

# Regulatory and Enforcement Alert

## SEC Staff Provides Welcome Relief for Performance Information in Marketing Materials

March 20, 2025

The SEC staff released consequential new FAQs<sup>1</sup> earlier this week, providing some common-sense guidance for complying with the Marketing Rule for SEC-registered investment advisers (Rule 206(4)-1 under the Investment Advisers Act of 1940). The FAQs clarify the staff's views that:

- i. an investment adviser can present “extracted performance” (*i.e.*, the performance of one investment or a group of investments from a private fund or other portfolio—the SEC staff refers to this as “extracted performance”) on a gross basis without showing the net performance attributable to the investment or group of investments; and
- ii. an adviser’s marketing materials can present specific investment “characteristics,” including common metrics related to fixed income securities (yield, for example), without presenting the characteristics on a net basis.

Both of these clarifications are welcome, but the relief in the FAQs is subject to several conditions, which we outline below.

### ***1. Individual Investments and Other Extracted Performance***

As a reminder, the SEC staff previously had provided guidance that if marketing materials display the gross performance of a single investment extracted from a portfolio, the materials must present an equally prominent net performance metric for each such investment. This prior guidance ran contrary to our interpretation of the Marketing Rule, and led to the creation of new, and mostly irrelevant presentations of “net returns” for individual investments—an exercise particularly confusing because many advisers calculate fees and expenses at the fund (or portfolio) level (and not at the investment level).

The newly revised FAQs alleviate the need to use these individual-investment net performance calculation methodologies. Under the new FAQs, advisers can show the gross performance of portfolio extracts (including individual investments) without also showing corresponding net performance for the extracts so long as:

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<sup>1</sup> [SEC Marketing Rule FAQs March 2025](#) (updated March 19, 2025).

- i. the extracted performance is clearly identified as gross performance;
- ii. the extracted performance is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the rule;
- iii. 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 gross performance<sup>2</sup>; and
- iv. 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 (*i.e.*, the staff recognizes that a portfolio and an individual investment it has made will have different time periods).

Generally speaking, subject to some interpretive issues, this guidance represents a return to pre-Marketing Rule requirements for the presentation of investment-level returns and other “extracted performance” metrics, including, for example, the aggregate performance of all realized investments made by a single fund.

## **2. Yield and Other Portfolio “Characteristics”**

The FAQs confirm that advisers can show performance characteristics—yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, Sharpe ratio, the Sortino ratio and other similar metrics—without showing a corresponding net figure for the characteristics. The staff conditioned the guidance on the following conditions:

- i. the “gross” characteristic is clearly identified as calculated without the deduction of fees and expenses;
- ii. the characteristic is accompanied by a presentation of the total portfolio's gross and net performance;
- iii. 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
- iv. 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 declined to exhaustively identify what qualifies as a “characteristic” for purposes of the FAQ, other than those identified above. A footnote to the FAQ, however, states the staff's view that the following (regardless of how such metrics are labelled in the advertisement) are performance metrics requiring net performance to be shown with equally prominent gross performance: 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).

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<sup>2</sup> As a potentially interesting side note, Footnotes 6 and 11 of the FAQ state that the phrase “equal prominence, designed to facilitate comparison” does not necessarily mean on the *same page*. This could provide additional flexibility for designing marketing materials. For example, it would be sufficient if the adviser provides, with at least equal prominence the gross and net performance results of the total portfolio on slide pages before the extracted performance.

## Conclusion

The new FAQs will likely alleviate some of the most challenging aspects of Marketing Rule compliance to date. Some open questions remain, however, including how market practice will develop regarding the presentation of performance the FAQs do not specifically address (*e.g.*, the presentation of performance metrics for multi-fund, sub-set composites). Advisers might wish to consider whether (and how) to un-wind performance presentations that were developed in response to the staff's prior guidance, including for funds that are currently fundraising, and how to comply with the conditions for reliance on the new guidance.

Advisers that choose to alter their current approach to performance calculations should bear in mind that all advertisements will remain subject to the general content requirements under the Marketing Rule, including the requirement to present all performance in a fair and balanced manner.

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