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Kirkland AIM

SEC Softens Model Net Performance Requirements and Provides Exception to Marketing Rule Disqualifications

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On January 15, 2026, the SEC Staff published Advisers Act [Marketing Rule guidance](#) containing two helpful positions.

First, the Staff stated there is no universal rule requiring an investment adviser to use model fees, instead of actual fees charged, when advertising net performance in a setting where the adviser intends to charge fees higher than those charged to the investors who experienced the performance.¹ Rather, in determining whether an advertisement showing actual fees complies with the Marketing Rule's [general prohibitions](#) (e.g., whether it is fair and balanced and not misleading), the Staff will review the facts and circumstances of the advertisement, including any disclosures made.

The Staff stated investment advisers "may use various means to illustrate the effect of differences between actual fees and anticipated fees on performance," but did not elaborate on what would constitute sufficient disclosure. As a result, industry approaches to presenting net performance will likely vary depending on the materiality of fee and other differences between historical funds and funds being marketed. We generally expect private fund advisers will use net performance based on actual fees in most instances and will rely on disclosure to highlight the impact of differences between historical and anticipated fees on performance.

Second, the Staff established a narrow exception to the Marketing Rule's prohibition on an investment adviser compensating a person for a testimonial or endorsement if the investment adviser knows (or in the exercise of reasonable care should know) the person is subject to a "disqualifying event" within the prior 10 years. The new exception applies only to certain self-regulatory organization (e.g., FINRA) final orders and is

subject to conditions outlined in the guidance, including that the person is in compliance with the terms of the order and that the order is disclosed in any advertisement containing the testimonial or endorsement.

If you would like to review your firm's approach to presenting fund performance in light of the new guidance or have any other questions, please contact the Kirkland regulatory attorneys with whom you regularly work.

1. This guidance addresses questions raised by footnote 590 in the Marketing Rule's [final rule release](#), which suggested model fees were required to be used in such cases: "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." ↪

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Suggested Reading

- 25 March 2025 Kirkland AIM SEC Marketing Rule Guidance Relaxes Requirements Related to Net Performance Presentations
- 05 January 2026 Kirkland AIM Private Fund Manager U.S. SEC / CFTC Compliance: 2026 Key Dates

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