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SECs Division of Examinations Releases 2023 Examination Priorities

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Each year, the SECs Division of Examinations (the “**Division**”) releases its priorities for the upcoming year, providing SEC registrants with a helpful tool to assist in managing, reviewing, and updating their compliance programs. The [2023 Examination Priorities](#) (the “**2023 Priorities**”), which were released in February, highlight many of the same significant focus areas that have been highlighted in previous annual Examination Priorities releases, along with a few new areas related to significant new SEC regulations.¹ A highlight of key focus points from the 2023 Priorities is below.

I. Notable New and Significant Focus Areas

Compliance with Recently Adopted Rules

- Marketing Rule. The Division stated that it will review whether registered investment advisers (“**RIAs**”) have adopted and implemented written policies and procedures in compliance with the newly-effective Marketing Rule. The Division will also review whether RIAs have complied with the substantive requirements of the Marketing Rule, including whether RIAs have a reasonable basis for believing they will be able to substantiate material statements of facts, and requirements regarding testimonials, endorsements and third-party ratings.²
- Derivatives Rule. The Division will: (i) assess whether registered investment companies (“**Funds**”) have implemented written policies and procedures in compliance with the Derivatives rule, and (ii) review whether Funds comply with Rule 18f-4, including whether Funds disclosures regarding use of derivatives are incomplete, inaccurate or potentially misleading.³
- Fair Valuation Rule 2a-5. The Division will review the compliance by Funds and their boards with new requirements for determining fair value, including, among other items, the implementation of board oversight duties, recordkeeping and reporting requirements. The Division also stated it would review whether Funds have made adjustments consistent with the rule with respect to valuation methodologies, compliance policies and procedures, governance practices, service provider oversight, and/or reporting and recordkeeping.⁴

Other Significant Areas

- RIAs to Private Funds. The Division emphasized its continued focus on RIAs to private funds, particularly

on private fund RIAs' conflicts of interest, calculation and allocation of fees and expenses; compliance with the Marketing Rule; policies and procedures regarding the use of alternative data; and compliance with the Custody Rule, including the timely delivery of audited financials and selection of permissible auditors.

- Notably, the Division stated it would focus on RIAs to private funds with certain characteristics, including private funds that use affiliated companies and advisory personnel to provide services to their fund clients and underlined portfolio companies and private funds that hold certain hard-to-value investments, such as real estate and crypto assets.⁵
- Standards of Conduct. The Division reiterated its focus on protecting retail investors, stating that it will continue to review broker dealers ("BDs") and RIAs' compliance with their obligations under Regulation BI and the fiduciary standard, respectively. The SEC will also review BDs and RIAs compliance with From CRS.⁶
- ESG Investing. The 2023 Priorities again highlight the SECs continued focus on Environmental, Social, and Governance ("ESG") investing, including whether Funds are operating in the manner set forth in ESG disclosures and whether recommendations of ESG products are made in investors' best interests.⁷

II. Information Security and Operational Resiliency

The Division again highlighted its perennial focus on cybersecurity, particularly in the light of the elevated risk environment surrounding cybersecurity. Accordingly, the 2023 Priorities provide the Division will focus on firms' response to cyber-related incidents and compliance with applicable cybersecurity regulations. The Division will also examine BDs' and RIAs' practices to prevent account intrusions and safeguard customer records and information.⁸

III. Crypto-Assets and Emerging Technologies

The 2023 Priorities noted the "proliferation" of certain types of investments (e.g., crypto assets) and emerging financial technology (e.g., BD mobile apps and robo-advisors), noting that the Division would conduct examinations of BDs and RIAs offering new products and services or employing new practices, and would examine potential impacts of recent distress among crypto asset market participants.⁹

IV. Investment Adviser and Investment Company Examination Program

RIAs

The Division highlighted focuses in several "core areas" and additional perennial issues, including: (i) marketing practices; (ii) custody; (iii) valuation; (iv) advisory fee calculations; (v) portfolio management; (vi) brokerage and execution; (vii) conflicts of interest; (viii) the calculation of fees; (ix) alternative ways that RIAs maximize revenue; and (x) excessive fees.¹⁰

Registered Investment Companies, Including Mutual Funds and ETFs

The Division stated it would focus on the fiduciary obligations of RIAs to Funds, particularly with respect to their receipt of compensation for services. During examinations, the Division stated it will evaluate Funds compliance programs and governance practices, and boards' processes for assessing and approving advisory and other fees, particularly for funds with weaker performance relative to their peers.

V. Additional Examination Priorities

BD Operations

The Division stated it will continue to assess BD compliance and supervisory programs, including those for electronic communications related to firm business, as well as recordkeeping for those electronic communications.

National Securities Exchanges

The Division will examine national securities exchanges to assess whether they are meeting their federal securities laws obligations.¹¹

Security-Based Swap Dealers ("SBSDs")

Examinations of new SBSBD registrants will continue to focus on whether SBSBDs have implemented policies and procedures that ensure compliance with security-based swap rules.¹²

Municipal Advisors

The Division will continue to examine municipal advisors to assess whether they meet their core standards, as well as conduct and duties applicable to municipal advisors.¹³

Transfer Agents

The Division will continue to examine transfer agents, prioritizing examinations of transfer agents that service microcap or crypto assets, or use novel technologies (e.g., blockchain or online crowdfunding portal applications).¹⁴

Clearance and Settlement Examination Program

The Division noted that, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, it will conduct at least one risk-based exam of each clearing agency designated as systematically important and for

which the SEC serves as supervisory agency, focusing on core risks, processes, controls, the nature of operations, and financial and operational risk.¹⁵

Regulation Systems Compliance and Integrity

The Division will evaluate whether Regulation SCI entities have established, maintained, and enforced the required written policies and procedures.¹⁶

FINRA

The Division will conduct risk-based oversight examinations of FINRA. The Division's examinations may focus on a number of areas, including FINRA's operations and FINRA's examinations of certain BDs and municipal advisors.¹⁷

MSRB

The Municipal Securities Rulemaking Board ("MSRB") regulates the activities of BDs that buy, sell, and underwrite municipal securities, as well as the activities of municipal advisors. The Division, along with FINRA and the federal banking regulators, will examine registered firms to assess compliance with MSRB rules.¹⁸

Anti-Money Laundering

The Division will continue to examine BDs' and registered investment companies' compliance with anti-money laundering ("AML") obligations, with a goal of evaluating whether policies and procedures are reasonably designed to identify suspicious activity and illegal money-laundering activities. The 2023 Priorities highlighted the heightened importance of examining AML programs of broker-dealers and certain Funds due to the current geopolitical environment and the increased imposition of international sanctions, along with review of firms' monitoring and compliance with OFAC and Treasury-related sanctions.¹⁹

The London Inter-Bank Offered Rate ("LIBOR") Transition

The Division, through examinations and outreach efforts, will assess firms' preparations for the transition away from LIBOR in mid-2023.²⁰

As in prior years, the 2023 Priorities do not contain an exhaustive list of issues the Division will prioritize in routine examinations and guidance in the upcoming year.²¹ However, we encourage RIAs, BDs, registered investment companies, and other market participants to review the 2023 Priorities and to consider whether their

compliance programs adequately address, at a minimum, the issues identified therein.

By the Investment Management and Broker-Dealer Team at Kilpatrick Townsend & Stockton

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Footnotes

¹ Press Release, SEC, *SEC Division of Examinations Announces 2023 Examination Priorities* (Mar. 30, 2023), https://www.sec.gov/news/press-release/2023-57?utm_medium=email&utm_source=govdelivery (hereinafter, "Press Release"); SEC, Division of Examinations, 2023 Examinations Priorities, (Mar. 30, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf> (hereinafter, "2023 Priorities").

² 2023 Priorities at 9.

³ 2023 Priorities.

⁴ 2023 Priorities at 4.

⁵ 2023 Priorities at 10-11.

⁶ 2023 Priorities at 11-12.

⁷ 2023 Priorities at 13.

⁸ 2023 Priorities.

⁹ 2023 Priorities at 14.

¹⁰ 2023 Priorities at 16.

¹¹ 2023 Priorities.

¹² 2023 Priorities at 19.

¹³ 2023 Priorities.

¹⁴ 2023 Priorities.

¹⁵ 2023 Priorities at 20.

¹⁶ 2023 Priorities at 21.

¹⁷ 2023 Priorities at 22

¹⁸ 2023 Priorities.



¹⁹ 2023 Priorities at 23.

²⁰ 2023 Priorities.

²¹ See Press Release, *supra* note 1.