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RECENT SEC LEADERSHIP CHANGES

The Securities and Exchange Commission (the "SEC") announced the appointment of Natasha Vij Greiner and Keith E. Cassidy as interim Acting Co-Directors of the Division of Examinations (the "Division"), effective July 25, 2023, while Division Director Richard Best is on extended medical leave. Greiner and Cassidy will also continue to serve in their current leadership roles within the Division.

Greiner currently serves as Division Deputy Director, National Associate Director of the Investment Adviser/Investment Company ("IA/IC") examination program (including the Private Funds Unit) and Associate Director of the Home Office IA/IC examination program. Greiner began her SEC career in the Division as a broker-dealer examiner and has served in a variety of roles across the agency for more than 21 years, including Acting Chief Counsel and Assistant Chief Counsel in the Division of Trading and Markets. Prior to joining the Division, Greiner spent almost a decade in the Division of Enforcement ("Enforcement"), including in its Asset Management Unit, where she investigated possible violations of the federal securities laws and litigated matters in federal district court and administrative proceedings.

Cassidy currently serves as Deputy Director and is the National Associate Director of the Division's Technology Controls Program with responsibility for examinations of Regulation SCI entities and for overseeing the SEC's CyberWatch program and the Cybersecurity Program Office. According to the announcement, Cassidy is also an infantry officer in the United States Marine Corps Reserve where he is the Executive Officer of 4th Reconnaissance Battalion and has earned numerous awards, including a Bronze Star. Cassidy previously served as the Director of the Commission's Office of Legislative and Intergovernmental Affairs, as Chief of Staff and Counsel at the Department of Justice's Office of Legislative Affairs, and as a legislative assistant in the United States Senate.

SEC Appoints George Botic to the Public Company Accounting Oversight Board

The SEC appointed George Botic, CPA, as a Board Member of the Public Company Accounting Oversight Board ("PCAOB") on September 27, 2023. Botic will replace current Board Member Duane DesParte, CPA, whose current term expires on October 24, 2023.

Prior to this appointment, Botic was the Director of the PCAOB's Division of Registration and Inspections, which includes the Global Network Firm Inspection Program, the Non-Affiliate Firm Inspection Program, the Broker-Dealer Auditor Interim Inspection Program, and the registration program. Botic oversaw the registration and inspection of all domestic and foreign accounting firms that audit public companies whose securities trade in the United States, as well as all broker-dealer audits. He previously served in various roles at the PCAOB, including as its Director of the Office of International Affairs, special advisor to former Chair James R. Doty, and Deputy Director of the Registration and Inspections Division. Earlier in his career, Botic was a senior manager with PricewaterhouseCoopers.

SEC RISK ALERTS

Division of Examinations Issues Risk Alert Regarding Investment Adviser Examinations

The Division issued a risk alert (the "Risk Alert") intended to provide additional transparency and insight regarding the scope of investment adviser examinations. The September 6, 2023, Risk Alert provides additional information regarding the Division's examination selection process and information regarding document requests. The Risk Alert describes how the staff's risk-based approach is "dynamic" in adapting to changes in market conditions, industry practices, and investor preferences, and that the information provided may better equip advisers for an examination as well as assist firms in their compliance efforts.

The Risk Alert indicates that the Division utilizes a risk-based approach for both selecting advisers to examine and in determining the scope of risk areas in those examinations. When selecting advisers to examine, the Division considers factors such as which advisers provide services, recommend products, or otherwise meet criteria relevant to the focus areas described in the Division's examination priorities. An adviser may be selected for an examination in order to evaluate firm risks, respond to events that pose risks to investors and the markets, and/or to assess how registrants are adapting to new regulatory requirements. When conducting an examination, the Division leverages technology and utilizes disclosure documents and various filings with regulators such as Form ADV and Form PF in its initial request for information but as an examination progresses it may make requests for additional information.

According to the Risk Alert, the Division selects an adviser to examine based on the firm's characteristics, on a tip, complaint, or referral, or on the staff's interest in a particular compliance risk area. In addition, the Risk Alert noted firm-specific risk factors that the Division staff may consider when selecting advisers for examination, such as those related to a particular adviser's business activities, conflicts of interest, and

regulatory history. The Risk Alert provided examples of Division staff's possible considerations including: (1) prior examination observations and conduct, such as when the staff has observed what it believes to be repetitive deficient practices during more than one review of a firm, significant fee- and expense-related issues, and significant compliance program concerns; (2) supervisory concerns, such as disciplinary history of associated individuals or affiliates; (3) tips, complaints, or referrals involving the firm; (4) business activities of the firm or its personnel that may create conflicts of interest, such as outside business activities and the conflicts associated with advisers dually registered as, or affiliated with, brokers; (5) the length of time since the firm's registration or last examination, such as advisers newly-registered with the SEC; (6) material changes in a firm's leadership or other personnel; (7) indications that the adviser might be vulnerable to financial or market stresses; (8) reporting by news and media that may involve or impact the firm; (9) data provided by certain third-party data services; (10) the disclosure history of the firm; and (11) whether the firm has access to client and investor assets and/or presents certain gatekeeper or service provider compliance risks.

Per the Risk Alert, after an adviser is selected, Division staff assesses the scope of the examination, such as selecting particular areas of the business in which to review. Documents requested will vary from examination to examination depending on the firm's business model, associated risks, and the reason for conducting the examination. According to the Risk Alert, Division staff request and review documents and information to assist in their understanding of advisers' operations, disclosures, conflicts of interest, and compliance practices with respect to certain core areas, including but not limited to custody and safekeeping of client assets, valuation, portfolio management, fees and expenses, and brokerage and best execution.

The Risk Alert provided guidance with respect to what may be requested in the staff's letter to an adviser notifying the firm of the upcoming examination. The initial request for information and documentation typically includes: (1) general information, which provides the staff with an understanding of the adviser's business and investment activities; (2) information about the compliance risks that the adviser has identified and the written policies and procedures the firm has adopted and implemented to address each of those risks; (3) information to facilitate testing with respect to advisory trading activities; and (4) information for the staff to perform its own testing for compliance in various areas.

SEC RULEMAKING

SEC Proposes Rule Amendments to the Broker-Dealer Customer Protection Rule

The SEC proposed amendments on July 12, 2023, to Rule 15c3-3, the Customer Protection Rule, to require certain broker-dealers to increase the frequency with which they perform computations of the net cash owed to customers and other broker-dealers (known as "PAB account holders") from weekly to daily ("Proposed Amendments"). Net cash owed to customers and PAB account holders must be held in a special reserve bank account.

The Proposed Amendments would require broker-dealers with average total credits (the amount of cash owed customers and PAB account holders) equal to or greater than $250 million to make the computations necessary to determine the amounts required to be deposited in the customer and PAB reserve bank accounts daily, as of the close of the previous business day. According to the SEC, by reducing the timeframe between computations, the Proposed Amendments would assist broker-dealers more dynamically in matching the net amount of cash owed to customers and PAB account holders with the amount on deposit in the broker-dealer's customer and PAB reserve bank accounts. The daily customer and PAB reserve computations would safeguard customers and PAB account holders by decreasing the potential for large mismatches to build over time, thereby increasing the likelihood that they are made whole even if a broker-dealer fails.

In addition, the Commission invited comments on whether similar daily reserve computation requirements should apply to broker-dealers and security-based swap dealers with respect to security-based swap customers.

The proposing release was published in the Federal Register on July 18, 2023, and the public comment period ended on September 11, 2023.

"I am pleased to support this proposal because, if adopted, it would help protect customers in the event that a broker-dealer fails," said SEC Chair Gary Gensler. "A key tenet of our securities laws is the segregation of customers' cash and securities from a broker-dealer's own account. Given the speed, scale, and volume of today's market activity, I believe customers would benefit if broker-dealers carrying large credit balances made daily reserve account calculations and deposits. This frequency would better align with the inflows, swings, and balances that broker-dealers experience in today's markets."

SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies

The SEC adopted the final rules regarding cybersecurity risk management, strategy, governance, and incident disclosure by public companies (the "Cyber Rules") on July 26, 2023. The Cyber Rules require registrants to disclose material cybersecurity incidents ("Material Incidents") that they experience and to disclose on an annual basis material information regarding their cybersecurity risk management, strategy, and governance ("Material CRSG Information").

In the proposing release to the Cyber Rules, which was released in March 2022, the Commission proposed new rules, rule amendments, and form amendments to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and material cybersecurity incidents by public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act"). According to the Commission's adopting release, the Cyber Rules will enhance and standardize disclosures regarding cybersecurity risks.

The Cyber Rules require registrants to disclose on the new Item 1.05 of Form 8-K any Material Incident and to describe the material aspects of the incident's nature, scope, and timing, as well as its material impact or reasonably likely material impact on the registrant. Such disclosure must be filed within four business days after a registrant determines that a cybersecurity incident is material, however, the disclosure may be delayed if the U.S. Attorney General determines that immediate disclosure would pose a substantial risk to national security or public safety and notifies the SEC of such determination in writing.

In addition, the Cyber Rules add Regulation S-K Item 106 ("Item 106"), which will require registrants to describe their processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats, as well as the material effects or reasonably likely material effects of risks from cybersecurity threats including previous cybersecurity incidents. Item 106 will also require registrants to describe the board of directors' oversight of risks from cybersecurity threats and management's role and expertise in assessing and managing material risks from cybersecurity threats. These disclosures will be required in a registrant's annual report on Form 10-K.

Under the adopted Cyber Rules, foreign private issuers are required to make comparable disclosures of Material Incidents on Form 6-K and for Material CRSG Information on Form 20-F.

The adopting release indicates that the terms "public companies," "companies," and "registrants" include issuers that are business development companies as defined in section 2(a)(48) of the Investment Company Act of 1940 (the "Investment Company Act"), which are a type of closed-end investment company that is not registered under the Investment Company Act, but do not include investment companies registered under the Investment Company Act.

The final Cyber Rules became effective on September 5, 2023. The Form 10-K and Form 20-F disclosures will be required beginning with annual reports for fiscal years ending on or after December 15, 2023. The Form 8-K and Form 6-K disclosures will be required beginning the later of 90 days after the date of publication in the Federal Register or December 18, 2023. Smaller reporting companies will have an additional 180 days before they must begin providing the Form 8-K disclosure. With respect to compliance with the structured data requirements, all registrants must tag disclosures required under the final rules in Inline XBRL beginning one year after initial compliance with the related disclosure requirement.

"Whether a company loses a factory in a fire—or millions of files in a cybersecurity incident—it may be material to investors," said SEC Chair Gary Gensler. "Currently, many public companies provide cybersecurity disclosure to investors. I think companies and investors alike, however, would benefit if this disclosure were made in a more consistent, comparable, and decision-useful way. Through helping to ensure that companies disclose material cybersecurity information, today's rules will benefit investors, companies, and the markets connecting them."

SEC Proposes Reforms Relating to Investment Advisers Operating Exclusively through the Internet

The SEC proposed rule amendments (the "Proposed Amendments") on July 26, 2023, permitting certain investment advisers that provide investment advisory services through the internet, known as "internet investment advisers" or "robo-advisers," to register with the SEC. The Proposed Amendments

would require an investment adviser, relying on the internet adviser registration rule, to have at all times an operational interactive website through which the adviser provides digital investment advisory services on an ongoing basis to more than one client. The Proposed Amendments would also eliminate the de minimis exception from the current rule by proposing to require that an internet investment adviser provide advice to all of its clients exclusively through an operational interactive website, and make certain corresponding changes to Form ADV.

The Proposed Amendments were published in the Federal Register on August 1, 2023, and the public comment period ended on October 2, 2023.

"In 2002, the SEC granted what was intended to be a narrow exception allowing internet-based advisers to register with the SEC instead of with the states," said SEC Chair Gary Gensler. "A lot has changed in the 21 years since, and I believe an exemption written in 2002 allows gaps in 2023. Thus, today's proposal would modernize the internet advisers exemption to better align registration requirements with modern technology and help the Commission in the efficient and effective oversight of registered investment advisers."

SEC Proposes New Requirements for the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

The Commission proposed new rules (the "Predictive Rule Proposal") on July 26, 2023, that require broker-dealers and investment advisers (collectively, "Firms") to take steps to address conflicts of interest associated with their use of predictive data analytics and similar technologies ("PDA Technology") used to interact with investors in order to prevent Firms from placing their interests ahead of investors' interests.

According to the Predictive Rule Proposal, Firms' use of PDA Technology to optimize for, predict, guide, forecast, or direct investment-related behaviors or outcomes has accelerated. Generally, PDA Technology is a type of advanced analytics that makes predictions about future outcomes using historical data combined with statistical modeling and data mining techniques to assist companies to find patterns in data to identify risks and opportunities to make more informed decisions about where to invest clients' funds.

According to industry sources, use of PDA Technology may benefit investors in providing greater market access, efficiency, and returns. According to the SEC, the Predictive Rule Proposal is important because Firms may use PDA Technology in a manner that places their own interests ahead of investors' interests causing investors to suffer financial harm. Also, given the scalability of PDA Technology, there is a potential for Firms to reach a broad audience at a rapid speed so that any resulting conflicts of interest could cause harm to investors on a broader scale than previously possible.

The Predictive Rule Proposal would require Firms to evaluate and determine whether their use of PDA Technology in investor interactions involves a conflict of interest that results in the Firms' interests being placed ahead of investors' interests. In addition, Firms would be required to eliminate, or neutralize the effect of, any such conflicts and be permitted to employ tools that they believe would address these risks, consistent with the proposal, which are specific to the particular technology they use. The Predictive Rule Proposal would also require Firms to have written policies and procedures reasonably designed to achieve compliance with the proposed rules and to make and keep books and records related to these requirements.

The proposing release was published in the Federal Register on August 9, 2023, and the public comment period ended on October 10, 2023.

Subsequent to the Predictive Rule Proposal's issuance, the Investment Company Institute ("ICI") and 15 other trade associations, including the National Association of Investment Companies, Managed Funds Association, and the American Investment Council, requested that the SEC extend the 60-day comment period for the Predictive Rule Proposal. In a letter dated August 15, 2023, the trade organizations (including a diverse group of market participants, such as registered investment advisers and broker-dealers, registered and private funds, as well as institutional and individual investors) reasoned that "the dramatic, incredibly expansive nature of [the proposal's] restrictions would without question have a severely chilling effect on firms' use of technology" and that it is appropriate to extend the comment period by 60 days because of "the shifting nature of the regulatory and commercial landscape resulting from [the SEC's] proposals and new rules, as well as the cumulative burden on registrants, service providers, and investors…"

The trade organizations' letter also addressed the unprecedented rule proposals issued by the Commission in the past two years as well as its implications that the Predictive Rule

Proposal would have on other recently implemented rules such as the Investment Advisers Act of 1940 (the "Advisers Act") marketing rules, which regulates investment advisers' marketing communications.

"We live in an historic, transformational age with regard to predictive data analytics, and the use of artificial intelligence," said SEC Chair Gary Gensler. "Today's predictive data analytics models provide an increasing ability to make predictions about each of us as individuals. This raises possibilities that conflicts may arise to the extent that advisers or brokers are optimizing to place their interests ahead of their investors' interests. When offering advice or recommendations, firms are obligated to eliminate or otherwise address any conflicts of interest and not put their own interests ahead of their investors' interests. I believe that, if adopted, these rules would help protect investors from conflicts of interest—and require that, regardless of the technology used, firms meet their obligations not to place their own interests ahead of investors' interests."

SEC Enhances the Regulation of Private Fund Advisers

The SEC adopted new and amended rules on August 23, 2023, which enhance the regulation of investment advisers to private funds known as "Private Fund Adviser Rules" (the "Private Fund Rules" or the "Reforms"). The SEC's initial proposed rules were issued on February 9, 2022, and met with intense industry discussion with two rounds of comment periods. According to the SEC, the new rules and amendments are designed to protect private fund investors by increasing transparency, competition, and efficiency in the private funds market. The adopted Private Fund Rules focus on reporting and disclosure obligations as well as impose restrictions and disclosure requirements with respect to certain activities.

Per the SEC release, the Reforms are designed to enhance transparency. The final rules will require private fund advisers registered with the Commission ("Registered Advisers") to provide investors with quarterly statements detailing certain information regarding fund fees, expenses, compensation, and performance. Registered Advisers will also be required to obtain and distribute to investors an annual financial statement audit of each private fund they advise which meets the requirements of the audit provision in the Advisers Act custody rule (rule 206(4)-2) and, in connection with adviser-led secondaries transaction, a fairness opinion or valuation opinion will be required. An adviser-led secondary transaction is one which offers fund investors the option between selling all or a portion of their interests in the private fund and converting or exchanging them for new interests in another vehicle advised by the adviser or any of its related persons.

The Reforms also require Registered Advisers to prepare and distribute to the fund's investors a summary of any material business relationships the adviser has, or has had within the prior two years, with the independent opinion provider. In addition, the Private Fund Rules include amendments to the books and records rule under the Advisers Act for Registered Advisers.

According to the SEC, to address certain conflicts of interest that have potential to lead to investor harm, the Private Fund Rules include a new rule—"the restricted activities rule"—that prohibits all private fund advisers (whether registered or not) from engaging in the following activities unless they provide appropriate specified disclosure and, in some cases, obtain investor consent:

1. Charging or allocating to the private fund regulatory, examination, or compliance fees or expenses of the adviser, unless such fees and expenses are disclosed to investors;
2. Reducing the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, unless the adviser discloses the pre-tax and post-tax amount of the clawback to investors;
3. Charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis unless the allocation approach is fair and equitable and the adviser distributes advance written notice of the non-pro rata charge and a description of how the allocation approach is fair and equitable under the circumstances; and
4. Borrowing money, securities, or other private fund assets, or receiving a loan or an extension of credit, from a private fund client without disclosure to, and consent from, fund investors.

In addition, the Reforms also impose the "preferential treatment rule" which, according to the SEC, addresses the material negative effects of specific types of preferential treatment on other investors. The Reforms prohibit all private fund advisers from providing preferential terms to investors regarding: a) certain redemptions from the fund, unless the ability to redeem is required by applicable law or the adviser offers the preferential redemption rights to all other investors without qualification; and b) certain preferential information about portfolio holdings or exposures, unless such preferential information is offered to all investors. In addition, the SEC adopted a disclosure-based exception to the proposed prohibition, including a requirement to provide certain specified disclosure regarding preferential terms to all current and prospective investors. As such, the Reforms prohibit all private fund advisers from providing preferential treatment to investors, unless certain terms are disclosed in advance of an investor's investment in the private fund and all terms are disclosed after the investor's investment.

The Private Fund Rules also include a "legacy status" provision applicable to certain of the restricted activities and preferential treatment provisions so that advisers and investors would not be required to renegotiate governing agreements for existing funds. Such legacy status will apply to those governing agreements entered into in writing prior to the compliance date and with respect to funds that have commenced operations as of the compliance date.

The Reforms also include amendments to the compliance rule under the Advisers Act requiring all registered advisers, including those that do not advise private funds, to document in writing the required annual review of their compliance policies and procedures. According to the SEC, written documentation of the annual review will help the Commission to determine advisers' compliance with the rules and identify potential weaknesses in compliance programs.

The Reforms as they pertain to industry providers are:

SEC-Registered Private Fund Advisers

- Quarterly Statement Rule: New Rule 211(h)(1)-2
- Private Fund Audit Rule: New Rule 206(4)-10
- Adviser-Led Secondaries Rule: New Rule 211(h)(2)-2
- Books and Records Rule Amendments: Amended Rule 204-2

All Private Fund Advisers

- Restricted Activities Rule: New Rule 211(h)(2)-1
- Preferential Treatment Rule: New Rule 211(h)(2)-3
- Legacy Status

All Registered Advisers

- Compliance Rule Amendments: Amended Rule 206(4)-7(b))

Notably, the Private Fund Rules do not apply to investment advisers with respect to securitized asset funds they advise.

The SEC distinguished compliance dates for the Private Fund Rules:

- **Quarterly Statement and Private Fund Audit Rules.** For larger and smaller private fund advisers, the compliance date is 18 months after publication in the Federal Register.
- **Adviser-Led Secondaries Rule, the Preferential Treatment Rule, and the Restricted Activities Rule**. For advisers with $1.5 billion or more in private funds assets under management, the compliance date is 12 months after the date of publication in the Federal Register; and for advisers with less than $1.5 billion in private funds assets under management, 18 months after the date of publication in the Federal Register.
- **Amended Advisers Act Compliance Rule.** For registered advisers, compliance will be required 60 days after publication in the Federal Register.

"Private funds and their advisers play an important role in nearly every sector of the capital markets," said SEC Chair Gary Gensler. "By enhancing advisers' transparency and integrity, we will help promote greater competition and thereby efficiency. Consistent with our mission and Congressional mandate, we advance today's rules on behalf of all investors—big or small, institutional or retail, sophisticated or not."

SEC Reopened Comment Period for Enhanced Safeguarding Rule for Registered Investment Advisers Proposal

The SEC reopened the comment period on August 23, 2023, for its proposed rule Safeguarding Advisory Client Assets that would redesignate and amend the current custody rule under the Advisers Act to enhance protections of customer assets managed by registered investment advisers. This rule was proposed by the Commission on February 15, 2023, and the initial comment period ended on May 8, 2023.

The comment period was reopened to allow interested persons additional time to analyze the issues and prepare comments in light of the final rules and amendments. The comment period will remain open until 60 days after the date of publication in the Federal Register, which was published on August 30, 2023.

ICI Submits Letter to SEC on Aggregated Impact of Rulemaking

The ICI submitted a letter (the "Letter") to the SEC on August 17, 2023, acknowledging that the SEC has issued numerous "interconnected rule proposals" over the last two-and-a-half years, and according to the ICI, without analyzing them holistically. The Letter raises the concern that the "unprecedented" number of proposals in a short period of time has not afforded regulated entities or market participants the time needed to fully process, digest, and evaluate the interconnections and interdependencies of the rules.

In its Letter, the ICI requests that the SEC: 1) "publish a thorough analysis of the cumulative effects of the interconnected rules that accounts for interconnections and dependencies among them and any other rules the SEC has proposed or intends to propose in the near term; 2) reopen the comment periods for the interconnected rules; and 3) finalize the rules holistically, not one at a time or in isolated series, taking into account not just the expected effects on investors and our capital markets but also practical realities

such as implementation timelines as well as operational and compliance requirements." The Letter also recommends that the SEC publish, for public notice and comment, proposed phased multi-year implementation schedules.

SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names

The final "Fund Names Rule" was adopted by the Commission in a 4-to-1 vote (the "Final Rule") on September 20, 2023. The amendments to the Names Rule will require a greater number of funds to adopt an 80 percent investment policy, including funds with names suggesting a focus in investments with particular characteristics; for example, terms such as "growth" or "value," or certain terms that reference a thematic investment focus, such as the incorporation of one or more ESG factors.

In addition, the Final Rule includes a new quarterly review which requires funds to review their portfolio assets' treatment under its 80 percent investment policy at least quarterly and includes specific time frames—generally 90 days—for getting back into compliance if a fund deviates from its 80 percent investment policy. The adopted amendments require enhanced prospectus disclosure requirements for terminology used in fund names, including a requirement that any terms used in the fund's name that suggest an investment focus must be consistent with those terms' plain English meaning or established industry use. With respect to the terms used in a fund's name, the SEC indicated in the Final Rule release that fund managers will determine how featured terms are defined. Additional N-PORT reporting and recordkeeping requirements for funds regarding compliance with the names-related regulatory requirements were also adopted.

The Final Rule becomes effective 60 days after publication in the Federal Register and according to the Final Rule, fund groups with net assets of $1 billion or more will have 24 months to comply with the amendments, and fund groups with net assets of less than $1 billion will have 30 months to comply.

"As the fund industry has developed over the last two decades, gaps in the current Names Rule may undermine investor protection," said SEC Chair Gary Gensler. "Today's final rules will help ensure that a fund's portfolio aligns with a fund's name. Such truth in advertising promotes fund integrity on behalf of fund investors."

Update to SEC's Rulemaking Spring 2023 Agenda

The Office of Information and Regulatory Affairs released the Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions (the "Agenda") on June 13, 2023. (See "SEC Releases Rulemaking Spring 2023 Agenda" in Blank Rome's Investment Management Regulatory Update dated July 2023.) Since then, three previously proposed rules were adopted in July, August, and September 2023: (i) the final rule on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (effective on September 5, 2023); (ii) the Private Fund Advisers: Documentation of Registered Investment Adviser Compliance Reviews final rule (issued on August 23, 2023, and effective November 13, 2023); (iii) the Fund Names Rule (will become effective 60 days after publication in the Federal Register). (See "SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies," "SEC Enhances the Regulation of Private Fund Advisers," and "SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names" in this *Regulatory Update*.)

Third Quarter Final Rules

- Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies
- Private Funds Rule
- Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names

The following rules were proposed within the third quarter and are also discussed within this Regulatory Update:

Third Quarter Proposed Rules:

- Daily Computation of Customer and Broker-Dealer Reserve Requirements under the Broker-Dealer Customer Protection Rule
- Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers
- Exemption for Certain Investment Advisers Operating Through the Internet
- Safeguarding Advisory Client Assets

SEC ENFORCEMENT ACTIONS

Valuation a Key Focus for SEC Enforcement Unit

At a recent Practicing Law Institute's ("PLI") annual investment management conference in July 2023, Co-Chief of the SEC Enforcement Division's Asset Management Unit ("Enforcement AM Unit") Andrew Dean discussed why the SEC will continue to scrutinize valuation procedures among asset managers and advisor firms. Dean noted reasons why valuation is of important concern including that: (i) marking hard-to-value securities inconsistently can lead to inflated positions, in turn inflating management and performance fees which can mislead investors and potential investors; and (ii) the valuation process is "opaque to investors typically." He also noted that auditors who oversee hard to value assets are important gatekeepers.

Dean's comments echoed those of Vanessa Horton, associate regional director of the SEC's examination unit, who spoke at an ICI conference earlier in March. Horton provided insight that the Division would look specifically at board compliance with respect to the fair valuation rule, record-keeping and reporting requirements, and whether fund sponsors have adjusted their process since September 2022.

Directors Charged with Liquidity Rule Violations Fight Back in Court

An investment advisory firm and two former directors charged with violating the liquidity rule in May 2023 filed a motion to dismiss Enforcement's first action under Rule 22e-4 since it went into effect in 2019, citing that the SEC overstepped its authority and breached the defendant's rights. The SEC charged an investment adviser for aiding and abetting violations of the rules relating to liquidity risk management by an open-end investment company that it advised and whose liquidity risk management program it administered. The SEC also charged the Fund's two independent trustees and two officers of both the advisory firm and of the Fund it advised with aiding and abetting liquidity rule violations by the Fund.

In its original complaint, the SEC alleged the Fund had held approximately 21% to 26% of its net assets in illiquid investments between June 2019 to June 2020 and neither the Fund nor its officers presented a plan to the board to reduce the fund's illiquid investments to 15% or lower, as the liquidity rule required, and did not file the required disclosures with the SEC. Further, the fund's officers classified the largest illiquid investment as a "less liquid" investment against the advice of fund counsel and auditors, and ignored restrictions, transfer limitations, and the absence of any market for the shares during this time in making such classification.

The defendants argued that the rule was invalid, and that the regulator had both exceeded its authority by introducing it and violated their due process by failing to give fair notice that the conduct was prohibited. With respect to the aiding and abetting violations, the defendants claimed that they were unaware of the illiquid classification of shares in question until approximately six months after the fund identified such shares in a letter to the SEC. The defendants argued that "to substantially assist…and seek to make something succeed necessarily requires the alleged aider and abettor to have taken or performed some action to assist the primary violation." The defendants also argued that the complaint failed to allege that the independent trustees consciously assisted the alleged violation. The case is ongoing in the Northern District of New York. (See "SEC Charges Investment Adviser and Fund Trustees with Liquidity Rule Violations" in Blank Rome's July 2023 Regulatory Update.)

SEC Charges New Jersey-Based ETF Manager for Fraudulent Conduct and Bars Founder

The SEC charged Samuel Masucci and ETF Managers Group LLC ("ETFMG"), an SEC-registered investment adviser based in Summit, New Jersey that he founded and controls with disadvantaging an exchange traded fund (the "ETF") and misleading the ETF's trustees to obtain $20 million in rescue financing to avoid a possible bankruptcy. Masucci and ETFMG agreed to pay a combined $4.4 million to settle the charges.

The SEC's order issued on August 1, 2023, found that, in 2019, in exchange for $20 million in financing and other services, Masucci agreed to keep the ETF's securities lending business at the broker-dealer that provided the financing despite offers with better terms from other securities lenders that could have benefited investors. According to the SEC order, Masucci knowingly failed to disclose this joint arrangement between himself and his firm, the fund, and the broker-dealer to the fund's independent trustees, instead telling them that the fund had no other viable options.

The SEC's order found that Masucci and ETFMG violated Sections 206(1) and 206(2) of the Advisers Act and that Masucci, ETFMG, and its parent company, Exchange Traded Managers Group LLC, violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder. Without admitting or denying the SEC's findings, Masucci agreed to a cease-and-desist order, to pay a $400,000 penalty, and to an associational bar under the Advisers Act and a prohibition under the Investment Company Act with a right to reapply after three years. ETFMG and the parent company agreed to censures, to a cease-and-desist order, and to pay, jointly and severally, a civil penalty of $4 million.

Fund Administrator Charged for Missing Red Flags to a Fraud

The SEC announced on August 7, 2023, that it settled charges against Theorem Fund Services LLC, a fund administrator (the "Fund Administrator"), for failing to respond to red flags relating to a fraud against a private fund and its investors.

The Fund Administrator provided administration services to a fund managed by EIA All Weather Alpha Fund Partners ("EIA") and Andrew M. Middlebrooks, both of whom the SEC charged in May 2022 with fraud for allegedly engaging in a scheme that included the misappropriation and misuse of investors' funds over a five-year period. According to the order, during the Fund Administrator's engagement, the fund suffered significant losses as a result of trading by EIA and Middlebrooks; however, the Fund Administrator, at the direction of EIA and Middlebrooks, calculated the net asset value, which did not recognize the losses, and sent investors account statements that materially overstated the value of their investments.

The SEC's order finds that the Fund Administrator was a cause of certain of EIA's and Middlebrooks' violations of the 1933 Act and of the Advisers Act and Rule 206(4)-8(a)(1) thereunder. The Fund Administrator agreed, without admitting or denying the SEC's findings, to a cease-and-desist order and to pay a civil penalty of $100,000. In addition, the Fund Administrator agreed to pay disgorgement of $18,000 and prejudgment interest of $4,271.

"Fund administrators are important gatekeepers in the private fund space," said Andrew Dean, Co-Chief of the SEC Enforcement Division's Asset Management Unit. "Here, TFS failed to live up to its gatekeeper responsibilities and distributed inaccurate account statements to investors despite clear red flags."

SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures

The SEC announced charges on August 8, 2023, against 10 firms in their capacity as broker-dealers (the "Broker-Dealers") and one dually registered broker-dealer and investment adviser (the "BD and IA") (collectively, the "Firms") for widespread and longstanding failures by the Firms and their employees to maintain and preserve electronic communications. These actions stem from the SEC's continuing sweep to ensure that regulated entities, including broker-dealers and investment advisers, comply with their recordkeeping requirements.

The Firms admitted the facts set forth in their respective SEC charging papers, acknowledged that their conduct violated recordkeeping provisions of the federal securities laws, agreed to pay combined penalties of $289 million as outlined below, and have begun implementing improvements to their compliance policies and procedures to address these violations:

- A securities firm together with a clearing service and an investment advisory firm agreed to pay a $125 million penalty;
- A multi-asset servicing specialist and an investment banking firm have each agreed to pay penalties of $35 million;
- A capital markets firm and a securities firm have each agreed to pay penalties of $25 million;
- An investment banking firm has agreed to pay a $15 million penalty;
- An independent investment bank and a wealth management, brokerage, and advisory firm have each agreed to pay penalties of $10 million; and
- A financial services firm has agreed to pay a $9 million penalty.

The SEC's investigation uncovered pervasive and longstanding "off-channel" communications at the Firms. As described in the SEC's orders, the Firms admitted that from at least 2019, their employees often communicated through various messaging platforms on their personal devices, including iMessage, WhatsApp, and Signal, about the business of their employers. The Firms did not maintain or preserve the substantial majority of these off-channel communications, in violation of the federal securities laws.

The Broker-Dealers were charged with violating certain recordkeeping provisions of the Exchange Act and with failing to reasonably supervise with a view to preventing and detecting those violations. The BD and IA was additionally charged with violating certain recordkeeping provisions of the Advisers Act and with failing to reasonably supervise with a view to preventing and detecting those violations. The failures involved employees at multiple levels of authority, including supervisors and senior executives.

In addition to the financial penalties, the Firms were ordered to cease and desist from future violations of the relevant recordkeeping provisions and were censured. The Firms also

agreed to retain independent compliance consultants to, among other things, conduct comprehensive reviews of their policies and procedures relating to the retention of electronic communications found on personal devices and their respective frameworks for addressing non-compliance by their employees with those policies and procedures.

"Compliance with the books and records requirements of the federal securities laws is essential to investor protection and well-functioning markets. To date, the Commission has brought 30 enforcement actions and ordered over $1.5 billion in penalties to drive this foundational message home. And while some broker-dealers and investment advisers have heeded this message, self-reported violations, or improved internal policies and procedures, today's actions remind us that many still have not," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "So here are three takeaways for those firms who haven't yet done so: self-report, cooperate and remediate. If you adopt that playbook, you'll have a better outcome than if you wait for us to come calling."

SEC Charges a FinTech Investment Adviser for Misrepresenting Hypothetical Performance of Investments and Other Violations

The SEC announced charges against a New York-based financial tech investment adviser ("FinTech Adviser"), marking the first violation of the SEC's amended marketing rule. The FinTech Adviser was charged with using hypothetical performance metrics in advertisements that were misleading and with multiple compliance failures that led to misleading disclosures about custody of clients' crypto assets, the use of improper "hedge clauses" in client agreements, the unauthorized use of client signatures and the failure to adopt policies concerning crypto asset trading by employees.

According to the SEC's order on August 21, 2023, for a period ranging from August 2021 to October 2022, the FinTech Adviser, which offers multiple complex strategies to retail investors through its mobile trading app, made misleading statements on its website regarding hypothetical performance, including by advertising "annualized" performance results as high as 2,700 percent for its crypto strategy. The order alleged that the FinTech Adviser's advertisements were misleading because they failed to include material information, for example, that the hypothetical performance projections assumed that the strategy's performance in its first three weeks would continue for an entire year. The order also found that the FinTech Adviser violated the marketing rule by advertising hypothetical performance metrics without having adopted and implemented required policies and procedures or taking other steps required by the Commission's marketing rule, which was amended in December 2020.

Additionally, the SEC's order found that the FinTech Adviser (1) made conflicting disclosures to clients about how it custodied crypto assets; (2) included in its client advisory agreements liability disclaimer language that created the false impression that clients had waived non-waivable causes of action against the FinTech Adviser; and (3) contrary to representations, failed to adopt policies and procedures concerning employee personal trading in crypto assets. The FinTech Adviser self-reported to the SEC staff that it failed to ensure that client signatures were obtained for certain types of transactions in client accounts and agreed to settle related charges, cooperate with the investigation, and consent that it violated the Advisers Act. Without admitting or denying the SEC's findings, the FinTech Adviser agreed to a cease-and-desist order, a censure, and to pay $192,454 in disgorgement, prejudgment interest, and an $850,000 civil penalty that will be distributed to affected clients.

"When offering and marketing complex strategies, investment advisers must ensure the accuracy of disclosures made to existing and prospective investors. The Commission amended the marketing rule to allow for the use of hypothetical performance metrics but only if advisers comply with requirements reasonably designed to prevent fraud," said Osman Nawaz, Chief of Enforcement Divison's Complex Financial Instruments Unit. "[The FinTech Adviser's] advertisements and disclosures painted a misleading picture of certain of its strategies for investors. This action serves as a warning for all advisers to ensure compliance."

A Global Banking and Financial Services Firm Settles with SEC for Charging Excessive Advisory Fees

The SEC charged a global banking and financial services firm (the "Firm") on August 25, 2023, for overcharging at least 10,900 investment advisory accounts more than $26.8 million in advisory fees. The Firm agreed to pay a $35 million civil penalty to settle the SEC's charges.

According to the SEC's order, certain financial advisers from the Firm and its predecessor firms agreed to reduce the firm's standard, pre-set advisory fees for certain clients and made handwritten or typed changes on the clients' investment advisory agreements that reflected the reduced fees at the time their accounts were opened. However, in certain instances, the account processing employees at the Firm including its predecessor firms failed to enter the agreed-upon reduced advisory fee rates into the firms' billing systems when setting up the clients' accounts. Additionally, according to the SEC's order, the Firm failed to adopt and implement written compliance policies and procedures reasonably designed to determine whether the billing systems it adopted contained accurate data and to prevent overbilling of the clients that the firm acquired through its predecessor firms and certain of its own new clients. As a result, the Firm and its predecessor firms overcharged certain clients who opened accounts prior to 2014 for advisory fees through the end of December 2022.

The Firm paid the affected accountholders approximately $40 million, including interest, to reimburse those account holders for the overcharging.

Without admitting or denying the SEC charges, in addition to the $35 million penalty, the Firm consented to the entry of the Commission's order finding that the firm violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7, and agreed to a cease-and-desist order and censure.

SEC Charges Accountant for Aiding and Abetting a $110 Million Ponzi Scheme and Orchestrating a Separate Fraudulent Scheme

The SEC filed charges against William V. Conn, Jr., a certified public accountant of Sandy Springs, Georgia, on August 28, 2023, for participating in a Ponzi scheme perpetrated by an investment adviser (the "Adviser") using an investment fund the Adviser created and controlled, Horizon Private Equity, III, LLC ("Horizon III"). The SEC also charged Conn with conducting a fraudulent scheme through a different investment fund he formed and controlled, Horizon Private Equity, LLC ("Horizon Equity").

According to the complaint, between 2007 and 2021 Conn agreed to serve as the public-facing manager of Horizon III, so the Adviser could perpetrate a Ponzi scheme that raised more than $110 million from over 400 investors without being detected by the investment adviser firm at which he was employed. In August 2021, the SEC charged the Adviser with multiple counts of securities fraud based on his role in orchestrating the Horizon III Ponzi scheme. The complaint also alleges that between 2008 and 2022, Conn solicited 21 of his accounting clients to invest nearly $2 million in his investment fund, Horizon Equity, and that Conn represented that the money would be invested in selected hedge funds. According to the allegations, Conn allegedly misappropriated and misused the investor funds to support his accounting business, pay personal expenses, and pay expenses related to a failed real estate project.

The SEC's complaint, filed in the U.S. District Court for the Northern District of Georgia, charged Conn with violating the antifraud provisions of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. Additionally, the complaint charged Conn with aiding and abetting the Adviser, and the two entities he controlled, in previously charged violations of the antifraud provisions of Sections 206(1) and 206(2) of the Advisers Act, Section 17(a) of the 1933 Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The complaint against Conn seeks permanent injunctive relief, disgorgement, prejudgment interest, and civil penalties.

Federal Court Rules Against SEC in Case Involving Cryptocurrency ETF

A U.S. federal appeals court for the District of Columbia (the "Circuit Court") ruled on August 29, 2023, that the SEC must reconsider a leading crypto asset manager's (the "Asset Manager") application to launch a spot bitcoin exchange-traded fund ("ETF").

According to Circuit Court Judge Neomi Rao, the SEC's denial of the Asset Manager's application was "arbitrary and capricious," noting that the agency has approved bitcoin futures ETFs and ordering the SEC reconsider the Asset Manager's application to launch a spot bitcoin ETF. The SEC claimed that spot markets for bitcoin are unregulated and subject to manipulation. In denying the Asset Manager's application to convert its bitcoin into an ETF, the Circuit Court considered that the SEC had not adequately explained why it approved the listing of bitcoin futures funds on national exchanges but denied approval of the Asset Manager's bitcoin ETF on the spot market. The Asset Manager argued that its proposed bitcoin exchange-traded product is materially similar to the bitcoin futures exchange-traded products and should have been approved to trade on NYSE Arca and the Circuit Court agreed.

The Circuit Court noted that over the last several years, the Commission received numerous proposals to list bitcoin investment products on national exchanges, but each were denied. Additionally, the Circuit Court referred to two bitcoin futures exchange traded products ("ETP") that were approved by the Commission in April 2022: 1) NYSE Arca's proposal to list Teucrium Bitcoin Futures Fund; and 2) Nasdaq's proposal

to list the Valkyrie XBTO Bitcoin Futures Fund. According to the Circuit Court, the listing exchange for both products had a surveillance sharing agreement with the CME that satisfied the Commission's significant market test.

The Circuit Court further noted that the SEC received thousands of public comments that nearly all favored listing the Asset Manager, however, the Commission denied the rule change, finding "NYSE Arca ha[d] not met its burden to demonstrate that its proposal [was] consistent with the requirements of [the] Exchange Act." As with every other proposed bitcoin ETP, the Commission found that the Asset Manager was not "designed to prevent fraudulent and manipulative acts and practices" and failed to satisfy the significant market test.

The SEC has 45 days to decide whether to abide by the ruling or appeal it. Additionally, on August 31, 2023, the SEC delayed making a decision on applications from other asset managers until mid-October and could delay final decisions for several additional months.

SEC Charges Private Equity Firm for Inadequate Disclosure of Fees Paid to Affiliate

The SEC charged Prime Group Holdings LLC ("Prime Group") on September 5, 2023, for failing to adequately disclose millions of dollars of real estate brokerage fees that were paid to a real estate brokerage firm that was owned by its chief executive officer ("CEO"). Prime Group agreed to pay a $6.5 million civil penalty and over $14 million in disgorgement and prejudgment interest to settle the charges. Prime Group is a private equity firm focused on alternative real estate asset classes.

According to the SEC's order, Prime Group launched an investment fund in 2017 to purchase self-storage real estate properties and alleges that the fund mostly relied on deal teams comprised of Prime Group's employees and independent contractors to find and acquire "off-market" properties. The deal teams' costs and compensation, as well as other expenses of Prime Group's operations, were paid, in part, from a three percent brokerage fee the fund paid on the deal teams' acquisitions. The SEC's order also found that the fund paid these brokerage fees to a real estate brokerage firm that was wholly owned by Prime Group's CEO, making the brokerage firm an affiliate (the "Affiliate") of Prime Group.

As a result, Prime Group was alleged to have made misleading statements in the fund's offering materials, including its limited partnership agreement, private placement memorandum, and due diligence questionnaires concerning fees and conflicts of interest, because Prime Group failed to adequately disclose that the Affiliate would be receiving these real estate brokerage fees. Between 2017 and 2021, the Affiliate received nearly $18 million in brokerage fees at the closing of the fund's property acquisitions.

The SEC's order found that Prime Group violated Section 17(a)(2) of the 1933 Act. Without admitting or denying the SEC's findings, Prime Group agreed to cease and desist from violating the charged provision and pay the $20.5 million in penalties, disgorgement, and interest.

"Funds, including those that invest in alternative asset classes, must ensure that their offering materials contain clear, accurate, and adequate disclosures," said Osman Nawaz, Chief of the SEC Enforcement Division's Complex Financial Instruments Unit. "In particular, information related to payments made to affiliates, and the potential conflicts of interest embedded in such arrangements, is critical to investors' decisions."

SEC Charges Five Advisory Firms for Custody Rule Violations

The SEC charged five investment advisors (the "Advisory Firms") on September 5, 2023, for failing to comply with requirements related to the safekeeping of client assets. Three of the firms were also charged with failing to update SEC disclosures in a timely manner regarding audits of their private fund clients' financial statements. The Advisory Firms agreed to settle the SEC's charges and pay more than $500,000 in combined penalties.

According to the SEC's orders, the Advisory Firms failed to do one or more of the following: have audits performed; deliver audited financials to investors in a timely manner; and/or ensure qualified custodian-maintained client assets. In addition, according to the orders, two of the firms failed to promptly file amended Forms ADV to reflect they had received audited financial statements, and one of the firms did not properly describe the status of its financial statement audits for multiple years when filing its Form ADV.

Without admitting or denying the findings, the Advisory Firms agreed to be censured, to cease and desist from violating the respective charged provisions, and to pay civil penalties ranging from $50,000 to $225,000.

This is the second set of cases that the Commission has brought as part of a targeted sweep concerning violations of the Advisers Act's Custody Rule and Form ADV requirements by private fund advisers after charging nine advisory firms in September 2022 for failing to comply with requirements relating to safekeeping client assets and/or to timely update their SEC disclosures to reflect the status of audits of financial statements for the private funds they advised.

"The Custody Rule and the associated Form ADV reporting obligations are core to investor protection," said Andrew Dean, Co-Chief of the SEC Enforcement Division's Asset Management Unit. "We will continue to ensure that private fund advisers meet their obligations to secure client assets."

SEC Sweep into Marketing Rule Violations Results in Charges against Nine Investment Advisers

The SEC brought charges against nine registered investment advisers (the "Registered IAs") on September 11, 2023, for advertising hypothetical performance to the general public on their websites without adopting and/or implementing policies and procedures required by new rules adopted in late 2020 and required compliance by November 4, 2022 (the "Marketing Rules"). The Registered IAs agreed to settle the SEC's charges and to pay $850,000 in combined penalties.

According to the Marketing Rules, registered investment advisers are prohibited from including any hypothetical performance in their advertisements unless they have adopted and implemented policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement. According to the SEC's order, each of the charged firms advertised hypothetical performance to mass audiences on their websites without having the required policies and procedures. In addition, two of the advisers, failed to maintain required copies of their advertisements.

Without admitting or denying the SEC's findings, the Registered IAs agreed to be censured, cease and desist from violating the charged provisions, comply with undertakings not to advertise hypothetical performance without having the requisite policies and procedures, and pay civil penalties ranging from $50,000 to $175,000.

The ongoing investigation of potential Marketing Rule violations is being conducted by the combined efforts of several Divisions of the SEC including Enforcement's AM Unit, Enforcement's Office of Investigative and Market Analytics, Examinations, the Division of Investment Management, and the Division of Economic and Risk Analysis.

"Because of their attention-grabbing power, hypothetical performance advertisements may present an elevated risk for prospective investors whose likely financial situation and investment objectives don't match the advertised investment strategy," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "It is therefore crucial that investment advisers implement policies and procedures to ensure their compliance with the rule. Until that is the case, we will remain vigilant and continue our ongoing sweep to ensure that investment advisers comply with the Marketing Rule, including the requirements for hypothetical performance advertisements."

SEC Charges an Alternative Investment Platform for Misleading Investors on Marine Financing Risk

The SEC settled charges on September 12, 2023, against a New York-based alternative investment platform and its registered investment adviser subsidiary (together, the "Platform") for failing to disclose critical information to investors in a $14.5 million asset-backed securities offering.

According to the SEC's order, in September 2019 the Platform offered securities to finance a loan that a Platform affiliate made to a group of companies for the transport and deconstruction of a retired ship and that the ship served as collateral for the loan with interest from the proceeds from the deconstruction. The Platform's right to the ship was the most important security for the loan and the securities that the Platform sold to investors.

According to the SEC's order, the Platform failed to disclose to investors a heightened risk that it would be unable to seize the ship in the event of a default. In addition, prior to the offering, the Platform's personnel had information showing that ships that secured other loans that the Platform affiliates had made to the same borrowing group were reported as deconstructed without any notice or repayment or could not be located. According to the SEC's order, the Platform proceeded with the offering without disclosing this material information regarding

the uncertainty of the ships' locations and that the Platform later concluded that the borrowing group deconstructed the ship that secured the September 2019 offering and stole the deconstruction proceeds by not repaying the loan from the Platform, leaving investors facing millions of dollars of losses.

Without admitting or denying the findings, the Platform consented to the entry of the SEC's order finding that they violated certain antifraud and other provisions of the federal securities laws. The SEC's order requires the Platform to cease and desist from these violations and to pay more than $1.9 million in penalties, disgorgement, and interest.

"[The Platform] aims to unlock the complex alternative investments market for retail investors but failed to disclose glaring red flags it had about the security of the collateral backing this offering," said Osman Nawaz, Chief of the SEC Enforcement Division's Complex Financial Instruments Unit. "As this case shows, we are committed to ensuring that investors in any asset class, including 'alternative' asset classes, receive complete and accurate disclosures about those investments."

SEC Charges Connecticut Advisory Firm GlennCap and Its Owner with Cherry-Picking

The SEC settled fraud charges against GlennCap LLC ("GlennCap"), a Connecticut-based investment advisory firm, and its owner, Jonathan Vincent Glenn, on September 14, 2023, for allocating profitable securities trades to favored accounts, including GlennCap's own accounts and client accounts that paid GlennCap a higher percentage of positive returns in fees, while allocating a disproportionate amount of unprofitable trades to disfavored clients, a practice, according to the SEC, known as cherry-picking.

According to the SEC's order, between at least January 2020 and March 2022 Glenn, who was also an investment adviser representative of GlennCap, engaged in block trading, which allowed him to pool funds from multiple clients' accounts into trades, and then, after seeing whether a position increased or decreased in value, he allocated the more profitable trades to accounts that he favored. The probability that the favored accounts received the more profitable trades by chance was statistically nearly zero. The SEC's order found that Glenn and GlennCap received at least $2.7 million in profits from the cherry-picking scheme and that Glenn made false and misleading statements regarding GlennCap's trading practices in documents it provided to clients and prospective clients.

The SEC's order found that Glenn and GlennCap violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 17(a) of the 1933 Act, and Sections 206(1) and 206(2) of the Advisers Act. Glenn and GlennCap consented, without admitting or denying the SEC's findings, to the entry of a cease-and-desist order requiring them to pay more than $3 million in civil penalties, disgorgement, and prejudgment interest.

PE Adviser to Pay $1.6 Million to Settle SEC Conflict Allegations

The SEC announced that a California-based registered investment adviser to private funds (the "PE Adviser") agreed to settle charges on September 22, 2023, that it made an undisclosed loan to a fund advised by an affiliate adviser, breaching its fiduciary duty and duty of care.

According to the SEC's order, the PE Adviser transferred a private fund asset from funds nearing the end of their term to a new fund, and loaned money from one private fund to another private fund advised by an affiliate. In so doing, per the SEC, the PE Adviser breached its fiduciary duty to private funds that it advised by failing to adequately disclose its conflict of interest in receiving accelerated monitoring fees paid by a portfolio company when that portfolio company was sold. The SEC's order also found that the PE Adviser violated its duty of care by failing to consider whether the fee acceleration was in its clients' best interest.

Additionally, according to the SEC's order, the PE Adviser breached its fiduciary duty by transferring certain expiring funds' assets to a new private fund it also advised and, by doing so, locked up investor money for at least an additional decade without: 1) obtaining investor consent; 2) providing existing investors an option to exit; and 3) disclosing the PE Adviser's conflicts of interest in the transaction. The PE Adviser further breached its fiduciary duty, per the SEC's order, by not adequately disclosing its conflict of interest when it loaned money from one private fund it managed to a new private fund managed by an affiliated adviser and by failing to undertake a process to determine if the loan was in its clients' best interest.

The SEC's order found that the PE Adviser violated antifraud and compliance provisions of the Advisers Act and without admitting or denying the SEC's findings, it agreed to a cease-and-desist order and censure, and to pay a $1.2 million penalty as well as $445,460 in disgorgement and prejudgment interest to investors.

"This case highlights our continued focus on holding private fund advisers responsible when they fail to act in their clients' best interests, including with respect to continuation funds," said Corey Schuster, Co-Chief of the Enforcement Division's Asset Management Unit. "Among other breaches, [PE Adviser] failed to disclose its conflicts of interest when it transferred a client's asset to a new fund."

A Registered Investment Adviser to Pay $25 Million for Anti-Money Laundering Violations and Misstatements Regarding ESG Investments

The SEC charged a registered investment adviser (the "Adviser"), a subsidiary of a leading international bank and financial services provider, on September 25, 2023, in two separate enforcement actions; one addressing its failure to develop a mutual fund Anti-Money Laundering ("AML") program, and the other concerning misstatements regarding its Environmental, Social, and Governance ("ESG") investment process.

According to the SEC's order regarding the AML action, the Adviser caused mutual funds it advised to fail to develop and implement a reasonably designed AML program to comply with the Bank Secrecy Act and applicable Financial Crimes Enforcement Network regulations. In addition, the order alleges that the Adviser caused such mutual funds' failure to adopt and implement policies and procedures reasonably designed to detect activities indicative of money laundering and to conduct AML training specific to the mutual funds' business.

With respect to the second enforcement action, per the SEC's order, the Adviser made materially misleading statements about its controls for incorporating ESG factors into research and investment recommendations for ESG integrated products, including certain actively managed mutual funds and separately managed accounts. According to the SEC's order, the Adviser marketed itself as a leader in ESG that adhered to specific policies for integrating ESG considerations into its investments; however, from August 2018 until late 2021, the Adviser failed to adequately implement certain provisions of its global ESG integration policy as it had led clients and investors to believe it would. The SEC's order also found that the Adviser failed to adopt and implement policies and procedures reasonably designed to ensure that its public statements about the ESG integrated products were accurate.

To settle the charges, the Adviser agreed to pay a total of $25 million in penalties and with respect to the AML action, the SEC's order found that the Adviser caused the mutual funds it advised to violate Rule 38a-1 under the Investment Company Act. In the ESG misstatements action, the SEC's order found that the Adviser violated Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder. Without admitting or denying the SEC's findings, the Adviser agreed to a cease-and-desist order and a $6 million penalty in the AML action; and to a cease-and-desist order, censure, and a $19 million penalty in the ESG misstatements action.

"The SEC's order finds that [the Adviser] advised mutual funds with billions of dollars in assets yet failed to ensure that the funds had an AML program tailored to their specific risks, as required by law," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "Importantly, those AML obligations require mutual funds to establish and implement individualized programs to detect and prevent money laundering and terrorism financing. I congratulate the Asset Management Unit for bringing this important mutual fund AML enforcement action."

"Whether advertising how they incorporate ESG factors into investment recommendations or making any other representation that is material to investors, investment advisers must ensure that their actions conform to their words," said Sanjay Wadhwa, Deputy Director of the SEC's Division of Enforcement and head of its Climate and ESG Task Force. "Here, [the Adviser] advertised that ESG was in its "DNA," but, as the SEC's order finds, its investment professionals failed to follow the ESG investment processes that it marketed."

SEC Charges California Advisory Firm AssetMark for Failing to Disclose Multiple Financial Conflicts
The SEC announced on September 26, 2023, that Concord, California-based registered investment adviser AssetMark Inc. ("AssetMark") agreed to pay more than $18 million to settle charges related to undisclosed conflicts of interest involving a cash sweep program operated by its affiliated custodian and its receipt of millions of dollars in revenue sharing payments from third-party custodians.

According to the SEC's order, from at least September 2016 to January 2021 AssetMark failed to provide full and fair disclosure of conflicts of interest arising from its affiliate's cash sweep program, which transferred, or "swept," clients' uninvested cash into interest-earning bank accounts. AssetMark did not advise clients that it helped set the fee that its affiliate custodian received for operating the cash sweep program. The fee reduced amounts of interest paid to those clients. Additionally, the SEC's order found that from at least January 2016 through August 2019, AssetMark received custodial support payments from some third-party custodians based on assets held in certain no-transaction-fee mutual funds, but it failed to disclose to clients that, in some cases, there were lower-fee share classes with lower expense ratios available to clients which, if used by clients, would not have resulted in payments to AssetMark.

The SEC's order found that AssetMark violated the antifraud and compliance provisions of the Advisers Act and without admitting or denying the SEC's findings, AssetMark consented to a cease-and-desist order requiring it to be censured, comply with certain undertakings, and pay a civil penalty of $9.5 million and disgorgement and prejudgment interest of more than $8.5 million, all of which is to be distributed to harmed investors.

SEC Charges Asset Management Advisory Firm and Its Principal for Failing to Disclose Misuse of Investment Funds
The SEC announced on September 26, 2023, that a New York-based asset management company ("AMC") and its principal agreed to settle charges related to their failure to disclose the misuse of proceeds raised from investment advisory clients and to the firm's failure to implement reasonably designed written policies and procedures concerning the disclosure of conflicts of interest.

According to the SEC's order, from at least February 2017 through August 2021 AMC and its principal advised at least 13 clients to invest at least $6.1 million in three companies in which the principal had decision-making authority and significant ownership interests. The SEC's order found that AMC and its principal failed to disclose to the clients that their investments would be temporarily used for other purposes, such as to fund AMC's payroll and to repay loans owed to its principal or to the other companies with which he was affiliated. In addition, per the SEC's order, AMC, through its principal, failed to implement reasonably designed written policies and procedures concerning the disclosure of conflicts of interest.

AMC and its principal, without admitting or denying the SEC's findings, consented to an order requiring each to cease and desist from committing or causing violations of various provisions of the Advisers Act, imposing a censure, and ordering them to pay, jointly and severally, a civil penalty of $250,000.

For additional information and assistance, contact Thomas R. Westle, Stacy H. Louizos, or another member of Blank Rome's Investment Management group.

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