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# SEC Updates Marketing Rule FAQ

Client Alert | February 23, 2024

*The SEC Staff advises that private fund sponsors that wish to exclude the impact of subscription credit facilities when showing a gross internal rate of return in their performance track records also must exclude such impact when showing the corresponding net internal rate of return.* On February 6, 2024, the staff of the U.S. Securities and Exchange Commission (the "***SEC Staff***") updated its Marketing Compliance Frequently Asked Questions with respect to the Advisers Act Marketing Rule[1] (the "***Marketing Rule***") to issue new interpretive guidance (the "***FAQ***") regarding the presentation of investment performance for private investment funds that utilize fund-level subscription credit facilities.[2] In particular, the SEC Staff advised that private fund sponsors that wish to exclude the impact of subscription credit facilities when showing a gross internal rate of return ("***Gross IRR***") in their performance track records must also exclude such impact when showing the corresponding net internal rate of return ("***Net IRR***"). According to the SEC Staff, doing otherwise would violate the Marketing Rule's requirement that any presentation of Gross IRR must be accompanied by Net IRR that has been calculated over the same time period and uses the same type of return and methodology as the gross performance. In addition, the SEC Staff also took the position that it would be impermissible under the general prohibitions set forth in the Marketing Rule[3] for a private fund sponsor to use performance presentation that shows only a Net IRR that includes the impact of a fund-level subscription credit facility without also including (i) a Net IRR that does *not* include the impact of such facility or (ii) "appropriate disclosures"[4] describing such facility's impact on the provided net performance.[5] In light of the FAQ, we advise that all private fund sponsors promptly review their PPMs, pitchbooks, and related marketing materials for compliance with the new interpretive guidance summarized above. _____ [1] Rule 206(4)-1 under the Investment Advisers Act of 1940, as amended. [2] "Subscription credit facilities" broadly include any borrowing secured by the unfunded capital commitments of a fund's investors, such as subscription line financings, capital call facilities, and bridge lines. [3] Rule 206(4)-1(a). [4] The FAQ does not clarify what would constitute an "appropriate disclosure" in this context, though we believe it would include, at minimum, a clear statement that the Net IRR takes into account leverage, which may make the returns higher than what they would have been without the use of such leverage. [5] A sponsor that complies with this requirement would not also need to show a corresponding gross figure, as the Marketing Rule does not generally require the inclusion of gross performance any time net performance is shown.

The following Gibson Dunn lawyers assisted in preparing this update: Kevin Bettsteller, Greg Merz, Shannon Errico, and Robert Harrington.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the issues and considerations discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Investment Funds practice group: Jennifer Bellah Maguire – Los Angeles (+1 213.229.7986, jbellah@gibsondunn.com) Kevin Bettsteller – Los Angeles (+1 310.552.8566, kbettsteller@gibsondunn.com) Albert S. Cho – Hong Kong (+852 2214 3811, acho@gibsondunn.com) Candice S. Choh – Los Angeles (+1 310.552.8658, cchoh@gibsondunn.com) John Fadely – Singapore (+65 6507 3688, jfadely@gibsondunn.com) A.J. Frey – Washington, D.C./New York (+1 202.887.3793, afrey@gibsondunn.com) Shukie Grossman – New York (+1 212.351.2369, sgrossman@gibsondunn.com) James M. Hays – Houston (+1 346.718.6642, jhays@gibsondunn.com) Kira Idoko – New York (+1 212.351.3951, kidoko@gibsondunn.com) Gregory Merz – Washington, D.C. (+1 202.887.3637,

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