



Morgan Lewis

**ADVANCED TOPICS IN
PRIVATE FUND PRACTICES
CONFERENCE**

Manager and Investor Perspectives

BOSTON

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Regulatory Updates

Speakers



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SEC Examinations and Enforcement 2022 Recap

Environmental, Social,
and Governance (ESG)

Conflicts of Interest
(e.g., business
relationships, cherry
picking)

Recordkeeping –
Off-Channel
Communications

Insider Trading
(April 2022 Risk Alert)

Speeding Tickets

Cybersecurity

CCO Liability

SEC Exam and Enforcement Focus on Marketing Rule Compliance

- SEC Exams kicked off Marketing Rule exam initiatives in November
 - Kicked off exam “overlay” collecting info from 400 exams
 - Focus on policies and procedures, performance (including predecessor), testimonials, social media, websites, marketing brochures, and emails
 - Overlay ended April 30
 - SEC created a deficiency monitoring team from home office and regional office
 - SEC staff reviewed deficiencies for consistency and evaluation of noted deficiencies falling in gray areas
 - SEC staff issued 110 deficiency letters
- Majority (66%) of firms updated policies, particularly on substantiation, hypothetical performance, and testimonials
 - Procedures for substantiation—most were good, but some were weak
 - Firms generally had a process to review advertisements, some had pre-approval
 - SEC staff identified shortfalls where testimonials and endorsements weren’t covered in some policies
 - Sometimes policies didn’t mention identification of conflicts within policies and procedures

SEC Exam and Enforcement Focus on Marketing Rule Compliance

Key Deficiencies

- Substantiation (major violation under general prohibitions)
- Material misstatements, false performance, manipulation of performance, omitting poor performance, and failure to net out fees
- Lack of policies and procedures on hypothetical performance

Enforcement Referrals

- Couple of referrals—mostly for false performance numbers
- SEC Enforcement has separately opened a matter under investigation captioned “In the Matter of Certain Registered Investment Advisers Who Market Hypothetical Performance”

Upcoming Marketing Rule Exam Initiatives

- Exams is doing detailed reviews on 175-200 firms
- Performance calculations and hypo performance is next
- SEC is going to recalculate the performance itself (though limiting to 20-25 exams)
- SEC also looking at testimonials/endorsements and predecessor performance—Each is kicking off shortly and being added to exam letters

SEC Exams & Enforcement – A Look Forward

2023 Focus:

- Crypto and Crypto-Related Assets
- Gatekeepers
- Cyber Intrusions and Outsourcing
- Complex Short-Term Products
- Undisclosed Fees and Cash Sweep Accounts
- Outsourcing
- Digital Engagement Practices
- Marketing Materials and New Marketing Rule
- Custody
- Fiduciary Duty, Hedge Clauses

SEC Regulatory Blitz

SEC has 52+ rulemaking initiatives

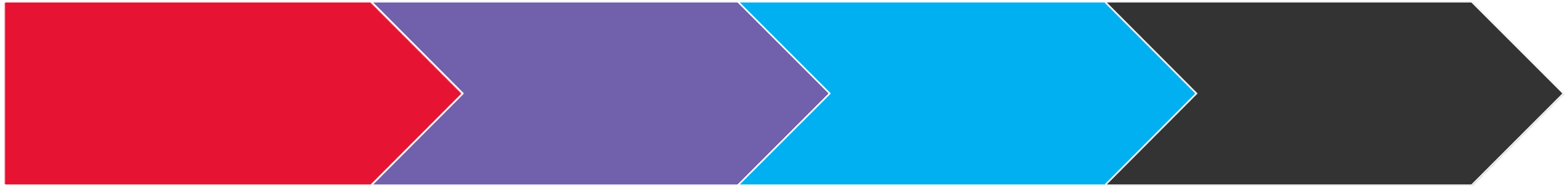
- SEC proposed and final rulemakings target financial services, including private funds
- Involve complex and sweeping changes
- Pose crushing implementation timelines
- Cumulatively pose risk of economic impacts

Rulemaking demands have throttled back SEC staff no-action and exemptive relief and guidance

- Decreasing transparency of SEC expectations and interpretations

SEC rulemaking blitz coincides with very active enforcement program and increasing penalties and “broken windows” approach

Recent SEC Rulemakings – Final Rules



Form PF – Current Reports

Compliance date:

six months from date of publication in Federal Register for new Sections 5 and 6; one year from date of publication in Federal Register for updates to existing sections

Fund-of-Funds Arrangements

Compliance date:

January 19, 2022

Marketing Rule

Compliance date:

November 4, 2022

Form N-PX

Compliance date:

August 31, 2024

Recent SEC Rulemakings – Rule Proposals

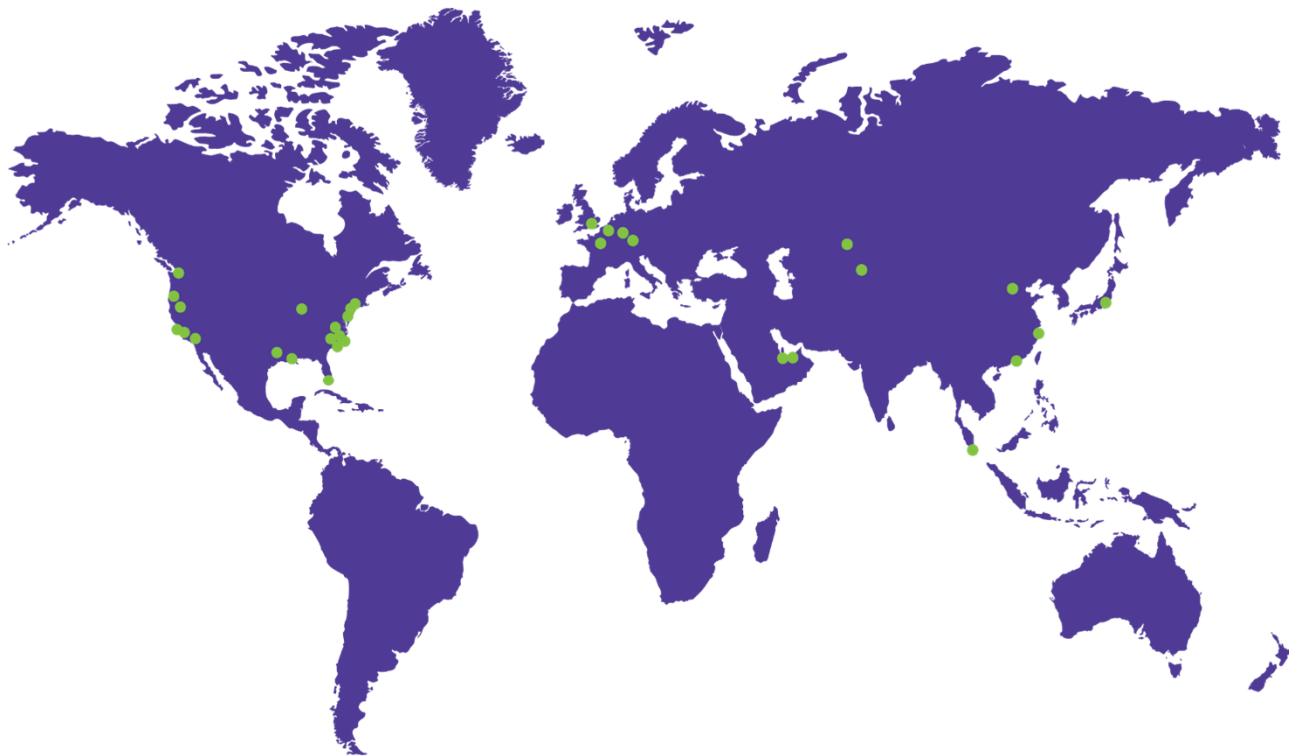
- **Private Fund Advisers** (comment period closed: April 25, 2022; reopened twice through November 1, 2022)
- **Form PF Amendments: Joint with CFTC** (comment period closed: October 11, 2022)
- **ESG Disclosures for Advisers and Funds** (comment period closed: August 16, 2022)
- **Climate Disclosure** (comment period closed: June 17, 2022)
- **Outsourcing by Investment Advisers** (comment period closed: December 27, 2022)
- **Cybersecurity Risk Management for Advisers and Funds** (comment period closed: April 11, 2022; reopened through May 22, 2023)
- **Safeguarding of Advisory Client Assets** (comment period closed: May 8, 2023)
- **Prohibition Against Conflicts of Interest in Certain Securitizations** (comment period closed: March 27, 2023)
- **Modernization of Beneficial Ownership Reporting** (comment period closed: April 11, 2022; reopened through June 27, 2023)

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