Private Funds Alert

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January 20, 2026

SEC Publishes Marketing Rule FAQs regarding the Use of Model Fees in Advertising Net Performance and Testimonials or Endorsements by Persons Subject to Final Orders Issued by SROs

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On January 15, 2026, the Securities and Exchange Commission's ("**SEC**") Division of Investment Management published two 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 (1) the use of model fees in presenting net performance and (2) testimonials or endorsements by persons subject to final orders issued by self-regulatory organizations ("**SRO**").[1]

FAQ regarding the Use of Model Fees in Presenting Net Performance

Where net performance is calculated using a model fee rather than actual fees, the Marketing Rule requires that such net performance reflects either "the deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted" or "the deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated." Footnote 590 to the Marketing Rule's adopting release states "if the fee to be charged to the intended audience is anticipated to be higher than the actual fees charged, the adviser ***must*** use a model fee that reflects the anticipated fee to be charged in order not to violate the rule's general prohibitions" (emphasis added).[2] Industry practitioners have long flagged confusion arising from this footnote, where the word "must" was read by some to require the use of a "model fee" whenever the fees of the product being offered were higher than those reflected in the advertised performance, effectively forcing a recalculation to the higher fee level in all cases.

The FAQ indicates SEC staff will review all facts and circumstances surrounding the use of actual fees versus a model fee in calculating net performance within a given advertisement, including relevant disclosures, when considering whether such calculations comply with the Marketing Rule. This FAQ accordingly clarifies that there are a range of options advisers can use in addressing circumstances where the fees of the product advertised are lower than the fees of the product being offered. The SEC's position also demonstrates that the Division of Investment Management is listening to concerns from industry and attempting to address them.

[1] A link to the FAQs can be found here.

[2] A link to the adopting release can be found here.

FAQ regarding Testimonials or Endorsements by Persons subject to Final Orders Issued by SROs

The second FAQ noted that SEC staff would not recommend enforcement where an investment adviser compensates a person for a testimonial or endorsement even if the adviser knew, or in the exercise of reasonable care should have known, such person was subject to the entry of a final order by an SRO of the type described in Section 203(e)(9) of the Investment Advisers Act of 1940, as amended, within 10 years prior to such person disseminating such endorsement or testimonial, provided that:

1. The sole reason the person is an ineligible person (as defined in the Marketing Rule) is the SRO's final order;
2. The SRO did not expel or suspend the person from membership, bar or suspend the person from association with other members, or prohibit the person from acting in any capacity;
3. The person is in compliance with the terms of the SRO's final order; and
4. For a period of 10 years following the date of such final order, any advertisement containing the testimonial or endorsement discloses that the person providing such testimonial or endorsement is subject to an SRO order, and includes the order, or a link to the order on the SRO's website or other public disclosure system, if available.

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Private Funds Alert is published by the Private Funds practice of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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