

## Australia: Is ASIC Coming for Private Market Funds?

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### *What the ASIC chair said*

At a recent industry event, the chair of the Australian Securities and Investment Commission (ASIC), indicated that ASIC would be increasing its scrutiny of private market funds.

In particular, Joe Longo said that there is a lack of transparency in private markets by virtue of their very nature and ASIC was concerned that investors in private funds (often referred to as wholesale funds in Australia) might not be adequately protected. He also said that ASIC had, in the case of private credit, established a dedicated team to investigate conflicts of interest and determine how firms value the assets they have lent against.

### *What other regulators have done*

Other regulators around the world, like the US Securities Exchange Commission (SEC), have taken enforcement action against private fund managers in recent years. Some of the issues that the SEC has identified as areas of focus have included:

- disclosure of fee and expense allocation practices and other conflicts of interest;
- marketing of funds, including use of hypothetical performance, valuation methodologies and cherry-picking;
- adherence to fund documents.

A number of these matters came to the SEC's attention when the managers disclosed them in their annual filings, but the SEC took action because the relevant matters were not adequately disclosed before limited partners made a commitment to the relevant private funds. Disclosure to the relevant fund's limited partner advisory committee (LPAC) was also too late – the disclosure needs to be before the investor makes the decision to invest so that they can make an informed decision. ASIC would likely take a similar view.

### *What could ASIC do?*

Historically, ASIC's attention has focused on registered funds rather than wholesale, unregistered funds. This is because, like in most jurisdictions, there is relatively little regulation that applies to unregistered funds in Australia. However, private funds involve the provision of financial services and

Australian financial services (AFS) licences, so ASIC has enforcement powers in relation to market misconduct (eg misleading or deceptive conduct) and AFS licensees.

Therefore, using these powers like the SEC, ASIC has acted against trustees of unregistered funds in relation to advertising of past and target returns and inadequate warnings. However, ASIC is at a disadvantage because AFS licensees are not subject to the same annual disclosure requirements as US registered investment advisers.

Accordingly, ASIC's action in this area is likely to start with a data gathering exercise followed by enforcement action if it identifies areas of concern.

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