Simpson Thacher

Registered Funds Regulatory Update

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SEC Rulemaking

SEC Adopts Private Fund Adviser Rules

In a recent 3-2 vote, the SEC adopted new and amended Private Fund Adviser Rules that will substantially increase the regulation of investment advisers to private funds. The Private Fund Adviser Rules generally focus on disclosure and reporting obligations and impose restrictions and disclosure requirements with respect to certain activities instead of outright prohibitions on such activities. The Private Fund Adviser Rules apply to investment advisers to private funds, which are defined as funds that would be investment companies but for the exclusion from the definition of investment company in Section 3(c)(1) or 3(c) (7) of the Investment Company Act, except the Private Fund Adviser Rules do not apply with respect to advisers to securitized asset funds that they advise (which includes CLOs, among other funds). Certain of the new provisions apply only to investment advisers that are registered or required to be registered with the SEC, whereas other provisions apply to all private fund investment advisers, whether SEC-registered, state-registered, un-registered, or “exempt reporting advisers” under the Advisers Act.

Reporting Obligations. Under the new Private Fund Adviser Rules, registered investment advisers to private funds must:

- Provide investors with quarterly statements detailing information regarding private fund performance as well as fees and expenses.
- Obtain an annual audit for each private fund.
- Obtain a fairness opinion or valuation opinion in connection with an adviser- or general partner-led secondary transaction.

Restricted Activities. Under the new Private Fund Adviser Rules, registered investment advisers and exempt reporting advisers are restricted from the following activities subject to consent-based and/or disclosure-based exceptions:

- Advisers are prohibited from charging or allocating to the private fund regulatory, examination, or compliance fees or expenses of the adviser, unless such fees and expenses (including the dollar amounts thereof) are disclosed to investors.
- Advisers must disclose and obtain consent from fund investors if the adviser charges or allocates to the private fund any fees or expenses associated with an investigation of the adviser; however, an adviser may not charge fees or expenses related to an investigation that results in a court or governmental authority imposing a sanction for a violation of the Advisers Act or the rules thereunder.
- Advisers are restricted from reducing the amount of an adviser (or affiliate) clawback by the amount of certain taxes unless the post-tax clawback is subject to after-the-fact disclosure.

- An adviser is prohibited from charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by it or its related persons have invested (or propose to invest) in the same portfolio investment unless (i) the allocation approach is fair and equitable, and (ii) the adviser distributes to fund investors advance written notice of the non-pro rata charge and a description of how the allocation approach is fair and equitable under the circumstances.
- Advisers are prohibited from borrowing or receiving an extension of credit from a private fund client without disclosure to, and consent from, fund investors.

Restrictions on Preferential Treatment of Certain Investors. The Private Fund Adviser Rules generally:

- Prohibit registered investment advisers and exempt reporting advisers from providing preferential liquidity (*i.e.*, redemption rights) or informational rights that the adviser reasonably expects to have a material negative effect on fund investors, unless this treatment is offered to other investors in the private fund and any similar pool of assets.
- Prohibit registered investment advisers and exempt reporting advisers from providing other types of preferential treatment, unless preferential material economic terms are disclosed in advance of an investor's investment in the private fund and all preferential terms are disclosed after the investor's investment.
- Require the registered investment adviser and exempt reporting adviser to distribute to prospective investors, prior to an investor's investment in the fund, and to current investors a written notice of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund.

Amendment to Advisers Act Books and Records and Compliance Rules. The SEC also amended the Advisers Act books and records rule to require registered investment advisers to retain specified materials related to the new Private Fund Adviser Rules and amended the Advisers Act compliance rule to require all registered investment advisers to document in writing their annual review of their compliance policies and procedures. The amendment to the compliance rule does not mandate a particular form or format for the adviser's documentation of its compliance policies and procedures, and as noted in the adopting release, many advisers already document, in some manner, their reviews of their compliance policies and procedures. Significantly, this amendment applies to all registered investment advisers, including those that do not advise private funds, and has the earliest compliance date of all the requirements adopted in this rulemaking—60 days after the Private Fund Adviser Rules are published in the Federal Register. Other requirements set forth in the Private Fund Adviser Rules have varying compliance periods following publication in the Federal Register.

Private Fund Advisers; Documentation of Registered Investment Adviser Compliance, SEC Rel. No. IA-6383 (Aug. 23, 2023), available at: https://www.sec.gov/files/rules/final/2023/ia-6383.pdf.

SEC Staff Guidance

SEC Division of Examinations Releases Process-Focused Risk Alert—Exam Selection and Typical Categories of Document Requests

The SEC's Division of Examinations recently released a Risk Alert that provides a high-level overview of its risk-based approach to selecting advisers for examination and determining the scope of the examination and identifies certain categories of documents typically requested in examinations. As stated in the Risk Alert, the Division conducts examinations for several reasons, including to: (i) promote compliance; (ii) prevent fraud; (iii) monitor risk; and (iv) inform policy (*i.e.,* the SEC's rule-making agenda). The Division has annually examined in recent years approximately 15% of all registered investment advisers.

Selecting Advisers for SEC Examination and Determining the Scope of the Examination

The Risk Alert noted that its risk-based selection approach is dynamic, which allows it to adapt to "changes in market conditions, industry practices, and investor preferences." Specifically, when selecting advisers to examine, the Division considers factors, such as which advisers provide services, recommend products, or otherwise meet criteria relevant to the focus areas described in the Division's published annual priorities. The Risk Alert noted certain general factors in its risk-based selection process, including: (i) prior examination observations and conduct, such as when the Staff has observed what it believes to be repetitive deficient practices during more than one review of a firm, significant fee- and expense-related issues, and significant compliance program concerns; (ii) supervisory concerns, such as disciplinary history of associated individuals or affiliates; (iii) tips, complaints, or referrals involving the adviser; (iv) business activities of the adviser or its personnel that may create conflicts of interest, such as outside business activities and the conflicts associated with advisers dually registered as, or affiliated with, brokers; (v) the length of time since the adviser's registration or last examination, such as newly registered advisers; (vi) material changes in an adviser's leadership or other personnel; (vii) indications that the adviser might be vulnerable to financial or market stresses; (viii) reporting by news and media that may involve or impact the firm; (ix) data provided by certain third-party data services; (x) the disclosure history of the firm; and (xi) whether the firm has access to client and investor assets and/or presents certain gatekeeper or service provider compliance risks.

According to the Risk Alert, once an adviser is selected for examination, additional risk assessment is conducted to determine the scope of the examination, such as selecting particular areas of the business that examiners will review. Therefore, the scope of an examination, and consequently the documents requested, will vary from examination to examination depending on the adviser's business model, associated risks, and the reason for conducting the examination.

Categories of Documents Typically Requested in Standard SEC Examinations

While examinations will vary, the Risk Alert noted commonalities among tested areas, such as "reviewing advisers' operations, disclosures, conflicts of interest, and compliance practices with respect to certain core areas, including, but not limited to, custody and safekeeping of client assets, valuation, portfolio management, fees and expenses, and brokerage and best execution."

The Risk Alert included a chart of information typically requested during an exam, though the information is not comprehensive and, as noted in the Risk Alert, the chart does not include information requested particular to advisers to private funds or certain other advisers with additional characteristics. Such information includes: (i) general information (*e.g.*, organizational information, disclosures and filings, and legal and disciplinary history); (ii) information regarding the compliance program, risk management, and internal controls (*e.g.*, annual compliance reviews, valuation processes, advisory fee calculations, and information processing, reporting, and protection); (iii) information to facilitate testing with respect to advisory trading activities (*e.g.*, client account information, portfolio management information, brokerage and trading, conflicts of interest, and insider trading); and (iv) information to perform testing for compliance in various areas (*e.g.*, marketing and advertising, financial records, and custody).

Investment Advisers: Assessing Risks, Scoping Examinations, and Requesting Documents, SEC Risk Alert (Sept. 6, 2023), available at: https://www.sec.gov/files/risk-alert-ia-risk-and-requesting-documents-090623.pdf.

SEC Enforcement

SEC Settles With Former Portfolio Manager for Causing Funds to Engage in Illegal Cross Trades

The SEC recently settled charges against Elsa Doyle, a former portfolio manager at a registered investment adviser, for, directly or indirectly, causing five money market funds, four of which were registered investment companies, to engage in 27 unlawful pre-arranged cross trades.

The Order found that, from May 2020 until March 2022, Doyle effected the cross trades by instructing a third-party broker-dealer to sell the securities from one fund and then to purchase the same securities back through the same broker-dealer on behalf of another fund. Doyle also showed a trader she worked with how she effected the cross trades by interpositioning a broker-dealer and then directed the trader to conduct additional cross trades between funds in the same manner. During this period, the adviser had policies and procedures governing cross trades, which permitted such trades but only if certain conditions were met. However, none of the required conditions were met despite the fact that Doyle attended annual compliance trainings.

Doyle's cross trades cost the funds approximately $39,000. According to the Order, Doyle caused the funds to violate Sections 17(a)(1) and 17(a)(2) of the Investment Company Act and Rule 17a-7 thereunder, which prohibit affiliated persons from engaging in cross trades subject to certain conditions. Without admitting or denying the findings, Doyle consented to a cease-and-desist order and a $30,000 civil monetary penalty.

In the Matter of Elsa M. Doyle, SEC Admin. File No. 3-21705 (Sept. 22, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6429.pdf.

SEC Marketing Rule Settlements Total 10 Before One-Year Anniversary of Compliance Date

The SEC recently settled charges against ten registered investment advisers for, among other things, advertising hypothetical performance to the general public on their websites without adopting and/or implementing policies and procedures required by the newly adopted Marketing Rule under the Advisers Act. All 10 settlements were announced before the one-year anniversary of the Marketing Rule's November 4, 2022 compliance date.

The relevant portion of the Marketing Rule prohibits a registered investment adviser from including any hypothetical performance in its advertisements unless, among other things, it "[a]dopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement." The Orders generally found

that the advisers failed to adopt and implement the required policies and procedures but still disseminated hypothetical performance in advertisements that were posted to their public websites thereby making the information available to mass audiences without the requisite tailoring.

Without admitting or denying the findings, each of the advisers agreed to a cease-and-desist order, removing or restricting access to hypothetical performance on their websites and social media, undertakings to make certain certifications, censure, and civil monetary penalties ranging from $50,000 to $175,000 each, for a total of $850,000 in combined penalties.

In the Matter of Titan Global Capital Management USA LLC, SEC Admin File No. 3-21569 (Aug. 21, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6380.pdf.

In the Matter of Banorte Asset Management, Inc., SEC Admin File No. 3-21636 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6404.pdf.

In the Matter of BTS Asset Management Inc., SEC Admin File No. 3-21637 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6405.pdf.

In the Matter of Elm Partners Management LLC, SEC Admin File No. 3-21638 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6406.pdf.

In the Matter of Hansen & Associates Financial Group Inc., SEC Admin File No. 3-21639 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6407.pdf.

In the Matter of Linden Thomas Advisory Services, LLC, SEC Admin File No. 3-21640 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6408.pdf.

In the Matter of Macroclimate LLC, SEC Admin File No. 3-21641 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6409.pdf.

In the Matter of McElhenny Sheffield Capital Management, LLC, SEC Admin File No. 3-21642 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6410.pdf.

In the Matter of MRA Advisory Group, SEC Admin File No. 3-21643 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6411.pdf.

In the Trowbridge Capital Partners LLC, SEC Admin File No. 3-21644 (Sept. 11, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/ia-6412.pdf.

SEC Settles With ETF Adviser and Bars Founder for Fraudulent Conduct

The SEC recently settled charges against ETF Managers Group LLC, a registered investment adviser, as well as Samuel Masucci, its founder, and Exchange Traded Manager's Group LLP, its parent company. The settlement relates to alleged non-disclosure of conflicts of interest involving the ETFMG Alternative Harvest ETF, the first cannabis ETF in the United States.

Beginning in the second half of 2019, ETF Managers Group urgently needed tens of millions of dollars to settle private litigation. To secure financing, ETF Managers Group used the ETF's lucrative securities lending revenue stream to negotiate $20 million in financing from the ETF's custodian and securities lender, the only entity willing to provide rescue financing without which ETF Managers Group faced certain bankruptcy.

Back in 2017, when the ETF was converted to track a cannabis index, the custodian and securities lending agent for the ETF ceased serving the ETF because it was unwilling to accept the reputational and legal risk then associated with cannabis. After months of searching, the only replacement custodian that could be found was one that agreed to a 60/40 "split" of the securities lending revenue with the custodian receiving 40%, which was significantly less favorable than the ETF's previous 80/20 split in place with its prior custodian. By early 2019, however, the number of willing service providers for cannabis funds had increased and ETF Managers Group and Masucci were able to obtain estimates for more than a half-dozen willing alternatives with more favorable splits of 70/30 or 80/20, which were more typical of similar securities lending arrangements at that time.

In the spring of 2019, ETF Managers Group and its parent lost a trial and were ordered to pay multi-millions in damages. Thereafter, Masucci began soliciting financing from various financial institutions needed to settle the litigation but the only entity willing to provide funding was the ETF's current custodian. In August 2019, Masucci made an offer to settle the litigation, which was guaranteed by the ETF's custodian; however, the guarantee was contingent on the ETF maintaining its securities lending business with the custodian whose 40% split of the lending revenue had earned it more than $10 million in revenues and made the ETF one of its "top 5" clients.

Masucci informed the ETF's independent trustees of the final terms of the financing arrangement to settle the litigation but he never disclosed that it was conditioned on keeping the ETF's securities lending business with the current custodian at a 60/40 split. Moreover, he did not disclose that other service providers had offered 80/20 and 70/30 splits. Instead, Masucci falsely represented that the current custodian remained the ETF's only viable option because other firms remained reluctant to take the business given the continued risks associated with servicing a cannabis fund. Masucci's failure to fully and fairly disclose these conflicts of interest occurred across regular updates to the independent trustees who Masucci knew were closely monitoring the situation given their need to protect the ETF in the event of ETF Manager Group's insolvency.

The Order found that Masucci and ETF Managers Group violated their fiduciary duties of loyalty and care to the ETF under Sections 206(1) and 206(2), the anti-fraud provisions, of the Advisers Act and that Masucci, ETF

Managers Group, and Exchange Traded Manager's Group violated provisions set forth in Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder prohibiting certain joint transactions.

Without admitting or denying the SEC's findings, Masucci agreed to a cease-and-desist order, a $400,000 civil monetary penalty, and an associational bar under the Advisers Act and a prohibition under the Investment Company Act with a right to reapply after three years. ETF Managers Group and Exchange Traded Manager's Group agreed to a cease-and-desist order, censures, and joint and several civil monetary penalties of $4 million.

In the Matter of Exchange Traded Managers Group LLC, et al., SEC Admin File No. 3-21542 (Aug. 1, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/34-98034.pdf.

Litigation

Grayscale Wins Lawsuit Against SEC Over Rejection of Bitcoin ETF Application

On August 29, 2023, the U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of Grayscale Investments, LLC in connection with the crypto-asset manager's bid to convert its over-the-counter $16.2 billion Grayscale Bitcoin Trust to a Bitcoin ETF listed on the NYSE's Arca market. The SEC had previously rejected the spot Bitcoin ETF's listing application, stating that the product was not "designed to prevent fraudulent and manipulative acts and practices." Although the SEC has permitted the listing of Bitcoin futures ETFs, it has consistently rejected applications for spot Bitcoin ETFs to trade on traditional regulated securities exchanges. In June 2022, Grayscale sued the SEC and filed a petition for the Court to review the SEC's order, claiming that the SEC acted "arbitrarily and capriciously" by denying its application and approving materially similar listing applications for Bitcoin futures ETFs.

According to Court filings, the SEC did not sufficiently explain its decisions to reject the listing applications for spot Bitcoin ETFs while approving those for Bitcoin ETFs that invest in cryptocurrency futures. The listing applications for Bitcoin futures ETFs were approved based on the use of a surveillance-sharing agreement between a related and "regulated market of significant size" to buy or sell Bitcoin futures at pre-agreed prices to protect against market manipulation. Although Grayscale and NYSE Arca also proposed using surveillance-sharing agreements, the SEC did not agree that it deserved the same regulatory treatment. The Court stated that the inconsistent treatment of investment vehicles that provide exposure to Bitcoin was unlawful absent a coherent explanation and granted Grayscale's petition for review and subsequently vacated the SEC's order denying the listing application.

Although its being called a landmark decision by some within the industry, the decision does not guarantee the approval of Grayscale's listing application. Not only does the SEC have 45 days to appeal the decision but the SEC could still reject the application on other grounds. However, the Court's decision could factor into the SEC's decisions on the listing of cryptocurrency-related investment vehicles and pave the way for spot Bitcoin ETFs at some point in the future.

Grayscale Investments v. SEC, No. 22-1142 (D.C. Cir. Aug. 29, 2023).

Second Circuit Holds That *Kirschner* Syndicated Term Loans Are Not Securities

On August 24, 2023, the Second Circuit Court of Appeals issued its opinion in *Kirschner v. JP Morgan Chase Bank, N.A.*, affirming the District Court's finding that the defendants-appellees did not violate securities laws in connection with the syndication of term loans because the term loans did not constitute securities and thus were not subject to state securities laws.

To determine whether the term loans constituted securities, the Second Circuit applied the four-factor test established by the Supreme Court in *Reves v. Ernst & Young*. The four factors of the *Reves* test are: (i) the motivations underlying the sellers and buyers' entrance into the transaction; (ii) the plan of distribution for the instrument; (iii) the reasonable expectations of the investing public; and (iv) whether an alternate regulatory scheme exists that may protect buyers. Beginning with the presumption that every note is a security, the Second Circuit found that the second, third and fourth *Reves* factors favored concluding that the term loans at issue did <u>not</u> constitute securities by relying in particular on the following facts:

- the syndicated loans were offered and sold only to sophisticated investors and included assignment restrictions;
- the loan documents received by the lenders, including the lenders' representations, most consistently referred to the instruments as "loans" and the participating parties as "lenders";
- lenders were protected from risk because the loans were secured; and
- specific policy guidelines addressing syndicated term loans have been issued by regulators such as the Office of the Comptroller of the Currency, the Federal Reserve and the FDIC, rendering the application of securities laws unnecessary.

Notwithstanding its ruling, the Second Circuit found the investment motivations of the lenders (though mitigated by the borrower's commercial motivations) weighed in favor of concluding the loans were securities; however, this factor did not overcome the contrary conclusion on the other factors.

The ruling by the Second Circuit in favor of the defendant banks preserves the existing legal framework for the syndicated lending market, allowing the market to continue to operate using current practices.

The plaintiff-appellant may appeal to the U.S. Supreme Court.

Kirschner v. J.P. Morgan Chase Bank, N.A., No. 21-2726-cv, 2023 U.S. App. LEXIS 22330 (2d Cir. August 24, 2023).

SEC Remarks

Chair Gensler Defends SEC's Pace of Rulemaking in Senate Hearing

In a testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, SEC Chair Gary Gensler defended the SEC's rapid pace of rulemaking, affirmed his criticism of fraud in the digital-asset industry, and discussed the regulatory challenges of AI.

In response to criticism regarding the recent pace of rulemaking, Gensler noted that the SEC laid out a unified regulatory agenda in 2021 and, in the interim, has issued 47 proposals and finalized 22 rulemakings since he was appointed Chair. He stated that the SEC has been enacting new rules at a pace slower than some of his predecessors that includes an average public comment period of 70 days, which exceeds the minimum required 60-day period. He also said the SEC had reopened the comment period on 18 proposed SEC rules to allow for additional public input. Gensler noted that a rule governing climate change disclosures had been delayed partly because the SEC had to consider numerous comments about the challenges companies face when calculating the climate impact of suppliers of goods and services. He mentioned that of the 22 SEC rules that were recently adopted, nearly all of them reflect public input.

With regards to the cryptocurrency markets, Gensler stated that he had never seen a field "so ripe with misconduct." He noted that there have been many problems in these markets given the industry's noncompliance with securities laws.

Gensler also faced a number of questions regarding an SEC rule proposal requiring broker-dealers and registered investment advisers to analyze conflicts of interest that could emerge when using predictive data analytics when interacting with investors. Under the proposed rule, firms would need to identify any conflicts that place the firm's interests ahead of investor interests and then eliminate or neutralize the effects of those conflicts. In response to questioning, Gensler stated the SEC is "technology neutral," and the SEC already uses machine learning, or AI, in certain functions. He noted that it is hard to explain AI models and the biases within them and that AI's new challenges might be something Congress may need to take up.

Gary Gensler, SEC Chair, *Oral Testimony of Gary Gensler Before the United States Senate Committee on Banking, Housing, and Urban Affairs* (Sept. 12, 2023), available at: https://www.sec.gov/news/testimony/gensler-oral-testimony-091223.

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