ONPOINT / A legal update from Dechert's Financial Services group

SEC Division of Examinations Releases 2023 Priorities

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Dechert LLP

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The Securities and Exchange Commission's Division of Examinations (EXAMS) published its report on 2023 Examination Priorities[1] on February 7, 2023. The 2023 Examination Priorities continue to reflect an examination program that is vigorous and broad in its focus, with special attention paid to newly implemented regulatory changes and the standards of conduct for investment advisers and broker-dealers. The 2023 Examination Priorities broadly identify the same major themes as in 2022 that impact investment advisers, investment companies, broker-dealers and particular products such as private funds and those that rely on London Inter-Bank Offered-Rate (LIBOR), but several priorities are new or expanded such as a focus on the recently adopted derivatives rule, fair valuation rule and marketing rule. While EXAMS tends to carry forward major themes from year-to-year, this year's priorities feature a number of new and newly emphasized areas of focus.

Many of these newer focus areas are centered on recently adopted rules and on the current policy initiatives of Chair Gary Gensler. For example, investment advisers should expect scrutiny of marketing activities, particularly related to substantiation of material statements of fact and performance reporting, where examiners are likely to rigorously apply recent guidance from the Division of Investment Management related to gross and net figures. Similarly, investment companies should anticipate questions concerning the use of derivatives and fair valuation practices. For investment advisers to private funds, EXAMS repeats familiar themes related to conflicts of interest and expense allocation but adds priorities related to leverage, hard-to-value assets, affiliated servicers, Special Purpose Acquisition Companies (SPACs) and investment adviser-led secondaries. The priorities also include a focus on side-by-side management of private funds and business development companies (BDCs), suggesting that examiners may ask about compliance with co-investment orders. For broker-dealers, EXAMS will focus on conflicts of interest in order routing and execution that may affect retail investors and compliance with Regulation SHO.

The major themes of EXAMS' priorities, described in detail below, cover the range of the SEC's current policy initiatives, including:

- Compliance with the derivatives rule and fair valuation rule under the Investment Company Act of 1940 and the marketing rule under the Investment Advisers Act of 1940;
- Registered investment advisers (RIAs) to private funds;
- Standards of conduct for RIAs and broker-dealers;
- Environmental, social and governance (ESG) investing;
- Information security and operational resiliency;

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[1] 2023 Examination Priorities, SEC Division of Examinations (Feb. 7, 2023). All statements in this *OnPoint* as to the intent or plans of EXAMS are based on the text of the 2023 Examination Priorities. At times, this *OnPoint* tracks the 2023 Examination Priorities without the use of quotation marks

- Crypto assets and emerging financial technology;
- Investment advisers and investment companies focus areas;
- Broker-dealers and exchanges;
- Clearance and settlement;
- Regulation systems compliance and integrity (Regulation SCI);
- Anti-money laundering (AML) programs; and
- The LIBOR transition.

Additional statistical information regarding the examination program, compiled by Dechert from various SEC sources, is provided in the Appendix.

2023 Examination Priorities

Message from the Leadership Team of EXAMS

The message emphasizes the new leadership team, new collaborative efforts with other regulators such as state regulators in crafting the examination priorities and foreign regulators in oversight efforts, and a continued focus on risk-based processes and on responses to emerging matters. In fiscal year 2022, EXAMS' staff examined "approximately 15% of the registered investment adviser population," which has grown to more than 15,000 registrants overseeing more than $125 trillion in assets under management, and the staff examined "nearly half of the approximately 3,5000 registered broker-dealers," which included 360 completed examinations combined together with Financial Industry Regulatory Authority examinations. In fiscal year 2022, as a result of examinations, "firms returned more than $50 million to investors" and the staff "made numerous referrals to the [Division of Enforcement]." The message also discusses how the staff responded to emerging events (*i.e.*, market volatility, cyber-events, market disruption related to crypto assets) and how it intends to do so going forward.

The staff continues to be focused on building its internal expertise and the development of "specialized working groups in key areas" such as technology, fixed income and new products, marketing and sales practices, private funds and valuation matters. The staff continues to use technology and data to identify examination candidates and focus areas and allocate resources accordingly. The message also explains that EXAMS expects to increase on-site interactions while continuing its remote examinations to promote registrant compliance programs.

Notable New and Significant Focus Areas

Compliance with Recently Adopted Rules Under the Advisers Act and 1940 Act

EXAMS will prioritize examining investment advisers' and investment companies' compliance with Rule 206(4)-1 under the Advisers Act (Marketing Rule), Rule 18f-4 under the 1940 Act (Derivatives Rule) and Rule 2a-5 under the 1940 Act (Fair Valuation Rule). This priority will entail assessing whether RIAs or investment companies, as applicable, have adopted (or updated) and implemented appropriate policies and procedures, as well as reviewing for substantive compliance with these rules. In particular, EXAMS will review for compliance with:

- The Marketing Rule – focusing on whether RIAs have a reasonable basis for believing they will be able to substantiate material statements of fact, are meeting disclosure requirements for testimonials, endorsements and third-party ratings and are complying with performance-related advertising prohibitions, including cherry-picking, providing gross performance without net performance and providing hypothetical or predecessor performance without meeting certain requirements.

- The Derivatives Rule – focusing on whether registered investment companies and BDCs have adopted and implemented policies and procedures reasonably designed to manage the funds' derivatives risks and prevent violations of the Derivatives Rule and have adopted and implemented derivatives risk management programs, whether boards are providing sufficient oversight and whether disclosures related to the fund's use of derivatives are incomplete, inaccurate or potentially misleading.
- The Fair Valuation Rule – focusing on whether funds and their boards are complying with new requirements for determining fair value, providing sufficient board oversight, implementing recordkeeping and reporting requirements and designating valuation designees. In examining for compliance with the Fair Valuation Rule, EXAMS will also review whether adjustments have been made to valuation methodologies, governance practices, service provider oversight, and reporting and recordkeeping.

RIAs to Private Funds

Reinforcing prior statements of Chair Gensler and other SEC leaders, EXAMS notes the significant growth of the private fund industry, stating that private funds' gross assets have increased by 80% over the past five years. As a result, EXAMS intends to prioritize examining RIAs to private funds, focusing on conflicts of interest, calculation and allocation of fees and expenses, compliance with the new Marketing Rule, policies and practices regarding the use of alternative data and compliance with Rule 206(4)-2 under the Advisers Act (Custody Rule). EXAMS will concentrate on RIAs to private funds with what it describes as specific risk characteristics, such as:

- highly-leveraged private funds;

- private funds managed side-by-side with BDCs;

- private equity funds that use affiliated companies and advisory personnel as service providers;

- private funds that hold certain hard-to-value investments, such as crypto assets and real estate-connected investments, with an emphasis on commercial real estate;

- private funds that invest in or sponsor SPACs; and

- private funds involved in investment adviser-led restructurings, including stapled secondary transactions and continuation funds.

Standards of Conduct: Regulation Best Interest, Fiduciary Duty and Form CRS

Continuing this examination priority from 2021 and 2022, EXAMS remains focused on examinations of broker-dealers and RIAs for compliance with their applicable standards of conduct. Moreover, since last year, the SEC staff has published two bulletins regarding the application of Regulation Best Interest and the SEC's interpretation of the

fiduciary duty applicable to investment advisers.[2] The bulletins focus on account recommendations, conflicts of interest, compensation practices, proprietary products and recordkeeping related to recommendations, and registrants may wish to review the bulletins for insight into likely questions from examiners.

Building on this guidance, EXAMS will continue to concentrate and sharpen its focus on: advice and recommendations with respect to products, strategies and account types; disclosures, particularly whether they include all material facts relating to conflicts of interest associated with advice and recommendations; processes for making best interest evaluations (including reviewing reasonably available alternatives, evaluating costs and risks, and identifying and addressing conflicts); and factors related to the investor's investment profile, such as investment goals and account characteristics. In the RIA context, EXAMS will consider whether conflicts disclosures are sufficient to support clients' informed consent to conflicts, whether express or implied.

In addition, EXAMS may focus on advice related to: specific complex and high-cost products, proprietary products, unconventional strategies that purport to address rising interest rates and microcap strategies. As purported examples of such products, the 2023 Examination Priorities noted derivatives, leveraged exchange-traded products (including exchange-traded funds (ETFs) and exchange-traded notes), variable annuities and non-traded real estate investment trusts (REITs) and strategies that purport to address rising interest rates. EXAMS may also focus on recommendations to certain types of investors, such as senior investors and those saving for retirement, among other things. EXAMS will seek to "identify and understand" the economic incentives that RIAs and broker-dealers, and their financial professionals, have when recommending products, services or account types. These incentives can include the source and structure of compensation, revenue or other benefits. In part, this review will involve considering whether a firm has established, reviewed and updated written policies and procedures to identify such conflicts. EXAMS will also review whether compliance policies and procedures are sufficiently tailored to the firm's business model, compensation structure, products, and current and targeted customers. Further, EXAMS will assess whether firms have customer or client agreements purporting to inappropriately waive or limit their standard of care, such as through hedge clauses. As part of regular examinations of broker-dealers and RIAs, EXAMS staff will also review Forms CRS, as applicable, which is required to be delivered to new and prospective retail investors, as well as to existing retail investors, filed with the SEC and posted to the firm's website.

Environmental, Social, and Governance Investing

Because of the increased demand for and growth in ESG-related investment products and strategies, EXAMS will continue to prioritize ESG-related advisory services and fund offerings. EXAMS intends to focus its review on whether funds are operating in the manner disclosed in their registration statements and are appropriately labeled, and whether recommendations of such products are made in the retail investor's best interest. The brevity of the 2023 Examination Priorities' statements on ESG likely should not be read as de-emphasizing the staff's focus on ESG-related matters, given the breadth and depth of recent EXAMS and Division of Enforcement activity in this area and the political and policy salience of ESG issues.

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2 Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors (2022); Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest (2022). For further information, please refer to *Dechert OnPoint*, SEC Publishes Staff Bulletin on the Standards of Conduct for Broker-Dealers and Investment Advisers Making Account Recommendations to Retail Investors and *Dechert OnPoint*, SEC Publishes Staff Bulletin on the Standards of Conduct for Broker-Dealers' and Investment Advisers' Conflicts of Interest.

Information Security and Operational Resiliency

The 2023 Examination Priorities warns that the current cybersecurity risk environment is considered elevated due to geopolitical concerns and the recent increase in ransomware attacks. As a result, EXAMS intends to review firms' policies and procedures, governance practices and responses to cyber-related incidents, as well as broker-dealers' and RIAs' compliance with Regulations S-P and S-ID. The staff will review firms' policies and procedures as to whether they are reasonably designed to protect customer information and whether the location of such information has been sufficiently disclosed to the SEC. Given the recent increased reliance on remote work, EXAMS recognizes that customer identification must be accessible to personnel working from remote environments while implying that such arrangements require heightened vigilance. EXAMS will remain focused on cybersecurity issues related to third-party vendors, policies aimed at preventing unauthorized account intrusions and access to customer records and information, and registrants' operational resiliency planning.

Crypto Assets and Emerging Financial Technology

EXAMS notes that there has recently been a great expansion in the development and use of crypto assets and emerging financial technology, such as broker-dealer mobile applications and digital investment advice, and intends to conduct examinations of broker-dealers and RIAs offering such products and services. EXAMS describes the disruptions to the market and recent financial distress among crypto asset market participants and expresses the intention to monitor and conduct examinations of potentially impacted or affected registrants, in particular firms that offer, sell, recommend or provide advice regarding crypto-related assets. The 2023 Examination Priorities states that the staff will assess whether these market participants have met and followed their respective standards of care when providing investment advice and routinely reviewed and updated their relevant compliance, disclosure and risk management practices.

Additionally, broker-dealer and RIA examinations will prioritize firms that utilize digital engagement practices[3] to assess whether recommendations or advice were improperly provided through social media marketing or social trading platforms, representations were fair and accurate, operations and controls were consistent with disclosures made to investors, advice and recommendations were in the best interest of the investor, and risks associated with digital engagement practices were considered.

Investment Advisers and Investment Companies

RIAs

A typical examination of an RIA assesses the compliance program and related disclosures in core areas such as custody, valuation, portfolio management, brokerage and execution. Examinations tend to also review for conflicts, compliance issues and oversight processes related to fees and expenses, particularly including fee calculation, alternative ways RIAs may attempt to maximize revenue (including revenue from bank clients' deposit sweep programs) and excessive fees. In addition, RIA examinations will also assess the RIA's policies and procedures regarding retaining and monitoring electronic communications and selecting and using third-party service providers. The 2023 Examination Priorities also note that EXAMS remains focused on whether various aspects of RIAs'

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3 For purposes of these examinations, the term "digital engagement practices" includes tools with behavioral prompts, differential marketing, game-like features (commonly referred to as gamification), and other design elements or features designed to engage with retail investors on digital platforms (*e.g.*, websites, portals and applications), as well as the analytical and technological tools and methods.

operations and compliance practices have appropriately adopted and considered current market factors. Consistent with prior years, EXAMS prioritizes RIAs that have never been examined and those that have not been examined for many years.

Registered Investment Companies, Including Mutual Funds and ETFs

Examinations of registered investment companies will continue to include a review of compliance policies and procedures, governance practices, disclosure and filings with the SEC. In conducting these reviews, EXAMS will focus on fiduciary obligations of RIAs to registered investment companies, particularly with respect to the receipt of compensation for services or other material payments made by such registered investment companies and other sources. EXAMS will focus on boards' processes for assessing and approving advisory and other fund fees (particularly for funds with "weaker" performance relative to peers), as well as the effectiveness of funds' derivatives risk management and liquidity risk management programs.

EXAMS will focus on funds with specific characteristics, such as:

- turnkey funds, to review their operations and assess the effectiveness of compliance programs;
- mutual funds that converted to ETFs, to assess governance and disclosures associated with the conversion;
- non-transparent ETFs, to assess compliance with the conditions and other material terms of their exemptive relief;
- loan-focused funds, such as leveraged loan funds and funds focused on collateralized loan obligations, for liquidity concerns and to review whether the funds have been significantly impacted by, and have adapted to, elevated interest rates; and
- medium and small fund complexes that have experienced excessive staff attrition, to focus on whether such attrition has affected the funds' controls and operations.

Several of these focus areas parallel SEC rulemaking and policy initiatives, such as those relating to outsourcing and liquidity risk management. EXAMS will also monitor the rise of volatility-linked and single-stock ETFs, and its review may include such funds' disclosures, marketing, conflicts and compliance with portfolio management disclosures, among other topics. EXAMS will continue to prioritize registered investment companies that have never been examined and those that have not been examined in "a number of" years.

Broker-Dealer and Exchange Examination Program

Broker-Dealers

In 2023, EXAMS intends to focus examinations on broker-dealer compliance and supervisory programs generally and will continue to emphasize compliance obligations regarding electronic communications related to firm business and recordkeeping for those communications. EXAMS also noted that it will continue to focus on compliance with the Customer Protection Rule (Rule 15c3-3 under the Securities Exchange Act of 1934) and the Net Capital Rule (Rule 15c3-1 under the Exchange Act), as well as on ensuring that broker-dealers have proper credit, market and liquidity risk management controls in place to weather stress events.

Additionally, the 2023 Examination Priorities reinforce recent SEC market structure policy initiatives. To this point, EXAMS will review conflicts of interest in order routing and execution that may affect retail investors. The 2023 Examination Priorities also note that examinations will review broker-dealers' compliance with Regulation SHO, including rules on aggregation units and locate requirements, and Regulation ATS, including consistency with disclosures in Form ATS-N. The 2023 Examination Priorities also highlights Rule 15c2-11 under the Exchange Act, requiring broker-dealers to refrain from publishing quotations for an issuer's security when current issuer information is not publicly available, and penny stock disclosure rules as examples of its focus on issues specific to over-the-counter securities and microcap securities. Lastly, EXAMS states that examiners will assess whether firms may be involved in the illegal distribution of unregistered securities.

Exchange Examination Program

National Securities Exchanges. Because exchanges are currently largely self-regulatory, examinations will focus on the exchanges' operations in monitoring, investigating and enforcing members. Examinations will also concentrate on compliance by listed companies with the exchanges' rules and any other applicable federal securities laws.

Security-Based Swap Dealers (SBSDs). Noting that SBSDs act as market makers or dealers in security-based swaps, EXAMS will focus on whether SBSDs have implemented policies and procedures to reasonably comply with Security-Based Swap rules, including Regulation SBSR, which requires SBSDs to report transactions to swap data repositories.

Municipal Advisors. As investment advisers related to municipal entities and municipal financial products, municipal advisers must comply with Municipal Securities Rulemaking Board Rule G-42, which establishes core standards of conduct and duties of municipal advisors. Examinations will assess compliance with MSRB Rule G-42 and whether municipal advisors have disclosed conflicts of interest and other fiduciary obligations.

Transfer Agents. Transfer agents are primarily responsible for maintaining security holder records, recording ownership changes, distributing dividends and other payments to security holders, and liaising between issuers and security holders. Examinations will review processing of transfers, recordkeeping and retention, safeguarding of assets and filings with the SEC. EXAMS will prioritize transfer agents that service microcap and crypto assets and transfer agents that use emerging technology when performing transfer agent services.

Clearance and Settlement

The 2023 Examination Priorities reminds readers of EXAMS' obligation, under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[4] to annually examine each clearing agency supervised by the SEC that has been designated as systematically important. The annual examinations must assess the clearing agencies' core risks, processes and controls, including the nature of the clearing agencies' operations and review of any financial and operational risks. Additionally, EXAMS intends to review registered clearing agencies' compliance with the SEC's written Standards for Covered Clearing Agencies,[5] which require policies and procedures addressing the availability of sufficient financial resources, protection against credit risks, management of defaults and safeguarding against operational and other risks. Specific areas of focus in 2023 include liquidity risk management, counterparty

4 Dodd-Frank Wall Street Reform and Consumer Protection Act, Title VIII, Pub. L. No. 111-203 (July 21, 2010).

5 Standards for Covered Clearing Agencies, Rel No. 34-78961 (Oct. 13, 2016).

credit stress testing, and governance and escalation. However, this list may expand as EXAMS consults with the Federal Reserve Board and the SEC's Division of Trading and Markets.

Regulation Systems Compliance and Integrity

Adopted in 2014 to bolster the technology infrastructure of the securities markets, Regulation SCI requires covered entities, such as national securities exchanges, certain clearing agencies, FINRA and MSRB, to establish and enforce policies and procedures reasonably designed to ensure that their systems' capacity, integrity and security are sufficient in order to promote fair and orderly markets. EXAMS will focus on:

- Software Development Life Cycle – whether the SCI entity is adequately able to review and update systems development and testing;
- Third-Party Dependencies – whether SCI systems operated by third parties have sufficient capability, availability and security;
- Network Segmentation – whether the system, if breached, would be likely to pose a security threat to SCI systems; and
- Application Programming Interface – whether SCI systems, especially those relying on external applications, have adequate security for maintaining operational capability.

FINRA and MSRB

FINRA uses examinations, enforcement and surveillance to supervise approximately 3,400 brokerage firms and more than 620,000 registered representatives. EXAMS selects areas within FINRA to examine based on risk-based oversight examinations, including FINRA's implementation of Regulation BI and Form CRS.

The MSRB oversees municipal advisors and broker-dealers that buy, sell and underwrite municipal securities. EXAMS looks at registered firms to check compliance with MSRB rules. EXAMS also conducts examinations of the MSRB itself.

Anti-Money Laundering

EXAMS noted the increased importance of conducting examinations of AML programs given the current geopolitical environment, including the increased imposition of international sanctions. EXAMS will continue to prioritize compliance with AML requirements in its examinations of broker-dealers and certain registered investment companies.[6] EXAMS will focus on evaluations of firms' fulfilling their AML obligations, including filing suspicious activity reports, establishment of appropriate customer identification programs, performing customer due diligence, compliance with beneficial ownership requirements and routine, independent testing.

The London Interbank Offered Rate Transition

EXAMS will continue to assess the preparedness of broker-dealers and RIAs for the transition away from LIBOR. Currently, LIBOR is scheduled for discontinuation in mid-2023.

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6 Pursuant to FinCEN regulations, only open-end investment companies are required to have AML programs in place.

Conclusion

The 2023 Examination Priorities provide insight as to how EXAMS determines examination targets, allocates the time and resources of EXAMS' staff, and, in certain instances, refers examination findings to the Division of Enforcement. The 2023 Examination Priorities provide important information regarding EXAMS' plans for this year, and can be predictive of potential enforcement activity involving participants in the financial services industry. However, EXAMS' staff is not limited to items identified in the 2023 Examination Priorities; as in the past, examination and enforcement activities are based on a variety of factors, and the staff's approach can change at any time in response to changes in its view of existing or emerging risks.

In its eleventh consecutive year of publication, the 2023 Examination Priorities continue to be an important tool for registered firms in assessing their compliance programs and preparing for examinations. While the Examination Priorities to a certain degree always represent the regulatory priorities of the SEC, the topics identified in the 2023 Examination Priorities in particular reinforce the policy initiatives of the current SEC chair. Firms may want to consider carefully the 2023 Examination Priorities in assessing their readiness for potential document requests or examinations by EXAMS in the coming year, especially the newer focus areas identified in the 2023 Examination Priorities and reiterated herein.

Appendix – EXAMS Examination Statistics 2020-2022[7]

	2022[8]	2021	2020
TOTAL NUMBER OF EXAMINATIONS	3,050	3,040	2,952
NUMBER OF BROKER-DEALER EXAMINATIONS	320	333	332
BROKER-DEALER EXAMINATIONS AS % OF TOTAL EXAMINATIONS	10.5%	11%	11.2%
NUMBER OF INVESTMENT ADVISER EXAMINATIONS	2,283	2,251	2,128
INVESTMENT ADVISER EXAMINATIONS AS % OF TOTAL EXAMINATIONS	74.9%	74%	72.1%
NUMBER OF INVESTMENT COMPANY EXAMINATIONS	125	129	107
INVESTMENT COMPANY EXAMINATIONS AS % OF TOTAL EXAMINATIONS	4.1%	4.2%	3.6%

7 The data contained in this chart was compiled using the following SEC sources: Fiscal Year 2023 Congressional Budget Justification Annual Performance Plan & Fiscal Year 2021 Annual Performance Report; and Fiscal Year 2022 Congressional Budget Justification Annual Performance Plan & Fiscal Year 2020 Annual Performance Report.

8 Several 2022 figures are estimates subject to change when the SEC has finalized the data from FY 2022.

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