

Investment Management & Funds Regulatory Update - December 2024

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In this issue, we discuss recent developments regarding enforcement of the Corporate Transparency Act, and enforcement actions involving investment advisers' alleged violations of the Marketing Rule and repeated filing violations.

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Industry update

Fifth Circuit reinstates injunction on Corporate Transparency Act; reporting requirements on pause

Reversing an order issued earlier this week, the Fifth Circuit reinstated the nationwide injunction on enforcement of the Corporate Transparency Act, placing reporting requirements back on pause. For more information, please see our recent [client update](#) on this topic.

Litigation

SEC settles alleged Marketing Rule violations arising out of hypothetical and back-tested performance models

On December 20, 2024, the SEC issued an order (the Atlas Order) instituting and settling administrative and cease-and-desist proceedings against Atlas Financial Advisors, Inc., (Atlas) a Oroville, California-based registered investment adviser with approximately \$106 million in assets under management. Atlas allegedly advertised its investment strategies using hypothetical and back-tested performance models without complying with Advisers Act Rule 206(4)-1, the Marketing Rule).

Under the Marketing Rule, registered investment advisers are prohibited from including hypothetical performance information in their advertisements unless, among other things, the adviser adopts and implements procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the audience of the advertisement.

According to the Atlas Order, Atlas's public website advertised its "Portfolio Shield" investment strategies using statements and factsheets that presented hypothetical performance derived from model portfolios and backtested against data predating the development and implementation of the Portfolio Shield strategies. Atlas also allegedly failed to disclose that the hypothetical performance was calculated from model portfolios that did not follow the advertised investment strategies.

In addition, Atlas allegedly stated that the Portfolio Shield strategies used a "systematic options overlay," when no such overlay was used, and misstated the portfolio managers' experience.

Atlas also violated the Marketing Rule, according to the Atlas Order, by failing to present net hypothetical performance alongside gross hypothetical performance, as the Marketing Rule requires, and failed to ensure that the hypothetical performance presented was relevant to the financial situation and investment objectives of the intended audience, as the Marketing Rule also requires.

In addition to these substantive violations, Atlas also failed, allegedly, to maintain books and records necessary to demonstrate the calculation of the performance models, and failed to implement compliance policies and procedures relating to representatives' trading in the same securities they recommended to clients.

On account of these alleged violations, the SEC charged Atlas with violating Sections 204 and 206(4) of the Advisers Act, and Rules 204-2(a)(16), 206(4)-1(a), 206(4)-1(d), and 206(4)-7 thereunder. Atlas agreed to be censured, to pay a civil money penalty of \$175,000, to cease and desist from future violations, and to evaluate and update its policies, procedures, and disclosures.

– [See a copy of the Atlas Order](#)

SEC reaches settlements with seven private fund advisers for repeated failures to file Form PF

On December 13, 2024, the SEC issued seven orders (the Form PF Orders) instituting and settling administrative and cease-and-desist proceedings against seven private funds advisers for repeated failures to file Form PF as required.

Since 2012, private fund advisers managing \$150 million or more of assets are required to file Form PF at least annually. In its Administrative Summary of these settlements, the SEC states that it uses the information disclosed in Forms PF in its regulatory programs "including examinations, investigations and investor protection efforts," and that the Financial Stability Oversight Council uses the aggregate data disclosed in Forms PF to evaluate systemic risks.

Each of the private fund advisers charged in the Form PF Orders allegedly failed to file Form PF for multiple years; the shortest period alleged was three consecutive years, and some of the funds allegedly failed to file for five consecutive years.

On account of these failures, each fund is alleged to have violated Rule 204(b)-1 under the Advisers Act. The seven funds agreed to pay civil money penalties aggregating to a total of \$790,000, ranging from \$90,000 to \$150,000.

– [See a copy of the Form PF Orders administrative summary](#)

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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