Weil

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WEIL PRIVATE FUNDS REGULATORY REVIEW

In recent years, the Securities and Exchange Commission (the "**SEC**" or "**Commission**") and other regulators have proposed and adopted various rules and interpretative guidance and have brought a wide range of important enforcement actions. This publication summarizes (i) the SEC's Division of Examinations' (the "**Division**") 2025 examination priorities, released in October, 2024[1]; (ii) a risk alert which the SEC issued on November 4, 2024 detailing certain key focus areas and observations of SEC Staff with respect to examinations of registered investment companies ("**RICs**")[2] and (iii) new SEC Staff Form PF FAQs published on December 20, 2024.[3]

This publication additionally discusses the SEC's recent settlement of charges against (i) two advisers and their sole owner for improperly charging expenses to private funds; (ii) an adviser, among others, for failing to timely make Form D filings; (iii) an adviser for failing to distribute required audited financial statements in a timely manner under Rule 206(4)-2 (the "**Custody Rule**") of the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"); (iv) an adviser and its managing partner related to undisclosed conflicts between the adviser and one of its portfolio companies; (v) seven advisers for repeated failures to file Form PF; (vi) an adviser for making misleading statements about the amount of assets under management that integrated environmental, social and governance ("**ESG**") factors in investment decisions; (vii) an adviser for misstatements regarding, and failure to adopt policies and procedures around, its investment strategy that incorporated ESG factors; (viii) advisers for violations of Rule 206(4)-1 (the "**Marketing Rule**") under the Advisers Act; and (ix) two affiliated advisers in connection with five separate enforcement actions for numerous violations, including misleading disclosures to investors, breach of fiduciary duty, prohibited joint transactions and principal trades, and failures to make recommendations in the best interest of customers.

1 The full publication is available here.

2 The Risk Alert can be found here.

3 The FAQs can be found here.

SEC'S DIVISION OF EXAMINATIONS ANNOUNCES 2025 EXAMINATION PRIORITIES FOR PRIVATE FUND SPONSORS

On October 21, 2024, the Division issued its examination priorities ("**Priorities**") for 2025, which detail the key examination topics and risks that the Division intends to prioritize in the exam setting. The Division highlighted the following areas of focus relevant to investment advisers:

Adherence to Fiduciary Standards of Conduct: The Division will continue to examine advisers' adherence to duties of care and loyalty owed to clients, specifically focusing on:

- Advisers' (i) prioritization of clients' best interests over their own and (ii) full and fair disclosure of all conflicts of interest sufficient to allow clients to provide informed consent to such conflicts;
- Whether advisers' recommendations regarding products, strategies and account types meet fiduciary obligations owed to clients, especially in relation to high-cost, unconventional or illiquid investments and assets sensitive to market changes;
- With respect to dual registrants and advisers with affiliated broker-dealers, the suitability of investment advice, transparency in recommendations and how such advisers mitigate and disclose conflicts of interest; and
- The impact of advisers' financial conflicts of interest on providing impartial advice and best execution.

Effectiveness of Advisers' Compliance Programs: The Division will continue to review the effectiveness of advisers' compliance programs under the requirements of Rule 206(4)-7 ("**Compliance Rule**") under the Advisers Act. Such reviews will remain focused on core areas of advisers' compliance programs, including marketing, valuation, trading, portfolio management, disclosure, custody and annual reviews. Other topics of Compliance Rule examinations may include (i) fiduciary duties of advisers that outsource investment management and selection, (ii) alternative revenue sources or benefits and (iii) appropriateness and accuracy of fee calculations and the disclosure of fee-related conflicts. Additionally, depending on advisers' practices or products, the Division may look deeper into specific aspects of compliance programs, such as the valuation of illiquid or "difficult-to-value" assets (e.g., commercial real estate), the use of artificial intelligence ("**AI**"), advisers' supervision of independent contractors and changes to advisers' businesses.

Advisers to Private Funds: The Division will continue to focus on advisers to private funds, prioritizing specific examination topics, including:

- Whether advisers' disclosure matches actual practices and that advisers meet their fiduciary obligations (especially during volatile markets and for strategies sensitive to interest rate changes), particularly targeting private funds with poor performance, significant withdrawals, high leverage and/or hard-to-value assets;
- Verifying the accuracy of private fund fee and expense calculations and adequacy of related disclosures, including with respect to the impact of post-commitment period management fees, valuation of illiquid assets and related fee and expense offsets;
- Assessing advisers' disclosure of conflicts of interest and risks, and the adequacy of related policies and procedures;[4] and
- Ensuring compliance with new SEC rules such as amendments to Form PF[5] and the Marketing Rule.

Information Security and Operational Resiliency: The Division will review advisers' practices designed to prevent interruptions to mission-critical services and to protect investor information, records and assets.[6] The Division will also assess (i) cybersecurity risks and resiliency goals associated with advisers' use of third-party products and services as well as (ii) advisers' (a) compliance with Regulation S-P and (b) policies and procedures related to safeguarding customer records and information (particularly at firms providing electronic investment services).

Emerging Financial Technology and Crypto Assets: The Division remains focused on private fund advisers' use of developing financial technologies such as automated investment tools, AI and trading algorithms or platforms as well as the attendant risks of such technologies. The offer, sale, recommendation of, advice regarding, trading

4 The Division noted such assessments would particularly focus on (i) use of debt, fund-level lines of credit, investment allocations, adviser-led secondary transactions, transactions between fund(s) and/or others, (ii) investments held by multiple funds and (iii) use of affiliated service providers.

5 A previous alert discussing the amendments to Form PF can be found here.

6 The Division will specifically assess advisers' (i) related policies and procedures, (ii) data loss prevention practices, (iii) access controls, (iv) governance practices, (v) responses to cyber-related incidents, (vi) account management, (vii) alternative trading system safeguards to protect confidential trading information and (viii) oversight of third-party vendors

in and other activities in crypto assets or related products will also continue to be a topic of heightened examination for applicable advisers.

OFAC: The Division will review whether advisers are monitoring the Department of Treasury's Office of Foreign Assets Control sanctions and ensuring compliance with such sanctions.

Advisers should review their existing practices, policies, procedures and disclosures in light of these examination priorities and should reach out to the Weil Private Funds Group with any questions.

SEC RISK ALERT DETAILING FOCUS AREAS AND OBSERVATIONS IN EXAMINATIONS OF RICS

On November 4, 2024, the Division released a Risk Alert detailing key areas of focus for the SEC in examining RICs,[7] as well as observations from the SEC Staff arising from recent examinations of RICs. While not directly applicable to private funds and their advisers, there are several themes that offer guidance for private fund managers, including the three key areas of focus in examinations of RICs: (i) adoption and implementation of effective written policies and procedures to prevent violations of the federal securities laws and regulations; (ii) whether there are clear and accurate disclosures that align with actual practices; and (iii) whether compliance issues are promptly addressed when identified.

Additionally, the Risk Alert notes that when selecting examination candidates, firm selection and examination scoping decisions may be driven from a complex or fund perspective, or a combination of both, and that the Division typically considers factors such as whether a fund's investment strategy and/or portfolio holdings meet criteria relevant to the focus areas described in the Division's stated priorities, whether new regulatory requirements are applicable to the funds, and a fund complex's examination history or when it first commenced operations. Also considered are fund-specific and adviser-specific risk factors, such as those related to the fund's or its adviser's business activities, conflicts of interest, and/or regulatory history.

SEC'S DIVISION OF INVESTMENT MANAGEMENT PUBLISHES FORM PF FAQS

Significant Form PF amendments will be effective on March 12, 2025. While a significant portion of the amendments pertain to advisers to hedge funds, the amendments will require all reporting private fund advisers (including private equity fund advisers) to:

- Separately report each component fund of a master-feeder arrangement and parallel fund structure, other than a disregarded feeder fund (i.e., a feeder fund that invests all of its assets in a single master fund, US treasury bills, and/or cash and cash equivalents);
- Include the value of investments in other private funds (including internal and external private funds) when determining whether the adviser is required to file Form PF and whether the adviser meets certain reporting thresholds; and
- Report additional information concerning the adviser and the private funds it advises, including: (i) general identifying information; (ii) assets under management attributable to advised private funds; (iii) withdrawal and redemption rights granted to private fund investors and (iv) funds' (a) gross asset value and net asset value, (b) inflows and outflows, (c) base currency, (d) borrowings and types of creditors, (e) beneficial ownership information and (f) performance.

On December 20, 2024, the SEC's Division of Investment Management published a new Form PF FAQ addressing a number of issues created by these amendments, including questions regarding timing of filings, general instructions, definitions and a number of specific new Form PF questions.

NOTABLE ENFORCEMENT ACTIVITY

Enforcement Action related to Allocation and Disclosure of Expenses

On January 10, 2025, the SEC announced that it settled charges against an exempt reporting adviser, its relying adviser and their sole owner for breach of fiduciary duty regarding fund expenses.[8] The Order alleged that from January 2019 through December 2023, the advisers and the owner improperly charged certain expenses to two private funds which the advisers managed, and they failed to disclose the resulting conflicts of interest whereby the advisers were incentivized to charge the expenses to the fund, rather than pay the expenses themselves.

According to the Order, during this time period, the advisers had the two private funds pay for various services that benefitted the advisers or their owner personally. These expenses included outsourced financial services,

7 RICs are primarily regulated under the Investment Company Act (as defined below), and are also subject to the Securities Act (as defined below) and the Securities Exchange Act of 1934, as amended. The RIC universe is very diverse and typically includes, among others, mutual funds, closed-end funds, unit investment trusts, and ETFs (as defined below). RICs offer exposure to a wide range of asset classes, and given the size and variety of the fund population, the Division utilizes a risk-based approach for examination selection and scoping that is aligned with the approach taken for examining investment advisers.

8 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

public relations services, and legal fees, none of which were included in the funds' governing documents as permitted fund expenses. Moreover, the Order alleged that the advisers did not fully and fairly disclose any of these payments or the resulting conflicts of interest to the funds' limited partners.

In addition, the advisers allegedly submitted invoices to the two private funds without taking reasonable steps to ensure that such funds owed the money being invoiced. The advisers approved these expenses on behalf of the funds and did not generate or keep records that would allow them to distinguish between their own expenses and expenses that were properly charged to the fund. According to the Order, this conduct constituted a breach of the advisers' fiduciary duty owed to the private funds.

As a result, the SEC charged the advisers with violating Sections 206(2) and 206(4) of the Advisers Act as well as Rule 206(4)-8(a)(2) and Rule 206(4)-7 thereunder. The advisers and their owner paid a total civil monetary penalty of $150,000. In light of this Order, advisers should ensure that all expenses which they plan to charge to fund clients are both authorized by the applicable fund's governing documents and fully and fairly disclosed to investors.

Enforcement Action related to Failure to File Form D

On December 20, 2024, the SEC announced that it settled charges against a registered investment adviser and two privately held companies for failing to timely file Forms D related to unregistered securities offerings.[9]

An issuer offering or selling securities in reliance on one of the exemptions from registration provided by Regulation D under the Securities Act of 1933, as amended (the "**Securities Act**") is required by Securities Act Rule 503 to file a notice of sales on Form D for each offering of securities no later than 15 calendar days after the first sale of securities in the offering. Although the failure to provide such notice does not result in a loss of the exemption under the Securities Act, the failure to comply with the requirements of Rule 503 is itself a violation of the Securities Act and the rules promulgated thereunder.

With respect to the action taken against the registered investment adviser in particular, two private funds controlled by the adviser conducted unregistered offerings of fund interests. The adviser failed to file a Form D in respect of either offering. Because the adviser engaged in activity that constitutes general solicitation with respect to each offering, the offerings could not be exempt under Section 4(a)(2) under the Securities Act[10] but instead had to rely on the exemptions provided by Regulation D. As a result, the adviser was charged with violating Rule 503 in failing to file a Form D for each of the offerings. The adviser and the two privately held companies agreed to pay combined civil penalties of $430,000.

The SEC's press release noted that an issuer's failure to timely file a Form D hinders the Staff's ability to fully assess the scope of the Regulation D market, harms the SEC's ability to monitor and enforce compliance with Regulation D and hampers the ability of investors and market participants to understand whether companies are complying with the federal securities laws in their offerings. In response to this settlement, advisers should ensure that Form D is timely filed for all offerings whereby the issuing entity is relying on the exemptions from registration provided under Regulation D.

Custody Rule Enforcement Action

On December 20, 2024, the SEC announced that it settled charges against a registered investment adviser for failing to distribute to investors audited fund financial statements within the time period required under the Custody Rule.[11] According to the Order, the adviser managed three pooled investment vehicles,[12] and had custody of client assets, but purported to rely on the exception provided in section (b)(4) of the Custody Rule (the "**Audit Exception**") with respect to such vehicles. The Order alleged that, for fiscal years 2021 and 2022, the adviser did not deliver audited financials for its three pooled investment vehicles to their respective limited partners within the 120-day timeframe as set forth in the Audit Exception.

As a result of this conduct, the adviser was charged with violating Section 206(4) of the Advisers Act, and Rule 206(4)-2 thereunder and agreed to pay a civil penalty of $115,000. In response to this settlement, advisers should ensure that they are timely distributing audited financial statements for all funds for which they are intending to rely on the Audit Exception.

9 The press release, along with links to the applicable SEC Orders, can be found here. A link to the Order pertaining to the registered investment adviser can be found here.

10 Section 4(a)(2) under the Securities Act provides an exemption from registration for an offering "not involving any public offering."

11 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

12 The Custody Rule, which sets forth a number of requirements for advisers having custody of client assets, provides that an adviser is deemed to have complied with the Custody Rule with respect to a fund if the fund is subject to an annual audit and if the adviser distributes the fund's audited financials to all limited partners within 120 days of the end of the fund's fiscal year.

Enforcement Action related to Undisclosed Conflicts of Interest

On December 20, 2024, the SEC announced that it settled charges against a registered investment adviser, as well as against the adviser's owner and managing partner (the "**Managing Partner**"), for failing to disclose certain conflicts of interest.[13]

According to the Order, between November of 2012 and April of 2024, the adviser and the Managing Partner advised one of the adviser's private funds to make a series of investments in a company (the "**Portfolio Company**"). The CEO of the Portfolio Company is the Managing Partner's uncle with whom the Managing Partner had a close relationship. In addition, as of December 2012, the Portfolio Company's CEO served as trustee for three trusts, of which the Managing Partner was a beneficiary. Moreover, these trusts were among the largest investors in the adviser's funds. As trustee, the Portfolio Company's CEO had the authority to select the trust's investments. Finally, in the spring of 2021, these trusts entered into a series of transactions whereby the trusts guaranteed repayment of a substantial line of credit to the Managing Partner.

The Order alleged that neither the adviser nor the Managing Partner disclosed any of these conflicts prior to causing the applicable private fund to invest in the Portfolio Company. The adviser and Managing Partner were charged with violations of Section 206(2) of the Advisers Act, and the adviser was charged with violating Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, and Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. The adviser and CEO paid civil penalties of $550,000 and $50,000 respectively. In response to this settlement, advisers should review their conflicts disclosure to seek to ensure that all actual or potential conflicts of interest inherent in their business are fully and fairly disclosed to investors.

Form PF Reporting Enforcement Action

On December 13, 2024, the SEC announced that it settled charges against seven registered investment advisers for failing to file annual reports on Form PF, as is required for registered investment advisers managing private fund assets of $150 million or more.[14] The Orders alleged that the advisers, whose assets under management ranged from $209M to $3.9B, were delinquent in their filings over multi-year periods. In connection with this conduct, the advisers were charged with violating Rule 204(b)-1 under the Advisers Act and agreed to pay civil penalties totaling $790,000.

The SEC uses information collected on Form PF to, among other things, conduct examinations and investigations, and to monitor systemic risk posed by the hedge fund and private fund industry. In response to these settlements, advisers should ensure that they are timely complying with their Form PF filing obligations. In addition, advisers should be aware of the amendments to Form PF that go into effect on March 12, 2025.[15]

Enforcement Actions related to ESG Investment Strategy

On November 8, 2024, the SEC announced that it settled charges against a registered investment adviser related to statements about the percentage of its AUM that integrated ESG factors in investment decisions.[16]

According to the Order, by the fall of 2019, the adviser believed that incorporating ESG considerations into its portfolio management activities globally was commercially beneficial, and as a result, the adviser decided to accelerate the integration of ESG into its advisory business. In marketing its ESG capabilities, the adviser made claims as to the percentage of firm-wide AUM that was "ESG-integrated" to the boards of directors of the funds that it advised, in proposals to prospective clients and in marketing materials.

The advertised percentages counted the adviser's passive exchange-traded funds ("**ETFs**") as ESG-integrated, which the Order alleges was misleading, as many of the ETFs employed passive strategies that did not follow an ESG-related index, and therefore such ETFs did not consider ESG factors in making investment decisions. In addition, the Order notes that the adviser failed to maintain written policies and procedures covering how the adviser would determine the percentage of firm-wide AUM that was ESG-integrated. As a result of the foregoing conduct, the adviser was charged with violating Sections 206(2) and 206(4) of the Advisers Act, Rules 206(4)-7 and 206(4)-8 thereunder, as well as the Marketing Rule. The adviser agreed to pay a civil monetary penalty of $17.5 million.

Additionally, on October 21, 2024, the SEC announced that it settled charges against a registered investment adviser for misstatements and compliance failures with regard to its purported ESG investment strategy.[17] According to the Order, from March 2020 until November 2022, the

13 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

14 The press release, along with links to the applicable SEC Orders, can be found here.

15 A previous alert discussing the Form PF amendments can be found here. The full text of the amendments' adopting release, along with a link to a related fact sheet, can be found here and here, respectively. In addition, the SEC released an FAQ related to the timing of the Form PF amendments, which can be found here.

16 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

17 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

adviser represented in prospectuses for three of its ETFs that such funds would not invest in companies that were involved in certain products or activities, including fossil fuels and tobacco. However, the Order alleged that during this time period, the funds did, in fact, invest in companies that were involved in coal mining, the transportation of coal, natural gas extraction and distribution and the retail sale of tobacco products.

In addition, the adviser represented to the funds' board of trustees and in the funds' prospectuses that its proprietary model would have the ability to screen out securities of companies involved in fossil fuels and tobacco, but the data which the adviser purchased from a third-party vendor excluded only a subset of companies involved in such activities. The Order also alleged that the adviser failed to adopt policies and procedures reasonably designed to prevent violations of the Advisers Act in connection with its investment processes for the funds at issue.

For the foregoing conduct, the adviser was charged with violating Sections 206(2) and 206(4)[18] of the Advisers Act, and Rule 206(4)-8 thereunder, along with violations under the Investment Company Act. The adviser agreed to pay a civil penalty of $4 million. In response, advisers should ensure that they are adhering in practice to their advertised investment mandates, especially those purportedly involving ESG considerations.

Marketing Rule Enforcement Actions

On December 20, 2024, the SEC announced that it settled charges against a registered investment adviser for several violations under the Marketing Rule.[19] According to the Order, the adviser disseminated material on its public website that the adviser claimed was "verified by Morningstar." In reality, Morningstar never verified the material, but rather, an employee of the adviser merely used a software tool offered by Morningstar to calculate the figures shown in the advertisement.

The Order also stipulated that the adviser attributed the hypothetical performance shown on its website and in factsheets to one of its investment strategies (the "**Strategy**"), but the adviser did not disclose that the model portfolio used to calculate the hypothetical performance included investments that did not consistently follow the strategy's advertised investment formula. The Order alleged that the adviser's website otherwise contained false and misleading statements as well, including that the Strategy "at all times" employed a "systematic options overlay," but in reality, the Strategy did not use an options overlay or invest in any ETFs that used one.

Further, the adviser was not able to substantiate certain statements on its website and failed to show corresponding net hypothetical performance figures alongside gross performance figures included on its website and in factsheets. Lastly, the Order alleged that the adviser disseminated hypothetical performance via its website, and as a result, the adviser failed to adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience, as required under the Marketing Rule.

As a result of this conduct, the adviser was charged with violating the Marketing Rule. Moreover, the adviser was also charged with failing to maintain records or documents necessary to form the basis for, or demonstrate the calculation of, the performance derived from model portfolios advertised on the adviser's website, in violation of Rule 204-2(a) under the Adviser Act. Finally, the adviser was charged with violating Rule 206(4)-7 under the Advisers Act for violations of its compliance manual, which required adviser personnel trades in a security be conducted after any client trades in such security. The adviser agreed to pay a civil monetary penalty of $175,000.

In addition, on November 1, 2024, the SEC announced that it settled charges against a registered investment adviser for violating the Marketing Rule.[20] According to the Order, from November 4, 2022 (the Marketing Rule's effective date) through May, 2024, the adviser disseminated advertisements on its website, through social media channels and via email that contained compensated endorsements from several professional athletes. The Order alleged that these endorsements were not accompanied by the disclosures as required by the Marketing Rule.[21]

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18 Rule 206(4)-8 provides that it is unlawful for any investment adviser to a pooled investment vehicle to "make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle." As these violations occurred before the effective date of the Marketing Rule, the adviser was not charged with any Marketing Rule violations.

19 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

20 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

21 The Marketing Rule generally prohibits an adviser from including an endorsement in an advertisement unless the adviser discloses, or reasonably believes that the person giving the endorsement discloses at the time of dissemination (i) clearly and prominently (a) that the endorsement was given by a person other than a current client or investor, (b) that cash or non-cash compensation was provided for the endorsement, if applicable, (c) a brief statement of any material conflicts of interest on the part of the person giving the endorsement resulting from the adviser's relationship with such person; (ii) the material terms of any compensation arrangement; (iii) and a description of any material conflicts of interest on the part of the person giving the endorsement arising from the relationship with the adviser and/or any compensation arrangement.

In addition, the adviser disseminated a performance chart displaying hypothetical performance on its public website. Because the adviser distributed hypothetical performance to a mass audience, the Order alleged that the adviser was unable to "form any expectations about [the audience's] financial situation or investment objectives," in violation of the Marketing Rule's hypothetical performance requirements.[22]

As a result of this conduct, the adviser was charged with violating Section 206(4) of the Advisers Act, and Rules 206(4)-1(b) and (d) thereunder, and agreed to pay a $250,000 civil penalty. In response to this settlement, advisers should ensure that any endorsements included in advertisements are accompanied by Marketing Rule-compliant disclosures. Additionally, advisers should review their publicly accessible websites and social media channels to ensure nothing contained therein runs afoul of the Marketing Rule.

Miscellaneous Enforcement Actions

On October 31, 2024, the SEC announced that it settled charges against two affiliated registered investment advisers resulting from five separate enforcement actions for various failures.[23]

One Order alleged that one of the advisers, which was also a registered broker-dealer, made misleading statements to brokerage customers who invested in its "conduit" private funds (the "**Conduits**").[24] The Conduits invested in other private funds, which would later distribute shares of companies that went public to the Conduits. The Conduit offering documents disclosed that shares of the public companies would be sold "as promptly as practicable under reasonable commercial terms." The Order alleged that, in reality, an affiliate of the adviser actively managed the shares, exercising "complete discretion" as to when to sell and the number of such shares to be sold, at times holding the shares for months before selling them. The adviser did not disclose to Conduit investors that the shares were subject to market risk due to hold periods, and the values of many shares declined significantly from the initial price at which the Conduit received them. As a result of this conduct, the adviser was charged with violating Sections 17(a)(2) and 17(a)(3) of the Securities Act. The adviser paid a civil penalty of $10 million.

According to a separate Order, from July 2017 through October 11, 2024, the same adviser failed to fully and fairly disclose the financial incentive of itself and its financial advisors to recommend its own "portfolio management program" over advisory programs that used third-party managers.[25] The Order alleges that the adviser also failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder in connection with the disclosure of conflicts of interest presented by the fee structure of the advisory programs. In connection with this conduct, the adviser was found to have violated Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-7 thereunder. The adviser paid a $45 million civil penalty.

A third Order found that from at least June 30, 2020 through July 14, 2022, the same adviser recommended certain mutual fund products to its retail brokerage customers when materially less expensive ETF products that offer the same investment portfolio were available, causing impacted customers to pay higher fees than they would have otherwise paid had they purchased the ETFs.[26] The Order also alleges that the adviser and its representatives failed to consider the higher fee structure associated with the mutual funds and failed to have a reasonable basis to believe that the recommendations were in the best interest of customers. The adviser was charged with violating Regulation Best Interest as a result of this conduct.

In March 2020, the other registered investment adviser caused prohibited joint transactions involving domestic and foreign money market funds for which it served as adviser.[27] During the COVID-19 pandemic, the Federal Reserve Board established the "Money Market Mutual Fund Liquidity Facility" ("**MMLF**") to address severe liquidity constraints in the market. Liquidity from the MMLF was available only to certain qualifying domestic funds and assets. In March of 2020, in anticipation of redemptions in its foreign fund, the adviser caused its domestic funds to provide the foreign fund with liquidity from the MMLF by effecting joint transactions through an intermediary investment bank. As a result of this conduct, the adviser was charged with violating Section 17(d) of the Investment Company Act, and Rule 17d-1 thereunder. The adviser paid a $5 million civil penalty.

22 The Marketing Rule generally prohibits an adviser from including hypothetical performance in an advertisement unless it adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience.

23 A press release related to the settlements can be found here.

24 A link to the full SEC Order can be found here.

25 A link to the full SEC Order can be found here.

26 A link to the full SEC Order can be found here.

27 A link to the full SEC Order can be found here.

Lastly, according to a separate Order, the same adviser engaged in or caused 65 prohibited principal trades by which one of the adviser's portfolio managers directed an unaffiliated broker-dealer to buy commercial paper (or similar securities) from the adviser's affiliate.[28] The adviser then purchased the paper from the broker-dealer on behalf of one of its clients. The Order alleged that certain of these trades, which involved money market funds that were RICs, violated Section 17(a)(1) of the Investment Company Act, because they did not comply with the conditions of the SEC's previously issued exemptive relief. With respect to the remainder of the trades involving non-RICs, the adviser was charged with violating Section 206(3) of the Advisers Act, because the adviser did not provide clients the required disclosures or obtain their consent for any of the trades. In addition, the adviser failed to adopt and implement policies and procedures to prevent unlawful principal trades by its investment professionals, resulting in an alleged violation of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, and Rule 38a-1 of the Investment Company Act. The adviser paid a $1 million civil penalty.

KEY TAKEAWAYS

SEC's Division of Examinations Announces 2025 Examination Priorities for Private Fund Sponsors

1. In October 2024, the SEC's Division of Examinations issued its examination priorities for 2025. For advisers to private funds, these priorities include whether advisers are adhering to their fiduciary obligations, the accuracy of fee and expense calculations, disclosure around risks and conflicts of interest, and compliance with new SEC rules such as the amendments to Form PF and the Marketing Rule.
2. In response to these priorities, advisers should review their current practices, policies, procedures and disclosures and reach out to the Weil Private Funds Group with any questions.

SEC Risk Alert Detailing Focus Areas and Observations in Examinations of RICs

1. In November 2024, the SEC's Division of Examinations released a Risk Alert detailing certain key areas of focus and observations arising from examinations of RICs.
2. While not directly applicable to private funds and their advisers, there are several themes in the Risk Alert that offer guidance for private fund managers, including (i) adoption and implementation of effective written policies and procedures to prevent violations of the federal securities laws and regulations; (ii) whether there are clear and accurate disclosures that align with actual practices; and (iii) whether compliance issues are promptly addressed when identified.

SEC's Division of Investment Management Publishes Form PF FAQs

1. On December 20, 2024, the SEC's Division of Investment Management published new FAQs addressing a number of issues raised by the Form PF amendments, which become effective on March 12, 2025.
2. The amendments will affect advisers to private equity funds in a number of ways, including by requiring all reporting fund advisers, among other things, to separately report each component fund of a master-feeder arrangement, to include the value of investments in other private funds in determining certain reporting thresholds, and to report certain additional information concerning the adviser and the private funds it advises.

Allocation and Disclosure of Expenses Enforcement Action

1. In January 2025, the SEC announced that it settled charges against an exempt reporting adviser, its relying adviser and their sole owner for improperly charging certain expenses to fund clients.
2. In response, advisers should ensure that all expenses which they plan to charge to fund clients are both authorized by the applicable fund's governing documents and fully and fairly disclosed to investors.

Enforcement Action related to Failure to File Form D

1. In December 2024, the SEC announced that it settled charges against a registered investment adviser, among others, for failing to timely file Form D in respect of offerings by two funds it controlled.
2. In response to these settlements, advisers should ensure, for each offering for which it is relying on an exemption from registration provided under Regulation D, that it is filing a Form D within 15 calendar days of the first sale of securities in the offering

Custody Rule Enforcement Action

1. In December 2024, the SEC announced that it settled charges against a registered investment adviser for failing to timely deliver audited fund financial statements in accordance with the Audit Exception to the Custody Rule.

28 A link to the full SEC Order can be found here.

2. In response to this settlement, advisers should ensure that, for each fund for which they are intending to rely on the Audit Exception, audited fund financials are delivered to limited partners within 120 days of such fund's fiscal year-end.

Enforcement Action related to Conflicts of Interest Disclosure

1. In December 2024, the SEC announced that it settled charges against a registered investment adviser and its managing partner for failing to disclose certain conflicts of interest related to the managing partner and the CEO of a portfolio company.

2. In response to this settlement, advisers should review their conflicts disclosure to seek to ensure that all actual or potential conflicts of interest inherent in the adviser's advisory business are fully and fairly disclosed to investors.

Form PF Reporting Enforcement Action

1. In December 2024, the SEC announced that it settled charges against seven registered investment advisers for repeatedly failing to file annual reports on Form PF.

2. Advisers should be sure to timely comply with their Form PF filing obligations and should be cognizant of the amendments related to Form PF, which go into effect in March of 2025.

Enforcement Actions related to ESG Investment Strategy

1. In November 2024, the SEC announced that it settled charges against a registered investment adviser for misleading statements regarding the percentage of its AUM that was "ESG-integrated." Additionally, in October 2024, the SEC settled charges against an adviser for misstatements regarding, and for failing to adopt policies and procedures around, its investment mandate, which it advertised was focused on ESG investing.

2. In response to these settlements, advisers should ensure that any calculation of ESG-integrated AUM captures only those assets that actually integrate ESG, and that advisers are following any advertised investment strategy in practice, particularly where an adviser has a stated ESG mandate.

Marketing Rule Enforcement Actions

1. At various times in Q4 2024, the SEC announced that it settled charges against registered investment advisers for various Marketing Rule violations, including (among other things) failing to include requisite disclosures alongside endorsements, failing to include net performance alongside gross performance, failing to adopt required policies and procedures with respect to hypothetical performance, the inclusion of false and misleading statements and the failure to substantiate material facts in advertisements.

2. In response to these settlements, advisers should review their marketing practices and ensure that the Marketing Rule's requirements, especially those around substantiation, performance reporting and endorsements are being followed.

Miscellaneous Enforcement Actions

1. In October 2024, the SEC announced that it settled charges against affiliated registered investment advisers for various violations, including for misleading disclosures to investors, breach of fiduciary duty, prohibited joint transactions and principal trades, and failures to make recommendations in the best interests of customers.

2. In response, advisers should compare the facts and circumstances of these settlements to their own operations in order to seek to avoid common pitfalls, particularly with respect to potentially misleading disclosures to investors and principal transactions.

Weil's Private Funds Group is available to help.
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