

Regulatory Alert

SEC Publishes Updates to Marketing Compliance FAQs on the Use of Model Fees and Eligibility of Persons Providing Testimonials and Endorsements

On January 15th, 2026, the SEC Division of Investment Management (the “Division”) provided key updates to the Marketing Compliance FAQs which provide further clarity on the use of model fees when calculating net performance and the eligibility of persons providing Testimonials and Endorsements to receive compensation from an investment adviser.

A. MODEL FEES WHEN CALCULATING NET PERFORMANCE

The Division provided new guidance regarding the presentation of actual net performance when the advertisement’s intended audience is expected to pay higher fees than the ones used to calculate actual performance.

Under the Marketing Rule:

- Net Performance is defined as: performance presented after the deduction of actual fees and expenses, or after the deduction of a “model fee” (subject to certain conditions).
- A “model fee” used to calculate net performance must not result in performance figures higher than actual performance or must be equal to the highest fee charged to the advertisement’s intended audience.
- In instances where the fees paid by the advertisement’s intended audience are anticipated to be higher than the fees used to calculate actual performance, a model fee reflective of the anticipated higher fees must be used.

Many investment advisers interpreted these requirements to mean that, if they were to present the past performance of an account strategy or private fund which charged fees lower than those they planned to charge when marketing the new account strategy or private fund, they would be required to recalculate all past performance shown using the higher fees they intended to charge going forward.

Updated Guidance:

- Per the updated guidance, “whether the use of actual fees violates the general prohibitions depends on all of the facts and circumstances of a specific advertisement,” including sufficient disclosure.
- In what is likely a welcome relief for investment advisers, if an adviser clearly illustrates the effects of differences between actual and anticipated fees on performance, whether through disclosure or a side-by-side comparison of the fee performance and actual performance, it is unlikely that the use of actual performance in an advertisement would violate the general prohibitions of the Marketing Rule.

B. TESTIMONIALS AND ENDORSEMENTS

The Division provided further clarification regarding actions which disqualify persons from receiving compensation for Testimonials and Endorsements.

Under the Marketing Rule:

- An investment adviser may not compensate a person if they know, or should know, that the person giving the Testimonial or Endorsement is an “Ineligible Person,” or a person who is subject to a “disqualifying event” in the 10 years prior to disseminating an Endorsement or Testimonial, including:
- Being subject to a final order by a SRO, which bars a person from association with an entity regulated by the SRO, or from engaging in the business of “securities, insurance, banking, savings association activities, or credit union activities,” or is based on violations of any laws or regulations which prohibit fraudulent, manipulative, or deceptive conduct.

Updated Guidance:

The Division took the view that if a person subject to a final order was not prohibited from acting in any capacity in relation to federal securities laws, they are permitted to receive compensation for Testimonials and Endorsements and engage in related activities.

Per the guidance released by the Division, the SEC would not pursue enforcement action against an adviser if they were to compensate for a Testimonial or Endorsement a person subject to a final order by an SRO which did not bar or suspend the person from membership, or prohibit them from acting in a capacity in connection with such disqualifying conduct, provided that:

- The sole reason the person is an Ineligible Person is the SRO’s final order;
- The SRO did not expel or suspend the person from membership, suspend the person from association with other members, or prohibit the person from acting in any capacity;
- The person is in compliance with the terms of the final order, including paying any fines, penalties, or disgorgements; and
- For a period of 10 years following the date of the final order, any advertisement containing the Testimonial or Endorsement discloses that the person providing the Testimonial or Endorsement is subject to an SRO final order, and includes either the text of the order or a link to the order on the SRO’s website or another public disclosure system.

This recent guidance from the SEC both provides more clarity to advisers on thorny issues related to marketing, and insights into the SEC’s priorities under Atkins: more flexibility for advisers, but continued focus on fulsome, transparent disclosure for investors.

If you have any questions, or wish to learn more about how Optima Partners can help, please email us at info@optima-partners.com.