



ALERTS

SEC Issues FAQ With Additional Guidance On New Marketing Rule

January 25, 2023

Highlights

The Marketing Rule FAQ addresses the presentation of gross and net performance for a single investment

A case study is considered “extracted performance” under the Marketing Rule

Private fund advisers should review marketing materials with case studies to ensure compliance

On Jan. 11, 2023, the SEC’s Division of Investment Management of the SEC (the “Staff”) issued an additional [Marketing Rule FAQ](#) (the “FAQ”) which addressed, among other questions, the presentation of gross and net performance for a single investment in advertisements that are subject to the new Marketing Rule under the U.S. Investment Advisers Act of 1940 (the “Advisers Act”). The Marketing Rule had a [compliance effective date](#) of Nov. 4, 2022.

Important Issue Covered by the FAQ

In general, the FAQ states that a registered investment adviser may not

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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. Addressing an area of much focus by investment advisers and interpretation by their external counsel and compliance consultants, the FAQ specifically addressed advertisements that present the prior performance of a single investment in a private fund, i.e., a “case study.” The Staff clarified in the FAQ that a case study would be considered “extracted performance” under the Marketing Rule and, therefore, advisers who present the gross performance of a single investment in a case study will also need to present the net performance of such investment. The FAQ also reminds private fund advisers that they have an obligation to provide tailored disclosures with respect to the calculation of net performance, as well as to present specific investment advice in a fair and balanced manner when showing extracted performance.

Although the FAQ provides needed clarity around advertisements that present a case study, the FAQ did not provide any practical guidance on how to calculate net returns on an investment-by-investment basis. The FAQ leaves some amount of uncertainty around the presentation of managed accounts, single-investment funds and other types of investment vehicles. Registered investment advisers will still need to work through these questions in order to fully comply with the Marketing Rule.

While the FAQ is not binding on the SEC, advisers should consider the guidance to provide insight into how the Marketing Rule may be interpreted and enforced. In light of the new guidance, registered investment advisers should review their marketing materials that present case studies and other position-level gross performance and determine whether they should be updated accordingly.

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