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Kirkland AIM

SEC Division of Examinations Issues 2023 Exam Priorities

17 February 2023

On February 7, 2023, the SEC's Division of Examinations ("Exams") published its [Examination Priorities for 2023](#). For the second year running, investment advisers to private funds were highlighted as a significant focus area for Exams, demonstrating the current SEC leadership's outsized focus on private fund advisers, which has also included numerous policy initiatives with several far-reaching rulemaking proposals¹ and significant attention by the Division of Enforcement.

Joining private fund advisers as a significant focus area is a new priority focused on compliance with recently adopted rules, which notably singles out the new Advisers Act Marketing Rule. Exams are already scoping in Marketing Rule compliance, and the priorities identify certain risk areas, including:

- adoption and implementation of reasonably designed policies and procedures;
- adviser's reasonable basis for the ability to substantiate material statements of fact;
- performance advertising requirements; and
- solicitation activities, including compensated testimonials and endorsements.²

Exams also identified several new or slightly modified priorities for 2023 related to private fund advisers, including:

- private funds that hold assets that are difficult to value, specifically identifying crypto assets and real estate-connected investments with an emphasis on commercial real estate;
- private equity fund managers that use affiliated companies and advisory personnel to provide services to funds and underlying portfolio companies;
- private funds managed side-by-side with business development companies; and

- policies and procedures for retaining and monitoring electronic communications and selecting and using third-party service providers.

Many exam priorities for 2023 are repeat areas of concern for Exams and again have been identified for specific focus, including:

- calculation and allocation of fees and expenses, including post-commitment period management fees and the impact of valuation practices;
- Custody rule compliance, highlighting timely delivery of audited financial statements and the selection of permissible auditors (i.e., auditors registered with, and subject to regular inspection by, the PCAOB);
- conflicts of interest around adviser-led fund restructurings, including stapled secondary transactions and continuation funds;
- whether private funds are operating in accordance with any ESG-related disclosures;
- information security policies and practices with additional focus on the use of third-party vendors, including sponsor visibility into the security and integrity of third-party products and services;
- private funds with crypto or crypto-related holdings to assess whether compliance, disclosure and risk management practices have been updated and enhanced in light of recent market events;
- controls around the use of alternative data and compliance with requirements concerning material non-public information; and
- prioritization of never-been-examined advisers (i.e., recently registered sponsors) and those that have not been examined for a number of years.

Private fund managers should keep these risk areas in mind in connection with on-going operations and may want to consider incorporating some of the relevant risk areas into annual compliance reviews for 2023.

1. See, *Kirkland AIMS*, [SEC Proposes Sweeping Rule Changes for Private Fund Advisers](#) (February 18, 2022), [SEC Proposes Significant New Cybersecurity Rules for Investment Advisers](#) (March 14, 2022), [SEC Proposes Enhanced Disclosure by Certain Advisers on ESG Investment Practices](#) (June 2, 2022), and [SEC Proposes New Rules on Adviser Oversight of Service Providers](#) (November 15, 2022). ↩

2. In addition to the Marketing Rule, Exams will focus on two new Investment Company Act rules related to registered investment companies and business development companies use of derivatives and fair value requirements. ↩

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Practices

- Investment Funds

Suggested Reading

- 12 January 2023 Kirkland AIM SEC Releases Marketing Rule FAQ on Private Fund Net Performance
- 12 December 2022 Kirkland AIM SEC Continues Enforcement Scrutiny of ESG Claims by Investment Advisers
- 15 November 2022 Kirkland AIM SEC Proposes New Rules on Adviser Oversight of Service Providers

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