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SEC Division of Examinations' 2023 Exam Priorities - A Continued Focus on Private Funds, Regulation Best Interest, ESG, and Crypto.

On February 7, 2023, the Securities and Exchange Commission's (SEC) Division of Examinations (EXAMs) announced its 2023 Examination Priorities (the "Priorities"), which highlight areas it expects to target in 2023 examinations. The Priorities reinforce many of the same areas of interest from the 2022 Priorities, including investment advisers to private funds, Regulation Best Interest ("Reg BI") compliance, ESG-related investments and strategies, and crypto assets and identify additional areas of focus based on SEC rules which recently went into effect. Registered investment advisers (RIAs), registered investment companies ("funds"), and broker-dealers should carefully review the Priorities to ensure that their compliance systems and policies are up to date, monitored, and enforced. Indeed, given the SEC's history of pursuing enforcement actions in areas highlighted in prior years as Examination Priorities, appropriate attention to these Priorities today can save regulated entities considerable resources down the road.

Key Takeaways

- The Priorities highlight three recently adopted rules as new risk areas for 2023: (1) Rule 206(4)-1 (the "Marketing Rule")[1] under the Investment Advisers Act of 1940 (the "Advisers Act"); (2) Rule 18f-4 (the "Derivatives Rule") under the Investment Company Act of 1940 (the "1940 Act"); and Rule 2a-5 ("Fair Valuation Rule") under the 1940 Act. RIAs and funds should prepare for the EXAMs staff to closely assess the effectiveness of their practices and compliance programs under these new rules, as applicable.
- Registrants should be vigilant about identifying, mitigating, and disclosing inter-affiliate conflicts of interest that can impact clients and customers. Throughout the Priorities, EXAMs stresses conflicts of interest among affiliates as presenting significant risks, especially related to the use of affiliated service providers, recommendations of proprietary products and services, and revenue sharing arrangements. The Staff notes EXAMs' interest in continuing to leverage data provided to the SEC in various regulatory filings, including fund registration statements, Form ADV, Form PF, Form CRS, and other reports. Given the SEC's focus on using technology to analyze and assess data across these various filings, registrants should continue to ensure that they include accurate and consistent information across their filings or risk flagging attention from SEC examiners.
- The Priorities state that RIAs and funds that have not been examined previously or have not been examined in a number of years will be a focus area for 2023. Such firms should consider conducting a self-audit of their compliance program and regulatory filings to ensure they are prepared for any forthcoming examination.

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February 21 2023

