

advertisement appears need not identify a source where an investor may obtain month-end performance data. By contrast, an advertisement containing performance information for a group of funds that is intended to be distributed to investors for an extended period (e.g., throughout a quarter) would be required to identify a toll-free or collect telephone number or a Web site where an investor may obtain month-end performance data even if the advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date on which the advertisement is first distributed to investors.

In determining the date of use of an advertisement, consideration should be given to all the facts and circumstances, such as the dates on which the advertisement is first published and distributed, the last date on which the advertisement is distributed, and, in the case of an advertisement appearing in a periodical, the dates on which the next issue of the periodical is first published and distributed. We would encourage funds to provide month-end performance information by toll-free or collect telephone number or Web site in any case where a question about the date of use results in a question as to whether an advertisement contains total return quotations that are current to the most recent month ended seven business days prior to the date of use.

Two commenters stated that an advertisement that includes performance information that is more current than the most recent month-end also should not be required to provide a source for month-end information. We disagree. When a fund chooses a date other than a quarter or month-end for presenting performance, there is potential for "cherry picking" the date to provide particularly favorable information. In such a case, we believe that month-end performance information should be made available to investors as a check on any such "cherry picking" and to provide investors with information from different funds for comparable periods.

#### Improved Narrative Disclosure

Advertising that focused on extraordinary fund performance during 1999–2000 led to increasing concerns that some funds, when advertising their performance, may resort to techniques that create unrealistic investor expectations or may mislead potential investors. These concerns have arisen again with the recent improvement in market performance, as commentators have noted an increase in

advertisements highlighting favorable short-term performance.<sup>39</sup> To address these concerns, we are adopting, with modifications to address concerns raised by commenters, changes to the narrative disclosure that is required to accompany performance advertisements. These changes are intended to help investors understand the limitations of past performance data and enhance their ability to obtain updated performance information. In particular, these amendments will require funds to include the following information in rule 482 advertisements that contain performance data: (i) A statement that past performance does not guarantee future results; (ii) a statement that current performance may be lower or higher than the performance data quoted; and (iii) a toll-free or collect telephone number or a website where an investor may obtain performance data current to the most recent month-end, unless the advertisement includes total return quotations current to the most recent month ended seven business days prior to the date of use.<sup>40</sup> An advertisement may combine two or more of these required statements in a single sentence, provided that each of the required disclosures is clear and easy to understand. Similarly, an advertisement may use any language that clearly communicates the information required to be disclosed.

We have modified the proposed required disclosure regarding the availability of month-end performance data in two ways that parallel modifications that we have made to the proposed requirements regarding availability of month-end performance data. First, the rule as adopted will permit identification of *either* a Web site or a toll-free or collect telephone number where an investor may obtain current month-end information. Second, an advertisement containing total return quotations current to the most recent month ended seven business days prior to the date of use would not be required to 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.<sup>41</sup>

We are also adopting, with modifications suggested by a commenter, an amendment to rule 482 that would direct prospective investors' attention to a fund's charges and expenses. As proposed, the amendment

would have required a fund to note in its rule 482 advertisement that information about charges and expenses is included in the statutory prospectus. As adopted, the rule would require rule 482 advertisements to include a statement that advises an investor to consider the fund's investment objectives, risks, and charges and expenses carefully before investing; explains that the prospectus contains this and other information about the investment company; identifies a source from which an investor may obtain a prospectus; and states that the prospectus should be read carefully before investing.<sup>42</sup> We were persuaded by a commenter's argument that the proposed required disclosures, while helpful, would not adequately direct investors' attention to the important factors that they should consider. We agree with the commenter that investors should consider a fund's objectives and risks, and its charges and expenses, before investing because these factors will directly affect future returns. We are concerned that the many fund advertisements highlighting performance have focused investors' attention on fund returns and that investors may be overlooking other important fund features, particularly charges and expenses, that may diminish a fund's returns.<sup>43</sup>

One commenter sought clarification as to how this provision would apply in the context of variable insurance products in light of recently adopted changes to disclosure requirements for variable insurance prospectuses, which require disclosure of the range of operating expenses of underlying funds in the contract prospectus, with detailed information about the expenses of each underlying fund required to be

<sup>39</sup> 17 CFR 230.482(b)(1)(i). Similar disclosure will also be required in an advertisement used with a profile pursuant to rule 498 under the Securities Act [17 CFR 230.498]. 17 CFR 230.482(b)(1)(ii).

Rule 482 currently does not require a fund to highlight the importance of information regarding the fund's investment objectives, risks, and charges and expenses. The rule does, however, require an advertisement to identify a source from which an investor may obtain a prospectus containing more complete information about the fund, which should be read carefully before investing. Current 17 CFR 230.482(a)(3)(i). The rule also requires that a fund that advertises performance data include some information about sales loads and other non-recurring fees. Current 17 CFR 230.482(a)(6).

<sup>43</sup> See Securities and Exchange Commission, *Mutual Fund Investing: Look at More Than a Fund's Past Performance* (last modified Jan. 24, 2000) <http://www.sec.gov/investor/pubs/mfperform.htm> (cautioning investors to look beyond performance when evaluating funds and to consider the costs relating to a fund investment). See also NASD Notice to Members No. 98–107 (1998) (reminding members of their obligation to ensure that discussions concerning fees and expenses in fund advertising are fair, balanced, and not misleading).

<sup>39</sup> See *supra* note 9.

<sup>40</sup> 17 CFR 230.482(b)(3)(i).

<sup>41</sup> See "Availability of Month-End Performance Information," *supra*.