investment or a group of investments in a private fund or other portfolio is "extracted performance" under the Marketing Rule. An SEC Staff FAQ published in January 2023 provided that advisers presenting extracted performance on a gross basis must also provide a corresponding net figure.

Given that calculations of incentive fees often apply on a portfolio-wide basis under applicable waterfalls, calculation of net performance of a portfolio extract proved to be subject to significant barriers. This March 19, 2025 update of the 2023 FAQ seeks to address the inherent barriers to calculating net performance on portfolio sub-sets under either European or American waterfalls. It does so by providing advisers with comfort that providing gross and net performance of the **total** portfolio, "with at least equal prominence to, and in a manner designed to facilitate

comparison with,” the extract, is sufficient to meet the requirements of Advisers Act Rule 206(4)-1(d)(1) (the “net performance” requirement”), provided that certain conditions are met.

2. FAQ Conditions

Under the updated FAQ, the SEC Staff would not recommend enforcement action if an investment adviser displays only the gross performance of an extract in an advertisementⁱⁱ without including corresponding net performance, if the following conditions are met:

- a. the extracted performance is clearly identified as gross performance;
- b. the extracted performance is accompanied by a presentation of the total portfolio’s gross and net performance consistent with the requirements of the rule;
- c. 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; and
- d. 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 FAQ reminds that any advertisement that presents the gross performance of one or more extracts in accordance with the FAQ remains subject to the Marketing Rule’s “general prohibitions” (these include prohibitions against materially misleading content, untrue statements of material fact, and certain content that is not fair and balanced, among other prohibitions, as discussed in our 2022 Marketing Rule client alert at Section 2.1) and the Advisers Act’s general anti-fraud provisions.

When presenting extracts, advisers should continue to be mindful of the Marketing Rule’s prohibition against including or excluding performance results, or presenting performance time periods, in a manner that is not fair and balanced (one of the Rule’s “general prohibitions”), among other prohibitions against “cherry-picking.”

In presenting the portfolio gross and net performance information, advisers should also be mindful of the February 2024 FAQ addressing vehicles that use a subscription-based capital commitment facility. The FAQ notes that “any presentation of gross performance be accompanied by a presentation of net performance that has been calculated **over the same time period** and using the same type of return and methodology as the gross performance” [emphasis added], and provides guidance regarding, in particular, the time period of net performance information where a vehicle uses a subscription facility.

II. PRESENTATION OF “PORTFOLIO OR INVESTMENT CHARACTERISTICS” ON A GROSS BASIS ONLY

Since the Marketing Rule came into force, one of the challenges of its application has been determining which numerical information related to a portfolio constitutes “performance results”, and thus requires a corresponding “net” figure, and which does not. This proved challenging as many types of portfolio metrics noted in the March 19, 2025 FAQ (e.g., dividend yield and contribution to return) are not inherently susceptible to calculation of net figures.

The FAQ provides a workable path forward to presentation of such important metrics.

Specifically, the FAQ provides that the SEC Staff would not recommend enforcement action under Advisers Act Rule 206(4)-1(d)(1) (the “net performance” requirement) if an investment adviser chooses to present in an advertisement one or more gross characteristics of a portfolio or investment, even if it does not include the corresponding net characteristic(s), if:

1. the “gross” characteristic is clearly identified as 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;
3. the total portfolio’s gross and net performance is presented with at least equal prominence, 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 presented metric is calculated.

A footnote to the FAQ states that the Staff positions articulated in the FAQ do not apply to total return, time-weighted return, return on investment (ROI), internal rate of return (IRR), multiple on invested capital (MOIC), or Total Value to Paid in Capital (TVPI). As such, advertisements presenting those figures on a gross basis would need to include corresponding net figures.

The FAQ does not define what is an investment or portfolio characteristic, beyond noting in its discussion of investment or portfolio characteristics “yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio, the Sortino ratio, and other similar metrics.” Certain of these characteristics may be more or less applicable for hedge funds vs. real estate or private equity funds.

III. IMPORTANT FOOTNOTES REGARDING FAQ CONDITIONS

The footnotes associated with the two FAQs have important and helpful guidance, and should be carefully reviewed. The footnote guidance includes, but is not limited to, the following:

- Gross and net performance of the total portfolio does not need to be presented on the same page of the advertisement as the portfolio characteristic or extracted performance, provided that the presentation facilitates comparison between the gross and net performance of the total portfolio and the characteristic. The footnote goes on to note that presenting the gross and net performance of the total portfolio prior to the extracted performance in the advertisement could facilitate such comparisons and help ensure they are presented with at least equal prominence to the performance of the extract.”

CONCLUSION

This new guidance provides welcome clarification for investment advisers that have been grappling with how to display extracted performance and portfolio/investment characteristics in advertisements since the Marketing Rule came into force in 2022. The guidance is particularly helpful for fund sponsors presenting case studies, performance information of a subset of investments from a fund with a wide investment mandate, or of a fund’s return characteristics that do not have an easily comparable net figure, such as current yield. With the guidance effective immediately, those in the market and reviewing and updating their marketing materials should consider if the updated FAQs provide comfort to expand the presented investment performance. The King & Spalding team is available to discuss any questions or concerns related to the new guidance and its effects on marketing materials.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

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¹ For our prior alerts on the Advisers Act Marketing Rule, see [SEC Staff Addresses Net Performance Presentation Requirements for Single Investments Under Marketing Rule](#) (Feb. 2023); [SEC Investment Adviser Marketing Rule: Compliance Date is Nov. 4, 2022](#) (Mar. 2022).

² Advisers Act Rule 206(4)-1(e)(1). The definition of advertisement generally excludes one-on-one communications, subject to certain exceptions (and exceptions from the exception).