Weil

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WEIL PRIVATE FUNDS REGULATORY REVIEW

In recent years, the Securities and Exchange Commission (the "**SEC**" or "**Commission**") and other regulators have proposed and adopted various rules and interpretative guidance and have brought a wide range of enforcement actions. This publication summarizes: (i) the two frequently asked question responses (each, an "**FAQ**") recently published by the SEC concerning Rule 206(4)-1 (the "**Marketing Rule**") under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"); (ii) recent "no action" letter guidance from the SEC related to Rule 506(c) of Regulation D under the Securities Act of 1933, as amended (the "**Securities Act**"); (iii) the interim final rule issued by the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("**FinCEN**") limiting beneficial ownership information ("**BOI**") reporting under the Corporate Transparency Act (the "**CTA**"); (iv) SEC Chair nominee Paul Atkins' comments at his Senate confirmation hearing; and (v) the proposed new reporting and performance template proposed by the Institutional Limited Partners Association ("**ILPA**").

This publication also discusses the SEC's recent settlement of charges against (i) a registered adviser and its former managing partner and chief operating officer related to misuse of fund and portfolio company assets; and (ii) an adviser for misrepresentations related to its anti-money laundering ("**AML**") procedures and for compliance failures.

As a reminder, the SEC adopted cybersecurity amendments to Regulation S-P in 2024 that will require significant changes to investment adviser policies and procedures to, among other things, require an incident response program, a client notification program, increased oversight of service providers and additional recordkeeping. Covered advisers must comply with these new requirements by ***December 3, 2025***. Our Private Funds Group and Privacy and Cybersecurity Group have been assisting clients prepare for this upcoming deadline. Please reach out for assistance in updating your policies, procedures and processes.[1]

1 A previous alert discussing the amendments to Regulation S-P can be found here.

SEC STAFF PUBLISHES FAQS PERMITTING ADVISERS TO PRESENT GROSS-ONLY EXTRACTED PERFORMANCE AND INVESTMENT CHARACTERISTICS UNDER THE MARKETING RULE

On March 19, 2025, the SEC's Division of Investment Management released two FAQs seeking to provide guidance relating to the presentation of gross and net performance and investment characteristics in investment advisers' advertisements under the Marketing Rule.[2]

FAQ on Presenting Gross-Only Extracted Performance

The first FAQ (the "**Extract FAQ**") addresses the practice of advisers presenting the gross performance of one investment or a group of investments in a private fund or other portfolio (an "**Extract**") without presenting the net performance of such Extract. While the Extract FAQ confirmed that the Marketing Rule requires an adviser to show net performance of an Extract when such Extract's gross performance is advertised, it also stated the SEC staff's position that advertisements meeting certain conditions may avoid the requirement to present an Extract's net performance where its gross performance has been displayed. Specifically, where gross performance of an Extract has been presented without including corresponding net performance of such Extract, SEC staff would not recommend an enforcement action against the adviser if:

1. the Extract's performance is clearly identified as gross performance;
2. the Extract's performance is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;
3. the gross and net performance of the total portfolio holding the Extract is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the Extract's performance; and
4. the gross and net performance of the total portfolio holding the Extract is calculated over a period that includes the entire period over which the Extract's performance is calculated.[3]

The Extract FAQ clarifies that the above factors are applicable for an Extract from a single portfolio as well as an Extract from a composite of all related portfolios thereto. The staff noted that performance extracted from a composite of portfolios may be considered hypothetical performance.

FAQ on Presentation of Investment Characteristics

The second FAQ (the "**Characteristic FAQ**") addresses the requirement for advisers to present net figures when advertising certain portfolio or investment characteristics (e.g., yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio, the Sortino ratio, and other similar metrics) which may be interpreted as performance under the Marketing Rule, apart from internal rate of return, multiple on invested capital or total value to paid in capital. Accurately calculating such characteristics net of fees and expenses may not be possible and therefore lead to misleading or confusing results. Therefore, the SEC staff stated in the Characteristic FAQ that when an adviser prominently displays the gross and net performance of the total portfolio calculated pursuant to the requirements of the Marketing Rule and such performance is presented in a manner that is not otherwise materially misleading, and provides appropriate accompanying information about the characteristic and how it is calculated, there is little risk of misleading prospective investors about the impact of fees and expenses surrounding such characteristics. Accordingly, the SEC staff noted that it would not recommend enforcement action against an adviser where one or more gross characteristics of a portfolio or investment are presented without corresponding net characteristics, if:

1. the gross characteristic is clearly identified as being calculated without the deduction of fees and expenses;
2. the characteristic is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;
3. the total portfolio's gross and net performance is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the gross characteristic; and
4. the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the characteristic is calculated.[4]

SEC staff stated that the Characteristic FAQ also applies to characteristics calculated based on the performance of (i) a composite aggregation of related portfolios, (ii) a

2 A link to the FAQs can be found here. A previous alert discussing the FAQs can be found here.

3 Alternatively, the Extract FAQ clarified that the SEC staff would not recommend an enforcement action if the Extract's performance presented as described above is calculated "over a single, clearly disclosed period."

4 Alternatively, the Characteristic FAQ clarified that the SEC staff would not recommend an enforcement action if the characteristic's performance presented as described above is calculated "over a single, clearly disclosed period."

representative account, (iii) a subset of a portfolio (i.e., extracted performance), and (iv) a subset extracted from a composite aggregation of related portfolios, provided the characteristics are presented in a manner consistent with the Characteristic FAQ.

Both FAQs note that an advertisement may clearly identify that an Extract's performance or characteristic is calculated without the deduction of fees and expenses (i.e., as a gross value) if, for example, it discloses that the characteristic shown does not reflect the deduction of all fees and expenses attributable to an investor and refers the recipient to the total portfolio's gross and net performance.

Interestingly, with respect to both FAQs, the SEC staff noted that so long as an advertisement facilitates comparison between the gross and net performance of the total portfolio and the Extract's performance or characteristic, the gross and net performance of the total portfolio does not need to be presented on the same page of the advertisement as the Extract's performance or characteristic. As an example, the Staff noted that in its view, presenting the gross and net performance of the total portfolio *prior* to the Extract or the characteristic in the advertisement could also facilitate such comparisons and help ensure they are presented with at least equal prominence to the Extract's performance or characteristic.

Applying these FAQs will take careful analysis and planning. Weil looks forward to answering questions and assisting advisers in utilizing this new, helpful guidance in marketing materials.

NO-ACTION LETTER PROVIDES CLEAR GUIDANCE FOR VERIFYING ACCREDITED INVESTOR STATUS IN OFFERINGS CONDUCTED UNDER RULE 506(C)

On March 12, 2025, the SEC issued a "no action" letter indicating that a "high minimum investment amount," coupled with certain representations, is relevant in verifying accredited investor status with respect to an offering conducted under Rule 506(c) of Regulation D under the Securities Act.[5]

An issuer conducting an offering under Rule 506(c) under Regulation D is required to take "reasonable steps" to verify an investor's accredited status. According to the "no action" letter, where the issuer requires purchasers to agree to certain high minimum investment amounts, the issuer will be deemed to have taken "reasonable steps" to verify an investor's status as accredited where the issuer obtains written representations from the investor that (i) such investor is accredited and (ii) the investor's minimum purchase amount is not being financed, in whole or in part, by any third party for the specific purpose of making the particular investment with the issuer. Separately, the issuer must also have no actual knowledge of any facts that would indicate whether such representation is untrue.

While the Commission's response in the "no action" letter did not specify what minimum investment amount would be sufficient, the request for interpretative guidance to which the letter is responsive contemplated a $200,000 minimum investment for investors who are natural persons and a $1,000,000 minimum investment amount for investors that are entities.[6] In response to this "no action" guidance, advisers relying on Rule 506(c) to offer fund interests should reevaluate their practices around verification of accredited investor status and reach out to the Weil Private Funds team with any questions. Moreover, advisers considering a switch to relying on Rule 506(c) to offer fund interests should also consider the impact of any such switch on the following: (i) representations in existing placement agent agreements stipulating the usage of Rule 506(b) to offer fund interests; (ii) reliance on "reverse solicitation" in connection with offering fund interests in European countries; (iii) the need for flexibility to admit non-"accredited investors" into a fund; and (iv) the Securities Act offering exemption used/to be used by any dedicated bank feeder funds.

FINCEN ADOPTS RULE LIMITING CORPORATE TRANSPARENCY ACT REPORTING REQUIREMENTS TO FOREIGN REPORTING COMPANIES ONLY

On March 21, 2025, FinCEN issued an interim final rule (the "**Interim Rule**") that eliminates all BOI reporting requirements under the CTA for entities previously known as "domestic reporting companies" (i.e., entities created by the filing of a document with a secretary of state or similar office under the laws of a U.S. state or Indian tribe), including requirements to update or correct any BOI reports previously filed with FinCEN.[7] The Interim Rule also narrows the CTA's definition of "reporting company" to mean only those entities formed under the laws of a foreign country that are registered to do business in any U.S. state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office (formerly known as "foreign reporting companies").

For foreign entities that became a "reporting company" prior to March 26, 2025 (the date the Interim Rule was published

5 A link to the "no action" letter can be found here. A previous alert discussing the "no action" letter can be found here.

6 A link to the request for interpretive guidance can be found here.

7 A link to the Interim Rule can be found here. A previous alert discussing the Interim Rule can be found here.

in the Federal Register) and that do not otherwise qualify for one of the CTA's BOI reporting exemptions, the Interim Rule extends the deadline to submit initial BOI reports, as well as to update or correct previously filed BOI reports, to no later than April 25, 2025. A foreign entity that registers to do business in the U.S. on or after March 26, 2025 (and does not qualify for a reporting exemption) will have 30 days to file an initial BOI report.

In a further change, reporting companies (as now limited to foreign entities) are no longer required to disclose to FinCEN the BOI of their beneficial owners who are U.S. persons. U.S. persons are similarly relieved of the obligation to provide their BOI to any reporting company.

FinCEN is accepting public comments to the Interim Rule for a period of 60 days, beginning March 26, 2025. FinCEN will evaluate comments received during this period in connection with a final rule it intends to issue later this year, which may further refine BOI reporting requirements under the CTA.

FinCEN's issuance of the Interim Rule follows the previously reported announcement by the U.S. Treasury Department on March 2, 2025 noting that it would not enforce the CTA's BOI reporting requirements against U.S. citizens or domestic reporting companies.

SEC CHAIR NOMINEE PAUL ATKINS DISCUSSES VIEWS ON PRIVATE FUND REGULATION IN SENATE CONFIRMATION HEARING

On March 27, 2025, the Senate Committee on Banking, Housing and Urban Affairs held the confirmation hearing for Paul Atkins, President Trump's nominee for SEC Chairman.[8] Such hearings can provide (and have in the past provided) valuable insight into policy views of the incoming administration. Notably, during Atkins' hearing, in response to questions from Senator Reed regarding Atkins' plans for transparency and investor protection in the private equity industry given the increasing availability of illiquid investments to retail investors, Atkins responded that diversification limits, along with the SEC approval process to offer funds to the public with illiquid holdings, would sufficiently address these concerns. Following concerns raised by Senator Smith that private fund managers unfairly charge higher fees and expenses than their public market counterparts and fail to adequately disclose such costs, Atkins noted the SEC has the authority to enforce Section 10b of the Securities Exchange Act of 1934 against private fund managers in the event of any materially misleading disclosures. Atkins also mentioned that "accredited investors" are sophisticated enough to assess suitability of private investment products. Last, Atkins noted he would seek to establish a firm regulatory foundation for digital assets and curtail the use of the corporate governance process to advance environmental, social and governance agendas within companies rather than increasing their value.

It is currently unclear how the new administration will approach examinations and enforcement activities, particularly as they relate to investment advisers, but the Weil Private Funds team will continue to monitor the market and communicate relevant updates as they arise.

ILPA RELEASES UPDATED REPORTING AND PERFORMANCE TEMPLATES

On January 22, 2025, ILPA released its updated ILPA Reporting Template and new ILPA Performance Template.[9] According to the press release, ILPA designed the updated templates to enhance standardization, transparency and comparability in reporting across geographies for private funds. Key features of the updated ILPA Reporting Template include:

- Breaking out internal chargebacks to identify expenses allocated or paid to general partners and/or related persons;
- Adding more granular external partnership expenses better aligned to general ledgers; and
- Creating a single, uniform level of detail for all general partners in order to provide greater consistency with the reporting framework in governing documents and accounting standards

Key features of the ILPA Performance Template include:

- Tables to capture cash flows and fund-level, as well as portfolio-level, transaction type mapping for transparency into the calculation methodology for performance metrics;
- Standardized reporting for performance and other metrics, including IRRs and TVPI/MOIC, with designated breakouts for reporting the relevant gross and net figures with and without the impact of fund-level subscription facilities; and
- Two versions available to support general partners' varying approaches to fund-level performance calculation methodology: one version based on itemized cash flows and the other based on grossed-up cash flows.

8 A link to the confirmation hearing can be found here.

9 A press release related to the announcement can be found here. A link to the ILPA Reporting Template Overview can be found here, and a link to the ILPA Performance Template Overview can be found here.

This release represents the first update to the ILPA Reporting Templates since 2016, when ILPA provided more robust standards for fee-and-expense reporting and compliance disclosures among investors, fund managers and their advisers.

The new templates are expected to be implemented beginning in the first quarter of 2026. Those advisers adopting the templates should begin preparing their accounting systems to map accordingly with this timeframe in mind.

NOTABLE ENFORCEMENT ACTIVITY

ENFORCEMENT ACTION RELATED TO MISUSE OF FUND AND PORTFOLIO COMPANY ASSETS

On March 7, 2025, the SEC announced that it settled charges against a registered investment adviser, its former managing partner, and its former chief operating officer for breaches of fiduciary duties related to the misuse of fund and portfolio company assets, and for violations of Rule 206(4)-2 (the "**Custody Rule**") under the Advisers Act.[10]

According to the Order, starting in August 2021, the ex-COO used portfolio company debit cards in more than 100 transactions to pay for personal vacations, clothing, and other personal expenses, and also caused one of the portfolio companies to pay her compensation above her authorized salary. Although the ex-managing partner became aware of the potential misappropriation in early 2022, neither the ex-managing partner nor the adviser took any steps to limit the ex-COO's access to portfolio company funds, or investigate potential misuse of these funds, until after November 2023. Accordingly, the SEC determined the ex-managing partner failed to reasonably supervise the ex-COO in accordance with the adviser's compliance manual.

In addition, the adviser and ex-managing partner caused a fund advised by the adviser to buy out a third party's interest in certain portfolio companies, the remaining portion of which was owned by an entity jointly controlled by the ex-COO and ex-managing partner. As part of the purchase price, the fund paid off two outstanding loans owed by the portfolio companies to the third party. The SEC found that the entity jointly controlled by the ex-COO and ex-managing partner should have contributed on a *pro rata* basis to satisfy the outstanding balance of the loans, and because the entity failed to do so, the ex-managing partner and ex-COO received an unearned benefit through the fund's satisfaction of the outstanding loan balance.

Finally, the order alleged that the adviser failed to timely deliver audited financial statements to investors in its funds, in violation of the "audit exception" to the Custody Rule.[11] As a result of the conduct described above, the SEC charged (i) the adviser with violations of Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 thereunder; (ii) the ex-COO with violations of Sections 206(1) and 206(2) of the Advisers Act; and (iii) the ex-managing partner with violations Sections 203(e)(6), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. The adviser, the ex-COO and the ex-managing partner paid a total civil monetary penalty of $515,000. In light of these Orders, advisers should ensure that they have implemented written policies and procedures to prevent the misuse of portfolio company and fund assets.

ENFORCEMENT ACTION RELATED TO AML MISREPRESENTATIONS

On January 14, 2025, the SEC announced that it settled charges against an investment adviser for failing to act in accordance with representations made to prospective and existing private fund investors concerning AML due diligence practices.[12]

According to the Order, from October 2018 through January 2022, the adviser represented in offering and other documents that were provided to prospective and existing investors, that it conducted specific AML due diligence on prospective investors and ongoing due diligence monitoring on existing investors. Specifically, the adviser represented that it had voluntarily incorporated into its AML program the requirements of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("**USA Patriot Act**"), which does not apply to investment advisers. The Order found that the adviser did not always conduct AML due diligence as described. In particular, the adviser had admitted as a fund investor an entity owned by an individual publicly reported to have suspected connections to money laundering activities, and a foreign court ultimately froze the fund's assets as a result of the admission of such investor.

10 A press release related to the settlements can be found here. A link to the SEC Order involving the adviser and former managing partner can be found here. A link to the SEC Order involving the former chief operating officer can be found here.

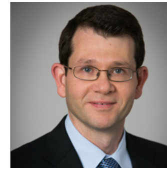
11 The Custody Rule, which sets forth a number of requirements for advisers having custody of client assets, provides that an adviser is deemed to have complied with the Custody Rule with respect to a fund if the fund is subject to an annual audit and if the adviser distributes the fund's audited financials to all limited partners within 120 days of the end of the fund's fiscal year.

12 A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

In addition, the Order alleged that, between April 2019 and January 2022, while the adviser was registered with the SEC as an investment adviser, the adviser failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder.

In connection with the above conduct, the adviser was charged with violating Section 206(4) of the Advisers Act and Rules 206(4)-8 and 206(4)-7 thereunder. The adviser agreed to pay a $150,000 civil penalty. In response to this settlement, advisers should make sure that they are able to demonstrate compliance with any AML representations made in offering or other materials.

Weil's Private Funds Group is available to help.
Please reach out to:



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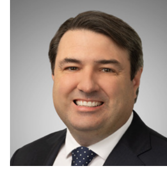

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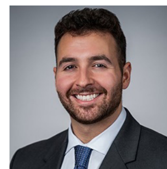

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