BLANKROME

Investment Management

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Regulatory Update and Recent SEC Actions

RECENT SEC LEADERSHIP CHANGES

Stephanie Allen Named as SEC's Director of Media Relations and Speechwriting

The Securities and Exchange Commission (the "SEC") announced the appointment of Stephanie Allen as director of media relations and speechwriting, effective Oct. 1, 2023. Allen served as director of speechwriting and senior adviser to the chair since March 2023, and replaces Aisha Johnson, who recently departed the agency.

Allen will serve as the primary spokesperson for the SEC and for Chair Gensler and will lead media relations for the Office of Public Affairs. Allen was previously the executive director of the Ludwig Institute for Shared Economic Prosperity. Before that, she was the director of strategic communications and marketing at Promontory Financial Group, an IBM company. After working for two senators earlier in her career, she served as Chair Gensler's speechwriter at the Commodity Futures Trading Commission.

SEC Names Kate E. Zoladz as Regional Director of Los Angeles Office

The SEC named, on November 29, 2023, Kate Zoladz as regional director of the SEC's Los Angeles Office. Zoladz joined the SEC in 2010 as a staff attorney in the Los Angeles office and later joined the Division of Enforcement's Asset Management Unit in 2017. Zoladz recently served as acting co-director since June 2023 and the associate regional director for enforcement since October 2019.

Daniel Gregus, Director of the Chicago Regional Office, to Depart the SEC

The SEC announced on December 7, 2023, that Daniel R. Gregus, director of the Chicago Regional Office, would leave the agency at the end of December after more than 30 years of service. Vanessa Horton and Kathryn Pyszka are now the acting co-directors. Horton has been an associate regional director of the Investment Adviser/Investment Company (IA/IC) examination program in the Chicago Regional Office since 2020. She joined the SEC's Chicago office in 2004 as an accountant and was later an exam manager and an assistant regional director in the Chicago IA/IC examination program. Pyszka has served as an associate regional director for enforcement in the Chicago office since 2017. She began her SEC service in 1997 as a staff attorney and later served in the positions of branch chief, senior trial counsel, and as an assistant director in the Chicago office and the Enforcement Division's Market Abuse Unit.

SEC RISK ALERTS

SEC Announces 2024 Exam Priorities

The SEC's Division of Examinations (the "Division") issued its report (the "Report") on October 16, 2023, regarding exam priorities for the upcoming year concerning investment advisers, broker-dealers, self-regulatory organization, and other market participants.

According to the Report, examination priorities continue to focus on whether investment advisers are adhering to their duty of care and duty of loyalty obligations. Areas of continued focus include:

- Investment advice provided to clients (with an emphasis on advice to older clients and those saving for retirement) with regard to products, investment strategies, and account types:
  - Complex products, such as derivatives and leveraged exchange-traded funds ("ETFs");
  - High-cost and illiquid products, such as variable annuities and non-traded real estate investment trusts ("REITs"); and
  - Unconventional strategies, including those that purport to address rising interest rates.
- Processes for determining that investment advice is provided in clients' best interest, including:
  - Making initial and ongoing suitability determinations;
  - Seeking best execution;
  - Evaluating costs and risks; and
  - Identifying and addressing conflicts of interest.

Per the Report, assessments will look at the factors that advisers consider in light of the clients' investment profiles, including investment goals and account characteristics. Examinations will review how advisers address conflicts of interest, including: (i) mitigating or eliminating the conflicts of interest, when appropriate, and (ii) allocating investments to accounts where investors have more than one account (*e.g.,* allocating between accounts that are adviser fee-based, brokerage commission-based, and wrap fee, as well as between taxable and non-taxable accounts).

Additionally, examinations will focus on the economic incentives and conflicts of interest associated with advisers that are dually registered as broker-dealers, use affiliated firms to perform client services, and have financial professionals servicing both brokerage customers and advisory clients to identify, among other things: (i) investment advice to purchase or hold onto certain types of investments (*e.g.,* mutual fund share classes) or invest through certain types of accounts when lower cost options are available; and (ii) investment advice regarding proprietary products and affiliated service providers that result in additional or higher fees to investors. Exams will include review of disclosures made to investors and whether they include all material facts relating to conflicts of interest associated with the investment advice sufficient to allow a client to provide informed consent to the conflict.

Specific areas of focus will include:

- Marketing Rule and whether advisers, including advisers to private funds, have:
  - Adopted and implemented reasonably designed written policies and procedures to prevent violations of the Advisers Act and the rules thereunder including reforms to the Marketing Rule;
  - Appropriately disclosed their marketing-related information on Form ADV;
  - Maintained substantiation of their processes and other required books and records; and
  - Disseminated advertisements that include any untrue statements of a material fact, are materially misleading, or are otherwise deceptive and, as applicable, comply with the requirements for performance (including hypothetical and predecessor performance), third-party ratings, and testimonials and endorsements.
- Compensation arrangements:
  - Fiduciary obligations of advisers to their clients, including registered investment companies, particularly with respect to the advisers' receipt of compensation for services or other material payments made by clients and others;
  - Alternative ways that advisers try to maximize revenue, such as revenue earned on clients' bank deposit sweep programs; and
  - Fee breakpoint calculation processes, particularly when fee billing systems are not automated.
- Valuation assessments regarding advisers' recommendations to clients to invest in illiquid or difficult to value assets, such as commercial real-estate or private placements.
- Disclosure review for the accuracy and completeness of regulatory filings, including Form CRS, with a particular focus on inadequate or misleading disclosures and registration eligibility.
- Policies and procedures with respect to:
  - Selecting and using third-party and affiliated service providers;
  - Overseeing branch offices when advisers operate from numerous or geographically dispersed offices; and
  - Obtaining informed consent from clients when advisers implement material changes to their advisory agreements.

Investment Advisers to Private Funds

According to the Report, examinations will prioritize specific topics, such as:

- Portfolio management risks in connection with exposure to recent market volatility and higher interest rates and effects on funds experiencing poor performance, significant withdrawals, and valuation issues for private funds with more leverage and illiquid assets.
- Adherence to contractual requirements regarding limited partnership advisory committees or similar structures (*e.g.,* advisory boards), including adhering to any contractual notification and consent processes.
- Accurate calculation and allocation of private fund fees and expenses (both fund-level and investment-level), including valuation of illiquid assets, calculation of post commitment period management fees, adequacy of disclosures, and potential offsetting of such fees and expenses.
- Due diligence practices for consistency with policies, procedures, and disclosures, particularly with respect to private equity and venture capital fund assessments of prospective portfolio companies.
- Conflicts, controls, and disclosures regarding private funds managed side-by-side with registered investment companies and use of affiliated service providers.
- Compliance with Advisers Act requirements regarding custody, including accurate Form ADV reporting, timely completion of private fund audits by a qualified auditor, and the distribution of private fund audited financial statements.
- Policies and procedures for reporting on Form PF, including upon the occurrence of certain reporting events.

Registered Investment Companies (including Mutual Funds and ETFs)

Per the Report, exam focus may include the following assessments:

- Compliance programs and fund governance practices—review boards' processes for assessing and approving advisory and other fund fees, particularly for funds with weaker performance relative to their peers;
- Disclosures to investors and accuracy of reporting to the SEC;
- Valuation practices, particularly for those addressing fair valuation practices (*e.g.,* implementing board oversight duties, setting recordkeeping and reporting requirements, and overseeing valuation designees), and, as applicable, the effectiveness of registered investment companies' derivatives risk management and liquidity risk management programs;
- Fees and expenses and whether registered investment companies have adopted effective written compliance policies and procedures concerning the oversight of advisory fees and implemented any associated fee waivers and reimbursements. Areas of particular focus include:
  - Charging different advisory fees to different share classes of the same fund;
  - Identical strategies offered by the same sponsor through different distribution channels but that charge differing fee structures;
  - High advisory fees relative to peers; and
  - High registered investment company fees and expenses, particularly those of registered investment companies with weaker performance relative to their peers.
  - Examinations will also review the boards' approval of the advisory contract and registered investment company fees.
- Derivatives risk management and whether registered investment companies and business development companies have adopted and implemented written policies and procedures reasonably designed to prevent violations of the SEC's fund derivatives rule (Investment Company Act of 1940 (the "Investment Company Act") Rule 18f-4). Review of compliance with the derivatives rule may include:
  - Review of the adoption and implementation of a derivatives risk management program;
  - Board oversight, and whether disclosures concerning the registered investment companies' or business development companies' use of derivatives are incomplete, inaccurate, or potentially misleading; and
  - Procedures for, and oversight of, derivative valuations.

Division staff will also focus on the following areas:

- Cybersecurity
- Cryptocurrency assets (focus on a range of activities surrounding crypto assets and related products, including offering, selling, recommending, trading, and providing advice on such assets); and
- Anti-Money Laundering ("AML") programs.

Cybersecurity: With respect to cybersecurity, the Division noted that "operational disruption risks remain elevated due to the proliferation of cybersecurity attacks, firms' dispersed operations, intense weather-related events, and geopolitical concerns." According to the release, the examination staff will focus on firms' policies and procedures, internal controls, governance practices, oversight of third-party vendors, and responses to "cyber-related incidents"

such as ransomware attacks. Reviews will consider how firms train staff on issues including identity theft prevention and customer records and information protection. Staff will also place a particular focus on "the concentration risk associated with the use of third-party providers, including how registrants are managing this risk and the potential impact to the U.S. securities markets."

Crypto Assets and Emerging Financial Technology: The release highlights concerns based on the continued growth and popularity of crypto assets (and their associated products and services) and the increase in automated investment tools, artificial intelligence, and trading algorithms or platforms. The Division's goal is twofold: (1) to ensure that registrants meet their fiduciary duties when recommending or advising about crypto assets; and (2) that compliances, risk disclosures, and operational resiliency practices are routinely reviewed and updated to account for the unique challenges crypto assets provide.

For crypto assets that are funds or securities, this includes ensuring that crypto assets are complying with the custody requirements under the Investment Advisers Act of 1940 (the "Advisers Act") and whether policies and procedures are reasonably designed, and accurate disclosures are made, relating to technological risks associated with blockchain and distributed ledger technology.

Anti-Money Laundering: The Division will continue to focus on whether broker-dealers and certain registered investment companies have proper AML programs as required by the Bank Secrecy Act. Specifically, the Division will examine whether broker-dealers and investment companies are appropriately tailoring AML programs, conducting independent testing, establishing an adequate customer identification program, and meeting their filing obligations.

SEC RULEMAKING

SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting

The SEC adopted rule amendments governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the "Exchange Act") on October 10, 2023, requiring market participants to provide more timely information on their positions.

Exchange Act Sections 13(d) and 13(g), along with Regulation 13D-G, require an investor who beneficially owns more than five percent of a covered class of equity securities to publicly file either a Schedule 13D or a Schedule 13G, as applicable. An investor with control intent files Schedule 13D, while "Exempt Investors" and investors without a control intent, such as "Qualified Institutional Investors" and "Passive Investors," file Schedule 13G.

The adopted amendments (among other things): (i) shorten the deadline for initial Schedule 13D filings from 10 days to five business days and require that Schedule 13D amendments be filed within two business days; (ii) generally accelerate the filing deadlines for Schedule 13G beneficial ownership reports (the filing deadlines differ based on the type of filer); (iii) clarify the Schedule 13D disclosure requirements with respect to derivative securities; and (iv) require that Schedule 13D and 13G filings be made using a structured, machine-readable data language.

In addition, the adopting release provides guidance regarding the current legal standard governing when two or more persons may be considered a group for the purposes of determining whether the beneficial ownership threshold has been met, as well as how, under the current beneficial ownership reporting rules, an investor's use of certain cash-settled derivative securities may result in the person being treated as a beneficial owner of the class of the reference equity securities.

The amendments were published in the Federal Register on November 7, 2023, effective on February 5, 2024. Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required on December 18, 2024. Compliance with the other rule amendments will be required upon their effectiveness.

"Today's adoption updates rules that first went into effect more than 50 years ago. Frankly, these deadlines from half a century ago feel antiquated," said SEC Chair Gary Gensler. "In our fast-paced markets, it shouldn't take 10 days for the public to learn about an attempt to change or influence control of a public company. I am pleased to support this adoption because it updates Schedules 13D and 13G reporting requirements for modern markets, ensures investors receive material information in a timely way, and reduces information asymmetries."

SEC Adopts Rule to Increase Transparency in the Securities Lending Market

The SEC adopted on October 13, 2023, new Rule 10c-1a, which will require certain persons to report information about securities loans to a registered national securities association ("RNSA") and require RNSAs to make publicly available certain information that they receive regarding those lending transactions. According to the SEC, the rule is intended to increase transparency and efficiency of the securities lending market.

Rule 10c-1a will require certain confidential information to be reported to an RNSA to enhance the RNSA's oversight and enforcement functions. The new rule requires that an RNSA make certain information it receives, along with daily information pertaining to the aggregate transaction activity and distribution of loan rates for each reportable security, available to the public. The Financial Industry Regulatory Authority ("FINRA") is currently the only RNSA.

The adopting release was published in the Federal Register on November 3, 2023. The compliance dates for the new rule are as follows: (1) an RNSA is required to propose rules within four months of the effective date; (2) the proposed RNSA rules are required to be effective no later than 12 months after the effective date; (3) covered persons are required to report information required by the rule to an RNSA starting on the first business day 24 months after the effective date; and (4) RNSAs are required to publicly report information within 90 calendar days of the reporting date.

SEC Adopts Rule to Increase Transparency Into Short Selling and Amendment to CAT NMS Plan for Purposes of Short Sale Data Collection

The SEC adopted, on October 13, 2023, new Rule 13f-2 to provide greater transparency to investors and other market participants by increasing the public availability of short sale related data. Specifically, Rule 13f-2 will require institutional investment managers that meet or exceed certain thresholds to report on Form SHO specified short position data and short activity data for equity securities. The Commission will aggregate the resulting data by security, thereby maintaining the confidentiality of the reporting managers, and publicly disseminate the aggregated data via EDGAR on a delayed basis. This new data will supplement the short sale data that is currently publicly available.

Relatedly, the Commission also adopted an amendment to the National Market System Plan ("NMS Plan") governing the consolidated audit trail ("CAT"). The amendment to the NMS Plan governing the CAT ("CAT NMS Plan") will require each CAT reporting firm that is reporting short sales to indicate when it is asserting use of the bona fide market making exception in Rule 203(b)(2)(iii) of Regulation SHO.

The adopting release for Rule 13f-2 and related Form SHO, as well as the notice of the amendment to the CAT NMS Plan, was published in the Federal Register on November 1, 2023. The final rule, Form SHO, and the amendment to the CAT NMS Plan will become effective 60 days after publication of the adopting release in the Federal Register. The compliance date for Rule 13f-2 and Form SHO will be 12 months after the effective date of the adopting release, with public aggregated reporting to follow three months later, and the compliance date for the amendment to the CAT NMS Plan will be 18 months after the effective date of the adopting release.

Clearing Agency Governance and Conflicts of Interest

On November 16, 2023, the SEC adopted Rule 17Ad-25 and related rules under the Exchange Act to improve clearing agency governance to mitigate conflicts of interest that may influence the board of directors or equivalent governing body of a registered clearing agency. The rules identify certain responsibilities of the board of a clearing agency, increase transparency into board governance, and, more generally, improve the alignment of incentives among owners and participants of a registered clearing agency. The rules establish new requirements for board and committee composition, independent directors, management of conflicts of interest, and board oversight.

The adopted rules:

(i) Define independence in the context of a director serving on the board of a registered clearing agency and require that a majority of the board—or 34 percent—be independent directors;

(ii) Establish independent director requirements for the compensation of certain other board committees and identify circumstances that would preclude a director from being an independent director;

(iii) Require a clearing agency to establish a nominating committee and a written evaluation process for evaluating board nominees and the independence of nominees and directors and specify requirements with respect to its composition, director fitness standards, and documentation of the outcome of the written eval practice;

(iv) Require a clearing agency to establish a risk management committee, specify requirements with respect to the committees' purpose and composition, and include an annual re-evaluation of such composition;
(v) Require policies and procedures for the management of risks from relationships with service providers for core services that directly support the delivery of clearance or settlement functionality or any other purpose material to the business of the registered clearing agency, with delineated roles for senior management and the board; and
(vi) Require policies and procedures for the board to solicit, consider, and document its consideration of the views of participants and other relevant stakeholders regarding material developments in the registered clearing agency's risk management and operations.

The final rule was published in the Federal Register on December 5, 2023, with an expected compliance 12 months after such publication for all requirements except for the independence requirement for the board and board committees, for which the compliance date is 24 months after publication.

SEC Defends Voting Disclosure Changes Before Fifth Circuit

In July of 2022, the SEC adopted amendments to its rules governing proxy voting advice. Specifically, the rule requires mutual funds, ETFs and certain other registered funds to disclose more information about how they cast votes on behalf of investors. (See Blank Rome's Investment Management Regulatory Update dated October 2022, "SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice," for further discussion). The rule is set to become effective July 1, 2024.

Since passing the rule, four states (Texas, Louisiana, Utah, and West Virginia) have challenged the SEC's authority to require fund managers to disclose additional information about votes they cast. Their argument to the Fifth Circuit is that the real purpose of the voting disclosure change is to empower corporate activities rather than the investing public. The SEC maintains, however, that the amendments fall within its authority under the Investment Company Act and that the SEC reasonably concluded that the changes would facilitate investors' ability to access information important to investment decisions and mitigate conflicts of interest.

SEC Adopts Rule to Prohibit Conflicts of Interest in Certain Securitizations

On November 27, 2023, the SEC adopted Dodd-Frank rules against trader conflicts. Securities Act Rule 192 implements Section 27B of the Securities Act of 1933 (the "Securities Act"), a provision added by the Dodd-Frank Act. The Rule seeks to prevent the sale of asset-backed securities ("ABS") that pose a material conflict of interest. Specifically, it prohibits a securitization participant, for a period of time, from engaging, directly or indirectly, in any transaction that would involve or result in any material conflict of interest between the participant and an investor in the relevant ABS. Rule 192 provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making activities of a securitization participant.

Under new Rule 192, conflicted transactions include a short sale of the relevant ABS, the purchase of a credit default swap or other credit derivative that entitles the securitization participant to receive payments upon the occurrence of specified credit events in respect of the ABS, or a transaction that is substantially the economic equivalent of the aforementioned transactions, other than any transaction that only hedges general interest rate or currency exchange risk.

SEC Adopts Rules to Improve Risk Management in Clearance and Settlement and Facilitate Additional Central Clearing for the U.S. Treasury Market

The SEC adopted rules on December 13, 2023, to enhance risk management practices for central counterparties in the U.S. Treasury market and facilitate additional clearing of U.S. Treasury securities transactions. The rule changes update the membership standards required of covered clearing agencies for the U.S. Treasury market with respect to a member's clearance and settlement of specified secondary market transactions. Additional rule changes are designed to reduce the risks faced by a clearing agency and incentivize and facilitate additional central clearing in the U.S. Treasury market.

According to the release, the amendments require that covered clearing agencies in the U.S. Treasury market adopt policies and procedures designed to require their members to submit for clearing certain specified secondary market transactions. These transactions include: (i) all repurchase and reverse repurchase agreements collateralized by U.S. Treasury securities entered into by a member of the covered clearing agency, unless the counterparty is a state or local government or another clearing organization or

the repurchase agreement is an inter-affiliate transaction; (ii) all purchase and sale transactions entered into by a member of the clearing agency that is an interdealer broker; and (iii) all purchase and sale transactions entered into between a clearing agency member and either a registered broker-dealer, a government securities broker, or a government securities dealer.

Further, the amendments permit broker-dealers to include customer margin required and on deposit at a clearing agency in the U.S. Treasury market as a debit in the customer reserve formula, subject to certain conditions. In addition, the amendments require covered clearing agencies in this market to collect and calculate margin for house and customer transactions separately. Finally, the amendments require policies and procedures designed to ensure that the covered clearing agency has appropriate means to facilitate access to clearing, including for indirect participants. The amendments also include an exemption for transactions in which the counterparty is a central bank, sovereign entity, international financial institution, or natural person.

ENFORCEMENT ACTIONS AND CASES

SEC Charges Investment Adviser with Failing to Properly Disclose Investments by Publicly Traded Fund

The SEC charged an investment adviser, on October 24, 2023, for failing to accurately describe investments in the entertainment industry that comprised a significant portion of a publicly traded fund it advised. The investment adviser settled the charges and agreed to pay a $2.5 million penalty.

According to the SEC's order, from 2015 to 2019, one of the investment adviser's trusts made significant investments, through a lending facility, in Aviron Group, LLC, a company that developed print and advertising plans for one to two films per year. According to the SEC's order, the investment advisor inaccurately described Aviron as a "Diversified Financial Services" company in many of the trust's annual and semi-annual reports. In addition, according to the order, the investment adviser stated that Aviron paid a higher interest rate than was actually the case, and in 2019, the investment adviser identified these inaccuracies and the trust accurately reported the Aviron investment in reports going forward.

Per the SEC's order, the investment adviser willfully violated fraud-based disclosure prohibitions under Section 34(b) of the Investment Company Act and Section 206(4) of the Advisers Act and related Rule 206(4)-8. Without admitting or denying the SEC's findings, the investment adviser agreed to a cease-and-desist order and a censure in addition to a monetary penalty.

Previously, in 2022, the SEC charged and then resolved its action against William Sadleir, the founder of Aviron, for misappropriating the trust's funds invested in Aviron.

"Retail and institutional investors rely on accurate disclosures of the companies that make up a closed-end or mutual fund's portfolio to evaluate a current or prospective investment in the fund," said Andrew Dean, co-chief of the Enforcement Division's Asset Management Unit. "Investment advisers have a responsibility to provide this vital information, and [the adviser here] failed to do so with the Aviron investment."

SEC Charges President/CCO of Asset Management Advisory Firm with Fraud

The SEC charged a president and chief compliance officer of registered investment adviser, Prophecy Asset Management LP ("Prophecy"), on November 2, 2023, for his involvement in a multi-year fraud that concealed losses of hundreds of millions of dollars from investors.

Prophecy advised multiple hedge funds and reported more than $500 million in assets under management. The SEC's complaint alleged that the president and Prophecy misled the funds' investors, auditors, and administrator about the funds' trading practices, risk, and performance—all while collecting more than $15 million in fees.

According to the SEC's complaint, the president led investors to believe that their investments were protected from loss, telling them the funds' capital was shared among dozens of sub-advisers who traded in liquid securities and posted cash collateral to offset any trading losses they

incurred. However, the SEC alleged that in reality, most of the funds' capital went to one sub-adviser, who incurred massive trading losses that far exceeded the cash collateral he had contributed. In addition, the complaint alleged that the president caused the funds to invest in highly illiquid investments, which also resulted in substantial losses to the funds, concealed these losses by fabricating documents and engaging in a series of sham transactions, and deceived investors about the diversification and trading strategies in two other funds. The complaint pleads by 2020, after losses in funds that Prophecy managed amounted to more than $350 million, the president and Prophecy indefinitely suspended redemptions by investors.

The SEC's complaint charged the president with violations of Section 17(a) of the Securities Act, Rule 10b-5, Section 206(1) and (2) of the Advisers Act, and Rule 206(4)-8 of the Advisers Act.

SEC Announces Enforcement Results for FY23

The SEC announced on November 14, 2023, its enforcement results for fiscal year 2023. The SEC filed 784 total enforcement actions in fiscal year 2023, a three percent increase over fiscal year 2022. These included 501 original, or "stand-alone," enforcement actions, an eight percent increase over the prior fiscal year; 162 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders; and 121 actions against issuers who were allegedly delinquent in making required filings with the SEC.

The stand-alone enforcement actions ranged from billion-dollar frauds to emerging market investments involving crypto asset securities and cybersecurity. The pool of charged individuals or entities included a diverse array of market participants from public companies and investment firms to gatekeepers (such as auditors and lawyers) to social media influencers. Notably, fiscal year 2023 was record-breaking for the SEC's Whistleblower Program with awards totaling nearly $600 million and more than 18,000 whistleblower tips, which is nearly 50 percent more tips than in the previous fiscal year.

In total, the SEC obtained orders for $4.949 billion in financial remedies, second only to the record-setting $6.439 billion in fiscal year 2022. Of this $4.949 billion, $3.369 billion was obtained in disgorgement and prejudgment interests and $1.580 billion in civil penalties. The SEC also obtained orders barring 133 individuals from serving as officers and directors of public companies, the highest number of bars obtained in a decade.

Crypto Currency Exchange Agrees to pay $4.3 Billion in Fines for Violations of the Bank Secrecy Act

On November 21, 2023, the largest Crypto Currency Exchange (the "Exchange") in the world agreed to pay a historic $4.3 billion fine for failing to register as a money-transmitting business and allowing users to evade U.S. sanctions against Iran. The Exchange's founder pled guilty to failing to maintain an effective anti-money laundering program in violation of the Bank Secrecy Act. This agreement marks the end of the Department of Justice's yearlong investigation over alleged money laundering, bank fraud, and sanctions violations.

The Exchange also agreed to pay several other penalties to resolve enforcement actions by the CFTC and Treasury Department. Under the CFTC's proposed orders, the Exchange will pay $2.7 billion, the founder will pay $150 million, and former CCO will pay $1.5 million for ignoring potential money launder and terrorists financing on its platform and for failing to register with the CFTC.

Additionally, the FinCEN settlement will require the Exchange to pay $3.4 billion in civil money penalty and will be subject to a five-year monitorship. Office of Foreign Assets Control will require the Exchange to pay a $968 million penalty. The Treasury will also retain access to the company's books, records, and systems for the five-year monitorship.

SEC Charges Real Estate Fund Adviser with $35 Million Fraud

The SEC filed a complaint in the U.S. District Court for District of Arizona, on November 28, 2023, charging an adviser, his investment company, and related entities controlled by the adviser with violating the antifraud provisions of the federal securities laws.

The SEC alleged that the adviser misappropriated more than $35 million from private real estate funds and other investment vehicles by using a substantial portion of the funds to pay for his family members' personal expenses and to fund private jets, yachts, and expensive residences. Further, the adviser issued a press release from another wholly owned LLC that stated the company's intention to purchase 51 percent of all minority shares in an unrelated public company, at $9 a share, more than nine times the company's then-current trading price. The shares jumped over 150 percent in after-hours trading shortly after the press release was issued. The adviser had purchased more than 72,000 call options in the company at a price far below the stock price in the days leading up to the press release, hoping to exercise the options at a profit after manipulating the stock price.

Global Bank and Affiliated Entities to Pay $10 Million for Providing Prohibited Mutual Fund Services

The SEC announced, on December 13, 2023, that a global bank and two affiliated entities ("Entities") agreed to pay $10 million to settle the SEC's charges that they provided prohibited underwriting and advising services to mutual funds.

In October 2022, the Superior Court of New Jersey entered a consent order that resolved a case alleging that the Entities violated the antifraud provisions of the New Jersey securities laws in connection with its role as underwriter to residential mortgage-backed securities. According to the SEC's order, the global bank and its affiliates were prohibited from serving as a principal underwriter or investment adviser to mutual funds or employees' securities companies pursuant to the Investment Company Act unless an exemptive order was received. The SEC order found, however, that the Entities continued serving in these prohibited roles until the SEC granted them time-limited exemptions on June 7, 2023. Without admitting or denying the SEC's findings, the Entities agreed to pay more than $6.7 million in disgorgement and prejudgment interest and civil penalties totaling $3.3 million.

"Today's action holds the [Entities] accountable for not complying with eligibility requirements," said Corey Schuster, Asset Management Unit co-chief. "This action reinforces the need for entities to properly monitor for events that may cause disqualification and proactively seek and obtain waivers from the Commission before becoming disqualified, or refrain from performing prohibited services."

BarnBridge DAO Agrees to Stop Unregistered Offer and Sale of Structured Finance Crypto Product

The SEC announced on December 22, 2023, that BarnBridge DAO ("BarnBridge"), a purportedly decentralized autonomous organization, and its two founders will pay more than $1.7 million to settle charges that they failed to register BarnBridge's offer and sale of structured crypto asset securities known as SMART Yield bonds. The SEC also charged the respondents with violations stemming from operating BarnBridge's SMART Yield pools as unregistered investment companies.

According to the SEC's orders, the respondents compared the SMART Yield bonds to asset-backed securities and marketed them broadly to the public. Investors could purchase "Senior" or "Junior" SMART Yield bonds through BarnBridge's website application. SMART Yield pooled crypto assets deposited by the investors and used those assets to generate fixed or variable returns to pay investors. A BarnBridge white paper, published by one of the founders, claimed that SMART Yield bonds would "mirror the safety and security of highly rated debt instruments offered by traditional finance…while still providing the outsized return" through its smart contract protocols. According to the orders, SMART Yield attracted more than $509 million in investments from investors, and BarnBridge was paid fees by the investors based on the size of their investment and their choice of yield.

To settle the SEC's charges, BarnBridge agreed to disgorge nearly $1.5 million of proceeds from the sales, and its two founders each agreed to pay $125,000 in civil penalties.

Without admitting or denying the SEC's findings, BarnBridge and its two founders agreed to cease-and-desist orders prohibiting them from violating and causing violations of the registration provisions of the Securities Act and the Investment Company Act. The SEC orders referenced remedial actions initiated by the founders.

SEC BuyBack Disclosure Rule Vacated by Appeals Court

The Fifth U.S. Circuit Court of Appeals in New Orleans, on December 19, 2023, granted a motion filed by business groups to vacate the SEC's new rule that required companies to provide timelier disclosures on stock buybacks. Prior to this ruling, on October 31, 2023, the court found that the SEC "acted arbitrarily and capriciously" and in so doing violated the Administrative Procedure Act by failing to conduct a proper cost-benefit analysis when drafting the rule. The

SEC was given 30 days to "correct the defects in the rule" but did not file a new draft. On December 7, 2023, business groups filed a motion for the court to vacate the rule.

The SEC's finalized rule in May 2023 required companies to disclose daily stock buyback information either quarterly or semiannually to include the number of shares repurchased each day and the average price paid on that day. In addition, the rule required companies to indicate whether certain directors or officers traded the relevant securities within four days before or after public announcement of an issuer's buyback plan or program.

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

Thomas R. Westle
Partner and Co-Chair, Investment Management
212.885.5239 | thomas.westle@blankrome.com

Stacy H. Louizos
Partner and Co-Chair, Investment Management
212.885.5147 | stacy.louizos@blankrome.com

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