

SEC'S "ABERRATIONAL PERFORMANCE INITIATIVE" TARGETING MUTUAL AND PRIVATE EQUITY FUNDS

According to a December 27, 2011, report in The Wall Street Journal (the "WSJ"), the Securities and Exchange Commission ("SEC") has expanded its "aberrational performance initiative" (the "initiative") to include investigations of potential fraud not only in hedge funds, but examinations of mutual funds and private equity funds as well. The initiative utilizes an undisclosed computer monitoring program developed by the SEC specifically to scrutinize fund results compared to overall market performance and volatility. Bruce Karpati, co-chief of the SEC's asset management enforcement unit, acknowledged "there is serious fraud in this space, and we [the SEC] have been attacking it." According to the WSJ report, opposition to the initiative by investment advisers has increased given concerns that strong fund performance in challenging economic times may result in undeserved SEC scrutiny.

ICI ISSUES THIRD COMMENT LETTER TO FSOC REGARDING "SIFI" DESIGNATIONS

On December 19, 2011, the Investment Company Institute (the "ICI") issued its second comment letter of 2011, and third in two years, regarding the Financial Stability Oversight Council's (the "FSOC" or "Council") proposed rule to bring certain non-bank financial companies deemed "significantly important financial institutions," under Federal Reserve supervision. Foremost in its letter, the ICI continues to urge the FSOC to strengthen the confidentiality standards surrounding obtained information by adopting Exemptions 4 and 8 of the Freedom of Information Act pertaining to "trade secrets" and "commercial or financial information" contained in reports prepared for a regulator's use or "supervision of financial institutions." The ICI, which represents U.S. investment companies, seeks to ensure confidential business information remains protected.

In October 2011, the FSOC letter indicated the Council would conduct a thorough analysis to determine the risk that asset management companies pose and examine potential mitigating measures. Accordingly, the ICI letter requests the FSOC conduct this examination and analyze its findings to determine whether such inclusion is warranted prior to including asset managers in the proposed rule.

HOUSE CAPITAL MARKETS SUBCOMMITTEE APPROVES GOP-AUTHORED WHISTLEBLOWER BILL

On December 15, 2011, the House Capital Markets Subcommittee approved a bill authored by Rep. Michael Grimm (R-NY) that would require whistleblowers to first bring information of potential wrongdoings to their company's internal compliance officers prior to reporting such malfeasance to the SEC's Office of the Whistleblower. In response to the bill's passing, SEC Chairman Mary Schapiro stated the Subcommittee's proposal would "have a chilling effect" on the flow of valuable tips from potential whistleblowers. Chairman Schapiro noted that the SEC is "seeing an uptick in higher quality [tips], including potential violations that would have been difficult to detect or which otherwise may never have come to light without the assistance of the whistleblower."

HIGHLIGHTS

SEC computerized monitoring program tracking mutual and private equity fund performance

ICI shows continued interest in shaping FSOC's proposed 'significantly important' rule

House GOP aims to temper SEC Whistleblower program

SEC adopts changes to available corporate civil liability pleas for criminally-liable defendants

SEC MODIFIES CONDITIONS FOR “NEITHER ADMIT NOR DENYING” WRONGDOING

In response to criticism from Judge Jed Rakoff, U.S. District Judge for the Southern District of New York, the SEC announced on January 6, 2012 that it would no longer allow companies to deny wrongdoing in civil settlements if they previously admitted or were convicted of such wrongdoing in a corresponding criminal case. In announcing the change, SEC Enforcement Division director Robert Khuzami explained, “Under our traditional ‘neither admit nor deny’ approach, a defendant could be found guilty of criminal conduct and, at the same time, settle parallel SEC charges while neither admitting nor denying civil liability.” Khuzami continued that it “seemed unnecessary for there to be a ‘neither admit’ provision in those cases where a defendant had been criminally convicted of conduct that formed the basis of a parallel civil enforcement proceeding.”

SEC TO HOLD COMPLIANCE SEMINAR FOR ADVISER AND FUND CCOs AND SENIOR OFFICERS

The SEC will be holding a Compliance Outreach Program for Investment Advisers and Investment Companies on January 31, 2012 in Washington, D.C. While no longer accepting registrations for in-person attendance, the agenda and a live webcast of the event are available on the SEC’s website at www.sec.gov.

- <http://www.sec.gov/news/otherwebcasts.shtml>
- <http://www.sec.gov/info/complianceoutreach/complianceoutreachns2012-agenda.htm>

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