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Regulatory Update and Recent SEC Actions

REGULATORY UPDATES

SEC Leadership Changes

On July 14, 2021, the Securities and Exchange Commission ("SEC") announced Peter Driscoll's resignation as director of the Division of Examinations ("Exams Division") and the appointment of Daniel Kahl as acting director of the Exams Division. Driscoll led the Exams Division and its predecessor Office of Compliance Inspections and Examinations from 2017 to 2021. Kahl joined the SEC in 2001 and has served as deputy director of the Exams Division since 2018 and as its chief counsel from 2016 to 2018. Prior to that, Kahl led the Division of Investment Management's Office of Investment Adviser Regulation.

On August 18, 2021, the SEC announced the appointment of Sanjay Wadhwa as deputy director of the Division of Enforcement. Wadhwa most recently served as senior associate director of the Division of Enforcement in the New York Regional Office.

On September 28, 2021, the SEC announced the appointment of Dan Berkovitz as general counsel, effective November 1, 2021. Michael Conley, currently the SEC's solicitor, will serve as acting general counsel until Berkovitz joins the agency. Berkovitz currently serves as commissioner of the Commodity Futures Trading Commission. Prior to serving as commissioner, Berkovitz was a partner and co-chair of the futures and derivatives practice at the law firm of WilmerHale.

China's Anti-Foreign Sanctions Blocking Law

On June 10, 2021, the Standing Committee of the National People's Congress of China enacted the Anti-Foreign Sanctions Law ("AFSL"). The AFSL provides legal grounds for Chinese authorities and private individuals and entities to take countermeasures "if a foreign country violates international law and basic norms of international relations…, or adopt[s] discriminatory restrictive measures against Chinese citizens and organizations, and interfere[s] in [the Peoples Republic of China ("PRC")]'s internal affairs." These countermeasures include: denial of visas; banning entry into and deportation from China; seizure and freezing of assets located in China; and blocking transactions with individuals and entities in China. The AFSL is the third in a series of anti-foreign sanctions blocking laws and it expands on an existing private right of

action granted to Chinese citizens and organizations to sue in court for damages they allegedly suffer as a result of a foreign sanction. It also expands on the earlier blocking laws by establishing an "Anti-Sanctions List" to identify individuals and entities, and their affiliates, directly or indirectly involved in "discriminatory restrictive measures" against China. The Anti-Sanctions List may include foreign government officials and agencies involved in drafting or implementing sanctions that impact Chinese parties, as well as individuals and entities that comply with those sanctions anywhere in the world.

It is unclear how the blocking laws will be enforced by the Chinese government and effectuated through the private rights of action, creating uncertainty for companies doing business in China that seek compliance with U.S. (and EU) sanctions.

SEC Division of Investment Management Releases Analysis of Prime Money Market Fund Buffers

On July 21, 2021, the Division of Investment Management (the "Division") released its analysis regarding the composition of liquidity buffers for prime money market mutual funds ("MMFs"), as reported by the MMFs on Form N-MFP and on their websites. According to the Division, during the period examined (October 2016 to May 2021), which included the period of heightened market volatility which occurred at the onset of the COVID-19 pandemic, MMFs on average maintained daily liquid assets and weekly liquid assets well over the minimums required by Rule 2a-7 of the Investment Company Act of 1940, as amended ("1940 Act") (10 percent and 30 percent, respectively). The Division noted that investors withdrew $125 billion from MMFs at the onset of the pandemic, causing a general reduction of MMFs' weekly liquid assets which approached the 30 percent threshold for some MMFs and fell below the 30 percent threshold in one case. However, no MMF reported its daily liquid assets falling below the 10 percent threshold in March 2020, which, according to the Division, demonstrates that MMFs maintained sufficient liquidity to meet daily redemption requests.

SEC Issues Risk Alert on Fixed Income Principal and Cross Trades

On July 21, 2021, Exams issued a risk alert on principal and cross trading practices involving fixed income securities (the "Risk Alert"). The Risk Alert supplemented a prior risk alert published in September 2019 which highlighted the most common observed compliance issues related to principal and cross trades. According to the Risk Alert, nearly two-thirds of the investment advisers examined received staff-issued deficiency letters, with the vast majority of them relating to compliance programs, conflicts of interest, and disclosures, including the following:

- Compliance Programs
  - policies and procedures that were inconsistent with the adviser's practices, disclosures, and/or regulatory requirements;
  - policies and procedures that lacked certain guidance such that the advisers' personnel did not have the information necessary to achieve compliance; and
  - policies and procedures that were not effectively tested.

- Conflicts of Interest and Disclosures
  - cross trades that were not executed at independent market prices for the securities or were subject to undisclosed fees; and
  - omitted information concerning cross trades (and the associated conflicts of interest) in advisers' Form ADV and disclosure documents.

The Risk Alert noted the following practices that appeared to be effective:

- Compliance Programs
  - clearly defining covered activities;
  - setting standards, such as the requirement that transactions are fair and equitable to all participating clients and that pricing methodologies are followed;
  - conducting testing for compliance; and
  - placing conditions on the execution of principal and/or cross trades within clients' accounts.

- Conflicts of Interest and Disclosures
  - providing clients with full and fair disclosure (in multiple documents) of all material facts surrounding principal and cross trades, including how conflicts of interest are identified and addressed.

The Risk Alert encouraged advisers to review their written policies and procedures regarding principal and cross trades, including the implementation of those policies and procedures, to ensure that they are consistent with the Investment Advisers Act of 1940 and the rules thereunder.

SEC Issues Risk Alert on Wrap Fee Programs
On July 21, 2021, Exams issued a risk alert (the "Risk Alert") highlighting common compliance issues observed during its examination of investment advisers' wrap fee programs. These programs typically bundle fees for investment advice, brokerage services, administrative expenses, and other fees and expenses. The Risk Alert noted frequently cited deficiencies in the following three areas:

- Fiduciary Duty and Recommendations Not Made in Clients' Best Interest
  - advisers did not monitor the trading activity in clients' accounts; and
  - advisers did not have a reasonable basis to believe that the wrap fee programs were in the clients' best interests.

- Disclosures/Conflicts of Interest
  - advisers had misleading or inconsistent disclosures regarding the same topic in various documents; and
  - advisers omitted disclosures regarding, or inadequately described, conflicts of interest (i.e., financial incentives received by advisers for making certain recommendations), fees, and expenses.

- Compliance Programs
  - advisers omitted, or had inadequate, compliance policies and procedures in place with regard to clients' best interests; and
  - advisers inconsistently implemented or enforced, or failed to implement, their policies and procedures.

The Risk Alert also noted the following best practices for wrap fees:

- Fiduciary Duty and Recommendations Made in Clients' Best Interest
  - conduct reviews of wrap fee programs to assess whether they are in the best interests of clients using information obtained directly from clients (e.g., through interviews and/or questionnaires);
  - periodically remind clients to report any changes to their personal situations, financial standing, and investment objectives that might impact the clients' risk tolerances and/or investment allocations; and
  - educate clients when recommending they convert their accounts from non-wrap fee to wrap fee programs.

- Disclosures/Conflicts of Interest
  - disclose compensation or incentives from wrap fee program sponsors or portfolio managers for investing client assets in the programs;
  - disclose that advisers have financial incentives not to migrate infrequently traded wrap fee accounts to brokerage or non-wrap advised accounts;
  - disclose that advisers or their supervised persons have incentives to not trade in clients' accounts because they may be responsible for paying ticket charges or other costs; and
  - disclose whether certain services or expenses are not included in the wrap fee.

- Compliance Programs
  - adopt policies and procedures that include factors to be used when assessing whether investment recommendations made to clients are in their best interests;
  - adopt compliance programs that monitor and validate that the advisers sought best execution for clients' transactions; and
  - adopt compliance policies and procedures that define what the advisers consider to be "infrequently" traded accounts and review such accounts to determine whether the wrap fee programs remain in the clients' best interests.

The Risk Alert concluded by encouraging advisers that recommend wrap fee programs to adopt policies and procedures to address the risks, conflicts, and challenges outlined in the Risk Alert.

Appeals Court Rules on Latest Section 36(b) Case

On July 26, 2021, an appeals court affirmed the ruling for the defendant in *Obeslo v. Great-West Capital Mgmt., LLC,* the latest decision in a lawsuit alleging a mutual fund's violation of Section 36(b) of the 1940 Act. Section 36(b) imposes a fiduciary duty on an investment adviser to an investment company with respect to the receipt of compensation and gives investment company shareholders a private right of action to enforce that duty. The district court in Obeslo found that the plaintiffs failed to prove that the defendant breached its fiduciary duty or that the plaintiffs suffered actual damages resulting from the alleged breach of fiduciary duty. In affirming the district court's ruling, the court of appeals held that the plaintiffs failed to establish any of the Gartenberg factors for showing that the fee charged "is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Twenty-nine lawsuits have been filed since the U.S. Supreme Court's 2010 ruling in favor of the defendant in Jones v. Harris Associates L.P., with no court finding liability under Section 36(b). At the time of the decision, it was the first time in more than two decades that there were no pending Section 36(b) cases against the mutual fund industry.

NASDAQ's Proposed New Rules Related to Board Diversity Approved by the SEC

On August 6, 2021, the SEC approved NASDAQ Stock Market LLC's ("NASDAQ") proposed new listing rules related to board diversity and disclosure. The new rules will require each NASDAQ-listed company to annually disclose information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board (the "Board Diversity Disclosure Rule"). The rules will also require each NASDAQ-listed company, subject to certain exceptions, to have at least two diverse board members, including one woman, or explain why it does not (the "Board Diversity Objective Rule").

The compliance period for the Board Diversity Disclosure Rule will begin in 2022. The compliance period for the Board Diversity Objective Rule will begin in 2023 and will take a tiered approach based on the NASDAQ market on which the company is listed and the size of the company's board. The compliance periods are subject to certain phase-in periods for companies new to NASDAQ.

"As we have noted in the past, investors are increasingly demanding diverse boards and diversity-related information about public companies. NASDAQ's proposal should improve the quality of information available to investors for making investment and voting decisions by providing consistent and comparable diversity metrics," said Commissioners Allison Herren Lee and Caroline A. Crenshaw in a joint statement.

SEC Requests Comment on Broker-Dealer and Investment Adviser Digital Engagement Practices

On August 27, 2021, the SEC announced that it is requesting information and public comment on matters related to the development and use of digital engagement practices ("DEPs") by broker-dealers and investment advisers (the "Request"). DEPs include behavioral prompts, differential marketing, game-like features, and other features designed to engage with retail investors on digital platforms, as well as analytical and technological tools and methods. The SEC issued the Request to:

- better understand market practices associated with the use of DEPs, including: (i) the extent to which firms use DEPs and the types most frequently used; (ii) the tools used to develop and implement DEPs; and (iii) information pertaining to retail investor engagement with DEPs, including data related to investor demographics and trading behaviors;
- provide a forum for market participants to share their perspectives on the use of DEPs, including potential benefits to investors and investor protection concerns; and
- facilitate a consideration of whether further regulatory action may be needed to protect investors.

The public comment period remained open for 30 days following publication of the Request in the Federal Register.

"While new technologies can bring us greater access and product choice, they also raise questions as to whether we as investors are appropriately protected when we trade and get financial advice," said SEC Chair Gary Gensler. "Predictive analytics and other DEPs often are designed with an optimization function to increase revenues, data collection, or customer time spent on the platform. This may lead to conflicts between the platform and investors."

PCAOB Approves Rule Establishing Framework under the Holding Foreign Companies Accountable Act

On September 22, 2021, the Public Company Accounting Oversight Board (the "PCAOB") adopted a new rule (the "Rule") related to the PCAOB's responsibilities under the Holding Foreign Companies Accountable Act (the "HFCAA"). The HFCCA, which aims to address restrictions China has placed on the PCAOB's ability to inspect audit workpapers of Chinese companies, requires the SEC to ban trading on all U.S. exchanges of any company based in a foreign jurisdiction that bars the PCAOB's audit inspection (a "Commission-Identified Issuer") for three consecutive years. Until now, the mechanics for determining Commission-Identified Issuers had not been established. The Rule, as contemplated by the HFCAA, provides a framework for how the PCAOB will make that determination, which includes:

- the manner of the PCAOB's determinations;
- the factors the PCAOB will evaluate and the documents and information it will consider when assessing whether a determination is warranted;
- the form, public availability, effective date, and duration of such determinations; and
- the process by which the PCAOB will reaffirm, modify, or vacate its determinations.

"The rule we adopt today exemplifies our strong and long-held belief that investors benefit from robust international regulatory cooperation and a level playing field for audit oversight in U.S. capital markets," said PCAOB Acting Chairperson Duane M. DesParte. "This rule will promote transparency and consistency in the processes that support fulfillment of the Board's responsibilities under the HFCAA."

Proposal to Change Tax Treatment for ETFs and Mutual Funds

On September 15, 2021, Senate Finance Committee Chair Ron Wyden published draft legislation seeking to repeal Section 852(b)(6) of the Internal Revenue Code. Section 852(b)(6) permits all open-end investment companies, including exchange-traded funds ("ETFs"), to transfer in-kind property, typically portfolio securities, to a redeeming shareholder in lieu of cash without having to recognize capital gains on the redeemed securities that must be distributed to the investment companies remaining shareholders. Investment Company Institute President and CEO Eric J. Pan issued a statement opposing the proposal, noting that the proposal will harm middle-income investors by subjecting them to more frequent and larger capital gain distributions on which they will have to pay taxes.

SEC Staff Releases Sample Climate Change Comment Letter

On September 22, 2021, the staff of the Division of Corporation Finance of the SEC (the "Corporation Finance Division") published a sample comment letter containing comments illustrative of those that it may issue to public operating companies regarding their climate-related disclosure or the absence thereof. The letter follows a recent increase in climate-related comments the Corporation Finance Division has issued during the disclosure review process. The letter is consistent with the SEC's 2010 Guidance Regarding Disclosure Related to Climate Change, which does not mandate specific, line item climate-related disclosures, but instead takes a principles-based approach. The letter focuses on the following three areas:

(i) General Disclosure

- Issuers may be asked to address potential discrepancies between the breadth of disclosures provided in such issuer's corporate social responsibility reports versus the abbreviated or total lack of such disclosures in its SEC filings.

(ii) Risk Factors

- Issuers may be asked to disclose (i) the material effects of transition risks related to climate change that may affect an issuer's business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, or market trends that may alter business opportunities, and (ii) material litigation risks related to climate change.

(iii) Management's discussion and analysis of financial condition and the results of operations

- Issuers may be required to provide additional disclosure in areas such as: (i) the effects of climate-related legislation, regulations, and international accords; (ii) the indirect consequences of climate-related regulation or business trends, such as decreased consumer demand for carbon-intensive goods or the impact on a registrant's reputation; and (iii) the physical consequences of climate change, such as the direct impacts on a registrant's facilities, for example, on coastal sites as a result of rising sea levels; and the indirect operational and financial impacts on its operations, for example, as a result of drought and shifts in weather patterns.

The staff noted that the comments contained in the letter do not constitute a complete list of the issues companies should consider. Accordingly, each issuer will need to determine, based on its particular facts and circumstances, what information is material to it and therefore must be disclosed.

SEC Proposes to Enhance Proxy Voting Disclosure and Require Disclosure of "Say-on-Pay" Votes for Investment Managers and Relating to Securities Lending Activity

On September 29, 2021, the SEC proposed amendments to Form N-PX, the annual report of the proxy voting record of a registered management investment company, that would increase the information that investment companies are required to report about their proxy votes. Among other things, the proposed rulemaking would require funds to categorize their voting by type (such as environmental or climate; corporate governance; and diversity, equity, and inclusion) using the same language as the issuer's form of proxy to identify proxy voting matters. Funds would also be required to disclose how their securities lending activity impacted their voting by disclosing the number of shares that were voted and the number of shares held by the fund that were loaned out on the record date. Further, the rulemaking would require institutional investment managers to disclose how they voted on executive compensation, or so-called "say-on-pay" matters, consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The public comment period will remain open for 60 days after publication in the Federal Register.

SEC Statement on Complex Exchange-Traded Products

On October 4, 2021, SEC Chair Gary Gensler issued a statement notifying the public that he had directed the SEC Staff to study the risks of complex exchange-traded products ("ETPs") and to present to the SEC recommendations on rulemaking proposals to address those risks. Gensler noted that some ETPs use strategies and structures that are more complex than typical stocks and bonds (i.e., leveraged and inverse ETFs) and can operate in unanticipated ways when markets experience volatility or stress conditions. Gensler noted his concern regarding the risks to individual investors, who may not fully appreciate the particular characteristics or risks of such investments.

"Though the listing and trading of these products… can be consistent with the Exchange Act, that doesn't mean the products are right for every investor," said Gensler. "I encourage all investors to consider these risks carefully before investing in these products. I believe that potential rulemaking could strengthen the investor protections around these products."

Commissioners Allison Herren Lee and Caroline also issued a statement on ETPs on October 4, 2021, suggesting that any new rules should cover ETPs that aren't regulated by the 1940 Act, such as exchange-traded notes, commodity pools, and other structured notes. Such an expanded view could apply to products that hold cryptocurrencies directly.

"While there are differences in the structures of these products, they can pose similar risks to investors and the markets, and the commission should endeavor to adopt a consistent approach to managing such risks to ensure that our rules do not needlessly create opportunities for regulatory arbitrage," said Commissioners Allison Herren Lee and Caroline Crenshaw in a joint statement.

SEC ENFORCEMENT ACTIONS

Financial Services Corporation Settles Charges Related to Investments in Complex Exchange-Traded Product

On July 19, 2021, the SEC filed a settled action against a financial services company (the "Company") for compliance failures relating to sales of a volatility linked exchange-traded product ("ETP"). As described in the SEC's order, the ETP at issue was intended only for short-term trading. According to the order, the issuer of the ETP warned the Company that it was not appropriate to hold the product for extended periods, and the ETP's offering documents made it clear that the product was more likely to decline in value when held over a longer period. The order found that although the Company prohibited brokerage representatives from soliciting sales of the product and placed other restrictions on sales of the product to brokerage customers, the Company did not place similar restrictions on certain financial advisers' use of the product in discretionary managed client accounts. The order further found that although the Company adopted a concentration limit on exchange-traded products, it failed to implement a system for monitoring and enforcing that limit for five years. The order further found that certain financial advisers had a flawed understanding of the appropriate use of the ETP and failed to take sufficient steps to understand risks associated with holding the product for extended periods. The order states that these financial advisers purchased and held the product in client accounts for lengthy periods, including hundreds of accounts that held the product for over a year, resulting in meaningful losses.

Without admitting or denying the SEC's findings, the Corporation agreed to cease and desist from violations of the Investment Advisers Act of 1940, a censure, and disgorgement and prejudgment interest of $112,274 and a civil penalty of $8 million, which will be distributed to investors harmed by the conduct at issue.

SEC Charges 27 Financial Firms with Form CRS Filing and Delivery Failures

On July 26, 2021, the SEC announced that 21 investment advisers and six broker-dealers have agreed to settle charges that they failed to timely file and deliver their client or customer relationship summaries, known as Form CRS, to their retail investors. The SEC's orders found that the firms failed to timely file or deliver their Form CRS, or post it to their website as required, until being twice reminded of the missed deadlines by their regulators. In addition, the orders found that the investment advisers and broker-dealers violated federal securities laws. Without admitting or denying the findings, the firms agreed to be censured, to cease and desist from violating the charged provisions, and to pay civil penalties.

SEC Charges Accounting Firm, Audit Partners, and Former Public Company CAO with Audit Independence Misconduct

On August 2, 2021 the SEC charged an accounting firm (the "Firm") and certain of its current and former partners (the "Partners") with improper professional conduct for violating auditor independence rules in connection with the Firm's pursuit to serve as the independent auditor for a public company (the "Issuer"). The SEC also brought charges against the Issuer's then-chief accounting officer (the "CAO") for his role in the misconduct. The SEC's order found that the Firm and the Partners improperly interfered with the Issuer's selection of an independent auditor by soliciting and receiving confidential competitive intelligence and audit committee information from the CAO during the request for proposal process. The order further found that the Firm's misconduct in connection with the audit pursuit would cause a reasonable investor

to conclude that the Firm and the Partners were incapable of exercising objectivity and impartiality once the audit engagement began. The SEC's separate order against the CAO found that, through his misconduct during the request for proposal process, including withholding key information from the Issuer's audit committee, the CAO caused the Issuer's reporting violations. The SEC's order found that the Firm and the Partners violated the auditor independence provisions of the federal securities laws and caused the Issuer to violate its obligation to have its financial statements audited by independent public accountants. All respondents have agreed to settle the charges and will collectively pay more than $10 million in monetary relief.

SEC Charges Investment Adviser and Associated Individuals with Causing Violations of Regulation SHO

On August 17, 2021, the SEC announced settled charges against an investment adviser (the "Adviser"), its principal, and its trader (the "Respondents") for providing erroneous order-marking information that caused executing brokers to violate Regulation SHO. According to the SEC's order, the Respondents provided the order-marking information on hundreds of sale orders of their hedge fund client to the hedge fund's brokers, causing those brokers to mis-mark the hedge funds' sales as "long." The order finds that in providing the inaccurate information, the Respondents also caused the hedge fund's brokers to fail to borrow or locate shares prior to executing the sales. The order further finds that the Adviser and its principal caused the hedge fund to engage in dealer activity without registering with the SEC or being exempt from registration.

Without admitting or denying the findings, the Respondents each agreed to cease-and-desist orders. In addition, the Adviser and its principal agreed to pay, jointly and severally, disgorgement of $7,000,000, with prejudgment interest of $1,078,183. The Adviser, its principal and its trader also agreed to pay penalties of $800,000, $75,000, and $25,000, respectively.

SEC Obtains Emergency Relief, Charges Investment Adviser and Its Principal with Operating $110 Million Ponzi Scheme

On August 20, 2021, the SEC filed an emergency action to stop a fraudulent Ponzi scheme allegedly perpetrated by the principal (the "Principal") of a registered investment adviser (the "Adviser") and two entities he controls: the Adviser and an investment fund (the "Fund"). According to the SEC's complaint, the defendants raised more than $110 million from over 400 investors by offering and selling membership units in the Fund. The Principal, the Adviser, and other representatives of the Adviser allegedly told investors that their Fund investments were safe, would be used for different investment activities, would pay a fixed rate of return, and that investors could get their principal back without penalty after a short waiting period. According to the complaint, however, these statements were false and misleading: The Fund did not earn any significant profits from legitimate investments, and a very large percentage of purported "returns" to earlier investors were simply paid from new investor money. The complaint also alleges that the Principal repeatedly lied to the SEC during regulatory examinations of the Adviser.

The SEC's complaint charges the defendants with violating the antifraud provisions of the federal securities laws. The complaint seeks preliminary and permanent injunctions, disgorgement, prejudgment interest, civil penalties, an asset freeze, and the appointment of a receiver.

SEC Announces Three Actions Charging Deficient Cybersecurity Procedures

On August 30, 2021, the SEC sanctioned eight firms (each registered as broker-dealers and/or investment advisory firms) in three actions for failures in their cybersecurity policies and procedures that resulted in e-mail account takeovers exposing the personal information of thousands of customers and clients at each firm. According to the SEC's order against one of the firms, cloud-based e-mail accounts of more than 60 personnel were taken over by unauthorized third parties, resulting in the exposure of personally identifying information of at least 4,388 customers and clients. The SEC's order found that none of the compromised accounts were protected in a manner consistent with the applicable firm's policies. The order also found that many of the firms failed to adopt written policies and procedures requiring additional firm-wide security measures after the first e-mail account takeover was discovered, or did not fully implement those additional security measures in a timely manner, placing additional customer and client records and information at risk.

The SEC's orders against each of the firms find that they violated federal securities laws. Without admitting or denying the SEC's findings, each firm agreed to cease and desist from future violations of the charged provisions, to be censured and to pay a penalty.

Whistleblower Awards Surpass $1 Billion

On September 15, 2021, the SEC announced awards of approximately $110 million and $4 million to two whistleblowers who provided information and assistance that led to successful SEC and related actions. The $110 million award stands as the second-highest award in the program's history, following the over $114 million awarded to a whistleblower in October 2020. The SEC has awarded approximately $1.1 billion to 214 individuals since issuing its first award in 2012, including more than $500 million in fiscal year 2021 alone.

SEC Charges Former Executives of Registered Investment Adviser with Fraud

On September 30, 2021, the SEC charged the former CEO (the "CEO") of an advisory firm (the "Adviser"), and the Adviser's former chief portfolio manager (the "Portfolio Manager"), for their roles in the Adviser's scheme to artificially inflate the net asset values and performance results of several Adviser-managed funds by recording non-binding transactions and fraudulent investment banking fees on the funds' books and records. According to the order, the inflated asset values and false performance results were included in promotional materials and account statements distributed to the funds' current and prospective investors, which showed the funds as always having positive monthly returns. The order finds that without the fraudulently booked transactions, the funds would have had at least 34 months of negative returns since inception. The order also finds that on at least 14 separate occasions, the CEO made the decision to waive monthly management and performance fees that the funds owed to the Adviser in order to achieve higher performance results, without disclosing the waivers to investors.

The SEC's orders find that the CEO violated the antifraud provisions of the federal securities laws and that the Portfolio Manager aided and abetted violations of certain antifraud provisions. Without admitting or denying the SEC's findings, the CEO and the Portfolio Manager each agreed to the entry of a cease-and-desist order. In addition, the CEO agreed to be barred from the securities industry, and to pay disgorgement of overcharged management and performance fees he received. The Portfolio Manager agreed to a limitation on activities from acting in a director or officer capacity in the securities industry, with a right to apply after three years, and to pay a penalty.

Thomas R. Westle *and* ***Stacy H. Louizos*** *would like to thank* ***Margaret M. Murphy*** *and* ***Jennifer Patt*** *for their contributions to this update.*

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