

6 ways to advertise your investment performance and not run afoul of regulators' wrath

Brian Hamburger debunks advertising myths that scare RIAs from showing off their tracks record

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The most intriguing aspect of this space occupied by registered investment advisors within the financial services sector is the vibrant energy and creativity that runs through it. Each advisor brings a unique set of experiences and client base to draw on a relatively blank canvas. As such, there are some widely disparate concepts about what is most valuable to an advisor's clients and, thus, the purpose and manner that an advisor proceeds under is born.

Some advisors rely substantially on advertising in some form or another, others shun it completely. I don't stand in judgment of either; I have seen incredibly successful advisors flourish on both sides of this issue. My concern is for the advisors who want to advertise but have been scared off by regulators, lawyers, consultants and media. See: [Advertising practices that can raise the hackles of regulators](#).

The biggest area for confusion surrounds the issue of performance advertising. See: [The 4 biggest investment performance myths — and how they can torpedo advisor-client trust](#). I support the concept that those advisors that attract assets by advertising performance are the first to lose them when performance declines. But the same can be said for advisors that attract clients by being an active member of a club or organization when the advisor ceases their participation in that group.

Investment advisors are subject to layers of laws, rules and regulations that relate to their advertising beyond that of other American businesses. In addition to the advertising rules in the Investment Advisers Act of 1940, as amended, the staff at the Securities and Exchange Commission has issued guidance through no-action letters and releases, certain of which specifically address the use of performance advertising. Just watch TV for more than an hour and you will see that, clearly, American pharmaceutical companies have less scrutiny on their advertising claims than investment advisors.



Brian Hamburger:
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Nonetheless, things are not as complicated as some would have you believe. In fact, the spectrum of possibilities is quite broad, so long as the advertising contains adequate disclosure.

Performance advertising is usually presented in one of two ways: (1) by showing the performance of some or all of the actual portfolios under management; or (2) by showing the performance of a “model portfolio.” Here’s what you need to know before setting out to advertise performance: See: [Performance measurement challenges for investors who live in a perpetual time horizon world](#).

1. Performance advertising need not include all of your accounts under management

Actual, or composite performance, may be based on all of the accounts under management or select accounts, provided that the exclusion of certain accounts does not cause the presentation to be misleading.

For example, an investment advisor’s composite portfolio of its equity accounts is generally understood to include all of the investment advisor’s accounts falling within the equity category. The advisor would then include appropriate disclosure.

2. Performance advertising does not need to be your actual performance

Advisors can use performance of model portfolios instead of actual performance if two conditions are met:

(1) the performance reflects the deduction of actual advisory (or in some cases model) fees, brokerage or other commissions, and any other applicable charges (excluding custodial fees); and

(2) the advisor includes required disclosure. A model portfolio is, in effect, a fictional account established as of a certain date which the advisor manages alongside its client portfolios.

3. Performance advertising must be presented net of fees

An advisor’s performance advertising must reflect the deduction of fees, brokerage or other commissions, and any other applicable charges (excluding custodial fees). This is often confused with rules applicable to one-on-one presentations. For one-on-one presentations, advisors are permitted to show performance that is gross of fees, provided certain conditions and disclosures are met.

4. Performance advertising does not require audited results

Despite assertions that advisors must obtain an independent audit of their track records, no such requirement exists in the Advisers Act or any guidance ever issued by the SEC; that is, unless the advisor claimed that it was presenting audited results.

To bolster credibility, some advisors wish to be able to claim that their performance results have been audited by an independent third party and, furthermore, are “GIPS compliant.” While the certification of an advisor’s performance and any advertisement derived from that performance under global investment performance standards lends a certain degree of reliability in the marketplace, the SEC does not require the advertising of registered investment advisors to be audited or GIPS compliant. If, however, an investment advisor claims that the results are such, then it must be able to support that claim. In that case, an audit would be required at the advisor’s expense.

5. There is no minimum time period required for performance advertising

An advisor does not have to be managing accounts for a specified period in order to advertise performance. However, it can be misleading to imply the advisor had performance before it was in existence. Remember, the performance many advisors are looking to advertise is that of the RIA, often a separate legal entity. Performance prior to the firm’s establishment was often that of the former advisory or brokerage firm.

Which brings me to our next point ...

6. You can bring your performance with you

Under certain circumstances, an advisor can advertise his or her performance from a prior firm upon transitioning to a new firm. The primary conditions are that the advisor has to have been responsible for the management of the accounts and the selection of the investments at the prior firm and must have the data to back up its performance assertions.

For example, if the advisor was at a wirehouse and invested client assets in one of the wirehouse’s standard model portfolios (but didn’t choose the securities within that portfolio), that performance cannot be used. If, however, the advisor managed its own accounts at a prior firm, has the documentation to support performance claims and is responsible for the management of the assets at the new firm, it may be able to use that performance provided the proper disclosures are made.

Honor system

Of course, prospective clients may demand that performance results be audited, that there be a minimum time period for the track record to be established, or for results to be presented net of

fees. And that is a significant consideration for an advisor. But advisors are already familiar with the demands of the marketplace.

We are busting myths here; myths that so often preclude investment advisors from advertising performance. So whether you decide to advertise or not; and if you advertise, whether you include performance, let that decision be guided by business principles, not regulatory myths.

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