GODFREY & KAHN

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Investment Management Legal and Regulatory Update

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LATEST DEVELOPMENTS: FUNDS

Final Rule: Investment Company Names

The SEC has adopted amendments to Rule 35d-1 (the Names Rule) under the Investment Company Act in order to address developments in the industry since the rule was adopted in 2001. The amendments will expand the scope of the Names Rule and require more funds to adopt a policy to invest at least 80% of the fund's assets in accordance with the investment focus that the fund's name suggests. Fund names that include the terms "growth", "value" or environmental, social, governance (ESG) terms will now be covered by the rule. In a change from the rule proposal, names that include the terms "global," "international," or "intermediate term (or similar)" in describing a bond fund, will not require an 80% investment policy under the amended rule. The SEC estimates that the amendment will subject an additional 2,200 funds to the 80% policy requirement.

80% Investment Policy Requirement

The Names Rule is intended to prevent funds from using names that misrepresent a fund's investments and risks. Prior to these amendments, the 80% investment policy requirement only applied to fund names that suggested a focus on a particular type of investment, industry, country or geographic region, or fund names that suggested a certain tax treatment. The new amendments expand the 80% requirement to funds whose names include terms suggesting that the fund focuses on investments that have, or whose issuers have, particular characteristics. The final rule does not define the term "particular characteristics" because the SEC believes the term is understood to mean any "feature, quality or attribute," such as "value," "growth," terms with ESG- or sustainability-related characteristics or terms that reference a "thematic investment focus" such as the internet, blockchain or cybersecurity. Terms that refer to the fund's portfolio as a whole (such as "balanced") or a particular investment technique (such as "long/short" or "hedged") will not fall under the amended rule.

The amended rule permits a fund to include in the 80% basket of investments any derivatives instruments that provide investment exposure to market risk factors associated with investments suggested by a fund's name. Funds must use each derivative instrument's notional amount to determine compliance with the 80% policy. Certain currency hedges are excluded from the compliance calculation.

Quarterly Monitoring; Time to Come Back into Compliance

In a departure from the proposal, the final rule does not require funds to reassess portfolio investments continuously to determine compliance with the 80% investment policy. Instead, a fund must review its portfolio on a quarterly basis. The amendments retain the current rule's requirement that a fund must comply with the 80% policy at the time of investment and "under normal circumstances." If a fund falls out of compliance with the rule, either intentionally in "other-than-normal" circumstances or otherwise, the fund has 90 days to get back into compliance. In a departure from the proposed rule, the final rule provides a fund with flexibility to determine what constitutes "other-than-normal" circumstances where the fund could intentionally depart from its 80% investment policy.

Prospectus Disclosure and Definitions

Each fund that is required to adopt an 80% policy must include disclosure in its prospectus that defines the terms used in its name. The disclosure must include the specific criteria that the fund uses to select the investments that the term describes. Terms used in fund names that suggest either an investment focus or tax-exempt status must be consistent with the terms' plain English meanings or an established industry use. In the final rule release, the SEC recommends that funds look to sources like industry codes or classifications, prior public disclosures, or a colloquial understanding of a term to satisfy this requirement. Terms may reasonably be defined differently, as long as the defined term is not inconsistent with the plain English meaning or established industry use.

Notice Requirement

The rule amendments retain the requirements that, unless a fund's 80% policy is a fundamental policy, the fund must provide 60 days' notice to shareholders before making any change to the 80% policy. The amendments do make several updates to the notice requirements to modernize and clarify aspects of the rule, including addressing electronic delivery.

Form N-PORT Reporting and Recordkeeping

As proposed, for funds that are required to file Form N-PORT and are required to adopt an 80% policy, the final amendments require those funds to report whether each investment in the fund's portfolio is in the fund's 80% basket. Those funds are also required to report the value of the 80% basket as a percentage of the value of the fund's assets. Funds will also be required to report the definitions of terms used in the fund's name, consistent with the prospectus disclosure.

Funds subject to an 80% policy will be required to maintain various records documenting their compliance with the Names Rule.

Compliance Dates; Next Steps

The rule amendments will become effective 60 days after publication in the Federal Register. Fund groups with net assets of $1 billion or more will have 24 months to comply with the amendments and fund groups with net assets of less than $1 billion will have 30 months to comply. Over the coming months, advisers and fund boards should discuss whether the amended Names Rule will require any changes in fund names, investment strategies, policies or disclosures as well as the compliance monitoring, filing and recordkeeping aspects of the rule.

Sources: SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names, SEC Press Release 2023-188 (Sept. 20, 2023), available here; Investment Company Names, Release No. IC-3500 (Sept. 20, 2023), available here; Final Rules: Amendments to the Fund "Names Rule", SEC Fact Sheet (Sept. 20, 2023), available here.

LATEST DEVELOPMENTS: ADVISERS

Compliance Rule Amendments Require Documentation of Annual Review

The new Private Fund Adviser Reforms, discussed in more detail below, include amendments to the Advisers Act compliance rule and will require **all** SEC-registered advisers to document the annual review of their compliance policies and procedures in writing. Advisers have been required to undertake an annual review of their compliance policies and procedures since the compliance rule was adopted in 2003, but written documentation of the review was not mandatory. As amended, the compliance rule requires the adviser to document the adequacy of their compliance policies and procedures and the effectiveness of their implementation, no less frequently than annually.

The amended rule does not suggest specific elements that advisers must include in the written documentation of their annual review. The SEC stated in the adopting release that it intends the written documentation requirement to be "flexible to allow advisers to continue to use the review procedures they have developed and found most effective." Advisers may choose to document the annual review in a number of ways, including:

- In a quarterly report, with an aggregate report at year end;
- In a longer written report with supporting documents, prepared annually;
- In a written presentation to the board; or
- In a short memorandum or compilation of informal notes that summarizes the findings over the year.

The compliance date is November 13, 2023.

Source: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Release No. IA-6383 (Aug. 23, 2023), available here.

SEC Risk Alert Highlights Criteria for Examination Selection and Scope

The SEC Division of Examinations (Division) recently published a risk alert providing information on the Division's examination selection process, which included a sample of the staff's typical initial request for documents and information.

The risk alert indicates that advisers can be chosen for examination because of one or more firm-specific risk factors, one or more factors relevant to the staff's annual priorities, or because of a tip, complaint or referral. Risk factors could include, among others:

- Business activities that create a risk for conflicts of interest, such as affiliated transactions;
- Length of time since the adviser's last exam;
- Prior exam observations of repetitive deficient practices; and
- Indications that the adviser may be vulnerable to financial or market stresses.

The risk alert notes that after the Division selects an adviser for examination, the scope of the exam and the documents requested are dictated by an additional risk assessment conducted by exam staff. While exams will be unique to each firm, most examinations typically include a review of the adviser's compliance practices, operations and disclosures across core areas of the adviser's business, including portfolio management, safekeeping of client assets, brokerage, and fees and expenses. It is important to remember that each regional office of the Division may apply its own risk factors in selecting advisers and in determining exam focus areas.

Source: Division of Examinations Risk Alert: Investment Advisers: Assessing Risks, Scoping Examinations, and Requesting Documents (Sept. 6, 2023), available here.

Final Rule: Private Fund Adviser Reforms

The SEC had adopted new rules aimed at enhancing the regulation of private fund advisers. The SEC is seeking to address the following risk factors:

- Lack of transparency;
- Conficts of interest; and
- Lack of governance mechanisms.

In a change from the proposed rule, the final rule does not include a prohibition against limitation of liability and indemnification clauses. However, in the adopting release the SEC included a reminder that an adviser's fiduciary duty applies to its private fund clients and discussed how the antifraud provisions apply to the adviser's dealings with clients and fund investors.

Each rule is summarized below.

Registered Private Fund Advisers *(Applicable to Registered Advisers Only)*

Quarterly Statement Rule. This final rule requires registered private fund advisers to provide a quarterly statement to investors that contains disclosure related to the cost of investing in the fund; fees and expenses, including compensation paid to the adviser by the fund; and standardized fund performance information.

Fund Table. Private fund advisers will be required to disclose the following information in a table format:

- A detailed accounting of all compensation, fees and other amounts allocated or paid to the adviser or its related persons by the private fund during the reporting period;
- A detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period (other than those listed in the bullet point above); and
- The amount of any offsets or rebates carried forward during the reporting period to reduce future payments to the adviser or its related persons.

Performance Disclosure. In addition, the quarterly statement rule requires advisers to liquid funds to show annual net total returns for each of the past ten fiscal years, average annual net total returns over the one-, five-, and ten-fiscal year periods, and on a cumulative basis for the current fiscal year as of the end of the most recent fiscal quarter. For illiquid funds, the rule requires advisers to show "performance based on internal rates of return and multiples of invested capital since inception and to present a statement of contributions and distributions."

An illiquid fund is considered to be a private fund that is not required to redeem interests upon an investor's request and has limited opportunities for investors to withdraw before the termination of the fund. A liquid fund is a fund that does not meet the definition of an illiquid fund.

The Audit Rule. This rule requires registered private fund advisers to obtain an annual audit of the financial statements of each private fund they advise. The SEC believes that the audit requirement will provide an "important check on the adviser's valuation of private fund assets". Private fund advisers currently using the "surprise examination" option under the Advisers Act custody rule will now need to obtain an annual audit for each private fund they advise.

Adviser-Led Secondaries Rule. This rule requires registered private fund advisers to obtain a fairness or valuation opinion when offering existing fund investors "the option between selling all or a portion of their interests in the private fund and converting or exchanging them for new interests in another vehicle advised by the adviser or any of its related persons". This is known as an adviser-led secondary transaction.

All Private Fund Advisers *(Applicable to Registered Advisers and Advisers relying on an Exemption, including Exempt Reporting Advisers)*

Restricted Activities Rule. This final rule restricts all private fund advisers from engaging in specified activities, listed below. Some activities may be undertaken if the adviser satisfies certain disclosure and, in some cases, consent requirements.

- The adviser may not charge or allocate to the private fund fees or expenses:
  - associated with an investigation of the adviser or its related persons without disclosure and consent from fund investors;

- related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for violation of the Advisers Act;
- for any regulatory, examination, or compliance fees or expenses of the adviser or its related persons unless such fees and expenses are disclosed to investors; or
- related to a portfolio investment on a non-pro rata basis when more than one private fund or other client have invested in the same portfolio company, unless the allocation is fair and equitable, and the adviser distributes advance written notice and a description of how the allocation approach is fair and equitable.

- The adviser may not reduce the amount of any adviser clawback (an obligation of the adviser to return performance-based compensation) by actual, potential, or hypothetical taxes applicable to the adviser or its related persons unless the adviser discloses the pre-tax and post-tax amount of the clawback to investors.
- The adviser may not borrow money, securities, or other private fund assets, or receive a loan or extension of credit, from a private fund client without disclosure to, and consent from, fund investors.

Preferential Treatment Rule. All private fund advisers will be prohibited from providing preferential treatment to investors (1) for certain redemptions from the fund, unless (a) an investor is required to redeem due to applicable law or regulation or (b) the adviser offers the preferential redemption rights to all other investors without qualifications; and (2) about portfolio holdings or exposures of the private fund if the information is reasonably expected to have a material, negative effect on other investors, unless such preferential information is offered to all investors. In addition, the rule allows an exception from the prohibition on preferential information if the adviser provides written disclosure to prospective and current investors containing information about the preferential treatment the adviser provides to all other investors in the same fund.

Grandfathering of Existing Private Funds. "Legacy status" or grandfathering will be granted with respect to certain aspects of the Preferential Treatment Rule and the Restricted Activities Rule for those advisers that have agreements with private funds that commenced operations prior to the relevant compliance dates of the new rules.

Compliance Dates

For the Quarterly Statement Rule and the Audit Rule, the compliance date is March 14, 2025. For the Adviser-Led Secondaries Rule, the Restricted Activities Rule and the Preferential Treatment Rule, the compliance dates are:

- September 14, 2024, for advisers with $1.5 billion or more in private funds assets under management
- March 14, 2025, for advisers with less than $1.5 billion in private funds assets under management

Challenge to Rules

On September 1, 2023, a lawsuit was filed with the federal Court of Appeals in the Fifth Circuit against the SEC, challenging the validity and enforceability of the Private Fund Adviser Rules. The petition argues that the new rules were adopted despite noncompliance with notice-and-comment requirements and that the SEC exceeded its statutory authority, among other assertions. The petitioners, six trade associations, may request a stay of the rules, in which case the transition period and compliance dates for the rules would be paused. There is no indication as of publication whether a stay will be requested or granted. It is anticipated the Court will receive the parties' briefs later this fall.

Sources: SEC Enhances the Regulation of Private Fund Advisers, SEC Press Release 2023-155 (Aug. 23, 2023), available here; Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Release No. IA-6383 (Aug. 23, 2023), available here; Private Fund Adviser Reforms: Final Rules, SEC Fact Sheet (Aug. 23, 2023), available here; MFA Files Lawsuit Against SEC to Prevent Adoption of Private Fund Adviser Rule, MFA Press Release (Sept. 1, 2023), available here; National Ass'n of Private Fund Managers, et al., v. S.E.C., appeal docketed, No. 23-60471, (5th Cir. Sept. 1, 2023), available here.

Proposed Rule: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Advisers

The SEC recently proposed new rules related to the increased use by broker-dealers and advisers of predictive data analytics (PDA), including artificial intelligence (AI), and the potential conflicts of interest that may arise through a firm's reliance on PDA. The proposed rules would apply to firms that use "covered technology," which the SEC defines broadly as "an analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes," in investor interactions (including exercising investment discretion on behalf of an investor).

Current examples of PDA and PDA-like technologies include, but are not limited to, AI, algorithmic trading, chatbots, and "digital engagement practices" such as behavioral prompts, differential marketing and game-like features (commonly referred to as "gamification"). The proposed rule intended "covered technology" to be extraordinarily broad so as to capture all PDA processes that are used to communicate with investors or manage investments. In practice, this could implicate many technologies used by advisers and broker-dealers. In a statement from Commissioner Hester M. Peirce criticizing the proposed rule, she asserts that the proposed rule would cover technologies as simple as spreadsheets, math formulas and statistical tools commonly used by firms in conducting their business.

The proposed rules broadly define "conflict of interest" as when a firm uses a covered technology "that takes into consideration an interest of" the firm or its associated persons. The SEC is concerned that a firm's use of PDA-like technology when providing information or advice to a prospective or current investor "could take into consideration the firm's interest in a manner that places its interests ahead of investors' interests and thus harm investors."

Under the proposed rules, firms would have to comply with the following:

- *Elimination, or neutralization of the effect of, conflicts of interest.* Ahead of investor interactions:

  - Identify any conflicts of interest associated with the use of covered technology;
  - Determine if the conflict puts the firm's interest before the investor's interests; and
  - Eliminate or neutralize the impact of the conflict.

- *Policies and procedures.* Firms using covered technology would have to adopt policies and procedures that require maintaining written descriptions of:

  - the process for assessing the use of covered technology in investor interactions;
  - the material features of the covered technology;
  - any conflicts of interest due to the use of covered technology;
  - the process for determining whether any conflict of interest results in the firm's interest being put before the investor's interest; and
  - the process for determining how to eliminate or neutralize any conflicts.

  Firms would also be required to review, at least annually, the adequacy and effectiveness of the policies and procedures and the written descriptions required under the rules.

In a joint letter to the SEC, industry groups have criticized the breadth of the proposed rule, noting the "severely chilling effect" it could have on firms' use of technology. The Investment Adviser Association (IAA) has expressed concern about the expansive restrictions of the proposed rule and the uncertainty of how this rule could interact with other proposed and recently finalized rules, given the rapid pace of SEC rulemaking over the past two years. The IAA and other trade groups requested an extension of the comment period for this proposal, but as of the date of publication of this update, no extension has been announced.

The comment period for the proposal closes on October 10, 2023.

Sources: SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, SEC Press Release 2023-140 (July 26, 2023), available here; Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Release No. IA-6353 (July 26, 2023), available here; Statement of SEC Commissioner Hester M. Pierce, Through the Looking Glass: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers Proposal, available here; Joint Trades Letter to SEC Requesting Extension of Comment Period for Predictive Data Analytics Proposal, Investment Adviser Association (August 15, 2023), available here.

Corporate Transparency Act; Reporting Requirements for Family Offices and State-Registered Advisers

The Anti-Money Laundering Act of 2020 established the Corporate Transparency Act (CTA), which requires the Financial Crimes Enforcement Network (FinCEN) to establish and maintain a national registry of beneficial owners of entities that are considered to be reporting companies. FinCEN's final rule implementing the CTA's registration and reporting requirements will become effective January 1, 2024.

Who Must File a Report? A reporting company is a corporation, a limited liability company, or certain similar entities.

There are 23 exemptions from the definition of reporting company, including SEC-registered advisers, SEC-registered broker-dealers, SEC-registered investment companies, certain venture capital fund advisers, and certain pooled investment vehicles such as 3(c)(1) or 3(c)(7) funds that are advised by SEC-registered advisers.

State-registered advisers, exempt reporting advisers and family offices are not able to rely on the adviser exemption and, unless another exemption applies, would be subject to the reporting requirements.

What Information Must be Reported? A reporting company created on or after January 1, 2024 must report information about itself, its beneficial owners and its "company applicants." A reporting company created before January 1, 2024 only needs to provide information about itself and its beneficial owners.

A beneficial owner is any individual who, directly or indirectly, either (1) exercises "substantial control" over the reporting company; or (2) owns or controls 25% or more of the ownership interests of the reporting company. The definition of substantial control is meant to capture those individuals who make important decisions on behalf of the entity – including senior officers, directors, and those who have authority over the appointment or removal of any senior officer or a majority of the board of directors.

The reporting company must disclose (1) its legal name and any trade name or DBA name; (2) its address; (3) the jurisdiction in which it was formed or first registered; and (4) its Taxpayer Identification Number (TIN). For each beneficial owner and company applicant, the reporting company must disclose the individual's: (1) legal name; (2) birthdate; (3) address (in most cases, a home address); and (4) an identifying number from a driver's license, passport, or other approved document, as well as an image of the identification document.

Types of Reports and Deadlines

Existing Companies. Reporting companies formed before January 1, 2024 will have until January 1, 2025 to register with FinCEN and file their initial report.

New Companies. Reporting companies formed on or after January 1, 2024 will have 30 days to register and file their initial report.

FinCEN will begin accepting reports on January 1, 2024.

Changes. Reporting companies will have 30 days to report any changes to or corrections of previously reported information for the company or its beneficial owners.

Penalties and Limited Safe Harbor

Penalties may be imposed on reporting companies that willfully fail to file or update their reports or provide false or fraudulent information in their reports. The CTA provides a safe harbor that allows reporting companies to avoid civil and criminal penalties for submitting incorrect information by filing a corrected reporting within 30 days of becoming aware of the inaccuracy and within 90 days of the initial filing, but only if the person that submitted the report did not knowingly or intentionally submit inaccurate information.

Resources

FinCEN has published a number of resources on this topic, including a Small Entity Compliance Guide, FAQs and Key Questions. Links are provided under Sources below.

Sources: Beneficial Ownership Information Reporting Requirements, 87 FR 59498 (Sept. 30, 2022), available here; Beneficial Ownership Information Reporting, Frequently Asked Questions, available here; Beneficial Ownership Reporting – Key Questions, available here; Small Entity Compliance Guide (Sept. 2023), available here.

Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies

The SEC recently adopted a final rule requiring public companies to disclose material cybersecurity incidents and provide annual disclosure on their cybersecurity risk management practices. This rule makes it much more likely that the SEC will also seek to finalize a cybersecurity rule for advisers and funds, which could happen later this year.

Under the current proposed rule for advisers and funds, which was issued in February 2022, advisers and funds would be required to implement cybersecurity policies and procedures, perform an annual review of such policies and procedures to evaluate their effectiveness and make any updates warranted by constantly evolving cyber threats and technologies. Additionally, advisers would be required to report significant cybersecurity incidents to the SEC within 48 hours after having a reasonable basis to conclude that a significant cybersecurity incident has occurred. The industry has criticized the short timeframe, because a cyber incident may still be ongoing after 48 hours, and due to administrative and operational concerns.

The public company final rule allows four days to file an incident report and provides for more streamlined disclosure requirements. This may be an indication that the SEC is also considering modifying the reporting requirement in the final rule for advisers.

The required cybersecurity incident disclosures could give funds more information to consider in conducting due diligence of potential and current vendors that are public companies, such as administrators and transfer agents. While it remains to be seen whether the incident reports will be useful in practice, advisers and funds may want to consider updating any standard due diligence questionnaires to request information about cybersecurity protocols and any incident reports filed in the past year.

For a discussion of the proposed cybersecurity risk management rule for advisers and funds, please see our April 2022 Investment Management Legal and Regulatory Update.

Sources: SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies, SEC Press Release 2023-139 (July 26, 2023), available here; Alyson Velati, SEC's Cyber Rule Could Help Firms Detect Vendor 'Red Flags', IGNITES (Aug. 4, 2023), available by subscription; Alyson Velati, Cyber Rule for Investment Advisors 'Imminent', IGNITES (Aug. 16, 2023), available by subscription.

SEC MARKETING RULE ENFORCEMENT ACTIONS

SEC Settles First Marketing Rule Enforcement Action

On August 21, 2023, less than one year since the Marketing Rule's compliance date, the SEC settled charges against Titan Global Capital Management USA LLC (Titan) alleging that hypothetical performance in Titan's advertisements was misleading. Without admitting or denying the SEC's findings, Titan paid $1 million in a civil penalty, disgorgement and prejudgment interest.

Titan advertised annualized performance results for its Titan crypto strategy as high as 2,700%, without disclosing that the return was based on a hypothetical account and that the 2,700% annualized return figure was based on the assumption that the strategy's performance in its first three weeks would continue for an entire year. Although Titan provided some information about the assumptions it used to calculate the hypothetical annualized return and related risks, the information was not presented in a clear and prominent manner in the advertisements but was accessible only through links labeled as "disclosures" and "track record."

Osman Nawaz, Chief of the SEC Division of Enforcement's Complex Financial Instruments Unit, remarked that "Titan's advertisements and disclosures painted a misleading picture of certain of its strategies for investors. This action serves as a warning for all advisers to ensure compliance." The SEC is putting advisers on notice that it will scrutinize marketing material closely to enforce compliance with the Marketing Rule.

Sources: SEC Charges FinTech Investment Adviser Titan for Misrepresenting Hypothetical Performance of Investments and other Violations, SEC Press Release 2023-153, (Aug. 21, 2023), available here; In the Matter of Titan Global Capital Management USA LLC, IA Release No. 6380 (Aug. 21, 2023), available here.

SEC Charges Nine Advisers for Advertising Hypothetical Performance on Websites

On September 11, 2023, the SEC announced it had settled charges with nine advisers for advertising hypothetical performance to the general public on their websites. Without admitting or denying the SEC's findings, the advisers paid $850,000 in combined civil penalties.

The charges are not surprising because the SEC cautioned in the adopting release for the Marketing Rule that "advisers generally would not be able to include hypothetical performance in advertisements directed to a mass audience or intended for general circulation."

The charged advisers reportedly presented hypothetical performance consisting of performance derived from model portfolios, backtested performance or both on their websites. The SEC found that each of the advisers failed to adopt and implement policies and procedures reasonably designed to ensure that the hypothetical performance was relevant to the likely financial situation and investment objectives of the intended audience. As a result, the advisers disseminated hypothetical performance on their websites to the general public rather than to a particular intended audience.

The Director of the SEC Division of Enforcement, Gurbir S. Grewal, stated that it is "crucial that investment advisers implement policies and procedures to ensure their compliance with the rule. Until that is the case, we will remain vigilant and continue our ongoing sweep to ensure that investment advisers comply with the Marketing Rule, including the requirements for hypothetical performance advertisements."

Sources: SEC Sweep into Marketing Rule Violations Results in Charges Against Nine Investment Advisers, SEC Press Release 2023-173 (Sept. 11, 2023), available here. See Related Materials for Individual Orders.

COMPLIANCE DATES FOR FINAL RULES

Final Rules	Compliance Dates
Amendments to Form N-PX and Say-on-Pay Vote Disclosure	Rule and form amendments effective for votes occurring on or after July 1, 2023, with the first filings subject to the amendments due August 31, 2024, for the 12-month period ended June 30, 2024.
Shareholder Reports, Rule 30e-3 Amendments and Amended Advertising Rules	Rule and form amendments effective January 24, 2023, with a compliance date of July 24, 2024.
Documentation of Adviser Compliance Reviews*	November 13, 2023
Private Fund Advisers* Quarterly Statement Rule Private Fund Audit Rule Adviser-Led Secondaries Rule	 March 14, 2025 March 14, 2025 Larger private fund advisers ($1.5 billion or more in private fund assets): September 14, 2024 Smaller private fund advisers (less than $1.5 billion in private fund assets): March 14, 2025
Investment Company Names*	Fund groups with net assets of $1 billion or more will have 24 months to comply with the amendments, and fund groups with net assets of less than $1 billion will have 30 months to comply.

STATUS OF PROPOSED RULES

Proposed Rules for Funds and Advisers	Status
Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices	The SEC has indicated final amendments for rules and forms will be issued in October 2023.
Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies	The SEC has indicated final rules will be issued in October 2023.
Proposed Rules for Funds	**Status**
Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting	Comments were due February 14, 2023. The SEC has not taken any further action as of the date of publication.
Proposed Rules for Advisers	**Status**
Modernization of Beneficial Ownership Reporting	The SEC has indicated final rule amendments will be issued in October 2023.
Outsourcing by Investment Advisers	The SEC has indicated a final rule will be issued in April 2024.
Safeguarding Advisory Client Assets	The SEC has reopened the comment period. Comments are due by October 30, 2023.
Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information	The SEC has indicated final amendments to Regulation S-P will be issued in April 2024.
Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*	Comments due October 10, 2023.

*Discussion included in this IM Update.