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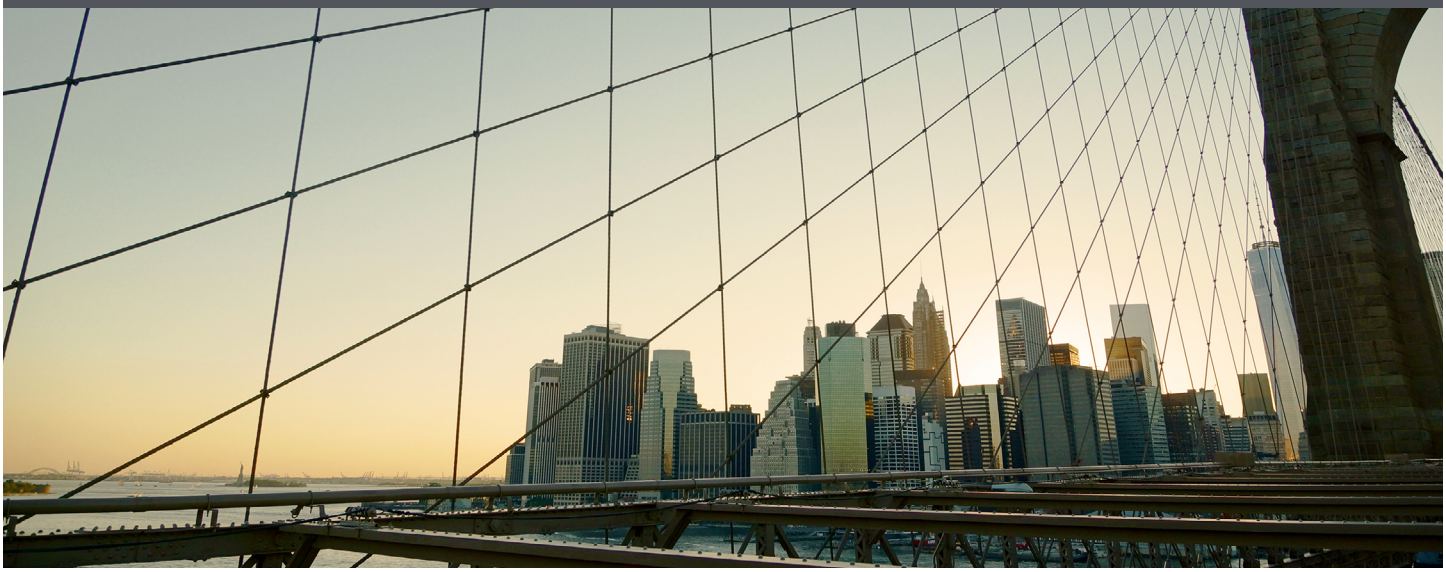
Investment Management



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Regulatory Update and Recent SEC Actions

REGULATORY UPDATES

Senate Confirms Jackson as Supreme Court Justice

The Senate has voted to confirm Judge Ketanji Brown Jackson as the 116th Supreme Court justice and the first Black woman and former public defender to ever serve on the court. The April 7, 2022, 53-47 vote confirmed Judge Jackson as the replacement for retiring Justice Stephen Breyer, who is departing the court after nearly three decades as a justice. Judge Jackson currently serves on the U.S. Court of Appeals for the D.C. Circuit. Prior to that, she served on the U.S. District Court for the District of Columbia. Judge Jackson also served as vice chair of the U.S. Sentencing Commission and as a law clerk to Justice Breyer.

Russian Sanctions in Response to Invasion of Ukraine

In response to Russia's invasion of Ukraine in February 2022, the United States, UK, and EU have implemented sweeping coordinated economic sanctions and export control restrictions targeting key industries, entities, and individuals in both Russia and Belarus. In light of the sanctions imposed on Russia, public companies have been encouraged to review their risk factor disclosures to ensure that they appropriately address the risks associated with these events as they relate to their business, results of operations, and financial condition. These potential risks include supply chain disruptions, contractual disputes and litigation, asset freezes, capital restrictions, business continuity interference, and heightened cybersecurity concerns. Advisers and investment company boards have been encouraged to keep current on the situation as well, specifically with respect to monitoring liquidity and fair valuation due to credit rating downgrades, and evaluating changes to portfolios or investment strategies and accompanying risk disclosure in view of the conflict.

The U.S. Treasury Department gave investment fund managers until May 25, 2022, to find non-U.S. buyers for their equity and debt holdings in certain sanctioned Russian entities. After May 25, the investment funds will need to freeze their holdings in the sanctioned companies, leaving the funds with illiquid holdings that are difficult to value. Many of the funds at issue are passively managed exchange-traded funds ("ETF"), which track broad stock or bond indexes that include the Russian firms. This makes it difficult to comply with the sanctions because the funds need to wait for index providers to make changes to the underlying indexes. They also may need to warn investors that their strategies could deviate from the original objectives, and they may experience increased index tracking error. At least five major sponsors of market indexes have announced that they will drop Russia from various equity and fixed income indexes.

SEC Leadership Changes

On March 15, 2022, the Securities and Exchange Commission ("SEC") announced that Commissioner Allison Herren Lee would not seek a second term. Lee joined the SEC's Division of Enforcement in 2005 and served in a number of roles during her time at the SEC, including counselor to former Commissioner Kara Stein, senior counsel in the Complex Financial Instruments Unit, and acting chair in 2021. Commissioner Lee will serve until her replacement is appointed.

"Commissioner Lee is an extraordinary public servant who is incredibly dedicated to the SEC's mission," said SEC Chair Gary Gensler. "During her time as acting chair, she brought swift focus to important investor issues, such as climate-related disclosures."

On January 27, 2022, the SEC announced that Kristin Snyder, deputy director of the Division of Examinations (the "Division"), would leave the SEC after more than 18 years of service. Joy Thompson has been named acting deputy director and acting associate director of the Private Funds Unit, and Natasha Vij Greiner has been named acting co-national associate director of the Investment Adviser/ Investment Company Examination Program.

On March 24, 2022, the SEC announced that Daniel S. Kahl, acting director of the Division, will depart the agency after more than 21 years of service. Richard R. Best, director of the SEC's New York Regional Office, will serve as acting director of the Division upon Kahl's departure. Best joined the SEC in 2015 and is currently the director of the New York Regional Office. Prior to joining the SEC, he held supervisory and investigative positions at the Financial Industry Regulatory Authority and the Office of the Bronx County District Attorney. Lara Shalov Mehraban will serve as acting director of the New York Regional Office.

Massachusetts Secretary of State Launches Sweep of Target Date Fund Offerings

Massachusetts Secretary of State William Galvin has said his office will investigate broker-dealers offering target date mutual funds. In a press release issued January 25, 2022, Galvin indicated that he is "particularly concerned by reports of inadequately disclosed fund changes that shifted financial burdens to small-dollar investors," who held the funds in non-retirement accounts, and subjected such investors in certain funds to unexpected and significant tax liabilities. In the press release, Galvin said the state's securities division sent letters seeking information from some of the larger asset management firms in this product space, including BlackRock, T. Rowe Price, and a unit of Vanguard.

SEC Proposes Amendments to Enhance Private Fund Reporting

On January 26, 2022, the SEC voted to propose amendments to Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds. The proposed amendments would: (i) require large hedge fund and private equity fund advisers to file reports within one business day of events that indicate significant stress related to a fund that could harm investors or signal risk in the broader financial system; (ii) lower the reporting threshold for large private equity advisers from $2 billion to $1.5 billion in private equity fund assets under management and revise their reporting requirements; and (iii) require large liquidity fund advisers to report substantially the same information that money market funds would report on Form N-MFP, as recently proposed by the SEC.

"Since the adoption of Form PF in 2011, a lot has changed," said Gensler. "The private fund industry has grown in size to $11 trillion and evolved in terms of business practices, complexity of fund structures, and investment strategies and exposures. … Among other things, today's proposal would require certain advisers to hedge funds and private equity funds to provide current reporting of events that could be relevant to financial stability and investor protection, such as extraordinary investment losses or significant margin and counterparty default events. I am pleased to support it."

SEC Reopens Comment Period for Pay versus Performance Proposal

The SEC has reopened the comment period on rules proposed in 2015 under the Dodd-Frank Act (the "2015 Proposal"). The 2015 Proposal would, among other things, require public companies to express how the executive compensation actually paid by the company related to the financial performance of the company through both tabular and narrative disclosure. The comment period, reopened on January 27, 2022, permits interested parties to submit further comments on the 2015 Proposal and requests comment in response to certain additional requirements the SEC is considering including, among other things: (i) whether companies should be required to disclose

additional performance measures beyond total shareholder return; (ii) whether, if required, pre-tax net income and net income would be useful additional financial measures; (iii) whether companies should be required to disclose the measure that, in the company's assessment, represents the most important performance measure used by the company to link compensation actually paid during the fiscal year to company performance; and (iv) whether companies should also be required to disclose a tabular list of the company's five most important performance measures used to determine compensation actually paid.

The reopening release also requests comment on how environmental, social, and governance ("ESG") measures are utilized in executive pay packages, and whether there is sufficient insight into the methodologies behind the measures on which ESG compensation targets are based.

"The Commission has long recognized the value of information on executive compensation to investors. … In this reopening release, we are considering whether additional performance metrics would better reflect Congress's intention in the Dodd-Frank Act and would provide shareholders with information they need to evaluate a company's executive compensation policies," said Gensler.

SEC Observations from Examinations of Private Fund Advisers

On January 27, 2022, the Division published a risk alert (the "Risk Alert") highlighting compliance issues observed by Division staff in examinations of registered advisers that manage private funds. The Risk Alert follows a risk alert on the topic published in 2020 (the "2020 Risk Alert"), and provides additional information on the following four categories that were addressed in the 2020 Risk Alert: (i) failure to act consistently with disclosures, such as failure to invest in accordance with fund disclosures regarding investment strategy; (ii) use of misleading disclosures regarding performance and marketing; (iii) due diligence failures relating to investments or service providers and inadequate policies related thereto; and (iv) use of potentially misleading "hedge clauses" that purport to waive or limit an adviser's fiduciary duty under the Investment Advisers Act of 1940 (the "Advisers Act"). The Risk Alert encourages private fund advisers to review their practices and written policies and procedures, including implementation of those policies and procedures, to address the issues identified in the Risk Alert.

Statement on Money Market Funds, Open-End Bond Funds, and Hedge Funds

On February 4, 2022, SEC Chair Gensler issued a statement before the Financial Stability Oversight Council on the financial resiliency of capital markets with regard to money market funds, open-end bond funds, and hedge funds. Noting that these pooled-investment vehicles have become a significant part of the capital markets and can pose issues for financial stability, Gensler asked the SEC staff to make recommendations with regard to bolstering the resiliency of each of these fund sectors. With regard to money market funds and open-end bond funds, Gensler noted the recently proposed amendments to rules that govern money market funds, and asked the staff to consider improvements regarding the fund liquidity rule or other reforms to enhance fund liquidity, pricing, and resiliency, particularly during future stress events. With respect to hedge funds, Gensler noted the proposed amendments to Form PF that would require certain advisers to report events relevant to financial stability (see *SEC Proposes Amendments to Enhance Private Fund Reporting* above) and asked the staff to work with staff at the Commodity Futures Trading Commission to consider whether they would recommend amending the joint portions of Form PF related to the periodic reports of hedge funds. Finally, Gensler noted that the SEC re-proposed a new rule to prevent fraud, manipulation, and deception in connection with security-based swap transactions.

SEC Proposes to Enhance Private Fund Investor Protection

On February 9, 2022, the SEC voted to propose new rules and amendments (the "Proposals") under the Advisers Act that would enhance the regulation of private fund advisers. The Proposals would:

- Require registered private fund advisers to provide investors with quarterly statements detailing information about private fund performance, fees, and expenses;
- Require registered private fund advisers to obtain an annual audit for each private fund and cause the fund's auditor to notify the SEC upon certain events;
- Require registered private fund advisers, in connection with an adviser-led secondary transaction, to distribute to investors a fairness opinion and a written summary of certain material business relationships between the adviser and the opinion provider;

- Prohibit all private fund advisers, including those that are not registered, from engaging in certain activities and practices that are contrary to the public interest and the protection of investors, including seeking reimbursement, indemnification, exculpation, or limitation of liability for certain activity; charging certain fees and expenses to a private fund or its portfolio investments, such as fees for unperformed services and fees associated with an examination or investigation of the adviser; reducing the amount of an adviser clawback by the amount of certain taxes; and borrowing or receiving an extension of credit from a private fund client; and

- Prohibit all private fund advisers from providing certain types of preferential treatment that have a material negative effect on other investors, while also prohibiting all other types of preferential treatment unless disclosed to current and prospective investors.

The SEC also proposed amendments to the Advisers Act compliance rule that would require all registered advisers, including those that do not advise private funds, to document the annual review of their compliance policies and procedures in writing.

"Private fund advisers, through the funds they manage, touch so much of our economy. Thus, it's worth asking whether we can promote more efficiency, competition, and transparency in this field," said Gensler. "I support this proposal because, if adopted, it would help investors in private funds on the one hand, and companies raising capital from these funds on the other."

SEC Proposes Cybersecurity Risk Management Rules for Registered Investment Advisers and Funds

The SEC has voted to propose rules related to cybersecurity risk management for registered investment advisers and registered investment companies and business development companies ("funds"), as well as amendments to certain rules that govern investment adviser and fund disclosures. The rules and amendments, proposed on February 9, 2022, would require investment advisers and funds to: (i) adopt and implement written cybersecurity policies and review annually the effectiveness of those policies; (ii) report significant cybersecurity incidents affecting the adviser or its clients to the SEC promptly, but in no event more than 48 hours, after having a reasonable basis to conclude that a significant cybersecurity incident has occurred or is occurring; (iii) publicly disclose cybersecurity risks and significant cybersecurity incidents that occurred in the last two fiscal years in their brochures and registration statements; and (iv) maintain records designed to improve the availability of cybersecurity-related information and help facilitate the SEC's inspection and enforcement capabilities.

The proposed rules would also require fund boards to initially approve and thereafter oversee the fund's cybersecurity policies and procedures. The SEC requests comment on whether fund boards should be required to approve the cybersecurity policies and procedures of certain fund service providers, such as its investment adviser, principal underwriter, administrator, or transfer agent; and what standards and criteria they should use to make those determinations, if required. The SEC also requests comment on whether a fund board, or some designee thereof (such as a cybersecurity expert), should have oversight over the fund's risk assessments of service providers.

"Cyber risk relates to each part of the SEC's three-part mission, and in particular to our goals of protecting investors and maintaining orderly markets," said Gensler. "The proposed rules and amendments are designed to enhance cybersecurity preparedness and could improve investor confidence in the resiliency of advisers and funds against cybersecurity threats and attacks."

SEC Issues Proposal to Reduce Security Settlement Cycles

The SEC has proposed rule changes (the "Proposal") to reduce risks in the clearance and settlement of securities, including by shortening the standard settlement cycle for most broker-dealer transactions in securities from two business days after the trade date (T+2) to one business day after the trade date (T+1). Among other things, the February 9, 2022, Proposal includes rules directed at broker-dealers and registered investment advisers that would shorten the process of confirming or affirming the trade information necessary to prepare a transaction for settlement so that it can be completed by the end of the trade date. The SEC noted that the Proposal is designed to reduce the credit, market, and liquidity risks in securities transactions faced by market participants and U.S. investors.

SEC Proposes Changes to Two Whistleblower Program Rules

On February 10, 2022, the SEC proposed two amendments to rules governing the SEC's whistleblower program. The proposed amendment to Rule 21F-3 would allow the SEC to pay whistleblower awards for certain actions brought by other entities, including designated federal agencies, in cases where those awards might otherwise be paid under the other entity's whistleblower program. The proposed amendment to Rule 21F-6 would affirm the SEC's authority to consider the dollar amount of a potential award for the limited purpose of increasing the award amount, and would eliminate the SEC's authority to consider the dollar amount of a potential award for the purpose of decreasing an award.

SEC Proposes Short Sale Disclosure Rule, Order Marking Requirement, and CAT Amendments

On February 25, 2022, the SEC announced that it voted to propose changes that the agency said would provide greater transparency to investors and regulators by increasing the public availability of short sale-related data. New Exchange Act Rule 13f-2 would require certain institutional investment managers to report short sale-related information to the SEC on a monthly basis. The SEC would then aggregate data about large short positions, including daily short sale activity data, and make that information available to the public for each individual security. This new data would supplement the short sale data that is currently publicly available from FINRA and stock exchanges. The SEC also voted to propose a new provision of Regulation SHO, Rule 205, which would require a broker-dealer to mark a purchase order as "buy to cover" if the purchaser has any short position in the same security at the time the purchase order is entered. Relatedly, the SEC proposed amendments to the national market system plan governing the consolidated audit trail ("CAT") that would require CAT reporting firms to (i) report "buy to cover" order marking information and (ii) indicate where it is asserting use of the bona fide market making exception under Regulation SHO.

"Proposed Rule 13f-2 would make aggregate data about large short positions available to the public for individual equity securities," said Gensler. "This would provide the public and market participants with more visibility into the behavior of large short sellers. The raw data reported to the SEC on a new Form SHO would help us to better oversee the markets and understand the role short selling may play in market events. It's important for the public and the SEC to know more about this important market, especially in times of stress or volatility."

Division of Trading and Markets Staff Statement

The staff of the Division of Trading and Markets (the "Staff") has urged broker-dealers and other market participants to remain vigilant to market and counterparty risks that may surface during periods of heightened volatility and global uncertainties. In particular, on March 14, 2022, the Staff encouraged broker-dealers to: (i) collect margin from counterparties to the fullest extent possible in accordance with any applicable regulatory and contractual requirements; (ii) seek sufficient information to determine counterparties' aggregate positions in any markets that may experience liquidity concerns and work with the counterparties to mitigate risk; (iii) stress test positions with the proper severity in light of current events and potential market movements, and act to manage the risk of the positions, particularly those that are concentrated, appropriately; and (iv) monitor risk management limits, calibrated to the financial resources of the broker-dealer, closely intraday and escalate any breaches promptly to senior management.

Biden Signs Bill with LIBOR Replacement Framework

President Biden has signed the Consolidated Appropriations Act of 2022, which includes the Adjustable Interest Rate (LIBOR) Act (the "Act"). The Act, signed into law on March 15, 2022, establishes a uniform benchmark replacement process for financial contracts that mature after the cessation of the London Interbank Offered Rate ("LIBOR") (scheduled for June 30, 2023) and do not contain clearly defined or practicable fallback provisions. The Act also establishes a safe harbor for lenders, shielding them from litigation for choosing a replacement rate recommended by the Board of Governors of the Federal Reserve, such as the Secured Overnight Financing Rate ("SOFR"). Parties may continue to use any appropriate benchmark rate in new contracts. The federal law is similar to legislation passed in New York and several other states in 2021, and was initially proposed by the Alternative Reference Rate Committee ("ARRC"), a group of private-market participants convened by the Federal Reserve Board and the New York Fed to help ensure a successful transition from U.S. dollar LIBOR to its recommended alternative, SOFR.

"President Biden and lawmakers have taken a vital step to protect investors, businesses, and consumers from LIBOR-related risks. By providing a solution for legacy contracts that have no workable fallbacks and a safe harbor for lenders who choose SOFR in relevant contracts, this legislation significantly reduces risks for market participants worldwide," stated ARRC.

SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures

The SEC has proposed rule changes that would require public companies to include information about climate-related risks, including: (i) the company's governance of climate-related risks and relevant risk management processes; (ii) how any climate-related risks identified by the company have had or are likely to have a material impact on its business and consolidated financial statements; (iii) how any climate-related risks have affected or are likely to affect the company's strategy, business model, and outlook; and (iv) the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of a company's consolidated financial statements, as well as on the financial estimates and assumptions used in the financial statements. Per the March 21, 2022, proposed rule changes, the required information about climate-related risks also would include disclosure of a company's greenhouse gas emissions. The SEC noted that the proposed disclosures are similar to those that many companies already provide based on broadly accepted disclosure frameworks, such as the Task Force on Climate-Related Financial Disclosures and the Greenhouse Gas Protocol.

"Today, investors representing literally tens of trillions of dollars support climate-related disclosures because they recognize that climate risks can pose significant financial risks to companies, and investors need reliable information about climate risks to make informed investment decisions," said Gensler. "Companies and investors alike would benefit from the clear rules of the road proposed in this release."

SEC Division of Examinations Announces 2022 Examination Priorities

The SEC has announced its 2022 examination priorities, noting a focus on private funds, ESG investing, retail investor protections, information security and operational resiliency, emerging technologies, and crypto-assets. Specific examination priorities from the March 30, 2022, announcement include the following:

- **Registered Investment Advisers to Private Funds.** The Division will review issues under the Advisers Act, including a registered investment adviser's ("RIA") fiduciary duty; and will focus on compliance programs, fees and expenses, custody, fund audits, valuation, conflicts of interest, disclosures, and controls around material nonpublic information. The Division will also review private fund advisers' portfolio strategies, risk management, and investment recommendations and allocations, focusing on conflicts and disclosures around these areas.

- **ESG.** The Division will continue its focus on ESG-related advisory services and investment products, including mutual funds, exchange-traded funds, and private funds. Examinations will focus on whether RIAs and registered funds are accurately disclosing their ESG investing approaches and whether they have adopted and implemented policies, procedures, and practices designed to prevent violations of the federal securities laws in connection with their ESG-related disclosures, including review of their portfolio management processes and practices. Examinations will also review the voting of client securities in accordance with proxy voting policies and procedures, including whether the votes align with their ESG-related disclosures and mandates and whether there are misrepresentations of the ESG factors considered in portfolio selection.

- **Retail Investors and Working Families.** The Division will continue to address standards of conduct issues for broker-dealers and RIAs to ensure that retail investors and working families are receiving advice in their best interests. Specifically, examinations will focus on how registrants are satisfying their obligations under Regulation Best Interest and the Advisers Act fiduciary standard. Examinations will include assessments of practices regarding consideration of investment alternatives, management of conflicts of interest, trading, disclosures, account selection, and account conversions and rollovers.

- **Information Security and Operational Resiliency.** The Division will review the practices of broker-dealers, RIAs, and other registrants to prevent interruptions to services and to protect investor information, records, and assets. Examinations will continue to review whether firms have taken appropriate measures to safeguard customer accounts, oversee vendors and service providers, address malicious email activities, respond to incidents, identify and detect red flags related to identity theft, and manage operational risk as a result of a dispersed workforce.

In addition, the Division will again be reviewing registrants' business continuity and disaster recovery plans, with particular focus on the impact of climate risk and substantial disruptions to normal business operations.

- **Emerging Technologies and Crypto-Assets.** The Division will conduct examinations of broker-dealers and RIAs that are using emerging financial technologies to review whether the unique risks these activities present were considered by the firms when designing their regulatory compliance programs. Examinations will focus on firms that are, or claim to be, offering new products and services or employing new practices to assess whether: (i) controls in place are consistent with disclosures made and the standard of conduct owed to investors and other regulatory obligations; (ii) advice and recommendations, including by algorithms, are consistent with investors' investment strategies and the standard of conduct owed to such investors; and (iii) controls take into account the unique risks associated with such practices. Examinations of market participants engaged with crypto-assets will continue to review the custody arrangements for such assets and will assess the offer, sale, recommendation, advice, and trading of crypto-assets.

- **Registered Investment Companies.** The Division will continue to prioritize examinations of registered investment companies, including mutual funds and ETFs. Focus areas include disclosures to investors, accuracy of reporting to the SEC, and compliance with new rules and exemptive orders (including ETF rules and exemptive orders for non-transparent, actively managed ETFs, and custom baskets). The Division will also assess whether funds' Liquidity Risk Management Programs are reasonably designed to manage liquidity risk and review the implementation of required liquidity classifications, including oversight of third party service providers. Money market funds will be reviewed for compliance with applicable requirements, including stress-testing, website disclosures, and board oversight; and business development companies will undergo reviews of their valuation practices, marketing activities, and conflicts of interest with underlying portfolio companies. The Division's focus on portfolio investments will include examinations of mutual funds investing in private funds to assess risk disclosure and valuation issues. The Division will also focus on advisory fee waivers, to assess the sustainability of services for firms that provide such waivers, and trading activities of portfolio managers that may be designed to inflate fund performance.

"In this time of heightened market volatility, our priorities are tailored to focus on emerging issues, such as crypto-assets and expanding information security threats, as well as core issues that have been part of the SEC's mission for decades—such as protecting retail investors," said the Division's Acting Director Richard R. Best. "Our priorities cover a broad landscape of potential risks to investors that firms should consider as they review and strengthen their compliance programs."

Birdthistle Addresses Fiduciary Duties under Section 36(b) of the 1940 Act

In a speech given to the ICI Investment Management Conference on March 28, 2022, William Birdthistle, director of the SEC's Division of Investment Management, expressed concern over whether advisers to registered investment companies ("funds") are honoring their fiduciary duty to shareholders with respect to the receipt of compensation for services or payments from the fund or its shareholders, as required under Section 36(b) of the 1940 Act. Noting that no plaintiff has ever been successful in an excessive fee suit brought under Section 36(b), Birdthistle pondered whether the duty enacted in the statute is "truly being honored." Birdthistle also reminded the audience that, in addition to fund shareholders, the SEC itself has the ability to bring Section 36(b) actions. Many in the industry consider this a signal that the SEC staff may be bringing such cases in the future.

Birdthistle also expressed concern over the lack of sufficient information regarding how much the industry makes in fees each year and noted that investors who are interested in using their voice indirectly through the votes of funds in which they invest may not have sufficient information about how portfolio shares are voted.

SEC Staff Issues Bulletin on Broker-Dealer Conduct

The SEC staff has issued a bulletin (the "Bulletin") regarding the standards of conduct for broker-dealers and investment advisers when making account recommendations to retail investors. The March 30, 2022, Bulletin states that Regulation Best Interest for broker-dealers and the fiduciary standard under the Advisers Act for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest. Noting that selection of an account type is a consequential decision for retail investors and is associated with potentially significant conflicts of interest, the Bulletin provides staff views on how broker-dealers, investment advisers, and their associated persons can satisfy their obligations when making account recommendations, including by considering reasonably available alternatives and cost, addressing conflicts of interest, and adopting and implementing reasonably designed policies and procedures regarding account recommendations.

SEC ENFORCEMENT ACTIONS

SEC Files Fraud Charges Alleging a Multimillion-Dollar Scheme That Targeted Retirement Accounts

On February 1, 2022, the SEC announced charges against Safeguard Metals LLC and its owner, Jeffrey Santulan, for engaging in a multimillion-dollar fraudulent scheme involving hundreds of investors who were at or near retirement age. According to the complaint, Safeguard and Santulan acted as investment advisers and persuaded investors to sell their existing securities, transfer the proceeds into self-directed Individual Retirement Accounts, and invest the proceeds into gold and silver coins, by making false and misleading statements about the safety and liquidity of the investors' securities investments and Safeguard's business. As alleged, Safeguard fraudulently marketed itself as a full-service investment firm with offices in London, New York City, and Beverly Hills that employed prominent individuals in the securities industry and had $11 billion in assets under management. In reality, Santulan allegedly operated the company from a small leased space in a California office building using sales agents. Safeguard and Santulan also allegedly misled investors about Safeguard's commissions and markups on the coins. The SEC's complaint charges Safeguard and Santulan with violating federal securities laws. The SEC is seeking permanent injunctions, disgorgement of allegedly ill-gotten gains plus interest, and civil penalties.

SEC Charges Robo-Adviser with Misleading Clients

The SEC has charged robo-adviser Wahed Invest, LLC with making misleading statements and breaching its fiduciary duty, and for compliance failures related to its Shari'ah advisory business. According to the February 10, 2022, order, Wahed Invest advertised the existence of its own proprietary funds when no such funds existed and promised investors that it would periodically rebalance their advisory accounts but did not do so. The order further finds that when Wahed Invest ultimately launched a proprietary ETF in July 2019, it used its clients' advisory assets to seed the ETF without prior disclosure to clients of any conflicts of interest. The order also finds that Wahed Invest marketed itself as providing advisory services compliant with Islamic, or Shari'ah, law, including marketing the importance of its income purification process on its website. Despite these representations, the order finds that Wahed Invest did not adopt and implement written policies and procedures addressing how it would assure Shari'ah compliance on an ongoing basis. Wahed Invest consented to the entry of the SEC's order finding that the firm violated the Advisers Act. Without admitting or denying the SEC's findings, Wahed Invest agreed to a cease-and-desist order, to pay a $300,000 penalty, and to retain an independent compliance consultant among other undertakings.

SEC Charges 12 Financial Firms for Failure to Meet Form CRS Obligations

On February 15, 2022, the SEC announced that six investment advisers and six broker-dealers have agreed to settle charges that they failed to file and deliver client or customer relationship summaries, known as Form CRS, to their retail investors by the required deadline and, in some cases, failed to include all information necessary to satisfy Form CRS requirements. The SEC orders find that the investment advisers violated the Advisers Act, and that the broker-dealers violated the Securities Exchange Act of 1934. Without admitting or denying the findings, each of the firms agreed to be censured, to cease and desist from violating the charged provisions, and to pay civil penalties.

SEC Charges Investment Company Founder with Orchestrating "Massive" Valuation Fraud

The SEC has charged the former chief investment officer and founder (the "Founder") of an investment company ("Investment Company") with overvaluing assets by more than one billion dollars while pocketing tens of millions of dollars in fees. According to the February 17, 2022, complaint, the Founder executed the overvaluation scheme by altering inputs and manipulating the code of a third-party pricing service used to value the funds' assets. The SEC also alleged that the Founder sought to thwart redemptions by investors who likely would have requested a return of their money had they known the funds' actual performance, particularly in the volatile markets in the wake of the COVID-19 pandemic. The complaint alleges that at times during the pandemic, the funds' actual values were half of what investors were told. In February 2021, the Founder was removed from his role with the Investment Company after SEC staff confronted the firm with information suggesting that the Founder had been adjusting the third-party pricing model. Several days later, the SEC issued an order to suspend redemptions of the fund. The SEC's complaint charges the Founder with violating federal securities laws and seeks permanent injunctive relief, return of allegedly ill-gotten gains, and civil penalties.

Judge Rejects Control Share Provisions in Closed-End Fund Litigation

A U.S. federal judge has ruled that certain closed-end funds advised by Nuveen Fund Advisors, LLC and Nuveen Asset Management, LLC ("Nuveen") and trustees of Nuveen violated the 1940 Act by stripping Saba Capital Management and Saba Capital CEF Opportunities 1, Limited ("Saba") of its full voting rights at an annual meeting. Saba filed litigation against Nuveen and their trustees in early 2021, arguing that they illegally amended fund bylaws to prevent large shareholders from voting all of their shares. Among the provisions added to the bylaws was a so-called "control share provision," which resulted in shareholders only being able to vote the first 10 percent of their stake unless they received approval to vote the rest. In the February 17, 2022, ruling, the court rejected Nuveen's argument that the SEC effectively allowed closed-end funds to adopt control share provisions, concluding that the bylaw amendment violated Section 18(i) of the 1940 Act's requirement that every stock be "voting stock and have equal voting rights with every other outstanding voting stock."

Investment Adviser to Pay More than $30 Million for Undisclosed Conflicts of Interest

The SEC has announced that a registered investment adviser (the "Adviser") has agreed to pay more than $30 million to settle charges that its undisclosed conflicts of interest defrauded current and prospective clients. According to the March 3, 2022, order, the Adviser failed to inform its clients of its practice of investing their assets in proprietary mutual funds that generate fees for the Adviser and its affiliates, rather than in competitor funds whose fees may be lower. Additionally, the order found that the Adviser failed to inform prospective clients that they could invest in the Adviser's proprietary funds at a lower cost. Clients who opened accounts with certain Adviser affiliates did not pay annual marketing or distribution fees, known as 12b-1 fees, but most clients who invested with the Adviser through their own financial advisers did. The order finds that the Adviser violated the Advisers Act. Without admitting or denying the SEC's findings, the Adviser agreed to cease and desist from committing or causing any future violations of these provisions; be censured; provide notice of the settlement to affected advisory clients; retain an independent compliance consultant; and pay disgorgement, prejudgment interest, and a civil penalty totaling $30,361,803 that will be distributed to investors through a Fair Fund.

SEC Charges Venture Capital Fund Adviser with Misleading Investors

The SEC has charged venture capital fund adviser Alumni Ventures Group, LLC ("AVG") with making misleading statements about its management fees and engaging in inter-fund transactions in breach of fund operating agreements. The SEC also charged AVG's CEO with causing AVG's violations. According to the March 4, 2022, order, AVG's website and other marketing communications represented that its management fee for the venture capital funds that it managed was the "industry standard '2 and 20.'" The order found that these representations were misleading because they led some investors to believe that AVG would collect a two-percent management fee during each year of its funds' 10-year term, and separately collect a 20 percent performance fee. According to the order, AVG's typical practice was instead to assess management fees totaling 20 percent of an investor's fund investment (representing 10 years' worth of two-percent annual management fees) upon the investor's initial fund investment. The order also

included findings that AVG made inter-fund loans and cash transfers between funds and made loans to certain funds in violation of the funds' respective operating agreements. Without admitting or denying the SEC's findings, AVG and its CEO agreed to a cease-and-desist order, AVG repaid $4.7 million to affected funds and agreed to a censure and to pay a $700,000 penalty, and the CEO agreed to pay a $100,000 penalty.

SEC Charges Previously Barred Investment Adviser with Fraud

The SEC has charged a previously barred investment adviser with lying to retail investors about the use and value of their investments. The SEC's March 7, 2022, complaint alleges that David Schamens solicited investments for a purported pooled investment vehicle that would invest in pre-selected stocks, which would then be "auto-traded" by a proprietary algorithm. However, rather than using investor funds to engage in trading, Schamens allegedly used the overwhelming majority of the money for personal expenses and to repay previous investors seeking redemptions. The complaint also alleges that Schamens provided investors with fictitious monthly statements showing returns at times exceeding 80 percent and that he sought to conceal his actions by presenting investors with a phony audit letter verifying transactions and balances in the fund. The complaint charges Schamens with violating federal securities laws and seeks a permanent injunction, disgorgement, and penalties.

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