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SEC PRIORITIES FOR PRIVATE EQUITY AND REAL ESTATE ADVISERS

The SEC's enforcement program for newly registered advisers to private equity funds has focused on advisers' receipt of undisclosed fees and expenses, misallocated fees, and failure to adequately disclose actual or potential conflicts of interest. The authors review this program, citing SEC directors' speeches and Commission enforcement actions. They suggest practical steps for advisers to take to avoid being charged with breach of fiduciary duty to their clients.

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Prior to 2010, private equity and real estate advisers typically did not register with the SEC in reliance on a registration exemption for advisers with fewer than 15 clients that do not hold themselves out to the public as investment advisers. However, with the enactment of the Dodd-Frank Act in 2010, these advisers were required to register with the SEC.¹ As a result, among other things, those advisers became subject to periodic examination by the SEC's Office of Compliance Inspections and Examinations ("OCIE"), giving the SEC increased visibility into their activities.

In October 2012, OCIE created a specialized unit – the Private Funds Unit – and launched its "Presence Exam Initiative" in order to quickly establish a presence with the private equity and real estate firms, and to

assess the issues and risks presented by their unique business model.² By 2015, OCIE had examined 25% of the newly registered private fund advisers, including advisers to private equity, real estate, and hedge funds.³ In 2014, Andrew Bowden, then-Director of OCIE, publicly identified a number of industry practices that OCIE had observed during the Presence Exam

¹ Title IV of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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² Andrew Bowden, Director of Office of Compliance Inspections and Examinations, 'Spreading Sunshine in Private Equity' at the Private Equity International Private Fund Compliance Forum (May 6, 2014), available at <https://www.sec.gov/news/speech/2014--spch05062014ab.html> ("Bowden Speech").

³ See Marc Wyatt, Acting Director, OCIE at Private Equity International Conference (May 13, 2015), available at <https://www.sec.gov/news/speech/private-equity-look-back-and-glimpse-ahead.html> ("Wyatt Speech").

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