

2023 Fiscal Year in Review: SEC Enforcement Actions Against Investment Advisers to Private Funds, Registered Funds, and Retail Clients

October 17, 2023

In its 2023 fiscal year that ended on September 30, the U.S. Securities and Exchange Commission (SEC or Commission) brought over 150 enforcement actions against investment advisers and their representatives. A review of notable actions under the Investment Advisers Act of 1940 reveals a number of trends likely to continue into FY2024, including aggressive enforcement in areas of focus for Chairman Gary Gensler’s regulatory agenda.

Here, we provide an overview of key areas of focus and notable actions. These areas of ongoing focus include the following topics:

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Rule Enforcement

Recent and Ongoing Sweeps

The SEC has been actively using market wide “sweeps” as a way to investigate efficiently similar conduct by multiple investment advisers and to send a stronger message to the market. During the fiscal year-end, the SEC brought charges against over 20 investment advisers through three enforcement sweeps and other investigations of similar violations.

- Amended Marketing Rule.*** In September, the SEC charged nine registered investment advisers in an ongoing sweep for advertising hypothetical performance to the general public on their websites without adopting and/or implementing policies and procedures required by the investment adviser marketing rule, which was amended in December 2020.¹ Without admitting or denying the allegations, the firms’ settlements included a total of \$850,000 in penalties that ranged from \$50,000 to \$175,000 and undertakings not to advertise hypothetical performance without having the requisite policies and procedures. These actions follow an August 2023 enforcement action against a fintech investment adviser alleging similar and additional disclosure violations, among other violations, which marked the first enforcement action charging violations of the amended marketing rule, and in which the adviser agreed to pay a civil penalty, disgorgement, and prejudgment interest totaling over \$1 million.² On the eve of the SEC’s fiscal year-end, the SEC brought another action against an investment adviser to mutual funds and private funds for pre-amended marketing rule conduct related to alleged material misstatements and omissions concerning index performance as well as related compliance policies and procedures failures, with the adviser agreeing to pay a \$1 million penalty.³ The SEC is continuing to examine and investigate registrants with respect to marketing and advertising.
- Off-Channel Communication Recordkeeping.*** The SEC remains focused on recordkeeping failures by both investment advisers and broker-dealers. In two separate announcements in this ongoing sweep, the SEC recently charged 15 broker-dealers, four dually registered broker-dealers and investment advisers, and two affiliated investment advisers for “widespread and longstanding failures” to maintain and preserve off-channel communications on personal devices, which facts the firms each admitted.⁴ Some of the investment advisers’ off-channel messages included providing and recommending investment advice to clients. The adviser entities were ordered to pay \$45.5 million of the combined \$368 million in penalties, with individual penalties ranging from \$2.5 million to \$15 million.⁵ Each also agreed to various, consistent undertakings. We anticipate additional actions brought in FY2024.
- Custody Rule.*** The SEC settled its second set of actions against five investment advisers alleging failures to comply with requirements related to safekeeping client assets in violation of the custody rule. The SEC also alleged Form ADV

violations against three of the advisers. In total, the firms agreed to pay over \$500,000 in penalties.⁶

Liquidity Rule

The SEC filed its first action enforcing Rule 22e-4 under the Investment Company Act of 1940, as amended (known as the liquidity rule). The liquidity rule requires a mutual fund to manage liquidity risk by, among other things, establishing a written liquidity risk management program prohibiting the fund from investing more than 15% of its net assets in illiquid investments. If the fund exceeds that limit, it is required to take certain prompt remedial steps.

- The SEC's complaint alleges that an investment adviser, its principals, and the fund's two independent trustees aided and abetted a mutual fund client's liquidity rule violations by failing to classify the securities in question as illiquid, present the fund board with a plan to reduce the fund's illiquid investments below 15%, and make required filings with the SEC, among other allegations.⁷ The SEC charged the trustees because under the liquidity rule, the fund's board is responsible for oversight of the fund's compliance with the rule and because the trustees allegedly allowed the fund to classify the at-issue securities as illiquid despite having knowledge of facts to the contrary. The case is pending; the SEC's complaint seeks permanent injunctions and civil money penalties.

Whistleblowers Protection Rules

Demonstrating its ongoing focus on upholding whistleblower protection under Exchange Act Rule 21F-17, the SEC charged a hedge fund investment adviser with impeding potential whistleblowers.

- The SEC's order alleged that the adviser violated the rule by requiring employees to sign agreements prohibiting the disclosure of confidential corporate information to third parties, without an exception for disclosure to the SEC by potential whistleblowers, and by requiring departing employees to sign releases affirming that they had not filed any complaints with any government agency in order for the employees to receive deferred compensation.⁸ The SEC's order noted the adviser's remedial efforts, including revising its release to add language affirmatively advising employees of their right to contact regulators and making reasonable efforts to send letters to former employees to notify them of their ability to communicate with the SEC without notice or approval by the adviser. Without admitting or denying the findings, the adviser agreed to pay a \$10 million penalty, which is the largest civil penalty to date in a standalone SEC action addressing Rule 21F-17.

Duty of Care/Best Interest

Among other actions finding breaches of an investment adviser's fiduciary duty, the SEC continues to charge investment advisers for breaching their duty of care by failing to undertake a best interest analysis.

- *Leveraged ETFs.* The SEC charged an adviser and its part-owner and representative with alleged breach of fiduciary duty in connection with the use of leveraged exchange-traded funds (ETFs) in discretionary client accounts as well as related compliance failures.⁹ According to the SEC's order, the respondents misunderstood the fundamental characteristics of the leveraged ETFs and therefore lacked reasonable belief that the leveraged ETFs were in their clients' best interests. The firm and individual agreed to pay \$195,228 and \$738,113, respectively, in disgorgement, prejudgment interest, and civil penalties.
- *Alternative Investments.* The SEC filed a complaint against an investment adviser and its principal alleging they unsuitably recommended that three clients invest in risky, alternative-investment opportunities without reasonably understanding and while lacking a reasonable basis to recommend the investments.¹⁰ The defendants consented to entry of final judgment that included remedies of engaging due-diligence consultants to review certain potential future transactions, and the principal agreed to a \$100,000 civil penalty.

Conflicts of Interest

Trade Allocation

As in prior years, the SEC brought and resolved several actions concerning "cherry picking," a practice of fraudulently allocating profitable trades to favored accounts at the expense of other advisory clients.

- For example, early this fiscal year, the SEC obtained consent judgments against, and settlements with, two investment firms, certain co-owners, and relief defendants relating to an alleged longstanding cherry picking scheme.¹¹ The SEC's amended complaint alleged that through the entities, the individual defendants allocated thousands of profitable trades worth more than \$4 million to favored accounts held by one defendant's parents and allocated millions of dollars of unprofitable trades to other clients. The SEC alleged that one defendant, the president and chief compliance officer (CCO), enabled the cherry picking by, among other things, sharing broker-dealer trading platform login information that the other individual defendant used to carry out the scheme. Pursuant to the settlements, the defendants and relief defendants must pay approximately \$5.7 million in monetary relief, and the defendants agreed to an associational bar and suspensions.

Valuation

The SEC brought numerous enforcement actions in connection with advisers' valuation of client assets, including relating to both incorrect and fraudulent calculations, and for related compliance failures.

- *Inflated Pricing Data.* The SEC charged a mutual fund investment adviser and its founder and principal with allegedly overcharging its clients fees based on fund net asset value (NAV) calculated using pricing data that was based, in part, on the funds' own inflated trading prices.¹² The SEC alleged that the respondents caused clients to sell to certain broker-dealers illiquid, high-yield debt securities at prices that the respondents proposed rather than "at prices that were independently derived from price discovery in the broader market," then causing other clients to repurchase the bonds at sight markups. The SEC further alleged that the "frequent" sale-repurchase transactions and "repeated mark-ups" resulted in the bonds' market price increasing at a faster rate than prices of similar securities. The adviser and founder agreed jointly and severally to pay approximately \$14.4 million in disgorgement and prejudgment interest, in addition to civil penalties of \$4,400,000 and \$600,000, respectively.
- *Inflated Quotes and "Imputed" Mid-Point Valuations.* The SEC obtained final consent judgments against a portfolio manager and trader from a now-defunct, and previously enjoined, hedge fund adviser for their roles in a fraudulent valuation scheme that inflated the funds' NAV by hundreds of millions of dollars.¹³ To conceal poor performance and attract and retain investors, the SEC found the adviser inflated fund holdings and exaggerated returns by directing trades to a broker-dealer in exchange for inflated quotes and the use of "imputed" mid-point valuations. The SEC previously announced a final consent judgment against the adviser's chief executive officer (CEO)/chief investment officer, who agreed to a \$450,000 penalty and industry bar.¹⁴
- *Compliance Rule Failures: Level 3 Investments.* The SEC charged another private fund adviser and its predecessor for allegedly failing to adopt and implement reasonably designed written policies and procedures concerning the valuation of fund portfolio investments in light of the nature of the investment mandates of the funds.¹⁵ The SEC alleged the adviser's policies gave "only minimal guidance regarding how to value Level 3 Investments in accordance with Generally Accepted Account Principles ... and other standards set forth in the funds' offering documents." The entities paid a joint penalty of \$275,000 and agreed to undertakings, including retention of a compliance consultant.

Revenue Sharing

Continuing a several-years'-old trend, the SEC brought several actions against advisers related to disclosures and practices concerning revenue sharing and other alleged financial conflicts of interest.

- *Affiliated Broker-Dealer.* The SEC charged two affiliated investment advisers for failing to make adequate conflicts disclosures concerning certain cash sweep revenue sharing and other compensation and fees from client transactions with an affiliated broker-dealer.¹⁶ The SEC also charged the firms with violating their duty of care in connection with the evaluation of transaction fees, cash sweep account options, and share classes of mutual fund that paid 12b-1 fees as well as failing to adopt and implement written compliance policies and procedures reasonably designed to prevent such violations. Without admitting or denying the allegations, the advisers agreed to undertakings and civil penalties of \$130,000 and \$50,000, respectively, and one adviser also agreed to pay disgorgement and prejudgment interest totaling over \$700,000.
- *Unaffiliated Clearing Brokers.* The SEC charged an investment adviser for allegedly breaching its fiduciary duty by failing to provide full and fair disclosure of material facts and conflicts related to revenue sharing and incentive payments received from unaffiliated clearing brokers.¹⁷ The SEC's order also alleged the adviser failed to implement written compliance policies and procedures related to the disclosure of compensation, conflicts of interest, and disciplinary histories. The adviser agreed to undertakings, a \$375,000 civil penalty, and over \$1.5 million in disgorgement and prejudgment interest.
- *Revenue Sharing, Mark-ups, and Fees.* The SEC obtained a final judgment against two investment advisers charged with defrauding their retail advisory clients by failing to disclose properly conflicts of interest arising from compensation received through 12b-1 fees, revenue sharing, administrative fees, and mark-ups and by "regularly and repeatedly put[ting] their financial interest ahead of their clients."¹⁸ The defendants consented to pay a \$1 million civil penalty each and to pay jointly over \$6.6 million in disgorgement and prejudgment interest.
- *Affiliate-Operated Cash Sweep Program.* The SEC charged an investment adviser for allegedly breaching its fiduciary duty by failing to disclose adequately conflicts of interest involving a cash sweep program operated by an affiliated custodian and the adviser's receipt of payments from certain other custodians.¹⁹ The SEC also alleged that the adviser failed to implement written policies and procedures reasonably designed to prevent such violations. The adviser agreed to pay more than \$18 million in a civil penalty, disgorgement, and prejudgment interest as well as comply with certain undertakings.

Fees and Expenses

The SEC continues to bring enforcement actions against fund managers related the perennial issue of fees and expenses. In the examples provided below, the SEC credited the advisers for taking remedial actions in advance of settlement, such as reimbursing affected clients and engaging third-party compliance consultants.

- *Inaccurate Fee Calculation.* In a settled action, the SEC alleged that a private equity fund adviser charged excess management fees inaccurately calculated based on aggregated invested capital at the portfolio company level instead of at the individual portfolio investment security level, as required by the applicable agreements, and that the adviser failed to disclose fee calculation conflicts of interest.²⁰ The SEC's order noted remedial acts by the adviser, including adopting and disclosing new and more objective permanent investment impairment criteria during an SEC examination and prior to the SEC Enforcement investigation and then applying the new criteria to reimburse the affected funds for over \$3.8 million of excess management fees with interest. The adviser agreed to pay a \$1.5 million penalty and nearly \$865,000 in disgorgement and prejudgment interest.
- *Failure to Waive Fees.* The SEC charged an investment adviser for failing to waive certain advisory fees accurately for a "fund of fund" mutual fund client consistent with its agreement with that client and for failing to have adequate related policies and procedures.²¹ Over the course of six years, the unwaived fees amounted to approximately \$27 million, which the adviser previously reimbursed to its client, plus lost performance and interest. Without admitting or denying the allegations, the adviser agreed to pay a \$2.5 million penalty.
- *Undisclosed Accelerated Monitoring Fees.* The SEC charged a private fund adviser for allegedly breaching its fiduciary duty, including by, among other things, failing to disclose adequately its conflict of interest arising from receiving accelerated monitoring fees paid by a portfolio company when that portfolio company was sold and by failing to consider whether the fee acceleration was in its clients' best interest.²² The SEC's order also alleged that the adviser transferred certain expiring funds' assets to a new private fund it also advised (described in a quote in the press release as a "continuation fund") and thereby locked up investor money without obtaining investor consent, providing an exit option, or disclosing conflicts of interest in the transaction.²³ The SEC's order also alleged that the adviser failed to implement written policies and procedures reasonably designed to prevent such violations. The adviser agreed to pay a \$1.2 million penalty and \$445,460 in disgorgement and prejudgment interest as well as certain undertakings.

Compliance Failures

The SEC continues to bring actions against investment advisers for compliance failures, including standalone compliance failure charges.²⁴ Compliance failures are routinely identified during the course of registrant examinations, and we note that one of the press releases for the below matters acknowledged that an SEC examination led to the investigation.²⁵ A number of enforcement actions this year involved instances where compliance failures persisted over multiple years or where the adviser failed to follow up on red flags.

- Inadequate Compliance Manual.* The SEC charged an investment adviser for failing to adopt and implement reasonably designed compliance policies and procedures, where the adviser had, among other things, adopted policies from another investment adviser's compliance manual without adequate tailoring.²⁶ According to the settled order, the SEC provided notice to the firm of such deficiencies, which persisted for multiple years, in connection with an examination. The SEC also charged the adviser with failing to conduct best execution reviews of third-party service providers. Without admitting or denying the allegations, the adviser agreed to a \$50,000 penalty and to engage an independent compliance consultant.
- Outside Business Activities.* The SEC charged an investment adviser and its CEO/founder for failing to adopt adequate policies and procedures and failing to supervise one of the adviser's representatives who misappropriated client funds for his outside business activities.²⁷ The SEC found that the firm's overall supervisory structure was inadequate because it had failed to establish sufficient supervisory policies and procedures, failed to follow those it had in place, and failed to follow up on "red flags." In an initial decision, an administrative law judge ordered the adviser and its CEO to pay civil penalties of \$250,000 and \$125,000, respectively, and barred the CEO from acting in a supervisory capacity.²⁸ The Commission has since granted the respondents' petition to review the initial decision.²⁹
- Advisory Account Reviews and Conflicts Disclosures.* The SEC charged an investment adviser for making false and misleading statements in its Form ADV brochure regarding reviews of advisory client accounts and for failing to disclose certain conflicts of interests, adopt and implement related policies and procedures, and deliver to clients required information about advisory personnel.³⁰ The order noted the adviser's remedial actions, including retaining a third-party compliance consultant to review and make recommendations to improve policies and procedures. Without admitting or denying the allegations, the firm agreed to pay over \$488,000 in civil penalty, disgorgement, and prejudgment interest and agreed to undertakings, including continuing to retain an additional independent compliance consultant.
- Unaddressed Exam Findings.* Another investment adviser settled an action in which the SEC alleged it failed (1) to adopt and implement adequate written policies and procedures; (2) to conduct annual reviews of its compliance program; and (3) to establish, maintain, and enforce a written code of ethics.³¹ The SEC's order noted the adviser received notice of these deficiencies during a prior SEC examination, yet failed to address these failures adequately until after an examination 15 years later raised these issues again. Noting the firm's remedial acts, including hiring a new CCO, engaging a compliance consultant, and addressing certain compliance deficiencies, the SEC's order imposed a \$100,000 penalty.

- *Conflicts of Interest Disclosures.* The SEC charged an investment adviser and its principal for failing to disclose the misuse of proceeds raised from advisory clients, including by using money for operating expenses of other entities or to repay intercompany loans and for the firm's failure to implement reasonably designed written policies and procedures concerning the disclosure of conflicts of interest.³² The SEC's order noted remedial efforts, including voluntarily repaying certain debts totaling \$1.65 million to investment advisory clients. Without admitting or denying the allegations, the adviser and principal agreed to pay, jointly and severally, a civil money penalty of \$250,000.

ESG Disclosures, Policies, and Procedures

Demonstrating its ongoing focus, the SEC charged investment advisers for violations relating to ESG issues.

- *ESG Research.* The SEC charged an investment adviser to registered funds for alleged policy and procedure failures involving ESG research its investment teams used to select and monitor securities, including by initially failing to have any such policies and, once policies were in place, failing to follow them consistently.³³ The adviser agreed to a \$4 million penalty.
- *ESG Integration.* The SEC charged a mutual fund investment adviser for making materially misleading statements about its controls for incorporating ESG factors into research and investment recommendations where the adviser had failed to implement certain provisions of its existing ESG integration policy, and for failing to adopt and implement policies and procedures reasonably designed to ensure that public statements about ESG integrated products were accurate.³⁴ Without admitting or denying the allegations, the adviser modified relevant processes, policies, procedures, and controls and agreed to pay a \$19 million penalty.

Other Disclosure Issues

In addition to undisclosed conflicts, the SEC remains focused on other types of material misstatements and omissions to clients and investors, as well as other inadequate disclosures.

- *Tax-Loss Harvesting Service.* The SEC charged an investment adviser for alleged material misstatements and omissions in statements to clients concerning an automated tax-loss harvesting service as well as failing to provide clients notice concerning changes it made to its advisory contracts.³⁵ The SEC also alleged books and records violations relating to the firm's failure to maintain records reflecting written agreements with certain clients as well as failing to adopt and implement adequate policies and procedures. The firm agreed to pay a \$9 million penalty.
- *Paired Interest Rate Swaps.* The SEC charged an investment adviser for allegedly making material omissions concerning its use of paired interest rate

swaps for a closed-end fund it advised by inadequately disclosing that where a significant portion of distributions came from those products.³⁶ The adviser agreed to pay a \$6.5 civil penalty.

- *SPACs*. Demonstrating its continued focus on SPACs, the SEC charged certain private fund advisers for alleged failures to disclose conflicts of interest regarding ownership interests in sponsors of SPACs into which they advised their clients to invest.³⁷ Two advisers, for example, agreed to pay civil penalties of \$1 million and \$1.4 million to settle such charges, among other violations.
- *Crypto Assets*. The SEC recently filed a complaint against a private funds investment adviser and its president, CCO, and majority owner for alleged fraudulent conduct that included, among other things, loss of control of crypto assets entrusted to them for at least one year without disclosure of that fact to advisory clients and multiple investments in a spouse's company without proper disclosure to private fund investors.³⁸ In addition, the SEC's complaint alleged multiple other violations, including failing to produce books and records to the SEC's Division of Examinations when requested. The case is currently pending with the SEC seeking preliminary relief to safeguard client assets, among other remedies.
- *Annuity Sales*. The SEC filed a complaint against a retail investment adviser and its founder for defrauding clients in connection with annuity sales to retirees.³⁹ The SEC alleged the defendants recommended their clients invest in certain insurance products that paid the founder a substantial upfront commission without adequately disclosing the financial incentive. The SEC further alleged the defendants failed to disclose free marketing services and payments that the founder received from marketing firms in exchange for peddling annuities to their clients. The SEC is seeking remedies of permanent injunctions, disgorgement plus prejudgment interest, and civil penalties. Among other defenses, the defendants are challenging the SEC's jurisdiction over insurance-related recommendations.

Unregistered Investment Adviser Activity

Underscoring the importance of registering with the Commission where an entity engages in investment adviser activity, the SEC brought its first action in recent years for unregistered investment adviser activity.

- The SEC filed a complaint against a limited liability company and its owner/principal alleging that the defendants operated for at least 10 years as unregistered investment advisers to their only client, a former Russian official residing outside the U.S. and reported to have political connections to the Russian Federation.⁴⁰ The action is pending, and the SEC is seeking injunctive relief, disgorgement with prejudgment interest, and civil penalties.

¹ Link [here](#). For more insights on the amended marketing rule and this sweep, see the following Sidley Updates: [SEC Adopts New Investment Adviser Marketing Rule](#) and [SEC Marketing Rule Enforcement: Charges Against Nine Registered Investment Advisers Over Hypothetical Performance Advertising](#).

² Link [here](#). In the August 2023 action, the SEC acknowledged the adviser's remedial acts and cooperation efforts, including voluntarily improving its compliance program.

³ Link [here](#). Here, too, the SEC acknowledged the adviser's remedial efforts, including its retention of outside consultants to review its marketing materials, policies, and procedures.

⁴ Links [here](#) and [here](#). The CFTC also settled charges against six firms for recordkeeping violations, with settlement amounts ranging from \$5.5 million to 75 million. See links [here](#), [here](#), and [here](#).

For more details and insights on the actions announced on September 29, 2023, see the following Sidley Update: [Latest Wave of SEC Off-Channel Communications Enforcement Actions: Five Takeaways](#).

⁵ Additionally, the SEC separately charged two broker-dealers for similar violations in May with the firms agreeing to pay penalties of \$15 million and \$7.5 million. Link [here](#).

⁶ Link [here](#).

⁷ Link [here](#). For more on the liquidity rule, see this Sidley Update: [SEC Adopts New Rules and Rule Amendments for Liquidity Risk Management Programs and Swing Pricing](#).

⁸ Link [here](#).

⁹ Link [here](#).

¹⁰ Link [here](#).

¹¹ Link [here](#).

¹² Link [here](#).

¹³ Link [here](#).

¹⁴ Link [here](#).

¹⁵ Link [here](#).

¹⁶ Link [here](#).

¹⁷ Link [here](#).

¹⁸ Link [here](#).

¹⁹ Link [here](#).

²⁰ Link [here](#).

²¹ Link [here](#).

²² Link [here](#).

²³ Link [here](#).

²⁴ See notes 15, 31, and 33 herein.

²⁵ Link [here](#); see also note 30 herein.

²⁶ Link [here](#).

²⁷ Link [here](#).

²⁸ Link [here](#).

²⁹ Link [here](#).

³⁰ Link [here](#).

³¹ Link [here](#).

³² Link [here](#).

³³ Link [here](#).

³⁴ Link [here](#).

³⁵ Link [here](#).

³⁶ Link [here](#).

³⁷ For example, links [here](#) and [here](#).

³⁸ Link [here](#).

³⁹ Link [here](#).

⁴⁰ Link [here](#).

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