

HAYNES BOONE

SEC Private Fund Focus: Issues and Solutions



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September 9, 2021

Presenters

Taylor Wilson – Managing Partner, Haynes and Boone, LLP

Taylor H. Wilson joined Haynes and Boone in 1990 and currently serves as managing partner of the firm. Taylor focuses his practice on corporate/securities, private equity, mergers and acquisitions and general corporate matters, and regularly advises investment advisers to both domestic and offshore funds with respect to fund formation and investment management activities. Taylor has been recognized as one of The Best Lawyers in America, Woodward/White, Inc., for Securities Law/Capital Markets Law 2007-2012; and for Corporate Law, 2013-2021. He has also been recognized as a Texas Super Lawyer, Thomson Reuters – Securities and Corporate Finance 2003-2013. Taylor received his B.A. from Amherst College and his J.D. from Southern Methodist University.

Kimberly Garber – Founder/Chief Executive Officer, CORE-CCO

As Founding Principal of CORE-CCO, a specialty compliance firm providing outsourced compliance resources and expertise to private fund managers and select institutional managers, Ms. Garber has nearly 30 years regulatory and compliance experience. She is the former head of the SEC Fort Worth Regional Office Examination Program and is an expert in federal securities laws and regulatory developments. Ms. Garber is also an expert in private fund compliance issues, providing compliance services to private equity funds, hedge funds, real estate funds, oil and gas and other alternative fund managers. As an experienced in-house compliance officer and regulator, she has extensive regulatory contacts and insights into regulatory and compliance processes and challenges.



Presenters

Igor Rozenblit – Managing Partner, Iron Road Partners

Igor is a leading expert in financial regulation who helped shape the U.S. Securities and Exchange Commission’s regulatory approach to the private capital markets. Igor focuses on helping clients successfully navigate a broad range of challenges stemming from regulatory examinations, investigations, litigation, disputes and other crisis scenarios. Igor’s unique combination of investing experience, due diligence expertise and decade of service as the SEC’s primary private markets expert allows him to provide insightful and practical guidance to clients grappling with complex regulatory and operational issues. While at the SEC he held various leadership positions including, Fellow in the Division of Enforcement’s Asset Management Unit, founder and co-head of the Division of Examinations’ Private Funds Unit and co-lead for the agency’s inter-divisional Private Fund Specialized Working Group. Before joining the SEC, Igor held various senior investment roles. He headed the North American private market investment activities for Amundi Asset Management where he invested in and performed due diligence on hundreds of private equity investment managers. Before Amundi, Igor was a private equity investment professional completing equity, debt and structured investments in healthcare and industrial companies. Igor holds a Master of Business Administration with Honors from the University of Chicago’s Booth School of Business and a Bachelor of Science in Computer Science from the University of Michigan.



Agenda

- **SEC Private Fund Focus**
 - Gensler Era Developments/Focus Areas
 - Potential Rulemaking
 - Exam & Enforcement Developments
- **Private Fund Risk Alert**
 - Conflicts of Interest
 - Fees & Expenses
 - Code of Ethics / Material Non-Public Information
- **Challenging Issues & Potential Solutions**
 - Real Estate Funds/SPVs
 - Venture Capital Funds
 - Product Line Expansion
 - End of Fund Life Issues



Gensler Era Developments/Focus Areas

Chairman Gensler testified before Congress noting SEC focus on the following areas and others slated for upcoming rulemaking:

Private Funds

- 18,000 PE Funds / 58% increase over 5 years
- 1,700 VC Funds / 110% increase over 5 years
- Potential implications for examinations

Digital Assets

- \$1.6 trillion as of May 2021 / \$9 billion 5 years ago
- Digital assets as securities
- Private fund compliance considerations

Fintech & Data Analytics

- Market events centered on mobile brokerage apps
- Growing reliance on artificial intelligence
- Request for comment on emerging technologies
- Examination and compliance considerations

Potential Rulemaking

- The SEC rulemaking agenda includes topics that may impact private funds, several of which have been highlighted in Congressional testimony.

Environmental, Social and Governance (ESG)

- Climate change disclosure
- Human capital management disclosure
- Corporate board diversity disclosure
- Investment adviser/investment company disclosure
- Private fund considerations and best practices

Special Purpose Acquisition Companies (SPACs)

- Wave of IPOs in 2020 and 2021
- Unprecedented surge in blank-check IPOs/SPACs
- Recent guidance – conflicts, disclosures, accounting
- SPAC enforcement cases and private litigation
- Private fund considerations and best practices

Cybersecurity Risk Governance

- Significant increase in security breaches
- Potential disclosure for public issuers
- Prior SEC guidance and risk alerts
- Cybersecurity enforcement cases
- Private fund considerations and best practices

Potential Rulemaking (continued)

Form PF

- Non-public private fund reporting form
- Potential amendments TBD
- Periodic updates to FAQ

Custody Rule

- Prior request for comments
- Expected to address digital assets
- Challenging issues for private funds

Examination Developments

Daniel Kahl named Acting Director, Division of Examinations

- 2021 Private Fund Exam Priorities
 - Compliance risks and deficiencies
 - Disclosures of conflicts of interest
 - Disclosures of investment risks and impact of economic conditions
 - Preferential treatment of certain investors
 - Liquidity considerations, gates and suspension of withdrawals
 - Portfolio valuations and impact on management fees
 - Principal and cross transactions and related party transactions
 - Fund restructurings and stapled secondary transactions



Examination Developments (continued)

Remote examinations expected to continue throughout 2021

- Risk Alerts
 - Fixed Income Principal & Cross Transactions (July 21, 2021)
 - ESG Investing (April 9, 2021)
 - Digital Asset Securities (February 26, 2021)



Enforcement Developments

Gurbir S. Grewal appointed Director, Division of Enforcement

- **Cybersecurity Controls & Procedures Cases**
 - Cetera Entities (August 30, 2021)
 - Cambridge Entities (August 30, 2021)
 - KMS Financial Services Inc. (August 30, 2021)
 - First American Financial Corporation (June 15, 2021)
- **Insider Trading Cases**
 - Matthew Panuwat – Shadow Insider Trading (August 17, 2021)
 - Apostolos Trovias (July 9, 2021)
 - Eric J. Watson, Oliver-Barret Lindsay, Gannon Giguere (July 9, 2021)
 - Mounir N. Gad & Nathan E. Guido (June 30, 2021)
 - Nathaniel Brown, Benjamin Wyman, et al. (June 15, 2021)
 - Chad Calice and Holly Hand (June 7, 2021)



Enforcement Developments (continued)

- SPAC Cases
 - Trevor R. Milton (July 29, 2021)
 - Stable Road Acquisition Company / Momentus Inc., et al. (July 13, 2021)
- Hedge Front Running Case
 - Sean Wygovsky (July 2, 2021)
- Cherry Picking Case
 - Ramiro Jose Sugranes, UCB Financial Advisers, Inc., et al. (June 10, 2021)
- Undisclosed Fees & Misrepresentations
 - Maxwell Dreyer (May 5, 2021)
- Misrepresentations & Fraud
 - Andrew T. Franzone & FF Fund Management, LLC (April 23, 2021)
 - Tyler Sadek, Scott Wolfrum, Troy Marchand (March 24, 2021)
- Unregistered Offering Fraud
 - Ettro Capital Management Corp. & Peter Ettro (March 15, 2021)



Private Fund Risk Alert

SEC Private Fund Risk Alert highlighted concerns addressed repeatedly in public comments, exam priorities and enforcement cases.

Conflicts of Interest

- Identification and disclosure of conflicts of interest
- Best practices for resolving conflicts of interest
- Common conflicts of interest:
 - Investment allocations
 - Co-investment practices
 - Related party transactions
 - Preferential treatment of investors
 - Affiliated service providers

Private Fund Risk Alert (continued)

Fees & Expenses

- Disclosure of fees and compensation
- Expense allocation best practices
- Common concerns:
 - Valuation impact on fees
 - Management fee offsets
 - Monitoring, oversight and deal fees
 - Compensation of insiders and operating partners
 - Allocation of shared expenses
 - Travel and entertainment expenses



Private Fund Risk Alert

Code of Ethics / MNPI

- Best practices for controlling material, non-public, information (MNPI)
- Information barriers
- Insider trading implications:
 - MNPI & alternative data
 - MNPI & private transactions
 - Shadow insider trading case
 - Policies and procedures cases
 - Other insider trading cases



CLE Accreditation Information

The code word for this Webinar is: **CORE 909**

Please email Shana Sanders (shana.sanders@haynesboone.com) with the following:

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Real Estate Funds / SPVs

- RE investment securities considerations
- Investment Company Act exemptions
- Investment adviser considerations
- Registration status
- Regulatory filings

Practical guidance and best practices:

- Analyze underlying investments to determine whether they are securities
- Review fund governing docs, management role and compensation
- Determine registration status and advisory clients
- Promptly file Form Ds and blue sky filings



Venture Capital Funds

- Venture capital exemption
- State exemptions
- Potential ineligible activities
- LP DDQs and expectations
- Examination of VCs / ERAs

Practical guidance and best practices:

- Establish policies and procedures for compliance with VC exemption
- Maintain documentation of eligibility and review regularly
- Conduct registration analysis and planning
- Prepare for a potential examination



Product Line Expansion

- Restrictive key person provisions
- Investment considerations
- Expense allocation considerations
- Conflicts of interest
- MNPI and information barriers

Practical guidance and best practices:

- Proactively identify conflicts and identify mitigating factors
- Utilize LPACs to approve conflict resolution procedures
- Enhance disclosure to build flexibility in investment allocation
- Expand key person provisions when possible or adjust team composition when not possible



End of Fund Life Issues

- Recapitalizations
- Secondary sales
- Continuation funds
- Other alternatives
- Ongoing audits

Practical guidance and best practices:

- Ensure robust disclosure to all LPs
- Offer equitable options to all LPs
- Conduct independent valuations
- Consider fee implications and potential conflicts



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