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SEC Regulation in a Non-Regulatory Environment

The Capital Commitment on **May 13, 2025**

With Paul Atkins as the new SEC Chair, the agency's priorities have shifted away from many of the aggressive policies of former Chair Gensler. The first four months of the Republican controlled SEC saw a dramatic shift in the approach to crypto with the dismissal or pause of major litigation, the termination of several longstanding investigations, the recission of accounting guidance regarding the safeguarding of crypto assets and the establishment of a new task force to help formulate the regulatory approach to crypto going forward. With the enforcement program under a new SEC undergoing significant changes, there will likely be a return to more traditional enforcement cases with greater emphasis on egregious conduct involving pecuniary gain or investor harm, moving away from "pushing the envelope" cases. Enforcement sweeps involving off-channel communications, late filings and other "broken windows" initiatives are expected to fall by the wayside. Regulation by enforcement could be replaced by increased interaction with the Staff, formal or informal guidance or lighter-touch rulemaking.

New Chair Atkins has advocated for greater transparency and efficiency in rulemaking and enforcement. Under his leadership, onerous new rulemaking should decrease dramatically, helpful guidance on existing rules should emerge and new ideas could be solicited through industry roundtables. Amendments to existing rules may even open new possibilities for fund managers and other investment advisers (including, per recent announcements, facilitating capital formation). On the enforcement front, investigations may proceed more efficiently, resolve faster, and focus more on substantive violations. Settlements may also align more closely with the SEC's penalty guidelines, calibrated to elements of the penalty statute.

A new direction in rulemaking and enforcement, however, does not necessarily mean that the Staff will no longer focus on the concerns underlying the more controversial issues under former Chair Gensler. The current Republican Commissioners may have previously spoken critically of certain rule proposals, but they have also recognized a need to prevent fraudulent or other harmful activities by investment advisers and other regulated market actors. Thus, while the SEC may not bring waves of high penalty, off-channel communications cases against registered entities, the Staff will expect those records to be retained as required under existing rules and may more regularly request their production in exams and investigations. Other issues that may have been referred to Enforcement in the past may remain as exam deficiencies, or the investigative Staff could look harder to find a substantive violation over mere compliance policy or internal control violations.

Having developed specialized expertise over private fund managers since the adoption of Dodd Frank, the Examinations Division (both at the Regional Office level and in at the Division's Private Funds Unit), as well as the Enforcement Division's Asset Management Unit, will continue to look for emerging, impactful issues and cases. Indeed, given the expected return to more "bread-and-butter" issues and enforcement cases, the following traditional issues involving private fund managers should still be in play:

- **Fiduciary Obligations** –situations involving allegations of potential fraud, breach of fiduciary duty, or conflicts of interest; expect greater scrutiny where the alleged conduct involves pecuniary gain to the manager or investor losses or other harm. Issues relating to fees and expenses, allocations, valuations, cross-fund transactions and related matters should remain a focus in exams and enforcement, as they were under the previous Republican administration.
- **Retail Investors** – matters that can be framed as protection of individual investors (*i.e.,* registered funds or 3(c)(1) funds, which do not limit their investors to "qualified purchasers"); the market's push towards retailization of alternatives may heighten the Staff's interest in this area.
- **Trading/MNPI** – insider trading investigations, which have been supported across the political divide; the Staff's focus on credit instruments and other markets that traditionally have not been a focus has been demonstrated by recent enforcement actions alleging an adviser's failure to maintain and enforce written MNPI policies involving trading in distressed debt and collateralized loan obligations.

While enforcement actions based solely on violations of the Compliance Rule (Rule 206(4)-7 under the Investment Advisers Act) seem less likely, these investigations typically begin by focusing on potential substantive violations. Enforcement Staff rarely set out to pursue compliance policy cases. Under the new SEC, investigations that fail to reveal substantive violations are more likely to be terminated without an enforcement recommendation, rather than resolved with compliance violations. However, investigations and exams will still focus on a firm's culture of compliance. The perception of weak internal controls or inadequate policies are often viewed as a "red flags," prompting the Staff to dig deeper and look for other potential issues – some of which may lead to related (or even unrelated) substantive findings the longer the Staff's review drags on.

The SEC's shift in rulemaking and enforcement priorities is certainly welcomed by many investment advisers. It should not, however, be seen as a move to complete deregulation, and investment advisers should remain focused on compliance and their fiduciary obligations.

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