

SEC Staff Updates Adviser Marketing Rule FAQs on Extracted Performance and Performance Characteristics

April 21, 2025

On March 19, 2025, the staff of the Division of Investment Management (the “Staff”) of the Securities and Exchange Commission (“Commission”) updated its Marketing Compliance Frequently Asked Questions (“March 2025 FAQs”)¹ to provide no-action relief with respect to the presentation of extracted performance, as well as clarity on whether certain portfolio or investment characteristics constitute “performance” for purposes of Rule 206(4)-1 (the “Marketing Rule”) under the Investment Advisers Act of 1940 (the “Advisers Act”).

Background

The Marketing Rule, adopted in 2020 and effective as of May 4, 2021, includes specific prohibitions on the presentation of performance in adviser advertisements.² The first is that an adviser may not show gross performance information in an advertisement unless it also presents net performance.³ Another is that an adviser may not present extracted performance, the performance results of a subset of investments extracted from a portfolio, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.⁴ In considering the two prohibitions, advisers and their counsel had, since the adoption of the Marketing Rule, wrestled with whether any extracted performance was required to be presented on a net-of-fee basis, consistent with the first prohibition and whether certain portfolio or investment characteristics, such as yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio, the Sortino ratio, and other similar metric (“Portfolio Characteristics”), constitute “performance,” subject to the net-of-fees requirement under the Marketing Rule.

The issue of whether extracted performance must be shown net-of-fees was seemingly resolved in January 2023 when the Staff published a FAQ (“January 2023 FAQ”) that the performance of a single investment or a group of investments in a private fund is extracted performance and therefore, “an adviser may not show gross performance of one investment or a group of investments without also showing the net performance of that single investment or group of investments, respectively.” In support of this position, the Staff reminded advisers that “[t]he adopting release also states that the rule requires that advisers that show extracted performance must show net and gross performance for the applicable subset of investments extracted from a portfolio.”⁵ While the Staff’s position provided clarity on the requirement to present extracted performance on a net basis, it failed to provide guidance as to how extracted performance net-of-fees should be calculated.

Extracted Performance No-Action Relief

In updating the January 2023 FAQ, the Staff reiterated in the March 2025 FAQs its prior position that a presentation of gross performance of an extract in an advertisement must be accompanied by the net performance of such extract. However, the Staff stated that when an adviser prominently presents both the gross and net performance of the total portfolio from which extracted performance was extracted, calculated pursuant to the requirements of the Marketing Rule and presented in a manner that is not otherwise materially misleading, there is little risk that presenting only the gross extracted performance will be misleading. Accordingly, the Staff will not recommend enforcement action to the Commission if an adviser presents the gross performance of an extract in an advertisement without including the corresponding net performance of the extract, if the following conditions are satisfied:⁶

- the extracted performance is clearly identified as gross performance;
- the extracted performance is accompanied by a presentation of the total portfolio’s gross and net performance consistent with the requirements of the Marketing Rule;

- 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
- 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.

An advertisement would be viewed as clearly identifying that the extracted performance is gross performance if it discloses that the extracted performance shown does not reflect the deduction of all fees and expenses that a client or investor has paid or would have paid and refers the reader to the presentation of the total portfolio's gross and net performance to understand the overall effect of fees. In addition, an adviser will be deemed to have satisfied both the prominence and the facilitation of comparison requirements if the gross and net performance of the total portfolio is presented prior to the extracted performance in the advertisement.

Finally, because time periods of extracted performance may not easily align with the time periods required by the Marketing Rule, the Staff will not recommend enforcement action to the Commission under the Marketing Rule if the extracted performance presented is calculated over a single, clearly disclosed period.

Portfolio Characteristics No-Action Relief

Another concern for advisers since the adoption of the Marketing Rule has been whether Portfolio Characteristics should be considered "performance" for purposes of the Marketing Rule, which does not include a definition of the term "performance." If a Portfolio Characteristic constitutes performance, the Marketing Rule requires the Portfolio Characteristic to be presented on a net-of-fees basis. Without confirming or denying any Portfolio Characteristic as performance, the Staff recognized the uncertainty advisers faced when including Portfolio Characteristics in advertisements. Accordingly, the Staff, similar to extracted performance, provided no-action relief if an adviser chooses to present Portfolio Characteristics on a gross basis ("Gross Characteristics") without presenting the corresponding Portfolio Characteristic on a net basis, if the following conditions are satisfied:

- the Gross Characteristic is clearly identified as being calculated without the deduction of fees and expenses;
- the Portfolio Characteristic is accompanied by a presentation of the total portfolio's gross and net performance in accordance with the requirements of the Marketing Rule;
- the total portfolio's gross and net performance is presented with equal prominence to, and in a manner designed to facilitate comparison with, the Gross Characteristic; and
- the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the Portfolio Characteristic is calculated.

Similar to extracted performance, an advertisement would be viewed as clearly identifying that a Portfolio Characteristic is calculated without the deduction of fees and expenses if the advertisement discloses that the Portfolio Characteristic shown does not reflect the deduction of all fees and expenses that a client or investor has paid or would have paid and refers the reader to the presentation of the total portfolio's gross and net performance to understand the overall effect of fees. In addition, an adviser will be deemed to have met both the prominence and the facilitation of comparison requirements if the gross and net performance of the total portfolio is presented prior to the Portfolio Characteristic in the advertisement.

As with the FAQ on extracted performance, the Staff will not recommend enforcement action to the Commission under the Marketing Rule if the Portfolio Characteristic presented is calculated over a single, clearly disclosed period.

Both March 2025 FAQs remind advisers that presentations of extracted performance and Portfolio Characteristics remain subject to the general prohibitions of the Marketing Rule and Sections 206(1) and 206(2) of the Advisers Act.

For More Information

We are available at any time to answer questions, discuss scenarios, and provide guidance. If you would like further information concerning the matters discussed in this article, please contact a member of the Investment Management Practice Group or visit us online at chapman.com.

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- 1 Division of Investment Management, Securities and Exchange Commission, Marketing Compliance Frequently Asked Questions (Updated Mar. 19, 2025), available at <https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/marketing-compliance-frequently-asked-questions>
 - 2 See Chapman and Cutler LLP Client Alert, *SEC Adopts Amended Rule 206(4)-1 Addressing Marketing Activities by Registered Investment Advisers* (Dec. 29, 2020), available at <https://www.chapman.com/publication-SEC-Rule-Marketing-Registered-Investment-Advisers>.
 - 3 Rule 206(4)-1(d)(1). "Net performance" is defined to mean the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. Rule 206(4)-1(e)(10).
 - 4 Rule 206(4)-1(d)(5).
 - 5 See footnote 2 of the January 2023 FAQ, *citing* Section II.E.1.a. of the adopting release (discussing gross performance).
 - 6 Where extracted performance is extracted from a representative account, an adviser may satisfy the conditions by showing the gross and net performance of a composite aggregation of all the related portfolios of the representative account (rather than the gross and net performance of the total representative account from which the extracted performance was extracted) presented in a manner consistent with the FAQs.

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