

# SEC Marketing Rule Current Issues

The Performance Measurement Forum  
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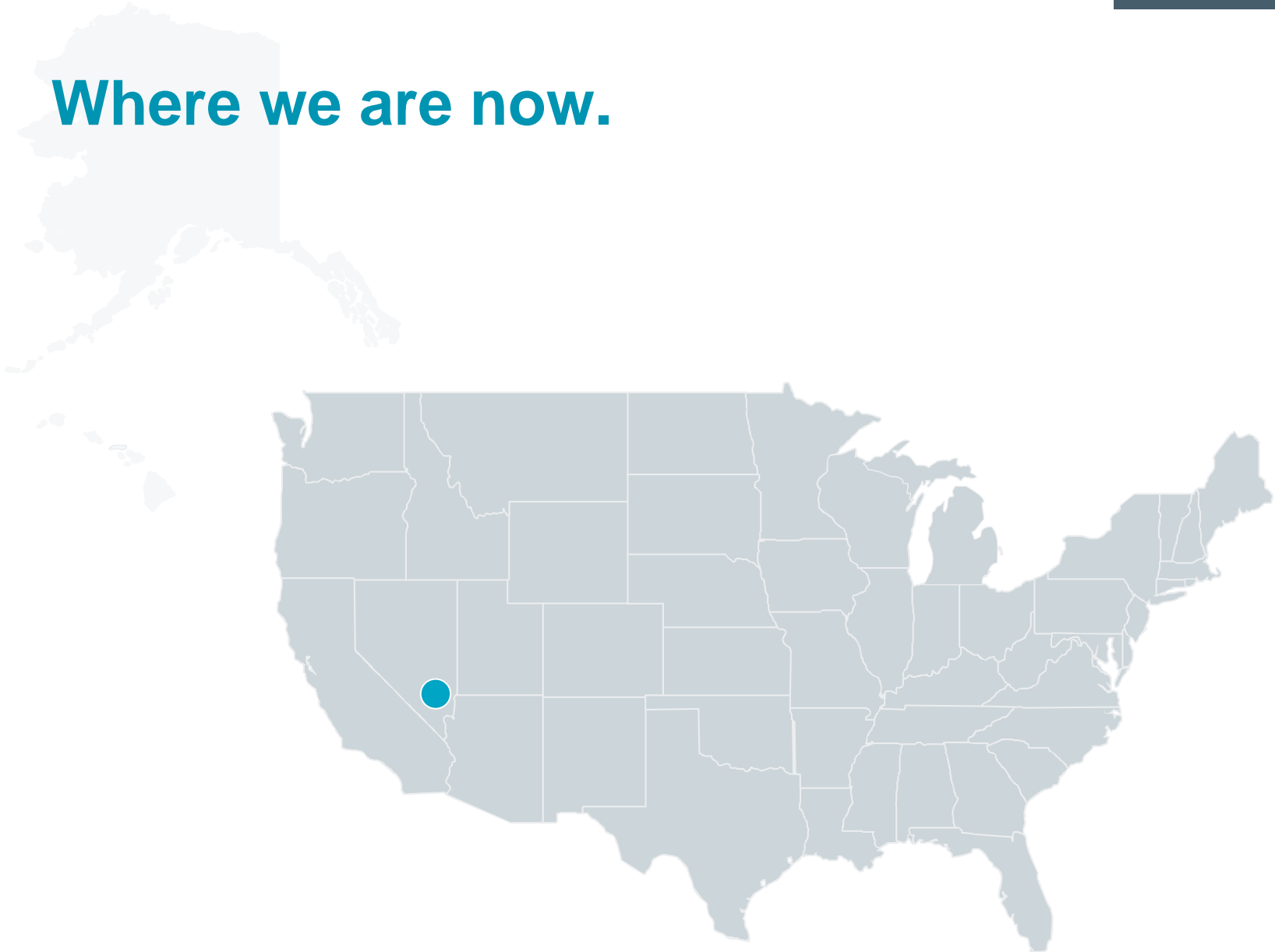
# Topics for Discussion

- Where are we now?
  - Recent SEC Action and Staff Guidance
- Common Performance Compliance Questions
  - What is performance?
  - Gross vs. Net
  - Yield and Attribution
  - Hypothetical Performance
  - Performance of Specific Recommendations
- Other Questions / Discussion



Where are we now?

# Where we are now.



# Recent SEC Actions / Staff Guidance

- 15 enforcement actions on use of hypothetical performance since August 21, 2023.
- SEC Risk Alerts
  - September 19, 2022 (before compliance date)
  - June 8, 2023
  - April 17, 2024
- Marketing Rule FAQs
  - March 18, 2021 (compliance timing)
  - April 14, 2021 (technical glitch re: calendar year end reporting)
  - January 11, 2023 (single security performance)
  - February 6, 2024 (gross/net IRRs)

# Common Questions / Issues

# What is “Performance”?

Marketing Rule has prescriptive requirements governing the presentation of “performance”... but it does not define performance. A possible interpretation:

- Anything that telegraphs how much money clients could make from the strategy or portions of the strategy (including single investments);

Implications for “performance”:

- Required net performance presentation; and
- Required time periods

# Gross Performance Presentation

## Gross performance.

- May be presented only if the advertisement also presents net performance:
  - With at least equal prominence to the gross performance; and
  - Calculated over the same time period, and using the same type of return and methodology

## Common Questions.

- C'mon! Really?!?!
- What fee do we use?
  - Model Fee
  - Actual Fee



# Schrodinger's Yield

Yield may or may not be performance;

Yield as a characteristic;

Yield as a performance statistic;

- Gross and Net; Required Time Periods
- Extracted performance considerations
- Hypothetical performance considerations

# Hypothetical Performance

ANY communication with “hypothetical performance” is an “advertisement”, unless in response to unsolicited request or to a prospective/existing investor in a private fund on a one-on-one basis.

Defined as:

- performance results that were not actually achieved by any portfolio of the investment adviser, including:
  - Model;
  - Backtested; and
  - Targeted / Projected performance.

# Hypothetical Performance Issues

Composite Extracts vs. Extracted Performance

Presentation Net of Fees

Presentation to “one or more” investor

Disclosure of “criteria and assumptions” and “risks and limitations”

Compliance Policies and Procedures – Limitation to a sophisticated “intended audience”

# Performance of Specific Recommendations

Extracted Performance is permitted.

Extracted Performance is defined as the “performance results of a subset of investments extracted from a portfolio”

One security is “a subset of investments extracted from a portfolio”

Extracted Performance is Performance

- Gross not permitted without net
- Time periods?

# Questions and Discussion

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