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SEC Issues New Guidance on Marketing Rule

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On March 19, 2025, the U.S. Securities and Exchange Commission (the "SEC") updated its Q&A guidance on Rule 206(4)-1 (the "Marketing Rule") of the Investment Advisers Act of 1940 (the "Advisers Act"). The updated Q&A guidance provides SEC-registered investment advisers with greater flexibility in presenting performance results in advertisements. The SEC's updated interpretation of the Marketing Rule addresses challenges advisers previously faced regarding the presentation of extracted performance and performance-related advertising in a private fund or other portfolio.

Extracted Performance: Gross vs. Net Presentation

The SEC defines "extracted performance" as displaying the performance of one investment or a group of investments in a private fund or portfolio. Previously, the SEC has taken the position that an adviser may not present any gross performance in advertisements unless it includes the net performance with equal prominence, and calculates the net performance over the same time period and using the same methodology.

The updated Q&A guidance concludes that an adviser may present extracted performance on a gross basis without corresponding net performance, provided the following conditions are met:

1. Clear Identification: The extracted performance is clearly identified as gross performance.
2. Total Portfolio Performance over Consistent Period: The advertisement includes the total portfolio's gross and net performance, calculated over a period that encompasses the extracted performance period.
3. Prominent Comparison: The total portfolio's performance is presented with equal prominence and in a manner facilitating comparison with the extracted performance.

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This change acknowledges the practical difficulties in calculating net performance for individual investments and aims to reduce compliance burdens while providing marketing materials that are not misleading to prospective or actual investors.

Portfolio or Investment Characteristics

The SEC notes that "performance" is not defined under the Marketing Rule, and thus there is ambiguity around what constitutes "performance" for advisers to comply with the rule. The SEC further notes that for certain characteristics such as yield rate, coupon rate, volatility, or other more complex metrics, calculation of net of fees and expenses may be either difficult to calculate, impossible to calculate, or ultimately misleading to investors. The updated Q&A guidance provides relief from this issue by providing that an adviser may present certain metrics on a gross basis without corresponding net figures, under the following conditions:

1. Gross Calculation Disclosure: The characteristic is clearly identified as being calculated without deducting fees and expenses.
2. Comprehensive Performance Data: The characteristic is accompanied by a presentation of total gross and net performance of the portfolio, consistent with the obligations of the Marketing Rule.
3. Prominent Comparison: The gross and net performance of the portfolio are presented with equal prominence to the gross characteristic, presented in a manner that facilitates comparison between the two.
4. Consistent Calculation Period: 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.

Conclusion

These updates to SEC guidance on the Marketing Rule aim to ease compliance challenges for investment advisers, while ensuring that advertisements remain fair and not misleading to investors. Advisers should review and, if necessary, update their advertising practices and compliance policies to align with this new guidance. Clients with concerns about how the new Marketing Rule guidance may impact them should consult a Rich May attorney.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Diana Alsabe.

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