Proskauer

Top Ten Regulatory and Litigation Risks for Private Funds in 2023

The Capital Commitment on **March 22, 2023**

Everything, everywhere, all at once, as a descriptor, captures the litigation and regulatory risks for the asset management industry in 2023. Every corner of the market faces greater risks than at any time since 2008. After years of breakneck growth fueled by low interest rates and a largely *laissez faire* regulatory regime, significant change is here.

The major reasons are straight-forward. Long-held investment assumptions stopped being true in 2022. Hopes for a post-COVID "return to normal" faded quickly as inflation reached levels not seen in more than 40 years. In response, central banks rapidly raised interest rates. Meanwhile, geopolitical tensions have intensified to – and remain at – levels not seen since the Cold War. Russia's invasion of Ukraine quickly escalated into Western sanctions and Russian responses, resulting in energy shocks and further inflation. For its part, China has shifted its industrial policy, tightening down on technology companies, and flexed its military power, while increasingly aligning itself with Russia.

Meanwhile, the meltdown of crypto has unleashed a torrent of bankruptcies, litigation, and criminal proceedings; the long-predicted "wave" of SPAC litigation is cresting in light of a recent court decision; disputes involving ESG now extend far beyond investigations of greenwashing, and include governance battles and political skirmishes – arenas where most asset managers fear to tread; portfolio company valuations are returning to earth, with the best evidence being the Vision Fund's repeated multibillion dollar write-downs and losses. These events seem almost quaint in light of recent developments, but they contributed to more recent crises and are leading to down rounds, lower performance expectations, elongated fund-raising cycles, higher operating costs, and increasing tensions at all levels (sponsors, LPs, and portfolio companies). The pressure on sponsors will be significant.

We have been writing about, and anticipating, these risks for years – with regular posts on crypto, SPACs, and valuations – among others – dating back to 2017. For example Regulatory Shake-Out on Digital Assets: An Industry Waits for Additional Guidance; U.S. Federal Regulators Turn Up the Heat on Cryptocurrency Trading Platforms; and SEC Proposes Extensive New Rules Applicable to SPACs and de-SPAC Transactions

We have also been writing about strategies for mitigating these risks and developing playbooks for addressing them when they arrive. Some of these publications include: Portfolio Company Risk: Plaintiffs Set Sights on Sponsors and Board Directors; and The Portfolio Company Playbook – Chapter 1: A Fund Sponsor's Guide to Navigating Risks, Conflicts, and Regulatory Concerns Arising from Portfolio Companies.

As is often the case with any fundamental dislocation, market disruption provides fertile ground for innovation and renewal. Indeed, in the midst of these challenges, the launch and continued advancement of Chat GPT and competing generative AI tools have already sparked new excitement and energy. In fact, it may signal the birth of a new investment cycle much like Netscape Explorer launched the original internet boom (amidst the lingering hangover from the "decade of greed"), and "my Space" helped launch the social media phenomenon and Web 2.0 (fresh on the heels of the bursting of the internet bubble in 2001). We wrote this introduction *before* SVB filed for bankruptcy, the failure of Signature Bank, and the rescue merger of Credit Suisse. Further disruption is virtually certain.

With this backdrop, we are pleased to present the Top Ten Regulatory and Litigation Risks for Private Funds in 2023.

- Portfolio Companies in Distress: Navigating the Risks from SVB to Down Rounds
- Crypto Contagion – Managing Risk on Multiple Fronts
- The New Reality: Valuation in a Volatile Market
- SEC Overreach: Insurers Underwrite?
- Messaging Missteps: SEC's Increasing Focus on Off-Channel Communications
- Ripples Following the SPAC Wave: Litigation and Regulatory Risks
- Energy Transition: A New Risk Climate for Investors
- Regulators Increased Focus on GP-led Secondaries and Continuation Funds

- The Trend Continues: Increased Regulatory Focus on Privacy and Cybersecurity for Private Funds
- Complying with the New SEC Marketing Rule: Seven Months in and Still Adapting

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