

MEDIA MENTIONS

Schulte partners Allison Scher Bernbach and Jennifer Dunn quoted in *Private Equity Law Report*

September 26, 2023

Schulte Roth & Zabel partners Allison Scher Bernbach and Jennifer Dunn were recently quoted in Rorie A. Norton and Vincent Pitaro's *Private Equity Law Report* article, "Final Private Fund Reforms: Overview of the New Rules and Analysis of the Restricted Activity Requirements (Part One of Three)," where they discussed the SEC's Private Fund Advisers Rules, adopted last month.

One change that comes with the rules is that they may force managers to disclose an examination sooner than they would have otherwise so that they can pass along the expenses to investors. "Managers do not usually run to tell investors when they are being examined," Jennifer explained. "Managers typically want to figure out what's going on, the scope of the examination and whether it is targeting any actual misconduct by the manager before notifying investors," facts that are not always apparent early on in an examination.

"Some examinations are ordinary course efforts by the SEC to gain general information about industry practices (e.g., sweep exams), and everyone gets caught up in those at one point," Jennifer said. Noting that many examinations have a way of evolving over time, she explained, "For example, the SEC might start an examination looking into a particular instrument a manager has traded, but then discover a books-and-records violation under the Advisers Act. Once the investigation results in a sanction for violation of the Advisers Act, a manager cannot charge the

fees and expenses of such investigation to the fund (even if they have already received investor consent to do so).”

Additionally, when multiple private funds or clients advised by an adviser have invested in the same portfolio investment, the adviser may not allocate fees or expenses related to that investment on a non-pro rata basis unless:

- the allocation is “fair and equitable under the circumstances”; and
- before making the allocation, the adviser distributes written notice to investors of the allocation and an explanation of why it is fair and equitable.

To be fair and equitable, an allocation does not have to treat all investors identically, however. Whether the allocation is fair and equitable will depend on factors relevant to the expense in question. “The fair and equitable standard is in keeping with an adviser’s existing fiduciary duties, so that element of the Rule should not meaningfully alter industry practices,” noted Allison.

Read the article.

Related People



**Allison
Scher Bernbach**

Partner
New York

Practices

INVESTMENT MANAGEMENT

REGULATORY AND COMPLIANCE