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In Two Significant Private Fund Regulatory Developments, SEC Staff Publishes FAQs Permitting Advisers to Present Gross-Only Extracted Performance and Investment Characteristics under the Advisers Act Marketing Rule and No-Action Letter Providing Clear Guidance for Verifying Accredited Investor Status in Rule 506(c) Offerings

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In a preview of what private fund advisers likely can expect from the new Commission, SEC staff issued two important pieces of guidance in the past week, including (1) FAQs permitting advisers to present gross-only extracted performance and investment characteristics under the Advisers Act Marketing Rule and (2) a no-action letter providing guidance for verifying accredited investor status in offerings conducted under Rule 506(c).

SEC Staff Publishes FAQs Permitting Advisers to Present Gross-Only Extracted Performance and Investment Characteristics under the Advisers Act Marketing Rule

On March 19, 2025, the SEC's Division of Investment Management released two new frequently asked question responses (each, an "FAQ") seeking to clarify the requirements of Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended (the "Marketing Rule"), governing the presentation of gross and net performance in investment advisers' advertisements.¹

FAQ on Presenting Extracted Performance

The first FAQ (the "Extract FAQ") addresses the practice of advisers presenting the gross performance of one investment or a group of investments in a private fund or other portfolio (an "Extract") without presenting the net performance of such an Extract. While the Extract FAQ confirmed that the Marketing Rule requires an adviser to show net performance of an Extract when such Extract's gross performance is advertised, it also stated the SEC staff's position that advertisements may meet certain conditions to avoid the requirement to present an Extract's net performance where its gross performance has been displayed. Specifically, where gross performance of an Extract has been presented without including corresponding net performance of such Extract, SEC staff would not recommend an enforcement action against the adviser if:

1. the Extract's performance is clearly identified as gross performance;
2. the Extract's performance is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;

¹ A link to the FAQ can be found [here](#).

3. the gross and net performance of the total portfolio holding the Extract is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the Extract's performance; and
4. the gross and net performance of the total portfolio holding the Extract is calculated over a period that includes the entire period over which the Extract's performance is calculated.

The Extract FAQ clarifies that the above factors are applicable for an Extract from a single portfolio as well as an Extract from a composite of all related portfolios thereto. The staff noted that performance extracted from a composite of portfolios may be considered hypothetical performance.

FAQ on Presentation of Investment Characteristics

The second FAQ (the "Characteristic FAQ") addresses the requirement for advisers to present net figures when advertising certain portfolio or investment characteristics (e.g., yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio, the Sortino ratio, and other similar metrics) which may be interpreted as performance under the Marketing Rule, apart from internal rate of return, multiple on invested capital or total value to paid in capital. Accurately calculating such characteristics net of fees and expenses may be impossible and therefore lead to misleading or confusing results. Therefore, the SEC staff stated in the Characteristic FAQ that when an adviser prominently displays the gross and net performance of the total portfolio calculated pursuant to the requirements of the Marketing Rule and such performance is presented in a manner that is not otherwise materially misleading, and provides appropriate accompanying information about the characteristic and how it is calculated, there is little risk of misleading prospective investors about the impact of fees and expenses surrounding such characteristics. Accordingly, SEC staff would not recommend an enforcement action against an adviser where one or more gross characteristics of a portfolio or investment are presented without corresponding net characteristics, if:

1. the gross characteristic is clearly identified as being calculated without the deduction of fees and expenses;
2. the characteristic is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;
3. the total portfolio's gross and net performance is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the gross characteristic; and
4. 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.

SEC staff stated that the Characteristic FAQ also applies to characteristics calculated based on the performance of (i) a composite aggregation of related portfolios, (ii) a representative account, (iii) a subset of a portfolio (i.e., extracted performance), and (iv) a subset extracted from a composite aggregation of related portfolios, provided the characteristics are presented in a manner consistent with the Characteristic FAQ.

Both FAQs note that an advertisement may clearly identify that an Extract's performance or characteristic is calculated without the deduction of fees and expenses (i.e., as a gross value) if, for example, it discloses that the characteristic shown does not reflect the deduction of all fees and expenses attributable to an investor and refers the recipient to the total portfolio's gross and net performance.

With respect to both FAQs, so long as an advertisement facilitates comparison between the gross and net performance of the total portfolio and the Extract's performance or characteristic, the gross and net performance of the total portfolio does not need to be presented on the same page of the advertisement as the Extract's performance or characteristic. For example, presenting the gross and net performance of the total portfolio prior to the characteristic in the advertisement could also facilitate such comparisons and help ensure they are presented with at least equal prominence to the Extract's performance or characteristic.

Applying these FAQs will take careful analysis and planning. Weil looks forward to answering questions and assisting advisers in utilizing this new, helpful guidance in marketing materials.

No-Action Letter Provides Clear Guidance for Verifying Accredited Investor Status in Offerings Conducted under Rule 506(c)

On March 12, 2025, SEC staff published a no-action letter stating that a high minimum investment amount, coupled with certain representations, is sufficient to verify accredited investor status with respect to an offering conducted under Rule 506(c) of Regulation D under the Securities Act of 1933, as amended.²

An issuer conducting an offering under Rule 506(c) is required to take "reasonable steps" to verify an investor's accredited status. In the no-action letter, SEC staff stated their view that where an issuer restricts purchasers to those with high minimum investment amounts, the issuer will be deemed to have taken "reasonable steps" to verify an investor's status as accredited where the issuer obtains written representations from the investor that (i) such investor is accredited and (ii) the investor's minimum purchase amount is not being financed, in whole or in part, by any third party for the specific purpose of making the particular investment with the issuer. The issuer must also have no actual knowledge of any facts that would indicate either such representation is untrue.

The incoming letter to which the no-action letter is responsive presented facts for the following categories of investors:³

1. a \$200,000 minimum investment for investors who are natural persons;
2. a \$1,000,000 minimum investment amount for investors that are entities; and
3. for investors that are legal entities accredited solely from the accredited investor status of all of their equity owners, a minimum investment obligation of each of such investor's equity owners to the investor of at least \$200,000 for natural persons and \$1,000,000 for legal entities, where such investor must make a minimum commitment to the offering of at least \$1,000,000 or, if all of such investor's equity owners are fewer than five natural persons, \$200,000 for each of such investor's equity owners.

This no-action letter significantly reduces the regulatory burdens for Rule 506(c) offerings and Weil expects more private fund advisers to explore the use of Rule 506(c) as a result. Weil looks forward to working with private fund advisers as they consider expanded use of Rule 506(c).

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² A link to the "no action" letter can be found [here](#).

³ A link to the request for interpretive guidance can be found [here](#).

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