

Analysis of SEC’s 2024 Exam Priorities for Private Fund Advisers

Client Alert | November 2, 2023

On October 16, 2023, the U.S. Securities and Exchange Commission’s (the “SEC”) Division of Examinations released its 2024 examination priorities for the upcoming year (the “2024 Priorities”).^[1] The publication of the 2024 Priorities comes at an important time in light of the final rules that the SEC adopted under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), in August of this year, which modify the inner workings of private funds and their sponsors by, among other things, restricting or requiring extensive disclosure of preferential treatment granted to investors, as well as imposing numerous additional reporting and other compliance requirements (the “New Private Funds Rules”).^[2]

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As anticipated, the 2024 Priorities further emphasize the SEC’s stated mission to increase “transparency into the examination program.” While the 2024 Priorities cover other important topics, we have highlighted the following key priorities that impact our private fund adviser clients and provided our analysis alongside them. We note that the following is not an exhaustive list of key priorities and is subject to change.

SEC Priority	GDC Analysis
The portfolio management risks present when there is exposure to recent market volatility and higher interest rates. This may include private funds experiencing poor performance, significant withdrawals and valuation issues, and private funds with more leverage and illiquid assets (such as real estate funds).	This priority seems largely focused on open-end funds that may experience liquidity shortfalls during periods of increased market volatility. For closed-end funds, this priority signals that in a difficult financial environment the SEC staff will be watching that sponsors are fairly valuing their funds’ assets and calculating their fees and performance accurately. Sponsors should continue to implement internal checks to ensure that their valuation policies are being followed and that positions are reassessed as conditions warrant. This priority also suggests a continued focus on advisers’ overall approach to portfolio risk and leverage management, including any policies and procedures adopted in that regard.
Adherence to contractual requirements regarding limited partner advisory committees or similar structures (e.g., advisory boards), including adhering to any contractual notification and consent processes.	Sponsors should periodically review their obligations related to limited partner advisory committee/board notices and consents to confirm that these obligations are being met and that such compliance is appropriately documented.
Conflicts, controls, and disclosures and use of affiliated service providers to ensure that such decisions are made, and processes are implemented, in the funds’ best interest and to allow investors to provide informed consent when needed. For example, such disclosure may include, but is not limited to, (i) disclosing processes for making initial and ongoing suitability determinations when allocating investments across investment vehicles managed by the same adviser or an affiliate, (ii) providing disclosure about how an adviser intends to mitigate or eliminate the conflicts of interest and (iii)	Unless overturned or modified, ^[3] the New Private Funds Rules also will require sponsors to disclose fees to paid to the adviser and its affiliates on a quarterly basis. Given the SEC’s historic and continued focus on this area, sponsors would be wise to continue to approach affiliate transactions with special care, and strive to make a determination (documented by the sponsor’s conflicts committee where applicable) that any affiliate transactions have been effected in accordance with the fund’s governing documents, including any disclosure or informed consent requirements contained therein. Allocations

disclosing economic incentives, such as the use of an affiliated firm to perform certain services.	of investment opportunities across multiple funds and other clients also will continue to be a focus of the SEC examination staff, and sponsors should ensure that appropriate documentation of allocation determinations is maintained.
Accurate calculation and allocation of private fund fees and expenses (both fund-level and investment-level), including valuation of illiquid assets (including adjustments to reflect write-downs or write-offs), calculation of post commitment period management fees (including whether a fund has the ability to recycle or reinvest proceeds after the commitment period), adequacy of disclosures, and potential offsetting of such fees and expenses.	The New Private Funds Rules set forth extensive reporting requirements related to fees and expenses, and the 2024 Priorities make clear that the SEC intends to spend significant time verifying calculations. We have seen the SEC pay increased attention to the calculation of fees at the end of a fund's commitment period, particularly situations where the sponsor has a conflict of interest (such as the sponsor's determination not to write off a permanently impaired investment such that management fees continue to be charged with respect to such investment). ^[4]
Due diligence practices for consistency with policies, procedures, and disclosures, particularly with respect to private equity and venture capital fund assessments of prospective portfolio companies.	It appears that the SEC intends to double check that sponsors are conducting due diligence in the manner they have communicated, both externally and internally. Sponsors would be wise to review marketing materials and internal policies for descriptions related to the due diligence that is undertaken when selecting investments. Sponsors should then confirm with the deal team whether the process has been followed and documented for all investments over the relevant period, and whether adjustments to disclosure or policy are needed or, alternatively, adjustments to the investment diligence process itself.
Compliance with Advisers Act requirements regarding custody, including accurate Form ADV reporting, timely completion of private fund audits by a qualified auditor and the distribution of private fund audited financial statements.	A continued focus on custody requirements does not come as a surprise as this has been a major point of emphasis of the SEC examination staff. Continued care and attention should be taken to ensure compliance with all aspects of the Advisers Act custody rule, which is highly technical, and that documentation of such compliance (for example, records of timely delivery of audited financial statements to investors) is maintained.
Policies and procedures for reporting on Form PF, including upon the occurrence of certain reporting events.	Please see our client alert, which can be found here , summarizing the SEC's significant amendments to Form PF. Form PF amendments will go into effect on December 11, 2023 (i.e., "trigger" based filing requirements) and June 11, 2024 (i.e., additional reporting requirements as part of routine Form PF filings).

^[1] Available at: <https://www.sec.gov/news/press-release/2023-222>. See also <https://www.sec.gov/files/2024-exam-priorities.pdf>.

^[2] For more information on the New Private Funds Rules, please see our client alert [available here](#).

^[3] The New Private Funds Rules are being challenged in court by an array of industry groups led by the National Association of Private Fund Managers, represented by Gibson Dunn. The U.S. Court of Appeals for the Fifth Circuit recently granted the challengers' motion to expedite the case, which requested a decision by the end of May 2024. The challengers filed their opening brief on November 1, 2023.

^[4] For more information on the recent SEC enforcement action against Insight Venture Management LLC ("Insight") where the SEC found that Insight charged excess management fees to its investors through "inaccurate application of its permanent

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impairment policy” and failed to disclose a conflict of interest to investors concerning the same policy, please see our client alert [available here](#).

The following Gibson Dunn attorneys assisted in preparing this client update: Tom Rossidis, Kevin Bettsteller, and Shannon Errico.

Gibson Dunn’s lawyers are available to assist with any questions you may have regarding the issues and considerations discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm’s Investment Funds practice group:

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