

Via Electronic Mail

December 19, 2025

Brian Daly
Director
Division of Investment Management
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Marketing Rule for Investment Advisers; Request for Clarification

Dear Director Daly:

Managed Funds Association (“**MFA**”)¹ appreciates the opportunity to provide our feedback to the U.S. Securities and Exchange Commission (the “**SEC**”) related to the December 2020 amendments to rule 206(4)-1 under the Investment Advisers Act of 1940 governing investment adviser advertising and related activities (the “**Marketing Rule**”)². MFA has supported the SEC’s goal of enacting principles-based provisions designed to accommodate the continual evolution and interplay of technology and advice and ensure that investment advisers are able to provide existing and prospective investors with useful information as they choose among investment advisers and advisory services, subject to conditions that are reasonably designed to prevent fraud.

MFA applauds the updated responses the staff of the Division of Investment Management issued regarding extracted performance earlier this year and the other clarifications previously issued with respect to the Marketing Rule (the “**Marketing Compliance FAQs**”).³ We appreciate the staff’s willingness to continue engaging with us on additional elements of the Marketing Rule that continue to cause friction and impair the ability of investment advisers to communicate in an efficient and timely manner with prospective clients and fund investors (and existing clients or fund investors with respect to new advisory services) (collectively, “**Investors**”). To further the SEC’s goals, we believe that the

¹ Managed Funds Association, based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA’s mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

² See Investment Adviser Marketing, SEC Release No. IA-5653 (Dec. 22, 2020) (the “**Adopting Release**”).

³ Division of Investment Management, Marketing Compliance Frequently Asked Questions (Updated Mar. 19, 2025), available at <https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/marketing-compliance-frequently-asked-questions>

Washington, DC
1301 Pennsylvania Ave NW
Suite 350
Washington, DC 20004

New York
546 5th Avenue
12th Floor
New York, NY 10036

Brussels
40 Rue D’Arlon
1000 Brussels, Belgium

London
14 Hanover Square, Mayfair,
London, United Kingdom, W1S 1HT

SEC should further clarify the Marketing Rule in several important respects (either through additional FAQs and no-action relief, or, if required for such clarification, amendments to the text of the Marketing Rule).

We raise below several areas we believe would benefit from clarification. We have included proposed FAQs (see Appendix A) and possible directional answers for the SEC’s consideration, which would provide helpful guidance to investment advisers. We believe such guidance would facilitate advisers’ timely and efficient responses to investor queries, reduce compliance burdens (and the risk of inadvertent violations), and enhance accurate and useful information available to investors. We would be pleased to meet with the SEC staff to provide additional context for our questions and background on our members’ experience, if helpful.

Executive Summary

(i) “One-on-one” communications:

- MFA requests confirmation that adviser responses to comparable Investor requests may reference or re-use prior responsive content without causing the subsequent communication to be deemed an advertisement.
- The SEC should clarify that the re-use of charts or tables containing bespoke calculations – i.e., where the underlying calculations and outputs are customized to each recipient – does not make such charts or tables advertisements.

(ii) Predecessor performance:

- MFA urges a more workable approach to substantiation where books and records reside with a predecessor and are not reasonably available to the adviser, provided the adviser has a reasonable basis to believe the information is not false or misleading and has the right to advertise such performance. MFA further requests alignment with GIPS portability concepts to allow advisers to continue to use performance information despite subsequent personnel changes
- MFA requests flexibility where only extracted gross performance is available and net performance is not practicable to obtain.

(iii) Layered disclosure requirements:

- MFA seeks confirmation that required risk and other disclosures may be provided via prominent hyperlinks or attachments that are “one-click away,” so long as each layer of content is itself fair and balanced.

(iv) Presentation of actual returns:

- MFA asks the SEC to confirm that presenting actual net returns is permissible with prominent disclosure that Investor results will differ for various reasons including multiple classes and different fee structures within the same fund or where fees have varied over time, and that actual net returns need not be treated in the same manner as model returns.

(v) Testimonials and endorsements:

- MFA requests clarification that arms' length payments for primary services by vendors or service providers (e.g., brokerage and legal advice) do not constitute "indirect compensation" for referrals, testimonials, or endorsements. MFA further requests confirmation that Investor fee discounts or other concessions do not constitute "compensation" to the extent an Investor provides referrals or serves as a reference.
- MFA seeks clarification as to what constitutes a testimonial or endorsement in the context of networking or entertainment events or the provision of referral lists without more.

(vii) Proposed FAQs:

- MFA has included proposed FAQs addressing: (1) re-use of content in one-on-one communications; (2) re-use of charts/tables with custom calculations; (3) disclosures for electronic advertisements; and (4) treatment of actual returns.

One-On-One Communications

The Marketing Rule defines an "advertisement" in two "prongs," extending beyond traditional, written marketing materials to include modern communication methods such as electronic mail and compensated testimonials and endorsements. The first prong covers any direct or indirect communication an adviser makes that offers advisory services for securities to Investors. Important exclusions from this prong include: (i) most one-on-one communications, (ii) extemporaneous, live oral communications, (iii) information in a required regulatory notice or filing, as long as such information is meant to satisfy that requirement, and (iv) hypothetical performance that is provided in a one-on-one communication with a private fund Investor or in response to an unsolicited request.

The SEC has indicated that bulk emails or algorithm-based messages that are nominally directed at or "addressed to" only one Investor may in fact be widely disseminated to numerous Investors and therefore would not be subject to the exclusion. Similarly, a template presentation or mass mailing customized only by changing the addressee would not be treated as a one-on-one communication. Likewise, the Adopting Release provides that an adviser cannot use duplicate inserts (such as a database of performance information inserts or tables) in an otherwise customized communication in an effort to avoid application of the Marketing Rule.⁴

Responses to Comparable Requests

Under the Marketing Rule, advisers must consider whether communications are sufficiently tailored to the recipient such that they can safely be considered "one-on-one." The SEC's prior guidance⁵ has raised practical concerns from advisers who may see it as advisable to reference or re-use all or part of documents provided to an Investor in a one-on-one communication to other Investors (e.g., to respond to questions from such Investors). These concerns slow responses to Investor inquiries and questions, create inadvertent inconsistencies in information sharing, and operate to

⁴ See the Adopting Release at section II.A.2.a.ii.

⁵ *Id.*

chill adviser communications with Investors.

MFA members seek clarification that mere re-use of content/responses in communications with multiple Investors does not make such re-used content/response an advertisement, particularly in situations where the adviser is responding to Investor-initiated requests for such information. In situations where the same or similar questions have been asked by one or more Investors, it is efficient for the adviser to re-use and build upon prior responses given to others, but the current guidance creates an incentive to create bespoke responses in each case to avoid characterization of such one-on-one communication as an advertisement, which risks inconsistent information being provided to similarly-situated investors.

Please see proposed Q1 in Appendix A clarifying the definition of one-on-one communication in the context of multiple Investors seeking the same or similar information.

Bespoke Charts/Calculations Do Not Constitute Re-use

Often, a form of chart or table, featuring custom calculations within, included by a private fund manager in a one-on-one communication may be deemed an advertisement merely because a similar form of chart or table is used to present custom calculations to another Investor (e.g., modelling returns to different fees). It would be helpful for the SEC to clarify that where custom calculations are utilized, the chart or table will not be deemed an advertisement merely because of re-use of a similar table in subsequent communications.

Please see proposed Q2 in Appendix A making clear that re-use of charts and tables including custom calculations is permitted as a one-on-one communication.

Substantiation of Predecessor Performance

Advisers may find it burdensome to comply with requirements relating to substantiation of predecessor performance, particularly in situations where an unrelated and/or competitor firm controls the books and records required for fulsome substantiation. For example, advisers may find it particularly difficult to answer questions about prior investment experience or to demonstrate a track record in connection with diligence and Request for Proposal (RFP) processes. Current requirements create a barrier to entry for new firms, impeding competition and reducing employment mobility for individuals in the industry. An easing of requirements in this area to allow for greater disclosures would benefit investors in particular and the economy more generally through increased choice and free market competition among investment professionals. Please provide a more principles-based approach for documenting predecessor performance, particularly in situations where a predecessor firm will not reasonably cooperate in providing books and records, to best substantiate such performance so long as the adviser has a reasonable belief that the information provided is not false or misleading and the adviser otherwise has the right to advertise such predecessor performance. For example, an investment adviser could reasonably rely on a past advertisement or Investor communication of the predecessor firm so long as the adviser does not know or have reason to know that the information provided therein is false or misleading.

In addition, we would welcome alignment with Global Investment Performance Standards (GIPS) portability standards in relation to firms which have previously properly complied with portability requirements relating to

predecessor performance but have seen a change in personnel through a situation such as a portfolio manager leaving for another firm. In such cases, to avoid further disruption to the business of such firm, it would be helpful if such firms had the ability to continue to use performance information once portability tests have been met, even if the persons responsible for such prior performance are no longer involved at such firm. We would welcome clarification that, consistent with GIPS, firms are permitted to continue use of such performance information notwithstanding changes in personnel.

Total Performance Relating to Predecessor Performance

Advisers utilizing predecessor performance information have identified a concern where their gross performance has been extracted from the total portfolio of a predecessor firm and net performance with respect to such extracted performance is not readily available. In such situations, the gross and net performance with respect to the total portfolio of a predecessor firm may be largely irrelevant to the adviser as the personnel of such adviser were not involved in providing investment advice beyond the extracted portion thereof. We would welcome clarification that where performance of an adviser has been extracted from the total portfolio of a predecessor firm and net performance with respect to such extracted performance is not readily available, the adviser may provide gross extracted performance without furnishing the corresponding gross and net performance with respect to the total portfolio of the predecessor firm.

Disclosure Requirements

The SEC has indicated that the requirement for an advertisement to provide fair and balanced disclosures, including with respect to the treatment of material risks, can be addressed by, for instance, identifying one benefit of an adviser's services, accompanying the discussion of the benefit with fair and balanced treatment of material risks associated with that benefit within the four corners of that advertisement, and then including a hyperlink to additional content that discusses additional benefits and additional risks of the adviser's services in a fair and balanced manner. The SEC has indicated that so long as each layer of an advertisement complies with the requirement to provide disclosures such as risks in a fair and balanced manner, providing hyperlinks to additional content would meet the requirement of this general prohibition. However, the SEC indicates that an adviser should not use layered disclosure or hyperlinks to obscure important information.

Advisers note, however, certain forms of advertisement (particularly social media and capital introduction databases) are heavily constrained in the amount of information to be provided and do not lend themselves to extensive disclosures. The necessity to provide a fair and balanced discussion even in concise communications creates practical difficulties for advisers who wish to utilize hyperlinks to broader disclosures for Investors wishing to form a more complete understanding. It would be helpful to clarify that, in such cases, it would be appropriate for fulsome disclosures to be made available only via hyperlink to allow the primary document to remain fair and balanced given applicable constraints in the amount of information which can be directly provided. Similarly, it would be helpful to clarify that, in the case of an advertisement via email, it would be appropriate for fulsome disclosures to be made available via attachments or hyperlinks. More generally, for advertisements delivered electronically that do not consist of testimonials or endorsements, it would be helpful to specify that the mere act of including disclosures via hyperlink or attachment would not constitute a failure to make the advertisement fair and balanced provided the totality of all disclosures, in context, remains fair and balanced and hyperlinks and attachments are not used to obscure important

information. Similarly, for advertisements delivered electronically that do not consist of testimonials or endorsements, please clarify that hyperlinked/"one click away" or attached disclosures, where prominently linked or attached within the advertisement and made clear that the hyperlink or attachment includes important disclosures, can reasonably be considered as being adequately prominent and contemporaneously provided.

Please see proposed Q3 in Appendix A making clear that hyperlinked/"one-click away" or attached disclosures will generally be permitted if prominently linked or attached in the advertisement and made clear that the link or attachment includes important disclosures.

Presentation of Actual Returns

Performance advertising raises special concerns that warranted additional requirements and restrictions under the Marketing Rule. The Marketing Rule mandates that investment advisers present net performance alongside gross performance, provide specific time-period data, and prohibits "cherry-picking" results from subsets of portfolios or using hypothetical performance without extensive disclaimers and procedures. The core principle is to ensure fair and balanced presentations of investment results to prevent misleading information.

Presentation of "net performance" in advertisements may reflect 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. Footnotes 590 and 593 of the Adopting Release state that 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 and net performance that reflects a model fee that is not available to the intended audience is not permitted. These statements raise concerns for advisers who simply wish to provide actual net returns in cases such as funds with multiple classes and different fee structures within the same fund or where fees have varied over time. It would be helpful to clarify that disclosure of actual net returns will be permitted where the advertisement clearly indicates that actual returns are provided for the fund as a whole and estimated or actual returns of Investors will vary from actual returns of the fund for various reasons. In such cases, the actual net returns may represent, for instance, a blended fee across classes, with an Investor's individual returns varying to some degree due to, among other things, fees/expenses actually paid and timing of contributions and withdrawals. Advisers are, of course, subject to the general prohibitions of the Marketing Rule, and would take into account facts and circumstances when determining how to present historical performance.

Please see proposed Q4 in Appendix A making clear that actual returns need not be treated in the same manner as model returns in certain private funds with multiple classes or multiple fee or performance compensation arrangements (including where fee or compensation arrangements have varied over time).

Testimonials and Endorsements

The second prong of the Marketing Rule's definition of advertisement covers compensated testimonials and endorsements, including any testimonial or endorsement for which an investment adviser provides direct or indirect compensation. This captures modern marketing tactics involving social media. Compensation includes both cash and non-cash items, such as gifts, reduced fees, awards, or prizes.

Indirect Compensation

Advisers have expressed uncertainty around accepting referrals of Investors (such as, for instance, pursuant to a capital introduction program) from their vendors and service providers (such as prime brokerage firms and legal services providers) who are compensated for their primary services in the ordinary course (e.g., brokerage and legal advice). Advisers would welcome clarification that their arms' length relationships with third party vendors and service providers do not constitute compensation for referrals, testimonials or endorsements. It would be helpful to have a clarifying statement that arm's length fair value compensation for the primary services provided by these firms (e.g., brokerage and legal advice) will not be deemed indirect compensation for referrals. Similarly, it would be helpful to have a clarifying statement that fee discounts or other terms governing an investment in a fund or managed account in exchange for the contribution of capital to a fund or managed account does not constitute indirect compensation for referrals to the extent an Investor provides referrals or serves as a reference to its adviser.

Referrals

Advisers would welcome clarification as to what constitutes a testimonial or endorsement in the context of networking or entertainment events (such as those associated with capital introduction programs) or the provision of referral lists without more. For instance, it would be helpful to clarify that mere circulation of an attendee list for a networking or entertainment event or a list of business counterparties, without further endorsement, approval or recommendation, would not constitute a testimonial or endorsement. In addition, it would be helpful to clarify that invitations to such events (including capital introduction events) or the provision of referral lists, without further endorsement, approval or recommendation, would not constitute a testimonial or endorsement.

* * *

MFA respectfully requests that the SEC provide clarifying guidance to aid the industry in effectively and efficiently implementing the requirements of the Marketing Rule. Please do not hesitate to reach out to Jill R. Whitelaw (jwhitelaw@mfaalts.org) or the undersigned at (jhan@mfaalts.org) with any questions regarding this letter.

Sincerely yours,

/s/

Jennifer W. Han
Chief Legal Officer & Head of Regulatory Affairs
MFA

Cc: The Hon. Paul S. Atkins, Chairman, SEC
The Hon. Hester M. Peirce, Commissioner, SEC
The Hon. Caroline A. Crenshaw, Commissioner, SEC
The Hon. Mark T. Uyeda, Commissioner, SEC

Appendix A – Proposed FAQs

Q1. Where more than one Investor asks for the same or similar information, does a response that references or re-uses prior communications to another Investor render the communication an “advertisement”?

Proposed Answer: We recognize that different Investors may ask the same or similar questions of an adviser and that the adviser’s responses to these questions may resemble, reference or re-use prior responses provided to other Investors including for purposes of consistency and efficiency. The reference and re-use of precedent in this manner can be distinguished from the maintenance by the adviser of a catalog or collection of standalone inserts or tables designed for proactive use in multiple standalone communications and would not require the adviser to treat such one-on-one communications as advertisements subject to the Marketing Rule.

Q2. If an adviser utilizes a form of chart or table with custom calculations within, will subsequent re-use with separate calculations (e.g., different fees) render such chart or table an advertisement?

Proposed Answer: No, the custom elements of a chart or table as described are sufficient for such chart or table to be considered a one-on-one communication.

Q3. Can the SEC provide clarity on where disclosure must or can be located where an advertisement is delivered electronically? For example, when will disclosure “one click away” or via attachment suffice?

Proposed Answer: Where an advertisement is delivered electronically and the advertisement does not consist of testimonials or endorsements, disclosures may be provided “one click away” or via hyperlinks or attachments so long as such disclosures are addressed in the primary document in a fair and balanced manner in relation to the matters discussed in the primary document. Moreover, where an advertisement is delivered electronically and the advertisement does not consist of testimonials or endorsements, hyperlinked/”one click away” or attached disclosures, where prominently linked or attached within the advertisement and made clear that the hyperlink or attachment includes important disclosures, can reasonably be considered clear and prominent as well as contemporaneously provided with the advertisement itself.

Q4. Must an advertisement showing actual net returns for a private fund with multiple classes or different fee structures within the same fund (or where fees have varied over time) be treated the same as an advertisement showing a track record with model returns? For example, can an advertisement reflecting actual returns for a private fund with multiple classes or different fee structures within the same fund (or where fees have varied over time) show the fund’s actual net return with disclosure that it represents a blended fee rate across all classes or different fee structures, in each case relevant for that specific fund?

Proposed Answer: Actual returns need not be treated in the same manner as model returns in a private fund with multiple classes or different fee structures within the same fund (or where fees have varied over time) so long as the fund classes do not represent segregated portfolios (i.e., different investors with different investments). In such cases the fund may advertise the actual returns of the fund as a whole with prominent disclosures addressing the fee and/or performance compensation rates applicable to calculating returns for that fund, if applicable, that the fund is comprised

of multiple classes paying different fees or investors with different fee structures, and that the returns of investors in the fund will differ from the returns of the fund as a whole based on, among other things, actual fees and expenses paid by the relevant investor and timing of contributions and withdrawals.