Winds of Change: The SEC Under New Leadership

Ryan Swan
Paul Hastings, LLP

As expected, Paul Atkins, who was nominated by President Donald Trump, was confirmed as the 34th chair of the Securities and Exchange Commission (SEC) on April 9, 2025. He replaces Gary Gensler, who vacated the seat in January. In due course, Atkins is expected to install new leadership in key divisions of the SEC affecting private fund managers, including the Divisions of Investment Management, Examinations, and Enforcement. Private fund sponsors (and the asset management industry generally) have been largely optimistic regarding the selection of Atkins (more on that below), but it's worth reflecting briefly on just how much has changed in the past year.

In the spring of 2024, registered private fund sponsors, including those in the real estate industry, were focused on assessing the impacts and business disruptions anticipated from the pending implementation of the SEC's Private Fund Adviser Rules—which loomed as a substantial and costly overhaul to private fund regulation. Although the Private Fund Adviser Rules were certainly one of the most extensive rulemakings, Gensler's agenda included many other proposed rules broadly affecting regulation of the asset management industry generally and private fund sponsors specifically. Private fund regulatory lawyers, fund administrators, and compliance consultants fielded countless calls, sponsored seminars, reviewed existing fund documents, and prepared template materials in preparation for the Private Fund Adviser Rules. Many sponsors increased their budgets for compliance costs, made new hires, and diverted accounting, investor relations, and other personnel from their typical functions to address the new requirements of the Private Fund Adviser Rules and other Gensler-era agenda items.

In many cases, not just sponsors were frustrated with the pace and content of rulemaking, many private fund investors were as well; some of the regulatory efforts were viewed as likely to result in additional compliance costs (some of which would be borne by funds) without significant gains. For example, although the Private Fund Adviser Rules initially had broad support among private fund investor organizations, many also offered significant commentary regarding where they felt the proposed rules had missed the mark. Enter the federal courts, which chastened the SEC with a series of decisions curbing recent SEC excesses and, extraordinarily, vacated the Private Fund Adviser Rules in their entirety as being beyond the scope of the SEC's delegated statutory authority. This put into doubt not only the future of the Private Fund Adviser Rules but also the likelihood of success for other pending SEC rules relating to cybersecurity; custody of client assets; the use of predictive data analytics and artificial intelligence; oversight of outsourced service providers; required environmental, social, and governance disclosures; and other matters. With respect to which, private fund regulatory lawyers, fund administrators, and compliance consultants fielded calls, sponsored seminars, etc. To be sure, sponsors are not mourning the abandoned or sidelined regulatory initiatives. The point is that the uncertain regulatory landscape—which has been a feature of the industry's relationship with the SEC over the past several years—has been costly and, ultimately, wasteful because industry participants have expended considerable resources to stay prepared for changes that are unlikely to take effect. So it is no surprise that private fund sponsors are optimistic regarding the change in SEC leadership. A lighter-touch SEC also may free up resources, enabling sponsors to more fully focus on responding to the specific concerns of their limited partner base and enhance the role of investor organizations as they work directly with sponsors to drive alignment on best practices.

What to Expect

Atkins previously served as an SEC commissioner for six years under the George W. Bush administration. After that, he worked in the private sector, including

most recently at Patomak Partners, a risk management and consulting firm for fintech, banking, and asset management businesses. Atkins has been an outspoken proponent of practical regulation and reforms to the SEC enforcement focus and process. He is expected to usher in a regulatory environment focused on the SEC's core mission of facilitating capital formation and protecting investors—particularly retail investors. Recent commentary during a Senate hearing relating to his appointment as chair underscores these themes. In the hearing, Atkins expressed concern over the decline in public companies and the burdensome regulation applicable to public market participants. To facilitate capital formation, Atkins expressed a willingness to eliminate regulatory roadblocks. With respect to private funds, he emphasized that private fund investors are sophisticated, have the means to understand the terms of their investments, do not require heightened protections provided by additional regulatory measures, and may make investments in public funds if they seek an investment product subject to tighter regulation.

Regarding enforcement, Atkins has been critical of regulation by enforcement—instances in which the SEC has used an enforcement action in lieu of formal rulemaking to send a message to a regulated industry or curb a particular activity. He also previously has indicated that he dislikes the emphasis on the number of enforcement actions and the dollar amount of remedies and penalties obtained as a measure of the SEC's enforcement efforts. Instead, he has expressed preferences for clear rulemaking and enforcement against bad actors for significant violations and misconduct.

None of this is to suggest that the SEC's new leadership is planning to rip up the rule book, but Atkins is expected to focus more on bread-and-butter regulation aimed at broadly protecting the capital markets and retail investors in particular and rules that thoughtfully foster valuable new markets and asset classes (such as cryptocurrencies), in each case without stifling innovation. Private fund sponsors have been an express area of focus for SEC rulemaking and the SEC's Division of Examinations for several years running. Atkins's priorities are broadly focused elsewhere—whether on improving the state of capital formation in the public markets, establishing a definitive regulatory framework for cryptocurrencies, or protecting retail investors. Taken together with his public commentary about private funds being appropriately regulated under the existing framework, participants in the private fund industry are hopeful that Atkins's stated priorities presage an overall lighter touch from the SEC than in recent years—fewer rulemakings and precedent-setting enforcement actions aimed at the industry.

Early Returns?

Of course, the commentary above is speculation, joining a chorus of other voices speculating on similar themes. It's certainly too early to tell what actual policy initiatives, structural changes, and examination and enforcement priorities will develop under Atkins's leadership. However, certain recent updates from the SEC are encouraging.

SEC No-Action Letter May Ease Diligence Burden to Facilitate 506(c) Offerings

In March, the SEC issued no-action guidance alleviating the diligence burden of using the Rule 506(c) offering exemption. By contrast to Rule 506(b), Rule 506(c) allows issuers and sponsors to utilize general solicitation and more broadly market a private placement offering so long as the sponsor takes reasonable steps to verify that all purchases are "accredited investors." Rule 506(c) was adopted in 2013, but reliance on this exemption, particularly in the private fund industry, has been modest. This is because the enhanced verification steps required under 506(c) largely have been interpreted to mean obtaining additional documentation from a prospective investor—whether a certification from an attorney, an accountant, or a broker for the investor or income or tax documentation supporting its status as an accredited investor.

Loath to add friction to an already complicated subscription process, many sponsors declined the advertising flexibility offered under Rule 506(c). The SEC's March no-action letter has the potential to expand the use of 506(c) by easing the diligence burden in circumstances in which investors are making a contribution in excess of certain minimum investment

amounts (as described in the letter, generally in excess of $200,000 commitments for natural persons and $1 million commitments for entities). Together with a representation that an investor has not obtained third-party financing specifically to meet the minimum investment amount, an issuer can rely on the high minimum investment amount as verification of the investor's accredited investor status, obviating the need for requesting additional documentation. This development likely won't lead to an overnight change in a sponsor's fundraising prospects or sources of capital, but it will give investor relations departments a freer hand in promoting firm successes to attract positive press and more widespread attention during a fundraise. By showing responsiveness in this way, the SEC may be signaling a willingness to engage on similar burdens unnecessarily inhibiting the capital formation process.

Marketing Rule Guidance Clarifies Application of Net Performance Requirement to Deal-by-Deal Asset Track Record

Additionally, in March, the SEC released clarifying guidance in the form of FAQs addressing certain Marketing Rule compliance topics. As a reminder, the SEC's new Marketing Rule for investment advisers took effect in 2022. It was a significant overhaul to the prior framework and resulted in changes to the way track record performance was presented—most significantly because it was interpreted to require net performance information with respect to performance extracts. In general, private fund investors were not asking for this kind of information; both sponsor and investor parties recognized the difficulty of attributing fund-level expenses at the investment level. Broadly speaking, the updated FAQs clarify that net performance information is not required for single investment, property-by-

property, or extracted performance (for example, performance segments such as real estate strategy or industry vertical) when accompanied by total gross and net performance for the relevant portfolio(s)/fund(s). This guidance will enable many private fund sponsors to return to the historical practice (the prevailing practice prior to the new Marketing Rule that took effect in November 2022) of including property-by-property performance information in marketing materials solely on a gross basis, and it provides sponsors additional flexibility to align their marketing materials with investor expectations. Prior SEC guidance on the topic had been much less clear, and the resulting ambiguity led much of the industry to prepare variants of net performance information for performance extracts, including on a property-by-property basis. Additionally, many SEC examiners pushed for the broader interpretation, leaving sponsors with little choice but to adopt the SEC's construction. This diverted the time and attention of accounting, compliance, and investor relations personnel in order to revise marketing materials and prepare metrics that the private fund industry broadly agreed did not convey meaningful returns information to limited partners or prospective investors. Again, by proactively addressing this issue, the SEC has provided clarity and eliminated a burden that it had been at pains to defend under prior leadership.

SEC Centralizes Oversight of Enforcement Investigations

Finally, the SEC recently finalized a rule requiring the commissioners to vote on issuances of formal orders of investigation. Over the years, this power has been delegated to the Division of Enforcement, which enables the Division of Enforcement a relatively freer hand in pursuing enforcement priorities with less initial oversight. The SEC's recent rule returns the power to the five-commissioner board, which comprises a majority of appointees from the current president. By tightening the reins on the Division of Enforcement, the commissioners will have more ability to guide the enforcement process to align with the leadership's stated priorities. To the extent this reduces formal enforcement investigations by creating a higher bar, it will allow at least some regulated entities to avoid the very costly litigation process of interacting with the SEC's Division of Enforcement.

Conclusion

As evidenced by the above, early signals—even though undertaken prior to Atkins's confirmation—are encouraging for the private fund industry and other regulated participants in the capital markets. It remains to be seen whether, for instance, the era of multimillion-dollar settlements for recordkeeping violations relating to off-channel communications is over for now. However, observers have reasons to hope that real changes are afoot that represent a focus on promoting regulatory clarity and fostering capital formation as opposed to penalizing a disfavored industry or touting year-over-year growth in enforcement penalties. At the same time, sponsors would do well to remember that any potential realignment under the Trump administration and Atkins is just another example of the pendulum swinging and that it will eventually swing back. In the meantime, maintaining focus on good fiduciary practices while shedding the cost overhang of uncertainty over regulatory requirements is welcome for all market participants. ■

Ryan Swan is a Partner in the Investment Funds & Private Capital practice of Paul Hastings, LLP. *The author acknowledges the contributions of Max Rosenberg and Josh Sternoff.*