STRADLEY RONON

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Client Alert | Investment Management and Securities Litigation & Enforcement

SEC Enforcement and Investment Advisers: 2023 Is in the Books. How Will 2024 Look?

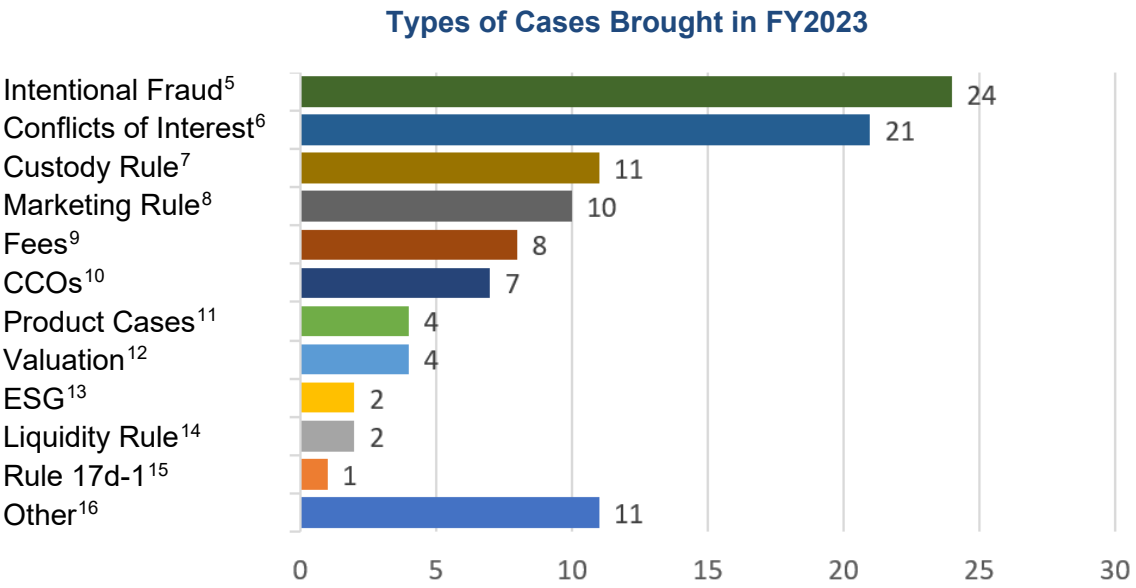
Under Chair Gary Gensler and Division of Enforcement Director Gurbir Grewal, who both arrived in 2021, the U.S. Securities and Exchange Commission's (SEC) enforcement program has been packed with priorities across the financial services industry, including many relevant to investment advisers and funds, as well as their management, employees and boards (together, IAs). This alert will identify: (1) key enforcement statistics, themes and matters for fiscal year 2023 (FY2023)[1] of interest to IAs; (2) notable enforcement developments thus far in fiscal year 2024 (FY2024); and (3) what to expect going forward as the Gensler Commission nears the conclusion of its third year.

SEC Enforcement in FY2023

In November 2023, the Division of Enforcement released its results for the 2023 fiscal year (FY2023 Enforcement Results).[2] According to the FY2023 Enforcement Results, the SEC:

- Brought 784 enforcement actions in FY2023, a 3% increase over fiscal year 2022 (FY2022).
- Brought 501 actions with substantive charges, an 8% increase from FY2022.
- Brought 86 (of those 501 actions) as substantive or "standalone" matters pursuant to the Investment Advisers Act of 1940 (IAA) and/or Investment Company Act of 1940 (ICA).[3]
- Filed 62 (of those 86 matters) as settled administrative proceedings, while the remaining 24 were filed in federal court. Of the 24 filed in federal court, 15 are still litigating.

Based on our classification and by our tally, the 86 standalone actions break down as follows:[4]



More than half of the matters brought pursuant to the IAA and ICA (45) were intentional frauds and conflict of interest matters.[17] These matters typically accounted for the bulk of enforcement actions brought pursuant to the 1940 Acts. The "Other" category is a hodgepodge of actions without scienter-based violations that do not fit elsewhere in our categorization. For example, there were two settled cases finding that an investment adviser did not adopt and implement reasonably designed policies and procedures, as required by Section 206(4) of the IAA and Rule 206(4)-7 thereunder, without findings of other violations.[18]

Below are the remaining categories of actions along with some additional topics and cases of note for IAs.

IAA/ICA Rules Enforcement

As in past years, the SEC in FY2023 brought numerous cases involving alleged violations of certain rules implemented pursuant to the IAA and ICA.

Custody Rule. The Custody Rule has traditionally been a frequently enforced rule given its significant impact on investor protection. The SEC's actions to enforce the Custody Rule have generally centered around failures by investment advisers to obtain annual audits for their advised funds or timely deliver audited financial statements to their clients. The SEC brought 11 settled actions to enforce the rule in FY2023 with penalties ranging from $50,000 to $225,000.

Marketing Rule. The SEC brought nine settled actions against investment advisers for failing to comply with the provisions of the new Marketing Rule by the November 2022 deadline. The charges alleged that the firms advertised hypothetical performance on their public websites to mass audiences without having sufficient policies and procedures to ensure that such information was relevant to the financial situation of such investors.[19] The penalties in these cases ranged from $50,000 to $175,000.[20] The matters resulted from an SEC enforcement sweep, as is common when the agency implements new rules and initially targets technical violations of the provisions.[21] Focusing this group of cases on inadequate policies and procedures is a good example of that approach.

Liquidity Rule. In FY2023, the SEC brought its first action to enforce the Liquidity Rule promulgated pursuant to the ICA in 2019. The SEC charged the adviser of a fund largely invested in central New York businesses and three of the fund's trustees for aiding and abetting the fund's alleged misclassification of a single asset in the fund's portfolio. The interested trustee settled the charges, but the adviser and two independent trustees moved to dismiss the SEC's case. The independent trustees argued that the SEC failed to state facts to support any of the elements of aiding and abetting, and all the litigating parties argued that the agency lacked appropriate authority from Congress pursuant to the ICA to promulgate the rule. The matter is pending a decision from the court on the parties' motions.

Rule 17d-1. The SEC brought one action in FY2023 involving Rule 17d-1 promulgated under the ICA. Rule 17d-1 prohibits certain actions by affiliated persons of investment companies (ICs) that constitute a joint arrangement/enterprise or profit-sharing. The SEC found that the adviser used the securities lending revenue of an exchange-traded fund (ETF) it advised to negotiate rescue financing for the adviser's parent. This is the first action involving a direct violation of Rule 17d-1 since 2008.[22]

Areas with Surprisingly Limited or No Enforcement

Fees. In FY2023, the SEC filed eight settled enforcement actions focused on fees, most of which involved disclosure failures. Despite then-Division of Investment Management Director William Birdthistle's focus on mutual funds with "high" advisory fees and "poor" returns,[23] a Division of Enforcement "sweep" that reportedly began in FY2022 and continued in FY2023,[24] and the Division of Examinations' identification of IC fees as a priority in FY2023,[25] there were no enforcement actions brought under Section 36(b) of the ICA. Nor were there any involving a violation of Section 15(c) of the ICA.[26]

Cybersecurity. Although cybersecurity has been a priority for the SEC's examinations program since 2014,[27] there were no cybersecurity enforcement actions involving IAs in FY2023. In a matter that is nonetheless instructive for IAs, the SEC brought its first cybersecurity-related action against a chief information security officer (CISO) of a public company, related to the company's response to a hack believed to have been perpetrated by a nation-state.[28] According to the SEC, the company and its CISO defrauded investors by overstating the company's cybersecurity practices and understating or failing to disclose known risks in filings made with the SEC. This matter is in litigation.

Environmental, Social and Governance (ESG). Although the SEC has prioritized ESG issues, including them as a Division of Examinations priority for four straight years (but not for FY2024),[29] the SEC only brought two settled actions involving ESG in FY2023. Moreover, one of these matters focused solely on the failure of an investment adviser to follow its policies and procedures regarding security selection.[30] And although the other matter included a breach of fiduciary duty claim based on the adviser's materially misleading statements regarding its ESG-related internal controls and policies and procedures, the SEC did not allege, for example, that the adviser's investment recommendations failed to conform to its ESG-related disclosures.[31]

Valuation. SEC charges concerning the failure to properly value assets continue to be rare outside of matters involving evidence indicating that proffered valuations were intentionally falsified or simply not calculated at all. There were three such litigated matters brought in FY2023.[32] In addition, the SEC brought a settled action against two affiliated private fund advisers for failure to adopt and implement reasonably designed valuation-related policies and procedures, particularly with respect to valuing certain "level 3" investments,[33] in violation of

Rule 206(4)-7 promulgated pursuant to the IAA. There were no settled actions involving valuation-related charges under Section 206(1) or Section 206(2) of the IAA.

Other Matters and Topics of Note for IAs

Product Cases. In FY2023, the SEC brought two settled actions against investment advisers for breaching their fiduciary duty of care, in one case for purchasing and holding in client accounts certain leveraged ETFs, and in the other for holding in client accounts a futures-linked exchange-traded note (ETN), in contravention of the product's purpose as described in the prospectus for each such product.[34] In addition, the SEC charged an investment adviser with violating Sections 206(1) and 206(2) of the IAA based on the adviser's failure to disclose commissions and perks it received in connection with its sale of fixed index annuities to clients.[35] The SEC also brought wide-ranging claims against another investment adviser, including IAA Section 206 fraud claims related to cryptocurrencies the adviser purchased for clients.[36] The latter two cases are being litigated on, among other grounds, claims that the IAA does not apply to fixed index annuities and cryptocurrencies because they are not securities.

Chief Compliance Officer (CCO) Liability. There were only seven standalone actions against investment adviser/IC CCOs this past fiscal year — five settled and two litigated. The facts and circumstances of those matters are generally consistent with an October 2023 speech by Grewal outlining three categories of cases in which compliance personnel would be charged: (1) where they affirmatively participated in misconduct unrelated to the compliance function; (2) where they misled regulators; and (3) where there was a wholesale failure to carry out their compliance responsibilities.[37] All but one of the standalone matters in which CCOs were charged in FY2023 fall within Grewal's first category.[38] In the remaining matter, which fits in the third category, the CCO of a registered investment adviser failed to adopt policies and procedures related to the firm's business or even the federal securities laws and did not conduct any training or compliance reviews of the firm's program for at least nine years.[39] The FY2023 investment adviser/IC CCO actions are also consistent with Grewal's statement from his October 2023 speech: "[W]e do not second-guess good faith judgments of compliance personnel made after reasonable inquiry and analysis."[40]

Off-Channel Communications. In FY2023 alone, 25 broker-dealers, dually-registered broker-dealers/investment advisers, broker-dealer-affiliated investment advisers and credit agencies paid more than $400 million to settle charges that they violated the recordkeeping requirements of the federal securities laws by failing to retain text messages, chats, messaging on apps (such as WhatsApp) and personal email accounts (off-channel communications).[41] These matters are important not only because of the excessive fines imposed for recordkeeping failures but also because the SEC has used them to highlight several other SEC enforcement concerns and priorities.

- *Preserving market integrity.* The SEC views the conduct underlying the off-channel communications actions as impeding its regulatory functions. Specifically, the SEC is concerned that firm personnel have shifted from using email, Bloomberg chats and other communications traditionally maintained by firms to off-channel communications. According to the SEC, if firms are not maintaining records of off-channel communications, then they are potentially depriving the SEC of evidence related to its investigations.[42] The SEC regards the impairment of its investigations as impacting its ability to protect investors and preserve market integrity.[43] With the exception of the first settled matter,[44] the SEC has provided little or no detail regarding the type of information that firms failed to preserve much less address whether that information may have been preserved elsewhere at the firms.

- *Tone at the top.* In each of the settled orders involving off-channel communications, the SEC identified, by title, senior management personnel who themselves engaged in such communications.[45] In doing so, the SEC made it clear that these violations stem, at least in part, from cultures of compliance affected by the "tone at the top" of the firms.

- *Standards of liability*. Thus far, each off-channel communications action involving a separate investment adviser as a respondent has also involved at least one affiliated broker-dealer respondent, and the affiliated entities settled to both Securities Exchange Act of 1934 (Exchange Act) and IAA recordkeeping rules. However, to date, the SEC has not charged any investment adviser or advisory personnel with recordkeeping violations that arise only pursuant to the IAA. This is likely in recognition of the much broader scope of the recordkeeping requirements under the Exchange Act when compared to the requirements under the IAA.[46]

- *Penalties.* The penalties levied in the off-channel communications matters are some of the largest ever for books and records violations. One firm agreed to pay a penalty of $125 million, which was the largest of the 25 penalties levied in FY2023.[47] Such penalties are demonstrative of the "recalibration" of penalties that Grewal announced in November 2022 in an effort "to more effectively promote deterrence and get away from the idea that penalties are just another business expense."[48] While the penalties might support Grewal's narrative and enforcement program, the industry should consider whether they meet the statutory penalty limitations that Congress has set for these types of violations.

- *Credit for cooperation.* In FY2023, the SEC repeatedly underscored its claim that self-reporting and other cooperation resulted in reduced civil penalties for certain firms that settled actions involving off-channel communications. For example, in a May 2023 press release announcing the orders entered against the first two settling parties, Grewal observed that both firms "self-reported and self-remediated their recordkeeping violations, and the reduced penalties in these cases reflect their efforts and cooperation."[49] In addition, the FY2023 Enforcement Results calls out by name the one firm that self-reported among those that settled in September 2023 and notes that although the self-reporting firm paid a $2.5 million penalty, "other firms that were charged as part of the initiative but had not self-reported agreed to pay substantially higher civil penalties to settle the charges."[50] The penalties paid by the other settling parties ranged from $8 million to $15 million.[51]

Whistleblower Rule. The SEC has continued to bring enforcement actions aimed at those it believes to have "impeded" whistleblowers in violation of Rule 21F-17(a) (the Whistleblower Rule). There were several such matters settled in just the last month of FY2023, including one concerning an investment adviser that had required its employees to sign agreements prohibiting the disclosure of confidential corporate information to third parties without an exception for potential SEC whistleblowers and required departing employees to sign releases affirming that they had not filed any complaints with any government agency in order to receive deferred compensation. The adviser was ordered to pay a $10 million civil penalty.[52]

Litigated Matters of Note. In FY2023, the SEC brought several matters against individuals who elected to litigate charges that they aided and abetted violations committed by an investment adviser or fund.[53] Such actions include the matter involving fixed index annuities and the matter involving the Liquidity Rule discussed above. These secondary liability charges present challenges for the SEC over and above those already present as a result of the aggressive claims it has brought against the investment advisers and funds in the same matters.[54]

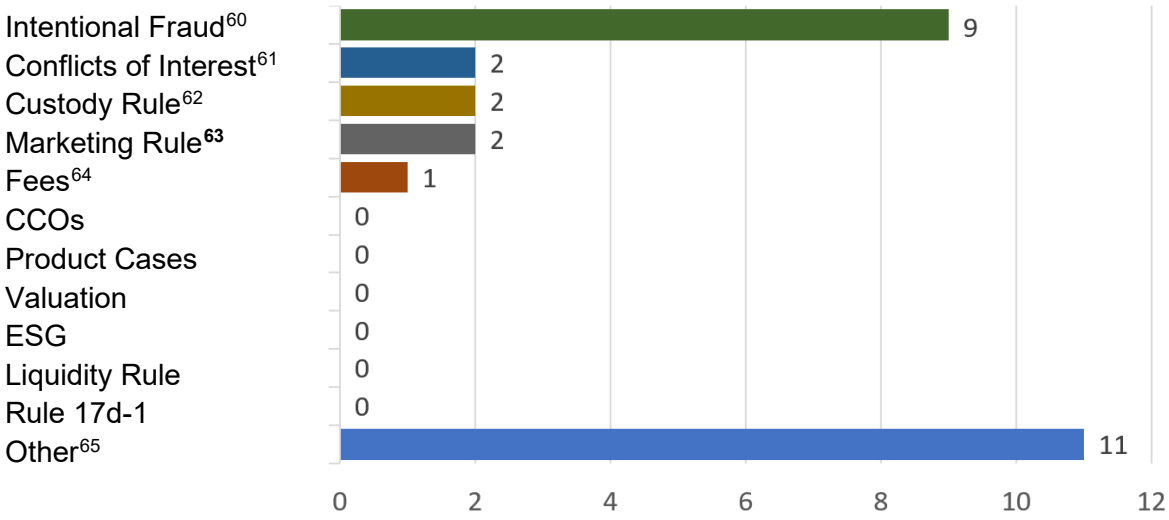
In addition to matters involving IAs, in an unprecedented setback to the SEC's attempt to curtail the ability of retail investors to purchase interest in cryptocurrency, the U.S. Court of Appeals for the D.C. Circuit in *Grayscale Investments v. SEC* held that the SEC's decision to reject Grayscale's application to launch a spot bitcoin ETF was "arbitrary and capricious."[55] Although it did not involve SEC enforcement, the case underscores the potentially far-reaching effects of courts' willingness to question the validity of the agency's decision-making. The SEC did not appeal the decision.

Finally, the U.S. Supreme Court granted writs of certiorari in two related cases likely to impact the tools available to the SEC's enforcement program. First, the Supreme Court is considering the elimination of the SEC's in-house tribunal, which would require all matters, settled or litigated, to be brought in federal court.[56] In *Jarkesy v. SEC*, the Fifth Circuit found that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in federal court or before its in-house tribunal. In addition, the Fifth Circuit ruled against the SEC on the constitutionality of administrative law judges under the Appointments Clause and whether seeking civil penalties in a fraud action through an administrative proceeding violated the respondents' right to a jury trial under the Seventh Amendment. The Supreme Court will consider all of these issues. Second, the Supreme Court is reviewing the judicially created concept of *Chevron* deference.[57] The appellants are challenging a National Marine Fisheries Service rule that requires vessels to pay the salaries of monitors on fishing boats to prevent overfishing. Although the law under which the rule was promulgated provides for such monitors, it is silent on who pays for them, with the agency arguing *Chevron* deference in its interpretation of the law.

SEC Enforcement So Far in FY2024

Through the first five months of the fiscal year, there have been 24 standalone actions involving IAs — 17 settled and seven litigated. Using the same categorizations as above, these actions break down as follows:[58]

Types of Cases Brought in FY2024[59]



Fees. The SEC brought a settled action against an investment adviser for failing to disclose information to its board during the 15(c) process regarding a passively managed, index-tracked ETF.[66] Specifically, the index provider partnered with a social media influencer known for commenting on sports and investing. The adviser and the index provider agreed to a sliding-

scale licensing fee based on the adviser's net management fee. The influencer received a share of the licensing fee as well as an ownership interest in the index provider. While this case represents a fairly unique fact pattern, it is a reminder to the industry of the types of fees included in the 15(c) process.

Statutory Disqualification. In another notable matter, the SEC brought a settled action finding that a registered investment adviser and two affiliates were ineligible to serve in their respective capacities because a state court enjoined one of the affiliates from violating a state securities law.[67] The adviser did not obtain exemptive relief following the state court finding and was therefore found to have violated Section 9(a) of the ICA. The three respondents were required to pay civil penalties that amounted to over $3 million, and the adviser respondent had to disgorge over $6 million, likely representing some or all the advisory fees it charged while its activities were statutorily limited.

Off-Channel Communications.[68] The SEC settled with another 16 firms for recordkeeping and other violations, along with civil penalties totaling more than $81 million.[69] As with the previous settlements, none of these matters involved solely investment advisers or IAA recordkeeping violations. The SEC reported that it gave credit in one of the matters where the related firms self-reported the violations.[70] Those firms paid a civil penalty of $1.25 million, while the other settling parties paid penalties between $8 million and $16.5 million.

Whistleblower Rule. The SEC also brought a settled action against a dually registered investment adviser and broker-dealer arising out of the firm's use of a confidential settlement agreement that violated the Whistleblower Rule.[71] According to the SEC, although the agreement "permitted clients [and customers] to respond to inquiries from the [SEC], it did not permit voluntary communications with the [SEC] concerning potential securities law violations." This is the first settled enforcement action applying the Whistleblower Rule to confidentiality agreements with customers and clients (not just employees, as was the case with the SEC's previously settled matters).

What to Expect for the Rest of FY2024 and Beyond

Continuing Priorities. As long as Gensler and Grewal remain in their positions, we expect many of the same SEC enforcement priorities and trends from FY2023 and thus far in FY2024 to continue.

In addition, certain SEC examiners' attention to Rule 17d-1 issues suggests that those issues may also generate enforcement interest. Also, although Birdthistle has departed, it is not yet clear that the ICA Section 36(b) "sweep" has run its course. Although we expect additional ESG actions like those brought in FY2023, we do not anticipate that ESG enforcement will increase in prominence given the absence of a final ESG rule promulgated pursuant to the IAA.

We also have no reason to think that the SEC will begin bringing cases against adviser CCOs that are inconsistent with the approach that Grewal outlined in his October 2023 speech, even though we expect the SEC to continue to scrutinize the conduct of CCOs during its investigations. Finally, with the ink barely dry on the SEC's extension of Whistleblower Rule enforcement to confidentiality agreements with clients and customers, we expect additional enforcement activity in this area.

Change on the Horizon? A presidential election year brings change. A new party in control of the White House could significantly affect the SEC's enforcement agenda through, among other things, the selection of a new SEC chair who will institute new priorities. But regardless, should

the Supreme Court rule against the SEC in *Jarkesy*, we expect to see an increase in the federal judiciary's involvement in SEC enforcement actions. Ever since the Supreme Court's ruling in *Lucia v. SEC*,[72] the SEC has elected to bring most contested matters in federal court but has still used its administrative tribunal to settle cases, revoke licenses and issue bars. A finding against the SEC in *Jarkesy* would further curtail, or even remove altogether, the SEC's ability to use its in-house forum. The result could be longer investigations for most matters as the SEC seeks to satisfy the higher evidentiary burdens and increased judicial scrutiny. Finally, should the Supreme Court significantly limit or eliminate *Chevron* deference, the SEC's aggressive rulemaking during the last three years could be meaningfully curtailed as courts no longer defer to the SEC's often broad interpretation of the statutes pursuant to which it conducts its rulemaking.

For more information, contact:

Gregory D. DiMeglio
Chair, Securities Enforcement
202.419.8401
gdimeglio@stradley.com

Jan M. Folena
Co-Chair, Securities Litigation and Enforcement
202.822.9611
jfolena@stradley.com

Peter Bogdasarian
Partner
202.419.8405
pbogdasarian@stradley.com

Lara N. Burke
Managing Counsel
202.507.6403
lburke@stradley.com

[1] FY2023 is the 12-month period ended September 30, 2023.

[2] See press release 2023-234, SEC Announces Enforcement Results for Fiscal Year 2023 (November 14, 2023).

[3] See Addendum to Division of Enforcement Press Release 2023-234.

[4] Please note that some cases have been placed in multiple categories. For example, *In the Matter of Foresight Wealth Management*, Release No. IA-6250 (February 27, 2023), involves both "Conflicts of Interest" and "Intentional Fraud."

[5] Id.; *In the Matter of Murray A. Huberfeld*, Release No. IA-6358 (July 31, 2023); *In the Matter of Exchange Traded Managers Group*, Release No. IA-6362 (August 1, 2023); *In the Matter of GlennCap*, Release No. IA-6422 (September 14, 2023); *In the Matter of Clark Reiner*, Release No. IA-6425 (September 19, 2023); *SEC v. Liddle*, No. 3:23-cv-00054 (W.D. Wisc. filed January 24, 2023); *SEC v. Susoeff*, No. 2:23-cv-00173 (D. Nev. filed February 1,

2023); SEC v. Coleman, No. 2:23-cv-00459 (E.D. Pa. filed February 6, 2023); SEC v. BKCoin Management, No. 1:23-cv-20719-RNS (S.D. Fla. filed February 23, 2023); SEC v. Kane, No. 1:23-cv-00371-CCC (M.D. Pa. filed March 1, 2023); SEC v. Riley, No. 1:23-cv-00273 (E.D. Va. filed March 1, 2023); SEC v. Kaplan, No. 2:23-cv-01648 (E.D.N.Y filed March 3, 2023); SEC v. Cutter Financial Group, No. 1:23-cv-10589 (D. Mass. filed March 17, 2023); SEC v. Cohen, No. 1:23-cv-02453 (S.D.N.Y. filed March 23, 2023); SEC v. Werthe (d/b/a HSR Wealth Management), No. 23CV0815L (S.D. Cal. filed May 4, 2023); SEC v. Red Rock Secured, No. 2:23-cv-03682 (C.D. Cal. filed May 15, 2023); SEC v. Thayer, No. 1:23-cv-00362 (S.D. Oh. filed June 13, 2023); SEC v. Infinity Q Capital Management, No. 23-civ- 05081 (S.D.N.Y. filed June 16, 2023); SEC v. Sisu Capital, No. 3:23-cv-03855 (N.D. Cal. filed August 1, 2023); SEC v. Lufkin Advisors, No. 9:23-cv-81289 (S.D. Fl. filed September 19, 2023); SEC v. Miller, No. 1:23-cv-08261 (S.D.N.Y. filed September 19, 2023); SEC v. MacWright, No. 2:23-cv-20609 (D.N.J. filed September 25, 2023); SEC v. Jacobson, No. 2:23-cv-05650 (E.D. La. filed September 29, 2023); SEC v. Third Friday Management, No. 9:23-cv-81332 (S.D. Fla. filed September 29, 2023).

[6] In the Matter of Randy Robertson, Release No. IA-6211 (January 5, 2023); In the Matter of Moors & Cabot, Release No. IA-6222 (January 19, 2023); In the Matter of Huntleigh Advisors, Release No. IA-6251 (February 27, 2023); Foresight Wealth Management, *supra* n.4; In the Matter of Corvex Management, Release No. IA-6284 (April 14, 2023); In the Matter of Pinnacle Investments, Release No. IA-6302 (May 5, 2023); In the Matter of RTW Investments, Release No. IA-6318 (May 30, 2023); In the Matter of Insight Venture Management, Release No. IA-6332 (June 30, 2023); In the Matter of Monroe Capital Management Advisors, Release No. IA-6352 (July 20, 2023); In the Matter of Moshe, Release No. IA-6359 (July 31, 2023); Huberfeld, *supra* n.5; Exchange Traded Managers Group, *supra* n.5; In the Matter of American Infrastructure Funds, Release No. IA-6428 (September 22, 2023); In the Matter of Bruderman Asset Management, Release No. IA-6435 (September 26, 2023); In the Matter of AssetMark, Release No. IA-6434 (September 26, 2023); In the Matter of Apexium Financial, Release No. IA-6437 (September 28, 2023); In the Matter of Florence Capital Advisors, Release No. IA-6450 (September 29, 2023); In the Matter of Appomattox Advisory, Release No. IA-6451 (September 29, 2023); Susoeff, *supra* n.5; Cutter, *supra* n.5; Third Friday Management, *supra* n.5.

[7] In the Matter of SQN Capital Management, Release No. IA-6393 (September 1, 2023); In the Matter of Apex Financial Advisors, Release No. IA-6396 (September 5, 2023); In the Matter of Bluestone Capital Management, Release No. IA-6398 (September 5, 2023); In the Matter of Disruptive Technology Advisers, Release No. IA-6400 (September 5, 2023); In the Matter of The Eideard Group, Release No. IA-6399 (September 5, 2023); In the Matter of Lloyd George Management (HK) Ltd., Release No. IA-6395 (September 5, 2023); In the Matter of Forepont Capital, Release No. IA-6438 (September 28, 2023); In the Matter of FSC Securities, Release No. IA-6441 (September 28, 2023); In the Matter of Osaic Wealth, Release No. IA-6442 (September 28, 2023); In the Matter of SagePoint Financial, Release No. IA-6443 (September 28, 2023); In the Matter of Woodbury Financial Services, Release No. IA-6444 (September 28, 2023).

[8] In the Matter of Titan Global Capital Management USA, Release No. IA-6380 (August 21, 2023); In the Matter of Banorte Asset Management, Release No. IA-6404 (September 11, 2023); In the Matter of BTS Asset Management, Release No. IA-6405 (September 11, 2023); In the Matter of Elm Partners Management, Release No. IA-6406 (September 11, 2023); In the Matter of Hansen & Associates Financial Group, Release No. IA-6407 (September 11, 2023); In the Matter of Linden Thomas Advisory Services, Release No. IA-6408 (September 11, 2023); In the Matter of Macroclimate, Release No. IA-6409 (September 11, 2023); In the Matter of McElhenny Sheffield Capital Management, Release No. IA-6410 (September 11, 2023); In the Matter of MRA Advisory Group, Release No. IA-6411 (September 11, 2023); In the Matter of Trowbridge Capital Partners, Release No. IA-6412 (September 11, 2023).

[9] Moors & Cabot, *supra* n.6; Huntleigh Advisors, *supra* n.6; In the Matter of Merrill Lynch, Pierce, Fenner & Smith, Release No. IA-6271 (April 3, 2023); In the Matter of Pacific Investment Management, Release No. IA-6328 (June 16, 2023); Insight Venture Management, *supra* n.6; In the Matter of Wells Fargo Clearing Services, Release No. IA-6387 (August 25, 2023); American Infrastructure Funds, *supra* n.6; AssetMark, *supra* n.6.

[10] In the Matter of Two Point Capital Management, Release No. IA-6199 (December 5, 2022); In the Matter of CS Manager, Release No. IA-6368 (August 7, 2023); SQN Capital Management, *supra* n.7; In the Matter of Summit Planning Group, Release No. IA-6423 (September 18, 2023); Appomattox Advisory, *supra* n.6; Lufkin, *supra* n.5; SEC v. Vista Financial Advisors, No. 1:23-cv-08432 (S.D.N.Y. filed September 25, 2023).

[11] In the Matter of Classic Asset Management, Release No. IA-6300 (May 4, 2023); Summit Planning Group, *supra* n.10; SEC v. Sapere Wealth Management, No. 3:23-cv-00172 (W.D.N.C. filed March 22, 2023); Sisu Capital, *supra* n.5.

[12] In the Matter of Sciens Investment Management, Release No. IA-6315 (May 24, 2023); SEC v. Infinity Q Diversified Alpha Fund, No. 1:22-cv-09608 (S.D.N.Y. filed November 10, 2022); Infinity Q Capital Management, *supra* n.5; Lufkin, *supra* n.5.

[13] *In the Matter of Goldman Sachs Asset Management*, Release No. IA-6189 (November 22, 2022); *In the Matter of DWS Investment Management Americas*, Release No. IA-6432 (September 25, 2023).

[14] *In the Matter of Joseph Masella*, Release No. IA-6303 (May 5, 2023); *SEC v. Pinnacle Advisors*, No. 5:23-cv-00547 (N.D.N.Y. May 5, 2023).

[15] *Exchange Traded Managers Group*, *supra* n.5.

[16] *In the Matter of Legal & General Investment Management America*, Release No. IA-6188 (November 21, 2022); *In the Matter of E. Magnus Oppenheim & Co.*, Release No. IA-6259 (March 13, 2023); *In the Matter of Betterment*, Release No. IA-6288 (April 18, 2023); *In the Matter of Pacific Investment Management*, Release No. IA-6329 (June 16, 2023); *In the Matter of Theorem Fund Services*, Release No. IA-6367 (August 7, 2023); *In the Matter of Fundrise Advisors*, Release No. IA-6381 (August 22, 2023); *In the Matter of Mortgage Industry Advisory*, Release No. IA-6413 (September 11, 2023); *In the Matter of Elsa M. Doyle*, Release No. IC-6429 (September 22, 2023); *In the Matter of Wellesley Asset Management*, Release No. IA-6433 (September 25, 2023); *In the Matter of DWS Investment Management Americas*, Release No. IC-6431 (September 25, 2023); *SEC v. Concord Management*, No. 7:23-cv-08253 (S.D.N.Y. filed September 19, 2023).

[17] Matters categorized as "Intentional Fraud" are those involving scienter-based violations, pursuant to Section 206(1) of the IAA, Section 10(b) of the Exchange Act, and/or Section 17(a)(1) of the Securities Act of 1933. "Conflicts of Interest" cases are those in which the SEC alleged an undisclosed conflict of interest as the basis for an adviser's breach of fiduciary duty in violation of either or both of Section 206(1) or Section 206(2) of the IAA.

[18] See *E. Magnus Oppenheim*, *supra* n.16; *Mortgage Industry Advisory*, *supra* n.16.

[19] See press release 2023-173, SEC Sweep into Marketing Rule Violations Results in Charges Against Nine Investment Advisers (September 11, 2023).

[20] Id. Two advisers also settled to related books and records violations. See *Macroclimate*, *supra* n.8; *MRA Advisory Group*, *supra* n.8.

[21] The SEC also settled Marketing Rule and other charges with Titan Global Capital Management USA LLC, levying a $1 million penalty. *Titan Global Capital Management*, *supra* n.8.

[22] *In the Matter of Gabelli Funds*, Release No. IA-2727 (April 24, 2008). The SEC last brought an indirect action in 2014. See *In the Matter of Christopher B. Ruffle*, Release No. IA-31066 (June 2, 2014).

[23] William Birdthistle, Remarks at the ICI Investment Management Conference (March 28, 2022). The SEC recently announced Birdthistle's departure, effective March 8, 2024. Press Release 2024-27, SEC Announces Departure of William Birdthistle; Natasha Vij Greiner Named Director of the Division of Investment Management (February 28, 2024).

[24] See Greg Saitz, High Fees. Poor Performance. That'll Be $10B in Advisory Fees, *Ignites* (September 20, 2022); Greg Saitz, 'Widows and Orphans'? Who Owns High-Fee, Poor-Return Funds, *Ignites* (November 1, 2022).

[25] See SEC's Division of Examinations 2023 Examination Priorities at p. 16 ("As part of its review of registered investment companies' compliance programs and governance practices, the Division will continue to evaluate boards' processes for assessing and approving advisory and other fund fees, particularly for funds with weaker performance relative to their peers.")

[26] Note, however, that such a case was brought in FY2024 and is discussed later in this alert. See *Van Eck Associates*, *infra* n.63.

[27] See Office of Compliance Inspections and Examinations (OCIE) Examination Priorities for 2014 at p. 7; OCIE Examination Priorities for 2015 at p. 3; OCIE Examination Priorities for 2016 at p. 3; OCIE Examination Priorities for 2017 at p. 4; OCIE Examination Priorities for 2018 at p. 9; OCIE Examination Priorities for 2019 at p. 11; OCIE Examination Priorities for 2020 at p. 13; SEC Division of Examinations 2021 Examination Priorities at pp. 24-25; SEC Division of Examinations 2022 Examination Priorities at p. 15; SEC Division of Examinations 2023 Examination Priorities at pp. 13-14; SEC Division of Examinations 2024 Examination Priorities at pp. 18-19.

[28] *SEC v. Solarwinds*, No. 1:23-cv-09518 (S.D.N.Y filed October 30, 2023).

[29] See OCIE Examination Priorities for 2020 at p. 15; SEC Division of Examinations 2021 Examination Priorities at p. 17; SEC Division of Examinations 2022 Examination Priorities at pp. 12-13; SEC Division of Examinations 2023 Examination Priorities at p. 13.

[30] *Goldman Sachs Asset Management*, *supra* n.13.

[31] *DWS Investment Management Americas*, *supra* n.13.

[32] *Lufkin*, *supra* n.5; *Infinity Q Diversified Alpha Fund*, *supra* n.12; *Infinity Q Capital Management*, *supra* n.5.

[33] In *Sciens Investment Management*, *supra* n.12, the SEC defined "Level 3 Investments" as "assets for which there is frequently no readily available market pricing information and for which no significant observable inputs are available."

[34] In *Classic Asset Management*, *supra* n. 11, the adviser that invested its clients in the ETFs failed to monitor the ETF holdings even though the prospectus said frequent monitoring was required. And in *Summit Planning Group*, *supra* n. 10, the adviser that invested its clients in the ETN failed to adequately consider how the product's disclosed risks could impact the investment's performance when held for extended periods. The SEC has a history of bringing such cases. See, e.g., *In the Matter of Wells Fargo Clearing Services*, Release No. IA-5451 (February 27, 2020). Note also that these cases did not involve violations of Regulation Best Interest.

[35] *Cutter*, *supra* n.5. The SEC also brought charges against the adviser's president and partial owner with direct violations of Sections 206(1) and 206(2) and aiding and abetting the adviser's violations of Section 206(4) and Rule 206(4)-7. Although the case has gained attention for centering around a product that is typically regulated under state law and arguably not a security, in denying the respondent's motions to dismiss, the *Cutter* court found that "investment advisors cannot enrich themselves at the expense of their advisory clients by directing clients to invest their assets in something that is not a 'security' without full and fair disclosure required by the Advisers Act" and disagreed with the defendants' argument "that an individual who falls within the statutory definition of investment adviser need not disclose any conflicts of interest arising from a non-security or can ignore their fiduciary obligations when recommending that clients invest assets in a non-security." *Cutter*, *supra* n.5, dkt. No. 60, 2023 WL 8653927, at *8 (D. Mass. December 14, 2023).

[36] *Lufkin*, *supra* n.5.

[37] Gurbir Grewal, Remarks at New York City Bar Association Compliance Institute (October 24, 2023).

[38] See *CS Manager*, *supra* n.10; *SQN Capital Management*, *supra* n.7; *Summit Planning Group*, *supra* n.10; *Appomattox Advisory*, *supra* n.6; *Lufkin*, *supra* n.5; *Vista Financial Advisors*, *supra* n.10. Cases falling under the second category are rare; there were none in FY2023.

[39] *Two Point Capital Management*, *supra* n.10.

[40] *Supra* n.37.

[41] See press release 2023-91, SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures (May 11, 2023); press release 2023-149, SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures (August 8, 2023); press release 2023-212, SEC Charges 10 Firms with Widespread Recordkeeping Failures (September 29, 2023); press release 2023-211, SEC Charges Two Credit Rating Agencies, DBRS and KBRA, with Longstanding Recordkeeping Failures (September 29, 2023). The FY2023 Enforcement Results classified these actions as "Broker Dealer" matters; they are not included among the 86 IA/IC enforcement actions noted above. The SEC also brought violations of 15(b)(4)(E) of the Exchange Act (and where applicable, Section 203(e)(6) of the IAA) for failures to supervise against all of the respondents except the two rating agencies.

[42] See *In the Matter of J.P. Morgan Securities*, Release No. EA-93807 (December 17, 2021) (the firm's "recordkeeping failures impacted the [SEC's] ability to carry out its regulatory functions and investigate potential violations of the federal securities laws across these investigations; the [SEC] was often deprived of timely access to evidence and potential sources of information for extended periods of time and, in some instances, permanently"); see also, e.g., *In the Matter of Perella Weinberg*, Release No. EA-98632 (September 29, 2023) (the firm's "recordkeeping failures likely impacted the [SEC's] ability to carry out its regulatory functions and investigate violations of the federal securities laws across [its] investigations").

[43] See press release 2021-262, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (December 17, 2021) (Quoting Grewal: "Recordkeeping requirements are core to the [SEC's] enforcement and examination programs and when firms fail to comply with them, as JPMorgan did, they directly undermine our ability to protect investors and preserve market integrity.").

[44] See *J.P. Morgan Securities*, *supra* n.42.

[45] See, e.g., *In the Matter of Interactive Brokers*, Release No. EA-98633 (September 29, 2023) (identifying a "group head in a U.S. leadership role" as exchanging numerous off-channel communications).

[46] IAA Rule 204-2(a)(7) requires registered investment advisers to maintain four enumerated categories of written communications; specifically, communications "received and … sent by such investment adviser" relating to "(i) recommendations made or proposed to be made and advice given or proposed to be given; (ii) receipt, disbursement or delivery of funds or securities; (iii) placing or execution of orders to purchase or sell securities; and (iv)

predecessor performance," with those records "maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser." By contrast, Exchange Act Rule 17a-4(b)(4) prescribes preserving "for a period of not less than three years, the first two years in an easily accessible place … originals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public."

[47] *In the Matter of Wells Fargo Securities*, Release No. EA-98076 (August 8, 2023).

[48] See Gurbir Grewal, Remarks at Securities Enforcement Forum (November 15, 2022).

[49] Press release 2023-91, *supra* n.41.

[50] *Supra* n.2. The FY2023 Enforcement Results also mentions settlements with two public companies (not investment advisers) against which the SEC decided not to seek any penalty at all due to their self-reporting, remedial measures and meaningful cooperation with the staff.

[51] See press release 2023-212, *supra* n.41; compare *Interactive Brokers*, *supra* n.45; *In the Matter of Robert W. Baird & Co.*, Release No. IA-6448 (September 29, 2023); *In the Matter of William Blair & Company*, Release No. IA-6446 (September 29, 2023); *In the Matter of Nuveen Securities*, Release No. EA-98630 (September 29, 2023); *In the Matter of Fifth Third Securities*, Release No. IA-6447 (September 29, 2023); with *Perella Weinberg*, *supra* n.42.

[52] *In the Matter of D.E. Shaw & Co.*, Release No. IA-6452 (September 29, 2023).

[53] See, e.g., *Infinity Q Capital Management*, *supra* n.5; *Cutter*, *supra* n.5; *Pinnacle Advisors*, *supra* n.14.

[54] This is particularly true in the Second Circuit. See, e.g., *SEC v. Apuzzo*, 689 F.3d 204 (2d Cir. 2012).

[55] *Grayscale Investments v. SEC*, 82 F.4th 1239 (D.C. Cir. 2023).

[56] *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688, 216 L. Ed. 2d 1255 (2023), and cert. denied, 143 S. Ct. 2690, 216 L. Ed. 2d 1256 (2023).

[57] *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023); *Relentless v. Department of Commerce*, 144 S. Ct. 325, 217 L. Ed. 2d 154 (2023). Oral argument was held on January 17, 2024.

[58] As with the chart above, please note that some cases have been placed in multiple categories. For example, *In the Matter of Wilmington Trust Investment Management*, Release No. IA-6455 (October 10, 2023), involves both "Conflicts of Interest" and "Fees."

[59] There have been no standalone IA/IC actions involving Section 36(b) or cybersecurity.

[60] *In the Matter of Chingyuan "Gary" Chang*, Release No. IA-6515 (December 26, 2023); *In the Matter of David B. Bodner*, Release No. IA-6540 (February 2, 2024); *In the Matter of Christian Fernandez*, Release No. EA-99559 (February 20, 2024); *SEC v. Darrah*, No. 2:23-cv-008843-CAS-AGR (C.D. Cal., filed October 20, 2023); *SEC v. Hughes*, No. 3:23-cv-21816 (D.N.J. filed November 2, 2023); *SEC v. Masanotti*, No. 3:23-cv-01481 (D. Conn. filed November 9, 2023); *SEC v. Komarow*, No. 3:23-cv-01599 (D. Conn. filed December 8, 2023); *SEC v. Murphy*, No. 3:23-cv-01621 (D. Conn. filed December 14, 2023); *SEC v. Rodriguez*, No. 3:24-CV-00027 (W.D. Texas filed January 24, 2024).

[61] *Bodner*, *supra* n.60; *Wilmington Trust Investment Management*, *supra* n.58.

[62] *In the Matter of Eagan Capital Management*, Release No. IA-6491 (December 1, 2023); *SEC v. Brite Advisors USA*, No. 1:23-cv-10212 (S.D.N.Y. filed November 21, 2023).

[63] *Wilmington Trust Investment Management*, *supra* n.58; *In the Matter of Van Eck Associates*, Release No. IA-6560 (February 16, 2024).

[64] *Hughes*, *supra* n.60.

[65] *In the Matter of Collaborative Financial Consulting*, Release No. IA-6457 (October 11, 2023); *In the Matter of BlackRock Advisors*, Release No. IA-6468 (October 24, 2023); *In the Matter of Credit Suisse Securities (USA)*, Release No. IA-6504 (December 13, 2023); *In the Matter of Barnbridge DAO*, Release No. IC-35079 (December 22, 2023); *In the Matter of Tyler Ward*, Release No. IC-35078 (December 22, 2023); *In the Matter of OEP Capital Advisors*, Release No. IA-6514 (December 26, 2023); *In the Matter of J.P. Morgan Securities*, Release No. IA-6530 (January 16, 2024); *In the Matter of Aon Investments USA*, Release No. IA-6536 (January 25, 2024); *In the Matter of Claire P. Shaughnessy*, Release No. IA-6535 (January 25, 2024); *In the Matter of TIAA-CREF Individual &*

Institutional Services, Release No. IA-6559 (February 16, 2024); *In the Matter of Contrarian Capital Management*, Release No. EA-99578 (February 21, 2024).

[66] *Van Eck Associates*, *supra* n.63.

[67] *Credit Suisse Securities (USA)*, *supra* n.65.

[68] Based on the SEC's classification of these matters in the FY2023 Enforcement Results, we have again not included them in the table above.

[69] *See* press release 2024-18, Sixteen Firms to Pay More Than $81 Million Combined to Settle Charges for Widespread Recordkeeping Failures (February 9, 2024).

[70] See id. (In reference to *In the Matter of The Huntington Investment*, Release No. IA-6552 (February 9, 2024), Grewal noted, "Once again, one of these orders is not like the others: Huntington's penalty reflects its voluntary self-report and cooperation.")

[71] *J.P. Morgan Securities*, *supra* n.65.

[72] *Lucia v. SEC*, 585 U.S. 237, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018).