

## SEC Charges Private Fund Manager with Advertising Rule Violations and Compliance Failures

June 2020

On April 17, 2020, the SEC settled charges<sup>1</sup> against a registered investment adviser for distributing allegedly misleading advertising materials. From 2014 through early 2015, while marketing for a private fund, the manager utilized marketing materials that contained a track record of its principals' investment decisions while employed by a prior firm. This track record included an investment in a private fund managed by a third party (where the principals had rights to veto certain investments for the first three years of the term), which was described as an early-stage "direct" oil and gas drilling interest.

The SEC found that the distribution of these materials violated Section 206(4) of the Advisers Act and Rule 206(4)-1, specifically noting that (i) the inclusion of the prior firm's fund in the track record significantly increased performance, (ii) the distributed materials omitted key information about that particular investment's third-party managed fund structure and (iii) investments in private funds managed by third parties were not consistent with the stated investment program of the private fund being marketed (i.e., "[d]irect investments in oil and gas leases and wells"). In addition, the SEC found that the registered investment adviser violated Advisers Act Rule 206(4)-7 because it did not comply with the firm's policy prohibiting the use of false or misleading marketing materials, "including misleading depictions of investment performance . . ." The SEC imposed a censure and civil monetary penalties of \$1 million.

This enforcement action should remind managers to review track records of investment performance, especially from employees' prior firms, for accuracy, both with respect to the performance numbers themselves and the categorization of investments. Compliance should carefully consider what prior performance should, and should not be, included in a presentation (and what disclosures are necessary to make a presentation not misleading). In addition, managers should consider reviewing their policies and procedures relating to the calculation of performance and preparation of marketing materials.

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<sup>1</sup> See Order Instituting Administrative and Cease-and-Desist Proceedings, available [here](#).

# SchulteRoth&Zabel Private Funds Regulatory UPDATE

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