

482 will be deemed to be an "omitting prospectus" under section 10(b) of the Securities Act for the purposes of section 5(b)(1) of the Securities Act.²⁵ Rule 482, however, is not a safe harbor from antifraud liability for any information included in a rule 482 advertisement, including performance information complying with the requirements of the rule.

In addition, we are amending rule 156 to provide further guidance regarding the factors to be weighed in considering whether a statement involving a material fact in investment company sales materials is or might be misleading. As discussed in the Proposing Release, we are concerned that the advertisement of past performance without an adequate explanation of other facts may create unrealistic investor expectations or even mislead potential investors.²⁶ For that reason, we are modifying the language of rule 156 to state more explicitly that portrayals of past income, gain, or growth of assets may be misleading where the portrayals omit explanations, qualifications, limitations, or other statements necessary or appropriate to make these portrayals of past performance not misleading.²⁷ This language is intended to address our concerns with fund performance advertisements that do not provide adequate disclosure: (i) Of unusual circumstances that have contributed to fund performance; (ii) that more current performance may be lower than advertised performance; or (iii) that would permit an investor to evaluate the significance of performance that is based on selective dates.²⁸ We remind funds and their underwriters and dealers, however, that this language would address other circumstances that

we have not specifically enumerated and that each fund, and its underwriters and dealers, is responsible for analyzing the facts and circumstances concerning its advertisements and determining whether its advertisements may be misleading.

C. Enhanced Disclosure Under Rule 482

We are adopting, with modifications to address commenters' concerns, additional amendments to rule 482 that will require enhanced disclosure of certain information designed to encourage advertisements that convey balanced information to prospective investors. Our amendments require that funds that advertise performance information make available to investors total returns that are current to the most recent month-end. They also require that fund advertisements include improved narrative information and present explanatory information more prominently.

Availability of Month-End Performance Information

Currently, rule 482(g) requires all performance data contained in any mutual fund advertisement to be as of the most recent practicable date, provided that any advertisement containing total return quotations is considered to have complied with the requirement if the total return quotations are current to the most recent calendar quarter ended prior to submission of the advertisement for publication.²⁹ We are adopting a second condition for a fund advertisement to be considered to have complied with the requirement of rule 482 that performance be as of the most recent practicable date. Specifically, total return quotations current to the most recent month-end, and available to investors within seven business days of the most recent month-end, must be provided at a toll-free or collect telephone number or on a Web site, unless the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of use of the advertisement.³⁰ As a result, investors who are provided advertisements highlighting a fund's performance should have ready access to performance data that is current to the most recent month-end and will not be forced to rely on performance data that may be more than three months old at the time of use by the investor.

We have modified the proposed new condition to require that month-end

performance information be available to investors within seven business days, rather than three calendar days, of the most recent month-end. A number of commenters objected to the three calendar-day timeframe as too short to gather the necessary information, particularly in cases in which funds are sold through intermediaries such as insurance companies and fund supermarkets, which sell funds from multiple complexes.³¹ Some commenters suggested longer timeframes ranging up to seven business days. Other commenters indicated that it could take ten business days or more to gather all of the necessary information and that the Commission should adopt a standard permitting month-end performance information to be provided "as soon as reasonably practicable" or within a "reasonable time."

We are persuaded by the comments that the proposed timeframe should be extended to seven business days. Particularly in the case of intermediary-sold funds, it could be difficult to gather, format, and make available the necessary information in three calendar days. Based on the comments, we believe that seven business days typically will provide sufficient time for making month-end performance data available. We recognize that there may be circumstances where more time is needed. We note, however, that if a fund exceeds the seven business-day timeframe in making month-end performance data available, it may nonetheless be in compliance with the currentness provisions of rule 482, as long as the performance data contained in an advertisement is "as of the most recent practicable date considering the type of investment company and the media through which the data will be conveyed."³²

We are also modifying the proposed condition in order to permit month-end performance information to be made available either at a toll-free or collect telephone number or on a Web site. The proposed rules would have required funds to make the information available by toll-free or collect telephone number. A number of commenters argued that funds should be permitted to make the information available through the Internet. They argued that telephone access to month-end information could be unnecessarily burdensome for both investors and funds. They argued that

²⁵ Section 5(b)(1) of the Securities Act [15 U.S.C. 77e(b)(1)] makes it unlawful to use interstate commerce to transmit any prospectus relating to a security with respect to which a registration statement has been filed unless the prospectus meets the requirements of section 10 of the Securities Act. Section 10(b) of the Securities Act [15 U.S.C. 77j(b)] permits the Commission to adopt rules that provide for a prospectus that "omits in part" or "summarizes" information contained in the statutory prospectus. Rule 482 was adopted under the authority of section 10(b) of the Securities Act.

²⁶ See Proposing Release, *supra* note 7, at Section I.B., "Performance Advertising Practices," 67 FR at 36715-16.

²⁷ 17 CFR 230.156(b)(2)(i); *Cf.* 17 CFR 230.156(b)(1)(ii) ("A statement could be misleading because of * * * [t]he absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading * * *").

²⁸ See Proposing Release, *supra* note 7, 67 FR at 36715-16 (discussing concerns about lack of disclosure relating to unusual circumstances contributing to fund performance, currentness of performance information, and selective use of performance figures).

²⁹ Current 17 CFR 230.482(g).

³⁰ 17 CFR 230.482(g)(1)(ii) and (g)(2).

³¹ A fund supermarket is a program offered by a broker-dealer or other financial institution through which its customers may purchase and redeem shares of a variety of funds from different fund complexes.

³² 17 CFR 230.482(g).