



# COMPLIANCE FLASH

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## A Publication of Seward & Kissel Regulatory Compliance

### SEC Division of Examinations Publishes Risk Alert on Private Fund Adviser Deficiencies

The SEC's Division of Examinations published a [Risk Alert](#) detailing commonly observed deficiencies in its exams of private fund advisers. The Risk Alert supplements the Division of Examinations' [prior Risk Alert](#) on private fund advisers examination observations by highlighting four areas of concern: (i) failure to act consistently with disclosures, (ii) use of misleading disclosures regarding performance and marketing, (iii) due diligence failures relating to investments or service providers, and (iv) use of potentially misleading "hedge clauses." Seward & Kissel's client alerts on the Risk Alert and the prior Risk Alert are available [here](#) and [here](#), respectively.

### SEC Proposes Heightened Form PF Reporting Requirements

The SEC [proposed amendments](#) to Form PF that would require advisers to large hedge funds and advisers to one or more private equity funds to file a current report within one business day of the occurrence of certain reportable events. The proposed amendments would reduce the threshold for reporting as a large private equity adviser from \$2 billion to \$1.5 billion, and require a large private equity adviser to report additional information regarding its funds. Seward & Kissel's client alert on the proposed amendments is available [here](#).

### SEC Sanctions Adviser for Failing to Adopt and Implement Policies and Procedures Regarding the Use of Hypothetical, Backtested Performance

The SEC settled an [enforcement action](#) against an adviser for failing to adopt and implement policies and procedures reasonably designed to prevent false or misleading advertisements concerning the hypothetical, backtested performance of the adviser's proprietary algorithmic trading strategies. The SEC found that the adviser failed to disclose certain dissimilarities between the backtest and the actual, "live" versions of the strategy, including the fact that the backtest and the live strategy relied on different securities when constructing a model portfolio.

### SEC Settles Enforcement Action against Adviser for Misrepresenting Fee Offset and Improper Hedge Clause

The SEC settled an [enforcement action](#) against an adviser for misrepresenting a fee offset and using a "hedge clause" that misled investors. The SEC found that the adviser failed to offset its advisory fees with commissions collected by an affiliated broker as stated in the adviser's Form ADV brochure. Additionally, the SEC found that the adviser's advisory agreements included a misleading hedge clause that would protect the adviser and any of its affiliates from "all claims," without any exceptions. The SEC highlighted that the adviser did not adequately explain the hedge clause to its mostly retail investors.

### SEC "Shadow Trading" Enforcement Action Advances

The District Court presiding over SEC v. Matthew Panuwat, the SEC's first of its kind "shadow trading" action, denied the defendant's motion to dismiss. In denying the motion, the Court found that the SEC sufficiently pled materiality because confidential information concerning a merger could be material as to a company not involved in the merger. Seward & Kissel's client alerts on the SEC's complaint and the Court's recent order are available [here](#) and [here](#), respectively.

### Upcoming Compliance Due Dates

- TIC Form SLT (February 23)
- Annual Exemption Affirmation for CPOs and CTAs relying upon CFTC Rules 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) and/or 4.14(a)(8) (March 1)
- Form PF Quarterly Update for all "large hedge fund advisers" (March 1)
- Form PRQ (March 1)
- Periodic Report for CPOs (for February 2022) (March 2)

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