CORE REGULATORY FORUM

Q4 UPDATE

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Regulatory Deadlines

- Form 13F – February 14
- Form 13H – February 14
- Schedule 13G – February 14
- CFTC Exemptions – March 1
- Quarterly Form PF – March 1
- Form ADV – March 31
- Schedule 13D/G – 10 Days after Triggering Transaction
- Form D – 15 Days after First Sale
- New State Privacy Deadlines – January 1 / July 1

Notable News Headlines

- "FTX: Inside the crypto giant's downfall"
  CNN Business
- "Fed Plans a March Rate Hike, But Will That Be the Final One?"
  Forbes
- "Jobs growth surges in US despite slowdown fears"
  BBC News

Upcoming Events

- CORE Private Fund Training & Networking Events

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CORE-CCO
COMPLIANCE: OUTSOURCED RESOURCES AND EXPERTISE

Regulatory Updates and Enforcement

Introduction

The U.S. Securities and Exchange Commission (***SEC***) released its strategic plan for 2022-2026 in November, providing an overview of the agency's structure, responsibilities, mission, vision, values and goals. The SEC oversees the United States' $100 trillion capital markets, reportedly representing 40% of the global capital markets. The SEC's oversight includes more than 5,200 public companies, 29,000 registered entities (including mutual funds and exchange traded funds, investment advisers, broker-dealers and transfer agents), 24 national securities exchanges, 7 clearing agencies, and 9 credit rating agencies. The agency is the primary watchdog for public trading in U.S. markets with current annual trading volumes of $118 trillion in public equities, $2.8 trillion in exchange-traded equity options, and $237 trillion in fixed income products, as well as the primary regulator for private transactions. The SEC also oversees other regulatory bodies such as the Financial Industry Regulatory Authority (***FINRA***), those that establish standards for the financial services industry and public companies, including Public Company Accounting Oversight Board (***PCAOB***) and the Financial Accounting Standards Board (***FASB***), and others.

The SEC's strategic plan focused on three primary goals for the agency:

- Protecting the public against fraud, manipulation and misconduct through rulemaking, enforcement and examinations. Current goals are focused on 1) identifying and addressing misconduct against individual investors; 2) enhancing the use of data to prevent, detect and address improper behavior; and 3) modernizing design, delivery and content of disclosure to investors to make informed decisions.
- Developing and implementing a robust regulatory framework that keeps pace with evolving markets, business models and technologies. Strategic goals are focused on 1) updating rules to reflect evolving technologies, business models and markets; 2) addressing systemic and infrastructure risks in the capital markets; and 3) enhancing expertise and outreach efforts to address evolving capital markets.
- Maintaining and supporting a diverse and skilled workforce equipped to advance the agency's objectives. Strategic goals are focused on 1) increasing capabilities through commitment to diversity, equity, inclusion, accessibility and equal opportunity; 2) promoting collaboration within and across SEC offices; 3) enhancing internal controls and risk management; and 4) modernizing technology in a cost-effective, secure and resilient manner.

The calendar year concluded with a number of significant staff changes, including the appointment of new Regional Directors in the New York and Denver Offices, one a former federal prosecutor from the U.S. Attorney's Office for the Southern District of New York, and the other a veteran enforcement attorney with the agency; the departure of the Regional Director in the Fort Worth Office, who joined Jones Day as partner; final appointments to the senior leadership team for the Division of Investment Management (the rulemaking division for investment advisers and private funds known as ***IM***), including Deputy Director and Co-Chief Counsels; appointment of two new Deputy Directors for the Division of Examinations (***Exam Division***); and the departure and appointment of new staff members in the roles of General Counsel and Chief of Staff. The SEC Inspector General quietly departed a month after raising concerns about the SEC's staff retention and rulemaking agenda. Since 2023 began, the Director of the Division of Corporation Finance (the rulemaking and disclosure review division for public companies) departed to teach law at Boston College and was replaced by the Deputy Director in the division. The SEC further named a new Chief Accountant, a current staff member, and Investor Advocate, a former V.P. at AARP.

Recent SEC Rulemaking

As calendar 2022 came to a close, most significant rule proposals from earlier in the year remained pending. The SEC published its Fall 2022 regulatory agenda in early January 2023, noting that it expects to finalize a number of rule proposals by April 2023, including among others, proposals related to private fund regulations; Form PF amendments; cybersecurity risk management; Section 13 beneficial ownership reporting; shortened settlement

cycles; special purpose acquisition companies (***SPACs***); and public company climate disclosures. Other pending rules are slated to be finalized by October 2023, including registered and private fund environmental, social and governance (***ESG***) disclosures as well as short sale disclosure reforms. The SEC has targeted additional rule proposals for 2023 related to investment adviser custody rules, registered fund fee disclosure and reform, digital engagement practices for investment advisers and broker-dealers, Reg D & Form D, Rule 144 holding periods, corporate board diversity disclosure, human capital management disclosure, and cybersecurity risk and related disclosures. While there is no guarantee that the rulemaking targets will be met, CORE expects a busy year of final and proposed rules. Following, are summaries of key rules that were finalized or proposed in Q4 2022.

Rule 10b5-1 Insider Trading Plans

Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (***Exchange Act***) prohibit the purchase or sale of a security on the basis of material non-public information (***MNPI***). However, Rule 10b5-1 permits officers, directors, affiliates or others presumed to have inside information to establish a written plan for trading securities (***10b5-1 trading plan***), if such plan is established in good faith at a time when the person was unaware of MNPI. Thereafter, if pre-planned transactions are executed pursuant to such 10b5-1 trading plan at a time when the individual may be aware of MNPI, the trader has an affirmative defense against accusations of insider trading. Under the rule, the 10b5-1 trading plan must either (1) specify the price, amount and date of the trade, 2) include a written formula or algorithm for determining the price, amount and date of the trade, or (3) not allow the adopter of the plan to influence how, when or whether a trade occurs. The SEC adopted amendments to Rule 10b5-1 in December 2022 to impose significant restrictions on the adoption and use of Rule 10b5-1 trading plans and increase corporate disclosure requirements related to the use of such plans. The final amendments included the following additional provisions:

- Cooling-Off Periods – The prior rule did not require any specific period between the date the plan was adopted and the date trading began. The amended rule requires a cooling-off period for directors and officers of the later of: (1) 90 days following plan adoption or modification; or (2) two business days following the disclosure in certain periodic reports of the issuer's financial results for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification) before any trades can occur under such plan. The rule would require a 30-day cooling-off period for persons other than issuers or officers and directors before trading can commence under the trading arrangement or modification.
- Certifications – While there was previously no certification requirements for Rule 10b5-1 trading plans, the amended rule requires that directors and officers personally certify, at the time the trading plan is adopted or modified, that: (1) they are not aware of any MNPI about the issuer or its securities; and (2) they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5.
- Limitations on the Number of Trading Plans – The amended rule limits the ability of anyone other than issuers to use multiple overlapping 10b5-1 trading plans. In addition, for anyone other than issuers, the amended rule permits only a single plan during any 12-month period designed to execute a single trade.
- Good Faith Requirement – Under the prior rule, a 10b5-1 trading plan must be written in good faith. The amended rule requires that all persons entering into a Rule 10b5-1 trading plan must act in good faith with respect to the plan.
- Enhanced Disclosures – While the prior rule did not require any disclosures regarding 10b5-1 trading plans, the amended rule requires: 1) quarterly disclosure by companies regarding the use of Rule 10b5-1 trading plans or other trading plans by their directors and officers, along with material terms of such plan (other than pricing terms); and 2) annual disclosure of a registrant's insider trading policies and procedures. Finally, the amendments require officers and directors to disclose on Forms 4 and 5 whether such transactions were pursuant to a 10b5-1 trading plan. The amendments will also require the

disclosure of insiders' gifts of stock within two business days on Form 4 rather than within 45 days of year-end on Form 5.

The final rules become effective on February 27, 2023. Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 filed on or after April 1, 2023. New disclosure requirements will be required by issuers in Forms 10-Q, 10-K and 20-F and any proxy statements for the first full fiscal period beginning on or after April 1, 2023, or October 1, 2023 for smaller issuers. Investment advisers, private fund managers, their affiliates or related persons with control positions, significant beneficial ownership, board memberships or other relationships that cause them to be control persons of public companies (*i.e.*, Section 16 reporting persons) may be directly impacted by such rule amendments. In addition, investment advisers and private funds that monitor the activities of insiders related to public companies they own or analyze, or related to their portfolio companies, may benefit from enhanced disclosures.

SEC Press Release – https://www.sec.gov/news/press-release/2022-222

Proxy Voting Say-on-Pay

On November 2, 2022, the SEC adopted amendments to Form N-PX that aim to make the proxy voting records of mutual funds, exchange-traded funds and certain other registered funds easier to analyze and compare. As amended, Form N-PX will be structured in a machine-readable XML structured data format facilitating an easier comparison of how funds are voting. The amendments require funds to categorize votes so investors can focus on matters they find important and to disclose votes in a consistent manner, identifying matters using the same language and in the same order as the issuer's proxy card. These amendments also now require institutional investment managers to disclose how they voted on executive compensation, otherwise known as "say-on-pay," matters, fulfilling a remaining mandate under the Dodd-Frank Act. Additionally, the amended form will provide insight into a fund's securities lending activities by requiring disclosure of the number of shares voted or instructed to be cast as well as the number of shares loaned but not recalled by the fund. These amendments will become effective for votes occurring on or after July 1, 2023, with the first filings subject to the amendments due in 2024.

SEC Press Release – https://www.sec.gov/news/press-release/2022-198

Broker-Dealer Electronic Recordkeeping

Enhancing the SEC's ability to preserve market integrity and protect investors, on October 12, 2022, the SEC adopted amendments to the electronic recordkeeping, prompt production of records, and third-party recordkeeping service requirements applicable to broker-dealers, security-based swap dealers (SBSDs), and major security-based swap participants (MSBSPs). These amendments seek to bring the SEC's electronic recordkeeping requirements for these entities in line with modern technology. Specifically, they add an audit-trail alternative to the previous broker-dealer recordkeeping rule that required the preservation of electronic records exclusively in a non-rewriteable, non-erasable format, commonly known as a write once, read many or "WORM" format. The alternative is designed to provide greater flexibility to broker dealers when configuring their electronic recordkeeping systems so they protect the authenticity and reliability of original records while aligning more closely with current electronic recordkeeping practices. While these requirements are not applicable to investment advisers, they may serve as an indication of how the SEC may seek to modernize investment adviser recordkeeping requirements in the future.

SEC Press Release – https://www.sec.gov/news/press-release/2022-187

Broker-Dealer Rule Proposals

In a December 2022 SEC meeting, Commissioners considered and approved four new proposals that address recent changes and developments in the U.S. trading markets identified as presenting potential conflicts of interest or jeopardizing competition to the detriment of investors. For example, in considering these proposals, Chairman Gensler noted that "a large and growing amount of equity trading now goes into what many call the dark markets, particularly off-exchange market centers such as wholesalers and dark pools [which]…benefit from

transacting using a different set of rules from the ones on national securities exchanges." The proposed rules are intended to enhance efficiency, competition and fairness across equity markets and would apply to registered broker dealers. Investment advisers and private fund managers are generally not subject to these rules. However, the proposals potentially affect investment and trading activities of these firms and their employees, highlight principles that may be applicable to their business in light of similar regulatory or compliance obligations to which they are subject, and provide insights in areas of scrutiny or concern by SEC examiners in general. Following are highlights from these proposals.

Regulation Best Execution

This proposal would establish a best execution regulatory framework for broker-dealers, requiring them (with limited exceptions) to use reasonable diligence to ascertain the best market for the security and buy or sell in such market so that the resultant price is as favorable as possible under prevailing market conditions. Additional requirements would apply for conflicted transactions (e.g., riskless principal transactions, orders from affiliates, and payment for order flow). The standard would require quarterly reviews of execution quality. The proposal would further require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to comply with the proposed best execution standard, review their best execution policies and procedures at least annually, document such reviews, and present written reporting details reviews to their boards or governing bodies.

SEC Press Release – https://www.sec.gov/news/press-release/2022-226

Enhanced Disclosure of Order Execution

The SEC proposed amendments to update the disclosure requirements under Rule 605 of Regulation NMS for orders executions in national market system (***NMS***) stocks (i.e., stocks listed on a national securities exchange). The Rule was adopted to help the public compare and evaluate execution quality among different market centers but has not been updated to address material changes in the speed and nature of trading. The proposed amendments would enhance reporting to increase transparency or order execution quality, increase the information available to investors, and help promote competition among market centers and broker-dealers. The amendments would expand reporting requirements to include additional market participants and expand the scope and content of standardized monthly reports to include additional reporting or detail regarding after hours orders, order type, order size, execution speed, and execution quality. Finally, the amended rule would improve accessibility to required summary reports available on the SEC website.

SEC Press Release – https://www.sec.gov/news/press-release/2022-223

Minimum Pricing Increments, Access Fees & Transparency

Regulation NMS currently establishes a minimum pricing increment of $0.01 for quotes and orders in NMS stocks priced ≥ $1.00 per share, which prevents bid-ask spreads for these stocks from being less than $0.01. In the current market, many stocks could be priced more aggressively within the bid-asked spread if such minimum did not exist and are therefore considered "tick-constrained." Trading in these stocks would be improved if competitive market forces could establish prices in sub-penny increments. Accordingly, the SEC proposed amendments under that would establish a variable minimum pricing model for NMS stocks that would apply to both quoting and trading such stocks. The proposal would further reduce access fee caps and require national securities exchanges to make the amounts of all fees and rebates determinable at the time of execution. Finally, the proposal would enhance transparency of better priced odd-lot orders.

SEC Press Release – https://www.sec.gov/news/press-release/2022-224

Enhanced Order Competition

The SEC highlighted a current market practice impacting individual market orders when the investor seeks to trade immediately at the best available market price (as opposed to limit orders). Currently more than 90% of such orders are routed to a small group of off-exchange dealers known as wholesalers who typically execute the order without providing any opportunity for other market participants to compete to provide better prices. SEC analysis noted that this practice materially reduced the amount of price improvement that would be expected if the order were subject to order-by-order competition. Accordingly, the proposed rule would require certain orders of individual investors to be exposed to competition in fair and open auctions before such orders could be executed internally by any trading center that restricts order-by-order competition.

SEC Press Release – https://www.sec.gov/news/press-release/2022-225

Oversight of Outsourced Service Providers

Rule 206(4)-11, a new rule under the Investment Advisers Act of 1940 (***Advisers Act***) proposed by the SEC on October 26, 2022, would require registered investment advisers to conduct initial (pre-engagement) due diligence assessments on new service providers who perform a “covered function” and ongoing assessments thereafter, requiring periodic monitoring of the provider’s performance of the covered function and reassessments of the provider as well as the appropriateness of outsourcing a particular covered function.

Not all service providers are within the scope of proposed Rule 206(4)-11 as written. The proposal defines a service provider as a non-supervised person (*i.e.*, people and entities) performing a covered function. The definition of covered function has two elements, both of which must be met to trigger the diligence requirements of this proposed rule. Covered functions include those that are (1) necessary for the adviser to provide its investment advisory services in compliance with the Federal securities laws; and (2) those that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser’s clients or on the adviser’s ability to provide investment advisory services. Thus, clerical, ministerial, utilities, and general office functions/services would be excluded, as would custodians hired directly by the client, service providers that are supervised persons, and placement agents and solicitors. Notably, affiliated service providers would generally be included.

Although each adviser would determine its “service providers” by applying the factor analysis prescribed in the rule to its advisory business, there are several “covered function” examples proposed for the Form ADV instructions, including:

- Adviser / Subadviser
- Client Services
- Cybersecurity
- Investment Guideline / Restriction Compliance
- Investment Risk; Portfolio Management (excluding Adviser / Subadviser)
- Portfolio Accounting
- Pricing
- Reconciliation
- Regulatory Compliance
- Trading Desk
- Trade Communication and Allocation
- Valuation

In the same proposal, the recordkeeping rules would also be amended to require advisers to make and keep the due diligence and monitoring records for service providers, any related policies and procedures, and the written agreement if there is one. No written agreement with these service providers is required, though in its written commentary to the proposal, the SEC strongly encourages firms to have a written agreement in place. Policies and procedures are similarly not explicitly required but referenced in the SEC’s commentary as a means to meet

the proposed recordkeeping rules. In addition to records of the due diligence assessments and monitoring, advisers would also need to create a list of the covered functions outsourced to a service provider, the name of the service provider, and a record of the factors corresponding to each listed function that led the adviser to list it as a covered function. The proposal suggests this could be satisfied in the written agreement, if it explicitly states the function/service is a covered function and includes factors that led to this decision. The factors or the full record could also be memorialized elsewhere, such as in the compliance manual or memorandum.

There is an added potential for impact to third-party recordkeepers. Advisers would not only have to conduct the provider due diligence assessment and monitoring as proposed (making them a de facto covered function service provider) but also obtain reasonable assurances of four standards: adopt and implement internal processes and/or systems for making and/or keeping records that meet the requirements of the recordkeeping rule applicable to the books and records being maintained on behalf of the adviser; make and/or keep records that meet all of the requirements of the recordkeeping rule applicable to the adviser; provide access to electronic records; and ensure the continued availability of records if the third party's relationship with the adviser or its operations cease. Service providers not able to provide these assurances or bring their recordkeeping or systems into line could be negatively impacted.

SEC Press Release – https://www.sec.gov/news/press-release/2022-194

Exam Developments

The Exam Division has not yet published its 2023 examination priorities memo as of publication date, although we expect it to be forthcoming in coming weeks. Examiners continued to work primarily remotely through year-end 2022 with a slow and partial return to the office expected gradually in 2023. Exam staff finished out the year and have begun 2023 intently focused on investment adviser compliance with the new Marketing Rule. While we do not expect immediate findings from those examinations to be published, we expect to hear more in coming months with respect to examiner observations of deficiencies and best practices. IM updated its Marketing Rule FAQ in early January 2023 to clarify its position requiring net returns when presenting extracted performance for specific companies/positions or segments of private funds. We suspect the clarification was the result of preliminary private fund exam findings.

National Compliance Outreach Program

The SEC held its national compliance outreach program on November 15, 2022, a full-day program opened by Chairman Gensler and with speakers from the Exam Division, Division of Enforcement (***Enforcement Division***), and IM. CORE took comprehensive notes from each session which it has made available to clients. Let us know if you would like to receive our complete notes. Following are highlights from the program:

- SEC Directors Panel – Directors from the Exam Division, Enforcement Division and IM provided insights on their structure, recent developments and current priorities, which include:
  - Exam Division – Private funds; Regulation Best Interest, fiduciary duty standard, ESG practices
  - Enforcement Division – Valuations, fees and expenses, conflicts of interest, off-channel communications
  - IM – Resiliency/liquidity in times of stress, transparency/enhanced disclosures and reporting, ESG disclosures
- Fiduciary Interpretations & Form CRS – The SEC adopted related rules in 2019 intended to enhance the quality and transparency of investment adviser and broker-dealer relationships with clients, particularly retail clients, including: 1) Regulation Best Interest applicable to broker-dealers (***BDs***); 2) a Fiduciary Standard interpretation applicable to investment advisers (***IAs***); and 3) Form CRS, a disclosure document required for IAs and BDs to provide standardized, plain English disclosures for retail customers (including individual SMA or wealth management clients but not individual private fund investors).

- Exam Focus – SEC exam staff have conducted reviews for compliance with these new standards and issued a risk alert regarding Form CRS deficiencies.
- Enforcement Developments – Enforcement has brought various BD and IA cases involving failure of care under the new standards and Form CRS failures.
- Staff Guidance – The SEC issued a Form CRS FAQ and published a Staff Bulletin in August 2022 designed to assist firms with addressing conflicts of interest
- Industry Efforts – IAs and BDs have conducted internal reviews of business practices to identify potential conflicts and updated policies, procedures and disclosures accordingly.

- New Marketing Rule – SEC staff and industry participants discussed actions they had taken in advance of the November 4 compliance date for the amended Marketing Rule and how the SEC was considering various aspects of the amended rule.
  - Exam Focus – The Exam Division issued a Risk Alert (as highlighted in the Q3 Regulatory Update) noting that they would immediately begin examining for compliance with the amended rule. Examiners received extensive training on the amended rule and expect advisers to similarly train their employees. Since the compliance date, we understand that examiners have been actively gathering data, although we do not expect an additional risk alert in the near future.
  - Enforcement Developments – Enforcement staff noted cases they had brought for misleading advertisements prior to adoption of the new rule and how cases may be impacted by the amended rule. However, they noted that they would likely wait for exam findings to pursue enforcement action.
  - Staff Guidance – The SEC initially issued a Marketing Rule FAQ with limited questions and subsequently added a question in January 2023. While the staff highlighted their desire to be transparent, we do not expect additional guidance in the near future.
  - Industry Efforts – The industry representative noted that they focused on 1) identifying materials covered under the amended definition of advertising, 2) potential inadvertent paid testimonials or endorsements, and 3) confirming compliance with new performance reporting standards.
- Registered Funds Topics – SEC staff shared insights on rulemaking, examination and enforcement initiatives impacting registered funds. While CORE clients are primarily private fund managers, and many of these requirements are not directly applicable, following are some brief highlights and the potential private fund correlation.
  - Rulemaking – The principles established under the following rules for appropriate oversight of valuation procedures and transparency in reporting on fees and expenses highlight similar areas of concern and recent proposals for private funds.
    - Valuation – The SEC adopted a new Rule 2a-5 under the Investment Company Act of 1940 (***Investment Company Act***) (effective in 2021 with a 2022 compliance date) that addressed fund valuation practices. The rule established requirements for fund boards or their valuation designees to: 1) assess and manage materials risks associated with fair valuations; 2) select, apply and test fair value methodologies; and 3) oversee and evaluate any pricing services used.
    - Shareholder Reporting – The SEC adopted amendments to annual and semi-annual shareholder reporting requirements (effective January 2023) to provide on-line reporting, including a fund's schedule of investments and other financial information and to require that presentations of fund fees and expenses in advertisements and sales literature be consistent with prospectus fee table presentations and be reasonably current.

        - Derivatives – The SEC adopted and amended rules effective in 2021 to enhance the regulatory framework for the use of derivatives, which require: 1) a derivative risk management program and 2) limitations on the amount of leverage-related risk that the fund may obtain based on value-at-risk or "VaR." Private funds are not subject to similar rules.
        - Liquidity Risk Management – The SEC proposed amendments in November 2022 to its liquidity risk management rules for registered funds to incorporate lessons learned from the market events of March 2020. Private funds are not subject to similar rules.
    - Exam Focus – Examiners highlighted their focus on 1) investment company board review and approval of advisory contracts and valuations; 2) expense allocations; and 3) evaluating firm's preparedness, compliance, and business impact related to the above rulemaking.
    - Enforcement Developments – Enforcement staff noted a recent action against a fund manager that overvalued assets by more than $1 billion using a third-party valuation service (see Infinity Q case below). They further referenced ESG disclosures, compliance with the fund names rule and compliance with books and records requirements as focus areas related to registered funds.
- ESG Related Topics – SEC staff noted the increased investor demand for ESG-focused investments, growth in the number of ESG funds (800 funds with $3 trillion in assets), and widespread debate on the topic among institutional investors, Congress and SEC staff. They acknowledged that there is not an agreed upon definition of what ESG means or a single way to incorporate ESG factors into investment practices but discussed agency-wide initiatives and concerns related to ESG.
    - Rulemaking – In its 2022 ESG proposal for investment advisers and fund managers, IM proposed a tiered disclosure regime based on fund type: 1) integration funds, 2) ESG focused funds, and 3) ESG impact funds. Commenters have expressed concerns that these categories would move the market in a way that was not intended. IM continues to consider comments as it moves toward a final rule target date in 2023.
    - Exam Focus – Exam staff noted that their focus to date was on 1) the adequacy of disclosure regarding firm ESG definitions and practices, 2) whether firms have implemented all screening and other diligence and monitoring represented or implied, 3) compliance policies, procedures and CCO/Compliance knowledge and involvement in ESG practices, 4) proxy voting and issuer engagement practices, and 5) misleading UNPRI transparency reporting claims.
    - Enforcement Developments – Enforcement staff noted that they had formed an ESG Task Force led by the Deputy Director to focus on disclosure and compliance issues related to ESG strategies. They highlighted three cases: 1) Fiat Chrysler misleading statements about vehicle emissions; 2) NY Robo Adviser marketing itself as compliant with Sharia Law with insufficient policies and procedures; and 3) BNY Mellon Investment Adviser, Inc. (***BNY Mellon***) misleading statements implying that ESG reviews had been completed on all investments when they had not.
    - Industry Insights – The industry representative noted that their firm underwent an SEC ESG-focused exam which was primarily a fact-finding mission with questions on how the firm conducted CO2 analysis, defined fossil free and used UNPRI data. He further emphasized the 1) need for consistency among disclosure documents related to ESG practices; 2) adequacy of ESG policies and procedures to ensure activities are completed, documented, and tested; and 3) importance of proxy voting and engagement with issuers, and related documentation of such activities.
- Private Fund Adviser Topics – The Exam Division's Private Fund Unit (***PFU***) provided insight regarding how it works together with regional office exam staff to review private fund managers. The PFU further coordinates with IM on rulemaking and guidance impacting private funds and with Enforcement Division staff in bring private fund enforcement actions.

- Rulemaking – The 2022 private fund rule proposal would include new required quarterly reporting to investors. IM staff noted that the proposed quarterly expense reporting is intended to provide an itemized "bill" of what the fund paid, directly or indirectly, over the past period.
- Exam/PFU Focus – Exam staff have focused and identified common deficiencies in the following areas: 1) conflict of interest identification, mitigation and disclosures; 2) discrepancies between disclosures and practices related to fees and expenses; 3) performance calculation details and related disclosures; and 4) changes in fund governing documents and business practices from one fund to the next.
- Enforcement Developments – Enforcement staff noted the following focus areas related to private funds: undisclosed conflicts including fees and expenses; 2) affiliated transactions; 3) undisclosed transaction fees; 4) conflicts involving SPACs; 5) misleading ESG statements; 6) investment strategy and deviation disclosures; 7) digital assets; 8) service providers; 9) misleading statements to fund limited partners or funds' limited partner advisory committees (LPACs); and 10) unauthorized use of fund assets.
- Industry Insights – The industry representative encouraged private funds to 1) discuss SEC concerns with business units to conduct an internal gap analysis; 2) consult with advisers and counsel when business practices do not squarely match old governing documents; and 3) carefully review new governing documents compared to business practices and not just use the prior versions.

- Hot Topics – Exam and Enforcement staff concluded the program with insights on various other current hot topics, including the following among others:
  - Cybersecurity – Noted this has been included in SEC exam priorities for the past 6 years, that they have done multiple exam initiatives on cyber preparedness, issued multiple risk alerts on exam observations, and a 2020 Cybersecurity & Resiliency Report noting best practices.
  - Electronic Messaging – Referenced SEC/CFTC enforcement sweep involving off-channel communications with more than $1.8 billion in penalties and noted that cases are easy to prove as it only takes one person's phone to prove off-channel communications.
  - Hedge Clauses – Confirmed SEC position that advisers may not waive their fiduciary duty and noted that there are few (if any) circumstances where a hedge clause would be permitted in an agreement with a retail client. Cautioned that even when used with sophisticated institutional clients, firms must ensure language is accurate and says that it does not waive any rights under federal securities laws.

Identity Theft Risk Alert

The Exam Division issued a Risk Alert in December 2022 identifying several practices that it asserts leave retail clients vulnerable to identity theft and financial loss. Registered advisers may qualify as Regulation S-ID "financial institutions" if they can direct transfers or payments from individual accounts to third parties based on individual instructions or can as agents on behalf of individuals. Financial institutions must assess whether they hold covered accounts (primarily for individual, family, or household purposes) and if they hold such accounts, establish a program to detect, prevent and mitigate identity theft in connection with account opening and for existing accounts. Exam staff identified the following common deficiencies in the alert:

- Risk Assessments
  - Not conducting an assessment to determine if there are covered accounts
  - Not identifying new and additional covered accounts
  - Identifying covered accounts periodically but not conducting risk assessments on such accounts, taking into account the account-opening/modification processes and other risks
- Written ID-Theft Programs

- Programs were not tailored to the business, too generic or relied on incomplete templates with missing fill-in-the-blanks
- All required elements of Reg-ID not addressed
  - Not having policies and procedures or a written program
    - Firms asserted other policies and procedures were part of their written ID-Theft program but did not incorporate them by reference into the program
    - Policies and procedures (whether or not incorporated) did not fully address all elements required by Reg-ID
  - Other missing elements
    - Red Flags
      - Identification of red flags or not identifying flags specific to the business
      - No procedures or failure to follow procedures to evaluate actual experience with identity theft in completing a risk assessment and use of such experience to identify additional red flags
      - No red flags identified, with only generic language for detecting and responding to red flags
    - Detection and Response to Red Flags
      - Relying on pre-existing policies (e.g., ***AML***) red flags not designed to prevent identity theft
      - Discussing or identifying red flag procedures when none existed or failed to contain relevant processes
    - Periodic updates failed to ensure red flags were added after making significant changes to account opening process or other business changes such as reorganizations, mergers, or acquisitions of other financial firms

- No oversight or ongoing administration of the program, or training
  - Insufficient information given to the board to evaluate program effectiveness
  - Ineffective training
    - Not doing an assessment to determine which employees should be trained
    - Training in the form of a single sentence telling employees to “be aware of identity theft”
  - Not evaluating service provider controls
    - Third-party controls to monitor identity theft were not evaluated, even to the extent the firm relied on a third-party to service covered accounts or perform activities in connection with covered accounts

Many private fund managers do not meet the definition of “financial institution” or “creditor” under Reg S-ID, as they do not hold transaction accounts for individuals and do not advance funds or loan money to clients or investors. Moreover, such advisers generally do not have covered accounts. A “covered account” is (i) an account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions; and (ii) any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks. Advisers that are subject to Reg S-ID, as well as those private fund or other managers who are not technically subject to the rule, should review their ID-Theft programs to ensure they address the applicable deficiencies and concerns noted in this risk alert.

SEC Risk Alert – https://www.sec.gov/files/risk-alert-reg-s-id-120522.pdf

Enforcement Developments

The SEC announced its Enforcement Results for Fiscal Year 2022 in November. Its recovery of $6.4 billion in penalties and disgorgement was the most on record in SEC history up from $3.8 billion in fiscal year 2021. These recoveries stemmed from 760 enforcement actions including 462 new “stand alone” enforcement actions, 129 actions against issuers allegedly delinquent in making required SEC filings and 169 “follow-on” administrative proceedings to bar or suspend individuals from certain securities market functions based on criminal convictions, civil injunctions or other orders. The whistleblower awards in 2022 were the SEC’s second highest ever both in terms of the total dollar amounts awarded and the number of individuals awarded. Though these numbers set some records, Director of the Enforcement Division, Gubir S. Grewal, noted “we don’t expect to break these records and set new ones each year because we expect behaviors to change. We expect compliance.” The SEC, with the ultimate goals of protecting investors, holding wrongdoers accountable and deterring future misconduct, has been resourceful with its tools to cover a breadth of issues in its enforcement actions.

Notably, the SEC took action recovering an aggregate of $1.235 billion in penalties against major institutions such as JP Morgan Securities; Barclays Capital Inc.; BofA Securities Inc. together with Merrill Lynch, Pierce, Fenner & Smith, Inc.; Citigroup Global Markets Inc.; Credit Suisse Securities (USA) LLC; Deutsche Bank Securities Inc. together with DWS Distributors Inc. and DWS Investment Management Americas, Inc.; Goldman Sachs & Co. LLC; Morgan Stanley & Co. LLC together with Morgan Stanley Smith Barney LLC; UBS Securities LLC together with UBS Financial Services Inc.; Jeffries LLC; Nomura Securities International, Inc.; and Cantor Fitzgerald for widespread and longstanding failures to maintain records of work-related text communications on personal employee devices. The extent of these penalties makes clear that these fines were not just a cost of doing business.

Ernst & Young LLP (***EY***), in June 2022, agreed to pay the largest penalty ever imposed by the SEC against an audit firm ($100 million), admitting among other things, that a significant number of EY audit professionals cheated on the ethics component of CPA exams and continuing professional education courses required to maintain their CPA licenses. In addition, EY was charged with withholding evidence of the misconduct from the SEC’s Enforcement Division during the investigation. Gurbir S. Grewal, Director of the SEC’s Enforcement Division, in discussing this case stated, “This action should serve as a clear message that the SEC will not tolerate integrity failures by independent auditors who choose the easier wrong over the harder right.”

In keeping with prior years, the SEC continues to involve individual defendants or respondents in its stand-alone enforcement actions. These individuals included senior public company executives such as chief executive officers and chief investment officers. In some cases, using Sarbanes-Oxley Section 304, the SEC ordered several public company senior executives to return bonuses and compensation after misconduct at their firms even in cases where the executives were not themselves charged with the misconduct.

The SEC continues to work alongside criminal law enforcement in certain cases, often involving recidivists or those engaging in intentional misconduct. For example, in a parallel action related to Archegos Capital Management, LP’s market manipulation scheme, the U.S. Attorney’s office for the Southern District of New York criminally charged Archegos’ founder, chief financial officer, head trader and chief risk officer.

Included in the SEC’s toolkit referenced above, is sophisticated data analytic work that supported investigations of a variety of illegal trading schemes, complex market manipulation, cherry-picking and traditional insider trading. In addition, their work was supported by more than 38,500 tips, complaints and referrals of possible securities law violations. The Whistleblower Program received a record-setting number of tips, with over 12,300 in fiscal year 2022. Issuing approximately $229 million in 103 awards, the SEC had its second highest year both in the number of awards and dollar amounts. The SEC also recognizes the impact of support from within companies being investigated (e.g., the expediting of investigations or provision of important evidence) and sometimes takes the benefit provided by company cooperators into account when ordering remedies. In 2022, significant remedial measures taken by companies, cooperation in the investigation process and self-reporting in certain situations resulted in the imposition of smaller penalties.

The SEC's actions in fiscal year 2022 addressed a wide variety misconduct violations across many types of violators. With the foundational importance of disclosure in our securities market, several actions related to financial fraud and issuer disclosure. The SEC took action against several gatekeepers for their failures to meet their obligations with cases against lawyers and transfer agents in addition to several cases against auditors, including the case against EY referenced above.

The SEC continues focus on the ever-evolving crypto asset securities space, charging one issuer for failing to register offers and sales of its crypto lending product under the Investment Company Act, charging certain other individuals in a fraudulent crypto pyramid and Ponzi scheme, and charging yet another group of individuals with insider trading related to the trading of certain crypto asset securities on a crypto asset trading platform.

The SEC has applied the general principles of materiality, disclosure accuracy and fiduciary duty codified in federal statutes, regulations and case law to engage in enforcement actions in the ESG space. For example, BNY Mellon, as noted above, was charged for materially misleading statements and omissions about how it considered ESG principles when making investment decisions in certain mutual funds.

With significant asset growth in the private fund space and industry-specific recurring issues such as undisclosed conflicts of interest, fees and expenses, valuation, custody and MNPI controls, the SEC continues to focus on private funds. In 2022, the SEC charged investment managers and sometimes their owners or certain employees with disclosure failures related to risks, fees, expenses and conflicts of interest; misrepresentation of fund performance; misappropriation of funds for personal use or Ponzi-style payments; and failure to comply with the Custody Rule or make timely amendments to Form ADV reflecting private fund financial statement status.

In the pay-to-play space, the SEC charged four investment advisers with violations when they continued to receive investment advisory fees from government entities after associates made campaign contributions to elected officials or candidates for elected office. The SEC also continued to enforce the Foreign Corrupt Practices Act (***FCPA***) against issuers with U.S. traded securities who engaged in bribery and other prohibited corrupt practices abroad.

Compliance Program Failures

Two Point Capital Management, Inc. (December 5, 2022)

The SEC brought a cease-and-desist order against Two Point Capital Management, Inc. (***Two Point***) and its CEO, John B. McGowan. Two Point is a New York registered investment adviser with approximately $256 million of assets under management and invests on behalf of approximately 100 clients with over 200 accounts, primarily individual investors for which the firm provides financial planning and portfolio management services. McGowan is the only employee at Two Point with investment decision-making authority and until February 2021, McGowan was the only individual responsible for implementing and developing Two Point's compliance policies and procedures and Code of Ethics. According to the SEC order, since 2012, when Two Point first registered with the SEC, Two Point failed to adopt and implement reasonably designed compliance policies and procedures, and to conduct annual reviews of its compliance program, as required by Section 206(4) of the Advisers Act and Rule 206(4)-7. Additionally, Two Point failed to establish, maintain, and enforce a written code of ethics that included provisions by Section 204A of the Advisers Act and Rule 204A-1. Two Point also failed to file and deliver Form CRS as required by Section 204 of the Advisers Act and Rules 204-1 and 204-5.

The firm was found to have adopted without any modifications, an off-the-shelf "handbook" containing standards of practice published by a professional trade organization for candidates preparing to take that organization's examinations. However, Two Point failed to tailor any part of this "handbook" to its client base or its investment advisory business. Furthermore, the "handbook" did not purport to be a model compliance manual to be adopted or incorporated by investment advisers. Rather, the document itself stated that it was designed to provide ethics-based guidance for the professional organization's members preparing for examinations. The preface stated that the professional organization encouraged firms to use the "handbook" as a part of a code of ethics. It did not purport to set out compliance policies and procedures. Additionally, the "handbook" contained no specific mention

of relevant federal securities laws. The Code of Ethics adopted from the professional trade organization contained only generic, high-level descriptions to professionalism, duties to clients/employers, conflicts of interest, and responsibilities of firm employees but none of the reporting or pre-approval requirements under Rule 204A-1. Two Point failed to conduct any compliance training or speak to supervised persons regarding their requirements to comply with federal securities laws and rules and failed to address the fact that access persons must report personal securities transactions and holdings or that such transactions must be reviewed periodically.

From at least 2012-2021, Two Point failed to conduct annual reviews of the adequacy of its compliance program or the effectiveness of its implementation. Additionally, Two Point was required to file Form CRS timely and failed to do so until the SEC conducted an examination of the firm. Two Point did not post the form in the required format on its website until May 5, 2021. As CCO, McGowan was responsible for these failures and individually charged by the SEC. In a settled order, Two Point and McGowan agreed to pay penalties of $75,000 and $25,000, respectively, and to undertakings which included: 1) hiring a new CCO tasked with continuing to expand and improve the firm's compliance program; 2) retaining a third-party compliance consulting firm to advise on its overall compliance program, policies, and procedures until at least December 31, 2024; and 3) revising its written compliance policies and procedures along with its written Code of Ethics.

SEC Litigation Release – https://www.sec.gov/litigation/admin/2022/ia-6199.pdf

Insider Trading

Former CEO of Biotech Company CytoDyn (December 20, 2022)

The SEC charged Nader Pourhassan, the former CEO of CytoDyn Inc. with fraud and insider trading in connection with providing misleading information to shareholders about the progress of a clinical research treatment for COVID-19 and HIV. The complaint alleges that Pourhassan repeatedly issued press releases exaggerating CytoDyn's efficacy and falsely announced that the company had submitted a completed application to the U.S. Food and Drug Administration. This false information caused the company's stock price to increase. The FDA submission was woefully inadequate, and the FDA alerted the company of the deficiencies with days; however, Pourhassan did not alert shareholders to this information. In the meantime, Pourhassan allegedly sold approximately $15.8 million worth of the stock based on the false information, netting profits of more than $4.7 million. The SEC's complaint further alleges that Kazem Kazempour, CEO of a contract research organization that interfaced with the FDA on CytoDyn's behalf, signed off on the incomplete application and subsequently sold more than $420,000 of CytoDyn stock. The fraudulent actions of Pourhassan and Kazempour gave investors false hope that a new treatment for life-threatening diseases was closer to FDA approval than it really was, which drove up the share price. In addition to the SEC's complaint, which charged the two men with violating the antifraud provisions of the federal securities laws, in a parallel action, the U.S. Department of Justice (***DOJ***) announced criminal charges against Pourhassan and Kazempour. The SEC's investigation is ongoing with litigation forthcoming. While the SEC clearly holds direct insiders of public companies liable for false statements to manipulate stock prices and trading in their own company's securities based on such information, they similarly charge other market participants for sharing false or misleading information that may impact a company's stock price to their own benefit.

SEC Press Release – https://www.sec.gov/news/press-release/2022-232

Corporate Insider, Vincent Issier (December 6, 2022)

The SEC charged Vincent Issier for illegally trading in the securities of Coherent, Inc. before the January 19, 2021 public announcement that Lumentum, Inc. had agreed to acquire Coherent for approximately $5.7 billion. Issier, an employee of Lumentum and part of the Lumentum due diligence team vetting the deal, obtained the MNPI about the acquisition negotiations through his role. While in possession of the MNPI, he purchased Coherent stock and options in violation of his duties to Lumentum. When Coherent's stock price rose by approximately 30% following the acquisition announcement, Issier obtained ill-gotten gains of approximately $6,300. The SEC found that Issier violated the antifraud provisions of Section 10(b) of the Exchange Act and

Rule 10b-5 thereunder. Issier consented to a cease-and-desist order and agreed to pay disgorgement of $6,300 plus interest and a civil penalty of $6,300 as part of his settlement agreement. While the details of this insider trading case are pretty vanilla, the case again emphasize the fact that small trades with a relatively small amount of the ill-gotten gains can still trigger an SEC action.

SEC Litigation Release – https://www.sec.gov/litigation/litreleases/2022/lr25470.htm

Pharmaceutical Chief Information Officer, Ramkumar V. Rayapureddy (November 10, 2022)

The SEC brought insider trading charges against Ramkumar Rayapureddy, Chief Information Officer of pharmaceutical company Viatris Inc., formerly known as Mylan N.V. The SEC's complaint alleged that from at least September 2017 through July 2019, Rayapureddy tipped material nonpublic information about Mylan's unannounced drug approval by the U.S. Food & Drug Administration to his friend and former colleague, Dayakar Mallu. Rayapureddy shared financial results and other information about an impending merger with a division of Pfizer Inc. As a result, Mallu generated gains totaling nearly $8 million and avoided losses by trading Mylan securities based upon Rayapureddy's tips. Mallu shared a portion of his profits with Rayapureddy through cash payments in India. The SEC previously charged Mallu in connection with this same investigation.

As the officer of a public company, Rayapureddy had a duty to safeguard MNPI concerning Mylan events; however, he violated this duty by tipping his friend in exchange for cash kickbacks. The SEC complaint charged Rayapureddy with violating Section 10(b) of the Exchange of 1934 and Rule 10b-5 thereunder. A permanent injunction, disgorgement, a civil penalty, and an officer and director bar were sought. In a parallel action, the DOJ's Fraud Section also announced criminal charges against Rayapureddy. Litigation is impending.

SEC Press Release – https://www.sec.gov/news/press-release/2022-204

Illegal Broker Tip, Michel E. Mueller (November 4, 2022)

The SEC announced that Michael E. Mueller of Austin, Texas agreed to settle charges that he engaged in insider trading in the securities of Layne Christensen Company before the public announcement that Granite Constructions Inc. had agree to acquire Layne for $565 million. According to the SEC complaint, Mueller received material nonpublic information from his friend and broker, John Mendes, and authorized Mendes to purchase Layne stock and options in Mueller's account from November 2017 to February 2018. Mendes told Mueller that a friend was working on structuring and financing a potential acquisition of Layne. Mendes received the confidential information in breach of that individual's duty to the acquiring company. Based on the MNPI he received from Mendes, Mueller recommended that a relative also purchase Layne securities, which the relative did. As a result of the misconduct, Mueller generated a profit of more than $38,000 and his relative generated a profit of more than $14,000. The SEC found that Mueller violated the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Mueller consented to a cease-and-desist order and agreed to pay disgorgement of more than $38,000 and prejudgment interest of over $8,000, and a civil penalty of over $52,000. This action is related to a settled action the SEC filed against Mueller's broker and another individual on September 20, 2022, SEC v. John P. Mendes et al.

SEC Administrative Release – https://www.sec.gov/enforce/34-96243-s

Dallas CPA, Scott A. Woodward (October 25, 2022)

The SEC entered an order charging Scott A. Woodward, of Dallas, with insider trading of public company PFSweb, Inc. stock. According to the SEC, Woodward, while working as an accountant on contract at PFSweb, learned that the firm was preparing to sell its LiveArea business unit. Despite his supervisor's warning that the planned sale constituted MNPI, Woodward purchased 4,970 shares of the company's stock. The purchases violated PFSWeb's internal policies restricting company employees and contractors from trading in the company's stock before the Live Area sale was made public. Once the sale was made public, the company's share price increased 56% from its pre-announcement closing price. Woodward gained $21,326 in ill-gotten

profits from his illegal transactions. In settlement, Woodward consented to cease and desist from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. He agreed to disgorge $21,326 plus pre-judgment interest and pay civil penalties of $21,326. The order also denied Woodward the privilege of appearing or practicing before the SEC as an accountant, with a right to apply for reinstatement after five years.

SEC Administrative Release – https://www.sec.gov/enforce/34-96153-s

Environmental, Social & Governance ("ESG")

Goldman Sachs Asset Management (November 22, 2022)

As we have highlighted in multiple recent regulatory updates, the SEC is heavily focused on ESG investment strategies and disclosures, as investors increasingly focus on such issues in selecting fund managers and investment advisers. The SEC brought an interesting enforcement case with a hefty $4 million penalty that highlights the agency's scrutiny of ESG and may indicate more similar cases to follow.

In this case, Goldman Sachs specifically marketed two mutual funds as ESG funds and a separately managed account as pursuing an ESG strategy. However, the SEC charged Goldman with not adopting written policies and procedures to govern how the firm evaluated ESG factors as part of its investment process until some time after the strategy was introduced and marketed. The firm did eventually adopt written policies and procedures related to its ESG investment process, and actively described the policies and procedures in communications to the funds' boards and to prospective investors and intermediaries in pitch books and requests for proposal (***RFPs***) but failed to consistently follow them. Specifically, the firm's policies noted that they used a questionnaire for each investment with a series of detailed questions covering ESG topics and a numerical scoring system or materiality matrix based on the responses to the questionnaire. The scores were to be used for position sizing. However, the case notes that the firm's investment analysts did not complete questionnaires for certain investments until after the investment team had already selected securities for the portfolio. Prior to the completion of the questionnaires and use of the materiality matrix to generate an ESG score, the SEC noted that the firm had conducted ESG research on the issuers held in the ESG investment products. However, the research was not uniformly applied across issuers and differed from the policies and procedures. The SEC further faulted the firm for not providing its staff with sufficient guidance concerning the applicability and scope of the policies and procedures that covered the ESG investment process. For example, some of the firm's staff believed completion of the questionnaire was optional; others believed that they could be completed sometime after the position had been added to the portfolio. Finally, once the policies and procedures were implemented and questionnaires completed for most positions, the SEC noted that the investment analysts did not maintain them in a central location, as required by the policies and procedures, which resulted in delays in producing documents in connection with the SEC investigation.

Following are what CORE believes are key takeaways from this case:

- If a firm does not market any funds or SMAs as pursuing an ESG strategy, they are not currently required to have a specific ESG policy. This may change in the future based on current SEC rule proposals.
- However, the CCO and Compliance Team should make sure that they review any pitch books, RFPs, due diligence questionnaires and other communications with prospective or current investors to make sure they know what ESG representations have been made.
- If firms do make ESG representations in such communications, they should implement policies and procedures that are reasonably designed to ensure that they are doing what they have represented.
- If firms adopt ESG policies and procedures, they must make sure that they are consistently following those procedures concurrent with making investment decisions, and not just applying or documenting ESG research after investments have been made.
- Firms should ensure that all investment team members and other relevant staff are adequately trained on their ESG policies, procedures, and disclosures so that they understand what is required when conducting and documenting due diligence.

- Firms should ensure that due diligence and any other documentation required by their ESG policies and procedures is centrally maintained and readily available for Compliance Team and SEC review, as needed.
- The CCO or Compliance Team should periodically review and monitor such documentation to confirm compliance with ESG policies, procedures, and disclosures.

SEC Press Release – https://www.sec.gov/news/press-release/2022-209

Valuation

Infinity Q Diversified Alpha Fund (November 10, 2022)

On November 10, 2022, the SEC filed a settled action against Infinity Q Diversified Alpha Mutual Fund related to its massive overvaluation scheme in which it mispriced its net asset value (***NAV***). The SEC's complaint stated that over a 5-year period running through February 2021, James Velissaris, the Chief Investment Officer of the mutual fund's investment adviser, materially and falsely inflated the mutual fund's reported NAVs through a massive overvaluation scheme. The mutual fund was charged with violating the pricing provisions of Rule 22c-1 of the Investment Company Act. Mutual Fund redemptions had been suspended on February 22, 2021, as a result of an application filed by the mutual fund's board pursuant to Section 22(e)(3) of the Investment Company Act. The mutual fund has been liquidated with distributions of approximately $670 million to current shareholders and approximately $570 million remaining to be distributed to harmed investors.

SEC Litigation Release – https://www.sec.gov/litigation/litreleases/2022/lr25575.htm

Front Running

Lawrence Billimek & Alan Williams (December 20, 2022)

In December 2022, the SEC announced charges against two individuals, a trader at a major asset management firm (Billimek), and another former financial professional and active day trader (Williams). Billimek routinely bought and sold securities in such large amounts that the trades caused the price of those securities to increase or decrease in a predictable way. He regularly advised Williams of these market-moving trades prior to their execution, allowing Williams to take advance of the expected price change to front run the trades in personal accounts. The scheme generated $47 million in profits, and Williams shared more than $500,000 of these profits with Billimek. The SEC charged Billimek with stealing confidential trade information, betraying the trust of his firm and his fiduciary duty, and charged Williams with misusing MNPI. Both individuals were further criminally charged with securities fraud, conspiracy and wire fraud. The case is currently being litigated.

SEC Litigation Release – https://www.sec.gov/litigation/litreleases/2022/lr25595.htm

Market Manipulation

Edward Constantin (December 13, 2022)

On December 13, 2022, the SEC brought charges against eight individuals in a $100 million securities fraud scheme in which they used the social media platforms Twitter and Discord to manipulate exchange-traded stocks. Seven of those charged promoted themselves as successful traders and cultivated hundreds of thousands of followers on Twitter and in stock trading chatrooms on Discord. The defendants purchased certain stocks and then encouraged their followers to buy those selected stocks by posting price targets or indicating they were buying, holding, or adding to their stock positions. When share prices and/or trading volumes rose in the promoted securities, they sold their shares without disclosing their plans to dump the securities while they were promoting them. The seven individuals were charged with fraud for violating Section 10(b) of the Exchange Act and Rule 10B-5 thereunder and Section 17(a) of the Securities Act of 1933. An additional complaint was filed against Daniel Knight (Twitter Handle @DipDeity), with aiding and abetting the alleged scheme by co-hosting a podcast in which he promoted many of the other individuals as expert traders and provided them with a forum for their manipulation. Knight also traded in concert with the other defendants and generated profits from the

manipulation. The SEC action is pending in U.S. District Court for the Southern District of Texas. Criminal charges against all eight individuals were filed in a parallel action brought by the DOJ's Fraud Section and the U.S. Attorney's Office. The investigation is currently ongoing.

SEC Litigation Release – https://www.sec.gov/litigation/litreleases/2022/lr25591.htm

Principal & Cross Trades

Legal & General Investment Management America, Inc. (November 21, 2022)

On November 21, 2022, the SEC announced settled charges against Legal & General Investment Management America, Inc. (***LGIMA***), a Chicago area RIA, related to almost 45,000 unlawful principal transactions that were made without required client disclosures or consent and 550 cross trades that violated statutory prohibitions against cross trading over a 2 and a half year period ending in December 2020. In addition to consenting to a cease-and-desist order and a censure, LGIMA agreed to a $500,000 civil penalty. The majority of these transactions were effected through an internally-developed automated trade matching program. LGIMA was found to have failed to adopt and implement reasonably designed policies and procedures related to principal transactions and cross trades, and to have willfully violated Advisers Act Sections 206(3) and 206(4) and Rule 206(4)-7, causing certain of its clients to violate Sections 17(a)(1) and 17(a)(2) and Rule 38a-1 of the Investment Company Act. The SEC recognized LGIMA's self-reporting, cooperation and remedial efforts and considered them when determining to accept the company's settlement offer.

SEC Administrative Proceeding Summary – https://www.sec.gov/enforce/ia-6188-s

Financial Statement & Audit Failures

Mattel Financial Statement Misstatements and PwC Audit Partner Conduct (October 21, 2022)

In October 2022, the SEC charged Mattel, Inc. for understating tax-related valuation allowance amounts, overstating tax expenses in the subsequent quarter (resulting in a $109 million tax expense error, that was not reported to Mattel's CEO or audit committee), and inaccurate earnings information. The error was detected by Mattel after receipt of an anonymous whistleblower letter. According to the SEC order, Mattel did not have sufficient internal controls related to calculating the valuation allowance. The SEC separately charged the firm's former PwC audit partner with improper professional conduct for failing to verify that the uncorrected tax error was documented and failing to inform the audit committee. The PwC partner was further charged with violating auditor independence rules because he provided prohibited human resource advice to Mattel regarding the firm's consideration and selection of CFO candidates. Mattel agreed to a $3.5 million penalty. The SEC will hold a public hearing to address the allegations against the former PwC audit partner.

SEC Press Release – https://www.sec.gov/news/press-release/2022-189

Real Estate

Real Estate Development Ponzi Fraud (October 13, 2022)

The SEC charged National Realty Investment Advisors LLC (***NRIA***) and four of its former executives with running a Ponzi-like scheme that raised approximately $600 million from an estimated 2,000 investors, including hundreds or retirees. The SEC's complaint alleged that beginning in 2018, NRIA and its executives raised funds by promising investors their money would be used to buy and develop real estate properties, which would generate profits through a fund that they set up to invest in the projects. Four executives solicited investors nationwide promising returns of up to 20 percent. Investor money was actually used to pay distributions to other investors, to fund an executive's family's personal and luxury purchases, and to pay reputation management firms to thwart investors' due diligence of the executives. NRIA manipulated the real estate fund's financial statements and the financial information in the marketing material distributed to investors, intentionally disguising the misuse of investor funds and creating the false appearance that NRIA and the fund were generating more

revenue than they actually were. While creating the appearance that they were successful, NRIA and the fund, having little to no actual revenue, filed for Chapter 11 bankruptcy protection in June 2022.

SEC Press Release – https://www.sec.gov/news/press-release/2022-188

FCPA Violations

Honeywell Bribery Schemes (December 19, 2022)

The SEC announced settled charges requiring Honeywell Interactional, Inc, a US-based global manufacturer of aerospace, building technologies, and automation products, to pay more than $81 million to resolve charges of a bribery scheme involving intermediaries and employees of its U.S. subsidiary to obtain business from Brazil stated-owned entity, Petrobas, in violation of the FCPA. The case noted that Honeywell retained a Brazilian agent to gain access and offered at least $4 million in bribes to high-ranking Petrobas officials. Separately, employees and agents of Honeywell's Belgian subsidiary paid bribes of more than $75,000 to an Algerian government official to obtain and retain business with Algerian state-owned entity Sonatrach. The SEC charged Honeywell for neglecting to implement sufficient internal account controls to mitigate against known corruption risks in countries like Brazil and Algeria and noted that this failure "created an environment in which Honeywell employees and agents could and did facilitate bribes."

In a parallel case, Honeywell entered into a deferred prosecution agreement and agreed to pay more than $78 million to settle criminal charges brought by the DOJ and agreed to settle charges brought by the Brazilian government.

SEC Press Release – https://www.sec.gov/news/press-release/2022-230

ABB Ltd. Bribery Scheme in South Africa (December 3, 2022)

The SEC in December 2022 charged a global electrification and automation technology company, ABB, Ltd., for violations of the FCPA arising from a bribery scheme in South Africa. The company was the subject of two prior FCPA cases in 2004 and 2010. The company paid service providers more than $37 million to bribe government officials in return for a $160 million contract to provide cabling and installation work at a government-owned electricity provider. The company agreed to pay more than $72 million in disgorgement and a $75 million penalty to settle the SEC's charges. In addition, ABB agreed to regularly report to the SEC for a three-year period the status of its ongoing remediation of its internal accounting controls and compliance program.

The SEC's action was part of a coordinated global settlement that included the DOJ and criminal authorities in South Africa and Switzerland. In its parallel case, the DOJ fined ABB $315 million to settle criminal charges.

SEC Press Release – https://www.sec.gov/news/press-release/2022-214

Miscellaneous Enforcement

AT&T Selective Disclosure (December 5, 2022)

On December 5, 2022, the SEC announced AT&T's agreement to pay the largest ever penalty in a Regulation FD case. AT&T agreed to pay $6.25 million, and three executives agreed to pay $25,000 each related to March 2021 charges of the company's selective disclosure of MNPI to research analysts. The SEC's complaint alleged that certain investor relations executives made private calls to analysts disclosing certain revenue and sales data that was specifically noted in internal documents for investor relations executives as information generally considered "material" to AT&T investors. The SEC's complaint alleged that this information caused analysts to substantially reduce their revenue forecasts which ultimately allowed AT&T to beat the overall consensus revenue estimate when it reported its results publicly. The Director of the SEC's Enforcement Division, Gubir S. Grewal, noted that this was "precisely the type of conduct Regulation FD was designed to prevent."

SEC Press Release – https://www.sec.gov/news/press-release/2022-215

Regulatory Updates and Enforcement

S&P Global Ratings Conflicts of Interest (November 14, 2022)

On November 14, 2022, the SEC charged S&P Global Ratings with violating conflict of interest rules designed to prevent sales and marketing considerations from influencing credit ratings. Under these rules, credit rating agencies are required to insulate their analytical functions from the influence of business considerations. In this case, employees responsible for managing the relationship with an issuer attempted to pressure the S&P analytical employees to rate a transaction consistent with preliminary feedback that the analytical employees provided that had contained a calculation error. The SEC found that, by their actions, the commercial employees ended up becoming participants in the rating process at a time when they were influenced by sales and marketing considerations. S&P self-reported the conduct at issue to the SEC, cooperated with the investigation and took remedial steps to bolster its policies and procedures related to conflicts of interest. The S&P agreed to settle the matter by paying a $2.5 million penalty, agreeing to the entry of a cease-and-desist order, a censure and compliance with certain undertakings

SEC Press Release – https://www.sec.gov/news/press-release/2022-205

Other Regulatory Developments

Anti-Money Laundering & Sanctions Developments

ENABLERS Act Status

In December 2022, the US Senate voted not to include the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (the ***ENABLERS Act***) in the 2023 defense budget via the National Defense Authorization Act. The ENABLERS Act was originally introduced by a group of bipartisan lawmakers following the release of the Pandora Papers, which exposed how dictators, criminals, and the corrupt are able to launder money through various economic sectors not required to perform the same due diligence expected of the banking industry. The act, which had the support of the White House, several influential senators, and a roster of foreign policy and national security experts, would have amended the 51-year-old Bank Secrecy Act by requiring the Treasury Department to create basic due diligence rules for American "gatekeepers" who facilitate the flow of foreign assets into the United States. Opponents of the act in Congress have said it should go through the regular legislative processes instead of being "tacked on" to a funding bill. Its supporters maintain that they will continue to push for the act as a standalone bill if need be. Banks are already required to investigate their clients and sources of wealth, but trust companies, lawyers, investment advisers, accountants, and other professionals have historically been excluded from due diligence rules in the U.S.— a loophole regularly criticized by financial crime experts and international watchdogs. Though the ENABLERS Act did not survive this go-round, counterparties and others may expect, or even require, that fund managers periodically screen their investors and underlying beneficial owners and controllers against negative news lists.

As previously recommended, CORE believes it to be best practice for U.S. fund managers to maintain a risk-based AML program and subject investors to basic know-your-customer practices and due diligence, which typically includes the following:

- Verifying the identity of an individual or legal entity investor;
- Understanding the source of an investor's funds;
- Identifying the ultimate controller(s) and beneficial owners of an investor; and
- Understanding the connections between an investor and potential high-risk geographies, industries, or individuals.

Should an investor or an investor related party be deemed to be of higher risk, enhanced due diligence is recommended. CORE will continue to assist and advise fund managers in all AML and know your customer (***KYC***) compliance matters.

Danske Bank AML Compliance Failures (December 13, 2022)

The SEC instituted fraud charges against Danske Bank, a multinational financial services corporation headquartered in Denmark, for misleading investors about its AML compliance program in its Estonia branch and failing to disclose the risks posed by the program's significant deficiencies. The Estonia branch provided banking services to a significant number of non-resident customers from Russia and other former Soviet-bloc countries that engaged in practices that raised red flags, including frequent use of offshore LLPs and nominee directors to obscure or conceal beneficial ownership information, use of unregulated intermediaries to carry out transactions on behalf of unknown clients, and ties to jurisdictions with enhanced money laundering risks. Danske further had numerous red flags indicating that its employees and managers at the Danske branch had conspired with customers to circumvent AML laws and regulations of the European Union, Denmark and Estonia and that the bank's AML and KYC safeguards were weak and ineffective. The SEC noted the bank's internal risk management procedures were inadequate to prevent such activity; and that its AML and KYC procedures were not being followed and did not comply with applicable laws and rules. The SEC alleges that, from 2009 to 2016, these high-risk customers utilized Danske Bank's services to transact billions of dollars in suspicious transactions through the U.S. and other countries, generating as much as 99% of the Estonian branch's profits. The complaint further alleges that, although Danske Bank knew of these high-risk transactions, it made materially misleading statements and omissions in its publicly available reports stating that it complied with its AML obligations and that it had effectively managed its AML risks. Danske Bank agreed to pay $413 million to settle the SEC's charges.

SEC Press Release – https://www.sec.gov/news/press-release/2022-220

J.H. Darbie & Co. (December 12, 2022)

The SEC charged broker-dealer J.H. Darbie & Co for failing to file suspicious activity reports (***SARs***) on low-priced securities transactions in accordance with their AML policy. This case highlights the need for clients to ensure they abide by policies mentioning specific red flags. J.H. Darbie's policies stated that low-priced transactions were a potential red flag of "illicit conduct in connection with the trading of low-priced securities" that should be reported to the AML Compliance Officer. However, the broker-dealer failed to file SARS related to penny stock transactions that were all of the type described in their policies. The complaint describes such transactions as indicative of manipulation, illegal unregistered offerings, or pump-and-dump schemes.

This is also an instance where a company's reference in a report concerning the Panama Papers came up as a red flag. However, presumably it was only a concern because one of the company's individual directors, who was also named in the Panama Papers, was also the subject of an SEC enforcement action barring him from engaging in the offer of penny stocks.

SEC Litigation Release – https://www.sec.gov/litigation/complaints/2022/comp25590.pdf

Digital Asset Developments

FTX – The Cryptic Empire That Once Was

Many call it the fraud of the century. Some see features of a Ponzi scheme in it. Some are calling out insufficient due diligence from institutional investors, and others say the blindness of the SEC is to blame. In any case, FTX Trading Ltd. (***FTX***), the crypt trading platform, and its collapse in November 2022 will have repercussions on the international crypto community for years to come. At its peak, the privately held FTX was valued at around $32 billion. Then, over just a 10-day period, the company faced severe liquidity issues and ultimately filed for bankruptcy. There were various conflicts and alleged crimes at FTX and the closely-affiliated trading firm Alameda Research, and it may take months or years before the dust settles. Nonetheless, below is a summary of items that seem to be known at this point.

Timeline

Regulatory Updates and Enforcement

In early November 2022, CoinDesk published a report highlighting probable leverage and solvency issues involving FTX and Alameda Research. Following this report, FTX and its then CEO, Sam Bankman-Fried, unsuccessfully searched for a bailout from a competitor and significant owner of FTX's own token – Binance. Ironically, as a result of due diligence conducted on FTX, Binance decided to liquidate its FTX tokens, causing an immediate liquidity crisis and Bankman-Fried to resign as FTX CEO. Following these chaotic days, FTX reported an alleged cyber-attack that resulted in $477 million loss of crypto assets. Following the bankruptcy filing and the hack, Bankman-Fried was arrested in the Bahamas and later extradited to the United States. Bankman-Fried is currently out on a $250 million bond, the largest amount in history.

Allegations

- Momentarily after filing for bankruptcy, FTX said it was the victim of a hacking attack. Outside sources say that about $477 million was stolen from FTX in the alleged hack. The legitimacy of this claim is to be determined.
- In mid-November a class-action lawsuit was filed against Bankman-Fried, alleging he created a fraudulent cryptocurrency scheme designed to take advantage of retail investors from across the U.S. Some of the people named in the lawsuit include celebrities like Steph Curry, Shaquille O'Neal, Naomi Osaka, Larry David, and Kevin O'Leary.
- After Bankman-Fried's extradition to the U.S., he was indicted by the U.S. District Court in Manhattan on eight counts, including securities fraud and money laundering. Bankman-Fried is set to face trial on eight criminal charges on October 2, 2023.
- Alongside criminal charges, the SEC is pursuing a civil case, charging Bankman-Fried with violating the anti-fraud provisions of the Securities Act of 1933 and the Exchange Act. The SEC's complaint seeks injunctions against future securities law violations; an injunction that prohibits Bankman-Fried from participating in the issuance, purchase, offer, or sale of any securities, except for his own personal account; disgorgement of his ill-gotten gains; a civil penalty; and an officer and director bar.

Regulatory Oversight

The FTX fraud and resulting losses to retail investors further highlight the need for effective regulation and oversight of cryptocurrency issuers and exchanges. While Chairman Gensler has been a strong proponent for SEC regulation of digital assets, concerns have been raised as to the adequacy of the SEC's oversight in this case. SEC staff reportedly met with Bankman-Fried and FTX leadership repeatedly in the months preceding FTX's collapse and had requested documentation regarding FTX's handling of customer assets. As the criminal and civil cases are ongoing, it is too soon to know the full details and the SEC's handling of the matter. However, the Chairman of the House Financial Services Committee, members of Congress and others are closely following developments in the cases and reviewing the SEC's oversight authority.

SEC Press Release – https://www.sec.gov/news/press-release/2022-219
SEC Report of Investigation – https://www.sec.gov/files/oig-509-exec-summary.pdf
Wall Street Journal – https://www.wsj.com/articles/a-question-for-congress-why-didnt-the-sec-stop-ftx-crypto-exchange-assets-investors-bankruptcy-fraud-sam-bankman-fried-11674063645?mod=Searchresults_pos13&page=1

SEC Charges Creator of Global Crypto Ponzi Scheme and Three US Promoters in Connection with $295 Million Fraud

The SEC charged four individuals who were involved in a crypto Ponzi scheme, operating between 2016 - 2018, that raised over 82,000 Bitcoin (worth around $295 million at the time) from more than 100,000 investors worldwide. In this classic Ponzi scheme, investors were deceived by guaranteed minimum daily returns of 0.35% which were to be achieved by trading activities of a purported crypto asset trading bot. In reality, profitable investor redemptions came solely from deposits made by new investors and not from any crypto asset trading

activity. In total, the four perpetrators received at least $60 million worth of Bitcoin (at the time). The SEC expressed its intention to continue using blockchain tracing and other analytical tools to identify and investigate fraud in the crypto asset space. The SEC's complaint aims to charge the four individuals with violating the antifraud provisions and securities and broker-dealer registration provisions of the federal securities laws.

SEC Press Release – https://www.sec.gov/news/press-release/2022-201

SEC Charges the Hydrogen Technology Corp. and Its Former CEO for Market Manipulation of Crypto Asset Securities

The SEC filed charges against The Hydrogen Technologies Corporation (***Hydrogen***), its former CEO, and Moonwalkers Trading's CEO for allegedly creating a manipulated market for its crypto asset securities called "Hydro". Hydro was publicly circulated through various methods, including an airdrop, bounty programs, employee compensation, and direct sales on trading platforms. The SEC alleges that, following the broad distribution of the Hydro token, the former CEO of Hydrogen hired Moonwalkers Trading to create a false appearance of voluminous market activity for Hydro which ultimately inflated the token's price. As a result of this illicit market manipulation, Hydrogen gained more than $2 million in profits. The SEC's complaint alleges Hydrogen, its former CEO and Moonwalkers Trading's CEO violated the registration, antifraud, and market manipulation provisions of the Securities Act of 1933.

SEC Press Release – https://www.sec.gov/litigation/litreleases/2022/lr25553.htm

SEC Charges SEC Seeks to Stop the Registration of Misleading Crypto Asset Offerings

The SEC instituted administrative proceedings against American CryptoFed DAO LLC (***ACF***) to determine whether a stop order should be issued to suspend the registration of the offer and sale of ACF's two crypto assets – Ducat and Locke. The SEC alleges that ACF's registration statement contained materially misleading statements and failed to include required business, management, and financial information, such as audited financials. The SEC's Cyber Enforcement Unit stated that "ACF not only failed to comply with the disclosure requirements of the federal securities laws, but it also claimed that the securities transactions they seek to register are not in fact securities transactions at all." In addition, the Enforcement Division has suggested that ACF's business plan resembles a Ponzi scheme. ACF has fought back, stating its intent to proceed with the offering and sale unless the SEC provided it with a Cease-and-Desist Order and a Howey Test Analysis or other legal justification proving that the Locke and Ducat tokens are securities. In all likelihood, ACF will issue its two tokens pursuant to the Token Safe Harbor Proposal 2.0 outlined by SEC Commissioner Hester Peirce. Notably, this proposal is not currently the law. We believe that this case is worth monitoring because it has the potential to affect the framework for how future token offerings are handled.

SEC Press Release – https://www.sec.gov/news/press-release/2022-208

Privacy Developments

A number of state and international privacy laws or implementing regulations have recently come into effect in the first part of 2023, and others are expected to be effective or enforced in the coming months. Several changes to California privacy laws and regulations, in particular, will affect certain fund managers that collect personal information from California consumers. Following is a selection of recent and upcoming state law developments.

Virginia Consumer Data Protection Act (***VCDPA***)

The Virginia Consumer Data Protection Act became effective January 1, 2023. Unlike the California laws discussed below, the VCDPA's applicability is generally only triggered if a manager processes the personal data of over a specified number of Virginia consumers per year. Even where thresholds are met, additional exemptions are also available for institutions and business subject to the Gramm-Leach-Bliley Act (***GLBA***). Further, this state law has effectively defined "consumer" to exclude employees and business-to-business contacts.

Regulatory Updates and Enforcement

California Consumer Privacy Act (***CCPA***) & California Consumer Privacy Rights Act (***CPRA***)

The CPRA became effective on January 1, 2023, amending the existing CCPA legislation and expanding its scope in some areas. In addition, the California legislature declined to extend certain exclusions from the CCPA which sunset as of January 1, 2023. Both developments not only require additional action by private fund managers already covered by these California laws, but also could impact private fund managers and encompass data not previously within the scope of CCPA. Implementing regulations for the CPRA are in flux; however, two rulemakings are expected, according to recent proceedings and statements from the California Consumer Protection Agency and Attorney General. The first set of regulations has been proposed and amended and is expected to be final in the first half of 2023, followed by a second rulemaking focusing on cybersecurity audits and risk assessments, among other things. As discussed in last quarter's update, the CCPA, as expanded by the sunsetting of exemptions, remains in effect and is currently being enforced. The CPRA provides for enforcement beginning July 1, 2023, for violations occurring on or after that date.

The law is generally applicable to any business with gross annual revenue in excess of $25 million and that collects personal information from California consumers (which generally include investors, prospective investors, service providers, employees, job applicants, or independent contractors, among others). As amended, the threshold for covered businesses is slightly modified in terms of its calculation methodology. "Revenue" should be calculated on a gross annual basis, as of January 1, for the previous calendar year. "Gross annual revenue" is still undefined, but the California Attorney General has clarified that it is not limited to revenue derived from California residents or generated in California. Separately, the buying, selling, or sharing of personal information of more than 50,000 California residents, rather than the previous 100,000, could also trigger applicability of these laws as would revenue derived at least 50% from selling *or sharing* consumer information. The CPRA also clarified that entities controlling or controlled by another entity that is covered are deemed to be subject to the rule if they have "common branding" and share personal information.

Key exclusions available for certain data otherwise subject to California privacy laws but "subject to" GLBA or Reg S-P privacy protections sunset on January 1, 2023. After its initial adoption, many private fund managers availed themselves of the CCPA's carve-out provisions for data subject to GLBA or Reg S-P, allowing for reduced obligations for applicable managers. While data subject to Reg S-P is still generally excluded, only certain personal data is "subject to" GLBA, *i.e.,* existing investor data collected in connection with a subscription agreement. While Reg S-P protects such existing investor information, it may not protect prospective investor information. Further, employee, service provider, and independent contractor personal data is similarly not protected by GLBA or Reg S-P and would also be in scope for such a manager.

Another exclusion for businesses under the CCPA also expired January 1. Whereas the original CCPA applied only to natural person consumers acting in a personal capacity, effectively excluding natural persons acting as agent for an entity, the expiration of this exclusion may bring the personal data of California-based institutional investors in scope, as a manager may collect the personal name or phone number of prospective institutional investor. Similarly, where the personal information of an employee of a California service provider has been collected, this is likely also in scope.

"Opt-out" and notice obligations are also expanded with the CPRA's amendments. While most managers do not engage in selling of consumer data in a manner that requires an opt-out notification be provided, as long as a manager's privacy notice states as such, privacy notices may need to be provided not only to private funds the adviser manages, but now also to its employees and contractors.

The CPRA requires additional obligations of covered businesses that expand CCPA in certain areas. Businesses would be required to have written agreements in place with "contractors" and third-party service providers who process personal information for business purposes, service providers to whom they disclose personal information, in addition to any third parties to whom they sell such information. There are no specific record retention requirements, but the CPRA prohibits businesses from retaining personal information longer than reasonably necessary for the stated purpose for which it was collected.

Regulatory Updates and Enforcement

Colorado, Connecticut, & Utah

The Colorado Privacy Act is slated to go into effect on July 1, 2023. The Act's implementing regulations, which focus heavily on data governance and management of sensitive data, are currently in the proposal stage and likely to be adopted in the first half of 2023, with a public hearing set for February 1 for comment. Similar to the VCDPA, Colorado's laws allow broader exclusions based on GLBA and number of Colorado consumers whose personal information is processed, as well as for employee-resident and business-to-business contacts.

The Connecticut Data Privacy Act will become effective on July 1, 2023, and the Utah Consumer Privacy Act on December 31, 2023.

Virginia Consumer Protection Act – https://law.lis.virginia.gov/vacode/title59.1/chapter17/

California Attorney General CCPA/CCRA Update & FAQs – https://oag.ca.gov/privacy/ccpa

Colorado Attorney General CPA Update – https://coag.gov/resources/colorado-privacy-act/