

SEC Clarifies Net Performance Requirement for “Extracted Performance”

Investment Services Group Client Alert

On January 11, 2023, the staff of the Division of Investment Management of the Securities and Exchange Commission updated its *Marketing Compliance Frequently Asked Questions* to address whether an adviser must show net performance when the adviser displays the gross performance of one investment or a group of investments from a private fund.

According to the Gross and Net Performance FAQ, “[t]he staff believes that displaying the performance of one investment or a group of investments in a private fund is an example of extracted performance under the new marketing rule.” As a result, “an adviser may not show gross performance of one investment or a group of investments without also showing the net performance.”

Previously, many in the industry had understood that the performance of single investments could be considered “specific investment advice” that would be subject to the “fair and balanced” requirement but not necessarily subject to the net performance presentation requirements, and that the gross performance of single investments could be accompanied by the gross and net performance of the entire portfolio for the same time period to meet the “fair and balanced” requirement.

The staff’s interpretation results in a number of challenges for advisers displaying the performance of a single investment, particularly for portfolios charging performance-based fees. In many cases, certain assumptions will have to be made in order to provide the net performance for a single investment. Given the unfortunate timing of this guidance, advisers that have taken a different approach will need to make immediate adjustments to their marketing materials.

The FAQ is available [here](#).

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