

an automated system could be unwieldy, requiring the investor to navigate through several series of menus and numerous prompts to retrieve the requested information when, for example, an intermediary offers numerous funds or a variable insurance contract issuer offers multiple contracts with multiple underlying investment options. They also argued that funds would incur significant expense in setting up automated telephone systems or in using live telephone operators to provide updated information, whereas most funds could use existing Web sites as an efficient means of communicating month-end performance data.

We are persuaded by these comments and are revising the proposal to permit funds to make month-end data available at a toll-free or collect telephone number or at a Web site.³³ We were particularly concerned that investors could become frustrated with navigating through multiple telephone prompts to obtain information about the particular fund in which they are interested. We were persuaded that funds should be permitted to determine whether this information could be provided in a more accessible, user-friendly format on a Web site. A single table could, for example, contain performance information for multiple funds, enabling an investor to find the relevant information at a glance. We encourage funds and their intermediaries to take advantage of the rule's flexibility to present month-end performance information through a medium and in a format that is readily accessed and understood by investors.

We remind funds that the availability of month-end performance information by telephone or Web site does not alter the application of the antifraud provisions of the federal securities laws to an advertisement. The month-end information obtained through a telephone call or Web site would not be considered part of the advertisement itself and would not cure any materially misleading statement or omission in the advertisement.

We wish to clarify that a fund advertisement may provide the telephone number or Web site of a third-party intermediary as the source for obtaining month-end performance information. The Proposing Release stated that updated performance information should be available from the fund itself and that other forms of distribution of this information should supplement availability from the fund

itself.³⁴ We recognize, however, that, in some cases, it may not be practical for month-end performance information to be available from the fund itself. For example, when a fund is sold through and advertised by a fund supermarket, it may be most practical for the fund supermarket to provide updated performance information to its customers. In the case of a variable annuity contract, fund performance net of contract charges is typically calculated by the insurance company sponsor rather than the fund and updated contract performance may perhaps be most appropriately provided by the insurance company.

Several commenters asked us to clarify whether the narrative disclosures that would normally be required in a rule 482 advertisement would be required when updated month-end performance information is provided through a toll-free or collect telephone number. These disclosures include statements regarding factors that investors should consider before investing, prospectus availability, limitations of past performance information, and sales loads.³⁵ These disclosures need not be provided on a toll-free or collect telephone line that is dedicated exclusively to providing updated month-end performance information to investors calling in response to a rule 482 performance advertisement because the investors would have received those disclosures in the original advertisement. If, however, the telephone number is used more broadly (e.g., for all incoming calls to a fund group), the toll-free or collect telephone number should include the narrative disclosures required by rule 482 because a caller may not have seen the original advertisement with the required disclosures. Similarly, if updated month-end performance information is provided on a Web site, all of the narrative disclosures required by rule 482 should be included because the Web site is broadly accessible to the public.

We are modifying the proposal to address the concerns of several commenters who suggested that the Commission not require a fund that advertises performance current to the most recent month-end also to provide that information by toll-free or collect telephone number. The commenters argued that, in such cases, providing a telephone number for obtaining this information would confuse investors. Investors would call the telephone

number, only to be given the same information that already appears in the advertisement. Accordingly, we are modifying the proposal to provide that an advertisement containing total return quotations is considered to have complied with the requirement that all performance data be as of the most recent practicable date if the total return quotations are current to the most recent month ended seven business days prior to the date of use of the advertisement.³⁶ A fund advertisement including information meeting this standard need not identify a toll-free or collect telephone number or a Web site where an investor may obtain performance data current to the most recent month-end.³⁷

We note that the exception from the requirement to provide month-end performance information by toll-free or collect telephone number or Web site applies only to advertisements that contain total return quotations that are current to the most recent month ended seven business days prior to the date of *use* of the advertisement. It is not sufficient if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of *publication or submission for publication* of the advertisement if that standard is no longer met when the advertisement is used. It also is not sufficient if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of *first use* of the advertisement if that standard is not met throughout the entire period of use of the advertisement.³⁸ Our intent is that an investor have access to current month-end information at the time he or she reviews an advertisement, either in the advertisement itself or through a toll-free or collect telephone number or Web site.

Thus, a Web site that is continuously updated so that it always contains total return quotations that are current to the most recent month ended seven business days earlier need not identify a toll-free or collect telephone number or a Web site where an investor may obtain month-end performance data. Similarly, an advertisement in a daily newspaper that appears on one particular day and contains total return quotations that are current to the most recent month ended seven business days prior to the date that the

³⁶ 17 CFR 230.482(g)(2).

³⁷ 17 CFR 230.482(b)(3)(i).

³⁸ Note to rule 482(b)(3)(i) [17 CFR 230.482(b)(3)(i)]; note to rule 482(g) [17 CFR 230.482(g)].

³³ 17 CFR 230.482(g)(1)(ii); 17 CFR 230.482(b)(3)(i).

³⁴ See Proposing Release, *supra* note , 67 FR at 36719.

³⁵ 17 CFR 230.482(b)(1)(i), (b)(3)(i), and (b)(3)(ii).