

2023 SEC Examination Priorities for Investment Advisers

by David Tang and Michael Schmieder

The SEC's Division of Examinations (the "Division") announced its examination priorities ("Examination Priorities") for fiscal year 2023.¹ This eUpdate summarizes key points from the Examination Priorities that impact SEC-registered investment advisers ("Advisers").

Notes and Statistics

In fiscal year 2022, the Division examined approximately 15% of the more than 15,000 Advisers overseeing \$125 trillion in assets under management, which resulted in numerous referrals to the SEC's Division of Enforcement. Firms returned more than \$50 million to investors in connection with the Division's examinations.

In the past five years, there has been an 80% increase in the gross assets of private funds. Currently, there are more than 5,500 private fund advisers ("Private Fund Advisers"), totaling over 35% of all Advisers, which manage approximately 50,000 private funds with gross assets exceeding \$21 trillion.

During 2023, the Division expects to return to on-site examinations as well as continue remote examinations. Since the COVID-19 pandemic, the Division had largely transitioned to remote examinations.

Investment Adviser Examination Priorities

In 2023, the Division will prioritize the following in their examinations of Advisers:

- Whether Advisers have adopted and implemented written policies and procedures to comply with the substantive requirements of the new Marketing Rule under the Investment Advisers Act of 1940 (the "Advisers Act").
- Whether Private Fund Advisers are fulfilling their fiduciary duties, with an emphasis on compliance programs, including in the areas of:
 - Conflicts of interest;
 - Calculation and allocation of fees and expenses (including post commitment period management fees);

Related People

- David Tang
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Related Capabilities

- Investment Funds
- Investment Management

- Compliance with performance advertising and compensated testimonials and other endorsements, such as solicitations, and other aspects of the Marketing Rule;
 - The use of alternative data;
 - Compliance with Advisers' Code of Ethics; and
 - Compliance with the Custody Rule.
- Private Fund Advisers to funds with specific risk characteristics, such as:
 - Being highly-leveraged;
 - Managed side-by-side with broker dealer companies;
 - Private equity funds that use affiliated companies and advisory personnel to provide services to their funds and underlying portfolio companies;
 - Holding certain hard-to-value investments, such as crypto assets and real estate-connected investments, with an emphasis on commercial real estate;
 - Invest in or sponsor Special Purpose Acquisition Companies (SPACs); and
 - Adviser-led restructurings, including stapled secondary transactions and continuation funds.
 - Whether Advisers have sufficient justification to label investment products as ESG, and are operating in a manner as disclosed with respect to their ESG products.
 - Whether Advisers have appropriate policies and procedures to:
 - Respond to cyber-related incidents, including ransomware attacks;
 - Comply with Regulations S-P and S-ID, where applicable;
 - Protect investor information, records, and assets; and
 - Prevent interruptions to critical services.
 - Advisers that are, or claim to be, offering new products (e.g., crypto assets) and services or employing new practices, including technological and on-line solutions (e.g., internet advisers, and automated investment tools and trading platforms, including Advisers referred to as “robo-advisers”).
 - Whether Advisers are fulfilling their fiduciary obligations to act in the best interest of retail investors, including assessments of compliance with Form CRS and management of conflicts of interest.
 - Whether Advisers have policies and procedures that are reasonably designed to identify suspicious activity and illegal money-laundering activities.
 - Generally, Advisers' compliance programs and related disclosures, including specifically the areas of custody and safekeeping of client assets, valuation, portfolio management, brokerage and execution, retaining and monitoring electronic communications, selecting third-party service providers, and the calculation of fees and expenses.

Dorsey Observations

In view of the steady frequency and growing scope of the Division's examinations, Advisers should take steps to prepare for examinations and regularly review the adequacy and effectiveness of their compliance programs. Dorsey's regulatory compliance services are available to advise firms through the SEC examination process, and assist firms with exam preparation and mock audits.

¹ SEC Division of Examinations 2023 Examination Priorities (February 7, 2023) *available at* <https://www.sec.gov/files/2023-exam-priorities.pdf>.