Beyond Private Equity Fees and Expenses: Don't Neglect These Important Compliance Areas

By Robert Conca

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Introduction

Since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, numerous advisers to private equity funds have been required to register as investment advisers with the U.S. Securities and Exchange Commission ("SEC").[1] Registration with the SEC subjects those private fund advisers to the Investment Advisers Act of 1940, as amended ("Advisers Act"), including Rule 206(4)-7 thereunder, often referred to as the "Compliance Program Rule." Among other things, Rule 206(4)-7 requires an adviser to adopt customized written policies and procedures that are reasonably designed to prevent and detect violations of the federal securities laws.[2]

In a May 2014 speech titled "Spreading Sunshine in Private Equity," the Director of the SEC's Office of Compliance, Inspections and Examinations ("OCIE") publicly announced that the private equity sector had become a focus for OCIE.[3] Since that time, the private equity industry has seen a continued and increasing focus by OCIE, and by the SEC's Division of Enforcement, on the private equity sector.[4] In 2017, we witnessed SEC comments and Examination Priorities clearly focus on private equity advisers and their practices[5] and that focus is expected to continue in 2018. Assuming that this level of scrutiny continues, private equity advisers should expect to receive contact from the SEC in short order, especially if they have never been examined or it has been quite some time since their last examination.

It should be clear that private equity advisers today are in a new era of increased regulatory scrutiny and transparency.[6] Over the past two years, the private equity fund issues making headlines in SEC enforcement cases relate to fund fees and expense practices, in particular how disclosures in offering documents differ from the manner in which fees and expenses are charged to fund investors.[7] Generally, however, when examining private equity advisers and referring matters to the Division of Enforcement, the SEC will look at the adviser's entire compliance program to review both high priority focus areas pursuant to the National Examination Program's priorities[8] as well as the adviser's implementation of and adherence to

its own policies and procedures. Moreover, private fund advisers should be acutely aware that the SEC may look past the sophistication of most private fund investors and examine a private fund adviser's compliance program, at least in part, as if the adviser provided services directly to retail investors.[9] This article highlights select compliance areas, *other than* fee and expense practices, where private equity advisers should be devoting significant time and attention based on recent SEC announcements and guidance as they work to complete the annual compliance program enhancements and look ahead to improving their compliance programs in 2018.

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Performance Advertising

On September 14, 2017, OCIE released a Risk Alert titled "The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers" ("Risk Alert"), which contains SEC staff observations based on the results of over 1,000 examinations of registered investment advisers.[10] Listed first among several advertising compliance deficiencies is the failure of advisers to provide accurate performance results in marketing materials. The Risk Alert serves to put advisers on notice, including advisers in the private equity industry, that the SEC expects advisers to address performance advertising issues proactively, and to have policies and procedures reasonably designed to prevent deficient advertising practices, while highlighting several important performance advertising issues, summarized below, that private equity advisers should consider when preparing fund performance data and drafting accompanying disclosures.

Net of Fees Performance Data

It has long been a focus of the SEC to ensure that advisers portray investment performance in a manner that is accurate and not misleading. One area where the regulators continue to focus is an adviser's explanation of how advisory fees affect investment performance. Applicable rules and regulatory guidance on this topic require an adviser to include in its marketing materials investment results that reflect the deduction of all applicable advisory fees.[11] Generally, while an adviser may also choose to set forth performance on a "gross of fees" basis, such gross performance needs to be supplemental to the adviser's net performance.[12]

Use of Benchmarks – How Relevant?

An adviser needs to explain the relevance of any benchmark compared to an adviser's investment performance in any advertising and marketing materials.[13] Such materials need to include all relevant disclosures including, among others, that the benchmarks are different from the adviser's own strategy, whether such a benchmark can be purchased directly and whether there is actual overlap between the benchmarks and the securities purchased by the adviser.[14]
For example, if a private equity fund adviser specializes in non-United States, emerging markets investments, any comparison of that adviser's returns to a domestic index (*e.g.,* the Russell 1000 Index) would not be directly related to the adviser's investment strategy, and the SEC will expect appropriate disclosures to accompany performance results. For a more subtle example, if an adviser manages domestic private equity investments and wants to compare a major U.S. benchmark, like the S&P 500 Index, in its marketing documents, the adviser needs to clearly explain the limitation in such a comparison and whether the index relates to or contains private investments in order to comply with the advertising rules and applicable no action guidance.

Hypothetical and Back-tested Performance in Marketing Materials

Hypothetical performance and back-tested performance[15] may be two of the most difficult areas of adviser advertising to disclose completely and thoroughly. Conceptually, these two types of performance reporting are unique - neither hypothetical nor back-tested performance describes an adviser's actual investment activities. Instead, they identify returns an adviser "would have" experienced under a certain set of defined conditions and assumptions. Because these types of performance did not really happen, the level of detail required to explain relevant information in disclosures to marketing materials in a manner that is not potentially misleading to a client or prospect is significant.

Disclosures relating to hypothetical and back-tested results tend to be lengthy, most often longer than the performance reporting data itself, and are often criticized as ruining the appearance of a marketing slide or pitch deck.[16] While aesthetic considerations may be important in many regards to an adviser, its sales staff, and ultimately to its chances to convert prospects into investors, they cannot outweigh regulatory considerations in this (or any) area of securities law compliance. The SEC will focus on whether the hypothetical or back-tested returns are described in a manner so that the material information is accurately conveyed to clients and prospects against the backdrop of the general antifraud rules.

Specifically, as seen in the *Clover Capital Mgmt., Inc.*, SEC Staff No-Action Letter (Oct. 28, 1986), the following are identified as being misleading when discussing such performance:

- Failing to disclose prominently the limitations inherent in hypothetical results;
- Failing to disclose, if applicable, material changes in the conditions, objectives, or investment strategies of the hypothetical portfolio during the period portrayed and the effect of those changes;
- Failing to disclose, if applicable, that some of the securities or strategies reflected in the hypothetical portfolio do not relate, or relate only partially, to the services currently offered by the investment adviser; and
- Failing to disclose, if applicable, that the investment adviser's clients actually had investment results that were materially different from those portrayed in the hypothetical results.

If you utilize this type of performance reporting for your private equity funds, you should work closely with your personnel and external advisers when preparing your marketing materials to ensure they contain robust and necessary disclosures.

Claims of GIPS Compliance

Compliance with a voluntary performance standard, such as the popular Global Investment Performance Standards (GIPS®)[17] created by the CFA Institute, can be a feather in the cap of a fund adviser and can distinguish an adviser from its competitors. The process to achieve GIPS compliance requires consistent adherence to specific policies and procedures. An adviser's track record is verified by an independent third party, and performance must be reported in accordance with the detailed GIPS advertising guidelines.[18] In addition, an adviser that claims GIPS compliance will need detailed internal policies and procedures tailored to the firm's processes designed to ensure such compliance, as well as to remain current with changes to the applicable requirements. Satisfying these standards requires significant time, effort, and discipline, and an adviser will incur substantial costs along the way. The end goal of such labor is to bring an additional level of credibility to the reported performance of the firm.

It should be clear that private equity advisers today are in a new era of increased regulatory scrutiny and transparency.

If your firm undertakes the effort to obtain GIPS verified performance and fulfills the continuing requirements,[19] your firm should be able to discuss that accomplishment in your marketing materials. By contrast, if you have questions about whether your firm continues to meet the standards, consult your advisers so that there is no doubt as to whether such a claim of GIPS compliance in marketing documents is accurate.

Past Specific Investments and "Cherry Picking"

Generally, the SEC's Advertising Rule[20] prohibits a registered adviser from using an advertisement

that refers directly or indirectly to past, specific recommendations that were or would have been profitable to any person. Like many rules, the Advertising Rule contains an exception so that the prohibition will not apply if the advertisement includes (i) a complete list of all recommendations made by the adviser during the prior one year period, (ii) certain information about the investments (including, among others, the name, date, purchase price, and current price), and (iii) a legend indicating that it should not be assumed that recommendations in the future will be profitable.[21] Although the concern remains that past specific recommendations are intrinsically misleading, the SEC has allowed advisers to present information relating to some, not all, recommendations when such investments are selected based on consistently applied non-performance based, objective criteria.[22]

Private equity advisers should review all documents where performance is discussed, including client materials, prospect materials, and the adviser's website, to ensure that proper disclosures are included along with any specific performance information.

Touting Initiative - References to Awards or Rankings

The Risk Alert focuses in part on the "Touting Initiative" launched by the SEC in 2016 to examine advisers who include awards, rankings on lists and/or professional designations in their marketing documents and information. Without a full explanation of details relevant to receiving such an award or achieving a high ranking, the SEC may conclude that your advertisements are materially inaccurate and potentially misleading. The Risk Alert summarizes some common findings from the Touting Initiative:

- Is the award or raking based on submission of false, misleading or incomplete information?[23]
- Did you have to pay to qualify for the award or accolade?
- Did you have to pay to continue to be considered for the award or accolade?
- Is the ranking based on information that currently applies to your firm (or is the ranking and/or its basis outdated)?
- Do you discuss professional designations[24] held by your personnel in Form ADV Part 2B?

If these factors apply to honors bestowed upon your firm or its personnel, ensure that appropriate disclosures are included in your marketing documentation. As always, do not forget to save backup of relevant information in your compliance files.

Private Equity Reporting on New Form ADV

Last year, the SEC adopted final rules that amend Form ADV and the information advisers are required to provide in annual and other than annual ADV filings.[25] The amended Form ADV, in effect since October 1, 2017, significantly expands certain areas of disclosure for private equity fund managers and codifies Umbrella Registration, an approach to registration initially set forth in a 2012 SEC no action letter. [26]

The Adopting Release, in particular the Background section and discussion of comment letters[27] received by the SEC regarding the changes to Form ADV, provide deeper insight into the rationale for the amendments. The Adopting Release[28] made it clear that the amendments to Form ADV are intended to:

- Improve the depth and quality of additional information reported, facilitate the SEC's risk monitoring initiative, and assist OCIE in its risk-based examination program;
- Provide investors and the public with additional information about investment advisers, including certain data relating to private funds that is similar to what is currently reported on Form PF;
- Provide a more efficient method to register multiple private fund advisers operating a single advisory business;
- Make the filing requirements for Umbrella Registration uniform;
- Collect additional details without disclosing publicly confidential or proprietary information about an adviser's business.

Umbrella Registration for Private Fund Advisers

Private fund advisers who are controlled by or under common control with a primary filing adviser may qualify for a streamlined reporting process referred to as "umbrella registration." This approach (which has been embraced by some private fund advisers already) entails one registration filing required for a private fund adviser's advisory business if certain criteria are satisfied based on the adviser's operations and corporate structure. In order to utilize "umbrella

registration" in the amended Form ADV, the following conditions must be met:

1. The filing adviser (which is the named registrant with the SEC) plus each relying adviser must only advise private funds and clients in separately managed accounts ("SMAs") that are qualified clients;[29]
2. The filing adviser must have its principal office in the United States, and be subject to the provisions of the Advisers Act;
3. The relying adviser(s) must be associated with and supervised by the filing adviser;
4. The relying adviser is subject to SEC examinations; and
5. The filing adviser and each relying adviser operates under a single code of ethics[30] and written policies and procedures manual.

In addition, definitions within Form ADV instructions have been revised to track the "umbrella registration" changes, and each relying adviser will be required to complete a new Schedule R on which it will report details about how it satisfies the relying adviser criteria.

Notably, the "umbrella registration" option is not available in the same fashion to United States-based exempt reporting advisers, or at all to investment advisers located outside of the United States.

Additional New Information Required

Using the new Form ADV, private equity fund advisers will be required to report additional details relating to the following aspects of the adviser's business (select items are listed below):

1. Social media sites controlled by the adviser (*e.g.*, Twitter, LinkedIn) and the address for each of the adviser's social media pages;
2. Whether a private equity fund limits sales of the fund to qualified clients;[31]
3. The total number of offices of the adviser where advisory services are provided and details regarding the number of employees providing such services;
4. Whether an adviser's Chief Compliance Officer receives compensation from a party other than the adviser, and details relating to such compensating parties; and
5. The amount of assets under management attributable to non-U.S. clients.

The new Form ADV contains a clarification regarding private fund audits such that a private equity fund adviser will need to report about whether a qualified opinion was received *during a fund's most recently completed fiscal year*.[32] Prior versions of this question did not contain the calendar year limitation such that, by the time Form ADV was due (assuming a December 31 fiscal year end), a private equity adviser virtually always had to check the box indicating "audit not yet received" and execute a follow up Other Than Annual Amendment to Form ADV once audit results were in hand.

It should be crystal clear to private equity advisers that the SEC will be paying close attention to future Form ADV filings and the wave of significant new information required under the revised Form ADV reporting. Private equity fund advisers should be considering how this next frontier of Form ADV reporting will differ from prior years, and begin taking steps to ensure that the significant additional information will be available for future Form ADV filings.

New Recordkeeping Requirements

As part of recent amendments to Form ADV requirements (described above), the SEC modified the Books and Records Rule[33] of the Advisers Act such that advisers are now required to maintain additional documents related to the calculation and distribution of performance information, as follows:[34]

A. Advisers will be required to keep records supporting performance claims in communications to *any person* (and not just communications to 10 or more recipients as required previously); and
B. Advisers will be required to maintain originals of written communications received and copies of written communications sent that relate to the performance or rate of return of any or all managed accounts or securities recommendations. E-mails that contain performance information are covered by this amendment.

These new requirements apply to communications and documents circulated or distributed after October 1, 2017, regardless of whether those documents were created prior to that date. Notably, customized, one-on-one presentations

are no longer exempt from this requirement.[35] This new recordkeeping requirement triggers a corresponding need for private equity advisers to comport their policies and procedures relating to performance advertising.

Pay to Play Issues/ Public Pension Advisers

Private equity advisers, especially those that seek investments from public entities, should be acutely aware of the Pay to Play Rule, [36] its restrictions against contributions to certain recipients and the harsh penalties that accompany a Pay to Play Rule violation. With the November 2017 elections, advisers have probably had to confront Pay to Play issues over the past several months as personnel sought to donate to political campaigns and candidates. The Pay to Play Rule prohibits an adviser from (i) providing advisory services for compensation to a Government Entity, Elected Official or Candidate for two years after the adviser, or any Covered Associate of the adviser, makes a Contribution to such an entity, (ii) providing direct or indirect payments to any third party that solicits Government Entities for advisory business unless this third party is also a regulated person, and (iii) soliciting from others, or coordinating Contributions from others for an Elected Official who is in a position to influence the selection of the adviser.[37] The Pay to Play Rule applies with equal force to an adviser to a pooled investment vehicle in which a government entity invests or is solicited to invest.[38]

The downside for even a *de minimis* contribution over the statutory threshold can result in fines and a loss of millions of dollars of fee revenue under the Pay to Play Rule's two year "timeout" provision.[39]

In addition, public pension advisers were identified as an OCIE examination priority in 2017.[40] Significantly, the SEC has publicly acknowledged the investor relationship between public pension plans and public university endowments, on the one hand, and private equity funds on the other hand.[41] With the SEC considering private equity advisers as advisers to public pension plans and a current OCIE priority, those fund advisers who manage public funds or work with or seek business from government clients need to be vigilant in designing and implementing Pay to Play policies and procedures, which may include any of the following: (i) limitations on both direct and indirect contributions, (ii) pre-clearance for contributions to campaigns and candidates, (iii) integration with an adviser's human resources function; and (iv) certifications from adviser personnel.

Private Fund Sales Practices

The topic of how private equity funds are sold reaches a surprising number of areas of a fund adviser's compliance program. Starting with the basics, most advisers have a Marketing Policy (or equivalent) that requires pre-clearance of fund slide decks and marketing materials by Compliance before distribution to investors, prospects and other third parties. Ensuring the necessary compliance reviews are performed is a mandatory first step to ensure a healthy (*i.e.*, compliant) sales function.

Many of us remember a well-publicized SEC speech in 2013 by then SEC Chief Counsel David Blass in which he summarized a long-time SEC position that, without having appropriate broker registrations and licenses, private fund advisers may not engage in activities that require broker-dealer registration when marketing interests in their private funds.[42] Mr. Blass stated the view that transaction-based compensation was a "hallmark of being a broker," and went on to note that a marketing department of a private fund adviser in which a dedicated sales force who primarily solicits or seeks to retain fund investors is a strong indicator of a business "effecting transactions" in the private fund, regardless of how those employees are compensated.[43] There has been recent enforcement activity on this topic, and it is safe to assume that this area is one that will continue to receive SEC scrutiny going forward.[44]

Other areas that private equity fund sales practices touch directly include investor solicitation and any Solicitation Policy requiring certain steps before an investor prospect may be approached and offering materials delivered,[45] and the new recordkeeping requirements (discussed above).

If you have not recently reviewed the activities of the individuals who actively market your private funds, their respective compensation arrangements, and the related compliance policies and procedures, now is the right time to do so.

Compliance Steps to Take Now

In light of the continued focus on private equity advisers by OCIE and the SEC's Division

of Enforcement, compliance officers in private equity fund advisers should consider taking the following steps now in connection with their regulatory compliance efforts:

- Perform a thorough review of current compliance policies and procedures to ensure they are reasonably tailored to your business and accurately reflect its current operations.
- Consider whether marketing and advertising practices are compliant with all applicable policies and requirements, including those emphasized in the Risk Alert.
- Begin efforts to collect information required under the amended Form ADV immediately.
- Verify your that your recordkeeping practices are compliant with current SEC rules;
- Review the activities and compensation structures of internal and external sales and marketing personnel to confirm the arrangements are in line with regulatory guidance.
- Revisit and enhance, as necessary, methods used to screen and collect information about firm and employee political contributions, especially if your firm has or intends to pursue government clients.
- Ensure that the CCO and the adviser's compliance program has sufficient resources and is deeply integrated into the firm's business operations.

Conclusion

OCIE staff is on the frontlines of the adviser review and examination function of the SEC and is considered the "eyes and ears" of the Commission.[46] Recently, OCIE has made efforts to disseminate information to SEC registrants, including private equity advisers, through publications like the Risk Alert[47] that highlight important compliance issues.[48] Importantly, OCIE has significantly increased both its resources and the number of examinations being conducted.

Operating and implementing an effective private equity compliance program takes time and resources. Private equity advisers would be well served to take affirmative and proactive steps to strengthen compliance operations, and ensure compliance programs address those topics that pose the highest risk to their firms, including (of course) areas that OCIE has identified as important through its own efforts. Doing so should go a long way in demonstrating the effectiveness of compliance operations the next time that the SEC examination staff pays a visit to your firm.

ENDNOTES

1 Depending upon the amount of assets held in a respective fund, registration as an investment adviser may need to be performed with one or more state regulators in lieu of registering with the SEC.

2 *See* Advisers Act Rule 206(4)-7.

3 Andrew J. Bowden, Director, OCIE, "Spreading Sunshine in Private Equity," May 6, 2014, available at https://www.sec.gov/news/speech/2014--spch05062014ab.html.

4 *Id.*; *see also, e.g.,* Marc Wyatt, Director, OCIE, "Private Equity: A Look Back and a Glimpse Ahead," May 13, 2015, available at https://www.sec.gov/news/speech/private-equity-look-back-and-glimpse-ahead.html.

5 *See* SEC 2017 Examination Priorities, available at https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf; *see also* Jane Jarcho, Deputy Director, OCIE, Remarks at IAA Compliance Workshop, Sept. 22, 2016 (as reported in IAA Newsletter, Oct. 2016).

6 In addition to the regulatory comments and announcements by SEC discussed herein, the SEC recently published an update to the quarterly private fund statistics (with data as of the third quarter of 2016) which has been collected though Form PF and through Form ADV filings made by private fund advisers. *See* Private Fund Statistics available at https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2016-q3-accessible.pdf.

7 *See, e.g., In the Matter of Kohlberg Kravis Roberts & Co., L.P.* (June 29, 2015), available at https://www.sec.gov/litigation/admin/2015/ia-4131.pdf; *In the Matter of W.L. Ross & Co. LLC* (Aug. 24, 2016), available at https://www.sec.gov/litigation/admin/2016/ia-4494.pdf.

8 See, e.g., SEC 2017 Examination Priorities, *supra*; SEC 2016 Examination Priorities, available at https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf.

9 See Andrew Ceresney, Director, Division of Enforcement, "2016 Keynote Address: Private Equity Enforcement." May 12, 2016, available at https://www.sec.gov/news/speech/private-equity-enforcement.html (noting retail investors significant investments in private equity through public pension plan investors and university endowments, the beneficiaries of which include teachers, police officers and fire fighters, who may not be in a good position to protect themselves in the face adviser wrongdoing).

10 OCIE Risk Alert, "The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers," September 14, 2017, available here: https://www.sec.gov/ocie/Article/risk-alert-advertising.pdf.

11 *See, Clover Capital Mgmt., Inc.*, SEC Staff No-Action Letter (Oct. 28, 1986). Additionally, such disclosures should discuss whether additional fees and expenses, such as custodial fees, are included as part of the performance.

12 In addition, there may be limited situations where gross of fee reporting is permissible, discussion of which is outside the scope of this article. *See Investment Co. Institute*, SEC Staff No-Action Letter (Sept. 23, 1988) (indicating that performance results presented on a gross basis in a one-on-one presentation to a wealthy client which contains certain specific disclosures may not be misleading).

[13] *See, e.g., Clover Capital, supra*.
[14] *See id.* (indicating that an advertisement comparing performance results to a benchmark may be misleading if the advertisement does not disclose the material limitations inherent in such a comparison).
[15] Also commonly referred to as "model" performance, which is the term used in the *Clover* letter. This article uses the term "hypothetical" which is the terminology used in the Risk Alert.
[16] Based on personal experience and other anecdotal evidence from Chief Compliance Officer colleagues.
[17] There are other voluntary performance standards, and this article refers to GIPS as an example for illustrative purposes.
[18] *See* "What Are the GIPS Standards?", available at http://www.gipsstandards.org/about/documents/factsheet.pdf.
[19] The Risk Alert cites an enforcement action where the adviser fell short of such requirements. *See, ZPR Investment Mgmt., Inc.*, Advisers Act Rel. No. 4249 (Oct. 30, 2015).
[20] Rule 206(4)-1 of the Advisers Act.
[21] *Id*.
[22] See *Franklin Management, Inc.*, SEC Staff No-Action Letter (Dec. 10, 1998), available at https://www.sec.gov/divisions/investment/noaction/franklinmanagement121098.pdf.
[23] This scenario is expressly mentioned in the Risk Alert, and included here to emphasize a point – it should be obvious that an accolade or award based on false, incomplete or incorrect information should not appear anywhere in any adviser's advertising or marketing materials.
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25 advertising or marketing materials.
09 (Aug. 25, 2016), available at https://www.sec.gov/rules/final/2016/ia-4509.pdf ("Adopting Release").
[26] The "umbrella registration" amendments to Form ADV are based on the American Bar Association No-Action Letter (Jan. 18, 2012) available at https://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm.
[27] The 50 comment letters received by the SEC are available on the SEC website at http://www.sec.gov/comments/s7-09-15/s70915.shtml.
[28] This article focuses on items most relevant to private equity fund advisers. The amendments to Form ADV apply broadly to SEC registered advisers, the thorough discussion of which is outside the scope of this article.
[29] See definition of "qualified client" at 17 CFR 275.205-3(d)(1).
[30] For more information, see rule 204A-1.
[31] This new clarification suggests that OCIE will be looking closely at verification of investor sophistication and the charging of performance fees across an adviser's investor base.
[32] *See* Amended Form ADV, Part 1A, Section 7.B.(1) of Schedule D, Question 23.(a)(2) [emphasis added].
[33] Advisers Act Rule 204-2.
[34] *Id.*; *see also* Adopting Release, *supra*.
[35] *Id*.
[36] *See* Advisers Act Rule 206(4)-5.
[37] Capitalized terms used but not defined in this section have the meaning set forth in Rule 206(4)-5; see also the Pay to Play Rule Adopting Release No. IA-3043 (Sep. 13, 2010), available at https://www.sec.gov/rules/final/2010/ia-3043.pdf.
[38] *See* Rule 206(4)-5(f)(3).
[39] In January 2017, the SEC announced settlements with ten investment advisory firms relating to charges that they violated the Pay-to-Play Rule by receiving compensation from public pension funds within two years after campaign contributions made by the firms' associates. The contribution amounts that triggered enforcement ranged from $400 to $10,000; the associated fine amounts ranged from $35,000 to $100,000. Eight of the settling parties were private equity funds or venture funds. *See* SEC Press Release of Jan. 17, 2017 containing links to all ten settlement orders, available at https://www.sec.gov/news/pressrelease/2017-15.html.
[40] *See* SEC 2017 Examination Priorities.
[41] *See* Ceresney, May 12, 2016.
[42] David W. Blass, Chief Counsel, Division of Trading and Markets, "A Few Observations About the Private Fund Space," Apr. 5, 2013, available at http://www.sec.gov/News/Speech/Detail/Speech/1365171515178.
[43] *Id*. On an equally concerning note for private equity advisers, Mr. Blass identified the risk of conducting brokerage activities relating to common fees charged by fund advisers (especially in the buyout space), which include fees paid by a portfolio company relating to an acquisition, disposition (including an initial public offering) or recapitalization. Importantly, the comments identified a potential argument that brokerage activities were not being conducted if the advisory fee is wholly offset by the amount of a transaction fee.
[44] *See, e.g.*, In re Blackstreet Capital Management, LLC, et al, Administrative Proceeding File No. 3-17267 (June 1, 2016), *available at:* https://www.sec.gov/litigation/admin/2016/34-77959.pdf.
[45] *See, e.g.*, Citizen VC, Inc. No Action Letter (Aug. 6, 2015), available at https://www.sec.gov/divisions/corpfin/cf-noaction/2015/citizen-vc-inc-080615-502.htm.
[46] *See, e.g.*, Peter B. Driscoll, Acting Director, OCIE, "Improving Investment Adviser Compliance," September 14, 2017, available at https://www.sec.gov/news/speech/speech-driscoll-2017-09-14.
[47] In addition to the Risk Alert relating to performance advertising, in 2017, OCIE published an alert relating to the most common compliance topics identified in examinations, two alerts relating to cybersecurity issues, and an alert relating to municipal advisors, which are available at: https://www.sec.gov/ocie.
[48] In addition, OCIE holds compliance outreach programs and events across the country as a way to educate and engage with the industry (*See, e.g.*, 2017 Compliance Outreach Program Regional Seminars for Investment Adviser and Investment Company Senior Officers, *available at:* https://www.sec.gov/info/cco/cco-regional-seminars-ia-ic-2017.htm).