

Private Fund Advisers on the Hotplate: SEC Turning Up the Heat

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Private fund advisers are once again featured prominently among the SEC Examination Division's exam priorities. As previously reported, this is unsurprising, given the scope and intensity of the SEC's increased pressure on private fund advisers in the past couple of years. See "[A Hailstorm for Private Fund Advisers?](#)" and "[SEC Proposes Sea Change in Private Fund Regulation,](#)" *Expect Focus – Life, Annuity, and Retirement Solutions* (April 2022).

Among other areas, the division's recently published 2023 exam priorities include:

- **Conflicts.** As fiduciaries, private fund advisers must identify material conflicts of interest and either eliminate them or mitigate and timely disclose them. Common conflicts include practices pertaining to the allocation of investment opportunities, financial relationships between investors and the adviser, undisclosed agreements with investors, and undisclosed interests in recommended investments. As applicable, these and other conflicts should also be addressed in a private fund adviser's risk assessment and compliance manual.
- **Fair Calculation and Allocation of Fees and Expenses.** The SEC has spotlighted this subject for nearly a decade. For 2023, the division underscored the calculation of post-commitment period management fees and the impact of valuation practices at private equity funds. As applicable, and in advance of any examination, private fund advisers should assess whether practices align with disclosures and are applied consistently.
- **New Investment Adviser Marketing Rule.** Private fund advisers should understand how and when the new marketing rule applies differently to them than to other advisers. Also, in connection with the rule's adoption, certain no-action letters previously relied on by some private fund advisers have been withdrawn. One consequence is that placement agent arrangements generally must now comport with new requirements.

- **Use of Alternative Data.** Private fund advisers using alternative data in investment decision-making must adopt procedures for vetting these data providers to ensure the firm’s sourcing and use of alternative data complies with applicable securities laws. (Alternative data is defined, generally, as data gathered from nontraditional sources such as satellite imagery, social media commentary, product reviews, credit card transactions, and geolocation information, among other sources.)
- **Compliance With Custody Rule.** Among other things, private fund advisers should be familiar (and, as applicable, comply) with SEC staff interpretations regarding special custody considerations for certain private funds. Private fund advisers should also monitor developments regarding the new rule that the SEC proposed earlier this year to replace the current custody rule. See [“SEC Proposes to Remake Advisers Act Custody Rule for a Modern World.”](#)

In light of the rising regulatory temperature, private fund advisers risk of getting burned if they don’t give careful consideration to the division’s exam priorities that apply to them.

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