In a break from prior practice, the U.S. Securities and Exchange Commission's (SEC) Division of Examinations (EXAMs) has published its priorities at the start of the 2024 fiscal year. It is a strong signal that the EXAMs staff expects asset managers to be well prepared to demonstrate their compliance with respect to "the key risks, trends, and examination topics" identified by the staff.

The EXAMs staff has grown substantially over the past year, and the increased "field presence" supports the stated goal of promoting transparency and compliance. This heavier examination hand comes in a period of ever-growing compliance burdens as the SEC has proposed, and recently adopted, rulemaking that stands to significantly affect the asset management industry.

Here, we highlight **key aspects of the 2024 EXAMs priorities for registered investment advisers**, including priorities specific to private fund advisers.

- EXAMs will focus on adviser advertising in the coming year. This is not surprising, as its aggressive examination approach to the new **Marketing Rule** under the Investment Advisers Act of 1940 has already resulted in multiple enforcement settlements. EXAMS' "**marketing practice assessments**" will evaluate the content of advertisements as well as advisers' Marketing Rule policies and procedures, the accuracy of Form ADV marketing disclosures and "substantiation of [marketing] processes and other required books and records."
- Perhaps reflecting the divided opinion of the country on the topic, **greenwashing and other environmental, social, and governance (ESG) topics are absent** from the priorities for the first time in several years. Still, the SEC's recently adopted amendments to the Names Rule under the Investment Company Act of 1940 that were intended to prevent misleading or deceptive fund names have already reduced the number of registered funds with ESG-related names, and the SEC's ESG disclosure proposal for registered funds and advisers remains outstanding. As the most recent greenwashing enforcement settlement illustrates, the SEC's 2021 ESG risk alert remains solid guidance for advisers to follow.
- EXAMs staff will maintain a keen focus on investment advisers' compliance with basic **fiduciary duties**, in particular around the mitigation, **disclosure and consent** of conflicts of interest; the **allocation** of investment opportunities; **complex investment products**, such as those with "unconventional strategies, including those that purport to address rising interest rates"; and processes for ensuring that investment advice is in clients' best interest, including with respect to **suitability** determinations, **best execution** efforts, **cost and risk** evaluations, and **conflicts of interest**.
- EXAMs staff also will continue to probe in the following areas where there are outstanding SEC rule proposals for investment advisers: **cybersecurity**, **customer information security**, and **custody** or "safeguarding" of client assets.
- Other repeat priorities from prior years include **operational resiliency**, processes for selecting and monitoring **third-party service providers**, **digital assets**, and "**economic incentives** and conflicts of interest associated with advisers that are dually registered as broker-dealers, use affiliated firms to perform client services, and have financial professionals servicing both brokerage customers and advisory clients."
- EXAMs staff will investigate **adviser compensation arrangements**, with particular focus on the receipt of compensation for nonadvisory services and other income streams of advisers to registered investment companies; alternative means of maximizing adviser revenue; and fee breakpoint calculation processes, particularly with manual billing systems.
- Valuation of **"illiquid or difficult" to value assets**, "such as commercial real-estate or private placements," is an EXAMs priority this year, as are controls around **material nonpublic information** and whether informed consent was properly obtained from clients for **material changes to the advisory agreement**.
- Topics covered in recent EXAMs risk alerts will be prioritized, including issues identified in **newly registered investment adviser examinations**, issues concerning **London InterBank Offered Rate (LIBOR)transition** preparedness, and issues around compliance with **anti-money laundering** regulations.

- Showing no mercy for **private fund advisers** working to absorb the SEC's recently adopted new private fund adviser rules, EXAMs staff will prioritize the following:

  - **Portfolio management risks** present for private funds with "exposure to recent market volatility and higher interest rates," including "private funds experiencing poor performance, significant

withdrawals and valuation issues and private funds with more leverage and illiquid assets."
    - Private fund advisers' **adherence to contractual requirements** regarding **notification and consent processes** for limited partner advisory committees (LPACs), advisory boards, and similar structures.
    - Private fund advisers' accurate **calculation and allocation of private fund fees and expenses**, "both fund-level and investment-level, including valuation of illiquid assets, calculation of post commitment period management fees, adequacy of disclosures, and potential offsetting of such fees and expenses."
    - Private fund advisers' **due diligence practices**, especially around private equity and venture capital fund portfolio company assessments.
    - The timely completion of **private fund audits** and distribution of audited financial statements to investors.
    - **Form PF** disclosures.

Conclusion

Compliance deficiencies identified in an investment examination can, of course, lead to an enforcement referral, and advisers should take heed of the guidance provided by EXAMs staff in publishing its 2024 priorities. Advisers should, through their chief compliance officers, assess their compliance programs and firm operations against the EXAMs priorities and work to remediate any gaps or shortcomings that are found. Please do not hesitate to reach out if we can assist.

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