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SEC Seeks to Clarify Position on Presentation of Gross and Net Performance Under the Marketing Rule

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On February 6, 2024, the SEC's Division of Investment Management released a new frequently asked question response ("**FAQ**") seeking to clarify the requirements of Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended ("**Marketing Rule**"), governing the presentation of gross and net performance in investment advisers' advertisements.¹

Specifically, the FAQ addresses the practice of advisers presenting gross internal rate of return ("**IRR**") that is calculated from the time an investment is made (whether or not fund borrowing or fund-level subscription facilities are used), while simultaneously presenting net IRR that is calculated from the time investor capital has been called to repay any such borrowing. The SEC noted that it views such an approach as violating the Marketing Rule's requirements that (i) any presentation of gross performance be accompanied by a presentation of net performance calculated over the same time period and using the same type of return and methodology as the gross performance and (ii) net performance be presented in a format designed to facilitate comparison with gross performance.

Instead, according to the FAQ, the SEC would expect that, if an adviser were to include in an advertisement a fund's gross IRR calculated from before capital commitments are called, it would also show such fund's net IRR calculated from the same time before capital commitments are called (i.e., including the effect of fund-level subscription facilities).

The SEC further noted that, in its view, an adviser would violate the Marketing Rule's general prohibitions if it only presented net IRR that includes the impact of fund-level subscription facilities without including either (i) net IRR without the impact of fund-level subscription facilities or (ii) appropriate disclosures describing the impact of such subscription facilities on the net IRR shown, under the premise that presenting only net IRR that includes the impact of fund-level subscription facilities could mislead investors by suggesting that the fund's advertised performance is similar to the performance that the investor has achieved from its investment in the fund alone.

¹ The full text of all Marketing Rule FAQs can be found [here](#).

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