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2025 Proskauer Annual Review

for Private Investment Funds

Delivering Results for Private Capital

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2025 Proskauer Annual Review for Private Investment Funds

The following annual review (Annual Review) is a summary of some of the significant changes and developments that occurred in the past year and certain recommended practices that investment advisers/investment managers (collectively, advisers) to private funds should consider in 2025.

Highlights from this year's Annual Review include:

> **An in-depth review of SEC regulatory changes**, including detailed explanations of new SPAC-related rules, the expanded scope of market participants under the Exchange Act, amendments made to Form PR and Regulation S-P, recently adopted rules regarding the Investment Company Act, and judicial invalidation and other challenges to SEC rulemaking.

> **A summary of SEC examination priorities impacting investment advisers**, including off-channel communications, fees and expenses, conflicts of interest and exempt reporting adviser exams.

> **A review of recent SEC guidance, compliance challenges, and enforcement actions related to the Marketing Rule**, highlighting issues such as IRR calculations, deficiencies in marketing materials, recordkeeping violations and evolving examination priorities for investment advisers.

> **Tax updates**, including an overview of the tax implications of new regulations and decisions regarding REITS, market-based sourcing for sales, "corporate jets," partnerships, Section 83(b) elections and a summary of the UK's recent tax proposal on carried interest.

> **A comprehensive overview of required regulatory filings** across the many agencies overseeing the private funds industry, including a quick-reference table for monthly filings in 2025.

Acknowledgments

This Annual Review is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

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SEC Examination Update

Over the past year, the SEC's Division of Examinations continued to conduct an intensive examination program. The Examinations Division has more than 1,100 employees and examines annually about 15% of the approximately 15,000 investment advisers registered with the SEC.

We continue to see a steady pace of exams, including exams of never-before examined advisers and repeat examinations, often around a five-year time frame, but with many longer and shorter exceptions. Over the past few years, the Division has continued to select examinations using a risk-based approach, rather than a periodic schedule, and the resulting exams are often focused on a particular area or areas of risk. Examinations can appear be triggered by the SEC's market monitoring activities, reviews of Form ADV and PF filings, media reports, tips, complaints or internet searches.

Issues frequently raised in exams include: expenses, conflicts of interest, fees paid to related entities, allocation of investment opportunities, principal trades and cross trades, trading by principals and employees, marketing materials, custody, and insider trading and other compliance controls and procedures.

In October, the Examinations Division issued its 2025 examination priorities. The Division also issued six risk alerts during its most recent fiscal year, covering topics such as initial observations regarding marketing rule compliance, security-based swap dealers and the examination process for broker dealers and municipal advisors.

As in recent years, the Examinations Division staff continues to conduct most examinations remotely. Most exams start with advisers receiving a communication announcing the beginning of the exam, followed by a letter requesting various documents, typically requiring production of the documents within 1-2 weeks, and then a series of conference calls with selected personnel of the adviser. Exams can range in duration from weeks to months or even years.

We also saw the continuation of the sweep exams on the use of artificial intelligence, ESG and "off-channel" communications. In exams going forward, advisers should expect close scrutiny of their statements, especially in their marketing materials, on the use of artificial intelligence. The SEC has expressed interest in "AI-washing."

Among the key priorities noted by the Examinations Division staff (all reinforced in the SEC's list of examination priorities and various risk alerts) are:

- Adherence to Fiduciary Standards of Conduct.
- Effectiveness of Advisers' Compliance Programs.
- Adviser Disclosures.
- Accuracy of Calculation of Fund Fees and Expenses.
- Conflicts of Interest and Risks.

Off-Channel Communications

Some examinations have begun to include specific requests relating to off-channel messaging. The exam requests have focused on the steps taken by managers to monitor, review and retain electronic communications, specifically text messages, messaging apps, instant messages, Bloomberg messaging and private messaging on social media sites. The SEC has asked (1) whether supervised persons are permitted to use personal devices for firm business or are permitted to use any form of electronic communication other than the manager's email accounts for business purposes; (2) what steps the manager takes to approve such activities; and (3) what steps the manager takes to ensure that supervised persons only use approved means of communications. Managers should be prepared to address these requests as they may become part of routine exams.

Exempt Reporting Adviser Exams (Venture Capital Advisers)

Although still rare, we have seen some examinations of Exempt Reporting Advisers (ERAs), primarily focused on the receipt of management fees and performance-based compensation, or expense allocations. Exams of ERAs are still not routine. However, we believe the staff is periodically examining firms relating to fee calculations, and whether management fees are appropriately calculated in light of potential portfolio company impairments or write-downs. In prior years, examinations focused on these matters have led to enforcement referrals and settled enforcement actions.

Marketing Rule Compliance

In April, the Examinations Division published a risk alert on common marketing rule issues seen during adviser examinations. In the risk alert, the Examinations Division specifically highlighted the following issues:

- **Flawed Policies and Procedures.** Although many advisers now have marketing rule policies and procedures, examinations staff noted that some of the policies and procedures were: (i) incomplete, (ii) overly general, (iii) not written down, (iv) did not describe the procedures related to all potential marketing channels (e.g., social media and websites), and (v) insufficiently tailored to the advisers' own advertisements (e.g., had policies that did not address testimonials, endorsements and third-party ratings, even though advisers used testimonials, endorsements and third-party ratings in their advertisements). Examinations staff also flagged that some advisers had marketing rule policies but had not actually implemented them. For example, they saw advisers who had marketing rule policies to include net performance when showing gross performance, but simultaneously had advertisements only showing gross performance.

- **Lack of Compliance with Marketing Rule-related Recordkeeping**. The examinations staff also described marketing rule-related books and records deficiencies such as:

  - Advisers who did not keep records to substantiate the performance information and claims made in their advertisements.

  - Advisers who did not keep copies of information posted to social media.

  - Advisers who did not keep copies of questionnaires or surveys that they completed and that were used in connection with their third-party ratings.

- **Form ADV Reporting Inaccuracies.** The staff noted that certain advisers inaccurately completed the marketing rule section of their Form ADVs. Specifically, certain advisers reported on their Form ADVs that they did not use third-party ratings, performance results and hypothetical performance in their advertisements, but the advisers did include those types of performance in their advertisements. Some advisers also submitted Form ADVs that still contained references to the now outdated Cash Solicitation Rule (Advisers Act Rule 206(4)-3).

- **General Prohibitions Deficiencies.**
  - The SEC staff identified several violations of the marketing rule's general prohibitions, including the following:
    - *Untrue statements of material fact and unsubstantiated statements of material fact.* Key issues included advisers claiming to be "free of conflicts" despite having existing conflicts, making false statements about personnel qualifications, providing inaccurate descriptions of their investment processes or strategies and misrepresenting their client bases. Other violations involved advisers including misleading claims about awards or accolades that advisers had not actually received in their advertisements. The SEC staff also noted that some advisers also failed to substantiate claims when SEC examiners requested proof, violating the rule's requirement to demonstrate a reasonable basis for such statements.
    - *Omission of material facts or misleading inference*. The staff observed advertisements that omitted critical information, leading to misleading inferences about the advisers' practices. Common issues included false claims about fiduciary duties, undisclosed conflicts of interest and misleading performance figures. Advertisements also implied endorsements or approvals from third parties, such as celebrities, without proper disclosures. The SEC also found misleading performance comparisons, including inappropriate use of benchmarks, outdated data and unqualified claims about past results. These violations emphasize the need for careful review of any advertisements.
    - *Fair and balanced treatment of material risks or limitations.* The staff highlighted advertisements that emphasized the potential benefits of an advisers' services without disclosing the associated material risks or limitations, such as social media posts that included adviser performance information without disclosures listing the related material risks and limitations.
    - *References to specific investment advice that were not presented in a fair and balanced manner.* An example of this is an advertisement that excludes certain investments without including sufficient context about why those investments were excluded and made it unclear if the investments were only excluded because they performed badly.
    - *Inclusion or exclusion of performance results or time periods in manners that were not fair and balanced.* The alert listed examples of this, such as advertisements that included the performance of only realized investments in the total net return figure and excluded unrealized investments.
    - *Advertisements that were otherwise materially misleading.* The alert flagged instances of advertisements in which the accompanying disclosures were in an unreadable font.

Looking forward, we anticipate that the Division of Examinations' key focus areas—such as fees and expenses, undisclosed conflicts of interest, related-party transactions, marketing practices, custody and insider trading—will remain priorities into 2025. These areas have been central to SEC compliance examinations for over a decade and are unlikely to shift significantly with the change to a Republican administration and a Republican-led SEC. While the incoming administration's efforts to improve efficiency in federal regulatory agencies may influence the SEC's operations, it is notable that the agency's annual examination coverage rate has averaged 15% consistently, regardless of the party in power, including during the last Trump administration. As such, advisers should not expect dramatic shifts in the SEC's examination focus or intensity in the near term.

SEC Enforcement Update

SEC Enforcement

What to Expect in Enforcement Under the Next SEC

With former Commissioner Paul Atkins expected to be the next SEC Chair, there will be a resetting of enforcement priorities that comes with any change in administration. Clearly, some portion of the more aggressive enforcement cases and policies under current Chair Gensler will no longer be supported by the new, Republican-controlled SEC.

The extensive voting record, speeches, public statements, and dissents of the two current Republican Commissioners and former Commissioner Atkins provide some clues on the expected changes. The two current Republican Commissioners (Peirce and Uyeda) have been unusually outspoken in objecting to certain types of enforcement actions, raising objections to approximately 200 Administrative Proceedings (APs) approved by the Commission since June 2022 (approximately 20% of all APs according to our estimates). A review of the voting record and dissents of these Commissioners reveal several types of private fund-related cases and policies that may change under a Republican-controlled SEC:

- **Off-Channel Communications** – With the most recent wave of cases announced in September 2024, Pierce and Uyeda voted against authorization of one action, issuing a dissent and urging their colleagues to “reconsider our current approach to the off-channel communications issue.” They argued that off-channel recordkeeping was an industry-wide problem that will not be solved through enforcement. The two Commissioners objected to a settlement order’s suggestion that ***reasonable*** policies must achieve ***perfection***, leaving firms with no achievable path to compliance. They suggested SEC staff engagement would a more productive path forward. While the Staff will continue to expect compliance with the recordkeeping requirements (with enforcement possible in egregious cases), a continued wave of new off-channel enforcement actions with large civil penalties seems highly unlikely.

- **Crypto** – In multiple dissents (joined by Commissioner Uyeda) Peirce has pushed the SEC to work with industry “to craft sensible, timely, and achievable regulatory paths.” She has repeatedly questioned whether the approach to crypto is the best way to protect investors, underscoring the “adverse consequences of the SEC’s approach to regulation in the crypto space.” Crypto will receive immediate attention and industry engagement under a new SEC. Although the new Commission may still pursue enforcement in fraud cases, do not expect it to file crypto registration matters.

- **Pay-to-Play** – There have been six pay-to-play settlements under Chair Gensler, each of which was approved by a 3-2 vote, with Commissioner Peirce issuing dissents. In connection with the group of four settlements announced in 2022, Commissioner Peirce criticized the pay-to-play rule as a “poorly conceived means to pursue laudable ends” and urged the SEC to revisit the rule “to ensure that it does not hinder political engagement that is unconnected to an adviser’s quest for government clients.” She repeated the call for rule improvements in two separate dissents in 2024. While emphasizing the importance for advisers to adopt effective policies to prevent contributions made to win business and acknowledging the SEC’s need to examine for compliance, Commissioner Piece reiterated that the SEC “should exercise prudence in its enforcement efforts.” Given the criticisms of the pay-to-pay rule and compliance burdens, this could be a rule ripe for revisions.

- **Other Examples of Overreach** – there were other examples, primarily involving public company disclosure or accounting matters, where Commissioners Peirce and Uyeda issued dissents asserting that the SEC was pushing the envelope on the legal interpretation of the securities laws. Particularly on novel interpretations of materiality, the next Commission may not want to push the envelope.

- **Civil Penalties** – there was a big push under Chair Gensler and former Enforcement Director Grewal for higher civil penalties to achieve the intended deterrent effect. However, at times the penalties imposed in recent settlements seemed disproportionate to the investor harm or pecuniary gain or otherwise were not grounded in the penalty statute. In over 200 instances, Commissioners Peirce and Uyeda voted to approve the enforcement recommendation except as to the civil penalties imposed. Under the new SEC, expect a dialing back of civil penalties – especially with respect to issuer penalties that ultimately are borne by shareholders – and a return to corporate benefit analysis underling the SEC's 2006 statement on financial penalties.

The recent speeches and dissents of Commissioners Peirce and Uyeda harken back to many of the **views previously expressed by Commissioner Atkins**, which is not at all surprising as Peirce and Uyeda served as counsel to Commissioner Atkins during his time at the SEC. A handful of quotes from a few key Atkins speeches while he was a Commissioner may predict themes that may reemerge under the new SEC:

- **Avoidance of Overreach** – the SEC should not be "devising new legal theories to reach behavior that does not clearly violate an existing rule. . . . We should not be playing 'gotcha' with our enforcement powers."

- **Enforce the Laws as Written** – "By respecting legal boundaries and not 'pushing the envelope,' the SEC provides predictability to investors, individuals and companies as to unacceptable conduct."

- **Guidance Where Appropriate** – "if clarification is needed, we should change the rules or issue formal interpretations with future effect." Any formal rulemaking must "give affected parties an opportunity to comment" and "requires us to address those comments."

- **Willingness to Bring Enforcement Actions** – "If fraud and deception have taken place, we should and will pursue it."

- **Hold Individual Wrongdoers Accountable** – "individuals commit fraud; corporations don't."

- **Predictability in Civil Penalties** – there should be more predictability and the Staff should adhere to the SEC's penalty guidance: "Even after the penalty statement, too often our penalties seem to be justified on little more than that they 'feel right.'"

- **Better Transparency into Enforcement Process** – the Staff should adopt a written and uniform "open jacket" policy for Enforcement matters and show defense counsel the evidence it has against the defendant: "That is called due process."

- **Potential Reforms to the Wells Process** – "it makes sense that the Commission should consider whether it is time to convene a Wells-like committee to 'bring to date' the best thinking on enforcement practices."

This record suggests significant changes in the enforcement program under a new SEC, including a potential return to more traditional enforcement cases with greater emphasis on egregious conduct with significant investor losses or pecuniary gain (particularly relating to retail investors) and a move away from "pushing the envelope" type cases. Regulation by enforcement could be replaced with greater interaction with the Staff, informal guidance, or lighter-touch rulemaking. Given former Commissioner Atkins' calls for enhanced transparency and efficiency in the enforcement process, investigations may proceed more efficiently, be resolved quicker and, where appropriate, result in settlements for material, substantive violations with civil penalties that adhere to the SEC's penalty guidance and are calibrated to elements of the penalty statute.

A new direction in enforcement, however, does not necessarily mean that the Staff would ignore issues highlighted under Chair Gensler. For example, while the SEC may not bring waves of high penalty, off-channel communications cases against registered entities, the Staff will expect those records to be retained and will request their production in exams and investigations. Issues relating to compliance failures will still be investigated, but those that might have been referred to Enforcement in the past may stay with Exams. The investigative Staff could look harder to find a substantive violation beyond compliance policy or internal control violations, but investigations that do not reveal substantive violations may be terminated instead of seeking to resolve the matter with a compliance violation.

Enforcement's 2024 Fiscal Year-End Results

On November 22, 2024, the SEC's Division of Enforcement announced its Enforcement Results for Fiscal Year 2024. Takeaways for fund managers include:

> Total enforcement actions were down from recent years. The Commission brought 583 total enforcement actions in FY 2024, which represents a 25% decrease from FY 2023's 784 actions. The SEC filed 431 new standalone enforcement actions, representing a 14% decrease from the prior year (501).

> Notably, over 70 of the standalone actions in 2024 (12%) were recordkeeping cases arising from the SEC's off-channel sweeps.

> The SEC obtained orders and judgments for over $8.1 billion in disgorgement and penalties, the highest amount in its history, exceeding 2023's $4.9 billion and 2022's $6.4 billion. However, over half of this figure resulted from a $4.5 billion settlement involving Terraform Labs after a trial verdict (which may be ultimately uncollectable against the bankrupt entity).

> Sanjay Wadhwa, the SEC's Acting Director of Enforcement, recently commented that the numbers may not tell the entire story, and observed that the Division's robust enforcement over the past few years has fostered a better culture of compliance across the industry. Furthermore, he noted several actions where reduced or no penalties have been imposed against parties that self-reported and meaningfully cooperated.

> Overall, 23% of the SEC's actions this year involved either investment advisers or investment companies, slightly above last year's 18%. Over the past eight years, actions involving investment advisers/investment companies have consistently comprised the highest or next highest percentage of total SEC matters by category.

> The SEC emphasized its continued efforts involving off-channel recordkeeping, noting that it reached settlements with over 70 firms resulting in more than $600 million in civil penalties. Off-channel cases continued to comprise a large percentage of penalties ordered (in FY 2023 the SEC imposed $400 million in off-channel penalties, and in FY 2022, $1.2 billion). Notably, a number of the FY 2024 matters were brought against either stand-alone or dual-registered investment advisers under the recordkeeping provisions of the Advisers Act.

> With respect to material non-public information (MNPI), the Commission noted settlements with several investment advisers for failing to establish, maintain, or enforce policies and procedures reasonably designed to prevent the misuse of MNPI. The potential MNPI in these matters, none of which alleged insider trading, related to individual loan data underlying collateralized loan obligations, merger activity involving private equity portfolio companies, and information received through ad hoc creditors' committees. The SEC also highlighted its settlement involving disclosure of confidential information relating to "block trades."

> With respect to the SEC's Whistleblower Program, the Commission received a record number of whistleblower tips (24,000 tips). The SEC awarded $255 million in whistleblower awards, down from 2023's record $600 million in awards (which included a nearly $279 million payment to a single whistleblower). In addition, the SEC imposed a record $18 million penalty for a

standalone violation of Rule 21F-17, which prohibits impediments to whistleblowing, and brought a series of additional cases under that rule based on language contained in customer and employee agreements.

Enforcement Actions Filed in Fiscal Years 2018 to 2024

	FY 2024	FY 2023	FY 2022	FY 2021	FY 2020	FY 2019	FY 2018
Disgorgement and Penalties Ordered (in billions)	$8.194	$4.949	$6.44	$3.80	$4.68	$4.35	$3.95
Total Actions	583	784	760	697	715	862	821
% of Total Actions Involving Investment Advisers / Investment Companies	23%	18%	23%	23%	19%	29%	21%

Despite fewer total actions, the SEC has continued to actively pursue matters involving investment advisers, and SEC officials often note that private funds are a "substantive priority area" for the division. The SEC has faced considerable setbacks in the federal courts, who have rejected its aggressive slate of rulemaking affecting the private funds industry. However, the SEC still has substantial tools to identify, examine and investigate the principles it has espoused in its rulemaking–for example, focused on fiduciary obligations of private fund managers. In 2025, with a deregulatory administration in charge, rulemaking will generally be on hold, but we expect the SEC staff will continue to use its existing enforcement authority to focus on private fund manager practices.

A summary of notable matters relating to private funds follows.

Off-Channel Messaging Sweep(s)

The SEC continued its off-channel messaging sweep investigation involving certain investment advisers and large broker-dealers, reaching settlements with over 70 firms resulting in more than $600 million in civil penalties. As communications through personal devices have become a part of everyday personal and business communication (so-called "off-channel" methods), this has become a key focus area. Under a deregulatory Commission, we expect the "sweep" phase of these investigations is likely over. However, in future exams or enforcement inquiries, the staff will ask about text messaging, and may bring enforcement cases where substantial noncompliance is found.

For example, on September 24, 2024, the SEC announced it had settled charges against 12 firms, including investment advisers and a dually-registered firm, for widespread failures to maintain and preserve electronic communications. These firms admitted to their violations and agreed to pay a combined $88.2 million in civil penalties. Among the settlements were two $35 million penalties, but in contrast, one firm that self-reported its violations and took substantial remedial actions did not incur a penalty. The violations were primarily related to the use off-channel communications, which the firms failed to properly maintain.

The SEC's enforcement actions highlight the serious consequences for firms failing to comply with recordkeeping requirements, with penalties varying depending on the severity of the violations and the firms' cooperation. Three firms received reduced penalties by self-reporting their violations and demonstrating efforts to comply. The SEC emphasized that substantial penalties may result when the violations involve senior management or hinder the SEC's investigative functions.

Regardless of whether a new SEC continues to bring off-channel enforcement actions, asset managers should be prepared in exams and investigations for scrutiny of their compliance with recordkeeping requirements relating to off-channel communications. To minimize potential exposure, firms should reevaluate their policies and procedures (particularly as they relate to required records under the Advisers Act), focusing on detection and surveillance, identification of permissible devices and platforms, and evaluation of how to address internal noncompliance. With the backdrop of existing enforcement settlements, smaller asset managers may likely to face similar challenges in pending exams or investigations. For example, in April 2024, the SEC settled with Senvest Management LLC for failing to preserve communications made via personal messaging apps in connection with certain trading activity, which violated the firm's policies. Firms should reassess their recordkeeping practices, update policies, and strengthen surveillance mechanisms to ensure compliance with recordkeeping requirements.

Valuation

In September 2024, the SEC announced it had settled a matter involving the manager of a number of private funds, registered funds and separate accounts relating to valuation of collateralized mortgage obligations (CMOs). According to the SEC, the firm valued illiquid, smaller-sized "odd lot" CMO positions by using pricing data intended for larger, institutional "round lots," resulting in an alleged misvaluation of odd lot CMO positions. In addition, the SEC noted that the firm executed cross trades—both internal transactions between affiliated accounts and dealer-interposed trades—without fully complying with internal valuation and compliance requirements.

Trade Allocation

In November 2024, the SEC has filed a civil suit against the former Chief Investment Officer ("CIO") of Western Asset Management Co. (WAMCO), accusing him of engaging in a fraudulent scheme that involved improper trade allocations to benefit certain clients. The SEC alleges that from 2021 to 2023, the CIO violated federal securities laws by cherry-picking trades—allocating profitable "day one" gains on Treasury derivatives trades to favored clients and assigning losing trades to other clients, including institutional and retail investors. The government asserts that the CIO misled investigators by falsely testifying that he had predetermined trade allocations before executing the trades, when in reality, he waited to observe the trades' performance before deciding on allocations. The SEC alleges that his actions, which resulted in $600 million in harm to disfavored clients, represented a breach of his fiduciary duties. The SEC is seeking permanent injunctions, disgorgement and civil penalties. It also contends that the CIO misrepresented the process by which he allocated trades, misleading investors about his decision-making process and the timing of trade allocations.

In addition to the SEC's civil charges, the DOJ unsealed a criminal indictment against the CIO, accusing him of securities fraud, investment adviser fraud, and other related offenses. The DOJ's charges focus on the same conduct, which the DOJ alleges violated WAMCO's internal policies and betrayed the trust of clients, many of whom were unaware that they were being disadvantaged by the CIO's actions.

The SEC also brought "cherry picking" charges in September 2024 against former investment adviser representatives at smaller firms, for conducting separate multi-year schemes to defraud. According to the SEC's complaints, both individuals used personal trading accounts to observe daily price movements of securities before deciding whether to allocate profitable trades to themselves or to their clients. This allowed them to disproportionately keep the profitable trades for their personal accounts and allocate the unprofitable ones to client accounts. Between 2015 and 2022, one adviser allegedly generated $5.3 million in illicit profits, while the other made over $1 million. The SEC charged both individuals with fraud under the Securities Exchange Act and the Investment Advisers Act. Additionally, the SEC has filed related compliance failure charges against the firms with which the individuals were associated.

Disclosure and Conflicts

The SEC settled several actions in September 2024 focused on alleged failures to disclose conflicts of interest.

In September 2024, the SEC settled an action against a fund manager for failing to comply with disclosure and approval requirements related to fees and expenses charged to its private real estate investment funds. The adviser had entered into a series of agreements with affiliated service providers, under which the funds paid certain fees. Although the transactions were disclosed retroactively through financial statements or presentations, the SEC alleged that the firm did not sufficiently obtain written consent or provide advance disclosures to limited partners or its LPAC, as required by the funds' governing documents.

Later that month, the SEC charged an investment adviser for failing to disclose and address conflicts of interest in transactions involving loans to and from funds it managed. In one instance, a portfolio company wholly owned by a fund took a $5 million bridge loan from an entity linked to the adviser, creating a conflict due to overlapping board memberships. The adviser failed to disclose this conflict or obtain prior consent from the fund's investors, in connection with this loan and similar undisclosed loans between the adviser and other funds it managed. These failures led to a settlement under Section 206(2) of the Investment Advisers Act. The adviser also failed to comply with the custody rule by not providing audited financial statements within the required timeframe for multiple funds, leaving client assets vulnerable to misuse. Inadequate internal policies and procedures contributed to these violations, underscoring systemic governance shortcomings.

On August 21, 2024, the SEC announced it had settled charges against FlowPoint Partners, LLC and its principal for misleading investors and breaching fiduciary duties in their management of four private funds. From July 2020 to late 2023, FlowPoint and its principal falsely claimed the funds underwent annual independent audits, despite no audits being completed for any of the funds. Furthermore, they violated fiduciary obligations by failing to obtain audits for two funds as required by their governing documents, operating those funds in a manner inconsistent with their stated obligations. Without admitting or denying the allegations, the respondents agreed to settle.

Also in August, the SEC settled similar charges against FPA Real Estate Advisers Group, LLC for violating the custody rule and the compliance rule between October 2019 and November 2022. The SEC alleged that FPA Real Estate Advisers, which manages pooled real estate investment vehicles, did not implement its written policies for reviewing fees charged by affiliated service providers, failing to ensure these fees aligned with market rates as disclosed to investors.

Fee and Expense Calculations

Fees and fee calculations continue to be a focus of SEC enforcement efforts. On October 7, 2024, the SEC settled a matter with LDP Partners LLC and its sole manager for breaching fiduciary duties and misleading investors, including improperly calculating and taking $55,000 in advance management fees from a fund it advised. These fees, taken in February and September 2023, violated the fund's governing documents, which required fees to be calculated and paid at the end of each month. While LDP Partners obtained informal approval from the fund's advisory committee, the committee lacked the authority to override the fund's operating agreements, allegedly rendering the transactions unauthorized.

This action followed a similar matter resolved in April 2024. The SEC charged Catalyst Capital Advisors LLC (CCA), a registered investment adviser, with violating fiduciary duties and regulatory provisions by arranging an improper joint legal fee agreement with its client, an open-end mutual fund. Between 2017 and 2020, CCA and the fund incurred $2.7 million in legal fees related to regulatory inquiries and private lawsuits, with the fund initially paying all fees, including those for CCA's legal representation, without approval from the fund's independent trustees. CCA benefited from deferred payments and a favorable cost allocation. The matter was settled on a no-admit no-deny basis.

MNPI Policies

Earlier this year, the SEC brought a handful of cases focused on policies and procedures to protect against the misuse of MNPI (Advisers Act Rule 204A). In particular, the SEC settled a case against an investment advisory firm focused on distressed debt investments, and continued to scrutinize the activities of ad hoc creditor committee participants, with the most recent enforcement action announced December 20, 2024.

Distressed debt managers participating in ad hoc creditors' committees often do not want to receive MNPI or otherwise restrict trading in the company bonds for an extended period of time. While the advisers involved had MNPI policies in place, the key takeaway from the enforcement actions in this area is that the SEC expects heightened procedures for creditor committee participation and, more generally, consultants or advisors who may have access to MNPI. In particular, the cases have emphasized the importance of specific written procedures concerning the handling of MNPI and addressing the risk of leakage or inadvertently receiving MNPI while serving on an ad hoc committee.

In a separate matter, the SEC focused on trading in securities issued by collateralized loan obligation ("CLO") vehicles were taking the appropriate steps to ensure their analysts and advisers were not themselves misusing MNPI. In August of this year, the SEC settled a case against a New York-based private fund and CLO manager. The fund manager traded tranches of debt and equity securities issued by CLOs it directly managed as well as those managed by third parties. The SEC alleged that as a participant in an ad hoc lender group, the fund manager had become aware of negative developments that concerned a particular borrower. While in possession of this confidential information, the firm privately sold two CLO equity tranches that contained a significant concentration of loans to the borrower. The CLO manager allegedly failed to consider the materiality of the negative information to the sold tranches before making the sale. The SEC imposed a civil penalty on the firm, focusing on the fund manager's failure to establish and enforce appropriate policies on the use and misuse of MNPI. As with the distressed debt case detailed above, advisers and funds must be sure to tailor their MNPI policies to the particular nature of their business. For more information on the CLO case and key takeaways, the full Proskauer case summary is here.

For more details on MNPI-related enforcement, please see the separate "Material Non-Public Information" chapter of this year-end review.

Artificial Intelligence (AI-washing)

In March 2024 (Delphia and Global Predictions) and again in August (QZ Asset Management), the SEC brought actions against smaller retail advisers for making false and misleading statements regarding the use of AI in investment processes. In its complaint against QZ Asset Management, the SEC alleged QZ Asset Management and its affiliates defrauded clients out of at least $6 million by falsely claiming the use of AI-driven technology to guarantee returns and forging affiliations with reputable financial institutions, while also providing materially deficient disclosures about its operations. In settling an administrative proceeding against Global Predictions, the SEC found that Global Predictions falsely advertised its use of AI for investment advice, misled clients about its services and performance, and failed to implement policies under the amended Marketing Rule to ensure accurate advertising and disclosures. Similarly, the SEC found in its settlement with Delphia that it made fraudulent claims about using client data for AI-driven investment strategies, despite never developing these capabilities, and persisted in misleading advertising and regulatory filings even after being flagged by the SEC.

ESG Disclosures

Although the incoming administration is not likely to focus on public company environmental, social and governance (ESG) cases, there were a number of notable settlements involving investment advisers for allegedly "greenwashing," or making unsupported ESG statements in disclosures to investors. Because these cases arise out of general fiduciary disclosure obligations under the Advisers Act, the incoming administration may continue to support such matters.

On September 19, 2024, the SEC announced settled charged against Inspire Investing ("Inspire"). From 2019 to 2024, Inspire failed to consistently apply its proprietary "biblically responsible investing" (BRI) strategy. While claiming a robust methodology to screen companies for alignment with biblical values, Inspire relied on inadequate manual research and failed to prevent investments in companies involved in prohibited activities. The SEC found Inspire's process inconsistent, leading to material misrepresentations in its disclosures and investment practices. The firm also lacked adequate compliance policies, contributing to these deficiencies. Inspire has since begun revising its disclosures and processes under the supervision of an SEC-imposed independent compliance consultant.

The SEC announced settlement with a large ETF fund manager on October 21, 2024, which touched upon similar (albeit politically different) disclosure issues. Between March 2020 and November 2022, the fund's adviser allegedly misrepresented the screening process for its ESG funds, claiming to exclude companies involved in fossil fuels and tobacco, regardless of revenue measures. However, its data from third-party vendors was insufficient, leading the funds to invest in a handful of such companies. Additionally, the SEC alleged that the firm failed to disclose these limitations to its board or investors, nor did it adopt policies to ensure adherence to its stated ESG criteria.

Marketing Rule

Investment advisers were required to comply with the new Marketing Rule starting in November 2022, and the resulting enforcement sweeps have continued through this year.

In April 2024, the SEC settled charges with five retail-focused investment advisers for advertising hypothetical performance without adequate policies and procedures. Violations included failing to ensure performance data was relevant, substantiated, or not misleading. The charges do not allege inaccurate information or fraud. Instead, the SEC is focused on policies, procedures, and presentations on websites aimed towards the general public, rather than to a particular intended audience.

On September 9, 2024, the SEC announced settled charged against nine registered investment advisers as part of an ongoing sweep investigation into violations of the Marketing Rule. The SEC found the investment advisors had disseminated advertisements containing untrue or unsubstantiated statements of material fact, and used testimonials, endorsements, or third-party ratings without the required disclosures.

These charges followed similar settled charges against five investment advisors in April 2024 (which likely originated from the same sweep investigation). The SEC found that these firms advertised hypothetical performance on their websites without implementing policies and procedures to ensure the relevance of such performance to the financial situations and investment objectives of their intended audiences, as mandated by the Marketing Rule. Fines ranged from $20,000 to $100,000, with lower fines being imposed on advisers who took corrective steps prior to being investigated by the SEC.

On June 14, 2024, the SEC announced settled charges against Twenty Acre Capital LP, a registered investment adviser, for misleading and unbalanced performance advertising related to its private fund from November 2021 through February 2023. The firm presented returns from a single investor as fund performance, without disclosing that these returns were significantly higher than those of the overall fund due to specific investment opportunities that were unavailable to other investors (including many opportunities that pre-dated their investments). This misrepresentation violated provisions of the Investment Advisers Act and its Marketing Rule, which require fair, balanced, and factual advertising.

Exchange Act Securities Disclosure Violations

Following its adoption a year ago of amended rules accelerating filing deadlines for Schedules 13G and 13D (and the effectiveness of the new deadlines for 13Gs), the SEC has continued to bring enforcement cases focusing on the timing of initial filings, amendments, and transitions from Schedule 13G to 13D, as well as Section 16 filings. The latest development was the SEC's announcement of settled charges against 23 persons, including investment firms and individual officers and directors for untimely filings, as well as two public companies for contributing to their insiders' violations and failing to disclose the delinquent filings as required. The penalties ranged from $10,000 to $200,000 for the individuals involved in the proceedings and from $40,000 to $750,000 for the entities involved. This followed the adoption of amended rules in 2023 accelerating filing deadlines for Schedules 13G and 13D.

On March 1, 2024, the SEC announced settled charges against investment adviser HG Vora Capital Management LLC for failing to timely disclose its ownership in Ryder System Inc. before its May 2022 acquisition bid. HG Vora filed on Schedule 13G as a passive investor. HG Vora then doubled its ownership of the company stock from 5.6% in year-end 2021 to 9.9% through mid-April. That alone did not show control purpose from the SEC's point of view. HG Vora held discussions with a private-equity firm about an acquisition of the company and drafted an offer letter with a placeholder offer price of $85 per share. According to the SEC, it was "no later than" this date that HG Vora shifted from a passive investor to an activist investor, with Schedule 13D filing obligations within 10 days. HG did not file the active investor Schedule 13D filing until 17 days later, when it transmitted a final offer letter and purchase price.

Trading Violations

The SEC has continued to focus on cases involving short sales in violation of Rule 105 of Regulation M, which prohibits short selling equity during a restricted period before a public offering and then purchasing the same security in the offering. In February 2024, the SEC announced settled charges against investment adviser Contrarian Capital Management L.L.C. for violating the rule by participating in two public offerings in April and June 2020 after making short sales of the same securities during the restricted periods. Contrarian agreed to pay $351,726.86 in disgorgement, $29,600.50 prejudgment interest, and a $140,000 fine. The SEC announced similar charges against trading firm Kershner Trading Americas, LLC and investment adviser FiveT Capital AG on May 20, 2024 and November 26, 2024, respectively. Kershner purchased stock in 23 public offerings after short selling the same stock during a restricted period when such purchases are prohibited, between February 2019 and June 2022. FiveT purchased stock in 14 public offerings of securities after having sold short the same stock during a restricted period, between July and December 2020.

Pay-to-Play Rule

With the recent election season, the SEC has reiterated the importance of compliance with the pay-to-play rule. In April 2024, the SEC announced a settlement with a private equity adviser alleging violations of the SEC's pay-to-play rule for investment advisers. An employee and covered associate of an SEC-registered investment adviser contributed $4,000 to the political campaign of a state government official, whose position had the ability to influence the selection of investment advisers for the state board of investment. The state had a pre-existing investment in private equity funds managed by the firm. This contribution triggered the pay-to-play rule restrictions, leading to a settlement with the SEC.

In August 2024, an investment adviser resolved similar charges after an individual made a $7,150 campaign contribution to a government official, and the individual was later hired by the investment adviser and became a covered associate. The individual sought and obtained the return of the contribution, but the amount exceeded the $350 limit and 60-day requirement for an exception, according to the SEC.

Custody Rule

The SEC continued the targeted actions concerning violations of the Investment Advisers Act's Custody Rule and Form ADV requirements by private fund advisers. On August 23, 2024, the SEC announced settled charges against investment adviser Cedar Legacy LLC for failure to deliver timely audits for two private funds over two fiscal years. The charges included failure to timely file a Form ADV annual amendment upon receiving the annual audit opinion for a third private fund.

On September 10, 2024, the SEC announced settled charges against Hi2 Investment Management, LLC for failure to provide timely annual audits on 17 occurrences and not complying with the custody rule. On September 20, 2024, the SEC announced settled charges against ACP Venture Capital Management Fund LLC for failure to register as an investment adviser and for noncompliance with the custody rule between November 2018 and January 2023.

On September 3, 2024, the SEC also announced settled charges against investment adviser Galois Capital Management LLC, related to a private fund mainly invested in crypto assets, for failing to safeguard client assets, including crypto assets, and for misleading investors about redemption notice periods. Fund managers invested in crypto should take note of the Custody Rule issues in this case. Galois Capital allegedly violated the Custody Rule by not using a qualified custodian for certain crypto assets, instead holding them on platforms like FTX, which led to significant losses when FTX collapsed in November 2022. Additionally, the SEC alleged the firm misrepresented the notice period required for redemptions to investors, which was implicated when the firm allegedly granted preferential redemptions on less notice to certain investors. Penalty amounts are to be distributed to harmed investors through a Fair Fund. Notably, Galois reported approximately $205 million in assets under management, half of which was lost in connection FTX's collapse. The company's civil penalty to be returned to investors, amounts to less than half a percentage point of the lost crypto funds.

Impeding Whistleblower Reporting

In September 2024, the SEC brought multiple enforcement actions for impeding whistleblower reporting. On September 4, 2024, the SEC announced that three affiliated firms settled charges for allegedly impeding clients from reporting securities law violations. Between May 2021 and February 2024, the firms asked 11 retail clients to sign confidentiality agreements tied to payments made for losses resulting from alleged breaches of securities laws. These agreements included clauses that violated SEC whistleblower protections, including clauses that restricted clients from reporting issues to the SEC unless the SEC initiated an inquiry, and some required clients to affirm they hadn't reported the disputes.

On September 9, 2024, the SEC followed up with settled charges against seven public companies for using agreements that allegedly violated rules protecting whistleblowers, by impeding employees from reporting potential misconduct to the SEC.

On September 24, 2024, the SEC announced similar settled charges against Florida-based investment adviser for violating Rule 21F-17. From November 2020 to September 2023, the adviser required candidates for employment to sign non-disclosure agreements that made it harder for them to report potential securities law violations to the SEC. These agreements restricted voluntary disclosures and required candidates to notify the adviser before responding to SEC requests. Additionally, a settlement with a former employee who planned to report securities violations included provisions that impeded the reporting process, leading to a no-admit no-deny settlement with the SEC.

Indemnification/Exculpation Provisions

The SEC has also increased its scrutiny of indemnification and exculpation clauses, especially those involving retail clients. While the final Private Fund Adviser Rules did not ban these clauses, the SEC emphasized that contractual waivers of fiduciary duty violate the Advisers Act. Private fund advisers should review and update indemnification provisions, particularly in contracts with retail investors, to ensure compliance with SEC regulations.

On September 3, 2024, the SEC announced settled charges against ClearPath Capital Partners LLC for failing to comply with the custody rule and using improper liability disclaimers in its advisory and private fund agreements. ClearPath did not distribute annual audited financial statements to investors in certain private funds on time, leading to the Custody Rule issue. Additionally, it included liability disclaimers in its agreements that could mislead clients into thinking the clients had waived non-waivable claims against the firm, including misleading statements about the firm's fiduciary duty.

Activist Funds

On July 11, 2024, the SEC announced settled charges against Anson Funds Management, LP and Anson Advisors, Inc. for failing to disclose material information about their short strategy involving activist short publishers. The SEC alleged, from 2018 to 2023, both entities' private placement memorandums misleadingly described the fund's short strategy without disclosing that they worked with short publishers who issued bearish reports and received a portion of the fund's trading profits. In 2018, Anson Advisors also allegedly paid over $1.1 million in trading profits to a short activist through a third-party intermediary using misleading invoices for research that was not performed.

On September 26, 2024, the SEC announced settled charges against investment adviser Macellum Advisors for failing to disclose payments received from third-party investment advisers, creating conflicts of interest. Macellum had agreements with unaffiliated advisers who invested alongside Macellum's private funds and paid Macellum affiliates performance-based fees. The SEC order found these payments created a financial conflict, as Macellum had an incentive to favor the outside advisers' interests over its own clients. Macellum did not fully disclose these payments or the conflicts of interest.

Fraud/Misappropriation

The SEC brought a number of matters relating to more egregious conduct and fraud involving fund managers.

At the end of 2023, on December 26, 2023, the SEC announced it obtained a temporary restraining order freezing certain assets and appointing a receiver for real estate investment company ArciTerra Companies LLC and its affiliates, due to serious allegations of fraud. The SEC's complaint, filed in November 2023, claims that since 2017, the firm's CEO and related entities misappropriated over $35 million from private real estate funds, using the funds for personal expenses and a lavish lifestyle, including private jets and yachts. Additionally, in November 2023, the CEO and an entity he controlled, Cole Capital Funds LLC, issued an allegedly false press release claiming a planned purchase of 51% of WeWork at a massively inflated price, causing WeWork's stock to spike, after he had purchased call options in advance. The SEC charged the CEO and his entities with various violations of the Advisers Act and Securities Exchange Act.

On January 25, 2024, the SEC announced settled charges against Aon Investments USA Inc. and its former employee for misleading the Pennsylvania Public School Employees' Retirement System (PSERS) about discrepancies in PSERS's investment return calculations. Aon was responsible for calculating PSERS's returns to determine if the "risk share" provision, which increases employee contributions if returns fall below a threshold of 6.36%, would be triggered. In 2020, Aon's calculations for some quarterly returns did not match prior figures, but instead of properly investigating the issue, the individual misrepresented the cause of the discrepancy to PSERS. Eventually, it was revealed that the discrepancy was due to data errors, and the corrected return rate of 6.34% triggered the risk share.

On April 24, 2024, the SEC announced charges against a fund manager for allegedly defrauding investors in his hedge fund, The Cheetah Fund L.P., which he founded and controlled. Between January 2019 and January 2023, the fund raised about $9.9 million by falsely claiming exceptional performance, while in reality, it suffered over $4.59 million in realized trading losses. The individual fund manager also allegedly misrepresented the fund's auditor and falsely indicated that he was compensated based on fund profits, despite incurring significant losses. He received at least $2.64 million from the fund, leaving investors with approximately $9 million in losses. The SEC charged the individual with violations of the securities laws and seeks a permanent injunction, disgorgement, civil penalties, and a ban from serving as an officer or director.

On May 29, 2024, the SEC announced settled charges Mass Ave Global Inc. and its CEO for making false and misleading statements to investors in the firm's flagship opportunity fund from 2020 to 2022. The SEC found that the CEO altered portfolio data, which was then included in investor communications such as monthly reports and position lists. Additionally, MassAve failed to disclose a conflict of interest related to one of its co-founders operating a separate hedge fund in China. In January 2023, the firm admitted to inaccuracies in its communications, leading to a wave of redemption requests and the start of winding down of operations. MassAve agreed to a settlement, while the individual CEO also agreed to a settlement that included a 12-month suspension from industry-related work.

On September 27, 2024, the SEC announced charges against the principals of a hedge fund focused on currency trading for defrauding investors by using allegedly false offering materials to misrepresent their trading track record. The principals claimed to have used a successful currency trading strategy previously employed for other clients and allegedly provided "Audit" and "Performance Audit" reports purportedly from an Australian firm. The reports were allegedly fabricated, and the portfolio managers allegedly created a fake email address to impersonate the auditor. The SEC charged them with violations of securities laws and is seeking disgorgement, civil penalties, and permanent injunctions.

On September 3, 2024, the SEC filed a settled complaint against Black Dragon Capital, LLC, Black Dragon Capital Investment Management, LLC, and the fund manager's CEO, alleging, in part, that the defendants used deceptive marketing practices. The SEC asserted that the defendants allegedly misrepresented investment performance data on their website and in marketing materials, giving prospective clients an inaccurate view of the firm's results. The Black Dragon Entities and CEO consented, without admitting or denying the allegations and subject to court approval, to a settlement involving injunctions and civil penalties.

SEC Policy and Rulemaking Updates

(i) New SPAC Rules

On January 24, 2024, the SEC adopted new rules that apply to special purpose acquisition company ("SPAC") transactions.[1] The adopted rules largely track the agency's proposals with some notable exceptions. The new rules became effective on July 1, 2024 (125 days after publication in the Federal Register), and apply to new transactions entered into on or after that date as well as to transactions that were ongoing on the effective date, even if they commenced prior to the effective date. SPACs that may still be ongoing on the effective date, or any party considering a new SPAC transaction, should consider the impact of the new rules, which may raise a number of interpretive questions.

Among other things, the new rules:

- require additional disclosures about SPAC sponsor compensation, conflicts of interest, dilution and the target company;
- require target companies in the de-SPAC transaction to be designated as co-registrants with the SPAC, subjecting the target company to liability for disclosures in the registration statement;
- deem that any business combination transaction involving a reporting shell company, including a SPAC, will involve a sale of securities to the reporting shell company's shareholders for purposes of the Securities Act;
- exclude financial projections provided in a de-SPAC transaction from liability protection under the Private Securities Litigation Reform Act of 1995 (PSLRA), require disclosure of material assumptions and potentially other factor's underlying projections;
- require disclosure of any legally required determination by the board of directors in a de-SPAC transaction whether the transaction is advisable and in the best interests of shareholders and any outside report, opinion or appraisal received that materially relates to the de-SPAC transaction; and
- mandate a 20-calendar-day minimum dissemination period for prospectuses, proxy and information statements filed for de-SPAC transactions.

Although the agency dropped proposed rules that had been the subject of criticism on the underwriter status of participants in the de-SPAC and on the investment company status of SPACs, it provided new guidance largely supporting its relatively extensive views on the relevance of those regulatory regimes.

[1] Special Purpose Acquisition Companies, Shell Companies, and Projections, SEC Release Nos. 33-11265, 34-99418, IC-35096 (Jan. 24, 2024).

The SEC's adoption of these rules followed a significant drop in the number of SPAC transactions from their height in 2021 as well as multiple sets of SEC guidance on SPAC transactions addressing many of the same issues as the new rules.

(ii) Further Definition of "As Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer

On February 6, 2024, the SEC adopted Rules 3a5-4 and 3a44-2 under the Exchange Act (the "Amended Dealer Definitions"),[2] which had the practical effect of greatly expanding the scope of market participants required to register with the SEC as "dealers." The Amended Dealer Definitions targeted market participants who regularly engage in a regular pattern of buying and selling securities or government securities. As adopted, the Amended Dealer Definitions include many market participants that do not traditionally identify as dealers, such as proprietary trading firms.

As noted below, the Amended Dealer Definitions have since been vacated in a federal district court proceeding. Accordingly, at this time, the Amended Dealer Definitions are no longer in effect.

(iii) Amendments to Form PF

As summarized in the 2022 PIF Annual Review, on August 10, 2022, the SEC and the CFTC jointly released proposed amendments to Form PF and related rules under the Advisers Act on August 10, 2022.[3] On February 8, 2024, the SEC adopted these amendments.[4]

The amendments to Form PF expand the information required to be reported by private fund advisers, including (i) more detailed information about fund borrowings, counterparty exposures, performance and hedge fund holdings; (ii) investments in cryptocurrency and other digital assets; and (iii) disaggregated information about fund structures, such as master-feeder, parallel funds and trading vehicles.

As adopted, the compliance date for these amendments would have been March 12, 2025. However, on January 29, 2025, the SEC and the CFTC jointly extended that compliance date until June 12, 2025.[5] Accordingly, the first required filings on the amended Form PF would be:

- *Large Hedge Fund Advisers:* The filing covering Q2 2025, due on August 29, 2025.[6]
- *Annual Filers*: The filing covering the full year 2025, due on April 30, 2026.[7]

Amendments Applicable to all Form PF Filers: General Instructions

The amendments modify instructions to Form PF that are applicable to all Form PF filers, including the reporting of certain identifying information, the calculation of assets under management, withdrawals and

[2] Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers, SEC Release No. 34-99477 (Feb. 6, 2024).

[3] Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, SEC Release No. IA-6083 (Aug. 10, 2022).

[4] Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, SEC Release No. IA-6546 (Feb. 8, 2024).

[5] For more information about this extension, please see our earlier posting: SEC and CFTC Extend Compliance Date for Form PF Amendments (January 30, 2025).

[6] Large Liquidity Fund Advisers, a separate category of quarterly filers from Large Hedge Fund Advisers, must make their quarterly filing within 15 days of quarter end.

[7] For filers with a fiscal year ending on December 31, which the SEC estimates includes approximately 99.6% of advisers. Depending on the date their fiscal year ends, other filers will need to begin filing on the new form at different times.

redemptions, inflows and outflows of assets, creditors and beneficial ownership. The amendments also change the way master-feeder arrangements, funds of funds and parallel funds are reported.

> *Master-feeder and Parallel Fund Structures*. Data reported on a master-feeder structure (and a parallel fund) generally must be reported separately for each component rather than in aggregate as currently permitted. An exception would be when a single feeder invests substantially all of its assets in a single master fund and/or Treasuries, cash and cash equivalents (a "disregarded feeder fund"). A private fund adviser would continue to aggregate a master-feeder structure for purpose of determining reporting thresholds, e.g., whether a particular hedge fund is a "large hedge fund."

> *Parallel Managed Account*. Under the amendments, Form PF filers must exclude reporting of parallel managed account, which are separately managed accounts or other pools of assets that pursue substantially the same investment strategies. Form PF currently permits (but does not require) private fund advisers to report such accounts and the SEC explained that the data from them has diminished the value of the fund data because the characteristics of these accounts are different from private funds. The value of parallel managed accounts would, however, continue to be reported on the form in a separate question (Question 16), and counted to determine whether the private fund adviser (or fund) meets the Form PF reporting threshold, e.g., whether the private fund adviser has $150 million of private fund assets under management.

> *Investments in Other Funds*. Private fund advisers that invest in other private funds ("Underlying Funds") currently include the value of the Underlying Funds for purpose of determining whether the private fund adviser meets the Form PF reporting threshold, i.e., whether the private fund adviser has $150 million of private fund assets under management. Private fund advisers are, however, permitted to exclude investment in private funds for purposes of determining whether the private fund meets the other threshold (e.g., to be a large hedge fund) as well as reporting in other sections of the form as long as they do so consistently.
>
> Under the amendments, however, while the calculation of the Form PF thresholds remain the same, private fund advisers would, in responding to some questions, be required to "look through" an Underlying Fund to identify the indirect holdings (i.e., equity, debt or other securities) unless the fund is a "trading vehicle" (discussed below). This change requires the private fund adviser to make a reasonable estimate as to the assets held by any Underlying Funds managed by third-party advisers.

> *Trading Vehicles*. The amendments require reporting of special purpose vehicles, alternative investment vehicles, blocker entities or other holding entities of reporting funds ("Trading Vehicles"). If the reporting fund owns all or a portion of the equity in the trading vehicle, private fund advisers would be required to aggregate its assets with those of the reporting fund or, if the reporting fund only owns a portion of the Trading Vehicle's equity, the reporting fund's proportionate share thereof. While Trading Vehicles would not need to be reported as separate reporting funds, each reporting fund that owns an interest in a Trading Vehicle must list the name of the Trading Vehicle in the reporting fund's own Form PF entries.

> *Reporting Timelines*. The amendments require private fund advisers that have quarterly filing obligations to update Form PF within a certain number of days after the end of each calendar quarter rather than fiscal quarter. This change is designed to improve the quality of the data FSOC receives.

Basic Information about all Private Fund Advisers and Private Funds: Section 1a and 1b

The amendments revise Section 1b of Form PF on which private fund advisers report certain identifying information about themselves and the private funds they advise.

- *Identifying Information*. The amendments require private fund advisers to provide additional identifying information, including legal identifiers, about the private fund adviser, its related persons, as well as the private funds.

- *Assets under Management*. Prior to the amendments, Question 3 of Form PF required private fund advisers to report assets under management and net assets under management attributable to private funds. The amendments now require private fund advisers to exclude the value of its private funds' investments in any other private fund managed by the private fund adviser ("Internal Funds") to avoid double counting. The amended instruction reflects the common understanding that a private fund adviser to a master feeder structure should not count both the master and feeder fund in determining the private fund adviser's RAUM.

- *Withdrawal and Redemption Rights*. The amendments require private fund advisers to each reporting fund (and not only private fund advisers to hedge funds) to disclose whether the fund provides investors with withdrawal or redemption rights "in the ordinary course." If the reporting fund does provide for redemptions or withdrawals, the frequency must be reported. The information must be reported notwithstanding any notice, gating, lockups or other restrictions. The SEC explains that, even though private equity and venture capital funds that would be covered if the amendments are adopted rarely provide investors with these rights, the information would give the FSOC a better "picture" of private funds.

- *Gross Asset Value and Net Asset Value*. The amendments require private fund advisers filing quarterly updates to report gross asset value and net asset value as of the end of each month of the reporting period rather than only reporting the information as of the end of the reporting period. The amendments also require private fund advisers to separately break out the value of unfunded commitments included in the gross and net asset values. This information will alert FSOC of funds in their early stages whose asset values consist primarily of unfunded commitments rather than capital that has been invested in underlying assets.

- *Inflows and Outflows*. The amendments add a new Question 14 asking about contributions to the reporting fund as well as withdrawals, redemptions and any distributions to investors. Private fund advisers are required to report the amount of all new contributions from investors, but exclude contributions of committed capital that they have already included in gross asset value calculated in accordance with Form ADV instructions. Quarterly filers would provide this information for each month of the reporting period. The SEC explained that information about cash flows would give FSOC better information about stresses on funds.

- *Borrowings and Types of Creditors*. Prior to the amendments, Question 18 of Form PF required private fund advisers to report the value of the reporting fund's borrowings and the types of its creditors. (The question is a short-form version of the more detailed reporting requirements applicable to large hedge funds in Section 2 of Form PF and thus not applicable to them.)

  However, the amendments codify SEC staff interpretations of Form PF in a new Question 18 to include "synthetic long positions" and provides a non-exhaustive list of other types of less exotic borrowings. In addition, the amendments require private fund advisers to report whether a creditor is based in the U.S. and, if it is, whether it is a U.S. depository institution (rather than a bank).

- *Fair Value Hierarchy*. Form PF requires private fund advisers to report assets and liabilities of reporting funds in categories based upon the fair value hierarchy of U.S. GAAP. The amendments require private fund advisers to report the date of categorization, the absolute value of liabilities and an explanation of any negative valuations. Cash and cash equivalents would be separately reported but not based on the fair value hierarchy.

> *Beneficial Ownership*. The amendments require private fund advisers to provide more granular information regarding beneficial owners of the reporting fund's equity. Question 22 (previously Question 16) has now been amended to ask whether certain groups of investors are or are not U.S. persons (broker-dealers, insurance companies nonprofits, pension plans, banking and thrift institutions) and whether beneficial owners that are themselves private funds are Internal Funds or are "external funds." Private fund advisers that report beneficial owners in the "other" category must also explain (in Question 4) why the owners would not qualify for other groups and explain the selection of "other."

> *Fund Performance*. The amendments change the way funds report performance information in a number of respects, including the circumstances when monthly and quarterly performance must be reported (when reported to investors, *et al*.) and the currency in which it is reported (the one used in reports to investors), and when dollar-weighted return should be reported ("IRR") instead of time-weighted return (i.e., when IRR is reported to investors, *et al*.).

Amendments to Reporting for all Hedge Funds: Section 1c

Section 1c of Form PF reports information about hedge funds. The amendments revise the way private fund advisers report information about the strategies they employ, counterparty exposures and trading and clearing mechanisms.

> *Fund Investment Strategies*. The amendments expand and update the current reporting requirements of hedge fund strategies (including the percentage of fund assets represented by the strategy), including more granular types of equity strategies (factor driven, statistical arbitrage and emerging markets) and debt strategies (litigation finance, emerging markets and asset backed/structured products). New categories include real estate and digital assets. Private fund advisers that select the "other" category of strategies are required to explain why in Question 4.

> *Counterparty Exposures*. The amendments require additional information about a hedge fund's borrowing and financing arrangements and its exposure to counterparties (its non-portfolios credit exposure). The new table would not apply to large hedge funds, which are required by proposed new Questions in Section 2 to report the same exposures on a quarterly basis. Responses to new Questions 26 through 28 would be reported annually.

New Question 26 requires private fund advisers to hedge funds (other than Qualifying Hedge Funds) to complete a new "consolidated counterparty exposure table" reporting the aggregate number of exposures that the reporting fund has to creditors and counterparties. The information in the new table would be broken down into the various types of exposures (e.g., secured and unsecured debt, margin, reverse repos, cleared and uncleared derivative positions, and short positions).

New Question 27 requires private fund advisers to hedge funds to identify significant fund counterparties. Prior to the amendments, Question 22 required private fund advisers to identify and provide information about the five creditors and counterparties to which the fund has the greatest mark-to-market exposure. Instead, new Question 27 requires private fund advisers to only identify counterparties to which the fund's total mark-to-market exposure (before posted collateral) is equal to or greater than, either (i) five percent of net asset value as of the data reporting date or (ii) $1 billion. If there are more than five such counterparties, the private fund adviser only would report the five counterparties to which the reporting fund owes the largest dollar amount. If there are fewer than five such counterparties, the private fund adviser would only report the counterparties meeting the threshold. New Question 28 replaces former (pre-amendment) Question 23 and provides information about counterparties' that have the greatest exposure to the fund using a similar test (except that posted collateral would not reduce the exposures).

The amendments instruct that filers should not net counterparty exposure between a reporting fund and any Trading Vehicles in which it owns an interest unless the reporting fund guarantees the Trading Vehicles obligations.

> *Trading and Clearing Mechanisms*. Pre-amendment Form PF required private fund advisers to report estimates of the volume of securities, derivative and repo trades that were traded and cleared using various modes (e.g., on a regulated exchange or swap execution facility, bilaterally, etc.). The information gives FSOC an understanding of the extent to which a fund trades away from regulated exchanges and clearing systems. The amendments to Form PF require the information to be provided in response to new Questions 29 and 30 the same information except in dollar values rather than as a percentage of value and trading volume.

Amendments for Hedge Fund Advisers: Section 2

Large Hedge Fund Advisers must file Section 2 of Form PF with respect to any Qualifying Hedge Funds that they advise.

The amendments eliminate some reporting requirements for hedge fund advisers, but substantially increase reporting for Qualifying Hedge Funds. All of the changes appear intended to improve the data set FSOC receives, will require significant retooling of fund administrators' systems and, in some cases, collection of new information.

> *Elimination of Section 2a*. The amendments eliminate the three current questions (former Questions 26, 27 and 28) comprising Section 2a, which required reporting of aggregate information about hedge funds sub-asset class exposure, turnover and the geographical breakdown of their investments. Similar questions in the amended Section 2 (new Questions 32, 34 and 35) would provide FSOC with similar information, although only from the larger Qualifying Hedge Funds.

> *Investment Exposure Reporting*. The amendments replace the table in former Question 30 (re-designated as Question 32) with a series of "drop down" menu selections for each sub-asset class and the information required for each. The question continues to require the aggregate dollar value of long and short position to various asset sub-classes for each Qualifying Hedge Fund, but the amendments now require a significant number of changes to data requirements.

> > *Sub-Asset Class Reporting*. The amendments merge some sub-classes and tailor the responses to require reporting by "instrument type" within the asset classes to identify whether the exposure is achieved through cash or physical investment exposure, through derivatives or other synthetic positions, or indirectly through a pooled investment vehicle (subject to a de minimis test). Pre-amendment Form PF permitted private fund advisers to combine such exposures when reporting certain debt and other sub-classes and to report pooled interest positions without regard to the indirect exposures; although such combined reporting is no longer permitted under the amended version of the Form.

> > *Adjusted Exposure*. The amendments also add new "adjusted exposure" metric for each sub-asset class, which nets the long and short positions that are in same sub-asset class and share the same reference security. The amendments also prescribe a uniform method of calculating interest rate risk required to be reported on certain debt obligations.

> *Currency Exposures*. Prior to the amendments, Form PF (in former Question 30) required private fund advisers to report direct exposure to currency for sub-asset classes related to foreign-exchange derivatives and non-US currency holdings. The amended Form expands currency exposure by adding a new Question 33 that would also require reporting of significant indirect currency exposures, i.e., those exposures from a holding of a pooled investment vehicle the value of which is equal to or greater than either five percent of net asset value or $1 billion.

> *Country and Industry Exposures*. Prior to the amendments, Form PF (in former Question 28) required private fund advisers to report geographic exposures across eight regions and six countries based on the percent of the reporting fund's net asset value. The amendments replace Question 28 with a new Question 35 that requires reporting of the long and short value of a fund's exposure to various countries, and also adds a new Question 36 that requires reporting of a fund's industry exposure, each as of month-end. In responding to new Questions 35 and 36, private fund advisers would identify exposures, in either case, that are equal to or greater than either (i) five percent of net asset value as of the data reporting date or (ii) $1 billion. Private fund advisers would be required to report, based on reasonably estimates, country and industry exposures that are direct or indirect (e.g., through an investment in other private funds, mutual funds, ETFs). Country exposures would be reported using International Organization for Standardization (ISO) codes, and industry exposures would be reported using the respective by North American Industry Classification System (NAICS) codes.

> *Turnover*. Prior to the amendments, Form PF (in former Question 27) required private fund advisers to report a fund's portfolio turnover for each month across ten categories of sub-asset classes (e.g., listed equities, corporate bonds and sovereign and municipal bonds). The amendments replace this question with a similar new Question 34, which has been expanded to include a number of additional categories (e.g., listed equity derivatives, foreign exchange derivatives and derivative exposure to sovereign bonds).

> *Reporting Reference Assets*. One of the most significant changes in the amendments is related to reporting of granular information regarding "reference assets" (also commonly referred to as the underlying assets, in the case of a derivative or option contract). Prior to the amendments, private fund advisers were permitted to provide summary information regarding the total number of their open positions and to report large positions that were greater than 5% of the reporting fund's net asset value. However, the SEC and FSOC have found it difficult to make meaningful comparisons among funds because private fund advisers use different methods for calculating their open positions. The amendments redesign these questions to provide insights regarding concentrated positions held by funds.

> > *Open Position Reporting*. In new Question 39, private fund advisers would be required to identify the total number of reference assets, of which the reporting fund had a "netted exposure" during each month. Netted exposure is calculated by offsetting any long and short positions of the same underlying to more accurately reflect the true economic exposure to the reference asset, whether net long or net short. In addition to counting the number of long and short reference assets, new Question 39 would also require private fund advisers to report, for each month, (i) the percentage of the fund's net assets represented by the reference assets that comprise the fund's top five long and short positions, and (iii) the percentage of the reporting fund's net assets that are comprised of the reference assets which make up the fund's top 10 long and short netted positions.

> > *Large Position Reporting*. New Question 40 requires private fund advisers to report, for each month, detailed information about reference assets that represent concentrated positions, including: a description of the asset; its CUSIP or Ticker; the dollar value of the long and/or short position; and its netted exposure. This proposed change would afford FSOC with regular insights into proprietary portfolio information about the reporting fund.

Prior to the amendments, Form PF only required private fund advisers to report large positions by sub-asset class, and did not require such precise information about large positions.

> *Counterparty Exposures*. The amendments include a new Question 41, which creates a consolidated counterparty exposure table similar to the new consolidated counterparty exposure table in Question 26 in section 1c. This table requires reporting of the aggregate number of exposures that a Qualifying Hedge Fund has to creditors and counterparties, broken down into the various types of exposures (e.g., secured and unsecured debt, margin, reverse repos, cleared and uncleared derivative positions, and short positions). However, unlike the table in section 1c, Question 41 requires information to be reported monthly, rather than annually, and expands the data collected (e.g., private fund advisers would report the expected impact to posted collateral in the event margin increased by one percent of the position size). New Question 41 would replace former Questions 43, 44, 45 and 47, which are now deleted.

New Questions 42 and 43 require private fund advisers to Qualifying Hedge Funds to identify significant fund counterparties, similar to new Questions 27 and 28 in section 1c. New Question 42 requires private fund advisers to identify counterparties to which the fund's total mark-to-market exposure (before posted collateral) is equal to or greater than, either (i) five percent of net asset value as of the data reporting date or (ii) $1 billion. In New Question 42(a), the private fund adviser would identify its top five counterparties, meeting this significance test, and on a counterparty-by-counterparty basis complete an "individual counterparty exposure table," broken down into the various types of exposures. New Question 42(b), on the other hand, would require the private fund adviser to identify all other significant counterparties, which also meet this same significance test, but would only require aggregate information about the total amount borrowed and the total collateral posted. Finally, new Question 43 requires information about counterparties' that have the greatest exposure to the fund using a similar test (except that posted collateral would not reduce the exposures) and would have an analogous Question 43(a) with an individual counterparty exposure table for the fund's top five debtors and Question 43(b) would require aggregate information for all other significant debtors if the fund.

> *Market Factors*. The amendments require private fund advisers to report data for all market factors that the fund's portfolio is directly exposed to, and providing such stress testing information will no longer be optional even if the private fund adviser does not regularly consider the factors in any formal testing. Private fund advisers would report data indicating how the reporting fund would be impacted, to both its long and short holdings, by certain increases or decreases in equity prices, interest rates, volatility, currency rates and commodity prices, among other market movements. The SEC believes this information would allow it to better track common market factor sensitivities, as well as correlations and trends in those market factor sensitivities, thereby giving it better insight to certain systemic risk.

> *Additional Data to be Reported*. The amendments also include several other data changes and additions, which range from minor tweaks in the presentation of existing data to new Questions seeking information that the private fund adviser is not required to report in the current version of Form PF.

(iv) Amendments to Regulation S-P

As summarized in the 2023 PIF Annual Review, the SEC released proposed amendments to Regulation S-P on March 15, 2023. On May 16, 2024, the SEC adopted these amendments.[8]

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8 Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information, SEC Release Nos. 34-100155; IA-6604; IC-35193 (May 16, 2024).

As adopted, the amendments impose enhanced requirements on registered investment advisers, investment companies, broker dealers and transfer agents (“covered firms”) with respect to handling of consumer financial information. The amendments principally focus on the responsibilities of covered firms with respect to data security incidents that impact customer non-public personal information (“customer information”).

As amended, Reg S-P now requires:

- ***Incident Response Program***: Covered firms are now required to develop, implement and maintain written policies and procedures for an incident response program that is “reasonably designed to detect, respond to and recover from unauthorized access to or use of customer information.” The program must include procedures to:

  - assess the nature and scope of an incident involving unauthorized access to or use of customer information;

  - identify the types of customer information that may have been subject to such unauthorized access or use;

  - take “appropriate steps” to contain and control the incident and to prevent further unauthorized access to or use of customer information; and

  - notify each affected individual whose “sensitive customer information”[9] was, or is reasonably likely to have been, accessed or used without authorization “unless the sensitive customer information has not been, and is not reasonably likely to be, used in a manner that would result in substantial harm or inconvenience.”[10]

- ***Incident Notification***: Where a covered firm experiences a data security incident impacting sensitive customer information that is or is reasonably likely to be used in a manner that would result in substantial harm or inconvenience, the covered firm must notify affected individuals within **30 days**. The as-adopted version of the amendments includes prescriptive rules for what needs to be contained in incident notifications that covered firms should carefully review.

  - The only exception to the 30-day notice requirement is a written notice from the U.S. Attorney General to the covered firm that the required notice poses a substantial risk to national security or public safety.

Notably, the final amendments do not include rules proposed in the draft amendments that would have imposed prescriptive requirements for written agreements with service providers with respect to data security and incident notification. However, the amended rules do impose requirements on covered firms to ensure they exercise thorough oversight and monitoring of service providers and implement policies and procedures to ensure service providers protect customer information and notify covered firms of a security breach impacting customer information within 72 hours of becoming aware of a breach — all requirements

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9 “Sensitive customer information” is defined as “any component of customer information alone or in conjunction with any other information, the compromise of which could create a reasonably likely risk of substantial harm or inconvenience to an individual identified with the information.” The final definition provides examples of sensitive customer information, including: (a) identification numbers such as SSNs, driver’s license and passport numbers and employer or taxpayer ID numbers; (b) biometric records; (c) unique electronic identification numbers, addresses or routing codes; (d) telecommunications identifying information or access devices that can be used to obtain money, goods or services or to initiate a transfer of funds and (e) customer account information in combination with account access information.

10 As adopted, the amendments delete the proposed amendments’ proposed definition of “substantial harm or inconvenience” which — had that proposed version been adopted — would have included a new standard not previously used in the GLBA of “more than trivial,” with various examples such as theft, fraud and physical harm. The final, as-adopted version of the amendments leaves “substantial harm or inconvenience” undefined, consistent with GLBA.

which, as a practical matter, will necessitate that service provider agreements have appropriate provisions around data security protections and breach response.

The amendments became effective on August 2, 2024. However, compliance with the amended rule will not be required until the Compliance Date. In general, compliance with the amendments will not be required until December 3, 2025 for larger firms, or June 3, 2026 for smaller firms.

The following table summarizes the SEC's criteria for defining "larger" firms. All other firms not meeting the "larger" firm criteria are considered "smaller" firms.

Entity	Qualification to be Considered a "Larger" Entity
Investment companies together with other investment companies in the same group of related investment companies	Net assets of $1 billion or more as of the end of the most recent fiscal year
Registered investment advisers	$1.5 billion or more in assets under management
Broker-dealers	All broker-dealers that are not small entities under the Exchange Act for purposes of the Regulatory Flexibility Act
Transfer agents	All transfer agents that are not small entities under the Exchange Act for purposes of the Regulatory Flexibility Act

(v): Inflation Adjustment to Qualifying Venture Capital Fund Criteria Under Section 3(c)(1)(C)(i) of the Investment Company Act

On August 21, 2024, the SEC adopted Rule 3c-7 under the Investment Company Act, adopting it as proposed.[11] The rule implements the inflation adjustment requirements relating to "qualifying venture capital funds" under Section 3(c)(1)(C)(i) of the Investment Company Act, as amended by the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.

More specifically, Section 3(c)(1) of the Investment Company Act provides for an exception from the definition of "investment company" for issuers that are beneficially owned by not more than one hundred persons — or, in the case of a qualifying venture capital fund, 250 persons — and which is not making and does not presently propose to make a public offering of its securities. Section 3(c)(1)(C)(i) originally defined "qualifying venture capital fund" to mean a venture capital fund (as defined under Advisers Act Rule 203(l)-1) that has not more than $10,000,000 in aggregate capital contributions and uncalled committed capital, with such dollar amount to be indexed for inflation once every five years beginning on a date selected by the SEC, rounded to the nearest $1,000,000.

Effective September 30, 2024, new Rule 3c-7 sets the initial inflation adjustment at $12,000,000 in aggregate capital contributions and uncalled committed capital. The rule also provides that this amount will be inflation-adjusted again by order of the SEC on or about November 1, 2029 and approximately every five years thereafter.

[11] Qualifying Venture Capital Funds Inflation Adjustment, SEC Release No. IC-35305 (Aug. 21, 2024).

(vi): Judicial Invalidation of and Other Challenges to SEC Rulemaking in 2024

Private Fund Adviser Rules: Vacated by Fifth Circuit, SEC Declines to Appeal

On June 5, 2024, a unanimous three-judge panel for the U.S. Court of Appeals for the Fifth Circuit vacated what had come to be known as the Private Fund Adviser Rules, a set of rules and amendments adopted by the SEC in August 2023.[12] The rules had been heavily criticized by private fund advisers and various related industry groups as being unduly burdensome and costly and were widely viewed as among the most significant and impactful regulatory requirements to be imposed on this industry in the post-Dodd-Frank era. For a description of the rules, please see the 2023 PIF Annual Review.

The vacated rules include the following:

- The Preferential Treatment Rule
- The Restricted Activities Rule
- The Quarterly Statement Rule
- The Adviser-Led Secondaries Rule
- The Private Fund Audit Rule
- Amendments to the Advisers Act Compliance Rule
- Related amendments to the Advisers Act Books and Records Rule

Background

The SEC had adopted the Private Fund Adviser Rules in an attempt to address what it identified as three failings across a broad range of private funds in the market: (i) lack of transparency to private fund investors, (ii) under-disclosed or failures to disclose conflicts of interest and (iii) governance structures within private funds that were not designed to prioritize investor oversight of the fund's investment adviser. Claiming authorization under Sections 211(h) and 206(4) of the Advisers Act and citing the potential for investor harm as well as instances of investor harm observed by the SEC in examinations and enforcement actions, the SEC passed a number of new and amended rules intended to address these issues.

Shortly following the rules' adoption, six trade associations brought a petition seeking to have the rules vacated on the basis that they exceeded the SEC's authority, were passed with insufficient notice and opportunity to comment and were otherwise arbitrary and capricious, all in violation of requirements for SEC rulemaking under the Advisers Act.[13]

The Court's Decision

The court issued its decision on June 5, 2024, vacating the rules on the grounds that the SEC exceeded its statutory authority, finding that neither Section 211(h) nor Section 206(4) granted the SEC the authority to adopt these Rules. While the plain language of Section 211(h) seemingly grants broad authority to the SEC to enact rules such as these (including the power to enact rules requiring "simple and clear disclosures to investors . . . including any material conflicts of interest" as well as rules "prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes"), the court applied principles of statutory interpretation to conclude that Congress had intended to limit such rulemaking authority only to the context

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12 National Association of Private Fund Managers v. SEC, No. 23-60471, (5th Cir. June 5, 2024).

13 For more information about this lawsuit, please see our earlier posting: Lawsuit Challenges Private Fund Adviser Rules (September 6, 2023).

of investment adviser interaction with retail customers, not private funds or private fund investors. Thus, the SEC could not rely upon Section 211(h) to issue these Rules.

The court came to the same conclusion in analyzing Section 206(4), which requires the SEC to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative" regarding "any investment adviser." The court emphasized the statute's requirement that the SEC must first "define" an act, practice or course of business to be "fraudulent, deceptive, or manipulative," noting that only after the SEC has "defined" the problematic conduct would the SEC then become empowered by this section of the statute to adopt rules intended to prevent that conduct. The court then concluded that the SEC had simply failed to meet that burden: "The Commission largely fails to "define" the fraudulent acts or practices that the Final Rule purportedly is designed to prevent."[14] The court also found that the rules did not meet the "reasonably designed" requirement, citing to what it viewed to be clear legislative intent to regulate investment advisers' conduct towards private funds and private fund investors more lightly: "By congressional design, private funds are exempt from federal regulation of their internal "governance structure." . . . The Commission cannot promulgate rules under the guise of section 206(4) that affects this internal governance structure."

Finding that the SEC had no statutory authority on which to rely, the court then vacated the rules.

The Decision's Aftermath

The SEC declined to appeal the court's ruling, either to the Fifth Circuit for a rehearing or to the Supreme Court. As a result, the rules were and remain vacated with effect from June 5, 2024 (the date of the court's order). On November 19, 2024, the SEC adopted technical amendments to remove these rules from the Code of Federal Regulations.[15]

However, the SEC and its staff have long considered problematic the underlying conduct targeted by the Rules. That conduct has been the focus of SEC examination and enforcement efforts for many years, including during the prior Republican-led administration from 2016-2020. It is therefore likely that such conduct will remain a focus going forward, albeit under longstanding fiduciary/disclosure principles rather than through the application of the rules' bright-line requirements and prohibitions.

Ongoing Litigation Regarding Short Sale Rule and Securities Lending Rule: Oral Arguments Heard by Fifth Circuit

The SEC was sued in December of 2023 in a lawsuit brought by two industry groups challenging the validity of the SEC's two short-sale related rules: Rule 13f-2 (the "Short Sale Rule") and Rule 10c-1a (the "Securities Lending Rule").[16] The basis claimed for this action was an allegedly defective cost-benefit analysis, and a claim that the SEC did not adequately consider the interconnectedness of the short selling and securities lending markets by adopting what plaintiffs state are inherently contradictory approaches to the two rules.

On October 7, 2024, the Fifth Circuit Court of Appeals heard oral arguments in the case.[17] During the proceedings, judges questioned whether the SEC had truly considered the interconnectedness between the two rules, particularly in light of the Securities Lending Rule's requirement to report daily aggregate securities lending (often viewed as an approximation of short-selling activity in the market) and the SEC's

[14] Notably, the court criticized the SEC for presenting little to no evidence of actual fraud: "And while some conduct could involve fraud, the Commission only has observed misconduct by about 0.05% of advisers. …The Commission's vague assertions fall short of the definitional specificity that Congress has required."

[15] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, SEC Release No. IA-6773 (Nov. 19, 2024).

[16] For a description of the rules, please see the 2023 PIF Annual Review.

[17] A recording of the oral arguments can be accessed at the Fifth Circuit's website at: ca5.uscourts.gov/OralArgRecordings/23/23-60626_10-7-2024.mp3.

statements in connection with the Short Sale Rule that detailed frequent disclosures about short-sale activity could harm market participants. In response, the SEC's attorney explained that in fact the SEC had considered this issue, which is why the final Securities Lending Rule delayed reporting of the most sensitive component of the reported information — loan size — by 20 business days.

A decision is expected from the court at some point during 2025. As adopted, the Compliance Date for the Short Sale Rule was set as January 2, 2025, however the SEC recently announced a one-year exemption from filings under this rule until January 2, 2026, which is also the Compliance Date for the Securities Lending Rule.[18] Filers required to file Form SHO under the Short Sale Rule therefore are not required to file until February 14, 2026, and may not be required to file at all if the rule is vacated by the court before then.

District Court Vacates SEC's Definition of "As Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer

On November 21, 2024, the U.S. District Court for the Northern District of Texas, considering two related cases, vacated the Amended Dealer Definitions (i.e., Rules 3a5-4 and 3a44-2 under the Exchange Act),[19] which took effect on February 6, 2024, and had the practical effect of greatly expanding the scope of market participants required to register with the SEC as "dealers." As noted above, the Amended Dealer Definitions include many market participants that do not traditionally identify as dealers, such as proprietary trading firms. In siding with the plaintiffs, the court concluded that the SEC had expanded the definition of dealer to an extent that was "untethered from the text, history, and structure" of the Exchange Act.

On January 17, 2025, in one of the outgoing administration's final actions, the SEC filed a notice of appeal of the District Court's decision. However, the SEC withdrew its appeal on February 19, 2025, one month into the new administration. Thus, the Amended Dealer Definitions remain vacated.

(vii): Proposed Rules Remaining in the Pipeline as 2025 Begins

Although the SEC was very active in its rulemaking agenda over the course of 2024, not all of its proposed rules emerged in final adopted form during 2024. These proposed rules, which will be left in the hands of the incoming administration to determine whether or not to finalize and adopt, include the following:

- The Cybersecurity Rule for Investment Advisers, Registered Investment Companies and Business Development Companies[20]
- The ESG Disclosure Rule for Investment Advisers and Investment Companies[21]
- The Outsourcing Rule[22]

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18 For more information about this exemption, please see our earlier posting: SEC Extends Compliance Date for Short Sale Reporting Rule to 2026 (February 10, 2025).

19 Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers, SEC Release No. 34-99477 (Feb. 6, 2024).

20 Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies and Business Development Companies, SEC Release Nos. 33-11028; 34-94197, IA-5956, IC-34497 (Feb. 9, 2022). For a description of the proposed rule, please see the 2023 PIF Annual Review.

21 Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, SEC Release Nos. IA-6034, IC-34594 (May 25, 2022). For a description of the proposed rule, please see the 2023 PIF Annual Review.

22 Outsourcing by Investment Advisers, SEC Release No. IA-6176 (Oct. 26, 2022). For a description of the proposed rule, please see the 2023 PIF Annual Review.

> Amendments to the Custody Rule (to be renamed the Safeguarding Rule)[23]

> The Predictive Data Analytics Rule[24]

It has been widely reported that the incoming administration intends to reduce the overall regulatory burdens faced by a wide variety of U.S. businesses, including the burdens imposed by SEC regulations. Accordingly, while no specific indications have yet been given as to whether the SEC intends to drop or to continue supporting any of the above proposed rules, they can all be expected to be subject to review and reassessment. Adoption is by no means assured and, even if some of these proposed rules are eventually adopted, significant modifications to their proposed terms are possible.

CFTC / NFA Updates

Enforcement Activity

The CFTC reported that its Division of Enforcement, in its fiscal year ending September 30, 2024, filed 58 enforcement actions, resulting in over $17.1 billion in penalties, restitution and disgorgement. The CFTC continues to focus on matters involving digital assets, with 10 of the 58 enforcement actions related to digital assets. These included settlements with FTX and Alameda Research, resulting in the largest recovery for victims and sanctions in CFTC history, as well as a first-of-its-kind settlement with Binance for operating an illegal digital assets derivatives exchange and willfully evading or attempting to evade the Commodities Exchange Act and CFTC regulations.

CFTC Finalizes Scaled-Back Amendments to Rule 4.7

On September 12, 2024, the CFTC approved a final rule to amend Rule 4.7 to:

- update the definition of "Qualified Eligible Person" ("QEP") to require that a QEP:
  - own securities of issuers not affiliated with the QEP and other investments with an aggregate market value of at least $4 million,
  - have at least $400,000 of exchange specified initial margin, option premiums and required minimum security deposits for retail forex trades on deposit with a futures commission merchant ("FCM") at any time during the six month period prior to the purchase of the pool participation, or
  - own a portfolio comprised of a combination of the requirements in the preceding paragraphs where the QEP satisfies a portion of each test that, when combined, would be equal to or greater than 100%; and
- permit Commodity Pool Operators ("CPOs") of funds-of-funds operating under Rule 4.7 to distribute monthly account statements to the pool participants within 45 days of month end, provided that the CPO notifies its QEP pool participants that they are electing this alternative disclosure schedule.

In a departure from the proposed rule, the final rule does not require CPOs and Commodity Trading Advisors ("CTAs") relying on Rule 4.7 to provide certain minimum disclosures to potential and current

[23] Safeguarding Advisory Client Assets, SEC Release No. IA-6240 (Feb. 15, 2023). For a description of the proposed rule, please see the 2023 PIF Annual Review.

[24] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, SEC Release Nos. 34-97990, IA-6353 (Jul. 26, 2023). For a description of the proposed rule, please see the 2023 PIF Annual Review.

participants in pools and advisory clients, including past performance information in the CFTC-required format.

CPOs and CTAs will be required to implement the increased portfolio requirements for QEPs by March 26, 2025, but CPOs will not be required to force existing pool participants to redeem, and CTAs will not be required to terminate existing advisory relationships. Investors who are "qualified purchasers" for purposes of the Investment Company Act will still automatically qualify as QEPs.

Please see "Derivatives" below for a discussion of the CFTC proposed rule potentially limiting event contracts.

Derivatives

In 2024, we have seen few new and amended rules from the CFTC and SEC relating to swaps, securities loans and short sales. The CFTC proposed amendments to its regulations that would prohibit event contracts involving certain activities, such as "gaming," from being listed on derivatives exchanges as contrary to the public interest. The CFTC and SEC also continue to actively use their statutory authority against those unlawfully offering or engaging in derivatives in the digital asset space.

CFTC

On May 10, 2024, the CFTC proposed amendments (the "Proposed Amendment") that would clarify the types of event contracts that fall within the scope of the Commodity Exchange Act ("CEA") as "gaming" contracts "contrary to the public interest". While not defined in the CEA or any of the CFTC's other regulations, "event contracts" are generally understood to be binary derivative contracts with a payout based on the outcome of an underlying occurrence or event. Under the Dodd-Frank Act, the CFTC was granted statutory authority to prohibit certain event contracts from being listed for trading on a registered exchange, if the contract involves one of five enumerated activities, which includes "gaming," and the CFTC determines that such contract is contrary to the public interest. The CFTC currently has a 90-day period to review all such contracts and determine whether they are contrary to the public interest. According to the CFTC, the past several years have witnessed a significant increase in the number and diversity of event contracts listed for trading by CFTC-registered exchanges, including those addressing political and economics related events. In light of the rapidly expanding market for these political and economics focused event contracts, the CFTC's Proposed Rules, if finalized, would more clearly specify the types of event contracts which can be listed on exchanges and, potentially, prohibit entire categories of event contracts from trading and clearing on CFTC registered exchanges as "gaming" contracts.

The Proposed Amendment also expands the definition of "gaming" to include "staking" or risking by any person of something of value on (i) the outcome of a political contest, including an election or elections; (ii) the outcome of an awards contest; (iii) the outcome of a game in which one or more athletes compete; or (iv) an occurrence or non-occurrence in connection with such a contest or game, regardless of whether it directly affects the outcome.

Crypto

Please see "Digital Assets Updates" for a summary of noteworthy developments applicable to crypto derivatives.

FINRA

There were no material changes to the FINRA rules impacting derivatives.

SEC

There were no material changes to the SEC rules impacting derivatives.

Alternative Data

Alternative data, or data garnered from non-traditional sources, has become a key input for many fund managers' investment decision-making processes. This continues to be the case, particularly given the uncertain economic conditions of the past year.

Alternative data sources offer advisers information that can't be found in traditional reviews of company filings, conversations with management and/or in the traditional review of news articles. Examples of alternative data include geolocation (e.g., foot traffic), credit card transactions, email receipts, point-of sale transactions, website usage, mobile app or app store analytics, satellite images, social media posts, online browsing activity, shipping container receipts, product reviews, price tracking, shipping trackers, internet activity and quality data, as well as many other sources.

SEC Exam/Enforcement Focus

In the years since the SEC's first enforcement action against an alternative data provider in 2021, the SEC Exams Division has included reviews of the acquisition and use of alternative data as part of a series of routine and sweep examinations.

> The Exams Division noted in its 2023 Examination Priorities that it would scrutinize whether registered investment advisors to private funds and firms are implementing appropriate policies and practices around the use of alternative data and use of potentially MNPI obtained through alternative data sources.

> And again in its 2024 Examination Priorities, the Exams Division stated that it "remains focused on certain services, including automated investment tools, artificial intelligence, and trading algorithms or platforms, and the risks associated with the use of emerging technologies and alternative sources of data."

> In its 2025 Examination Priorities, the Exams Division reiterated its focus on "risks associated with the use of emerging technologies and alternative sources of data." Although the topic did not appear extensively in the SEC's latest exam priorities, alt data compliance has become a routine area of inquiry in exams, particularly for heavy users of alt data. Of course, with a new Administration, the SEC's focus and scrutiny may shift in this, and other related areas, though perhaps not as great a shift as is expected in the regulation of crypto and decentralized finance (DeFi).

Given the demand for alternative data in this economy, firms remain interested in new sources and analytics and vendors are continuing to launch new products that commercialize novel insights or newly-collected data. Thus, it remains important to understand how the SEC views the oversight of alternative data vendors and their datasets by advisers. Our general advice surrounding compliance remains the same:

> The Exams Division believes that an adviser should have written policies and procedures crafted to address the creation, acquisition, use and ongoing surveillance of alternative data vendors (as well as the adviser's own staff when the staff is creating its own alternative data).

> Those policies and procedures should be periodically reviewed and updated to take into account changing circumstances in both the alternative data industry in general, and with respect to how the adviser uses alternative data in particular.

> The Exams Division would expect to see written records reflecting the adviser's due diligence of alternative data vendors and the applicable data sets being acquired and that such documentation should show how any "red flags" that were identified during the due diligence process were resolved.

> The Exams Division may inquire whether advisers are conducting simple Google searches of alternative data vendors to see whether there were any issues regarding vendors that were easily identifiable.

> The Exams Division may expect to see more disclosure around alternative data in an adviser's Form ADV Part 2.

In addition, in light of the wide implementation of generative AI ("GenAI") and the well-known limitations of current GenAI models (e.g., inaccurate output, or "hallucinations," and bias), it behooves firms to conduct due diligence to find out if their alternative data vendors use GenAI. Relevant questions might include what models are being deployed, how GenAI is being used in data collection or analytics, what guardrails or human processes are in place to ensure data quality, and how the company is positioning itself for compliance with future laws and industry standards applicable to AI.

FTC Focus

General. The Federal Trade Commission ("FTC") has continued its attention to what it calls the "opaque" marketplace for mobile location data and the subsequent sharing and sale of information to data aggregators and brokers that then sell data access or data analysis products to marketers, researchers, or other businesses interested in gaining insights from alternative data sources. The FTC has previously stated on its Business Blog that the misuse of mobile location and health information, including reproductive health data," exposes consumers to significant harm," and in 2024 added: "[A] particular FTC concern is the extent to which collecting location data can reveal where people live and work, where they worship…and other sensitive information collected without consumers understanding what's going on…." Moreover, in the age of AI, developers are hungry for more data for training and testing. In a past Business Blog post, the FTC pointed out that given this reality, the agency "will hold companies accountable for how they obtain, retain, and use the consumer data that powers their algorithms." More recently, the FTC commented on companies changing the terms of their privacy policy so that they are no longer limited in the ways they can use data, including for AI training purposes. In a Business Blog post, the agency reminded companies of certain obligations: "It may be unfair or deceptive for a company to adopt more permissive data practices—for example, to start sharing consumers' data with third parties or using that data for AI training—and to only inform consumers of this change through a surreptitious, retroactive amendment to its terms of service or privacy policy."

Three Major Enforcement actions involving Consumer Data. In 2024, the FTC brought actions against – and reached proposed settlements with three business ventures engaged in the collection, use and sharing of certain consumer information.

> *In re X-Mode Social, Inc.*, FTC No. 2123038

> *In re InMarket Media, LLC*, FTC No. 2023088

> *In re Avast Limited*, FTC No. 2023033

Two of the actions involved the collection of location data and the third involved the collection of browsing-related information. These actions, as well as the FTC's ongoing *Kochava* litigation and recent FTC blog posts and statements, suggest that location data and browsing information is ongoing FTC focus for the foreseeable future (which may or may be reconsidered in the new Administration).

Locational Data – X-Mode and InMarket Enforcements

In January 2024, the FTC finalized the settlement and consent order with X-Mode Social, Inc. and its successor Outlogic (collectively, "X-Mode") with respect to allegations that the company improperly collected and sold consumers' location data to third parties from various industries (including governmental contractors). Shortly thereafter, the FTC finalized the settlement and proposed consent order with InMarket

Media, LLC ("InMarket"), also over similar allegations that the company improperly collected and sold location data to third parties for advertising and marketing purposes.

The X-Mode Complaint alleged that X-Mode collected or purchased consumer location data from its own apps, third party apps and other sources and then sold that data to participants in various industries, as well as to private government contractors. According to the FTC, the data X-Mode sold was not anonymized and in fact was generally associated with mobile advertising IDs (MAIDs) such that the recipient of the data could match an individual consumer's mobile device with the exact locations they visited, including sensitive locations such as medical clinics and places of worship.

The InMarket Complaint is similar in many respects to the X-Mode Complaint. Here again, the FTC alleged that location data was collected and purchased from mobile devices via an SDK and from other sources, and subsequently matched that information with other specific details, all without appropriate notice and consent.

The remedies included in both the X-Mode and InMarket Orders are extensive and not necessarily limited to issues related to Sensitive Location Data. And while many are common across both Orders, there are some differences. For example, while the X-Mode Order prohibits (subject to certain exceptions) X-Mode from using Sensitive Location Data, the InMarket Order includes not only a similar prohibition on Sensitive Location Data, but also a prohibition on selling or licensing of "Location Data" "in exchange for any valuable consideration." Both Orders require the respondents going forward to obtain Affirmative Express Consent to the collection and use of location data.

Another key point: both Orders require implementation of SDK Supplier Assessment Programs to ensure that consumers have provided Affirmative Express Consent for the collection and use of Location Data obtained from third party apps via an SDK. The Orders also mandate the implementation of Sensitive Location Data Programs overseen by senior officers.

Browser Information – Avast Enforcement

In June 2024, the FTC finalized a $16.5 million settlement and consent order with software provider Avast Limited and two subsidiaries including Jumpshot, Inc. (collectively, "Avast"). The FTC claimed that Avast licensed or sold detailed web browsing information to third parties through a variety of products, despite promises that its anti-tracking privacy software would protect consumers from online tracking. The FTC alleged that to the extent Avast did describe its information collection and sharing practices, Avast claimed that any sharing of user information would be in "anonymous and aggregate" form, when, in fact, according to the FTC, Avast sold consumers' browsing information to third parties in non-aggregate, re-identifiable form. The FTC asserted that the Avast products provided data buyers with "extraordinary" detail about consumers' browsing habits (e.g., webpages visited, timestamps, location, and a persistent identifier to allow tracking over time) and included various data insights, such as browsing sessions, search terms, e-commerce shopping events, and transactions.

Parsing the language of all of the Orders, the FTC's position appears to be that contractual practices that facially appear to ensure consumer privacy compliance may be insufficient, if not backed by certain diligence practices to assure proper consumer notice and consent. This is borne out in the agency's commentary on the InMarket Order: "InMarket's primary mechanism for ensuring that consumers have provided appropriate consent is through contractual requirements with its third-party app partners. However, contractual provisions, without additional safeguards, are insufficient to protect consumers' privacy."

Kochava Enforcement Update. Back in August 2022, the FTC filed a complaint against Kochava, Inc. ("Kochava"), a digital marketing and analytics firm, seeking an order halting Kochava's alleged acquisition and downstream sale of "massive amounts" of precise geolocation data collected from consumers' mobile devices. The complaint alleges that the data is collected in a format that would allow third parties to track consumers' movements to and from sensitive locations, including those related to reproductive health, places of worship, homeless and domestic violence shelters, addiction recovery centers, and their private residences, among others. The FTC also alleged that the location data provided by Kochava to its customers was not anonymized and that the data may be used to track consumers to sensitive locations and poses an unwarranted privacy risk likely to cause substantial injury to consumers, thus constituting an unfair business practice.

In February 2024, the Idaho district court denied Kochava's motion to dismiss the FTC's amended complaint. The court found the amended pleadings "significantly expands the factual allegations in its original Complaint" and are "legally and factually plausible" such that Kochava's practice of selling vast amounts of data about mobile device users may violate Section 5(a) of the FTC Act through certain alleged privacy harms and exposure to significant risks of secondary harms. At this early part of the litigation, the court found that FTC's recitation of harms that have resulted from the sale of geolocation information and similar mobile device data supported its claim that Kochava's practices are likely to cause consumer injury. Of course, the FTC will ultimately have to prove its case with respect to Kochava's practices should the matter reach the summary judgment or trial stage.

The court also reaffirmed that an invasion of privacy may constitute an injury that gives rise to liability under Section 5 of the FTC Act. In doing so, it differentiated between the sale of "bits and pieces" of data that are available through other lawful means or the intermittent tracking of location data by an app when used and Kochava's alleged aggregated profiles of raw and synthesized data on millions of individual device users.

Subsequently, the FTC filed a second amended complaint, further refining its allegations of consumer harm.

Connected Cars. As the FTC has noted in a Technology Blog post, privacy advocates have raised concerns about the vast amount of data that could be collected from cars, such as biometric, telematic, geolocation, video, and other personal information, and that news reports have suggested that data from connected cars could be used to stalk people or affect their insurance rates. The FTC published this post in response to a slew of lawsuits stemming from a *New York Times* article detailing how automakers were sharing consumer driving activities and behaviors with data brokers and insurance companies, allegedly causing, in some cases, drivers' insurance rates to rise. (See e.g., *In re: Consumer Vehicle Driving Data Tracking Collection*, No. 2024-md-03115 (N.D. Ga.)). Two Democratic Senators also conducted an investigation into these data sharing practices and have requested the FTC to further investigate. As such the FTC has cautioned car manufacturers and all businesses that: (1) The FTC will take action to protect consumers against the illegal collection, use, and disclosure of their personal data and that cars are akin to mobile phones when it comes to revealing a person's persistent, precise location and that "geolocation data is sensitive and subject to enhanced protections under the FTC Act"; (2) Surreptitious disclosure of sensitive information can be an unfair practice and companies that have legitimate access to consumers' sensitive information must ensure that the data is used only for the reasons they collected that information; and (3) Using sensitive data for automated decisions can also be unlawful, as "companies that feed consumer data into algorithms may be liable for harmful automated decisions."

Data Privacy Legislation Efforts - Federal

Public awareness and general scrutiny over the collection, selling and packaging of geolocation and other sensitive data has heightened in recent years, earning the attention of both federal and state regulators and legislatures. Several bills have been introduced in Congress in recent years addressing the use of personal locational data (see e.g., the "Digital Consumer Protection Commission Act of 2023," (S.2597); the "DATA Act," (S.688)). These are not the first bills that have attempted to generally limit the sale and use of locational and other sensitive data. In addition, Congress continues to work on reaching consensus on comprehensive data privacy legislation (see e.g., the "American Privacy Rights Act of 2024" (H.R.8818)), but has failed to overcome various issues, such as the extent such a law would preempt existing state data privacy laws and the availability of a private right of action, among other issues. With a shake-up of party control, it remains to be seen if data privacy will be a priority in the new Congress.

Data Privacy Legislation Efforts – State

On the state level, in the wake of passage of the California Consumer Privacy Act (CCPA) in 2018 (and approval by voters of the California Privacy Rights Act of 2020), at least twenty other states have passed their own consumer data privacy laws, many during 2024. The state data privacy laws specify how data controllers must fulfill duties regarding consumers' assertion of their new data privacy rights, as well as on issues of transparency, data minimization, processing of opt-out and deletion requests and limitations surrounding the processing of sensitive data (such as precise geolocation data) without adequate consumer consent. With regard to consumer data privacy rights, California also passed notable legislation (AB3048) that would prohibit a business from maintaining a browser that does not include a setting that enables a consumer to send an privacy opt-out preference signal (a requirement that would eventually include "mobile operating systems" as well).

Scraping Litigation Developments

Due to the focus on the training of generative AI models in the past year, scraping – and the legal issues around scraping – have become a subject of great interest. For example, we've seen a handful of lawsuits against various GenAI providers alleging unauthorized scraping of and improper use of plaintiffs' proprietary data as GAI model training material, with claims variously based on copyright, contract, and privacy law. With a multitude of cases filed, and but a few preliminary decisions, we await in the coming years more certainty on the important copyright and fair use issues and related issues involving the scraping of data for AI training purposes.

The array of decisions in the well-reported hiQ-LinkedIn litigation (which was settled in December 2022) gave a green light, at least in some circumstances, to scraping publicly available websites without fear of liability under the CFAA; however, even removing the CFAA from the liability equation for access to public website data, we've seen that there are still potential state law claims that a site operator may bring against an unwanted data scraper. This point has been explored in some ongoing scraping disputes from the past year. For example:

- In an ongoing dispute, the Eleventh Circuit for the second time in the lifetime of the litigation considered trade secret misappropriation and related copyright claims in a scraping case between Compulife Software, Inc. and direct competitors in the life insurance quote market involving publicly available website data. The Eleventh Circuit affirmed the lower court judgment finding the defendants liable for trade secret misappropriation when they orchestrated a "scraping attack" of Compulife's website that acquired millions of variable-dependent insurance quotes in a usable format to set up a competing service. The decision affirmed the lower court holding that Defendants acquired Compulife's trade secret via "improper means" when it scraped so much of the database from Compulife's site that they posed a competitive threat to Compulife. In doing so, the court acknowledged that manually accessing the life insurance quote information from the Plaintiff's publicly web-accessible database would generally not constitute the improper acquisition of trade secret information. The court noted, however, that "even if individual quotes that are publicly available lack trade secret status, the whole compilation of them (which would be nearly impossible for a human to obtain through the website without scraping) can still be a trade secret." (*Compulife Software, Inc. v. Newman*).

- Air Canada previously filed a suit alleging that Localhost LLC, operator of the Seats.aero website, unlawfully bypassed technical measures and violated Air Canada's website terms when it scraped "vast amounts" of flight data without permission and purportedly caused slowdowns to Air Canada's site and other problems. Air Canada also alleged that in addition to scraping its website, Localhost engaged in "API scraping" by impersonating authorized requests to Air Canada's API. Air Canada moved for a preliminary injunction barring Localhost from scraping data from its Website. The court declined the motion, finding that while plaintiff had shown Localhost assented to the website terms, it stated that both parties made plausible arguments regarding whether the Terms apply to Localhost's use of the API and whether that use constitutes a breach of the Terms, such that a preliminary injunction was not warranted. (*Air Canada v. Localhost LLC*).

> Ryanair DAC ("Ryanair"), a European low-fare airline, brought various claims against Booking Holdings Inc. (and its well-known suite of online travel and hotel booking websites) for allegedly scraping the ticketing portion of the Ryanair site. Ryanair asserted that the ticketing portion of the site is only accessible to logged-in users and therefore the data on the site is not public data and that defendants circumvented code-based authentication mechanisms designed to limit access to the myRyanair portion of the website. Back in 2022, the court allowed, among other things, Ryanair's CFAA claims to go forward. At trial, the jury reached a verdict in favor of Ryanair on the CFAA claims and awarded $5,000 in damages, which is the minimum damage amount under the statute. (*Ryanair DAC v. Booking Holdings Inc.*). Amidst dueling post-trial motions, Ryanair has moved for a permanent injunction "to enjoin Booking.com from accessing the Ryanair website []—itself or through a third party—to obtain or purchase Ryanair flights without express written permission from Ryanair." In response, the defendants have argued the relief would be extraterritorial (and affect non-U.S. actors and non-U.S. computers) and regardless, Ryanair's purported harms are compensable by money damages.

CFPB Open Banking Rule

After a yearslong lead-up, the Consumer Financial Protection Bureau (CFPB) published its final "open banking" rule. The rule effectuates the section of the Consumer Financial Protection Act, which charged the CFPB with establishing standards and protections for the third-party acquisition and use of consumer banking and other financial data. The open banking rule is a regulatory push away from screen scraping and into a standardized, credential-free secure application program interface ("API") data access methodology. The rule accelerates a shift toward open banking, where consumers have more control over personal financial data and gain new protections against companies sharing or misusing their data.

In the last few years many – but not all – financial institutions and fintech developers have voluntarily transitioned away from scraping and into using application program interfaces (governed under data access agreements). Scraping practices created security risks and gave rise to allegations of improper use of consumer banking credentials and has been the source of a significant amount of litigation and regulatory enforcement. (See, e.g., the Plaid settlement and other litigations).

As a result of this rule, the CFPB expects that APIs will mostly supplant credential-based screen scraping as a data collection practice. When commenting on the proposed rule, many banks expressed dismay that the rule did not expressly prohibit screen scraping. In response, the CFPB in the final rule notice, contended that: "Nothing in the proposal would have precluded data providers from blocking screen scraping, and nothing in the final rule does so. However, data providers may act improperly if they attempt to block screen scraping across the board without making the requested data available through a more secure alternative."

The rule is not without controversy. Not surprisingly, the rule already subject to at least one legal challenge.

A few noteworthy provisions related to the privacy and scope of use of consumer financial information:

> *Establishment of APIs:* Financial institutions, card issuers, digital wallets and other covered financial data providers would be required to establish and maintain APIs to make consumer data available in a machine-readable, standardized format.

> *Data privacy restrictions*: An authorized third party fintech provider must "limit its collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service." In the CFPB's view, limiting third parties to using covered data

only as "reasonably necessary" for the provision of the product or service "ensures that consumers understand the scope of their authorization and retain control over their data."

  - In particular, the rule states that targeted advertising, cross-selling of other products or services, and the sale of covered data are not "reasonably necessary" to provide any product or service.

  - The rule requires third parties to limit "the duration of collection of covered data to a maximum period of one year after the consumer's most recent authorization."

- *Deidentified data*: During the rulemaking process data aggregators and others urged the CFPB to include an exception to the data use restrictions for the use of deidentified financial data for downstream uses (e.g., market research, consumer sentiment analytics, etc.). However, the final rule does not include any such exception. The CFPB acknowledges the effect of its rulemaking on certain parties in the data ecosystem: "This limitation may eliminate or lessen the profitability of certain business models. Third parties that generate revenue from sharing covered data with fourth parties—such as firms with no authorization to access data from the consumer—may lose much of that source of revenue." The CFPB reminded entities that third parties can still seek separate consumer authorization for deidentified data to be shared with outside parties or used for research if these purposes are properly presented as an authorization for data access for a standalone product or service.

A new Administration taking power in 2025 brings with it some uncertainty on this issue. It is possible that Congress may seek to rescind the rule under the Congressional Review Act, or at the very least, one might expect the CFPB to take a lighter touch with respect to oversight or enforcement under the rule after it comes into effect (at least with respect to the largest covered financial institutions) in 2026.

CFPB Proposed Data Broker Rule

On December 3, 2024, the CFPB announced a proposed rule that would limit unregulated data sales of personal identifiers by certain data brokers by making clear that when data brokers sell certain sensitive consumer information they would be considered "consumer reporting agencies" under the Fair Credit Reporting Act (FCRA). Overall, the CFPB proposed rule seeks to address when a data broker would be covered by the FCRA, and to protect Americans from what it perceives as the invasions of privacy created by certain data broker activities that violate the FCRA. Specifically, the CFPB is considering several options for reducing the risk of re-identification of deidentified consumer report data and is taking public comment as to when communications of deidentified consumer report data, such as aggregated data reports, would still be deemed consumer reports. With the incoming Administration, the fate of this proposed rule is uncertain.

Digital Assets

President Biden's executive order on the responsible development of digital assets defines the term "digital assets" as "all central bank digital currencies ("CBDCs")…and other representations of value, financial assets and instruments, or claims that are used to make payments or investments, or to transmit or exchange funds or the equivalent thereof, that are issued or represented in digital form through the use of distributed ledger technology." Examples of digital assets include cryptocurrencies, CBDCs, non-fungible tokens ("NFTs"), tokenized assets, Ordinals, fan tokens and in-game tokens, as well as stablecoins, which refer to a category of cryptocurrencies with mechanisms that are aimed at maintaining a stable value, such as by pegging the value of the coin to a specific currency, asset, or pool of assets or by algorithmically controlling supply in response to changes in demand in order to stabilize value. Stablecoins are mainly used as means to participate in, or as so-called settlement tokens inside of, decentralized finance (or "DeFi") platforms.

Regardless of the terminology used, a digital asset may be, among other things, a security, a commodity, a derivative or another financial product. Digital assets may be exchanged across digital asset trading platforms, including centralized and decentralized finance platforms, or through peer-to-peer technologies.

The term "Web3" generally refers to a new iteration of web technologies that feature a technology stack that uses blockchains, cryptocurrencies, NFTs, new decentralized governance models (e.g., decentralized autonomous organizations (or "DAOs")) and related concepts and mechanisms enabling a new wave of innovation in financial assets and shared value creation. Web3 is a dynamic space with new business models and strategies and the prospect of complex legal issues to consider on many fronts.

Now, more than a decade from the release of the Bitcoin Whitepaper by the pseudonymous Satoshi Nakamoto about a new peer-to-peer electronic cash system using distributed ledger technology, digital currency and related assets are no longer in their infancy. Instead, they are constantly evolving, creating both challenges and opportunities. One important aspect of capitalizing on such opportunities is, among other things, understanding and recalibrating, if necessary, in response to new legal developments.

Indeed, a new type of diligence is required to mitigate risk and succeed in the digital asset space (with its highs and lows and periods of regulatory uncertainty), and lawyers and financial advisors can add a tremendous amount of value when it comes to designing a platform, say, or setting up the governance structure and legal wrapper of a DAO.

Some noteworthy developments in the digital assets industry from the past year are as follows:

Regulatory Uncertainty Continues, but Updated Enforcement Priorities Expected in the New Administration

In recent years, federal regulators have struggled with questions over which agency has jurisdiction over the cryptocurrency market. At the same time, the crypto industry has called for greater guidance regarding digital tokens from the SEC and the CFTC and legislation that clarifies the regulation of the space and delineates agency oversight. Back in 2022, SEC Chair Gensler suggested in comments that he wanted the SEC to engage in rulemaking to regulate crypto, though to date, the SEC's jurisdiction has been largely based on one-off enforcement actions. One crypto exchange, Coinbase, sought to compel the SEC to write clearer rules regarding the status of digital assets and to act on Coinbase's rulemaking petition requesting the agency create a comprehensive new regulatory regime for trading crypto assets that are securities. (*In re Coinbase, Inc.*, No. 23-1779 (3rd Cir. Filed April 24, 2023)). In December 2023, the SEC formally declined Coinbase's request for a rulemaking, deeming it "unwarranted." Chair Gensler echoed these sentiments in a separate statement and stressed the importance of the agency's "discretion to determine the priorities of our regulatory agenda" and disagreed with Coinbase's assertions, reiterating that "existing laws and regulations already apply to the crypto securities markets." Requesting a more "reasoned explanation" for its denial to conduct rulemaking, Coinbase filed another petition with the Third Circuit. (*Coinbase, Inc. v. SEC*, No. 23-3202 (3rd Cir. Oral Argument Sept. 23, 2024)).

In the meantime, bipartisan comprehensive crypto legislation stalled in the U.S. Senate after the U.S. House of Representatives passed a major bill in May 2024 to modernize crypto regulation (HR. 4763 or the "FIT21 Act"). Among other things, the legislation would have provided the CFTC with new jurisdiction over digital commodities and clarified SEC jurisdiction over digital assets offered as part of an investment contract. It is expected that this issue will be taken up again in the next Congress. In the absence of Congressional action, existing financial laws remained the main source of law governing crypto, as federal agencies defended their turf and jurisdiction over these emerging markets.

Of course, given that the new Administration, whose officials have generally professed support for the crypto industry and criticized what they considered over-regulation in the crypto space and overreach of the SEC, it is likely that crypto companies will face less regulatory scrutiny. It is also expected that some ongoing enforcement actions against crypto entities that do not involve fraud or cognizable investor harms that were filed during the Biden Administration may be favorably resolved or dropped. There will also likely be changes to crypto enforcement priorities at the SEC with the announcement that Chair Gensler will step down at the start of the new Administration. It is also possible that a new SEC Chair might propose rules aimed at creating new regulatory frameworks for crypto asset securities or release guidance concerning the circumstances when digital assets are offered and sold as securities.

Further Developments in the Ripple Case

In a closely-watched decision in 2023, a New York district court dealt the SEC a significant loss in its legal battle with Ripple over the XRP digital token. (*SEC v. Ripple Labs, Inc.*). While the New York district court held that Ripple's initial sales of XRP to institutional investors constituted the sale of unregistered securities, it was a Pyrrhic victory as the court held that all other ways in which Ripple sold or distributed XRP did not involve the sale of unregistered securities.

Subsequently, the SEC moved for remedies and entry of judgment on Ripple's violations of Section 5 of the Securities Act of 1933 as to the institutional sales. In August 2024, the court entered a civil monetary penalty against Ripple of $125 million for its violations of Section 5 as to the institutional sales of XRP. Both parties have appealed to the Second Circuit.

Additional Challenges to the SEC

Other crypto entities have challenged the SEC's assertion of jurisdiction over digital assets, including:

> Bitnomial, Inc., a digital asset derivatives exchange company and a designated contract market registered with the CFTC, filed suit, alleging that the SEC has "overextend[ed] its jurisdiction over digital assets — in particular, futures contracts on a digital asset" when it allegedly asserted that Bitnomial would violate securities laws over a contemplated XRP Futures product listing that Bitnomial had self-certified with the CFTC, but the SEC claimed is a security future and thus subject to joint SEC and CFTC jurisdiction. Declaring that registration with the SEC is infeasible for this product (effectively blocking its listing), Bitnomial seeks a declaration that XRP Futures are not security futures and an injunction blocking the SEC from asserting jurisdiction over XRP Futures. In its complaint, Bitnomial pointed to an alleged turf war between the CFTC and the SEC over regulation of digital assets, stating: "Here, the SEC asserts jurisdiction over a product that is already regulated by and subject to the exclusive jurisdiction of [the CFTC] In doing so, the SEC inappropriately duplicates and compounds the regulatory burden on Bitnomial." (*Bitnomial Exchange, LLC v. SEC*, No. 24-09904 (N.D. Ill. Filed Oct. 10, 2024)).

> After receiving a Wells Notice, the operator of crypto trading platform crypto.com filed a suit seeking a declaratory judgment that the SEC has overstepped its authority in threatening an enforcement action concerning secondary market sales of network tokens on crypto.com, claiming the SEC lacks jurisdiction over such sales: "The SEC has aggressively weaponized the Rule against secondary-market network token sellers by defining Crypto Asset Securities to encompass nearly every network token in existence, arbitrarily exempting only bitcoin and ether from its scope despite the substantial similarities of those assets to the Targeted Network Tokens." (*Foris DAX Inc. v. SEC*, No. 24-00373 (E.D. Tex. Filed Oct. 8, 2024)). In December 2024, crypto.com notified the court that it was voluntarily dismissing the case.

In addition, a coalition of Republican attorneys general brought suit against the SEC, arguing that "the SEC has sought to unilaterally wrest regulatory authority away from the States through an ongoing series of enforcement actions targeting the digital asset industry" and seeking declaratory and injunctive relief "to prevent the SEC from continuing its unlawful campaign of regulatory overreach and interference with state sovereignty." (*Commonwealth of Kentucky v. SEC*).

SEC Approves Exchange Listing Applications for Spot Bitcoin ETPs, Setting the Stage for Ethereum ETFs

On January 10, 2024, the SEC issued an order approving the applications of 11 different spot Bitcoin exchange-traded products to each list and trade their shares on a national securities exchange. The SEC Order represents the first time that the SEC has permitted the listing of an exchange-traded product ("ETP") that invests directly in a cryptocurrency — here, Bitcoin. The Commission, on a three-to-two vote, concluded that there was a sufficient correlation between prices on the spot Bitcoin market and those of Bitcoin futures traded on the Chicago Mercantile Exchange ("CME") that the CME could reasonably be able to surveil for market manipulation and fraud. The SEC Order also noted that existing regulation under the Investment Advisers Act of 1940 and Regulation BI under the Exchange Act will apply to market intermediaries that recommend investments in spot crypto ETPs, which will further protect retail investors from the risks associated with Bitcoin. Chair Gensler, in his statement supporting the order, pointed out that retail investors could already invest directly in Bitcoin on the spot market in various ways, including through payment apps, without any investor protections. Investors in spot Bitcoin ETPs, he asserted, would have better access to disclosure about the investment risks and the protections of the securities laws regulating broker-dealers and investment advisers, which address conflicts of interest.

The SEC Order is significant for sponsors of registered investment companies, which will be able to offer spot Bitcoin ETPs side-by-side with their registered exchange-traded funds. The ETPs will provide retail investors a more convenient way to access the cryptocurrency market and are anticipated to broaden investor participation in these markets.

Less than six months later, the SEC gave approval for the listing and trading of shares of Ethereum ETFs that would hold spot ether, in whole or in part. Notably, the approval indicates that each approved sponsor cannot engage in action where any of the subject ether becomes subject to the Ethereum proof-of-stake validation or is used to earn additional ether or generate income or other earnings (also known as "staking"), as that would require the applicable exchange to submit a proposed rule change under Rule 19b-4.

In October 2024, the SEC approved the proposals from two exchanges, the NYSE American and Cboe Global Markets, to list and trade options on certain Bitcoin ETFs.

Selected SEC Enforcement Actions against Crypto Platforms and Crypto-Asset Service Providers

Several ongoing enforcement actions against crypto platforms survived dismissal, while other entities settled charges related to securities violations:

- The SEC's action against crypto trading platform Kraken survived a motion to dismiss. (*SEC v. Payward, Inc.*). In seeking to dismiss the action, Kraken argued that the SEC "failed to adequately allege that it exchanged, brokered, dealt and cleared 'investment contracts' because the only thing made available for trading on Kraken were the digital assets themselves — which are not securities." In August, however, the California district court declined to dismiss the case, finding that the SEC "plausibly alleged that at least some of the cryptocurrency transactions that Kraken facilitates on its network constitute investment contracts, and therefore securities, and are accordingly subject to securities laws." Subsequently, Kraken filed a motion requesting an order certifying an interlocutory appeal, which was denied by the district court.

- The SEC's action ongoing action against Coinbase, Inc., over allegations that Coinbase intermediated transactions in crypto-asset securities on its trading platform and through related services in violation of the federal securities laws, mostly survived a motion to dismiss. The court stated that "the SEC adequately alleges that Coinbase, through its Staking Program, engaged in the unregistered offer and sale of securities," but that Coinbase was entitled to dismissal of the claim that Coinbase acts as an unregistered broker by making its Wallet application available to customers (*SEC v. Coinbase, Inc.*).

- The SEC's pending action against Binance Holdings Ltd. for alleged violation of securities laws, including operating unregistered exchanges, broker-dealers and clearing agencies, mostly survived a motion to dismiss (*SEC v. Binance Holdings Ltd.*). The defendants filed a renewed motion to dismiss the SEC's amended complaint ("The SEC spilled substantial ink attempting to strengthen its allegations but still failed to sufficiently allege that any secondary sales of crypto assets on BAM were sold as investment contracts").

- The SEC sued Consensys, a crypto asset-related service provider, alleging that Consensys violated securities laws by acting as an unregistered broker of digital asset securities through its MetaMask Swaps service, which effects the exchange of one crypto asset for another on an investor's behalf. The complaint also alleged Consensys acted as an unregistered broker by soliciting investors to participate in certain Ethereum staking programs (*SEC v. Consensys Software Inc.* (E.D.N.Y. Filed June 28, 2024)). Upon receiving the Wells Notice about this enforcement action, Consensys had brought a separate declaratory judgment action in Texas district court seeking a declaration relating to the lawfulness of Consensys' ether transactions and its MetaMask software. The Texas court dismissed the action as moot (since the SEC had ended its Ethereum 2.0 investigation) and as unripe due to a lack of final agency action.

- A New York district court approved a final consent judgment between the SEC and Terraform Labs PTE, Ltd. ("Terraform") and Do Hyeong Kwon ("Kwon"), over various charges related to the meltdown of the Terra Luna algorithmic stablecoin in 2022 (*SEC v. Terraform Labs PTE, Ltd.*). As part of the settlement, the defendants agreed to pay more than $4.5 billion to victims and creditors in bankruptcy.

- The SEC settled charges against TrueCoin, LLC and TrustToken, Inc. for their alleged fraudulent and unregistered sales of investment contracts involving a purported stablecoin. The SEC alleged that, during the subject period, the defendants engaged in the unregistered offer and sale of investment contracts in the form of the crypto asset TUSD and falsely marketed the investment opportunity as safe and trustworthy by claiming that the stablecoin was fully backed by U.S. dollars or their equivalent, when, according to allegations, a substantial portion of the assets purportedly backing the stablecoin had been invested in a speculative offshore investment fund (SEC v. TrueCoin LLC).

- The SEC settled previously filed charges against Flyfish Club, LLC for conducting an unregistered offering of crypto asset securities in the form of NFTs that raised approximately $14.8 million from investors to finance the construction and launch of a private members-only restaurant called Flyfish Club. Flyfish agreed to pay a $750,000 civil penalty and comply with certain undertakings. (*In re Flyfish Club, LLC*).

Additional Enforcement Actions Involving Digital Assets

Beyond the SEC's enforcement efforts, the CFTC reached a number of settlements in the digital asset DeFi space (beyond its closely watched agreement with FTX Trading, Ltd. and Alameda Research, LLC that ordered the now-bankrupt FTX group of companies to pay $12.7 billion in monetary relief to FTX customers and fraud victims), including:

- A $1.8 million settlement with an overseas crypto prime brokerage firm, Falcon Labs, Ltd., for failing to register with the CFTC as a futures commission merchant ("FCM"), in what the CFTC termed as its first action against an unregistered FCM that facilitated access to digital asset exchanges.

- A $175,000 settlement with Universal Navigation Inc. d/b/a Uniswap Labs over allegations that it violated the CEA when it offered leveraged or margined retail commodity transactions in digital assets via a decentralized digital asset trading protocol. As described by the CFTC, Uniswap's protocol allowed users to create and trade with liquidity pools, which consist of a matched pair of digital assets that are valued against each other, within a range. Two CFTC commissioners issued dissenting statements in this case, including Commissioner Summer K. Mersinger, who stated that she felt this enforcement was unfounded because Uniswap had attempted to take proactive measures to comply, and due to the lack of any allegations of harm to the market or consumers, further commenting, "This case has all the hallmarks of what we have come to know as regulation through enforcement: A settlement with a de minimis penalty that bears little relationship to the conduct alleged, sweeping statements about the broader industry that are not germane to the case at hand, and legal theories that have not been tested in court."

> In a first-of-its-kind settlement, a settlement of charges against Binance, Changpeng Zhao, its founder, and Samuel Lim, a former chief compliance officer, for operating what the CFTC termed "an illegal digital asset derivatives exchange" and for allegedly willfully evading or attempting to evade provisions of the Commodity Exchange Act and CFTC regulations.

State attorneys general have also used financial and consumer protection laws against cryptocurrency companies in some instances. Some examples include:

> The California Attorney General announced a $3.9 million settlement with trading platform Robinhood Crypto, LLC over allegations that Robinhood violated the California Commodities Law by failing to allow customers to withdraw their cryptocurrency from their Robinhood accounts for the subject period and failing to fully disclose aspects of its trading and order handling arrangements.

> The New York Attorney General announced a $2 billion settlement with bankrupt cryptocurrency firms Genesis Global Capital, LLC, Genesis Asia Pacific PTE, LTD., and Genesis Global Holdco, LLC ("Genesis") for recoveries for investors who were allegedly defrauded when Genesis concealed more than $1.1 billion in losses from investors who provided digital assets through an investment program called "Gemini Earn." The settlement bans Genesis from operating in New York. Back in October 2023, the New York Attorney General filed a lawsuit against crypto exchange and custodian Gemini Trust Co. ("Gemini"), Genesis and others over allegations that the defendants defrauded investors. Genesis, a crypto lending firm and the crypto exchange Gemini entered into a collaboration where Gemini users could participate in Gemini Earn and lend their crypto assets, which were then provided to Genesis to generate returns through various lending activities. In 2022, Genesis faced major liquidity issues, exacerbated by the FTX collapse, which led to a temporary suspension of withdrawals for Gemini Earn users. Genesis later filed for bankruptcy in early 2023. Since Genesis held the assets tied to Gemini Earn, this effectively froze users' funds and sparked a wave of legal challenges, with Gemini and the Earn program's users seeking ways to recover their assets. In May 2024, Gemini announced that Earn users received $2.18 billion of their digital assets in kind.

Insider Trading Update

Insider Trading Developments

The past year has seen a number of cases and SEC settlements involving insider trading and related policies to prevent misuse of material nonpublic information ("MNPI"), including the following:

> The trial court verdict in the SEC's shadow insider trading case, establishing a new frontier for misappropriation theory in insider trading cases;

> The DOJ securing the first ever insider trading conviction based solely on abuse of a 10b5-1 trading plan;

- An insider trading settlement after an appellate court reinstated the SEC's claims, reversing the district court's mid trial dismissal of the SEC's case; and

- Several SEC enforcement actions against registered investment advisers for failing to maintain and enforce written MNPI policies involving trading in distressed debt and collateralized loan obligation ("CLO") trading.

A Case Where Misappropriation Theory Met "Shadow Trading"

The SEC's victory in its litigated enforcement case involving so called "shadow trading" received particular attention this year. In short, shadow trading refers to a situation where an investor gains MNPI on Company A, and then uses that knowledge to trade securities of a separate Company B. During 2024, SEC v. Panuwat provided a groundbreaking look at how this novel shadow trading concept would be treated at trial.

SEC v. Panuwat

The SEC brought an insider trading case against Matthew Panuwat, alleging that as then head of business development at Medivation, a biopharmaceutical company, Panuwat had received MNPI about Medivation and used that knowledge to his advantage when purchasing call options on securities of Incyte, another biopharmaceutical company that was neither a partner nor direct competitor of Medivation. Panuwat knew that Medivation was about to be acquired by a larger pharmaceutical firm, and the SEC's theory was that he believed the deal announcement would have a positive effect on Incyte's stock price.

The SEC alleged that Panuwat knew that Incyte was one of the few other mid cap companies in oncological biopharmaceuticals, and therefore would be a more attractive option to acquiring companies that lost out on the opportunity to purchase Medivation. After the acquisition of Medivation became public, Incyte's stock price rose nearly 8%, and Panuwat made over $100,000 on the call options he had purchased.

In an eight day trial in March 2024, the jury determined that Panuwat acquired MNPI material for Incyte as part of his employment with Medivation, and that Panuwat breached his duty of trust and confidentiality to Medivation through his trading activity. After trial, Panuwat moved for judgment as a matter of law, or, in the alternative, a new trial. Both motions were denied. Panuwat is currently appealing the decision to the Ninth Circuit.

A First: Insider Trading Conviction for 10b5-1 Trading Plan

For the first time ever, a corporate executive has been convicted of insider trading based exclusively on misuse of MNPI when entering a 10b5-1 trading plan. Such trading plans are established by a written agreement between a corporate insider and a brokerage firm that allows the insider to sell company stock in the future in predetermined ways. The trading plan can provide an affirmative defense against insider trading in the event that trades are executed after the insider comes into possession of MNPI.

United States v. Peizer

In June of this year, a federal jury in California found Terren Piezer, former CEO of Ontrak, Inc., guilty of securities fraud and insider trading for sales of Ontrak securities under two 10b5-1 trading plans. This is the first criminal conviction based solely on the use of a 10b5-1 trading plan.

Ontrak Inc. is a publicly traded health care company, and Peizer was CEO, Chairman, and then Executive Chairman of the company. According to the DOJ's allegations, in 2021, Peizer learned that Ontrak's then largest customer was at risk of terminating its contract with Ontrak, which would significantly damage the company's stock price. While in possession of this MNPI concerning Ontrak's largest customer, Peizer entered into two 10b5-1 trading plans.

Peizer entered into the first plan in May 2021, shortly after learning that Ontrak's client was expressing serious doubts about its willingness to continue its contract with Ontrak. After executing his May 2021 plan, Peizer learned the customer intended to terminate its contract with Ontrak. Five minutes after learning this nonpublic information, in August 2021, Peizer executed a second 10b5-1 plan. When executing these plans, Peizer allegedly ignored the advice of multiple brokers, several attorneys, and Ontrak's own Insider Trading Compliance Officer. Instead, he established trading plans with no cooling off period — a set amount of time between the creating of the plan and the sale of the Ontrak stock. Less than one week after Peizer executed his August 2021 plan, the MNPI was made public, and Ontrak's stock plummeted more than 44%. In total, Peizer allegedly avoided over $12 million in losses through his two 10b5 1 plans.

After parallel DOJ and SEC charges were filed in 2023, a federal jury in California found Peizer guilty for one count of securities fraud and two counts of insider trading. A sentencing hearing is scheduled for February 10, 2025. Peizer faces a maximum sentence of 65 years in prison.

This case is part of the DOJ Fraud Section's renewed efforts to take a data driven approach to enforcement and prosecution of 10b5-1 plan abuses. This case was brought under the criminal securities fraud statute (18 U.S.C. § 1348). And while 10b5-1 plans exist in part to help executives rebut criminal charges of insider trading, a 10b5-1 defense is unavailable if the executive in question was in possession of MNPI prior to executing a plan or if the executive entered into the plan in bad faith.

The SEC has also amended 10b5-1 rules since the events at issue in Peizer occurred. The amended rules require a "cooling off" period before trading under a 10b5-1 plan can begin. For Directors and Section 16 Officers, this period is the longer of 90 days after a plan is adopted or two business days after the security issuer's financial results are disclosed in a Form 10-Q or 10-K. In any event, this cooling off period for a Director or Section 16 Officer cannot exceed 120 days. These additional enhancements to the rule provide more rigor around the 10b5-1 process.

Given these limitations to the 10b5-1 defense, insiders should enter into trading plans in good faith, allowing legal counsel the opportunity to review the 10b5-1 plan before executing it to ensure the executive neither possesses information deemed MNPI, ensure a cooling off period is provided for and confirm the plan otherwise comports with all the conditions of Rule 10b5-1.

SEC Insider Trading Case Settles after Fourth Circuit Reversal and Remand

As reported in last year's annual review, the U.S. Court of Appeals for the Fourth Circuit reversed a district court's mid trial dismissal of an SEC action. In SEC v. Clark, the district court had ruled mid trial that the SEC had not established insider trading based merely on a statistical analysis of the defendant's allegedly suspicious trades and a relationship between the defendant and a corporate insider who had MNPI.

On appeal, the Fourth Circuit reversed the trial court, holding that the SEC can meet its burden of proof by presenting merely circumstantial, rather than direct, evidence of insider trading and that a trial court must not weigh evidence, determine witnesses' credibility or substitute its judgment for the jury's in ruling on a motion for judgment as a matter of law. Weeks before a second trial was set to begin, the defendant reached a settlement with the SEC. Pursuant to the Final Judgment, which was entered on December 22, 2023, the defendant was ordered to pay a civil penalty of $240,934.

Background

The defendant in Clark allegedly had traded on MNPI from his brother in law about a merger involving the company where the brother in law worked as Corporate Controller. The SEC relied on what it deemed suspicious trading: the defendant had bought speculative out of the money call options on the company's stock; the transactions had been unusual for the defendant; the defendant had borrowed money to pay for some of his trades; and he allegedly had told his son to buy some of the same options. The alleged tipper (the brother in law) settled with the SEC and paid $240,000, but the defendant proceeded to trial.

The district court dismissed the action after the close of the SEC's case at trial, finding no testimony, documents, or other evidence showing that, despite the defendant's seemingly anomalous trading pattern, the brother in law had obtained MNPI about the proposed merger and had passed it to the defendant. The court concluded that there was "no circumstantial evidence here that gives rise to an inference that [the defendant] received the insider information." The SEC appealed, and the Fourth Circuit reversed and remanded for further proceedings.

Implications

The Clark decision was fact intensive, and it did not make new law on insider trading or on motions for judgment as a matter of law. But it did illustrate that trial courts must not fully discount circumstantial evidence and its sufficiency to prove a case. As the Fourth Circuit observed: "because a defendant or interested party rarely makes a statement or reveals information that amounts to direct evidence of impermissible trading based on confidential insider information, the Commission may present circumstantial evidence to meet its burden of proof." The court noted that "[c]ircumstantial evidence, if it meets all the other criteria of admissibility, is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

Although there was no second trial to resolve the issues at the heart of the litigation, the Fourth Circuit's fact dependent holding supports the SEC's position that circumstantial evidence can support an enforcement action.

SEC Cases Against Distressed Debt Managers Involving MNPI Procedures

The Commission continued to scrutinize the work of ad hoc creditor committee participants and brought actions against distressed debt managers for failing to establish, maintain, and enforce policies and procedures reasonably designed to prevent the misuse of MNPI. These cases highlight the need for specific written policies addressing the MNPI risks associated with participation on ad hoc committees, especially where the advisory firm wishes to continue trading in such company debt while having committee representation.

Many private fund managers investing in distressed corporate bonds frequently engage with investors and financial advisors seeking to form ad hoc creditors' committees in order to explore beneficial debt restructuring opportunities prior to a bankruptcy filing. Often, the manager will not want to receive MNPI or otherwise restrict trading in the company bonds for an extended period of time. For example, a manager may wish to remain unrestricted until formally entering a non-disclosure agreement ("NDA") with the company and will make clear to the company's external financial advisors and other committee members that it should only receive material prepared on the basis of public information. In other cases, managers will rely on information barriers for its distressed investing strategy and organize its business into a "public side" and a "private side." In all such situations, the SEC has emphasized the importance of specific written procedures concerning the handling of MNPI and addressing the risk of leakage or inadvertently receiving MNPI during the course of participating on ad hoc creditors' committees.

The failure to address creditor committee participation in particular has been the focus of the SEC scrutiny that could lead to charges under Section 204A of the Advisers Act, which requires investment advisers to establish, maintain and enforce written policies to prevent misuse of MNPI, as well as Section 206(4) (the Compliance Rule). The SEC has shown a willingness to bring these cases (settled or litigated) even in the absence of any alleged insider trading.

Although it is difficult for industry participants to determine what the firms did wrong from these cases, one takeaway is that the SEC expects heightened procedures for creditor committee participation and, more generally, consultants or advisers who may have access to MNPI.

SEC Sanctions a Private Fund Manager for CLO Activity

Not only did SEC move to enforce MNPI rules against investors trading in third party securities, it also sought to ensure firms trading in securities issued by collateralized loan obligation ("CLO") vehicles were taking the appropriate steps to ensure their analysts and advisers were not themselves misusing MNPI.

In August of this year, the SEC settled a case against a New York based private fund and CLO manager. The fund manager traded tranches of debt and equity securities issued by CLOs it directly managed as well as those managed by third parties. The SEC alleged that as a participant in an ad hoc lender group, the fund manager had become aware of negative developments that concerned a particular borrower. While in possession of this confidential information, the firm privately sold two CLO equity tranches that contained a significant concentration of loans to the borrower. The CLO manager allegedly failed to consider the materiality of the negative information to the sold tranches before making the sale. However, the firm did obtain internal compliance approval to sell the CLO tranches before doing so. Soon after the MNPI was publicly released, the value of the loans dropped, and the equity CLO tranches decreased in value by approximately 11%.

While the SEC did not specifically allege insider trading, in part due to the compliance approval pre sale, it nevertheless imposed a $1.8 million civil penalty on the firm, focusing on the fund manager's failure to establish and enforce appropriate policies on the use and misuse of MNPI. As with the distressed debt case detailed above, advisers and funds must be sure to tailor their MNPI policies to the particular nature of their business. For more information on the CLO case and key takeaways, the full Proskauer case summary is here.

Private Fund Litigation

Section 220 Books and Records Demands – Both Form and Substance Matter

Over the years, Delaware jurisprudence has clarified the requirements in Section 220 of Delaware's Corporation Law, which allows shareholders to review the books and records of a company if they suspect wrongdoing. Most recently in *Martin Floreani v. FloSports, Inc.*, Chancellor McCormick specified several procedural requirements shareholders need to fulfill in order to appropriately bring a books and records request.

As a reminder, Section 220 is the vehicle that allows stockholders to review the books and records of a company, and is commonly used by stockholders to investigate the management of their companies for alleged misconduct, or to evaluate the value of their own investments. Over the years, Section 220 has been interpreted to require a stockholder to demonstrate: 1) a proper purpose; 2) a credible basis for their investigation; and 3) an appropriate scope for their request. But Chancellor McCormick's recent decision emphasized *technical* requirements of Section 220 that must also be met.

Specifically, in *Floreani*, Chancellor McCormick's decision highlighted the strictness with which Delaware courts will apply Section 220. Specifying technical requirements on stockholders, the Chancellor explicitly held "Section 220(b) requires that a demand: (1) be in writing, (2) be under oath, (3) state the stockholder's purpose, and (4) be directed to the corporation at its registered agent or principal place of business. (5) If the stockholder is not a record holder, then the demand must be accompanied by documentary evidence of beneficial ownership of the stock. (6) If the demand is sent by an attorney, then it must be accompanied by a power of attorney. That's four form and manner requirements that apply in all circumstances and two that apply in certain circumstances." On the basis of these requirements, VC McCormick declined the plaintiff's books and records request.

The *Floreani* opinion sheds light on the way Delaware courts analyze Section 220's requirements. The dockets of the Delaware courts, and in particular the Delaware Court of Chancery, are bursting at their seams. Chancellor McCormick's recent decision related to Section 220 demands clarifies some of the technical steps that potential plaintiffs must take prior to running to court.

Delaware Issues Reminder of its "Contractarian" Mindset

Late last year, the Delaware Court of Chancery further emphasized its policy to look to the plain language of agreements. In *St. Peters, L.P. v. Bold On Boulevard LLC*, C.A. No. 2024 0653 MTZ (Del. Ch. Nov. 19, 2024), Vice Chancellor Zurn rejected the argument that a party's consent was unreasonably withheld where the contract provision did not require such a standard.

The Bold on Boulevard case involved the validity of a plaintiff's decision to remove one of the defendants as manager of an LLC. The LLC was created to purchase property, which was financed by the plaintiff's investment and a loan. Importantly, any material amendments to the loan required the plaintiff's consent, over which the plaintiff had "an absolute independent right to…withhold or condition any requested consent" as per the LLC's operating agreement. The operating agreement also included a change of control provision pursuant to which the plaintiff could remove the defendant as manager if the defendant defaulted on the loan. The agreement required the plaintiff to provide the defendant with fifteen days' written notice to cure in the event of the default. After the defendant defaulted twice, and after the fifteen day cure period expired, the defendant requested the plaintiff's' consent to modify certain loan terms. The plaintiff refused.

The Court held that the plaintiff was within its rights to withhold consent. The Court pointed to the operating agreement's consent provision as one of the main reasons for its decision, holding that the operating agreement "expressly preserved" the plaintiff's "freedom to withhold consent to loan modifications in its self interest." Importantly, the Court pointed to other provisions in the agreement that stated the plaintiff's consent cannot be "unreasonably withheld," demonstrating that the parties could have incorporated a similar reasonableness requirement into the consent provision if that was their intention. In response to the defendant's objections, Vice Chancellor Zurn also noted that the mention of the implied covenant in the consent provision was "curious," but ultimately does not "raise the bar" above the contract's language as "the implied covenant is omnipresent: one need not speak its name, even once, to make it appear."

The message from the Delaware Court of Chancery is once again clear. "Delaware's LLC law is . . . 'explicitly contractarian,' and fundamentally regards and enforces limited liability company agreements as a contract." And here, where the provision at issue did not expressly include a "reasonableness" standard, especially in combination with the fact that other aspects of the agreement did, the Court of Chancery was disinclined to read one in.

FINRA / Broker-Dealer Updates

FINRA Amendment to Rule 2210 Permitting Projected Performance and Targeted Returns in Institutional Communications Held Up Pending SEC Review

Financial Industry Regulatory Authority ("FINRA") Rule 2210(d)(1)(F) generally prohibits a member firm from including a performance projection or targeted return in any written communication with a customer, retail or institutional.

On November 13, 2023, FINRA filed with the Securities and Exchange Commission ("SEC" or the "Commission") a proposal to amend Rule 2210 to create a tailored exception from the general prohibition permitting their use in marketing materials, including pitch books and decks for privately placed funds and other securities, to institutional investors and qualified purchasers. (An "institutional investor," as defined in Rule 2210(a)(4), includes a bank, insurance company, employee benefit plan, mutual fund, registered investment advisers or any other individual or entity with assets of at least $50 million; a "qualified purchasers," as defined in Section 2(a)(51)(A) of the Investment Company Act, includes an individual, family company or trust with more than $5 million in investments.) The exception was to be subject to certain conditions, including (1) written policies and procedures reasonably designed to ensure the communication is relevant to the investor's financial situation and investment objectives; (2) records supporting the criteria used and assumptions made in calculating the performance or return; and (3) disclosure that they are hypothetical and may not be achieved (together with information enabling the investor to understand the criteria and assumptions made and the risks and limitations of using them). See our client advisory on the proposed exception here: [FINRA Proposes to Amend Rule 2210 to Permit Projected Performance and Targeted Returns in Institutional Communications | Regulatory & Compliance].

The SEC, by delegated authority to the Division of Trading and Markets, issued an order approving the amendment on July 19, 2024. However, on July 26, 2024, the SEC, by itself, stayed the order approving the amendment pursuant to Rule 431 of the SEC's Rules of Practice, which may be invoked by one or more Commissioners to review the delegated action.

According to FINRA, the amendment was intended to align broker-dealers' obligations with those of investment advisers under Rule 206(4)-1 under the Investment Advisers Act (the "IA Marketing Rule"). The exception, however, was not coextensive with the IA Marketing Rule. Among other things, the IA Marketing Rule permits a more liberal use of projections and targeted returns by investment advisers in communications with all manner of clients, not just institutions and qualified purchasers.

The SEC's approach under the IA Marketing Rule is less proscriptive of investment guidance and information that can be communicated to clients provided information of a prospective quality is accompanied by the appropriate explanations, disclosures, disclaimers and *caveats* needed to evaluate it properly. In this regard, FINRA's continued prohibition on the communication of projections and targets to retail investors may impeded their equitable access to useful and important information. Indeed, one is hard pressed to identify information investors desire more in making their decisions on whether to acquire a managed product than the manager's good faith assessment of targeted performance and projected returns, especially retail investors less capable of divining the information themselves.

Under the circumstances, it is just as likely the SEC review is intended to gain greater clarity on the need for any restrictions for broker-dealers beyond what is permissible for advisers, with the possibility that the final exception will be expanded to be more coextensive with the IA Marketing Rule.

SEC Rules Expanding the Interpretation of "Dealer" to Include Liquidity Providers Vacated in Court

On February 6, 2024, the SEC, in a vote of 3-2 along party lines, adopted new rules 3a5-4 and 3a44-2 requiring hedge funds and other principal traders acting as "liquidity providers" in securities to register as "dealers" or "government securities dealer" under the Securities Exchange Act of 1934 (the "Exchange Act"). They would also be required to become members of the Financial Industry Regulatory Authority ("FINRA") or another self-regulatory organization ("SRO"), subjecting them to a broad swath of capital, reporting and operational rules under the federal securities laws and SRO rules.

The investment fund industry vehemently objected to the rules, arguing they conflicted with longstanding SEC guidance distinguishing "traders" from dealers. Commissioner Hester Peirce who voted against the rules remarked that they obliterated SEC precedent that market participants had been relying on for decades.

On November 21, 2024, the U.S. District Court for the Northern District of Texas granted motions for summary judgment vacating the rules in cases brought by the National Association of Private Fund Managers, the Alternative Investment Management Association, the Managed Funds Association and two crypto industry groups. The district court found that the SEC acted without lawful authority in promulgating the rules under the Exchange Act. The court found that the definition of dealer in the statute, which refers to a person "engaged *in the business* of buying and selling securities," contemplates trading with "customers," not merely counterparties. It found that the provision of market liquidity apart from customer business was without foundation under the definition.

The SEC has until January 20, 2025 to appeal the decisions. It is unlikely that the Commission under the Trump administration will pursue the matter, which is inconsistent with its lighter-touch regulatory agenda.

Foreign Corrupt Practices Act

Although the pace of FCPA enforcement in 2024 remained steady, the year included a few noteworthy policy developments that may impact asset managers and financial institutions with international activities. In addition, it remains to be seen what, if any, impact the 2024 U.S. election will have on FCPA enforcement going forward. While President elect Trump has expressed skepticism about the FCPA in the past, line prosecutors at the DOJ and SEC have communicated a continuation of enforcement efforts, perhaps accompanied by enforcement of the fairly new Foreign Extortion Prevention Act ("FEPA"), signed into law in late 2023.

From a policy perspective, there were a few noteworthy developments worth highlighting, including the following:

Incentivizing Whistleblower Reporting

Following the launch of the three year Compensation Incentives and Clawbacks Pilot Program in March 2023 and the announcement of a Mergers & Acquisitions Safe Harbor Policy in October 2023, the DOJ continued to issue policy guidelines in 2024 relevant to how it intends to identify and prosecute.

In August 2024, the DOJ launched a three year Corporate Whistleblower Awards Pilot Program. At a high level, an individual may be eligible for a whistleblower award if, alone or jointly with other individuals, they provide the DOJ with original information in writing, and that information leads to criminal or civil forfeiture exceeding $1 million in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution or civil forfeiture action. The Department issued program guidance and frequently asked questions to accompany this announcement.

Some notable aspects of the Corporate Whistleblower Awards Pilot Program are summarized below:

> A corporate entity would not be eligible for an award.

> A whistleblower would not be eligible if they would be eligible for an award through another U.S. government or statutory whistleblower, *qui tam*, or similar program if they had reported the same scheme that they reported under this program.

> A whistleblower would not be eligible if they meaningfully participated in the criminal activity they reported, including by directing, planning, initiating or knowingly profiting from that criminal activity.

> ***However***, a whistleblower remains eligible if the Department determines, in its discretion, that the individual's **minimal role** in the reported scheme was sufficiently limited that the individual could be described as "**plainly among the least culpable of those involved in the conduct of a group**."

> A whistleblower may not be eligible if they knowingly and willfully made or make any false statement or representation, interfered with or obstructed the Department's investigation.

During speeches in December 2024, DOJ officials noted having already received over 250 reports arising out of the Whistleblower Pilot Program.

The DOJ also amended the Corporate Enforcement and Voluntary Self Disclosure Policy to reflect the Whistleblower Pilot Program. More specifically, it indicated that if a company receives an internal whistleblower report and reports the misconduct to the DOJ within 120 days of the whistleblower report and before the DOJ reaches out to the company, the company may be eligible for a presumption of declination if the company fully cooperates and remediates the misconduct. In August 2024, the DOJ issued a declination to the Boston Consulting Group in accordance with the Corporate Enforcement and Voluntary

Self Disclosure Policy, noting the company's full and proactive cooperation and timely and appropriate remediation, including termination of the personnel involved and imposition of compensation-based penalties. The Boston Consulting Group also agreed to a disgorgement of $14.4 million.

Guidelines on Effective Compliance Programs

In September 2024, the DOJ updated its Evaluation of Corporate Compliance Programs. The updates include critical additions in the following three areas:

- Use of new technology (e.g., artificial intelligence) in corporate business and in their compliance programs
  - What is the technology that a company and its employees use to conduct business?
  - Has the company conducted a risk assessment of the use of that technology?
  - Has the company taken appropriate steps to mitigate any risk associated with the use of that technology?
- Corporate support of internal reporting and anti-retaliation
  - Is the company encouraging employees to speak up and report misconduct?
  - Are there company practices that chill reporting?
  - What are policies and training related to whistleblower protection and anti-retaliation?
  - How are employees who report misconduct treated?
- Appropriate corporate access to data
  - Do compliance personnel have adequate access to relevant data sources, including to assess the effectiveness of the company's compliance program?
  - What are the assets, resources and technology that are available to compliance and risk management personnel?
  - Is the company putting the same resources and technology into gathering and leveraging data for compliance purposes as it is using in its business?

Compensation Clawbacks

As noted above, the DOJ also released in March 2023 a Compensation Incentives and Clawbacks Pilot Program, aimed at incentivizing companies who seek to recoup funds from individuals involved in misconduct. In the September 2024 remarks, Deputy Assistant Attorney General Nicole Argentieri also highlighted two fine reductions awarded to companies in connection with this Pilot Program, as quoted below:

> To date, two companies have received fine reductions under the pilot program, both in Foreign Corrupt Practices Act (FCPA) cases. Albemarle proactively implemented procedures to freeze future bonuses for those suspected of misconduct, who directly oversaw employees engaged in the misconduct, or who were aware of red flags but failed to prevent the misconduct. They were rewarded with a reduction in their criminal monetary penalty equal to the amount of the bonuses that were withheld. Albemarle was also awarded a 45% reduction from the low end of the applicable penalty range — the highest

percentage reduction to date — in light of its substantial cooperation and significant remediation.

SAP also withheld compensation from culpable employees and defended the decision through litigation. These actions sent a clear message to other SAP employees — and employees of companies everywhere — that misconduct will have individual financial consequences. As a result, SAP not only received a fine reduction equal to the amount of withheld compensation. This was also an important aspect of the company's remediation that supported our decision to award a 40% fine reduction.

Foreign Extorsion Prevention Act

In December 2023, Congress signed into law the Foreign Extorsion Prevention Act (FEPA) as part of the National Defense Authorization Act. FEPA criminalizes the "demand side" of corruption by making it a crime for foreign public officials (or persons selected to be a foreign official) to demand, seek, receive, accept or agree to receive or accept a bribe in exchange for misusing their official duties. While U.S. prosecutors have pursued foreign public officials using other means (including money laundering offenses and economic sanctions) in the past, FEPA provides a complement to the FCPA and another tool for U.S. authorities to pursue corrupt foreign officials. It has not yet been applied in practice, but DOJ prosecutors hinted that this could come soon.

In terms of enforcement, 2024 produced a few notable matters, certain of which are ongoing, that are summarized below:

On November 20, 2024, the U.S. Securities and Exchange Commission filed a civil FCPA complaint in the United States District Court for the Eastern District of New York against Cyril Sebastien Dominique Cabanes, a French citizen and resident of Singapore, who is a former board member of Azure Power Global Ltd. (*Securities and Exchange Commission v. Cabanes*, Case No. 24 cv 8081). This is the first FCPA enforcement action against an individual by the SEC since October 2020. On the same day and in a related matter, the SEC also filed a securities fraud complaint in the same court against Gautam Adani, Chairman of Adani Green Energy Ltd.'s board of directors, and his nephew, Sagar Adani, Executive Director of Adani Green's board (*Securities and Exchange Commission v. Adani and Adani*, Case No. 24 cv 8080).

Both of the SEC actions involve allegations of a bribery scheme by two renewable energy companies, Azure Power Global Ltd. and Adani Green Energy Ltd., in connection with multi-billion-dollar solar energy projects awarded by the Indian Government in 2019. The SEC alleges approximately $250 million in bribes to Indian state officials were paid or promised during 2021 through 2023 in order to secure contracts relating to the awarded projects. The SEC's allegations include, among others, that Cabanes communicated through various means, including WhatsApp messages that were sent and received in the United States using the means of interstate commerce, along with other electronic communications, about and in advancing the bribery scheme. The SEC also alleges Adani's offering documents in connection with its $750 million note offering in 2021 included materially false or misleading statements about its anti-corruption and anti-bribery efforts in light of its directors' alleged misconduct.

On the same day, the U.S. Department of Justice also unsealed a criminal indictment, originally filed on October 24, 2024, against Cabanes, the Adanis, and five other individuals affiliated with the two companies alleging underlying bribery schemes, securities fraud and wire fraud schemes, as well as a scheme to obstruct the government investigations of said conducts. The DOJ's indictment alleges other financial transactions between 2020 and 2024 by the two companies — in addition to the note offering alleged by the SEC — that include false and misleading statements in connection with the anti-bribery commitments and practices.

The individuals are challenging these indictments and dispute the allegations that have been made.

Many FCPA allegations and enforcement actions do not proceed to trial for resolution. However, trials and convictions do happen, often years after defendants are initially charged. With the additional investigative period, questionable conduct today could result in severe repercussions several years down the road for individuals and corporate entities.

For example, in February 2024, Javier Aguilar, a former employee of Vitol Inc., was convicted in a jury trial at the United States District Court for the Eastern District of New York of conspiracy to violate the FCPA, violating the FCPA, and conspiracy to commit money laundering in connection with bribery scheme in Ecuador and Mexico. In August 2024, Aguilar pled guilty to a bribery scheme in a related matter involving PEMEX Procurement International, a wholly owned affiliate of the Mexican state-owned oil company, PEMEX. Notably, the indictment against Aguilar was initially filed in September 2020 and contains allegations of misconduct dating back to 2015.

In September 2024, Glenn Oztemel, a former employee of Arcadia Fuels Ltd. and Freepoint Commodities LLC, was convicted of FCPA and related offenses by a jury of the United States District Court for the District of Connecticut. Oztemel was initially charged in February 2023 relating to allegations of misconduct dating back to 2010.

Foreign Investment Review: CFIUS and BEA Reporting

CFIUS

The Committee on Foreign Investment in the United States (“CFIUS”) plays a prominent role in private fund transactions. Private funds managed or operated outside of the United States (“US”) regularly need to review investment activities and the extent to which CFIUS filing requirements or risk assessment issues are implicated, especially for transactions involving critical technology. The top acquirers of US critical technology are firms in Canada, the United Kingdom (“UK”), Germany, Japan, South Korea, France, China, Luxembourg, and Sweden.

The 2023 CFIUS annual report issued in 2024 reveals several noteworthy trends concerning CFIUS filings and enforcement. According to the report, there were 109 short-form Declaration filings for the most recent reporting year. Of those, 36 were subject to mandatory filing requirements. Approximately two-thirds of the Declaration filings were from allied countries.

China remains the largest source of long-form filings, as Chinese investors are less likely to initiate a review by short-form Declaration filing given those investors’ higher risk profile. Like 2022, in 2023 no Presidential decisions were issued (i.e., transactions blocked). There were 233 long-form filings, 128 of which were subject to subsequent investigations, including 35 that were ultimately subject to mitigation measures – a decrease from the 41 subject to mitigation measures in 2022. In the most recent reporting year for CFIUS, mitigation measures include elements of the following:

> prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, or technical information;

> establishing guidelines and terms for handling existing or future contracts with the US Government or its contractors, US Government customer information, and other sensitive information;

> ensuring that only authorized persons have access to certain technology, systems, facilities, or sensitive information;

> ensuring that certain facilities, equipment, data, and operations are located only in the United States;

- establishing a corporate security committee, voting trust, and other mechanisms to limit foreign influence and ensure compliance, including the appointment of a US Government-approved security officer, member of the board of directors, or board observer, and requirements for security policies, communications policies, annual reports, and independent audits;

- notifying, and requiring the approval of, security officers, third-party monitors, or relevant US Government parties in advance of visits to the US business by foreign nationals;

- security protocols to ensure the integrity of products or software sold to the US Government;

- notifying customers or relevant US Government parties when there is a change of ownership in the US business; and

- assurances of continuity of supply to the US Government for defined periods, notification and consultation prior to taking certain business decisions, and reserving certain rights for the US Government in the event that the company decides to exit a business line; establishing meetings to discuss business plans that might affect US Government supply or raise national security considerations.

On November 18, 2024, the U.S. Department of the Treasury, as Chair of CFIUS, issued final rules to strengthen enforcement and enhance their procedural powers in various ways, including:

- Expanding the information that CFIUS may request from parties to non-notified transactions—transactions that the parties did not voluntarily report to CFIUS—including requests for information related to national security considerations, beyond information solely to determine whether it is a covered transaction;

- Expanding the instances in which CFIUS may use its subpoena authority, including in connection with assessing national security risk associated with non-notified transactions;

- Allowing the CFIUS Staff Chairperson to set, as appropriate, a timeline for transaction parties to respond to risk mitigation proposals for matters under active review;

- Expanding the circumstances in which a civil monetary penalty may be imposed due to a party's material misstatement or omission, including when the material misstatement or omission occurs outside a review or investigation of a transaction and when it occurs in the context of CFIUS's monitoring and compliance functions;

- Substantially increasing the maximum civil monetary penalty from $250,000 per violation to $5,000,000 per violation for violations of obligations under the CFIUS statute and regulations, as well as agreements, orders, and conditions authorized by the statute and regulations; and

- Extending the time frame for submission of a petition for reconsideration of a penalty to CFIUS and the number of days for CFIUS to respond to such a petition.

The final rules are expected to be in effect in January 2025.

The Committee has shown a willingness to impose significant monetary penalties in 2024 enforcement actions. Enforcements actions in 2024 include:

- An enforcement action resulting in a $60 million penalty, for failure to take appropriate measures to prevent unauthorized access to certain sensitive data and failure to report incidents of unauthorized access promptly to CFIUS, in violation of a previously entered National Security Agreement ("NSA") with CFIUS following a merger.

- A $1.25 million penalty, the maximum amount authorized under the applicable CFIUS regulations, against a transaction party for submitting a joint voluntary notice ("JVN") and supplemental information containing five material misstatements, regarding the source of funding and related agreements, including forged documents and signatures. As a result, CFIUS rejected the filing, and the transaction was abandoned.

- An enforcement action against a party to a National Security Agreement, resulting in an $8.5 million penalty, after the company's majority shareholders orchestrated the removal of the company's independent directors, thereby causing the Security Director position to be vacant and the board of directors' government security committee to be defunct, resulting in a breach of the NSA.

As an alternative to imposing a monetary penalty, Treasury or another CFIUS Monitoring Agency ("CMA") may instead issue a Determination of Noncompliance Transmittal ("DONT") Letter, after CFIUS has determined that one or more violations occurred. A DONT Letter notifies the party or parties that the CMAs have determined that one or more violations occurred but decided not to pursue further enforcement remedies. Notably, if CFIUS later pursues penalties against the same party for a separate violation, the violation identified in the previous DONT Letter may be a relevant aggravating factor. A DONT Letter has been issued for first-time, inadvertent, limited scope violations that did not harm national security and had little potential to do so, with consideration for timely self-disclosures, remediation, cooperation, and a compliance program or difficult extrinsic circumstances. For example, the Committee has issued a DONT Letter for failure to prevent unauthorized access to restricted intellectual property, or the transfer of assets to a company controlled by certain foreign persons in violation of a CFIUS Order.

Overall, the CFIUS oversight web continues to expand—it should remain on the shortlist of regulatory and compliance items to address early and proactively for non-US-managed investment funds and every transaction that may involve ex-US funding sources. Additionally, CFIUS-type foreign direct investment regimes continue to proliferate globally, with nearly all the major market economies now having a formalized review and approval process. Fund managers and compliance specialists must keep abreast of developments in this area and ensure that processes are in place to identify potential Foreign Direct Investment filing requirements outside the US.

CFIUS Jurisdiction Over Real Estate Transactions By Foreign Persons

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) granted CFIUS authority to review certain real estate transactions in close proximity to certain United States military installations or other sensitive facilities or properties of the U.S. Government. On November 1, 2023, the U.S. Department of the Treasury, as Chair of the Committee on Foreign Investment in the United States (CFIUS), in coordination with the U.S. Department of Defense, announced a final rule to expand CFIUS's jurisdiction over real estate transactions by foreign persons.

The final rule added 59 military installations in 30 states to CFIUS's jurisdiction. Most (40) additional military installations will fall within CFIUS's jurisdiction for real estate transactions within a one-mile radius, and 19 additional military installations will fall within CFIUS's "extended range" jurisdiction for real estate transactions within a 100-mile radius. CFIUS's jurisdiction over 8 military installations would also expand from a one-mile radius to the extended 100-mile radius. The final rule went into effect on December 9, 2024.

The final rule accompanied notable enforcement in 2023 by the White House, through CFIUS. On May 13, 2024, the White House issued an order to MineOne Partners Ltd. to divest real estate located within 1 mile of Francis E. Warren Air Force Base in Cheyenne Wyoming. According to the order, MineOne is partially owned by Chinese nationals and acquired the property in June 2022. The company thereafter improved the property to allow for specialized cryptocurrency mining. Notably, CFIUS's non-notified transaction team first investigated the transaction based on a public tip—the transaction parties did not file with CFIUS until after the investigation. The order mandated divestment of the property within 120 days, and removal of all equipment and improvements to the property within 90 days of the order, subject to extensions granted by CFIUS.

Outbound Investment Program Rules (‘*Reverse* CFIUS’)

Other expansions to maintain US technological leadership have included rules to monitor and restrict outbound investment -- so-called “reverse CFIUS.” On August 9, 2023, President Biden issued Executive Order 14105 – “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern.” On October 28, 2024, the U.S. Department of the Treasury issued final regulations implementing Executive Order 14105, which addresses investments by U.S. persons in certain identified technologies in “Countries of Concern”, including The People’s Republic of China, The Special Administrative Region of Hong Kong, and The Special Administrative Region of Macau. The regulations are effective as of January 2, 2025.

The Final Rule identifies the following technologies and products subject to the regulations:

- Certain transactions implicating semiconductor and microelectronics are prohibited, including those related to certain electronic design automation software, certain fabrication or advanced packaging tools, the design or fabrication of certain advanced integrated circuits, advanced packaging techniques for integrated circuits, and supercomputers. In contrast, notifiable transactions are those related to the design, fabrication, or packaging of integrated circuits not otherwise covered by the prohibited transaction definition.

- Certain transactions implicating quantum information technologies are prohibited, including those related to the development of quantum computers or production of any critical components required to produce a quantum computer; the development or production of certain quantum sensing platforms; and the development or production of certain quantum networks or quantum communication systems.

- Certain transactions implicating Artificial intelligence (AI) systems are prohibited, including those related to the development of any AI system designed to be exclusively used for, or intended to be used for, certain end uses that are prohibited, as well as those related to the development of any AI system that is trained using a quantity of computing power greater than 10ˆ25 computational operations, or trained using primarily biological sequence data and a quantity of computing power greater than 10ˆ24 computational operations. In contrast, notifiable transactions would be those related to the development of any AI system not otherwise covered by the prohibited transaction definition, where such AI system is: designed or intended to be used for certain end uses or applications; or trained using a quantity of computing power greater than 10ˆ23 computational operations.

The Rule sets forth the penalty and disclosure framework for violations, including civil and criminal penalties, divestment and voluntary self-disclosure. Other key elements of the Final Rule include:

- Outright prohibitions of certain transactions by U.S. Persons implicating highly strategic technologies, and a notification requirement for certain other transactions;

- A knowledge standard, meaning the obligations on U.S. persons will apply if such person has actual or constructive knowledge of relevant facts or circumstances relating to a transaction. The Final Rule establishes that a U.S. person has knowledge if it possesses actual knowledge that a fact or circumstance exists or is substantially certain to occur, if the U.S. person possesses an awareness of a high probability of a fact or circumstance’s existence or future occurrence, or if the U.S. person could have possessed such information through a reasonable and diligent inquiry;

- The categories of covered transactions to which the prohibition and notification requirements will apply, including the acquisition of an equity interest or a contingent equity interest, certain debt financing that grants certain rights to the lender, the conversion of a contingent equity interest, a greenfield investment or other corporate expansions, the entry into a joint venture and certain investments as a limited partner or equivalent (LP) in a non-U.S. person pooled investment fund;

- Coverage of foreign persons, such as: (i) a person of a country of concern that is engaged in a covered activity related to defined sub-sets of technologies and products, or (ii) a person that has a voting or equity interest, board seat, or certain powers with respect to such a person of a country of concern where more than 50% of one of several key financial metrics of the person is attributable to one or more such persons of a country of concern;

- Excepted transactions, such as investment in publicly traded securities, certain LP investments with a threshold of $2,000,000, derivatives, buyouts of country of concern ownership, intracompany transactions, certain pre-final rule binding commitments, certain syndicated debt financings, equity-based compensation, and third-country measures;

- A national interest exemption: the final rule allows a U.S. person to seek an exemption from the application of the prohibition or notification requirement on the basis that a transaction is in the national interest of the United States; and

- Notification requirements, where a U.S. person subject to the notification requirement is required to file notification with Treasury that includes information related to the transaction, such as details about the U.S. person, the covered foreign person, the covered transaction, and the relevant national security technologies and products.

The Rule will apply to the conduct of a U.S. person only and defines such a U.S. Person as “any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States, including any foreign branch of any such entity, or any person in the United States.” The Rule’s supplementary information clarified that:

- An entity organized in the United States will be considered a U.S. person even if its parent is a non-U.S. person;

- A non-U.S. person that happens to be a parent of a U.S. person will not be treated as a U.S. person for the purposes of this Final Rule solely because of its relationship to the U.S. person;

- Any person in the United States, including personnel of a non-U.S. person entity working in a branch office of that non-U.S. person entity will be considered a U.S. person based on their presence in the United States; and

- Such a person’s non-U.S. person employer will not to be considered a U.S. person solely because of an employee’s presence in the United States.

Bureau of Economic Analysis and Treasury International Capital System Reporting

The Department of Commerce’s Bureau of Economic Analysis (“BEA”) conducts surveys every five years to gather information about foreign direct investment in the United States (the BE-12 survey), as well as United States direct investment abroad (the BE-11 survey). It also tracks foreign entities’ acquisition of U.S. businesses through the BE-13A form, discussed briefly below. Commerce uses data from the BEA surveys to evaluate how the U.S. economy interacts with economies worldwide.

BE-12 – Foreign Direct Investment in the United States

Every U.S. business enterprise in which a foreign person (foreign parent) owns or controls, directly or indirectly, 10 percent or more must complete the survey. Entities must file one of four forms: BE-12A, BE-12B, BE-12C, or BE-12 Claim for Not Filing.

> **BE-12A**. Completed by a U.S. affiliate that is **majority-owned** by one or more foreign parents and whose total assets, sales, or net income is greater than $300 million.

> **BE-12B**. Completed by a U.S. affiliate that meets one of two criteria: (i) it is **majority-owned** by one or more foreign parents and has total assets, sales, or net income of more than $60 million and less than $300 million, or (ii) it is **minority-owned** by foreign parents and has total assets, sales, or net income of more than $60 million.

> **BE-12C**. This form must be completed by a **majority or minority-owned**. affiliate that has total assets, sales, or net income of $60 million or less.

> **BE-12 Claim for Not Filing**. This form should be used by any entity that is not required to file any of the preceding three forms but was nonetheless notified by the BEA to file. Entities that are not notified by BEA and do not meet the filing criteria above are not required to make any submission.

Only the U.S. affiliate at the first level of ownership must file. Entities further down the chain of ownership need not file, and may refer a BEA request to the first level affiliate. In addition, certain private funds are not required to file to the extent they do not hold controlling interests in an operating company—defined as a company that is not a private fund or a holding company—in which a foreign person holds 10 percent or more of the voting interest. BEA has determined that when investments by or into private funds do not involve "operating companies," such investments typically "display the characteristics of portfolio investment rather than direct investment" and therefore should not be reported on BEA surveys. BEA has published a detailed flow chart to aid potential reporters in determining whether they may claim the private fund exemption, which is available on its website. The BEA regulations define "private fund" as "the same class of financial entities defined by the Securities and Exchange Commission as private funds on Form PF."

BE-11 – United States Direct Investment Abroad

Participation in the survey is required if two conditions are met. First, the U.S. entity must directly or indirectly hold at least 10% voting (or equivalent) interest in a foreign business enterprise, whether incorporated or unincorporated. Second, BEA must individually contact the U.S. entity about the survey. *If BEA does not contact a U.S. entity that holds at least 10% voting (or equivalent) interest in a foreign business enterprise, the U.S. entity need not report*.

Those contacted by BEA must potentially file one or more reports, unless exempt. All qualifying U.S. entities must complete the **BE-11A** form on their own behalf. They must then determine whether to file one or more of the following additional reports on behalf of their qualifying foreign affiliates:

> **BE-11B**: for majority-owned foreign affiliates whose assets, sales, or net income exceed $60 million.

> **BE-11C**: for minority-owned foreign affiliates whose assets, sales, or net income exceed $60 million.

> **BE-11D**: for "***newly established or acquired***" foreign affiliates that have assets, sales, or net income above $25 million but below $60 million. "Newly established" refers to the preceding fiscal year.

BEA will seek only information about entities' fiscal year ending in the preceding calendar year. For example: if an entity's fiscal year ended on March 31, 2023, that entity would report for the 12-month period preceding March 31, 2023.

The first step when contacted by BEA is to determine whether an exemption is available. The BE-11 Claim for Not Filing exemption form allows entities to claim either (i) full exemption from any BE-11 filing or (ii) specific exemptions for certain foreign entities. A U.S. entity may claim exemption, based on the criteria described above if all of its foreign affiliates are exempt.

A common exemption is that the contacted entity did not own or control 10% voting (or equivalent) interest at the end of the preceding fiscal year. Another common basis for not filing is the "private fund exemption," discussed above.

In the past, BEA has attempted to contact prospective reporters through mailed letters and by email. U.S. businesses with holdings abroad should flag any such outreach and determine whether they are required to participate in the survey.

BE-13A Transaction Reporting

In addition to the periodic surveys discussed above, BEA requires a U.S. business to file a BE-13A form within 45 days of a foreign investor's acquisition of its voting interest in the U.S. business when the following prerequisites are satisfied: (i) the value of the acquisition is greater than $3 million; (ii) the acquisition will lead to at least 10% of the voting interest in the U.S. business; and (iii) the U.S. business remains a separate legal entity.

TIC Surveys

The Department of the Treasury's Treasury International Capital (TIC) System and the Federal Reserve Bank likewise conduct surveys that are directionally similar to the BEA surveys. However, the TIC surveys are more focused on providing a detailed picture of *holdings of U.S. securities by foreign residents*. TIC defines "securities" very broadly, including LP interests. Similar to the BEA surveys discussed above, the SHL survey is conducted every 5 years.

All entities contacted by the Federal Reserve Bank of New York are required to file at least SHL Schedule 1, which gives the TIC System a general overview of the level of foreign securities holdings in a U.S. business.

Any entity—regardless of whether it has been contacted by the Federal Reserve—must submit both Schedule 1 and Schedule 2, if the total fair market value of that entity's reportable U.S. securities held by foreign residents is at least $200 million. Entities must file a separate Schedule 2 for each foreign securityholder.

The SHL is the main survey conducted by the TIC System. Companies are advised to access the TIC online portal to remain informed about upcoming surveys and reporting obligations associated with those surveys.

Penalties for Failure to Report

The BEA and TIC Surveys are statutorily authorized by the International Investment and Trade in Services Survey. 22 U.S.C. § 3101 et. seq. For both surveys, failure to participate can lead to a civil penalty "of not less than $2,500, and not more than $25,000." *Id*. § 3105(a). *Willful* failure to report can lead to a criminal fine of up to $10,000 and imprisonment for up to one year. Id. § 3105(c).

Hart-Scott-Rodino Antitrust Improvements Act of 1976

Antitrust enforcement continues to evolve, with fund-related activities remaining a central focus. Over the past year, regulators have introduced rule proposals and enforcement actions aimed at curbing deal activity, directly targeting fund managers' business models. Updates include changes to Hart-Scott-Rodino (HSR) reporting requirements, revised merger guidelines presuming anticompetitive harm in broader circumstances and actions seeking to unwind completed transactions. Notably, the revised Merger Guidelines place emphasis on "serial acquisitions" or "roll-ups" by private equity and fund advisers.

The HSR Act imposes filing and waiting period requirements for transactions that meet certain annually adjusted thresholds (currently $119.5 million).[25] HSR filings provide antitrust enforcers opportunity to review transactions and investments and investigate and address potential competitive concerns prior to completion. The HSR Act also carries monetary penalties for failure to comply — up to $51,744 per day for 2024. Fund managers should consider HSR filing obligations in all types of transactions, including smaller transactions, minority investments, exercises of warrants or options and follow-on investments. As a best practice, consider the current market value of previously acquired positions to plan for potential HSR filing and waiting period requirements when participating in follow-on offerings and investments; review minority holdings that may have appreciated above the HSR threshold; and plan for incremental purchases that may trip the initial or subsequent notification thresholds. Subsequent notification thresholds for 2024 are: $239 million, $1.195 billion, 25% (if valued at greater than $2.39 billion) and 50% (where value exceeds $119.5 million).

The basic HSR reporting threshold increased to $119.5 million in 2024 and suspension of the HSR early termination program continues, meaning that most HSR filings are subject to the full 30-day waiting period.[26] The Federal Trade Commission (FTC) published a new merger filing fee schedule. Mergers valued at less than $173.3 million on the low end of the scale are subject to a filing fee of $30,000, while at the high end of the scale, transactions valued at $5.365 billion or above face a $2.335 million fee. See the full fee schedule below:

Transaction Size	Filing Fee
More than $119.5 but less than $173.3 million	$30,000
At least $173.3 million but less than $536.5 million	$105,000
At least $536.5 million but less than $1.073 billion	$260,000
At least $1.073 billion but less than $2.146 billion	$415,000
At least $2.146 billion but less than $5.365 billion	$830,000
At least $5.365 billion	$2,335,000

In October 2024, the FTC and the Department of Justice (DOJ) finalized new HSR reporting rules. The rules go into effect February 10, 2025, and will fundamentally alter the HSR reporting landscape. The new rules expand the scope of transaction-related documents required to be submitted, expands the reporting requirements regarding minority shareholders and requires additional information regarding the transaction rational and competitive overlaps. Expect the filing process to take longer and be more rigorous and costly.

25 Size-of-Transaction is equal to the aggregate total amount of voting securities, assets, or non-corporate interests held as a result of the acquisition when aggregated with previously acquired positions.

26 The Early Termination program is scheduled to be reinstated in early 2025.

2024 saw an increase in HSR enforcement actions for failure to file. In September, the FTC announced a nearly $1 million civil penalty against an individual for his alleged failure to file on open market acquisitions of Wells Fargo & Company shares. Relatedly, the FTC appears to have revised its previous policy of exercising leniency for inadvertent first-time failures to file. Although there has been no formal announcement, the FTC has signaled a stricter approach towards these filings, and we expect settlements for these violations to rise in 2025.

Merger enforcement continued to be active in 2024. In December 2023, the DOJ Antitrust Division and the FTC released revised Merger Guidelines. The 2023 Merger Guidelines draw specific attention to “serial acquisitions” and set lower thresholds for where anticompetitive effects can be inferred or presumed. The guidelines notably increase the agencies’ focus on labor markets, nascent competitors, and the influence of private equity roll-ups. While it is too early to tell if Trump administration antitrust enforcers will rely on the 2023 Guidelines, they continue to provide insight into how the FTC and DOJ approach merger enforcement.

This year saw many high-profile merger enforcement developments. Notably, in August, the FTC’s highly anticipated hearing to pause Albertsons’ planned $24.6 billion supermarket merger with Kroger kicked off. The FTC’s case, along with follow-on cases brought by states attorneys general and private parties, raised concerns about reduced competition, potential price increases and impacts on workers. On December 10, 2024, a federal judge in Oregon sided with the FTC and granted a preliminary injunction pausing the deal. In so doing, the judge found that the deal would hurt competition in local markets across the country, both when looking only at other supermarkets or when including “large format stores” such as Walmart. Notably, however, the judge declined to endorse labor market concerns raised by the FTC in the case — finding a lack of economic evidence to support arguments that the deal would diminish union bargaining leverage. A day later, Albertsons terminated the deal and sued its former suitor in Delaware Chancery Court.

The proposed $4 billion merger between Tempur Sealy International, the largest mattress manufacturer globally, and Mattress Firm, the largest U.S. mattress retailer, also faced significant opposition from the FTC. The FTC filed an administrative complaint and a federal lawsuit to block the transaction, arguing that the vertical integration would grant Tempur Sealy excessive market power, enabling it to restrict rivals’ access to Mattress Firm’s retail network. According to the complaint, this could result in reduced competition, higher prices, and limited options for consumers across the U.S. The FTC’s unanimous decision to challenge the transaction highlighted concerns about the potential harm caused by vertical transactions.

Additionally, the FTC and DOJ continued to bring challenges related to the makeup of corporate boards. In September, the FTC announced a consent order related to Chevron Corporation’s acquisition of rival oil producer, Hess Corporation, prohibiting Chevron from appointing Hess CEO John B. Hess to its board of directors. The FTC alleged that Mr. Hess had improper communications with OPEC. It is reported that Mr. Hess may challenge this outcome under the new incoming administration.

The DOJ likewise has continued its stepped-up enforcement relating to Clayton Act Section 8, resulting in further high-profile director resignations. Section 8 has import for advisers and private funds taking minority positions in competing companies and seeking board representation. Under the Clayton Act, no person or representative of the same person or entity may serve simultaneously as a director or officer of competing companies, though there are carve-outs and exceptions. The prohibitions under Section 8 are limited to cases in which each of the companies has, under the revised thresholds for 2024, capital, surplus, and undivided profits of more than $48,559,000. The statute also permits directors and officers whose appointments were not prohibited at the time of appointment to continue to serve for up to a year after the Section 8 thresholds are exceeded.

Corporate Transparency Act

The Corporate Transparency Act (the “CTA”) requires a range of entities, primarily smaller, otherwise unregulated companies, to file a report with the U.S. Department of the Treasury’s Financial Crimes

Enforcement Network ("FinCEN") identifying the entities' beneficial owners — the persons who ultimately own or control the company — and providing similar identifying information about the persons who formed the entity. The CTA also authorizes FinCEN to disclose this information to authorized government authorities and to financial institutions in certain circumstances.

On December 3, 2024, the United States District Court for the Eastern District of Texas issued a nationwide injunction against enforcement of the CTA. The Court found that without an injunction, compliance with the CTA will "almost certainly" cause "substantial, incompensable monetary costs and constitutional harm" to the plaintiffs. The Court determined that an injunction was warranted and should apply nationwide. On December 23, 2024, the Fifth Circuit of the United States Court of Appeals (the "Fifth Circuit") issued an order that had the effect of reinstituting the deadlines under the CTA. On December 26, 2024, the Fifth Circuit vacated the stay of the injunction on the CTA that the motions panel had issued earlier in the week. As a result, the injunction is back in effect, and the CTA is not currently enforceable.

On December 27, 2024, FinCEN published an alert acknowledging that reporting companies are not currently required to file beneficial ownership information and are not subject to liability if they fail to do so while the court order remains in force. FinCEN indicated that reporting companies may continue to submit beneficial ownership information reports voluntarily. Entities that would otherwise be required to file under the CTA should monitor the progress of the case and be prepared to file if the injunction is lifted.

FinCEN's Beneficial Ownership Information Reporting Requirements (the "Reporting Rule") require certain domestic and foreign entities to submit a "beneficial ownership information" ("BOI") report to FinCEN. The Reporting Rule describes who must file a BOI report, what information must be reported and when a report is due. The Reporting Rule went into effect on January 1, 2024, and Reporting Companies are required to file the required information within 30 days of creation or registration of the entity or after a change in reported information, unless an exemption applies.

Each Reporting Company is required to report the entity name (and any alternative trade or d/b/a names), business street address, jurisdiction of formation and, for foreign entities, the State or Tribal jurisdiction of registration and a unique identification number (such as Taxpayer Identification Number, Employer Identification Number, Legal Entity Identifier, etc.). The Reporting Rule also requires Reporting Companies to identify their beneficial owners — defined as any individual who, directly or indirectly, owns 25% or more of the ownership interests in the Reporting Company or who has substantial control over the Reporting Company. Senior officers of the Reporting Company (president, CEO, CFO, COO, GC or any other officer performing a similar function), any individual who has the authority to appoint or remove any senior officer or a majority of the board of directors or similar body, as well as any individual who has substantial influence over important matters of the Reporting Company (including, for example, the reorganization, dissolution or merger of the Reporting Company, the selection or termination of business lines or ventures or the amendment of any governance documents) all exercise substantial control over the Reporting Company under the Reporting Rule. Additionally, Reporting Companies that are created or registered to do business in the United States by filing with a U.S. secretary of state or similar body on or after January 1, 2024 are also required to report the "company applicants" who directly file and who are primarily responsible for filing, or directing or controlling the filing of, the entity's formation documents (the "Company Applicants"). It is important to note that the reporting obligation lies with the Reporting Company and not the beneficial owner or Company Applicant.

The Reporting Rule lists 23 types of entities that are exempt from the definition of Reporting Company and, consequently, are not required to file reports under the Reporting Rule. These include large operating companies, public companies, registered investment companies and certain pooled investment vehicles, among others. Of note, although the Reporting Rule exempts directly or indirectly wholly owned subsidiaries of a number of entity types, including registered investment companies, there is no such blanket exemption for subsidiaries of exempt pooled investment vehicles. Some feeder fund vehicles, alternative investment vehicles, other subsidiaries of private funds and holding company entities that are not otherwise eligible for an exemption are likely to be subject to the Reporting Rule. Certain kinds of pooled investment vehicles, such as real estate vehicles relying on the Section 3(c)(5)(c) exemption under the Investment Company Act of 1940, certain commodity pools (even if advised by a registered commodity trading advisor and operated by a registered commodity pool operator) and certain foreign pooled investment vehicles are not exempt from the Reporting Rule.

FinCEN has released a number of FAQs in response to questions received regarding compliance with various aspects of the Reporting Rule.

Subsidiary Exemption

In response to questions relating to the exemption available to subsidiaries that are "controlled or wholly owned" by certain categories of exempt entities, FinCEN clarified that a subsidiary's ownership interests must be "fully, 100-percent owned or controlled by an exempt entity (or exempt entities)." FinCEN further stated that "control of ownership interests" means that the exempt entity (or exempt entities) "entirely controls" all of the ownership interests of the subsidiary in the same way that an exempt entity must wholly own all of a subsidiary's ownership interests to qualify for a subsidiary exemption. Note that a subsidiary, the ownership interests of which are owned or controlled by more than one entity, can qualify for the subsidiary exemption if each owning or controlling entity is one of the types of exempt entities that the Reporting Rule designates as an eligible owning or controlling entity (such as a registered investment advisor, a publicly traded company or a large operating company). These owning or controlling entities do not need to be affiliated with each other for the subsidiary to qualify for this exemption. If any portion of a subsidiary's ownership interests cease to be wholly owned or entirely controlled, directly or indirectly, by eligible exempt entities, the subsidiary will not qualify for the subsidiary exemption.

Multiple Changes to Exemption Status

FinCEN further clarified whether a Reporting Company whose size fluctuates above and below one of the thresholds for the large operating company exemption needs to file a BOI report with each change. A Reporting Company will need to file a BOI report whenever it "otherwise meets the definition of a reporting company and does not meet the criteria for the large operating company exemption (or any other exemption)." If a Reporting Company files a BOI report and later becomes exempt, that company should file a "newly exempt entity" BOI report. If, at a later date, the Reporting Company no longer meets the criteria for an exemption, the Reporting Company will need to file an updated BOI report within 30 calendar days of the occurrence of the change.

Dissolved Entities

Entities that ceased to exist before January 1, 2024 are not required to file a BOI report. Reporting Companies that existed for any period of time on or after January 1, 2024 and were not formally and irrevocably dissolved before that date are required to file. This is the case even if the entity formally dissolved before its initial BOI report was due.

U.S. Tax

Final Regulations on Domestically Controlled REITs

On April 24, 2024, the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") issued final regulations on the definition of a "domestically controlled" real estate investment trust ("REIT") (the "Final Regulations"). The Final Regulations retain the controversial "foreign-controlled domestic corporation look through rule" from the proposed regulations, under which a domestic corporation must be "looked through" to its owners to determine whether a REIT is domestically controlled, but this rule is narrowed to apply only to non-public domestic corporations that are more than 50% owned, directly or indirectly (by value), by non-U.S. owners, rather than 25% or greater (which was the threshold under the proposed regulations). The Final Regulations also add a limited 10-year transition rule for certain investors in existing REIT structures.

The Final Regulations are effective as of April 25, 2024.

Foreign-Controlled Domestic Corporations

The Final Regulations provide that, to determine whether a REIT is domestically controlled, all "look through persons" are looked through to their owners. A look through person is any person other than a "non-look through person." A "non-look through person" is any individual, any domestic C corporation other than a "foreign-controlled domestic corporation", certain publicly traded REITs or regulated investment companies ("RICs"), any nontaxable holder, any foreign corporation or foreign government, any publicly traded partnership (domestic or foreign), any estate (domestic or foreign), any international organization, any qualified foreign pension fund (a "QFPF") and any foreign trust or corporation that is directly or indirectly owned by a QFPF.

Under the Final Regulations, a "foreign-controlled domestic corporation" (which is looked through) is a non-public domestic corporation that is more than *50%* owned, directly or indirectly (by value), by non-U.S. owners. The proposed regulations had provided that non-public domestic corporations that are *25%* or greater owned by non-U.S. owners are looked through. Thus, the Final Regulations are more taxpayer-friendly than were the proposed regulations. Still, the Final Regulations will limit the ability of foreign investors to invest in a REIT through a domestic blocker in order to ensure that the REIT is treated as domestically controlled.

The Transition Rule

The Final Regulations exempt an existing REIT from the foreign-controlled domestic corporation look-through rule for up to 10 years if (i) the aggregate fair market value of any USRPIs acquired by the REIT directly or indirectly after April 25, 2024 does not exceed more than 20% of the aggregate fair market value of the USRPIs held directly or indirectly by the REIT as of April 25, 2024; and (ii) the percentage of REIT stock held directly or indirectly by one or more non-look through persons does not increase by more than 50 percentage points in the aggregate over the percentage of stock of the REIT owned directly or indirectly by the non-look through persons.

Guidance Related to Section 892

The Final Regulations omit the guidance under the proposed regulations relating to the Section 892 exemption from U.S. federal income taxation for foreign governments. The preamble to the Final Regulations provides that this guidance will be addressed in separate rulemaking.

Possible Structuring In Light of the Final Regulations

As mentioned above, a domestic C corporation cannot be more than 49.9% owned by non-U.S. persons without looking through it. However, shareholder loans by those non-U.S. shareholders can mitigate the effect of the Final Regulations. However, if a shareholder loan is used by non-U.S. shareholders of a domestic C corporation and those shareholders do not qualify for the benefits of a tax treaty with the United States that provides a zero rate of withholding on interest, those shareholders' interests would generally be limited to 9.9% in order to benefit from the portfolio interest exemption.

Further discussion of structuring considerations is available on our May 10, 2024 blog post.

Recent IRS Favorable Guidance Regarding a REIT's First Year

On October 4, 2024, the IRS released Private Letter Ruling 202440007, which concluded that the lack of income and assets in the first taxable year of an entity that had elected to be treated as a REIT did not cause the entity to fail to qualify as a REIT for the year. This ruling provides guidance on an issue of longstanding uncertainty. Although private letter rulings may only be relied upon by the taxpayers who have requested them, the rationale and conclusions that they express generally reflect the IRS's analysis and current positions. PLR 202440007 should offer reassurance for the REIT industry and legal practitioners alike.

PLR 202440007 is the first instance of the IRS directly addressing the issue of whether a REIT qualifies as such during an initial start-up period where it holds no assets or has no income.

The IRS concluded that the REIT's lack of assets and absence of gross income did not preclude satisfaction of the asset test or either income test and denied the taxpayer's request to be treated as if it had not made an election to be a REIT for its first taxable year. The IRS explained that because "95% of $0 equals $0" and "75% of $0 equals $0," the entity seeking the ruling did, in fact, meet each of the tests. The IRS also examined the legislative history of Section 856 to support its conclusion, noting that the primary concern of the income and asset tests is to ensure that the REIT structure is used for passive income and real estate assets, respectively (and not whether or not the REIT has gross income or assets, in the first instance). The income and asset tests are intended as anti-abuse mechanics, primarily to prevent the tax-favored REIT structure from being utilized for reasons beyond its statutory intent (namely, active conduct of a trade or business and investments in sectors other than real estate), and an entity with no assets or gross income does not implicate those concerns.

For additional information, please reference our October 10, 2024 blog post.

California FTB Releases Updated Proposed Regulations on Market-Based Sourcing Rules with Implications for Asset Managers

On September 13, 2024, California's Franchise Tax Board ("FTB") released updated proposed regulations ("Draft Regulations"), which would amend the rules regarding market-based sourcing for sales other than sales of tangible personal property. These proposed rules would have a significant effect on professional service providers, including asset managers. The Draft Regulations would apply to taxable years beginning on or after January 1, 2024.

The Draft Regulations build on the 2021 Regulations, which alter the existing language of Section 25136-2 by implementing a look-through approach in how California assigns income to the applicable taxpayer. In particular, the Draft Regulations would continue to source revenues for asset management services to the location of the investor or beneficial owner. This essentially requires a look through to the domicile of a fund's investors or beneficial owners and then adds a "value of interest" component to source the asset management fees to the location of the investors or beneficial owners. For this purpose, (i) master funds, feeder funds and similar entities that pool investors' assets are not considered beneficial owners, and (ii) "the domicile of an investor" is presumed to be the investor's billing address on file with the taxpayer unless the taxpayer has actual knowledge that the investor's principal place of business is different than the investor's billing address.

To the extent the total asset management fees attributable to California-domiciled limited partners exceeds the California economic nexus threshold ($711,538 for 2023), such asset manager would be deemed to have California income tax nexus and a related filing obligation, even if it has no physical presence in or connection to California.

A hearing has been requested and is expected in January 2025.

For additional information, please reference our September 20, 2024 blog post.

Supreme Court Upholds Mandatory Repatriation Tax in *Moore v. U.S.*

On June 20, 2024, the U.S. Supreme Court ruled 7-2 that the so-called mandatory repatriation tax under Internal Revenue Code Section 965 ("MRT") is constitutional.

Justice Kavanaugh wrote the majority opinion. Justice Thomas (joined by Justice Gorsuch) dissented. Justice Barrett (joined by Justice Alito) and Justice Jackson delivered separate concurring opinions. The Court found that the MRT is constitutional under Article I, Sections 8 and 9 and the Sixteenth Amendment. Specifically, the majority's opinion answered affirmatively to the "precise and narrow question" of "whether

Congress may attribute an entity's realized and undistributed income to the entity's shareholders or partners, and then tax the shareholders or partners on their portions of that income." The majority's opinion was arguably even narrower than it claimed, specifically eschewing ruling on situations where, for instance, the entity itself is subject to tax on the income in question (such as domestic corporations).

Moore v. U.S. has been widely followed in the tax community, as it was the first time in decades in which the U.S. Supreme Court considered the constitutionality of a U.S. federal income tax statute and had the potential to upend years of well-settled tax law and planning principles. The narrow Supreme Court decision relieves these concerns, although the majority opinion explicitly did not address other taxes such as, for example, a wealth tax. The dissent and Justice Barrett's concurring opinion expressed a notably narrower view of the definition of "income" under the Sixteenth Amendment than the majority, and each strongly suggested that a "realization" requirement was required for a tax to be a tax on income under the Sixteenth Amendment.

Proskauer filed an amicus brief on behalf of the American College of Tax Counsel in support of the government's position.

Increase in Tax Audits of Use of Private Aircraft, a/k/a "Corporate Jets"

The IRS has announced a new audit campaign targeted at the use of private aircraft, a/k/a "corporate jets". This has been an intensifying area of focus by the IRS over the last few years as a result of recently increased tax benefits for private aircraft. Clients who use airplanes for business and have taken advantage of these tax benefits should be prepared for additional scrutiny of their tax returns.

It is apparent from auditor training materials that the IRS has significantly improved their sophistication on corporate jet audits, and the training materials establish that the IRS can and will request detailed documentation to substantiate the business use position. These extend beyond flight logs and documentation related to the plane to the itineraries of the passengers when on the ground, receipts for their activities between flights, etc. While most organizations have compliance and document retention policies in place, recent IRS actions underscore the importance of having these and of (vis a vis tax reporting) erring on the side of recordkeeping. Those organizations which have taken the accelerated depreciation on the purchase price of aircraft are probably the first set of taxpayers who will be vetted/considered for audit.

For additional information, please reference our October 28, 2024 blog post.

Treasury and IRS Announce New Attack on Partnership Basis-Shifting Structures and Establishment of "Passthrough Working Group" to Develop Further Partnership Guidance

On June 17, 2024, the IRS announced the formation of a dedicated group in the Office of Chief Counsel specifically focused on developing guidance on partnerships, which is expected to work with a new "passthrough working group" being established in the Large Business and International Division of the IRS. At the same time, Treasury and the IRS launched an attack on a specific partnership strategy involving so-called "basis bump" or "basis-shifting" transactions involving related parties through a combination of guidance challenging the substance of such arrangements and declaring such arrangements to be "transactions of interest" that are subject to the strict disclosure requirements of the "reportable transaction" rules.

A "basis bump" or "basis-shifting" transaction generally involves using sophisticated related party partnership structures to exploit various basis adjustment rules in the partnership provisions of the Internal Revenue Code, with the intended result of shifting the tax basis in partnership assets — either from non-depreciable property or depreciable property. The present attack on such transactions is limited to transactions involving "related" parties, which include, generally, corporations or other entities with more than 50% overlapping ownership, as well as certain family relationships (such as parents and their children).

The announced effort to combat these related party-basis adjustment transactions has three parts. The first prong consists of proposed regulations identifying certain types of basis adjustment transactions as "transactions of interest." This means that the transactions will need to be specifically disclosed to IRS under the reportable transaction rules, which apply to the partnership and the related party partners involved in the transactions as well as to material advisors.

The second prong of the attack is a revenue ruling in which the IRS states that the "economic substance" doctrine applies to disallow the benefit of the partnership basis adjustments otherwise allowable under the tax law, where the transaction among related parties was devoid of economic purpose or substance. The revenue ruling, which is effectively the position the IRS intends to assert in any litigation over these transactions, described three situations in which purported partnership basis adjustments will be disregarded and notes, in all three situations, that enhanced 20%-40% penalties for undisclosed noneconomic substance transactions would apply.

The third prong is a notice announcing Treasury and the IRS's intent to issue proposed regulations governing related party partnership basis adjustments. In general, these rules to be proposed will not permit either the partnership or a related party partner to receive the benefit of an increase in basis. The notice announces that, broadly, the proposed regulations are expected to address the required method of accounting for basis in related party partnership transactions and rules for determining taxable gain or loss on the disposition of basis-adjusted property. The proposed regulations will also expand the scope of transactions to include those involving tax-indifferent parties. This last aspect of the proposed regulations suggests that potentially affected taxpayers who may not necessarily be subject to the immediate effects of the new guidance may, nevertheless, wish to consider whether they have entered into other arrangements that might be brought into scope by future proposed regulations. Additionally, other proposed regulations will address the treatment of partnerships that are owned by members of a consolidated group of corporations. Those regulations are intended to adopt a "single entity" approach that could extend beyond basis-adjustment transactions.

A more detailed summary is on our June 21, 2024 blog post.

IRS Creates Standardized Form for Section 83(b) Elections

In early November, the IRS released Form 15620, which is an approved IRS form for making Internal Revenue Code Section 83(b) elections ("Section 83(b) elections"). Section 83(b) of the Internal Revenue Code provides taxpayers with the ability to include the fair market value of nonvested property over the amount (if any) paid for the property at the time of transfer in their gross income, rather than when the property becomes vested. In general, the effect of the irrevocable election is that taxpayers can pre-pay the tax liability associated with the property while it has a lower valuation (assuming the property's value increases in the following years). Section 83(b) elections are often made in connection with the grant of restricted shares for early-stage companies, as well as in respect of profits interests (also called "carry" in the asset management industry). Profits interests that meet the requirements of certain IRS Revenue Procedures have favorable tax treatment, even without Section 83(b) elections. Nevertheless, Section 83(b) elections are frequently made on profits interests on a protective basis so as to preserve the favorable tax treatment in the event that the profits interest does not comply with the applicable IRS Revenue Procedures.

With the release of Form 15620, taxpayers are no longer responsible for drafting an election form if they want to make a Section 83(b) election, as was historically the case. However, taxpayers may continue to file their own election form and not use Form 15620 if they choose to do so. Consistent with existing Section 83(b) elections filing procedures, Form 15620 currently may only be filed via mail, but the IRS is expected to support electronic filing eventually.

Ongoing Challenges to Soroban

It's been a year since *Soroban Capital Partners LP v. Commissioner*, where the Tax Court held that the phrase "limited partner, as such" means that, in order to benefit from the self-employment exclusion, a limited partner must be passive and cannot actively participate in the partnership. The Tax Court did not consider whether even de minimis participation would disqualify a limited partner from the exclusion. Accordingly, under *Soroban*, limited partners in private equity and hedge fund managers must pay self-employment tax if they actively participate in the manager.

Denham Capital Mgmt. v. Comm'r of Internal Revenue

The Tax Court reached a similar conclusion in *Denham* on December 23, 2024. The petitioner, Boston-based PE firm Denham, argued that the Denham partners should be considered limited partners under Section 1402(a)(13) and challenged the *Soroban* standard as vague and unworkable. The Tax Court upheld and applied the functional analysis test from *Soroban* and determined that the limited partners in this case actively participated in the partnership and would be subject to self-employment taxes.

Multiple other cases are going through various stages of litigation to challenge the Tax Court's decision in *Soroban*. A few are highlighted below, but many more are pending.

Sirius Solutions LLLP v. Commissioner

Appeal from the Tax Court is currently before the 5th Circuit Court of Appeals.

Point72 Asset Mgmt. v. Comm'r of Internal Revenue

Cross-motions for summary judgment have been filed and are under seal. The updated status report is expected to be submitted to the court in January 2025.

Further, on September 29, 2023, the IRS and Treasury released their 2023-2024 Priority Guidance Plan, which includes a project on the "limited partner exception", indicating that issuing guidance on this topic is an administrative priority during this period. Similarly, the 2024-2025 Priority Guidance Plan, which was issued on October 3, 2024, specifies that the agencies are prioritizing regulations on the "limited partner exception". However, neither plan provides details about the project, so the scope of the forthcoming guidance remains uncertain.

ERISA

On April 23, 2024, the U.S. Department of Labor ("DOL") issued final rules (the "Final Rules") which would have expanded what it means to provide fiduciary "investment advice" under the U.S. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and Section 4975 of the U.S. Internal Revenue Code of 1986, as amended (the "Code") (discussed in further detail here). The Final Rules were set to become effective on September 23, 2024, but on July 25, 2024, a federal court in Texas stayed the effective date until further order of the Court (Fed'n of Americans for Consumer Choice Inc. v. Dep't of Labor, E.D. Tex., No. 6:24-cv-00163, 7/25/24). The Court also stayed the effective date of related DOL amendments to Prohibited Transaction Class Exemption ("PTCE") 84-24. The very next day, the U.S. District Court for the Northern District of Texas issued a broader stay in American Council of Life Insurers v. Dep't of Labor that applies to all of the PTCE amendments related to the Final Rules (i.e., PTCEs 84-24 and 2020-02, 75-1, 77-4, 80-83, 83-1 and 86-128). Both stays apply nationwide and are not limited to just the parties to the cases.

The Final Rules

The Final Rules would have replaced the DOL's 1975 regulation that set forth a relatively narrow five-part test, each prong of which needed to be satisfied, in order to be considered to be providing "investment advice" for purposes of determining status as a "fiduciary" under ERISA and Section 4975 of the Code.

Under the "five-part test," a person is considered to be providing "investment advice" only if the person: (i) renders advice as to the value of securities or other property, or makes recommendations as to investing in, purchasing or selling securities or other property, (ii) on a regular basis, (iii) pursuant to a mutual agreement, arrangement, or understanding with the plan, the plan fiduciary or individual retirement account ("IRA") owner that, (iv) the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and (v) the advice will be individualized based on the particular needs of the plan or IRA. A person who meets all five prongs of the test and receives direct or indirect compensation will be considered an "investment advice" fiduciary with respect to the applicable plan or IRA.

Among other things, the Final Rules would have provided as follows:

> ***Broader Definition of "Investment Advice"***. The narrow "five-part test" was to be replaced with a new, broader definition of "investment advice." Under the Final Rules, which made clear that the test for fiduciary status is objective, "investment advice", includes a recommendation to a retirement investor (i.e., an ERISA plan or a participant, beneficiary or fiduciary thereof, or an IRA or a beneficiary, owner or fiduciary thereof) of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property if the adviser meets one of the following two conditions:

> Professional investment recommendations: The adviser either directly or indirectly (through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business ***and*** the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:

> is based on review of the retirement investor's particular needs or individual circumstances,

> reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and

> may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; *or*

> Fiduciary acknowledgment: The adviser represents or acknowledges that it is acting as a fiduciary under Title I and/or Title II of ERISA with respect to the recommendation.

> ***Sales Recommendations, Investment Information and Investment Education Not Covered***. The Final Rules would have specifically provided that sales recommendations that do not meet the above objective test would not be treated as fiduciary investment advice. In this regard, the DOL noted in the preamble that the objective test was aimed at ensuring that the advice goes beyond a mere "sales pitch," and instead reflects the sort of relationship of trust and confidence that should be afforded fiduciary status and protection. The Final Rules would have further provided that the mere provision of investment information or education, without an investment recommendation, is not covered.

> ***IRA Rollover Advice and Other One-Time Advice Covered***. The Final Rules would also have specifically covered advice to roll over assets from an employer-sponsored retirement plan into an IRA — in other words, rollover advice would be ERISA-covered fiduciary "investment advice" regardless of whether the advice is provided on a "regular basis." By eliminating the "regular basis" requirement, other instances of one-time advice could be considered fiduciary "investment advice" under the Final Rules.

> ***Advice Provided by Discretionary Fiduciaries Not Automatically Covered***. Under the Final Rules, any investment recommendation would need to meet the objective test described above in order to be considered "investment advice." The proposed rules would have automatically picked up any investment recommendation provided by an adviser to a retirement

investor if the adviser either directly or indirectly (through or together with an affiliate) had discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor, even in a context unrelated to the advice. However, automatic coverage of such an investment recommendation was not included in the Final Rules.

In separate (but related) rulemakings, the DOL finalized amendments to certain PTCEs (including PTCEs 2020-02 and 84-24, among others) which would have provided some relief to investment advice fiduciaries for certain compensation arrangements that would otherwise be prohibited, provided the adviser complied with certain "impartial conduct standards" and other exemption conditions. These PTCE amendments were similarly set to become effective on September 23, 2024 (though there was a one-year transition period for certain conditions in the PTCEs).

The Stay Orders

The Court in *Fed'n of Americans for Consumer Choice* found that the plaintiff insurance agents were likely to succeed on the merits of their claim that the Final Rules (like the DOL's vacated 2016 fiduciary rules) conflicted with ERISA in several ways, including by potentially imposing ERISA fiduciary status on one-time advice providers to non-ERISA plans (i.e., IRAs) that did not have a well-established relationship with their clients built on trust and confidence — what the Court viewed as the hallmarks of a fiduciary investment adviser. This Court also found that the DOL acted arbitrarily and capriciously in amending PTCE 84-24 to impose duties of loyalty and care that Title II of ERISA (applicable to IRAs) does not include, effectively recreating the 2016 fiduciary rule's problematic private cause of action.

The Court in *American Council of Life Insurers* similarly found that the plaintiff insurance agents were "virtually certain" to succeed on the merits of their claims to vacate the Final Rules and the related exemption amendments, and accordingly stayed the effective date of the Final Rules and related exemption amendments during the pendency of the case.

It is currently unclear if the Final Rules (and related PTCE amendments) will ultimately be vacated or allowed to take effect. We will continue to monitor developments in this area, and will keep you posted.

DOL Unveils Final Amendment to QPAM Exemption

On April 3, 2024, the DOL published in the federal register a final amendment to PTCE 84-14 (the "QPAM Exemption") that made considerable changes to the exemption's conditions (the "Final Amendment"), including:

- Increasing the equity/net worth and assets under management thresholds to qualify as a "qualified professional asset manager" ("QPAM");
- Adding a new requirement for a QPAM to notify the DOL if it will be relying on the exemption, and the DOL will publish a list of QPAMs on its website;
- Specifically including foreign criminal convictions in the list of criminal convictions that will make a QPAM ineligible to rely on the exemption;
- Adding new types of "prohibited misconduct" that will make a QPAM ineligible to rely on the exemption;
- Providing for a one-year transition period following a QPAM's criminal conviction or prohibited misconduct to minimize the impact of the QPAM losing the ability to rely on the exemption;
- Clarifying the requirement that the terms of the applicable transaction and related negotiations be the sole responsibility of the QPAM; and

- Adding a recordkeeping requirement.

The Final Amendment, which became effective on June 17, 2024, has far-reaching effects on employee benefit plans subject to Title I of ERISA and IRAs subject to Section 4975 of the Code (collectively, “Plans”), and investment funds and separate accounts holding “plan assets” of one or more such Plans (“Plan Asset Entities”). The Final Amendment significantly impacts investment managers managing Plan Asset Entities (including eliminating the ability of certain managers to qualify as a QPAM), employers/plan sponsors of Plans, IRA owners and other fiduciaries responsible for engaging or monitoring investment managers, as well as counterparties to Plan Asset Entities seeking to rely on the QPAM Exemption.

How Did We Get Here?

The prohibited transaction rules under ERISA (and the mirror provisions under Section 4975 of the Code) prohibit, among other things, sales, leases, loans and the provision of services between Plans and certain parties related to those Plans referred to as “parties in interest” (or “disqualified persons” under Section 4975 of the Code). In light of the broad definition of “party in interest,” many assume for purposes of practicality that every counterparty in a transaction involving a Plan is a prohibited “party in interest” and, therefore, that every transaction involving a Plan requires an exemption from the prohibited transaction rules.

Enter the QPAM Exemption, which provides broad exemptive relief from those prohibited transaction restrictions for transactions between a “party in interest” with respect to a Plan and a Plan Asset Entity holding “plan assets” of such a Plan, where the Plan Asset Entity is managed by a QPAM and the other Plan protective conditions of the QPAM Exemption are met.

In order to qualify as a QPAM with respect to a Plan, the relevant entity must be either a bank, a savings and loan association, an insurance company, or a registered investment adviser that meets certain financial requirements and acknowledges in writing that it is a fiduciary to the Plan. However, one of the Plan protective conditions of the exemption provides that a QPAM would become ineligible to rely on the exemption for a period of 10 years if the QPAM, or various affiliates or five percent or more owners of the QPAM, are convicted of certain crimes.

The Final Amendment

Below is a high-level summary of the changes to the QPAM Exemption in the Final Amendment.

Increase of equity/net worth and assets under management thresholds to qualify as a QPAM

The Final Amendment increases the financial thresholds necessary for an entity to qualify as a QPAM as follows:

- the equity capital or net worth threshold (as applicable) for a bank, a savings and loan association and an insurance company increases from $1,000,000 to: (i) $1,570,300 as of 12/31/24, (ii) $2,140,600 as of 12/31/27, and (iii) $2,720,000 as of 12/31/30;
- the assets under management threshold for a registered investment adviser increases from $85,000,000 to: (i) $101,956,000 as of 12/31/24, (ii) $118,912,000 as of 12/31/27, and (iii) $135,868,000 as of 12/31/30; and
- the shareholders’ or partners’ equity threshold for a registered investment adviser increases from $1,000,000 to: (i) $1,346,000 as of 12/31/24, (ii) $1,694,000 as of 12/31/27, and (iii) $2,040,000 as of 12/31/30.

The increases go into effect as of the last day of the QPAM’s fiscal year ending no later than the applicable date set forth above. Thereafter, the threshold amounts will be subject to future annual inflation adjustments, which the DOL will publish no later than January 31st each year (to take effect as of the last day of the QPAM's fiscal year ending no later than December 31st of such year).

Requirement to notify DOL that QPAM will be relying on the exemption

The Final Amendment requires a QPAM to notify the DOL by email at *QPAM@dol.gov* that it is relying on the QPAM Exemption as follows:

- A QPAM must report the legal name of each business entity relying on the exemption and any name under which the QPAM may be operating.
- The notice need only be provided once, unless the QPAM changes its legal or operating name.
- The notice must be provided within 90 days of the QPAM's reliance on the exemption or a change to its legal or operating name.
- The DOL will publish on its website a list of QPAMs who have provided such notification to the DOL.
- If a QPAM is no longer relying on the exemption, it can notify the DOL and have its name removed from the list of QPAMs on the DOL's website.

The DOL also included a 90-day cure period for inadvertent failures to notify the DOL during the 90-day reporting period described above. In order to "cure" the failure, the QPAM must provide an explanation to the DOL of why it failed to provide the notice during the 90-day reporting period. Additionally, the DOL confirmed in the regulatory preamble that "isolated" instances of failing to report generally would not result in QPAM ineligibility.

Specific inclusion of foreign criminal convictions in the list of criminal convictions that would make a QPAM ineligible to rely on the exemption

The Final Amendment provides that a QPAM will become ineligible to rely on the QPAM Exemption for a period of 10 years if the QPAM, or various affiliates or five percent or more owners of the QPAM, are convicted of certain crimes — including foreign criminal convictions. However, to address comments that criminal convictions may occur in foreign nations with the intent to harm U.S.-based investment managers, the Final Amendment excludes convictions and imprisonments that occur within a foreign country that is included in the U.S. Department of Commerce's list of foreign adversaries (which currently include China, Cuba, Iran, North Korea and the Maduro Regime of Venezuela).

Addition of new types of prohibited misconduct that would make a QPAM ineligible to rely on the exemption

The Final Amendment includes a new category of misconduct that will lead to a QPAM's ineligibility to rely on the QPAM Exemption for 10 years (similar to covered criminal convictions), referred to as "participating in prohibited misconduct," which is triggered if the QPAM, its affiliate or a five percent or more owner:

- Enters into a non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") with a federal or state prosecutor where the factual allegations that form the basis of the NPA or DPA would have constituted a covered criminal conviction if they were successfully prosecuted; or
- Is found or determined in a final judgment or court-approved settlement in a proceeding brought by certain federal or state regulators that it:
    - Engaged in a systematic pattern or practice of violating the conditions of the exemption;

- Intentionally violated the conditions of the exemption; or
- Provided materially misleading information to a federal or state regulator in connection with the conditions of the exemption.

"Participating in" such misconduct includes not only active participation but also knowingly approving of the conduct or having knowledge of such conduct without taking appropriate and proactive steps to prevent such conduct from occurring, including reporting the conduct to appropriate compliance personnel.

The Final Amendment provides that a QPAM will become ineligible on account of participating in prohibited misconduct only if the factual basis for determining that such prohibited misconduct occurred is set forth in a final judgment or court-approved settlement brought by certain federal or state regulators (although the court need not specifically consider the exemption so long as the facts set forth in the judgment or settlement confirm that such misconduct occurred).

If a QPAM, its affiliate, or any owner of a five percent or more interest in the QPAM enter into a foreign equivalent of an NPA or DPA, the QPAM is required to notify the DOL by email within 30 calendar days following execution of the foreign equivalent NPA or DPA.

One-year transition period to minimize the impact of a QPAM losing the ability to rely on the exemption

Any QPAM that becomes ineligible to rely on the exemption on account of a criminal conviction or participating in prohibited misconduct must provide a one-year "transition period" for then-existing Plan clients to the extent the QPAM desires to be able to rely on the exemption during the transition period. During such one-year transition period, the QPAM must fully comply with the conditions of the exemption, it must ensure that it manages each Plan's assets prudently and loyally, and it must comply with the following additional conditions:

- Within 30 days of the ineligibility date, the QPAM must provide notice to the DOL and each of its client Plans stating:
  - Its failure to satisfy such condition of the exemption and the resulting initiation of the one-year transition period;
  - That during the transition period the QPAM:
    - Will not restrict the client Plan's ability to terminate or withdraw from its arrangement with the QPAM;
    - Will not impose fees, penalties, or charges on the client Plan in connection with such termination or withdrawal (other than certain reasonable fees disclosed in advance that are designed to prevent abusive investment practices or to ensure equitable treatment of pooled fund investors);
    - Will indemnify, hold harmless, and promptly restore actual losses to the client Plan resulting therefrom (including the costs of unwinding transactions and transitioning to a new manager); and
    - Will not employ or knowingly engage any individual that participated in the conduct that was the subject of the criminal conviction or the prohibited misconduct; and
  - An objective description of the facts and circumstances upon which the criminal conviction or prohibited misconduct is based, written with sufficient detail to fully inform the client Plan's fiduciary of the nature and severity of the conduct so that such fiduciary can satisfy

its fiduciary duties of prudence and loyalty with respect to hiring, monitoring, evaluating and retaining the QPAM in a non-QPAM capacity.

> As of the ineligibility date, the QPAM must not employ or knowingly engage any individual that participated in the conduct that was the subject of the criminal conviction or the prohibited misconduct.

The Final Amendment permits a QPAM to utilize the exemption for new transactions on behalf of existing client Plans during the one-year transition period. However, the exemption will not be available for new client Plans during the transition period, and after the transition period expires, the QPAM may not rely on the exemption until the expiration of the 10-year ineligibility period unless it obtains an individual exemption from the DOL permitting it to do so.

The Final Amendment further provides that if a QPAM becomes ineligible (or anticipates that it will become ineligible) due to a criminal conviction or prohibited misconduct, the QPAM may apply for an individual exemption from the DOL to continue to rely on the relief provided under the QPAM Exemption beyond the one-year transition period. In the preamble, the DOL cautioned that, in such circumstances, QPAMs should apply for an individual exemption as soon as possible in order to be in the best position to obtain exemptive relief prior to the expiration of the transition period.

Clarification of the requirement that the terms of the applicable transaction and related negotiations be the sole responsibility of the QPAM

The Final Amendment provides that the terms of the applicable transaction, whether to enter into the transaction, and any associated negotiations must be determined by the QPAM (or under its authority and direction), and the transaction must not be designed to benefit a party in interest. In this regard, the transaction must be based on the QPAM's own independent exercise of fiduciary judgment and free from any bias in favor of the Plan sponsor or other parties in interest (in other words, the QPAM cannot be appointed to uncritically approve a transaction negotiated, proposed or approved by the Plan sponsor or another party in interest). Further, the exemption will not be available for any transaction that has been planned, negotiated or initiated in whole or in part by a party in interest and presented to a QPAM for approval to the extent the QPAM would not have the requisite sole responsibility over the transaction.

Addition of a recordkeeping requirement

The Final Amendment requires a QPAM to maintain records for six years demonstrating compliance with the exemption. In the preamble, the DOL noted that the extent to which transaction-by-transaction records are necessary depends on the facts and circumstances, and that this recordkeeping condition is focused on requiring the QPAM to retain records satisfactory to prove compliance with the applicable conditions for any section of the exemption the QPAM relied upon, such as satisfying the definition of QPAM and limiting the involvement of parties in interest in investment transactions. The records must be maintained in a manner that is reasonably accessible at the QPAM's customary business location during normal business hours for examination by the DOL, the Internal Revenue Service, other federal or state regulators, any Plan fiduciary, any contributing employer or employee organization whose members are covered by the Plan, and any Plan participant or beneficiary. However, such Plan-related parties are only permitted to access records relevant to their transactions, and the QPAM does not need to provide access to privileged trade secrets or privileged commercial or financial information of the QPAM.

As noted, the Final Amendment significantly impacts investment managers acting or seeking to act as QPAMs, Plan fiduciaries responsible for engaging or monitoring QPAMs and counterparties relying or seeking to rely on the QPAM Exemption.

In addition, for fiduciaries of ERISA-covered Plans, it is important to recognize that ERISA's fiduciary duties of prudence and loyalty apply in the context of hiring, monitoring and retaining/firing an investment manager regardless of whether the investment manager qualifies as a QPAM or may utilize the QPAM Exemption.

As always, we are available to answer any questions you may have with respect to the Final Amendment or otherwise regarding compliance with the QPAM Exemption or any other PTCEs.

State Regulation / Blue Sky

Compliance with Rule 506 is very important in connection with state securities, or "blue sky" laws, since under Section 18 of the Securities Act, the states are pre-empted from regulating offerings that comply with Rule 506. Without such compliance with Rule 506, there is no pre-emption, and unless an applicable self-executing state exemption is available, a state where an investor purchases the issuer's securities can require a pre-sale filing and regulate the required disclosure for the offering, as well as other aspects of the offering. If a filing is incomplete or late or a state finds any other issue with it, they may require that the issuer make a rescission offer to the investors and possibly pay fines.

Provided that an offering is made in compliance with Rule 506, the blue sky laws of many states currently require that a copy of Form D be filed with the relevant state authority within 15 days following the initial sale of securities in that state, along with the state's required filing fee. In addition, some states' blue sky laws require that copies of amended SEC filings also be filed with the state. A handful of states require annual renewal filings and, in a couple of cases, the payment of annual renewal fees for ongoing offerings. Please note that all states except Florida now have a central electronic filing system for Rule 506 offerings, "The NASAA Electronic Filing Depository," usually referred to as the "EFD," which is currently required to be used for filings in many states, and will possibly be mandatory for all or most states in the not too distant future. EFD filings have become much more prevalent since the pandemic and are, in fact, a practical and convenient alternative to paper filings.

Private funds should be aware of requirements that may be triggered when sales of securities are made to investors in states where sales have not been made in the past, and sales in states in which a Form D has not yet been filed. The penalties for failing to make timely filings can be significant. Some states may require payment of a fine, or even demand that an issuer offer rescission to each investor in a state, or the administrator may issue a consent order.

Although Section 18 of the Securities Act states that covered securities, such as securities offered pursuant to Rule 506 of Regulation D, are not subject to state regulation, an increasing number of states use their authority under broker dealer and investment adviser regulation and anti-fraud statutes to review and comment on Form Ds filed in connection with Rule 506 offerings. Questions regarding whether a related party listed under item 3 of Form D is required to be registered as an investment adviser in the state are not unusual. A handful of states also occasionally request to see copies of the offering materials provided in connection with the offering.

Employment Law

Non-Compete Law

Federal

On April 23, 2024, the Federal Trade Commission ("FTC") voted 3-2 to issue a final rule ("Final Rule") on non-compete agreements that imposed a near-complete ban on the use of non-competes by employers. Although the Final Rule was set to become effective on September 4, 2024, a federal court in the Northern District of Texas issued a nationwide injunction preventing it from going into effect. The district court granted a preliminary injunction against the rule, holding that: (1) the FTC exceeded its statutory authority in issuing the rule; and (2) the rule was arbitrary and capricious under the Administrative Procedures Act. The FTC appealed to the Fifth Circuit on October 18, 2024.

On October 7, 2024, the National Labor Relations Board's ("NLRB") General Counsel, Jennifer Abruzzo, issued a memorandum to all Regional Directors, Officers-in-Charge and Resident Officers stating that she intends to urge the NLRB "not only to find certain non-compete provisions unlawful but also, as fully as possible, to remedy the harmful effects on employees when employers use and apply them." GC Abruzzo also stated that "stay-or-pay" provisions, under which "an employee must pay their employer if they separate from employment," also infringe on employees' Section 7 rights.

While the NLRB has yet to issue a decision in line with GC Abruzzo's memorandum, it may soon review an Administrative Law Judge's ("ALJ") decision that brings the issue forward. In *J.O. Mory, Inc*, No. CA-309577 (2024), the ALJ held that overly broad non-compete and non-solicitation provisions in an employment agreement may create a "chilling effect" on employees' exercise of their Section 7 rights.

The upcoming change in administration has created additional uncertainty, with many anticipating that the Trump administration will roll back the non-compete restrictions proposed under the Biden administration.

Follow our blog for more information and updates to federal non-compete rules and regulations.

California

Effective as of January 1, 2024, California employers are prohibited from entering or attempting to enforce non-compete agreements regardless of where the agreement was signed. Previously, the California Business and Professions Code restricted non-competes entered within the state, but the new law amends this restriction to include contracts entered beyond the borders of California. The law allows an employee, former employee or prospective employee to bring a private action to enforce the new law for injunctive relief, recovery of actual damages or both. Additionally, prevailing employees, former employees or prospective employees will be entitled to recover reasonable attorney's fees and costs.

This new law fortifies California's public policy interests against non-compete agreements and expands employees' enforcement rights for challenging these agreements in California courts. However, it remains to be seen how the law will interplay with principles of comity, especially when out-of-state employers have secured judgments in other states. It is possible that employers will feel pressure to commence litigation to enforce non-competes in more favorable jurisdictions before a California court can strike down the agreement.

For more information on this amendment, see our blog post.

Confidentiality and Non-Disparagement Provisions

New Jersey

On May 7, 2024, in *Savage v. Township of Neptune*, 257 N.J. 204 (2024), the Supreme Court of New Jersey unanimously held that non-disparagement clauses in an employment contract or settlement agreement that have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" are unenforceable as against public policy. The case concerned a settlement agreement containing a non-disparagement clause covering claims of sexual discrimination, harassment and retaliation by the defendant. The Court held that the non-disparagement clause was unenforceable under N.J.S.A. 10:5-12.8(a), as it contained provisions that would conceal details about discrimination claims.

Salary Disclosure Laws

Following the lead of California, Colorado, Connecticut, New York (City and State), Washington State and Rhode Island (along with a few other municipalities) that previously enacted salary transparency laws, several additional jurisdictions implemented or passed their own salary disclosure laws in 2024.

Washington, D.C.

Effective as of June 30, 2024, employers with at least one employee in the District of Columbia must disclose the "minimum and maximum projected salary or hourly pay in all job listings and position descriptions advertised." The projected figures should be based on what the employer "in good faith believes at the time of the posting it would pay for the advertised hob, promotion, or transfer opportunity." Additionally, "before the first interview," employers are required to disclose to prospective employees the "existence of healthcare benefits that employees may receive."

Hawaii

Effective as of January 1, 2024, Hawaiian employers with at least 50 employees are required to disclose an hourly rate or salary range in job listings that reasonably reflects the actual "expected compensation." Unlike most other jurisdictions, the Hawaiian law's disclosure requirements do not apply to job listings for internal transfers or promotions or for positions with small employers that have fewer than 50 employees. Public employee positions for which salary, benefits or other compensation are determined under a collective bargaining agreement are also excluded from the pay transparency law. For more information, read our blog.

Illinois

Effective January 1, 2025, Illinois employers with at least 15 employees will be required to include "pay scale and benefits" in all job postings. This means employers must disclose the wage, salary or wage or salary range that employers reasonably believe they will pay for the position, as well as a general description as well as the benefits and other compensation (including bonuses, stock options or other incentives) that the employer expects to offer for the position. The law will apply to jobs performed at least in part in Illinois as well as jobs where the employee will report to a supervisor, office or other work site in Illinois. Read our blog for more details.

Massachusetts

Effective July 31, 2025, employers with 25 or more employees in Massachusetts must include a pay range in job advertisements. Pay range includes the "annual salary range or hourly wage range that the covered employer reasonably and in good faith expects to pay for such position at that time."

Additionally, the law requires that employers that are already required to provide the Equal Opportunity Employment Commission ("EEOC") with workforce demographics reports EEO-1, EEO-3, EEO-4 and EEO-5 and that have 100 or more employees within Massachusetts will now be required to send copies of those reports to the Massachusetts state secretary as well.

For the first year after the law is in effect, there will be a grace period of two business days after an employer receives notice of a violation to correct the problem without facing a fine. The law additionally prohibits retaliation or discrimination against any employee or applicant for taking action to enforce the law or making a complaint regarding an alleged violation of the law.

For more information on the Massachusetts pay transparency law, click here.

New Jersey

Effective May 18, 2025, certain New Jersey employers must include salary information in their postings for new jobs and transfer opportunities. The new law covers New Jersey employers with ten or more employees over 20 calendar weeks who do business, employ persons or take applications for employment. In their postings, employers must include the hourly wage or salary—or the range of the hourly wage or salary—for the role, as well as a general description of benefits and other compensation programs for which the employee hired into the role would be eligible.

Covered employers are also required to "make reasonable efforts to announce, post, or otherwise make known" opportunities for promotion that are advertised either externally or internally within the employer to all current employees in the affected department(s) prior to making a promotion decision.

Covered employers are not required to include the pay information in postings "that are posted for the purpose of identifying qualified applicants for potential future job openings and not for existing job openings."

For more information on the New Jersey pay transparency law, click here.

Temporary Workers and Independent Contractors

Federal

On January 11, 2024, the U.S. Department of Labor ("DOL") published its "final rule" on independent contractor classification under the Fair Labor Standards Act ("FLSA"), effective March 11, 2024. The final rule codified the DOL's "general interpretations for determining whether workers are employees or independent contractors under the FLSA" and endorsed a multi-factor "economic realities" test for determining classification similar to the one used by many federal courts (and by DOL prior to January 2021). The DOL's final rule emphasizes that an analysis of independent contractor classification must consider the "totality of the circumstances" and evaluate the following six factors, with none necessarily considered dispositive:

> **1. Opportunity for profit or loss depending on managerial skill**: This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. Relevant considerations include whether the worker determines or can meaningfully negotiate the charge or pay for the services provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising or other efforts to expand their business or secure more work and whether the worker makes decisions to hire others, purchase materials and equipment—and/or rent space. If a worker has no opportunity for profit or loss, the factor suggests that the worker is an employee.

> **2. Investments by the worker and the potential employer**: This factor considers whether any investments by a worker are "capital or entrepreneurial" in nature and would "generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach."

> **3. Degree of permanence of the work relationship**: This factor supports a determination of employment "when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships." Conversely, the factor supports a finding of independent contractor status "when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities."

> **4. Nature and degree of control**: This factor considers both active and reserved control (e.g., the right to control) by the entity receiving the services over "the performance of the work and the economic aspects of the working relationship," including whether the engaging entity sets the worker's schedule, has the ability to discipline the worker, limits the worker's ability to work for others, etc.

> **5. Extent to which the work performed is an integral part of the employer's business**: This factor does not depend on whether any individual worker in particular is an integral part of

the business, but rather whether the function the worker performs is an integral part—e.g., whether it is "critical, necessary, or central to the [engaging entity's] principal business."

> **6. Skill and initiative**: This factor considers "whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative." It supports employee status where the worker does not use specialized skills in performing the work or "where the worker is dependent on training from the employer to perform the work."

While this rule went into effect on March 11, 2024, it is already subject to various legal challenges. Additionally, there is the possibility the incoming Trump administration will seek to withdraw this rule and issue a more business-friendly rule, as it did in January 2021. Regardless of whether the rule is overturned by a court or replaced by the new administration, employers should remain vigilant about their compliance with more stringent independent contractor laws already in effect in many states.

For a more detailed discussion of this topic, please see our blog posts here and here.

New York

New York State's "Freelance Isn't Free Act" went into effect on May 20, 2024. The law, which only applies to contracts entered into on or after that date, provides certain protections for freelance workers, mirroring protections in the New York City law, which took effect in May 2017.

The law provides the definition for a "freelance worker," which includes any natural person or organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for an amount equal to or greater than $800, either by itself or when aggregated with all contract for services between the same hiring party and freelance worker during the immediately preceding 120 days.

When a hiring party retains a freelance worker's services, the terms must be listed in a written contract between the parties and provided to the freelancer as either a physical or electronic copy. The law details information that must be included in the contract, such as (i) the names and address of the parties, (ii) an itemization of services, (ii) a date and mechanism for payment of contracted compensation, and (iv) a date to submit the list of services rendered. The hiring party must retain a copy of the contract for at least six years. The Commissioner of Labor is empowered to enforce the law through the issuance of rules, to investigate workers' complaints and to award remedies, including civil and criminal penalties.

Find out more information about this law, see our blog post here.

Paid Leave Laws

Illinois

Effective as of January 1, 2024, the "Paid Leave for All Workers Act" requires Illinois employers to provide at least 40 hours of paid leave per year to be used for any reason. The new law provides most Illinois employees with paid leave to be used at their discretion.

The act applies to all private sector employers of any size, state and local governments. Most Illinois employees are covered except: (1) those covered by the federal Railroad Unemployment Insurance Act or Railway Labor Act; (2) certain student employees; and (3) short-term higher education employees. Employees will have access to leave at the later of 90 days after the beginning of their employment or 90 days after the effective date of the law.

Paid leave may be taken for any reason, and employees are not required to provide a reason to their employer and cannot be asked for documentation or certification of the reason for the leave. Employees may file a complaint with the Illinois Department of Labor within three years of an employer's alleged violation of the Act. Employers found to have violated the Act are subject to actual damages, compensatory damages, attorneys' fees/costs and equitable relief. Additionally, an employer that violates the Act will also be subject to a civil penalty of $2,500 for each separate offense.

For more details on the Illinois Paid Leave for All Workers Act, see our blog post.

Chicago

Effective as of July 1, 2024, the Chicago Paid Leave and Paid Sick and Safe Leave Ordinance ("Ordinance") entitles eligible employees to accrue up to 40 hours of Paid Leave and up to 40 hours of Paid Sick Leave in a twelve-month period and carryover certain leave into the next year. Eligible employees accrue one hour of Paid Leave and one hour of Paid Sick Leave for every 35 hours worked after July 1, 2024, or their first day of employment, whichever is later. Alternatively, employers may choose to frontload the leave. Finally, employers in violation of the Ordinance may be subject to fines, monetary damages, and private causes of action by affected employees.

For more information on Chicago's Ordinance, including covered employees and employers, see our blog post.

Maine

Maine has enacted the Maine Paid Family Leave Insurance Program ("PFML"). The PFML will require employers and employees to begin contributing to a paid Family and Medical Leave Insurance fund on January 1, 2025, with the processing of claims beginning May 1, 2026.

The program provides wage-replacement benefits to eligible persons who are on family medical leave from employment. The law will cover nearly all employees in Maine, including private and public sector workers. It will cover employees regardless of employer size and include full time, part-time, temporary and seasonable workers.

Leave provided includes medical, caregiving, parental, safe and deployment related leave. To be eligible for the benefits, a worker will need to have earned at least six times the state average weekly wage in total over the base period. Workers can receive up to twelve weeks of leave per benefit year and will receive 90 percent of the portion of their weekly wages that is less than or equal to 50 percent of the state average weekly wage plus 66 percent of the portion of their weekly wages that is more than 50 percent of the state average weekly wage.

For more information on Maine Paid Family Leave Insurance Program, see our blog post.

California

Effective as of January 1, 2024, an amendment to California's statewide paid sick leave law increased the minimum amount of sick leave time eligible employees must accrue each year from three days to five days. While many California cities already mandate 48 to 72 hours of paid sick leave per year, workers outside of these areas will now have their sick leave significantly expanded.

The new law also raised the total amount of paid sick leave that employers must allow employees to accrue over time and carry over from one year to the next from six days to ten days.

For a detailed look at the new law see our blog post.

New York State

Several updates to the New York Paid Family Leave Law ("NYPFL") are scheduled to take effect on January 1, 2025. NYPFL provides for partially paid, job protected leave for eligible employees: to (i) care for a new child following birth, adoption, or placement in the home; (ii) to care for a covered family member with a serious health condition; or (iii) for qualifying exigencies related to military duty.

The changes starting in 2025 are:

> Eligible employees taking leave under NYPFL will continue to receive 67% of their average weekly wage, up to a cap of 67% of the current Statewide Average Weekly Wage (NYSAWW). For 2025, the NYSAWW is $1,757.19, which means that the maximum weekly benefit for 2025 is $1,177.32 (a $26.16 increase from 2024).

> Eligible employees will contribute 0.388% of their gross wages per pay period, with the maximum annual contribution for 2025 set at $354.53. Employees earning less than the current NYSAWW of $1,757.19 will contribute less than the annual cap of $354.53, consistent with their actual wages.

Importantly, New York State has also continued to maintain its COVID-19 sick leave law, which requires employers to provide at least five or fourteen calendar days (depending on employer size) of sick leave (in most cases paid) for isolation or quarantine related to COVID-19. This sick leave is separate and apart from any other sick time or other paid time off the employer may already provide. The COVID-19 sick leave law will expire on July 31, 2025, but employees may continue to apply for leave under NYPFL to care for a family member who has contracted COVID-19 where the condition qualifies as a serious health condition.

In addition, beginning January 1, 2025, New York employers will be required to provide employees with paid prenatal personal leave. Under amendments to the New York Labor Law, employers must provide up to 20 hours of prenatal leave for certain healthcare services related to pregnancy, including "physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy." Paid prenatal leave under this new law is in addition to, and may be taken separately from, any paid leave taken under laws such as NYPFL and the New York Paid Safe and Sick Leave Law.

For more information on the updates to NYPFL, see our blog post.

Connecticut

Starting January 1, 2025, certain employers in Connecticut will be required to provide paid sick leave to their employees. While Connecticut was the first state to require private employers to provide paid sick leave, its current statute is limited in coverage, as it only applies to employers with 50 or more employees in the state and only requires such employers to provide paid sick leave to employees who meet the definition of service worker (as defined by law). The new law eliminates the service worker criteria, allowing all Connecticut employees to be eligible for paid sick leave (with limited exceptions for seasonal employees and certain unionized employees).

The new law provides new requirements for when employees can begin using paid sick leave, permissible reasons for taking sick leave and employer notice and recordkeeping. The new law will also reduce the minimum employee threshold for meeting the definition of a covered employer in three phases, as follows:

> Effective January 1, 2025: the requirements will apply to employers that employ 25 or more employees in the state;

> Effective January 1, 2026: employers that employ eleven or more employees in the state will be covered; and

> Effective January 1, 2027: employers that employ at least one employee in the state will be covered.

For more information on the expansion of Connecticut's paid sick leave law, see our blog post.

Nebraska

Beginning October 1, 2025, private employers in Nebraska will be required to provide one hour of paid sick time for every 30 hours an employee works as part of the Nebraska Healthy Families and Workplace Act (the "Act"). The Act establishes certain thresholds for employers of various sizes:

> Employers with fewer than 20 employees must allow employees to earn up to 40 hours of paid sick leave annually.

> Employers with 20 or more employees must allow employees to earn up to 56 hours of sick leave annually.

The Act also prohibits retaliation against employees from exercising their rights under the new law and establishes a civil cause of action for violations of the Act.

However, certain employers are not required to provide additional paid sick time under the act if they have an existing paid leave policy that (1) makes available the amount of paid leave required under the Act; and (2) ensures that paid leave may be used for the same purposes and under the same conditions as set forth in the Act.

Missouri

Beginning May 1, 2025, private employers in Missouri will be required to provide one hour of paid sick time for every 30 hours an employee works as part of the Minimum Wage and Earned Paid Sick Time Initiative. Employers must provide written notice of the paid sick time by April 15, 2025.

While there is no cap on paid sick time that an employee may accrue, employers will be able to limit the use of paid sick time depending on their size:

> Employers with fewer than fifteen employees will be able to limit use of paid sick time to 40 hours per year.

> Employers with fifteen or more employees will be able to limit use of paid sick time to 56 hours per year.

In addition, under the new law, employers must allow employees to carry over at least 80 hours of unused sick leave from year to year. Employers are also permitted to "frontload" paid sick time to employees by providing the full amount of leave at the beginning of the year rather than allowing employees to accrue it over time. However, if an employer chooses to frontload paid sick time, any unused leave must be paid out at the end of the year, and employees will not be permitted to carry over unused leave.

Alaska

Beginning on July 1, 2025, private employers in Alaska will be required to provide their employees one hour of paid sick time for every 30 hours worked as part of the Alaska Minimum Labor Standards Initiative (the "Initiative"). While there is no cap on paid sick time that an employee may accrue under the Initiative, employers will be able to limit the use of paid sick time depending on their size:

> Employers with fewer than fifteen employees will be able to limit use of paid sick time to 40 hours per year.

> Employers with fifteen or more employees will be able to limit use of paid sick time to 56 hours per year.

Alaska employers will also be required to allow employees to carry over paid sick time into the next year.

Artificial Intelligence

Federal

On September 24, 2024, the DOL announced the publication of the AI & Inclusive Hiring Framework (the "Framework"). The Framework, developed and published by the DOL-funded Partnership on Employment & Accessible Technology, sets forth ten "Focus Areas" for employers to consider when using AI recruiting and hiring tools to minimize the risk of algorithmic discrimination.

Importantly, the Framework does not have the force of law and is rather intended as a guide to employers implementing AI in the workplace. However, some of the best practices included in the Framework—such as evaluating the effects of AI tools on an ongoing basis and notifying job applicants about the use of AI tools in the hiring process—are also features of enacted or proposed legislation at the state and local level.

For more information on the AI & Inclusive Hiring Framework, see our blog post.

Illinois

On August 9, 2024, Illinois Governor JB Pritzker signed into law HB3773, a bill amending the Illinois Human Rights Act to address employers' use of AI. The amendment clarifies that it is a civil rights violation to use AI that has the effect of discriminating on the basis of protected classes under Illinois law or to "use zip codes as a proxy for protected classes."

The amendment also requires employers to "provide notice" to employees when they use AI for purposes of "recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms privileges, or conditions of employment."

For more information on Illinois's amendment to the Illinois Human Rights Act, see our blog post.

Executive Compensation

Incentivizing Employees of Funds with Long-Term Incentives in Equity or Cash

Profits Interests vs. Phantom Carry

Compensation packages for private fund advisers typically include performance incentives that align their compensation with the private fund's performance and the timing of distributions made by the private fund. Traditional profits interests (carry) are often attractive because they provide a way for compensation to be taxed at the capital gains rates rather than ordinary income rates. Also, profits interests can often be subject to forfeiture (or buy back for an amount below fair market value) upon breach of a restrictive covenant, so profits interests can be used as a carrot to incentivize compliance with any such covenants. An important drawback, however, is that holders of profits interests generally have to be treated as partners, which means the sponsor is required to provide annual K 1s (even before they are vested) and cannot be treated as employees of the issuer.

"Phantom" carry arrangements are a way to mirror the economics of a profits interest but without treating employees as partners. There are two key drawbacks to a phantom carry arrangement. First, payments under the arrangement are treated as ordinary income that is subject to withholding for income and employment taxes (at rates that are higher than long-term capital gains rates). Second, phantom carry arrangements are subject to Section 409A of the Internal Revenue Code (and, for some advisers and private funds, Section 457A).[27] This means that phantom carry arrangements typically must specify a payment schedule that is not aligned with the timing of distributions made by the private fund pursuant to the LLC or partnership agreement. Failure to have a compliant payment schedule would result in accelerated income tax on the full value of the award (before the recipient is paid and before there is an underlying distribution by the fund to generate cash) plus an additional 20% tax and potentially other penalties. The taxes fall on the employee, but the employer also has a reporting obligation, each of which create additional risk.

In general, there are two ways to structure a phantom carry arrangement to delay income tax until the time of payment and to avoid the 20% additional tax:

> **Condition payment on the employee remaining employed until shortly before the payment is made**. This approach is useful for retention but can cause problems if the private fund has a long investment horizon because recipients would not have any "vested" interest if they resign or terminate employment involuntarily.

> **Specify a payment schedule that complies with the requirements of Section 409A**. (This approach is not available if the private fund is subject to Section 457A.) To comply with Section 409A, the arrangement must specify in advance that payment will be made upon a specified event (separation from service, death, disability, financial hardship, or a change in control) or at a specified time (or times). Structuring payments around a Section 409A compliant payment schedule is complicated and requires the assistance of counsel well versed in the Section 409A traps.

Compensation-Related Tools for Retention

In order to retain talent in a competitive market, including the hiring of employees with some form of remote work arrangement as described further below in the "Adaptability of the Mobile Workforce and Related Complexities" section, we continue to see employers offering retention bonuses. These bonuses can be designed to pay out solely based on continued employment or they could include performance conditions (or both). Similarly, existing compensation programs can be designed to reward both specific company goals as well as "soft" goals that seek to develop a strong company culture. For example, there has been an increased prevalence of performance metrics tied to environmental, social and governance issues affecting a company's business. On the flip side, employers could potentially use restrictive covenant agreements (i.e., noncompetition and non-solicitation of customer and employee clauses) to limit employee movement and reduce turnover. These are not perfect solutions. For example, many states already restrict the use of restrictive covenant agreements, and other states are seeking to pass laws to restrict their use. The federal government has attempted to restrict their usage as well as further described in the Employment Law section.

Defensive Compensation Elements: Employment Related Clawbacks

While we generally view performance compensation as a "carrot" to align the financial interests of service providers with those of private fund entities and their investors, it is important to not overlook the other side of the coin–disincentives.

Private funds can consider adopting clawbacks with respect to certain compensation arrangements. Compensation clawbacks can serve a number of purposes. First, clawbacks can be structured with an eye toward retention — for example, a clawback of a significant signing bonus, retention bonus or relocation fringe benefit if a service provider resigns prior to a stated date (typically 12-24 months following commencement of service). Second, clawbacks can be structured to disincentivize certain types of

[27] In general, Section 457A applies to (1) foreign corporations with respect to which significant income is not subject to tax in the U.S. or under a comprehensive foreign income tax regime, and (2) partnerships for which significant income is allocated to tax exempt entities or to foreign persons who are not subject to income tax in the U.S. or under a comprehensive foreign income tax regime. For example, most offshore funds sponsored by U.S. managers are subject to Section 457A.

behavior, for example, misconduct, a breach of restrictive covenants or actions that otherwise constitute a termination for "cause" as further described in the Employment Law section. This type of clawback functions like liquidated damages; it tends to be the most controversial with service providers and most complicated to enforce. Third, clawbacks can be structured to recoup payments that were made improperly (whether because of flawed accounting or otherwise), and, in this case, would typically track closely to public company style clawbacks contemplated by the Dodd Frank Act. Compensation clawbacks have long been a focus in the financial industry and public company spaces. Public companies must navigate multiple clawback regimes that are currently in effect, including: (1) Section 304 of the Sarbanes-Oxley Act which imposes, by statute, severe financial penalties on CEOs and CFOs if the financial statements issued by their company are determined to have been materially inaccurate, (2) the SEC's final regulations to implement the Dodd-Frank clawback provisions (the "Final Rules"),[28] (3) proxy advisors (such as ISS and Glass Lewis) that have pressured public companies to have clawback policies that are broader than those required by the Final Rules to pick up more people and cover a broader array of circumstances triggering clawback, and (4) the DOJ's (i) revised clawback guidance[29] and (ii) three-year clawback pilot program (the "Program") effective March 15, 2023.[30] Therefore, a multidisciplinary approach should be considered when reviewing, implementing and enforcing any clawback policies, particularly with respect to public companies.

Compensation clawbacks can apply to a range of compensatory elements, including in the context of cash compensation and cash fringe benefits (for example, bonuses — including signing bonuses, retention bonuses and relocation reimbursements), as well as carried interest and/or portfolio company equity or equity linked incentive gains. In structuring a clawback provision and/or policy, consider the behavior that the clawback is intended to incentivize/disincentivize, the desired length of the clawback and whether the clawback should be based on pre tax or after tax amounts. This final consideration is often negotiated, as clawbacks that occur in a tax year that follows the tax year of payment can lead to a service provider not being able to recover the full tax benefit of the repayment.

Compensation clawbacks may be further complicated by state laws concerning earned wages. To give a clawback provision and/or policy a better chance of success, clawbacks should be in writing and agreed to by the fund entity and service provider at the outset of service, and employment/labor counsel should be involved to address state specific considerations. Enforcing a clawback may result in litigation and attendant negative publicity, so fund entities might wish to consider including arbitration clauses and otherwise relying on the clawback more for its chilling effect than for purposes of recovery of the underlying funds.

Notably, the clawbacks discussed above are separate and apart from clawbacks in fund documents that tie to fund performance (i.e., clawbacks that permit recovery of carry that is distributed before limited partners receive their full return, particularly prevalent in American waterfall structures). [Interestingly, the issue of pre versus post tax recovery has come up in the context of these clawbacks in connection with the SEC's proposed and adopted rules under the Advisers Act. The "Private Funds Rules", which include the "Restricted Activities Rule", reformed the regulation of private fund advisers under the Advisors Act and became effective on November 13, 2023. These rules are described in greater detail under the heading "SEC Policy and Rulemaking Updates".

[28] The SEC adopted the Final Rules on October 26, 2022, which were codified in the formal listing standards adopted by the national securities exchanges to implement the Final Rules that became effective on October 2, 2023.

[29] Note that the DOJ's focus on criminal culpability versus the SEC's civil no-fault approach and the DOJ's focus on criminal culpability is further discussed along with the interaction of the Final Rules and the DOJ's clawback guidance in our blog post and this Law360 article.

[30] The Program (a) provides that when entering into criminal resolutions, companies will be required to implement compliance-related criteria in their compensation and bonus structures and to report annually to the DOJ about such implementation during the term of such resolutions, and (b) directs DOJ prosecutors to consider possible fine reductions where companies seek to recoup compensation from culpable employees and others who both (1) had supervisory authority over the employee(s) or business area engaged in the misconduct and (2) knew of, or were willfully blind to, the misconduct. The DOJ provided an update on September 23, 2024, indicating that the clawback pilot program is changing corporate behavior and the significant role that companies and compliance professionals have "on holding the line on compliance and good corporate culture."

Debt-to-Equity Transitions and Out-of-Court Restructurings

After years of strong growth and ready availability of both public and private credit, we have entered into an era of greater volatility and a more uncertain market. This has resulted in some companies having a harder time repaying their debt and some others defaulting on their debt covenants entirely. In some cases, this has resulted in private credit parties restructuring their positions in the company and taking some form of equity position.

While the structuring aspects of these arrangements is beyond the scope of this summary, we would like to focus on the opportunities that these restructured arrangements create for incentivizing employees even in out-of-court restructuring scenarios. Equity-based incentive structures in these scenarios are often similar to equity-based incentive structures in general, non-distressed situations. Existing equity incentives may need to be modified or adjusted to align with the company's post-restructuring organization and goals. In addition, creditors and lenders may address how to incentivize "pre-equity" performance; that is performance that must occur in order for the equity to come into the money at all.

In these circumstances, the flexibility of private credit arrangements is a significant asset to incentivize and align performance. "Pre-equity" incentive plans all share one fundamental feature — they provide for executives and other members of management to share in value that would have otherwise only been available for distribution or payment to regular or convertible debt-holders. Beyond this common denominator, there are a number of levers that can be adjusted to drive the specific behavior that the debt and equity-holders would like to incentivize. For example, payment can be made as debt is paid down, upon an "exit" or other significant capital transaction, or upon some combination of these triggers. The amount payable can be calculated as a simple percentage of the payment on some or all of the debt or payment can be determined through a more nuanced formula that takes into account other factors such as the types of debt being repaid and other financial, strategic, and/or operational metrics. Unlike equity arrangements, "pre-equity" arrangements will generally be taxed as compensation to the individuals, without the potential tax advantages of equity incentives such as profits interest which in some cases can benefit from long-term capital gains tax rates.

As with other forms of compensation, care should be taken in structuring these types of arrangements in a manner that does not result in additional tax (including Section 409A or Section 457A if the private fund is subject to Section 457A) and companies should work closely with their tax preparers and accountants in order to fully understand the tax reporting and accounting consequences of these awards.

Succession Planning

Any one or a combination of the incentive awards described above in the "Incentivizing Employees of Funds with Long-Term Incentives in Equity or Cash" section can also be helpful with succession planning as founders[31] of hedge funds and private equity funds near retirement and as a result, will require a transition of leadership.

Further, firms and their founders will need to consider multiple key issues when granting awards to new leadership and determining go-forward ownership of the funds, including any founders' remaining portion of ownership and their roles (if any) in the firm following their transition as further described below.

The Economic Effect and Other Business Impact. If a founder owns a significant ownership stake in the funds, a firm may consider purchasing the founder's interests so that there is more available equity to compensate new leadership or remaining partners and employees or to enable the funds to accomplish certain business objectives. If a firm purchases any portion of the founder's interests, the firm should ensure that it has sufficient time to engage a third party to value the interests as needed, and depending on how

[31] Note that in addition to founders, many of these same issues are relevant where founders have already transitioned but where current senior executives are looking to transition out of the business.

high the value of the interests is, it may require a longer period for the firm to purchase the interests, including obtaining any necessary financing.

If a founder does retain a portion of their ownership interests, a firm should evaluate whether it will pursue any of the following, particularly if a founder asks for certain protections with respect to the value of their interests, such as consent rights regarding certain material changes to the business operations (e.g., entering into corporate transactions or the hiring or termination of key employees): (i) limit the founder's ownership to existing funds or businesses or allow the transitioning founder's ownership to be entitled to receive proceeds from new funds or businesses that are established following their succession (or alternatively take a combined approach that would gradually decrease the founder's entitlement to proceeds in funds or businesses established following their succession), (ii) a call right that would provide the firm with the right to purchase the founder's interests, as well as the determination of the valuation methodology of the interests at the time the call right is exercised, (iii) require the founder to sell their interests in the firm's funds collectively (instead of permitting the founder to sell their interests individually) in the event of a sale of the founder's interests in order to align with the interests of the buyer, and/or (iv) a right of first refusal in order to restrict the founder's ability to transfer their ownership interests to certain third parties (including competitors or other parties with opposing interests of the funds).

Further, a firm may consider seeking restrictive covenants against not only new leadership, but also a founder following their transition, including a non-compete depending on the scope of the transitioning founder's activities and potential employment or services thereafter, confidentiality and assignment and protection of intellectual property covenants and a non-solicit of customers and employees.

Lastly, firms should be aware of certain rights of third parties[32] with respect to a transition of leadership. Therefore, any corporate documents, funds documents and other agreements should be carefully reviewed, and upon review, a determination should be made as to whether any amendments to the documents are necessary.

The Role of the Founder/Senior Executive During the Transition of Leadership. In order to ensure a smooth transition and provide new leadership with a clear path of control, if a founder will remain involved in the business through the transition of leadership, the founder's title (for example, the founder may serve as chairman or similar role through the succession), duties and obligations should be expressly prescribed in the founder's go-forward arrangement. The arrangement should also clearly provide for any business and governance terms that will apply to the founder, including the founder's compensation and benefits. Further, the founder's arrangement should specify any rights the founder will retain (e.g., consent rights over material business decisions depending on how large of an ownership stake the founder will retain), which may descend over time proportionate to a decrease in the founder's ownership interest. However, any rights retained by a founder should be carefully reviewed and discussed by the firm to ensure that the founder does not have the ability to materially interfere with the business operation of the firm under new leadership. The founder's role through the succession should also be considered in light of any new governance implemented by the firm, which can include a formal governing body (e.g., a board of directors or committee) that has the authority to make significant business decisions and provide oversight over both the founder and new leadership.

Firms and their founders and new leadership should each engage with their respective legal counsel and business advisors as far in advance as possible to ensure a successful transition of leadership.

[32] For example, (i) certain third-party investors may have redemption rights in the event of a founder departure or change in control, or liquidity rights pursuant to a sale of a founder's interest, (ii) fund investors may have consent rights under the Advisors Act and certain rights pursuant to certain funds' agreements, (iii) firm loans may include covenants that prohibit certain liquidity transactions involving the founder and certain corporate structural changes in connection with the leadership transition of the funds as well as certain priority liquidity rights, and (iv) regulatory authorities that may require certain notifications or consents in connection with a change of control of the firm or its affiliates.

Adaptability of the Mobile Workforce and Related Complexities

COVID 19 work from home policies helped to usher in a host of changes to the work environment. Although companies have generally been encouraging or requiring employees to return to the office on a more regular basis, some version of "working from home" or "remotely" appears to be here to stay for now. As a result, employees have more opportunities than before; they do not need to move to take a new job and they can move without having to change jobs. A positive for employers is greater access to talent — not just those individuals who are located near a specific office of the company. But how do you retain employees when opportunities are abound? Employers have both "carrots" and "sticks" in their toolbox to overcome this challenge, as discussed above. In addition to the retention issues described in the "Compensation-Related Tools for Retention" section above, "remote" work raises other key complexities, including:

> **Employer withholding may be impacted**. Each state has its own laws that should be consulted. Many states assert the right to tax an employee's income if the employee works (or is deemed to be working) within the state. These states typically also require the employer to withhold state (and local) income taxes from the employee's wages, and the penalty for failure to withhold is requiring the employer to pay the tax (and interest and possibly penalties) that it failed to withhold. To comply with these requirements, employers might have to register and withhold in states where they did not previously do business.

> **Employees are exposed to potential double tax**. If an employee works remotely from a state other than the state where the employer has previously done business, the employer may be required to withhold income taxes in both states with respect to wages paid for work done (or deemed to be done) within each state, and the employee might not receive a tax credit in either state for the withholding tax paid to the other.[33] In some cases, this may result in double taxation on their wages.[34]

> **Employers could have to pay additional taxes**. In many states, the mere presence of employees in the state can create "nexus" for the employer in that state, which could (i) subject the employer itself to state (and local) income taxes and tax filing obligations; (ii) obligate the employer to collect and pay over state sales taxes; and/or (iii) require the employer to register to do business in that state.

> **For non exempt employees, it may be more difficult to track hours worked and meal breaks**.

> **Employers need to manage providing tools for remote work**. For example, laptop computers and phones are obvious, but things like ergonomic support, paper and ink can be more complicated. Some state laws impose minimum requirements.

> **Information Security Policies and Practices may need additional updating and monitoring**. A more decentralized workforce generally means that employees and service providers need to be capable of accessing confidential and other sensitive information to do their jobs effectively and often from devices that are not company-provided or controlled. Hardware and software solutions are widely available to help companies monitor the access

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33 Currently 16 states and the District of Columbia have reciprocal agreements that permit residents to only pay income tax in their state of residence.

34 For example, New York State has a rule that generally treats an employee who is principally assigned to an employer location in New York but works remotely out of state as if he or she were physically working in New York on those remote working days, so as to subject the employee's income to New York taxation. New York does not provide a credit for taxes paid to the state where the employee actually works. This means the employee can end up having to pay taxes in both New York and the state where they actually work. Note that the New York Division of Tax Appeals has denied petitions challenging this rule. See *In the Matter of the Petitions of Edward A. and Doris Zelinsky*, New York Division of Tax Appeals, Determination No. 830517 (Hearing November 30, 2023).

and use of their information, but the ability to require certain methods of authentication or monitoring (including, for example, the use of biometric login information or software managing company data on personal devices) can implicate federal, state, local, and, most significantly for many employers, non-U.S. laws. Navigating this complex framework while providing appropriate security measures for a company's information often requires consultation with outside counsel and other third-party providers and is an ever-changing area in an increasingly cloud-based world.

Estate Planning

Inflation Indexing – Federal Estate and Gift Tax Exemptions Continue to Increase, but Decrease in 2026 is Looming

On January 1 of each year, the federal lifetime estate, gift and generation skipping transfer ("GST") tax exemption amount (also known as the "Basic Exclusion Amount") is adjusted for inflation. The Basic Exclusion Amount increased to $13,610,000 per individual (or $27,220,000 for a married couple) in 2024. Similarly, the annual gift tax exclusion amount also increased to $18,000 per individual (or $36,000 per married couple) in 2024.

On October 22, 2024, the IRS published Rev. Proc. 2024 40, which provides the tax inflation adjustments for tax year 2025. On January 1, 2025, the Basic Exclusion Amount will increase to $13,990,000 per person (or $27,980,000 per married couple), which is an increase of $380,000 per individual from the prior year. Also on January 1, 2025, the annual gift tax exclusion amount will increase to $19,000 per person ($38,000 for a married couple). By January 1, 2026, the exemption amount is projected to be over $14,000,000 per person (over $28,000,000 for a married couple). However, under current law, the lifetime estate and gift tax exemption is scheduled to be cut in half on January 1, 2026. Therefore, it is important for clients to consider taking advantage of these record high exemption amounts now, before they are reduced in 2026. It is not clear if and to what extent November's election result will change the expected drop in the estate tax exemption amount, since Congressional action will be required to extend the current high exemption amount past December 31, 2025.

The historically high exemption amounts, coupled with decreasing interest rates, have created an optimal time to transfer wealth. Using tax efficient wealth transfer strategies, donors can leverage their exemptions and take advantage of market volatility by transferring currently undervalued property.

Changing Interest Rates, Increasing Exemption Amounts and Estate Planning Opportunities

Interest rates have begun to decline from their late 2023 levels, though they are still much higher than they were in early 2022. At the same time, the federal estate, gift and GST tax exemption amounts have also substantially increased. This combination makes it an optimal time for individuals to leverage their increased exclusion and exemption amounts by passing assets to the next generation and reducing their estate, gift and income tax exposure. Just as increasing rates make certain investment strategies more attractive, a higher interest rate environment and increased exemption and exclusion amounts bring certain estate planning techniques into focus.

Clients who have not yet used their full Basic Exclusion Amount should consider creating long term trusts (sometimes referred to as "dynasty trusts") for the benefit of their descendants and other family members (which can include spouses). Certain jurisdictions allow such trusts to last in perpetuity. Therefore, under current Federal law, as of January 1, 2025, it will be possible to transfer up to $13,990,000 per grantor into such a trust and avoid the imposition of Federal and state estate tax on the assets in the trust on the death of the grantor and on the deaths of future generations.

For clients who already have used most of their Basic Exclusion Amount but want to make additional wealth transfers, one effective technique in this environment is the qualified personal residence trust ("QPRT"). A QPRT is created by transferring title to a personal residence, which could be either a principal home or a vacation home, to a trust that contains certain provisions required by the Internal Revenue Code. Generally, an individual is permitted to transfer no more than two residences to a QPRT. The trust provides that the trust creator (the "Grantor") retains the exclusive right to live in the personal residence for a specified number of years (the "Trust Term"). During the Trust Term, the Grantor continues to be responsible for paying property taxes and other expenses related to the maintenance of the personal residence. At the end of the Trust Term, title to the personal residence is distributed in accordance with the provisions of the QPRT (i.e., to children or a continuing trust for their benefit). During the Trust Term, the trustees are permitted to sell the residence and purchase a new one for the Grantor. If the cost of the new residence is more than the proceeds from the sale of the old one, the Grantor can pay the difference and co purchase a new home with the trust. If the new residence costs less, the excess proceeds from the sale of the old residence can be returned to the Grantor or remain in the trust with the Grantor receiving an annuity from the cash (in an amount determined by certain tables published by the IRS) and with the remainder beneficiaries receiving any cash remaining at the termination of the QPRT.

Upon creating the QPRT, the Grantor has made a gift. The value of the gift is determined by subtracting the value of the Grantor's retained right to live in the personal residence from the fair market value of the personal residence at the time it is transferred to the QPRT. The value of the Grantor's retained right to live in the personal residence is determined actuarially, using statistical tables and interest rates published each month by the Internal Revenue Service. The value of the retained interest and the gift depends on prevailing interest rates, the length of the Trust Term and the Grantor's age. As interest rates increase, the value of the Grantor's retained interest also increases, resulting in a decrease in the amount of the gift. Therefore, a QPRT can be a very effective strategy when interest rates are relatively high. Upon expiration of the Trust Term, the personal residence, including any appreciation in its value, passes pursuant to the terms of the QPRT without any further exposure to gift tax.

Corporate Transparency Act – Impact on Trusts and Private Investment Funds

Effective January 1, 2024, the Corporate Transparency Act ("CTA") requires certain domestic and foreign entities ("Reporting Companies") to disclose their Beneficial Owners to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). Pursuant to the CTA, a domestic Reporting Company is defined as a corporation, limited liability company or "other similar entity" created by the filing of a document with the secretary of state or similar authority within the United States. A foreign Reporting Company includes any foreign entity that is registered to do business in the United States. According to the CTA, a Beneficial Owner is any individual who, directly or indirectly, either (1) exercises substantial control over the Reporting Company or (2) owns or controls at least 25% of the ownership interests of a Reporting Company.

Unless a Reporting Company falls within one of the 23 types of entities that are exempt, Reporting Companies formed on or after January 1, 2024, must file their initial report within 90 days of receiving their notice of formation or registration. Reporting Companies that were formed or registered prior to January 1, 2024, have until January 1, 2025, to submit their initial report. On December 3, 2024, the United States District Court for the Eastern District of Texas issued an order for a preliminary injunction enjoining the enforcement of the CTA and staying the January 1, 2025 compliance deadline. However, it remains to be seen whether that injunction will remain in place, so pending further court decisions and/or Congressional action, it would be prudent for clients to comply with the CTA to avoid penalties for failure to report.

The CTA represents a significant step forward in enhancing transparency to combat illicit financial activities within the corporate landscape by establishing new reporting and compliance obligations for foreign and domestic Reporting Companies. Enacted to address concerns related to money laundering, tax evasion and other financial crimes, the CTA's broad language has implications that extend far beyond traditional corporate entities, encompassing a variety of legal structures, including private investment funds, trusts and other entities structured to facilitate investment by a group.

While the CTA aims to enhance transparency, it raises concerns about the privacy of individuals involved in trust structures. Trusts do not meet the definition of a Reporting Company. However, a trust can be a Beneficial Owner of a Reporting Company. For trusts, the reporting requirement also captures individuals with significant control over the trust, such as the trustee, grantor and each beneficiary or class of beneficiaries. Furthermore, reporting may also be required with respect to limited liability companies, partnerships and other entities commonly used for business and estate planning purposes.

The implications of the CTA are still evolving. However, the CTA undeniably represents a major shift in reporting enforcement for companies and Beneficial Owners. As regulations and guidance continue to be refined, fiduciaries will need to carefully adapt trust planning strategies to balance transparency compliance, administrative feasibility and flexibility for grantors and beneficiaries.

The Impact of *Connelly v. United States* on Estate Planning

On June 6, 2024, the United States Supreme Court decided the case of *Connelly v. United States* (No. 23 146), which addressed whether the estate of a deceased building supply company owner should be taxed on $3 million in life insurance proceeds the company used to buy his shares after his death. This case affects any company (including a management company) with existing buy sell agreements that are intended to be funded with company owned life insurance.

At issue in the decision was a company owned by two brothers. The company had a stock redemption plan and owned life insurance policies on the brothers' lives, intended to fund the stock redemption plan's purchase obligation. The Supreme Court held that for federal estate tax purposes, the value of the company (1) should include the value of the life insurance proceeds (intended to fund that purchase obligation), and (2) should not be reduced for the liability from the stock redemption agreement purchase obligation.

Many insurance funded buy sell agreements involve family owned, closely held businesses, but the Connelly decision is not restricted to those companies that are owned by family members. Any fund managers having similar insurance funded buy sell agreements may wish to evaluate alternative arrangements that may yield more tax efficient results.

A cross purchase arrangement is one such alternative arrangement. Compared to the *Connelly* structure, in the simplest form of a cross purchase arrangement, each owner of the company (or his trust) owns a life insurance policy on the other owner(s) and assumes the purchase obligation. As a result, for federal estate tax purposes, the value of the company will not include the life insurance proceeds; the company itself will not own the policy (or have the purchase obligation).

Clients with insurance funded buy sell agreements may wish to explore how, and if, they should implement a cross purchase arrangement instead. In certain cases, converting to a legally sound cross purchase arrangement may yield significant estate tax savings for the owners.

Shareholder Activism

As discussed in last year's report, 2023 saw some significant regulatory, caselaw and market developments in shareholder activism, including:

- marking the first proxy season during which the use of universal proxy cards was mandated;
- affirmation by Delaware courts of the use of extensive advance notice requirements as promoting orderly election contests, while rendering unenforceable overbroad requirements that risk frustrating any nomination of alternative director candidates; and
- the adoption of amendments to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, which became effective in February 2024. Such amendments had the effect of, among other things:
  - Shortening the deadline for initial Schedule 13D filings from 10 calendar days to five business days, although they now can be filed until 10:00 p.m. Eastern Time rather than 5:30 p.m.; notwithstanding the shorter deadline, the 10-day "lock up" period during which

an activist switching from a 13G to a 13D cannot acquire more shares or vote the reported shares remained the same.

> Requiring that Schedule 13D amendments be filed within two business days of a material change rather than the former “prompt” facts and circumstances approach;

> Accelerating the filing deadlines for Schedule 13G beneficial ownership reports and amendments, and requiring quarterly 13G amendments for material changes, rather than annual amendments as was previously required;

> Expressly requiring the disclosure of certain derivative securities; and

> Providing additional guidance and commentary on the parameters around what activities do and do not result in the formation of a “group,” as well as when cash-settled derivatives may result in beneficial ownership of the associated reference securities.

Furthermore, beginning in December 2024, all Schedule 13Ds and Schedule 13Gs were required to be filed using a structured, machine-readable XML-based language in order to assist market participants in compiling, analyzing and considering the disclosed information. Also in 2024, many shareholder activists became subject to the newly amended Form N-PX filing requirements applicable to Form 13F filers, which require Form 13F filers to file a Form N-PX with the SEC to report their shareholder voting records with respect to company advisory proposals “say-on-pay,” “say-on-frequency of say-on-pay,” and “golden parachute” votes required by U.S. public companies. As discussed elsewhere in this Report, investors with short selling strategies were given a one-year reprieve by the SEC for the requirement to report their short positions confidentially to the SEC on Form SHO.

Shareholder activists in 2024 navigated this new regulatory landscape to engage in a significant number of activist campaigns, which resulted in the following activity (all data is derived from the *Barclays 2024 Review of Shareholder Activism*):

> 243 activist campaigns were launched in 2024, which marks the highest total since 2018’s record of 249 campaigns.

> 160 different investors launched campaigns in 2024, which marks the most ever recorded. These activists include 45 first-time activists, which was also a record. Only 17% of activist campaigns in 2024 were launched by “major activists.”

> Large cap companies are being increasingly targeted by the blue-chip activists, with mega-cap companies (over $25bn market capitalization) comprising 30% of major activist targets vs. 23% five years ago.

> Campaigns focused on strategic and operational optimization appeared in nearly 22% of campaigns in 2024, which represents a significant increase to the 18% three-year average of campaigns involving strategic and operational demands.

> CEOs have been increasingly targeted by activists, with 27 CEOs resigning in 2024 after being targeted by activists. Over the past two years, 20% of activist targets have seen their CEO resign within a year of campaign initiation vs. average CEO turnover of 12%.

> Campaigns focused on M&A comprised 43% of global campaigns, in line with historical averages. However, M&A-focused campaigns launched in the second half of 2024 represent more than half of campaigns launched during that period, reflecting increased optimism for the M&A markets.

> Activists won 119 board seats in 2024, slightly above the four-year average of 115 board seats. 24% of such seats were gained through proxy contests that went to a shareholder vote and 76% through settlements.

> Activists were not particularly successful in campaigns that went all the way to a vote, as activists secured board seats in only 3 of 10 such contests and only 6 of 38 seats sought.

The Moelis Decision

In February 2024, the Delaware Court of Chancery in *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.* invalidated certain provisions of a shareholder's agreement relating to shareholders' pre-approval rights, restrictions on board composition and required representation on board committees. The Court held that these types of provisions set forth in "internal governance arrangements" are unenforceable under Section 141(a) of the Delaware General Corporation Law ("DGCL"), which provides that "*the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation*." This decision reflected a divergence from market practice, where such agreements were commonly entered into in connection with impending IPOs, financing arrangements or settlements with activist shareholders.

The *Moelis* decision called into question the enforceability of a number of terms that are commonly agreed upon between companies and activists in connection with the settlement of activist campaigns, including obligations to nominate activist designees, hardwiring of committee appointments and restrictions on the size of the Board.

In response to the *Moelis* decision, the Delaware legislature adopted Senate Bill 313, which restored market practice by adding a new Section 122(18) to the DGCL. Section 122(18) of the DGCL expressly allows companies to enter into contracts with current or prospective stockholders, and provides a non-exhaustive list of contractual provisions to which a company may agree, including those that (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation) before the company may take actions specified in the contract, and (c) covenant that the corporation or one or more persons or bodies (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation) will take, or refrain from taking, actions specified in the contract. Senate Bill 313 became effective on August 1, 2024, and will apply retroactively to agreements entered into prior to such date. However, any proceedings completed or pending prior to August 1, 2024, will remain unaffected and will remain subject to the law predating such date.

Insurance

During 2024, Proskauer continued to work with a wide variety of private funds of all types and sizes on insurance matters, including reviewing and negotiating their insurance programs; advising on insurance in connection with various types of transactions; and assisting in recovering on their insurance claims through claim negotiations and mediations and, in rare cases where the disputes could not be resolved amicably, in coverage arbitrations and litigations. Below are a few of the key developments and trends we saw in 2024, along with our thoughts on where we see things headed in 2025.

Increased attention to protecting against risks arising from portfolio companies

Private equity firms and activist hedge fund advisers continue to face risks from lawsuits against their individuals who serve as directors of portfolio companies and against the firms themselves. During 2024, we represented several clients in seeking insurance coverage for such lawsuits under both the private funds' insurance policies and portfolio companies' policies.

Coverage disputes in this scenario are both more likely and more difficult when strong coverage under both sets of policies has not been negotiated and attention has not previously been given to ensuring that the two sets of policies work together. Attention to capacity exclusions, allocation provisions, other insurance clauses, and outside capacity coverage agreements is critical. Additionally, particularly careful attention needs to be given to the renewal of insurance policies for portfolio companies experiencing financial distress, as insurers often use those circumstances as a basis for adding exclusions and provisions that can significantly limit coverage, such as insolvency exclusions, creditor exclusions, and other problematic provisions. Careful review, negotiation, and coordination of portfolio company policies and private fund level policies can help mitigate the risks arising from portfolio companies to funds and individuals.

One promising development we have seen in the last year is that more asset managers (but still a distinct minority) have begun to negotiate strong manuscript policies for their portfolio companies. Historically, the quality of coverage provided under D&O policies issued to portfolio companies has been poor — and that continues to be true of the majority of portfolio company policies — but as more advisers begin focusing on the quality of their portfolio companies' policies, we hope to see that change. We are focusing on drafting strong manuscript portfolio company policies and expect to do so more in 2025.

Relatedly, we have also seen an increased focus on protecting individuals against the legal and regulatory risks they face for serving in outside capacities, such as serving as directors of portfolio companies. This increased focus on individual protection has included: review and negotiation of adviser and private fund policies for protection of individuals in their various respective capacities; review and negotiation of portfolio company policies when individuals are serving on portfolio company boards; and an increased emphasis on obtaining dedicated insurance limits for individuals (called "Side A" policies) at the private fund level and/or portfolio company level and negotiating enhancements to such policies. It is critically important to ensure that sponsor policies and portfolio company policies respond seamlessly and in a prearranged, coordinated fashion in these claims.

Continued focus on transactional risk insurance products

During 2024, we saw a continued focus on transactional risk insurance products. Representation and Warranties Insurance ("RWI") policies are now purchased in connection with most transactions, and sophisticated buyers of such insurance continue to negotiate for stronger manuscript policies. We also saw a significant amount of RWI policies for secondaries transactions during 2024.

There have been a number of new entrants in the RWI market, and it is important for buyers considering using one of these new entrants to not only ensure that they are comfortable with the underwriting and claims teams and financial status of the underwriter, but also that the policy offered by the underwriter provides coverage that is consistent with that offered by the top underwriters in the space.

During 2025, we expect to see more rigorous underwriting by RWI insurers of pre closing tax indemnities and representations involving financial statements in secondaries transactions. Some RWI insurers have begun to offer more extensive coverage for these types of losses in secondaries transactions without knowledge qualifiers with enhanced diligence.

Although RWI policies continue to be by far the most prevalent policy in connection with M&A transactions, we also saw tax indemnity policies and contingent liability policies purchased in connection with transactions that presented specific, serious risks. If M&A activity increases in 2025, we would expect to see transactional risk insurance policies become an even more significant focus for private equity firms as they buy and sell companies.

Increased attention on insurance in distress scenarios

Due to economic challenges faced in several sectors during the past year, we saw many change of control transactions at operating companies through debt for equity transactions, Article 9 foreclosures, and chapter 11 credit bid sales or debt for equity conversion plans. These transactions commonly cause the company's D&O insurance to go into "run off" and no longer cover claims for wrongful acts occurring after the change of control transaction. This creates important insurance implications for any existing private equity sponsor of the company and any asset managers that are acquiring the equity in the company and/or appointing board representatives. First, these transactions typically lead to the purchase of tail coverage to protect the company's prior board (including board members appointed by the sponsor) against future claims. Second, the acquiring company (often an acquisition vehicle formed by the lenders, "NewCo") must also buy new D&O coverage to protect NewCo and its new board (including board members appointed by the new equity holder) on a go forward basis.

There also are a number of restructuring scenarios — consensual or otherwise — that involve asset manager lenders appointing directors to a borrower's board. This often occurs consensually in connection with a forbearance agreement or amendment. Other times, it occurs non consensually in connection with the exercise of remedies. In either scenario, D&O insurance is critically important, including assessing whether a change of control transaction has taken place such that new insurance is required, carefully reviewing the coverage being purchased to ensure it provides adequate protection for the appointed directors, and coordinating the relevant company's coverage with the asset manager's own coverage.

Focus on cyber insurance, but in a challenging cyber market

Cyber risks continued to be a significant focus for advisers during 2024. The combination of the SEC's increased focus on cyber risks as well as increased focus from investors has caused many advisers to obtain cyber insurance. The market for cyber insurance has hardened in the past several years, however — with increased premium costs and additional limitations on coverage — due to cyber insurers having paid out more and larger claims than they had anticipated for cyber events. The more challenging market has made it even more important for careful analysis and review of potential insurance coverage, particularly because it is rare for all cyber risks of concern to fund clients to be covered under the same policy. Instead, it is common for cyber "crime" risks (for example, social engineering and fraudulent transfers) to be covered under a crime policy or endorsement to a fidelity bond, with other cyber risks (for example, data breaches and business interruption from cyber events) to be covered under a separate cyber policy. Coordinating these separate coverages is important to ensure that as broad a spectrum of cyber risks as possible are covered.

Increased participation in insurance related transactions

We have seen an increased number of asset management firms participate in transactions that involve investments in insurance or insurance related entities or transactions that are backed by insurance. As to the former, we have seen a number of asset management firms purchase equity in or provide loans to insurance companies or insurance brokers or invest in insurance claims. As to the latter, we have seen a number of asset management firms participate in finance transactions that are backed in whole or in part by insurance — such as loans to companies where the collateral includes a judgment or intellectual property rights and insurers insure the loan or the collateral. Carefully negotiating the insurance is critical in these situations to ensure that the investment is protected.

Continued opportunity to negotiate strong coverage for asset managers

The market for D&O/E&O coverage for asset managers continues to provide strong opportunities for negotiation of coverage terms as compared to many different types of policies and industries. For example, although many insurers' standard forms provide only limited coverage for investigations — as coverage is not triggered until late in the investigation (after significant costs have already been incurred) or is limited to only individuals rather than advisers or private funds — if the policies are negotiated, advisers are commonly able to obtain coverage for the costs of defending government investigations from the very earliest stages. Given the wide availability and critical importance of this broad coverage, it would be a significant missed opportunity to not seek and obtain such enhanced coverage. There are numerous other important provisions in asset manager policies — such as policy exclusions, the definition of covered "Loss" and provisions dealing with the claim process — that are often highly negotiable and can help mitigate against the risk of coverage denials or fights with the insurer.

Continuing contentious coverage environment, but with opportunities to resolve claims short of litigation/arbitration

During 2024, insurers in the private fund space have continued to take aggressive positions in seeking to deny coverage, and we have represented a number of adviser clients in resulting coverage disputes. Insurers have attempted to deny coverage on numerous grounds in the past year, including based on policy exclusions, policy definitions and public policy arguments. We have also witnessed insurers deny coverage based on alleged breaches of policy consent and cooperation provisions. This continued contentious claims environment reinforces the importance of carefully reviewing and negotiating coverage at the outset, as well as ensuring that the claim process (including any notice and consent requirements) is carefully managed from the outset to avoid falling into any coverage traps. Involving coverage counsel from the outset of a claim is important to ensure that the claim is properly presented to the insurer — with potential coverage issues addressed and managed in advance — and that a strategy for maximizing leverage in the claim process (including taking advantage of commercial and business relationships) is employed. Where policies have been well negotiated, and the claims process managed carefully, we have seen many claims be able to be resolved through negotiation and/or mediation without having to resort to more expensive litigation or arbitration.

Looking ahead to 2025

We expect to see a continued and increased focus on protecting asset managers, their portfolio companies, their assets and their key individuals through negotiation of strong insurance products in the various areas discussed in this review. Although we also expect insurers to continue to be aggressive in challenging claims, those asset managers that pay careful attention to insurance on the front end should be well positioned to avoid coverage fights or successfully resolve such coverage fights if they arise.

Reorganization and Chapter 11

A. Supreme Court Rejects Nonconsensual Releases of Third Parties in *Purdue Pharma*

Traditionally, bankruptcy law has only operated to address and eliminate claims held by creditors against debtors. But in recent years, debtors have increasingly used the bankruptcy process to release claims held by creditors against non-debtor parties, such as shareholders, officers and directors of the debtor, without the consent of such creditors.

The permissibility of this mechanism, known as a nonconsensual third-party release, however, has been subject to debate across the country. On June 27, 2024, the U.S. Supreme Court settled the issue in the chapter 11 case of Purdue Pharma L.P. ("*Purdue*"). Specifically, a majority of the Supreme Court ruled that nonconsensual third-party releases are not permissible under the Bankruptcy Code outside of the asbestos context. We provide an overview of the Supreme Court's ruling and its potential consequences below.

Background

Purdue, a pharmaceutical company that generated most of its revenue from the sale of prescription opioid OxyContin, faced what the bankruptcy court referred to as a "veritable tsunami of litigation" arising from the marketing and sale of this product. To address this issue, Purdue filed for bankruptcy protection in September 2019.

After years of litigation and extensive negotiation, Purdue obtained court approval of a plan of reorganization which, among other things, contained non-consensual third-party releases in favor of the Sackler family (Purdue's owners). These releases eliminated claims held by creditors of Purdue against the Sackler family and other non-debtor entities, including claims arising from alleged willful misconduct and fraud.

In exchange for these releases, the Sackler family agreed to contribute approximately $4.5 billion to fund charitable initiatives and certain creditor recoveries outlined in the plan. While the plan was supported by an overwhelming majority of creditors, several states and other creditors opposed it, finding the plan's release of the Sacklers unacceptable. Those opposing the plan appealed the bankruptcy court's ruling.

On appeal, the U.S. District Court for the Southern District of New York reversed the bankruptcy court, holding that non-consensual third-party releases are not permitted by the Bankruptcy Code. Following that reversal, the Sacklers entered further negotiations and agreed to contribute an additional $1.5 billion in exchange for the releases. This increased contribution persuaded certain objectors to drop their opposition to the plan, but other parties, including the U.S. Trustee (the arm of the U.S. Department of Justice that oversees bankruptcy cases), continued to oppose it on the basis that no amount of additional funding could legitimize the use of third-party releases on a non-consensual basis.

The issue was appealed to the Second Circuit, which reversed the district court and ruled that non-consensual third-party releases were permitted by the Bankruptcy Code. The case was further appealed to the Supreme Court.

Supreme Court Decision

In a 5-4 decision, the Supreme Court reversed again, ruling that the Bankruptcy Code does not permit non-consensual third-party releases. The Supreme Court's analysis focused on the text of the applicable Bankruptcy Code provisions.

According to the Court, the only statutory support the parties identified in favor of non-consensual third-party releases in a bankruptcy plan was Bankruptcy Code § 1123(b)(6). This subsection is part of Bankruptcy Code § 1123, which governs the "contents" of a Chapter 11 plan of reorganization. Under Bankruptcy Code § 1123(a), a plan must include specific provisions, while Bankruptcy Code § 1123(b) refers to optional provisions that a plan "may" include, such as those that (1) impair or leave unimpaired any class of claims, (2) provide for the assumption, rejection or assignment of executory contracts, (3) settle or otherwise resolve claims held by the debtor against non-debtors, (4) sell the debtor's property, and (5) modify the rights of secured creditors. Critically for the Purdue case, the list of provisions that "may" be included in a bankruptcy plan includes a "catchall" final subsection: a plan "may" include "any other appropriate provision not inconsistent with the applicable provisions of this title." § 1123(b)(6).

The parties defending the releases relied on this catchall provision, arguing the non-consensual release of liability was an "appropriate" provision, in the context of the Purdue bankruptcy, that was not barred by any other "applicable provision" of the Bankruptcy Code. The Supreme Court disagreed. The Court held that § 1123(b)(6) was "a catchall phrase tacked on at the end of a long and detailed list of specific directions," and that, under ordinary principles of statutory construction, such "catchall provision" should not be afforded the "broadest possible construction," but rather should be read only to "embrace only objects similar in nature to the specific examples preceding it." Slip. Op. at 10 (internal quotations and citations omitted).

In connection with § 1123(b), the Supreme Court held that there was an "obvious link" between the preceding subsections in the list: all "concern the *debtor*—its rights and responsibilities, and its relationship with its creditors." Slip. Op. at 11. As such, the Supreme Court held that § 1123(b)(6) must be similarly limited. It could not be "fairly read to endow a bankruptcy court with the radically different power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." *Id.*

The Supreme Court rejected the argument that broad policy considerations should be used to expand the meaning of § 1123(b)(6) beyond the limits suggested by the statutory language (Slip. Op. at 13). It also noted other provisions in the Bankruptcy Code that were inconsistent with the view that the Bankruptcy Code granted broad powers to discharge non-debtors (Slip. Op. at 14–16).

Finally, the Supreme Court expressed concern at the abuse of the releases at issue. The Supreme Court noted the Sacklers were receiving what amounted to a discharge of all Purdue-related claims against them, without delivering all of their assets to a bankruptcy court for equitable distribution, and in derogation of Bankruptcy Code provisions that, in a Sackler bankruptcy, would have prohibited them from being discharged of claims arising from "fraud" or "willful misconduct." In other words, the Supreme Court concluded "the Sacklers seek greater relief than a bankruptcy discharge normally affords, for they hope to extinguish even claims for wrongful death and fraud, and they seek to do so without putting anything close to all their assets on the table." Slip Op. 16. Such expansive relief, the Court held, was not permissible.

Implications of the Purdue Decision

Although the *Purdue* ruling definitively determined that non-consensual third-party releases are impermissible, it left several key questions unresolved. For instance, the Supreme Court clarified that it did not intend to cast doubt on the legitimacy of consensual third-party releases or on what might constitute "consent" in this context (Slip Op. at 19–20). Courts have since struggled with the concept of "consent" to third-party releases in light of *Purdue*.

In the chapter 11 case of Red Lobster Management LLC, Case No. 6:24-bk-02486-GER, the Bankruptcy Court for the Middle District of Florida granted approval of the debtor's disclosure statement only on the condition that "opt-out" third-party releases (binding parties to such release unless they affirmatively opt out) be removed from the plan, in favor of "opt-in" third-party releases (rendering releases only effective as to parties who affirmatively opt in). On the other hand, the Bankruptcy Court of the Southern District of Texas recently approved a plan containing opt-out third-party releases, holding that such opt-out releases were consensual according to settled Fifth Circuit precedent and not barred by *Purdue*. *See In re Robertshaw US Holding Corp*., 2024 Bankr. LEXIS 1958 (Bankr. S.D. Tex. Aug. 16, 2024).

Finally, the Bankruptcy Court of the District of Delaware, while not entirely rejecting opt-out releases, ruled that they are proper only if the creditor takes an affirmative action, such as voting for the plan, but fails to exercise its opt-out rights nonetheless. *See In re Smallhold, Inc*., No. 24-10267, 2024 WL 4296938 (Bankr. D.Del. Sept. 25, 2024). We can expect continued uncertainty as courts grapple with the consequences of the *Purdue* decision, and, as discussed above, a split in the courts' approach to consent. A debtor's ability to deliver third-party releases as negotiating currency to drive additional recoveries, while limited by *Purdue*, will nonetheless depend on the venue where the case is filed.

B. Treatment of Make-Whole Premiums in Chapter 11 Bankruptcy

Make-whole premiums are common terms in loan agreements, bond issuances and other debt instruments that compensated lenders for the loss of expected fees and interest when a borrower prepays the outstanding debt obligations. Whether and to what extent the Bankruptcy Code prohibits the payment of such make-whole premiums in bankruptcy has been subject to debate and a growing circuit split. Most recently, the U.S. Court of Appeals for the Third Circuit (the "Third Circuit"), in *In re The Hertz Corporation*, No. 23-1169 (3d Cir. Sept. 10, 2024) ("Hertz"), adopting the positions of the Fifth Circuit[35] and the Ninth Circuit,[36] held that, while payment of make-whole premiums tied to future interest payments was not recoverable pursuant to Bankruptcy Code section 502(b)(2)'s general prohibition on payment of unmatured interest,[37] Hertz's unsecured noteholders were nonetheless entitled to payment of such premiums under the so-called "solvent debtor" exception, which is an equitable exception to section 502(b)(2).

Below, we examine the Third Circuit's decision and its consequences.

35 *In re Ultra Petroleum Corp.*, No. 21-20008 (5th Cir. Oct. 14, 2022) ("Ultra"). See here for additional coverage on *Ultra*: https://www.proskauer.com/pub/special-alert-fifth-circuit-targets-make-whole-claims-in-bankruptcy

36 *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 2492 (2023) ("PG&E").

37 Under *Ultra*, such make-whole premiums are the "functional" or "economic" equivalent of unmatured interest.

The Hertz Third Circuit Decision

On May 22, 2020, the Hertz Corporation and certain of its affiliates commenced filed their bankruptcy cases in Delaware due to the drastic and significant effects COVID-19 had on travel demand and Hertz's liquidity. Prior to the bankruptcy, in 2019, Hertz warned in an SEC filing that a potential chapter 11 filing would likely wipe out all value for stockholders. Hertz, however, had a surprising and quick turnaround. Approximately a year after Hertz filed for chapter 11, Hertz was sold to a group of private equity funds and proposed a chapter 11 plan (the "Plan") that would leave creditors unimpaired and pay all creditors in full and provide a return to equity in an amount of over $1 billion. Because creditors were receiving full payment, they were presumed to accept Hertz's Plan and were not allowed to vote on the Plan.

Notwithstanding the unimpaired treatment of creditors pursuant to the Plan, the Plan did not pay the holders of the unsecured notes issued by Hertz (the "Noteholders") the contract rate interest for the duration of Hertz's bankruptcy. Instead, the Plan provided the Noteholders would receive interest at the much lower applicable federal judgment rate. Hertz's Plan also failed to provide for the payment of certain contractual fees (the "Applicable Premiums") (*i.e.*, another characterization of a make-whole premium).

The Noteholders filed a complaint seeking payment of (i) post-petition interest at the contract interest rate, (ii) the Applicable Premiums, and (iii) flat fees for early redemption of certain 2022 and 2024 Notes. The Bankruptcy Court dismissed the Noteholders' claims for the higher contract rate. The Bankruptcy Court concluded that, as unimpaired creditors of a solvent debtor, they were entitled to interest at the "legal rate," in accordance with Bankruptcy Code sections 1129(a)(7)(A)(ii) and 726(a)(5), and that "legal rate" is the federal judgment rate. The Bankruptcy Court further rejected the Noteholders' argument that a "solvent debtor exception" mandated payment at the contract rate. The Bankruptcy Court also dismissed the claims for flat redemption fees for the 2022 and 2024 Notes, because the Bankruptcy Court determined those fees were not triggered as a matter of contract law. Following discovery, the parties moved for summary judgment on the issue of whether the Applicable Premiums (*i.e.*, make-whole claims) constituted "interest" for purposes of section 502(b)(2) of the Bankruptcy Code. The Bankruptcy Court concluded that the "economic substance" of the Applicable Premiums was interest and disallowed the Noteholders' claims.

While this dispute was developing, the Fifth and Ninth Circuit decisions in *Ultra* and *PG&E Corp.* were rendered, both of which required solvent debtors to pay unimpaired creditors post-petition interest at the rate provided for in the contract. Armed with these decisions, the Noteholders requested reconsideration of the Bankruptcy Court's decision. Upon reconsideration, the Bankruptcy Court declined to change its ruling and *sua sponte* certified its decision for direct appeal to the Third Circuit (bypassing an appeal to the District Court) recognizing the circuit spilt.

On September 10, 2024, in a 2-1 decision, the Third Circuit held that unsecured noteholders' claims against a debtor for certain "Applicable Premiums" were the "economic equivalent" to unmatured interest and, therefore, not recoverable under section 502(b)(2) of the Bankruptcy Code.[38] Nevertheless, because the debtor was solvent, the court held that the unsecured noteholders were entitled to recover more than $270 million in post-bankruptcy interest at the higher "contact rate" under the Notes, as well as redemption premiums and other fees, by operation of the absolute priority rule.

First, the Third Circuit agreed with the Bankruptcy Court and found that the flat fees for early redemption of the 2022 and 2024 Notes were not triggered, because the 2024 Notes, by their terms, matured when Hertz filed for bankruptcy and the Notes redemption occurred after maturity. In ruling, the Third Circuit recognized that "the Bankruptcy Court's ruling allows Hertz to redeem the 2024 Notes well before 2024 without a fee." However, when "viewed in the complex context of modern leveraged finance, that is not as 'bizarre' a result as the Noteholders suggest." The Third Circuit based its ruling on the terms and provisions included in the debt documents and concluded that denial of the early redemption fee was fair under the contract because the Notes were redeemed after maturity, not before.

[38] *In re The Hertz Corp.*, Case No. 23-1169, 2024 WL 4132132 (3rd Cir. Sept. 10, 2024).

Second, the Third Circuit agreed with the Bankruptcy Court and held that the Bankruptcy Court correctly disallowed the Noteholders' claims for the Applicable Premiums. The Third Circuit focused its analysis on whether the Applicable Premiums were either (i) definitionally interest, or (ii) its economic equivalent. The Noteholders argued that "interest is a fee accruing while borrowed money is used. By contrast, the Applicable Premiums do not slowly and steadily accrue over the life of the Notes; they come into being fully formed upon an early redemption." In other words, according to the Noteholders, the Applicable Premiums are "not compensation for Hertz's ongoing use of the Noteholders' money," one of the preferred definitions of interest, "but rather compensation for the termination of Hertz's obligations to the Noteholders." The Third Circuit found the Noteholders' reading too narrow, and that the definition does not require a charge to accrue daily or be contingent on the ongoing use of money. Instead, the Third Circuit found that the Applicable Premiums were among a "suite of fees [the lenders] extracted from Hertz in return for their credit." Notwithstanding the Noteholders' arguments to the contrary, at its core, Hertz's commitment to pay the Applicable Premiums was "compensation" for the use of the Noteholder's funds. Thus, because section 502(b)(2) of the Bankruptcy Code disallows a claim for unmatured interest if it is either definitionally interest or its economic equivalent, and because the court found that the Applicable Premiums are both, the Court of Appeals held that the Bankruptcy Court correctly disallowed the Noteholders' claims for the Applicable Premiums.

Third, the Third Circuit held that the "solvent-debtor" exception survived the enactment of the Bankruptcy Code and operated to suspend Bankruptcy Code section 502(b)(2)'s disallowance of claims for unmatured interest and required full payment of the Applicable Premiums to the extent they represented valid contractual obligations. After a lengthy discussion on the history of the absolute priority rule and what it means to be impaired, starting with the United States Supreme Court's rejection of prior practices in "equity receiverships" of railroad reorganizations, through the codification of the absolute priority rule in the Bankruptcy Code, the court rejected any suggestion that the Noteholders could be rendered unimpaired if they received less than the contract rate of interest in a solvent debtor case. The Third Circuit noted, "[a] creditor is impaired if its treatment violates the absolute priority rule because every creditor has a right to treatment consistent with that principle," and the court condemns "backdoor means" to defeat the rule. Further, the Third Circuit also noted that it would neither be fair nor equitable for solvent debtors to pay less than the contract rate of interest before making distributions to equity.

Implications of the Third Circuit Decision

The Third Circuit's decision reveals a circuit spilt still remains as to whether make-whole premiums are enforceable in a bankruptcy proceeding, but brings its decision in alignment with the Fifth and Ninth Circuits with respect to solvent debtors. The Third Circuit's decision demonstrates make-whole claims are frequently targeted for disallowance in bankruptcy cases (with inconsistent results) and puts claims by unsecured lenders for make-whole premiums squarely in the crosshairs.

It is also important to note in *Hertz*, the Third Circuit determined an *unsecured creditors*' entitlement to recover a make-whole premium, not a *secured creditors*', who possess different rights pursuant to the provisions of the Bankruptcy Code. Accordingly, there is reason to believe that there is a legal basis for a secured creditor to recover a make-whole (or a prepayment premium) based on the rights in section 506(b) of the Bankruptcy Code, which allows for the payment of "interest on such claim, and any reasonable fees, costs, or charges" when the creditor is over secured (*i.e.*, the value of the collateral exceeds the claim amount).

Marketing Rule Compliance in 2024

When compliance with amended Rule 206(4)-1 (the "Marketing Rule") became mandatory for all RIAs on November 4, 2022, investment advisers faced several challenges in applying the Marketing Rule to their practices: negotiating with uncooperative placement agents, overhauling their marketing materials and changing their policies and procedures. And, as summarized in our 2023 Annual Review, challenges and developments continued through 2023 as RIAs reacted to new guidance from the SEC staff, a focus on

Marketing Rule compliance in routine and targeted compliance examinations, and the first wave of SEC enforcement actions focused on Marketing Rule violations.

After a second full year following the amended rule's compliance date, during which the SEC staff issued further guidance and brought additional enforcement actions relating to the Marketing Rule, investment advisers continue to find challenges in applying the rule to their practices. Below are some of the more notable developments:

Division of Investment Management: Marketing Rule FAQ Guidance

> **Requirement to Use Consistent Cash-Flow Timing in Calculating Gross and Net IRRs.** In FAQ guidance published on February 6, 2024, the SEC staff clarified requirements for calculating gross and net internal rates of return (IRRs) in advertisements under the Marketing Rule. The guidance reiterated that gross performance must always be accompanied by net performance calculated "over the same time period and using the same type of return and methodology." The SEC specifically addressed the practice by some private fund advisers of presenting Gross IRR calculated from the time an investment is made (excluding the effects of fund-level subscription facilities) while calculating Net IRR only from when investor capital is called to repay such borrowing. According to the SEC, this approach violates the Marketing Rule, because it results in IRR calculations using inconsistent time periods and methodologies. The staff noted that such presentations "would result in IRR calculations being made across different time periods" and would involve "calculating performance without and with the impact of fund-level subscription facilities," thus failing to facilitate meaningful comparisons between gross and net performance.
>
> The guidance further warned that presenting Net IRR inclusive of subscription facility impacts could be misleading, unless it is accompanied by either (i) comparable performance metrics excluding the effects of subscription facility usage or (ii) clear disclosures "describing the impact of such subscription facilities on the net performance shown."
>
> In response, many private fund advisers have revised their marketing materials to ensure that any Gross IRRs are paired with Net IRRs calculated using consistent cash-flow timing. Some advisers have also included pro forma performance figures that exclude the effects of subscription facilities altogether, particularly as certain investors increasingly request such metrics. However, this practice is not yet universal. In instances where pro forma performance is not provided, advisers are supplementing disclosures to address the impact of subscription facility leverage on returns.
>
> While the FAQ's guidance focuses on subscription facilities, it is worth noting that similar IRR discrepancies may also arise with other forms of direct or indirect leverage, such as NAV facilities or other borrowing arrangements, or the reinvestment or recycling of realized proceeds in cash-flow-generating strategies. Although the SEC has not yet commented specifically on these other forms of leverage, the principles outlined in the guidance suggest that advisers should ensure consistent time periods and methodologies whenever presenting Gross-Net return pairs.

Division of Examinations: Marketing Rule Risk Alert (2024)

> On April 17, 2024, the SEC Division of Examinations issued a Risk Alert, highlighting common deficiencies and best practices regarding compliance with the Marketing Rule.

Key observations include the following:

- **Compliance Rule Observations.** While many advisers updated their compliance frameworks (e.g., policies, pre-approval processes, staff training), deficiencies were noted, including:

  - **Generic or Inadequate Policies:**

    - Policies that consisted only of general descriptions of the Marketing Rule without specific actionable processes.

    - Policies that failed to address the marketing channels utilized by the adviser, such as websites and social media.

    - Informal (non-written) policies.

  - **Incomplete or Untailored Policies:**

    - Policies that were outdated, partially updated or failed to address specific requirements under the Marketing Rule (e.g., testimonials, endorsements and third-party ratings).

  - **Implementation Failures:**

    - Policies that were updated to reflect Marketing Rule requirements but were not followed in practice.

  These findings highlight the importance that the SEC staff places on Marketing Rule policies and procedures that are not only appropriately tailored to the adviser's actual practices but are also complied with in practice.

- **Books and Records Rule Observations.** SEC staff identified several deficiencies in maintaining and preserving required records, including:

  - **Failure to Retain Third-Party Rating Documentation:** Advisers completed questionnaires or surveys for preparing third-party ratings, but did not retain copies of these documents.

  - **Inadequate Social Media Recordkeeping:** Advisers did not maintain copies of content or information posted to social media platforms.

  - **Lack of Documentation for Performance Claims:** Advisers failed to preserve supporting documentation for performance claims included in their advertisements.

- **Observations Related to Form ADV.** SEC staff identified several common violations relating to compliance with the Marketing Rule-related amendments to Form ADV, including the following:

  - **Inaccurate Reporting on Form ADV, Part 1A:** Advisers incorrectly stated that their advertisements did not include:

    - Third-party ratings (e.g., websites or social media posts featured third-party ratings, but this was not disclosed)

- Performance results (e.g., marketing materials included performance results, but this was not reported)

- Hypothetical performance (e.g., hypothetical performance was included in advertisements, but not disclosed on Form ADV)

- **Outdated or Inaccurate Language:**

  - References to the now-rescinded Cash Solicitation Rule (former Rule 206(4)-3) remained in some Form ADVs.

  - Advisers inaccurately reported that no referral arrangements existed or failed to disclose material terms and compensation of referral arrangements in Part 2A, Item 14**.**

  These findings serve as a reminder to advisers to review their Form ADVs to ensure consistency with the Form's disclosure requirements.

- **Observations Related to the Marketing Rule's General Prohibitions.** The SEC staff observed multiple deficiencies in advisers' advertisements under the Marketing Rule's General Prohibitions. Common violations included the following:

  - **Untrue Statements of Material Fact:** Advisers made statements in advertisements that were inaccurate or untrue, such as:

    - Claiming to be "free of all conflicts" when actual conflicts of interest existed.

    - Misrepresenting adviser personnel qualifications, such as education, experience or professional designations.

    - Describing non-existent advisory services or mandates, including:

      - Referencing ESG mandates that the firm did not actually employ.

      - Claiming investment processes were validated by professional institutions when no such validation occurred.

    - Incorrectly characterizing the firm's client base, such as:

      - Describing the adviser as a "private fund adviser" while managing no private funds.

      - Publicizing awards or accolades that were never received.

  - **Unsubstantiated Statements of Material Fact:** Advisers included material statements in advertisements, but failed to substantiate them when requested during SEC examinations. Examples included:

    - Advertisements referencing a network of personnel providing services when only a sole individual performed these services.

    - Claims that investment recommendations accounted for clients' individual risk tolerances, while all clients were placed in the same strategy without consideration of such tolerances.

    - References to non-existent lists of approved securities or formalized securities screening processes.

- **Omission of Material Facts or Misleading Inference:** SEC staff identified advertisements that omitted material facts or included information that created untrue or misleading implications or inferences. For example:

    - **Performance Information Omissions:** Failed to disclose critical details, such as:

        - Share classes included in the performance data.

        - Use of lower fees in performance calculations than those offered to the target audience.

        - Omitted material information about fees and expenses used to calculate returns.

    - **Benchmark Comparisons:** Failure to define benchmark indices or provide sufficient context for comparisons, including whether benchmark performance excluded reinvestment of dividends.

    - **Outdated or Unavailable Data:** Performance presentations relied on outdated market data or included investment products no longer available to clients, often featuring lower costs than current offerings.

    - **Misleading Track Record Claims:** Advertisements highlighted performance during time periods when general market trends likely drove the results without providing adequate disclosures to contextualize the data.

    - **Third-Party Ratings:** Implications that advisers were sole or top award recipients when the awards were shared among multiple recipients, or the advisers were not top-rated. Failure to disclose that ratings were based on non-advisory factors (e.g., assets under management or nominations from colleagues).

    - **Implying SEC Approval:** Advertisements used SEC registration, or SEC logo, to imply a particular level of skill or SEC approval.

- **Fair and Balanced Treatment of Material Risks or Limitations:** SEC staff observed deficiencies in advertisements that emphasized the potential benefits of advisers' services without providing a fair and balanced treatment of associated material risks or limitations. For example, social media advertisements highlighting performance information without disclosing the material risks or limitations associated with the promoted benefits.

- **References to Specific Investment Advice, or Inclusion/Exclusion of Performance Results or Time Periods, Not Presented in a Fair and Balanced Manner**: SEC staff noted that some advertisements included references to specific investment advice, and/or included or excluded performance results or time periods, in a manner that was misleading or unbalanced. For example:

    - Highlighting only the most profitable investments without context or rationale, such as omitting investments that were written off as losses or lower-performing investments.

- Failing to establish or implement criteria in policies and procedures to ensure that references to specific investment advice are fair and balanced.

- Advertisements omitted the time period for performance data or failed to specify whether the returns covered the same time period as other performance information in the advertisement.

- Advertisements included only the performance of realized investments in total net return figures while excluding unrealized investments.

Since this Risk Alert was published, the above topics have remained a focus of SEC Exam staff as they conduct their routine compliance examinations. Investment advisers should therefore keep these findings closely in mind as they prepare their marketing materials and conduct their annual compliance reviews. In more egregious cases, SEC staff observations of Marketing Rule violations can be elevated to the SEC's Division of Enforcement, as noted below.

Recent SEC Marketing Rule Enforcement Actions

- In 2024, the SEC announced two batches of enforcement actions relating to Marketing Rule violations, the first on April 12, 2024 announcing five enforcement actions, and the second on September 9, 2024 announcing an additional nine enforcement actions. The SEC also brought another separate enforcement action on November 1, 2024. All were settled actions, with fines ranging from $20,000 to $325,000. The SEC's key violation findings in these actions included the following:

  - **Use of Hypothetical Performance Without Required Policies and Procedures:** Advertisements included hypothetical performance disseminated to the general public on websites without policies and procedures designed to ensure the performance was relevant to the likely financial situation and investment objectives of the intended audience, as required by the Marketing Rule.

  - **Misleading and Unsubstantiated Performance Claims:** Dissemination of false and misleading statements in advertisements, including misleading model performance and performance claims that could not be substantiated.

  - **Endorsements Without Written Agreements:** Failure to enter into written agreements with individuals compensated for providing endorsements.

  - **Untrue or Misleading Statements**:

    - Falsely claiming membership in a non-existent organization

    - Claims of "conflict-free" advisory services that could not be substantiated.

  - **Misleading Use of Testimonials and Endorsements**:

    - Testimonials were included in advertisements but did not come from current clients as claimed.

    - Advertisements featured paid endorsers who were not clients, without disclosing the nature of the relationship or compensation.

- **Misleading Use of Awards and Third-Party Ratings**:
  - Advertisements included unsubstantiated claims regarding awards provided to firm principals.
  - Advertisements included outdated third-party ratings (older than five years) without disclosing the dates of the ratings or the time periods upon which the ratings were based.
- **Recordkeeping and Compliance Failures:** Violations of recordkeeping requirements and failure to maintain proper compliance policies and procedures.

Marketing Rule Exam and Enforcement Focus Going Forward

- While much remains to be seen in terms of the SEC's exam and enforcement priorities under the new administration — in particular, the new administration's willingness to address asserted deficiency findings through enforcement, as opposed to resolving any such findings through the routine compliance examination process — it is likely safe to assume that basic compliance with the Marketing Rule's requirements will remain a focus. In this regard, it is also worth noting that the Marketing Rule itself is a product of the last Republican-led administration, having been proposed and adopted under former Chair Jay Clayton's tenure.
- In particular, for any investment advisers marketing or planning to market to "retail" investors or otherwise to non-qualified purchaser investors, the SEC staff are likely to apply closer scrutiny to marketing materials used in that context. Accordingly, investment advisers that have historically marketed primarily to non-retail audiences but that are now engaging in more retail (or "retail-adjacent") focused marketing should consider whether to revisit and/or improve their Marketing Rule compliance efforts, at least before their next SEC exam.

European Union and United Kingdom

ESG Disclosure Requirements and Taxonomy Regulation for Asset Managers – What Comes Next?

SFDR

The Sustainable Finance Disclosure Regulation (SFDR), introduced in March 2021, is a cornerstone of the EU's sustainable finance framework, designed to enhance transparency on sustainability-related matters and to integrate sustainability risks into investment decision-making processes. SFDR is one moving part of the European Green Deal to support the EU's broader environmental objectives, including achieving net-zero carbon emissions by 2050. By setting expectations for disclosures at both the entity and financial product levels, SFDR's aim was to ensure that investors have access to consistent, comparable information about the sustainability characteristics of financial products. However, there has been criticism of the regime, and it is evolving as a result.

Below is an overview of SFDR, incorporating insights from recent developments and ongoing reforms.

Framework Overview:

- **Purpose and Scope:** SFDR was intended to be a disclosure regime that obligates financial market participants to provide transparency on how they integrate environmental, social and governance (ESG) factors into their investment practices. It applies across the EU to both financial entities (e.g., fund sponsors) and financial products, including funds marketed into the EU.

- **Classification of Funds:**
  - **Article 6**: Covers funds that do not promote ESG characteristics, requiring limited disclosures on the integration of sustainability risks in the investment decision-making process and their likely impact on the returns of the fund.
  - **Article 8**: Covers funds promoting environmental and/or social characteristics, with regards to all or a proportion of assets. There is flexibility in the characteristics promoted, the corresponding sustainability indicators to demonstrate whether they are being attained and what is considered to be "binding" from an ESG perspective in the investment strategy. All equity and debt investments must meet good governance principles; however, the parameters for "good" governance are within the manager's discretion to determine in an appropriate policy.
  - **Article 9**: Covers funds with a sustainable investment objective, with all investments needing to be "sustainable investments" either under SFDR or the EU Taxonomy Regulation. Both regulatory regimes incorporate a "do no significant harm" principle where, not only must the sustainable investment objective be contributed by each investment, but there must also not be harm to other environmental or social objectives. As a result, there are more demands in the disclosures required and investment exclusivity in sustainable assets for Article 9 funds.
  - **Standardization**: Article 8 and 9 funds must use prescribed templates for pre-contractual and periodic disclosures and provide website disclosures under a mandatory list of headings, intended to support comparability for investors.

Change on the horizon:

- **Ambiguities in SFDR:**
  - SFDR has faced criticism for its lack of clarity in its disclosure regime — for example, with broad definitions such as "sustainable investment" — and has morphed into a de facto labelling regime. Furthermore, the absence of minimum standards for Article 8 funds has been highlighted by some as a gap, as funds in this category are not required to achieve specific ESG outcomes. With inconsistent interpretations, there have also been concerns over greenwashing.
- **European Commission Consultation on SFDR:**
  - As a result of the ambiguities in SFDR, a 2023 European Commission consultation process sought stakeholder input on SFDR's effectiveness and potential areas for improvement, including whether SFDR 2.0 should include a more prescriptive labelling regime.
  - In May 2024, the Commission's Summary Report highlighted strong support for introducing a new, prescribed labelling regime, with a new category focused on transitional investments — products aimed at investing in businesses and activities in their journey toward sustainability — particularly welcomed. Despite the European Supervisory Authorities (ESAs) also publishing an opinion in support of new labels, alongside several individual EU regulators including France's AMF, SFDR 2.0's implementation remains years away, and the current SFDR framework will remain in force for the foreseeable future.

- **Technical Updates to SFDR Level 2:**
  - Alongside the consultation referenced above, the European Supervisory Authorities also proposed significant refinements to the SFDR disclosures in December 2023 (in the Level 2 standards), including:
    - New templates and a "dashboard" for more accessible disclosures.
    - Enhanced reporting on greenhouse gas reduction targets.
    - Additional Principal Adverse Impact (PAI) indicators focused on social factors.
    - Adjustments to criteria for "do no significant harm" and calculations for sustainable investments.
  - These changes were set out to address practical implementation challenges and ensure more granular disclosures. The European Commission had until March 2024 to decide on endorsing these proposals, but no such decision has been forthcoming. It may be that such updates are now paused, due to the wider consultation set out above.

Investor expectations:

- **Investor Influence**: While SFDR does not mandate fund sponsors to classify products under a specific article, investor expectations have increasingly pressured fund sponsors to adopt Article 8 classifications. This reflects a growing demand for products with ESG characteristics, taking advantage of the significant flexibility in Article 8.

Taxonomy Regulation

The EU Taxonomy Regulation (EU/2020/852) establishes a classification system for defining environmentally sustainable activities. It is a critical component of the EU's sustainable finance framework, designed to provide clarity and consistency in identifying economic activities that align with the EU's environmental objectives. Below is an updated summary of the regulation, incorporating recent developments.

Overview of the EU Taxonomy Regulation

- **Purpose**: The Taxonomy Regulation introduces an EU-wide classification system to define "environmentally sustainable economic activities." It aims to establish a common language for policymakers, businesses and investors, facilitating the flow of capital into activities that support the EU's sustainability goals.
- **Alignment with SFDR**: Disclosures on Taxonomy Regulation alignment are required under the Sustainable Finance Disclosure Regulation (SFDR), with the aim to create an integrated framework for transparency in sustainable finance.
- **Criteria for Sustainability:**
  - An economic activity is considered environmentally sustainable if it:
    - Substantially contributes to one of six defined environmental objectives.
    - Does not significantly harm any of the other objectives.

> Complies with minimum social safeguards.

> Meets detailed technical screening criteria specific to each activity.

Environmental Objectives

The six environmental objectives under the Taxonomy Regulation are Climate change mitigation; Climate change adaptation; Sustainable use and protection of water and marine resources; Transition to a circular economy; Pollution prevention and control; and Protection and restoration of biodiversity and ecosystems.

Initially introduced in **January 2022**, the Taxonomy has gradually expanded its scope, adding new criteria and sectors to reflect the evolving needs of sustainable finance.

Recent Developments

Effective from 1 January 2024, the Taxonomy Regulation has been updated to include technical screening criteria for the last four environmental objectives set out above.

These updates significantly enhance the scope of the Taxonomy, allowing a broader range of activities to be classified as environmentally sustainable. Moreover, amendments have been made to the criteria for the existing objectives of climate change mitigation and climate change adaptation, introducing new sectors such as:

> **Aviation**: Expanded coverage for sustainable practices in air transport.

> **Construction**: Inclusion of sustainable building materials and techniques.

> **Manufacturing**: Criteria for sustainable production methods.

Future Expansion

The EU Taxonomy is a dynamic framework designed to evolve over time. As the European Commission develops additional technical screening criteria, more economic activities and sectors will be included. There is also further guidance that gets published to support with navigating the EU Taxonomy requirements, including in a FAQs published by the European Commission in December 2024. It may also be the case that the EU Taxonomy has an elevated importance in SFDR 2.0 in terms of sustainable investments needing to be Taxonomy-aligned if the economic activity is listed there, but that remains to be confirmed.

Update on the EU Corporate Sustainability Reporting Directive (CSRD)

The Corporate Sustainability Reporting Directive (CSRD) forms a critical part of the EU's Green Deal, alongside the Sustainable Finance Disclosure Regulation (SFDR) and the EU Taxonomy Regulation. It significantly expands the scope of corporate sustainability reporting in the EU and introduces robust new requirements designed to enhance transparency around companies' environmental, social and governance (ESG) impacts. The CSRD requirements are being implemented in phases, starting from financial year 2024.

Scope of CSRD

The CSRD applies broadly across the EU and extends its reach extraterritorially to non-EU entities, including U.S. companies, through various triggers, such as listing of transferable securities on EU-regulated markets, group-level reporting obligations or financial thresholds (e.g., turnover, balance sheet size, or employee count). Estimates suggest that over 10,000 companies outside the EU, including approximately one-third from the U.S., will be subject to CSRD compliance. Determining scope can be complex, particularly for multinational organizations operating within the EU's extended value chains.

Key CSRD Reporting Requirements

The CSRD mandates reporting in accordance with the European Sustainability Reporting Standards (ESRS). These standards include:

- **Cross-cutting standards:**
  - **ESRS 1**: General principles.
  - **ESRS 2**: General disclosures applicable to all entities.
- **Topical standards:**
  - Climate change (ESRS E1),
  - Pollution (ESRS E2),
  - Water and marine resources (ESRS E3),
  - Biodiversity and ecosystems (ESRS E4),
  - Circular economy (ESRS E5),
  - Workforce issues (ESRS S1-S2),
  - Affected communities (ESRS S3), and
  - Governance (ESRS G1).
- **Sector-specific standards:**

  Not yet published, but expected to cover industries like energy, agriculture, textiles and financial services.

  Reporting will be structured around four pillars, either on a mandatory basis for the ESRS 2 General Disclosures or where a sustainability topic is assessed as material:

  - Governance
  - Strategy
  - Impact, risk and opportunity management
  - Metrics and targets

  This structure aligns with frameworks like the Task Force on Climate-related Financial Disclosures (TCFD) recommendations (although the sustainability topics reach beyond climate-related matters).

Challenges and Opportunities

- **Double Materiality:**

  CSRD introduces a double materiality test that requires companies to assess and report on:

  - **Financial materiality**: How ESG factors affect the business' financial position.

  - **Impact materiality**: How the business affects society and the environment.

- **Value Chain Reporting:**

  Companies must consider their entire value chain, including indirect relationships, with a transitional relief period of three years, in the double materiality test on each sustainability topic. If complete information cannot be obtained, companies must document their efforts, challenges and plans for future compliance.

- **Assurance and Equivalence:**

  Sustainability reports under CSRD will be subject to assurance requirements. While non-EU companies may be exempt if they report under an equivalent framework, the double materiality requirement is a significant hurdle, as many existing non-EU frameworks (e.g., the U.S. SEC's proposed rules or California climate reporting) focus only on financial materiality, and there is no obvious route for equivalence at the current time.

Future Guidance and Implementation

The ESRS sector-specific standards and additional guidance for non-EU companies will be published over time, covering industries such as financial services, oil and gas, mining, agriculture and motor vehicles. Further clarification on CSRD's interoperability with other international reporting regimes is also anticipated over time alongside implementation guidance.

Even out-of-scope entities may face indirect impacts from commercial pressures to provide CSRD-relevant data for in-scope partners operating within the same value chain. Thus, the Directive's influence is expected to extend well beyond its formal regulatory boundaries. Organizations are encouraged to prioritize readiness, particularly in addressing double materiality and value chain complexities, to navigate the evolving regulatory requirements effectively.

UK Sustainability Disclosure Requirements (SDR)

On 28 November 2023, the UK's Sustainability Disclosure Requirements (SDR) were officially published in the FCA's Policy Statement PS23/16, marking a significant milestone in sustainable finance regulation in the UK. The SDR introduces labelling, marketing and disclosure rules for sustainable funds and includes a robust anti-greenwashing rule applicable to all UK-regulated firms.

Scope and Timeline

Anti-Greenwashing Rule

Effective from 31 May 2024, the anti-greenwashing rule applies to all UK-regulated firms, regardless of whether they use SDR labels. It ensures that claims regarding environmental and social characteristics are clear, fair, not misleading, and align with the actual sustainability profile of products or services. Examples include statements, strategies and even images.

In April 2024, the FCA also published finalised guidance (FG24/3) on their expectations for complying with the anti-greenwashing rule, including that statements should be:

> Correct and capable of being substantiated;

> Clear and presented in a way that can be understood; and

> Complete.

Sustainable Fund Labelling and Disclosure

Applicable to UK asset managers from 31 July 2024, these opt-in rules establish three fund labels:

> Sustainability Focus

> Sustainability Improvers

> Sustainability Mixed Goals

While overseas managers and funds are currently outside the direct regulatory scope, there is likely to be an extension of SDR with a focus on overseas retail funds.

Portfolio managers and advisers are not yet included within SDR, but may come under its remit in future following consultations on this in early 2024.

Fund Label Criteria and Requirements

For asset managers choosing to apply a label to a UK fund, the following conditions must be met:

> **Sustainable Investment Objective**: A clear purpose centered on sustainability.

> **70% Asset Allocation**: At least 70% of the fund's assets must adhere to the sustainability objective. The remainder may only be used for liquidity, risk, or diversification purposes or not conflict with the sustainability objective.

> **Evidence-Based Standards**: Asset selection must follow a robust, independently assessed standard, which can be carried out in-house if segregated from the investment process.

> **KPIs**: Key performance indicators must track progress toward sustainability goals, measuring fund or asset-level performance.

> **Escalation Plan**: Outline steps for addressing underperforming assets.

> **Label-Specific Criteria:** Each label has unique criteria reflecting distinctions in sustainability focus. Unlike the EU's SFDR, SDR labels are not hierarchical, and the inclusion of "sustainability" (rather than "sustainable") acknowledges transitional or improving assets.

> **Do no significant harm:** Alignment with a "do no significant harm" standard similar to the EU SFDR.

> **Stewardship:** Disclosure of stewardship practices where applicable.

> **Internal governance and control:** Regular maintenance of governance, resources and organizational arrangements to support sustainability objectives.

> **Annual Review**: Labels must be reassessed every 12 months to ensure compliance.

Interaction with EU SFDR

The FCA has provided a comparison between SDR and the EU's SFDR, but notes limited synergy between SDR's labels and SFDR's Article 8 and 9 categories. For example, many Article 8 funds would need to "level up" to meet SDR labelling requirements.

As the SDR takes shape, firms should assess its implications for their sustainability strategies, particularly in relation to anti-greenwashing compliance and alignment with fund labelling standards.

ESMA Fund Name Guidelines

The May 2024 ESMA Final Report on the Guidelines for funds' names using ESG or sustainability-related terms (the "Guidelines") marks a critical moment for asset managers. These Guidelines aim to clarify when the use of ESG or sustainability-related terms in fund names may be deemed unfair, unclear or misleading. The Guidelines introduce minimum asset allocation thresholds, exclusionary criteria and additional criteria, which vary depending on the specific ESG or sustainability terms used in the name.

The Guidelines apply to all alternative investment funds (AIFs) managed by EU-based alternative investment fund managers (AIFMs), as well as UCITS managed by UCITS management companies. ESMA estimates that around 1,700 EU-domiciled AIFs will be impacted by these new rules.

For funds with names that include terms such as "transition," "social," "governance," "environmental impact" or "sustainability" (or derivatives of these words), the Guidelines outline specific requirements. There is no exhaustive list of names that trigger the rules, so fund managers must use their judgment to assess whether their funds fall within the scope.

These Guidelines reflect the EU's push for greater transparency, accountability and consistency in how ESG funds are marketed. Funds with ESG-related names must now ensure that at least 80% of their assets are aligned with the binding elements of their investment strategy. This rule ensures that funds are genuinely committed to their ESG objectives, rather than using the ESG label superficially.

The Guidelines mandate the application of two sets of exclusionary criteria depending on the type of ESG fund. Funds that focus on climate transition, social and governance issues will need to adhere to the Climate Transition Benchmark exclusionary criteria. Meanwhile, funds with names linked to environmental sustainability or impact will also have to follow the additional exclusionary criteria outlined in the Paris-Aligned Benchmark.

Additionally, any fund that uses "transition" or "impact" in its name must demonstrate a clear, measurable path toward achieving a positive social or environmental transition. This should include a goal to create measurable social or environmental impact alongside financial returns. Similarly, funds with sustainability-related names are required to "meaningfully" invest in sustainable investments, as defined under Article 2(17) SFDR.

Although it is clear that these Guidelines apply to fund managed by EU-AIFMs, it remains uncertain whether non-European AIFMs marketing their funds within the EEA under the national private placement regime (NPPR) will also be affected. Another grey area is how strictly EEA regulators will apply the Guidelines to closed-ended funds that are no longer open for new distribution.

For many asset managers, these Guidelines signify a shift from voluntary ESG commitments to stricter regulatory obligations.

EU Rules on Marketing and Pre-marketing of Funds

In August 2021, rules concerning the marketing and pre-marketing of funds were introduced (being made up of Directive ((EU) 2019/1160) and Regulation ((EU) 2019/1156)) aimed at reducing the regulatory barriers for the cross-border distribution of funds in the EU (the "CBDF Package"). Previously, the interlinked concepts of "pre-marketing" and "marketing" were interpreted differently between EU Member States, and the CBDF Package introduced a harmonized definition of "pre-marketing" of funds. The "pre-marketing" definition allows for fund-specific information, including draft private placement memoranda or offering documents, to be provided to potential investors and for this to still fall within the scope of pre-marketing, provided certain disclaimers are included in the documentation and as long as it does not amount to "an offer or placement" to an investor, which would trigger a formal marketing notification requirement.

EU fund managers are required to notify their local home state regulator within two weeks of beginning their pre-marketing. Non-EU Managers intending to pre-market in EU Member States are required to submit a pre-marketing notification in those Member States which have implemented the CBDF package allowing Non-EU Managers to rely on the pre-marketing regime (Germany, Luxembourg, Finland and the Netherlands) or will need to wait for registration approval under the NPPR of the relevant Member State before commencing any pre-marketing or marketing activity. Any third party carrying out pre-marketing or marketing activities on behalf of a fund manager must be authorized as an investment firm under the Second Markets in Financial Instruments Directive (2014/65/EU) (MiFID), a credit institution under the Capital Requirements Directive (2013/36/EU) (CRD IV), an Undertakings for the Collective Investment in Transferable Securities (UCITS) management company or an alternative investment fund manager under AIFMD, or act as a tied agent in accordance with MiFID. In addition, the agent is directly subject to the pre-marketing rules in the CBDF Package. Fund managers should ensure that any potential placement agents and fund distributors have the appropriate authorizations.

The CBDF Package also introduced restrictions on the use of "reverse solicitation" in jurisdictions where there has been any prior marketing or pre-marketing activity. Where there is a subscription by professional investor(s) in the relevant EU Member State within 18 months of the AIFM having begun pre-marketing, it is deemed to have taken place as a result of active "marketing" (triggering the requirement to make a formal marketing notification).

The CBDF Package included new de-notification requirements, which include that EU AIFMs must notify their home Member State regulator when intending to cease marketing of an AIF. This would mean that the EU AIFM will not be able to carry out pre-marketing in relation to the AIF and a "similar investment strategy" or "investment ideas" for 36 months after the de-notification. Non-EU Managers who have made a pre-marketing notification are subject to the same restriction in the EEA Member State in which a pre-marketing notification has been made. The AIFMD marketing rules under the CBDF Package do not apply to marketing activities in the UK because the UK has not on-shored the relevant European legislation.

Prudential Rules for UK Investment Firms

The UK Investment Firms Prudential Regime (IFPR) came into force on January 1, 2022 and applies to UK investment firms authorized under MiFID as it is applied in the UK post-Brexit, which includes previous "BIPRU" firms and "Exempt CAD" firms, as well as AIFMs that have MiFID top-up permissions (known as collective portfolio management investment firms (CPMI)). The IFPR is based on the European Investment Firms Regulation ((EU) 2019/2033) (IFR) and the Investment Firms Directive ((EU) 2019/2034) (IFD), which came into force in June 2021, and the UK has adapted it for the prudential regulation of FCA investment firms.

The IFPR introduced new regulatory capital requirements for firms within its scope and, among other things, new remuneration, reporting and disclosure requirements.

The IFPR regime distinguishes between "small and non-interconnected investment firms" ("SNI" firms) and non-SNI firms. The level of compliance with certain rules that apply to a firm within the scope of the IFPR is determined by whether or not the firm is an SNI or a non-SNI firm.

SNI firms are defined in the prudential sourcebook for MiFID firms (MIFIDPRU 1), prescribing a series of permission-based and quantitative thresholds for firms to determine whether they are an SNI. The FCA expects approximately 70% of firms to be SNI, and firms that exceed the relevant thresholds are known as "non-SNI".

The regulatory capital requirements require all firms subject to the IFPR to hold an "initial capital" requirement as well as an additional capital amount by reference to their "annual fixed overheads." A number of firms have been particularly impacted by the regulatory capital requirements, such as Exempt CAD firms, which have seen their capital requirements significantly increase. Certain firms are able to benefit from temporary transitional provisions, enabling them to gradually adjust to the additional requirements under the IFPR. For example, Exempt CAD firms are able to gradually increase their capital over the course of five years from 1 January 2022.

All firms within scope of the IFPR need to comply with the MIFIDPRU Remuneration Code requirements, which vary depending on the type of firm. The MIFIDPRU Remuneration Code applies to remuneration, including carried interest, paid to a firm's staff (which has a wide meaning under the FCA rules). In particular, SNI firms have to comply with basic remuneration requirements, requiring them to establish and implement remuneration policies, while applying proportionality. Larger SNI firms are subject to enhanced remuneration rules, which amongst other things, also have to establish risk and remuneration committees, comply with pay-out process rules and provide certain additional remuneration disclosure.

Amendments to the EU Alternative Investment Fund Managers Directive (AIFMD II)

The AIFMD has applied since July 2013 and contains the key regulatory framework for AIFMs in the EEA and has also been implemented and on-shored in the UK. Following a review of the AIFMD by the European Commission, the legislative package amending the AIFMD was published on 26 March 2024 (AIFMD II), in the Official Journal of the European Union (Official Journal), with an adoption date of 15 April 2024 (the "Adoption Date"). The amendments, commonly known as "AIFMD 2.0," will generally take effect two years from the Adoption Date, on 16 April 2026.

AIFMD II will impact EU AIFMs and some funds which are marketed in EEA Member States under the NPPR. It will not be directly applicable to UK AIFMs (unless they market their funds into the EEA), as the UK is no longer part of the EEA. The extent of the impact of AIFMD II on asset managers will depend largely on the strategies employed by these managers. For instance, credit fund managers — particularly those involved in managing "loan originating AIFs" — are expected to face significant changes due to the new regulatory requirements. While AIFMD II does not constitute a fundamental overhaul of the existing AIFMD, it introduces several important changes, including:

- a new regime for "loan originating AIFs", including certain risk retention requirements, leverage limits and diversification requirements;
- additional disclosure, substance and reporting requirements in respect of delegation arrangements;
- additional investor disclosure requirements around fees and expenses; and
- liquidity management requirements in respect of open ended-funds.

The provisions of AIFMD II will primarily apply to EU full-scope AIFMs. Non-EU AIFMs marketing funds in the EU under NPPRs will be subject to certain limited provisions, particularly with regard to the reporting requirements set out in Annex IV and the disclosure obligations under Article 23.

Under AIFMD II, the pre-contractual disclosures required by Article 23 will be expanded to include, among other items, a detailed description of the conditions under which the AIFM (whether EU or non-EU) may utilize liquidity risk management tools. These AIFMs will also be required to disclose, on an annual basis, all direct and indirect fees and charges incurred by the fund.

Additionally, AIFMs will be subject to enhanced regulatory reporting obligations. Currently, non-EU AIFMs marketing in the EU under NPPRs and EU AIFMs are required to report on principal markets, instruments, exposures and concentrations. Under AIFMD II, this requirement will be broadened to include all markets, instruments, exposures and assets associated with each fund managed. The total leverage employed by each fund must also be reported, and further reporting on delegation arrangements will be mandated.

It is possible that some Member States may introduce additional "gold-plating" requirements for non-EU AIFMs marketing funds in those jurisdictions, though the specifics of such measures will not be clear until AIFMD II is fully implemented.

Amendments to the European Long-term Investment Fund Regulation (ELTIF II)

Regulation (EU) 2023/606 (ELTIF II), which amended Regulation (EU) 2015/760 (ELTIF Regulation), came into force on 10 January 2024 across EEA Member States. Following its adoption by the European Commission, the Commission Delegated Regulation ((EU) 2024/2759) (the "Delegated Regulation" or "ELTIF RTS") containing the regulatory technical standards (RTS) for the European Long-Term Investment Fund (ELTIF) has been published on 25 October 2024 in the Official Journal of the EU. The Delegated Regulation came into effect on 26 October 2024.

The Delegated Regulation serves as a supplement to ELTIF II. The ELTIF RTS addresses several key areas, including the requirements for an appropriate redemption policy, liquidity management tools and the conditions under which transfer requests for units or shares of the ELTIF may be matched.

The original ELTIF Regulation was aimed at boosting European long-term investments in the real economy, but did not gain a lot of traction, with very few ELTIFs having been authorised. The purpose of ELTIF II is to enhance and reshape the ELTIF Regulation so that it can remain attractive to professional investors and also align private market strategies to a wider retail investor base.

ELTIF II has amended the ELTIF Regulation and addresses a number of issues, including (amongst other things) the provision of greater flexibility for fund managers to design appropriate investment strategies and portfolio compositions for ELTIFs, a removal of the minimum investment requirement, as well as a greater facilitation of fund-of-fund and master-feeder structures.

These changes are aimed at increasing the popularity and use of ELTIFs, and it is yet to be seen what the impact of this will be.

UK Tax

On Wednesday 30 October 2024, the UK government announced changes to the UK taxation of carried interest as part of the 2024 Autumn Budget. Changes were expected following statements made by the Labour Party in the run up to their July 2024 general election win, including in their manifesto, and HM Treasury's (HMT) subsequent call for evidence on the tax treatment of carried interest published on 29 July 2024.

The framework for the changes has now been announced and in this article we summarise the proposed new regime and provide initial thoughts on some of the implications for private investment fund managers with activities in the UK. No draft legislation has been published for the new regime, and the details of the new regime are subject to further consultation with HMT and HM Revenue & Customs (HMRC) (see below for further details), so not all the details are known at this stage, and this article is based on what we know so far.

Outline of the changes and timeline

There will be no change to the UK taxation of carried interest proceeds received (or to use the legislative term "arising") between now and 5 April 2025.

The 2025/26 tax year (from 6April 2025 to 5 April 2026) will be a transition year, with a rate increase from 28% to 32% for carried interest capital gains, but otherwise no change to the current UK rules for taxation of carried interest.

The more significant changes to the UK taxation of carried interest are set to be effective from 6 April 2026 and generally to affect all carried interest proceeds received on or after 6 April 2026. The remainder of this article describes this proposed new regime for UK carried interest taxation from 6 April 2026.

In basic terms, what changes to carried interest taxation are proposed from April 2026?

Carried interest proceeds will be taxed as trading income of the individual receiving the carried interest. Income tax and self-employed (Class 4) national insurance will apply.

(The carried interest proceeds will also be taxed as trading income of the individual where the individual is deemed to receive the carried interest, which could include proceeds received by a partnership of which they are a partner or received by their personal holding structure. In this article we therefore refer to the individual receiving or being deemed to receive carried interest.)

The default rule will be that carried interest will be subject to tax at the recipient's marginal rate of income tax and Class 4 national insurance (currently 45% and 2% respectively for additional rate taxpayers). In other words, the default tax rate for carried interest proceeds from April 2026 will be 47% for additional rate taxpayers.

However, a special rate will apply to carried interest which is "qualifying carried interest". This is stated to be 72.5% of the prevailing rates. Based on current rates, this special rate will be 34.075% for additional rate taxpayers, i.e. 47% multiplied by 72.5%. In the remainder of this article, references to rates will be to the rates applicable to additional rate taxpayers.

In order to be "qualifying carried interest" to which this 72.5% multiplier applies:

- the carried interest must fall within the existing definition of carried interest within the "disguised investment management fee" (DIMF) rules (which at a very high level means that it must fall within the existing "safe harbour" definition or be a profit related return of which there is a significant risk of non-payment); and

- the carried interest must not be treated as "income based carried interest" (IBCI) – IBCI is an existing feature of the UK carried interest legislation and broadly means carried interest from a fund which has an average holding period (weighted by value invested) of less than 40 months.

In addition, the consultation process will consider whether further conditions will have to be satisfied for carried interest to be "qualifying carried interest". The conditions being explored are:

- a minimum GP commitment requirement, applied on a team basis rather than an individual basis, may need to be satisfied (depending on the outcome of the further consultation); and

- there may also be a requirement for a "lock up" (again depending on the outcome of the further consultation), i.e. contractual arrangements which prevent the carried interest holder from accessing their carried interest until an (as yet unspecified) minimum holding period has been satisfied.

In short, to access the new 34.075% rate for carried interest, the carried interest must be from a fund which has an average holding period of more than 40 months and may also need to satisfy a minimum GP commitment and/or "lock up" test.

Does this mean that the 40 month average holding period rules which previously applied only to LLP members will apply to all carried interest holders from April 2026?

Yes. Under the current IBCI rules (which treat carried interest receipts from funds which have an average holding period of less than 40 months as trading income, with tapering for funds with an average holding period between 36-40 months) individuals who are granted carried interest as employees are generally exempt from the application of the rules. This has meant it has been thought of as a regime which only applies to LLP members (or other non-employee carry recipients). However, this exclusion for those who are granted carried interest as employees is to be abolished from April 2026.

How certain is it that the changes proposed from April 2026 will be implemented?

The proposals are subject to consultation between now and April 2026, with the first consultation closing on 31 January 2025. It is to be welcomed that there is a relatively long period of consultation, rather than a rush to implement the changes.

However, given the background to these changes and the tone of the consultation document, in our view this consultation should be thought of as a consultation on the technical detail of the new rules and the finer points of how the rules will be applied, rather than a consultation on whether or not the proposed new regime will be imposed or a consultation on the broader policy aspects of the new regime.

It is worth noting three important exceptions to this.

First, the minimum GP commitment requirement is not yet a confirmed feature of the new regime. Rather the government say they are exploring it, which leaves open the possibility that this requirement may not be included in the final legislation.

Second, the same is true of the requirement for a "lock up".

Third, there is a specific statement in the government's paper recognising that the IBCI rules can be difficult to apply to private credit funds and committing to work with expert stakeholders to consider amendments to address this, with the proviso that qualifying carried interest treatment should still be limited to funds engaged in long-term investment activity. In light of this, it is expected that we may see changes to how the IBCI rules apply to credit funds and as such the commentary on the application of the IBCI rules below does not cover the position of credit funds.

More generally, we would like to hope that in the consultation on the technical detail, there will be scope for finessing the IBCI rules as currently implemented, insofar as they can have undue or unintended effects on certain other types of funds (some of which are mentioned below). But it remains to be seen how open the government will be to this.

What are the challenges with the applying the IBCI average holding period rules?

A detailed examination of the IBCI rules is beyond the scope of this article. However, what sounds like a simple test – whether a fund has an average holding period, weighted by value invested, of less than 40 months – raises a number of technical questions and can be complex to apply in practice. Some fund managers will have been grappling with these complexities since 2016 because they have LLP members who have been subject to these rules; others will be faced with these complexities for the first time from April 2026.

The complexities take various forms and differ from fund strategy to fund strategy.

For buyout, growth and venture strategies, many of these complexities amount to technical niggles, particularly around the rules which allow follow-ons to be backdated and staged exits to be postdated in certain cases. There can also be practical difficulties with the way that the conditional exemption rules only allow a single re-test (the conditional exemption rules allow a taxpayer to treat carried interest as not being IBCI where it is paid out early from a fund at a time when the fund's average is still below 40 months but where it is expected that the average will be greater than 40 months later in the life of the fund). It is likely that for most equity funds these points will not prove insurmountable, but some small revisions to the drafting of the rules could take away some of the uncertainties and seemingly unintended consequences. Failing that, guidance from HMRC on their view of the application of the rules, which has not yet been published, would be helpful.

For funds of funds and secondaries funds, the technical challenges can be more pronounced. There are provisions in the legislation designed to alleviate some of the complexities for these funds, but they do not necessarily sit well with how these funds operate in practice and the specific facts of how a particular secondaries fund or a fund of fund manages its investments can result in different outcomes. As mentioned, a detailed exploration of these points is outside the scope of this article, but those managing secondaries funds and funds of funds who have not had to deal with these rules until now could usefully start assessing how these rules will affect their UK teams.

How do these changes affect non-UK residents who spend, or have during the life of the relevant fund spent, some of their time working in the UK?

One of the areas where there is currently most complexity and uncertainty is how the proposed post-April 2026 regime will affect non-UK resident individuals. In part, this is due to the wide range of different circumstances in which non-residents may find themselves and in part due to uncertainty about how the tests for territoriality will be interpreted and how they will interact with any relevant double tax treaties.

Carried interest proceeds, whether qualifying carried interest or not qualifying carried interest, will be deemed for UK tax purposes to be trading income, as the profits of a deemed trade carried on by the individual. Based on the government's proposal, the starting point is that this deemed trading income should be taxable in the UK "to the extent that the investment management services by virtue of which the carried interest arose were performed in the UK". The government state that this is subject to the terms of any applicable double tax treaty.

In light of this statement, the current working assumption is that – despite there being some important technical questions about how treaties work in the context of deemed trading income – the government in principle accept that the UK does not have taxing rights over this deemed trading income if there is a suitable double tax treaty with a typical business profits article with the jurisdiction where the individual is tax resident and the conditions for that treaty and that article applying are met. In short, this could mean that an individual resident in a jurisdiction with which the UK has a full double tax treaty may be outside the scope of the UK carried interest tax charge provided they, as an individual, do not have a UK permanent establishment.

However, even if the above is correct, it is unlikely to help all non-resident individuals, because some may still be within the scope of the charge in certain circumstances, for example if (i) they are not resident in a jurisdiction with a suitable double tax treaty, (ii) they are resident in such a treaty jurisdiction but they have a UK permanent establishment (which could include an interest in a UK LLP or take the form of a fixed place of business, for example), or (iii) they are resident in such a treaty jurisdiction and they do not have a UK permanent establishment, but they previously had such a UK permanent establishment at some point during the life of the fund from which the caried interest derives. These are issues which have existed for a small number of non-UK resident individuals who have received or been deemed to receive IBCI or DIMF income, since those rules were introduced in 2015/2016, but from April 2026 they will affect a significantly larger number of people.

Those seeking to understand how these rules can affect them may be non-UK tax resident individuals who regularly spend some time working in the UK and who hold (or whose personal holding structures hold) carried interest. They may be non-UK tax resident individuals who are frequently present in the UK for business, but not regularly working in the UK. They may be individuals who have been UK tax resident, have left the UK and ceased to be UK tax resident and no longer spend time working in the UK, but who had spent time working in the UK earlier in the life of the fund from which the caried interest derives.

Each such individual situation will need to be analysed on its specific facts because the facts that can go to whether they have a UK permanent establishment may be different, the prior links with the UK may be different, and the position as regards treaty relief may be different. All these points can affect the outcome. What is more, as the consultation on these new rules progresses, it may become clearer how the UK government is thinking about the technical questions on the application of double tax treaties in the context of deemed trading income.

What should a private investment fund manager with individuals who work in the UK do in preparation for April 2026?

Fund management houses who have not previously had to apply the 40 month average holding period rules to their funds in relation to UK carried interest should start analysing their funds from that perspective, paying particular attention to how the special rules for certain types of funds may help. Assessing how the conditional exemption rules might apply to them based on the expected cadence of carried interest payments may also be helpful.

Fund management houses with non-UK resident individuals who are carried interest holders who spend some of their working time in the UK should consider seeking advice on the specific facts of those individuals' situations in order to understand the potential effect of the April 2026 changes on them. These individuals are likely to want to seek their own personal tax advice on their position too.

Fund management houses with carried interest holders who are UK resident individuals who are also US taxpayers may wish to consider, or encourage these carried interest holders together with their personal advisers to consider, the interaction of these proposed new UK rules with US tax rules, particularly in the context of double tax relief.

UK tax resident carried interest holders who have previously made use of the UK's regime for non-domiciliaries are also likely to be affected by the significant reforms to that regime to be introduced from April 2025 (in essence, its abolishment and replacement with a new tax regime for foreign income and gains based on residence, the details of which are beyond the scope of this article). Such individuals will need to keep a close eye with their personal advisers on the interaction between those reforms and the 2026 changes to carried interest taxation.

All private investment fund management houses should keep apprised of developments as these proposals move through the consultation stage, as this is not the end of the story.

Latin America

Overview

The Latin American funds market continues to be in constant expansion. In Brazil alone, it is an industry with over nine trillion reais (approximately 1.5 trillion dollars) in investments, having grown about one trillion reais in 2024 alone. Continuing past years' trends, regulators kept an ongoing dialogue and collaboration with the asset management industry in order to create a more investor-friendly framework that further fosters the investment environment in Latin American countries, having efficiency, competitivity and systematization as the industry's main pillars.

As discussed in our 2024 report, during the prior administration (2018 – 2022) the Ministry of Finance of Brazil created work groups which have been tasked with the improvement of economic regulations. These groups have been kept in place under the recently inducted government, and many of the initiatives proposed by them have turned into reality in the past year. This included the new regulatory framework of investment funds enacted in April 2023 by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* - CVM), which is aimed at modernizing the rules for the organization and operation of investment funds, following significant discussions with authorities and industry players.

From a business perspective, while Brazil and Latin America in general remain fertile ground for infrastructure investments, the consumer, investment technology and financial services sectors were among the busiest sectors in venture capital and private equity in 2024 in terms of both number of deals and deal amounts.[39]

In addition, funds focused on high-yield fixed-income assets, such as private credit, securitization of receivables and mortgage-backed securities have also taken advantage of opportunities resulting from the high interest rates currently observed in Latin American economies.

Adoption of the New Regulatory Framework for Investment Funds

The new regulatory framework referred to above introduced important novelties, such as (i) allowing for the limitation of liability of investors, (ii) permitting the creation of different classes of quotas within a single fund, (iii) creating a specific insolvency regime for investment funds, aligned with the Brazilian insolvency law, (iv) establishing more modern and objective governance rules for investment funds with clear delimitation of the duties and liabilities of managers, administrators and other services providers and players in the context of running investment funds and (v) establishing tailormade subsidiary rules for specific classes of funds, such as private equity funds, real estate investment trusts, ETF, among others.

Although the new CVM ruling came into effect on April 3, 2023, funds existing on the date of enactment of the new rules were required to adapt to comply with them by December 31, 2024—except for credit rights investment funds (the so-called FIDCs)—which were required to be in compliance by November 29, 2024.

Consolidation of Simplified Private Funds' Structures in Brazil

As a general note, while the Brazilian regulators did not enact groundbreaking rulings for the funds' industry in 2024, given the more stable regulatory and tax environments of the past few years, we have witnessed a consolidation of simplified closed-end fund structures in Brazil.

For instance, as provided in our 2024 report, the taxation of foreign investments in Brazilian private equity funds (the so-called FIPs) was modified towards a friendlier framework, including, among other changes, the suppression of the limitation on the maximum stake held by a foreign investor in a FIP and portfolio requirements, which compliance were previously required for foreign investors to benefit from an exemption from income tax over distributions. Previously, in order to enjoy the exemption, foreigners could only hold up to 40% of the total outstanding equity of the fund (the so-called 40% Test).

As expected, this change allowed managers to structure investment funds in a more straightforward and cost-efficient manner, with only one silo in the structure, without the need to form multiple silos to allocate investors.

New Rules for Nonresident Bank Accounts

On December 3, 2024, the Brazilian Central Bank and the CVM enacted a joint ruling to regulate investments in Brazil by nonresidents. This new ruling supersedes the prior ruling that regulated the special custody account created for nonresident investors to trade and invest in the Brazilian market (the so called "4373 accounts").

[39] Source: ABVCAP and TTR report – 3Q2024.

The new rules were enacted with the purpose to reduce the costs and bureaucratic burden of foreign investors in respect of their investments in Brazil and respective cashflows. The main changes under this new ruling include the elimination of the following obligations that were previously required for nonresident investors: (i) custody requirements in respect of nonresidents' bank accounts; (ii) with respect to private equity investments, the requirement for nonresident investors to appoint a legal representative in Brazil and to register with the CVM and (iii) the requirement for nonresident investors to make simultaneous foreign exchange operations and bank transfers in reais in respect of each transaction in Brazil.

Structuring of Secondaries Transactions

Following a global trend in the investment funds market, secondaries transactions are becoming increasingly common in Latin America. Particularly with respect to deals involving Brazilian funds, sponsors and limited partners should be mindful of local regulatory and tax matters when negotiating and structuring such transactions. Because there is no singular solution across the board for all secondary structures, special consideration needs to be given to the particular situation of the fund, the underlying asset and in order to preserve any regulatory and tax efficiencies which had been put in place on the occasion of the formation of the original fund or its investments.

Potential Taxation of Closed Funds

The Brazilian Congress is still discussing a bill of law that intends to eliminate tax exemptions and advantages applicable to closed funds which effectively operate as holding companies of a single investor or group of related investors (such as family offices). The current proposed wording would only apply to Brazilian investors but, as the discussions are still ongoing, further amendments to the text may also affect the taxation applicable to foreign investors.

New Legal Framework for Agriculture-Related Investment Funds (FIAGROs)

The CVM enacted a ruling on September 30, 2024 which set a new framework for agriculture-related investment funds (the so called FIAGROs) after three years of studies and development in connection therewith, as well discussions with industry players following the inception of the FIAGROs in 2021.

The main change under the new rules is that the FIAGROs have now more flexibility in terms of the types of agriculture-related investments that can be made under its investment policies and such funds are now allowed to invest in different types of agricultural assets within the same vehicle. It is also worth mentioning that the FIAGROs became eligible to participate in the carbon market, which was also considered a restricted activity under the terms of the previous legal framework.

This new rule becomes effective on March 3, 2025 and existing FIAGROs will have until June 30, 2025 to comply with the new provisions thereof.

Annual and Other Periodic Filing Requirements

Below is a summary of certain key filing requirements applicable to advisers to private funds. We note that this list of filings discussed below is not intended to be exhaustive. In addition to the requirements discussed in this Annual Review, advisers should examine the nature of their business and operations and determine whether any other filings or other actions will be required pursuant to applicable federal, state, and/or non-U.S. laws and/or regulations.

We further note that the SEC has made several rule proposals that, if enacted, will result in material changes to certain forms, including Form ADV, Form PF and Schedules 13D and 13G. Please see "SEC Policy and Rulemaking Updates" for a discussion on the rule proposals.

Form ADV

RIAs must file an updated Form ADV Part 1 and Part 2A with the SEC within 90 days after the investment adviser's fiscal year-end (e.g., by March 31, 2025, for advisers with a December 31 fiscal year-end). RIAs must deliver the updated Form ADV Part 2A, or a summary of the material changes made, to clients within 120 days following the adviser's fiscal year-end (e.g., by April 30, 2025, for advisers with a December 31 fiscal year-end). Although underlying investors of private funds managed by an adviser are not "clients" of the adviser under the Advisers Act, it is generally considered best practice to deliver the updated Form ADV Part 2A to these investors on an annual basis. Part 2B of Form ADV is called the "brochure supplement." RIAs must give a client a brochure supplement for everyone that it supervises who: (1) formulates investment advice for that client and has direct client contact; or (2) makes discretionary investment decisions for that client's assets, even if the supervised individual has no direct client contact.

In addition to the annual amendments, Form ADV Part 1 must be promptly amended where certain types of information reported, such as the disciplinary history of the adviser and/or its personnel, becomes inaccurate or, in certain cases, materially inaccurate. Form ADV Part 2A must be amended promptly whenever information reported becomes materially inaccurate. If the change relates to a disciplinary event, then the updated Form ADV Part 2A and/or Part 2B, as applicable, must also be delivered to clients. While Form ADV Part 2B is not required to be filed with the SEC, advisers must maintain copies in their records, and the Exams Division does ask for Part 2B when they undertake exams.

ERAs are subject to similar reporting requirements with respect to sections in Form ADV Part 1 that apply to them. If the ERA is exempt from SEC registration under the "private fund adviser" exemption, the ERA must register with the SEC once it reports in its annual amendment to Form ADV that its RAUM attributable to private funds have reached $150 million (or, in the case of an adviser based outside of the U.S., if the RAUM attributable to private fund assets managed from a place of business in the U.S. have reached $150 million). The ERA must apply for registration within 90 days of filing the amendment. If the ERA is exempt from SEC registration under the "venture capital fund adviser" exemption, the ERA must register with the SEC *prior* to the time it may no longer rely on such exemption.

Certain states impose "notice filing" requirements, requiring advisers to file their Form ADV with the relevant state securities authorities. Advisers may also be subject to additional state requirements, where, for example, the adviser has a place of business in the state and/or has over five non-exempt clients in that state. Advisers may also be subject to certain blue-sky requirements, as discussed below. An adviser should review its business on a periodic basis to determine whether any additional state requirements have been triggered.

Form PF

An RIA that advises one or more private funds and has at least $150 million in RAUM attributable to private funds is required to file Form PF with the SEC to report certain information regarding the private funds under its management. The frequency of the reporting obligation and the amount of information that must be reported on Form PF will vary depending on the size of the adviser and the type of private funds managed by it.

In general, a registered adviser that has at least $150 million in RAUM attributable to private funds is required to file Form PF within 120 days after the end of the adviser's fiscal year (e.g., by April 30, 2025, for advisers with a December 31 fiscal year-end). However, the reporting requirements for advisers with larger RAUMs will be more frequent and/or more extensive. In particular:

> *Large Hedge Fund Advisers*. An adviser with at least $1.5 billion in RAUM attributable to hedge funds as of any month-end during the preceding fiscal quarter is subject to more comprehensive quarterly reporting requirements with respect to hedge funds under its management. In addition, a Large Hedge Fund Adviser is required to provide fund-specific information with respect to any "qualifying hedge funds" (i.e., hedge funds with more than $500

million in net asset value). A Large Hedge Fund Adviser must file Form PF within 60 days of each quarter-end (by March 1, 2025, for the quarter ending December 31, 2024).

> *Large Private Equity Fund Advisers*. An adviser with at least $2.0 billion in RAUM attributable to private equity funds as of the end of the most recent fiscal year will be subject to more comprehensive annual reporting requirements with respect to private equity funds under its management. Large Private Equity Fund Advisers must file Form PF within 120 days of fiscal year-end (by April 30, 2025, for investment advisers with a December 31 fiscal year-end).

> *Large Liquidity Fund Advisers*. An adviser with at least $1.0 billion in RAUM attributable to private liquidity funds and registered money market funds as of any month-end during the preceding fiscal quarter will be subject to more comprehensive quarterly reporting requirements with respect to private liquidity funds and registered money market funds under its management. Large Liquidity Fund Advisers must file Form PF within 15 days of each quarter-end (by January 15, 2025, for the quarter ending December 31, 2024).

For purposes of determining whether an adviser meets any of the applicable large adviser classifications above, the adviser may disregard a private fund's equity investments in other private funds.

ERAs are not required to file Form PF.

Form D and Blue Sky Filings

Form D. A private fund conducting an offering under Rule 506 must file a Form D with the SEC on its filer management system, EDGAR, within 15 days of the initial sale of securities in such offering (*i.e.*, the date on which the first investor is irrevocably contractually committed to invest). For any ongoing offering for which a Form D was filed after March 16, 2009, Form D must be amended annually on or before the first anniversary of the last notice filed. Form D must also be amended as soon as practicable to correct a material mistake of fact or error or to reflect a change in the information provided in the previously filed notice. For certain specified types of changes in information, however, such as a change in the amount of securities sold in the offering or the number of investors who have invested in the offering, the private fund is not required to amend Form D until the next annual filing (if any) is due (but may choose to do so at any time).

Blue Sky Filings. Compliance with Rule 506 is very important for compliance with blue sky laws, since, under Section 18 of the Securities Act, the states are preempted from regulating offerings that comply with Rule 506. Without such compliance, unless an applicable self-executing state exemption is available, a state where an investor purchases the issuer's securities can require a pre-sale filing and regulate the required disclosure and other aspects of the offering.

Provided that an offering is made in compliance with Rule 506, the blue-sky laws of many states currently require that a virtual filing be made on their central electronic filing system in connection with the Form D within 15 days following the initial sale of securities in that state, along with the state's required filing fee. In addition, some states' blue-sky laws require that copies of amended SEC filings also be filed with the state. A handful of states require annual renewal filings and, in a couple of cases, the payment of annual renewal fees for ongoing offerings.

Advisers should be aware of requirements that may be triggered when sales of securities are made to investors in states where sales have not been made in the past, and sales in states in which a Form D has not yet been filed. The penalties for failing to make timely filings can be significant. Some states may require payment of a fine, or even demand that an issuer offer rescission to each investor in a state, or the administrator may issue a consent order.

Although Section 18 of the Securities Act states that covered securities, such as securities offered pursuant to Rule 506 of Regulation D, are not subject to state regulation, an increasing number of states have nevertheless used their authority under broker-dealer and investment adviser regulation and anti-fraud statutes to review and comment on Form Ds filed in connection with Rule 506 offerings. Questions regarding whether a related party listed under item 3 of the Form D is required to be registered as an investment adviser in the state are not unusual. Some states have also requested to see copies of the offering materials to be provided.

Form 13F

An adviser is required to file a Form 13F with the SEC if it exercises investment discretion over $100 million or more in Section 13(f) securities as of the last trading day of any month in any calendar year. In general, Section 13(f) securities include U.S.-listed equity securities, certain equity options and warrants, shares of closed-end investment companies and certain convertible debt securities. The SEC publishes an official list of Section 13(f) securities at the end of every quarter.

An adviser must file a Form 13F for the last quarter of the calendar year during which the reporting threshold is met. In addition, it must file a Form 13F for the first three quarters in the subsequent calendar year, even if its holding level has dropped below $100 million. In each case, Form 13F will be due within 45 days of quarter-end.

For advisers that exceeded the reporting threshold for the first time in 2024, the first Form 13F filing deadline in 2025 will be February 14, 2025 (for the quarter ending December 31, 2024).

Schedules 13D and 13G

A person that has direct or indirect beneficial ownership of more than 5% of a class of outstanding voting equity securities of a U.S. public company is required to file Schedule 13D, or Schedule 13G, if eligible, with the SEC. "Beneficial ownership" is defined to include the direct or indirect power to (i) vote the securities; or (ii) exercise investment authority over the securities, including the right to acquire the securities within 60 days (such as through the exercise of an option or a convertible security). Under this definition, "beneficial owners" may include a private fund, its investment adviser and/or certain controlling persons and/or parent companies of the adviser. If the due date of a Schedule 13D or 13G falls on a weekend or federal holiday, the due date is the following business day.

Schedule 13D. Schedule 13D must be filed within 10 days after crossing the 5% threshold and must be amended promptly following: (i) a material increase or decrease in the filer's holding; or (ii) a material change in the Schedule 13D. An increase or decrease is deemed "material" if it equals at least 1% of the outstanding securities and may, depending on the facts and circumstances, be deemed "material" even if it is less than 1%.

Effective February 5, 2024, and required beginning on September 30, 2024, Schedule 13D must be filed within 5 days after crossing the 5% threshold. An amendment to Schedule 13D must be filed within 2 business days of the triggering event.

Schedule 13G. A beneficial owner otherwise required to file Schedule 13D may file Schedule 13G if it acquired the securities in the ordinary course of its business and not with the purpose or effect of changing or influencing the control of the issuer.

> If the beneficial owner falls within any of the specified categories of "Qualified Institutional Investors" (QII), which includes SEC-registered investment advisers, it must file Schedule 13G within 45 days after the end of a calendar year if its holding crossed the 5% threshold during the year and is at least 5% as of year-end (by February 14, 2025, for 2024). Schedule 13G must be amended within 10 days of a month-end if the holding exceeds 10% of the class of equity securities as of such month-end and if it thereafter increases or decreases by more than 5% of the class of equity securities.

Effective February 5, 2024, and required beginning on September 30, 2024, Schedule 13G must be filed within 45 days after the calendar quarter-end if its holding crossed the 5% threshold. Schedule 13G must be amended within 5 days (rather than the current deadline of 10 days) of a month-end when required as detailed above.

> A beneficial owner that does not qualify as a QII may still use Schedule 13G as a “passive investor,” so long as its holding is below 20% of the class of securities. A passive investor must file Schedule 13G within 10 days of crossing the 5% threshold. Schedule 13G must be amended promptly once the holdings exceed 10% of the class of equity securities and if it thereafter increases or decreases by more than 5% of the class of equity securities.

Effective February 5, 2024, and required beginning on September 30, 2024, Schedule 13G must be filed within 5 business days after crossing the 5% threshold. Schedule 13G must be amended within 2 days (rather than the current “promptly” deadline) when required as detailed above.

Schedule 13G is also available to a beneficial owner that crossed the 5% threshold as of calendar year-end but is exempt from filing a Schedule 13D due to exemptions under Section 13(d) of the Exchange Act or otherwise. This may include, for example, a beneficial owner that met the 5% threshold at the time the issuer went public and continues to meet the 5% threshold at the end of the relevant calendar year-end, if other conditions are met. Each such exempt filer is required to file a Schedule 13G within 45 days after the end of a calendar year (by February 14, 2025, for 2024).

Effective February 5, 2024, and required beginning on September 30, 2024, a beneficial owner that crossed the 5% threshold as of calendar-year end but is exempt from filing a Schedule 13D is required to file a Schedule 13G within 45 days after calendar quarter-end.

QII, passive investor and exempt investor filers must amend Schedule 13G within 45 days of each calendar year end to report any changes in the information previously reported, provided that no amendment will be required if the only change relates to the filer’s percentage holding and is solely due to a change in the underlying aggregate number of outstanding shares in the class. The filing deadline for 2024 amendments will be February 14, 2025.

Effective February 5, 2024, and required beginning on September 30, 2024, QII, passive investor and exempt investor filers must amend Schedule 13G within 45 days of each calendar quarter-end in which a material change occurred.

Forms 3, 4 and 5

Form 3. A person, including an adviser or other affiliate, depending on various factors, is required to file Form 3 with the SEC within 10 days of: (i) acquiring beneficial ownership of more than 10% of a class of equity securities of a U.S. public company (including, among other things, puts, calls, options, warrants, convertible securities, or other rights or obligations to buy or sell securities exercisable within 60 days); and/or (ii) becoming an officer or director of a U.S. public company. “Beneficial ownership” is defined in the same way as in the Schedule 13D and 13G context. With respect to an issuer undergoing an IPO, the initial Form 3 filing is due on the effective date of the registration of the securities under the Exchange Act.

Form 4. If a director, officer, or 10% beneficial owner effects a transaction which changes the beneficial ownership of securities previously reported on Form 3, such director, officer, or beneficial owner must file a Form 4 with the SEC within 2 business days of the transaction.

Form 5. Form 5 must be filed with the SEC within 45 days following the issuer’s fiscal year end to report any exempt or other insider transactions not previously reported on Form 4 (by February 14, 2025, if the issuer has a fiscal year-end of December 31).

Form 13H

Large traders of Regulation NMS securities (generally defined to be exchange-listed securities, including options) are required to file Form 13H with the SEC. A "large trader" is any person that exercises investment discretion over transactions in Regulation NMS securities that equal or exceed: (i) two million shares or $20 million during any day; or (ii) 20 million shares or $200 million during any month. Large traders must file Form 13H with the SEC when the thresholds above are met. The initial Form 13H filing must be made "promptly" after reaching the threshold (generally within 10 days). Thereafter, an annual 13H filing must be submitted within 45 days of the end of the calendar year (by February 14, 2025, for 2024). Amendments to Form 13H must be filed promptly following the end of a calendar quarter, if any information on the Form 13H becomes inaccurate. For example, the addition or removal of brokers would need to be reported at the end of a calendar quarter.

CFTC Annual Reaffirmations and Periodic Reports

CPO and CTA Exemption Reaffirmations. Each Commodity Pool Operator ("CPO") exempt from CPO registration under CFTC Rule 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), or 4.13(a)(5) and each Commodity Trading Advisor ("CTA") exempt from CTA registration under CFTC Rule 4.14(a)(8) must submit an annual affirmation of its exemption via the NFA's Electronic Exemption System within 60 days of calendar year-end (by March 1, 2025, for 2024).

Annual Reports and Account Statement Requirements. Each registered CPO, including a CPO relying on CFTC Rule 4.7, must file financial statements of each commodity pool it operates with the NFA within 90 days after each such commodity pool's fiscal year-end (by March 31, 2025, if the fiscal year ends on December 31).

In addition, each registered CPO must distribute monthly account statements to participants of the commodity pool within 30 days of month-end for commodity pools with a net asset value greater than $500,000. For commodity pools with a net asset value of $500,000 or less, or operated under CFTC Rule 4.7, the CPO is instead required to distribute quarterly account statements to pool participants within 30 days of the quarter-end.

CFTC Form CPO-PQR and NFA Form PQR. Each registered CPO is required to report certain information to the CFTC on CFTC Form CPO-PQR. CFTC Form CPO-PQR contains three sections: Schedule A, Schedule B, and Schedule C. The frequency that a CPO must file CFTC Form CPO-PQR and the sections that it must complete will depend on the CPO's amount of assets under management (AUM) and its SEC reporting obligations (if a dual-registrant).

Each registered CPO that is an NFA member is also required to file NFA Form PQR quarterly with the NFA. NFA Form PQR consists of certain questions from Schedule A and Schedule B of CFTC Form CPO-PQR.

Both CFTC Form CPO-PQR and NFA Form PQR are filed on the NFA's EasyFile system. As NFA Form PQR is incorporated into CFTC Form CPO-PQR, there are no separate filings for the CFTC and the NFA. A CPO will satisfy its NFA Form PQR reporting obligations to the extent it is already responding to the same items on its CFTC Form CPO PQR for that reporting period.

In addition, CPOs that are registered as investment advisers with the SEC may satisfy certain of their CFTC Form CPO-PQR filing obligations by filing Form PF with the SEC.

Filing Requirements				
CPO Size	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
Large CPO	CFTC Form CPO-PQR Schedules	CFTC Form CPO-PQR Schedules	CFTC Form CPO-PQR Schedules	CFTC Form CPO-PQR Schedules

(CPO with AUM of at least $1.5 billion)	A, B, and C (within 60 days of quarter-end)	A, B, and C (within 60 days of quarter-end)	A, B, and C (within 60 days of quarter-end)	A, B, and C (within 60 days of quarter-end)
Mid-Sized CPO (CPO with AUM of at least $150 million but less than $1.5 billion)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	CFTC Form CPO-PQR Schedules A and B (within 90 days of year-end)
Small CPO (CPO with AUM of less than $150 million)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	CFTC Form CPO-PQR Schedule A and NFA Form PQR (within 90 days of year-end)
Dual-Registered CPO (CPO that is an SEC-registered investment adviser and files Form PF with the SEC)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	NFA Form PQR (within 60 days of quarter-end)	CFTC Form CPO-PQR Schedule A and NFA Form PQR (within 60 or 90 days of quarter-end, depending on AUM)

The upcoming filing deadlines for the period ending on December 31, 2024, will be March 1, 2025, for Large CPOs and March 31, 2025, for Mid-Sized and Small CPOs.

CFTC Form CTA-PR and NFA Form PR. All registered CTAs, regardless of size and dual registration, must file CFTC Form CTA-PR annually within 45 days of the end of the fiscal year. CFTC Form CTA-PR covers certain identifying information about the CTA as well as performance information. In addition, each CTA that is an NFA member must file NFA Form CTA-PR within 45 days of each quarter-end. As the same form is used for CFTC Form CTA-PR and NFA Form PR, a CTA will satisfy its NFA Form PR obligation for the quarter ending on December 31 by filing its annual CFTC Form CTA-PR. Both CFTC Form CTA-PR and NFA Form PR are filed on the NFA's EasyFile system.

The deadline for the period ending December 31, 2024, will be February 14, 2025.

The CFTC has published a series of FAQs on CFTC Forms CPO-PQR and CTA-PR.

TIC Form B

A U.S. adviser (on behalf of itself and any U.S. or non-U.S. funds that it manages) and U.S. resident funds managed by a non-U.S. resident adviser are required to report cross-border claims, liabilities and short-term securities holdings on TIC B Forms with the Federal Reserve Bank of New York in each case if the reporting person is owed "reportable claims" or owes "reportable liabilities" in excess of certain monetary thresholds, as discussed below.

The TIC B Forms require reporting of current obligations (including loans, regardless of their maturity) and short-term securities:

> that are owed by a U.S. resident entity to a non-U.S. resident, or by a non-U.S. resident entity to a U.S. resident;

> that are not held by a U.S. custodian or sub-custodian; and

> that are more than the relevant reporting thresholds (determined on an aggregated basis for the top-tier U.S. entity in an affiliated group, and separately for all the funds that they manage).

TIC B Forms consist of a series of monthly and quarterly forms. Monthly TIC B filings (Forms BC, BL-1, and BL-2) are due no later than 15 days following the end of a month. Quarterly TIC B filings (Forms BQ-1, BQ-2 (Part 1), BQ-2 (Part 2), and BQ-3) are due no later than 20 days following the end of a quarter. If the due date of a report falls on a weekend or federal holiday, the due date is the following business day. Any financial institutions with “reportable claims” or “reportable liabilities” (as described below) exceeding the monetary thresholds and required to file for a reporting period are also required to file for all subsequent reporting periods in that year, regardless of whether the thresholds are exceeded in the subsequent periods. The reporting threshold for each TIC B Form (except Form BQ-3) is $50 million total ($25 million in any one foreign country). The reporting threshold for Form BQ-3 is $4 billion total (no country limit). A reporter is only required to file the applicable TIC B Forms for which its reportable claims and/or liabilities exceed the relevant threshold.

“Reportable claims” generally include all claims not held by a U.S. resident custodian or sub-custodian, including deposit balances due from banks, negotiable certificates of deposit of any maturity, brokerage balances, customer overdrawn accounts, loans and loan participations, resale agreements and similar financing agreements, short-term (original maturity of one year or less) negotiable and non-negotiable securities, money-market instruments, reinsurance recoverable, and accrued interest receivables.

“Reportable liabilities” generally include all liabilities not held by a U.S. resident custodian or sub-custodian, including non-negotiable deposits of any maturity, brokerage balances, overdrawn deposit accounts, loans of any maturity, short-term (original maturity of one year or less) non-negotiable securities, repurchase agreements and similar financing agreements, insurance technical reserves, and accrued interest payables.

“Reportable claims” and “reportable liabilities” do not include long-term securities (including equities and any long-term notes, bonds, and debentures), derivatives, credit commitments, contingent liabilities and securities borrowing or lending agreements in which one security is borrowed or lent in return for another. For purposes of the TIC B Forms, a feeder fund’s investment into a master fund is considered a non-reportable long-term security and is not a reportable claim.

Representatives of the government agencies responsible for the TIC B Forms have indicated that any claims or liabilities held by a U.S. resident custodian or sub-custodian (such as a bank) or otherwise reportable by another U.S. financial institution (such as an administrative agent) should not be reported by investment advisers or funds, or be used to calculate whether the threshold limits have been exceeded.

A U.S. resident investment adviser reporting on behalf of itself and the entities in its organization should generally file Forms BC, BL-1, BQ-2 (Part 1), and/or BQ-3, as applicable. A U.S. resident investment adviser should generally file consolidated reports on behalf of the funds it manages, including reportable claims and liabilities of non-U.S. resident funds, on Forms BL-2, BQ-1, and BQ-2 (Part 2). Non-U.S. investment advisers do not have a reporting obligation, but any U.S. resident fund they manage may be required to make a TIC B filing.

TIC Form S

The TIC Form S was discontinued in 2023. Institutions that previously filed the TIC S form will still be able to revise data from past submissions and are required to keep records for 3 years.

TIC Form SLT

U.S. resident custodians (including U.S. resident banks), U.S. resident issuers (including U.S. private funds) and U.S. resident end-investors (including U.S. investment advisers, whether or not registered) are required to file TIC Form SLT with the Federal Reserve Bank of New York to report their cross-border ownership of reportable long-term securities if the fair market value of their reportable holdings and issuances equals at least $1 billion as of the last business day of any month.

Most equity securities and debt securities with a maturity of greater than one year are considered reportable long-term securities for purposes of Form SLT. Certain types of securities are excluded, such as, among other things, short-term securities (original maturity of one year or less), bankers' acceptances and trade acceptances, derivative contracts (including forward contracts to deliver securities), loans and loan participation certificates, letters of credit, bank deposits and annuities.

U.S. advisers with aggregate holdings of reportable long-term securities with a fair market value of at least $1 billion by the adviser and its clients are likely to be subject to Form SLT reporting. An adviser that is subject to the reporting requirement will file one consolidated report for all U.S. resident parts of its organization and all U.S. resident entities that it advises. Funds organized under the laws of any U.S. state are included in the "U.S. resident" portion of a reporting adviser's organization, which will subject securities issued by non-U.S. master funds that are held by U.S. feeder funds and holdings of U.S. master fund securities by non-U.S. feeder funds to reporting. For U.S. resident holdings of non-U.S. securities, the reporting party would be required to disclose:

> the residence of the non-U.S. issuer; and

> the fair market value and type of non-U.S. security.

For non-U.S. resident holdings of U.S. securities, the reporting party would be required to disclose:

> the non-U.S. holder's residence;

> the fair market value and type of U.S. security; and

> whether the non-U.S. holder is a "foreign official institution" (including national governments, international and regional organizations, and sovereign wealth funds).

The U.S. Department of Treasury has recently adopted an amendment to Form SLT to elicit more detailed data from reporting parties. Effective for all Form SLT reports as of December 2022, each reporting party should expect to be required to disclose the above in more detail than they were required to previously.

Form SLT must be filed monthly by the 23rd day following the end of each month (e.g., by January 23, 2025, for December 2024). If the due date of the report falls on a weekend or federal holiday, the TIC Form SLT report should be submitted the following business day. If the $1 billion threshold is crossed as of the end of any month, the reporting person must file Form SLT for all remaining months in that calendar year regardless of the subsequent amount of its reportable holdings.

BE-13

BE-13 collects data on new foreign direct investment in the U.S. from U.S. persons that meet the reporting requirements, even if such U.S. person has not been contacted by the BEA.

A U.S. entity is required to make a BE-13A filing if a non-U.S. person acquires direct or indirect ownership or control of 10% or more of the voting securities of such U.S. entity. A U.S. entity that crosses the 10% reporting threshold must file a Form BE-13A if the cost of acquiring or establishing such interest exceeds $3 million. However, U.S. private funds will not have to report on BE-13 unless a foreign person acquires 10% or more of the voting interests in an operating company indirectly through the U.S. private fund.

A different BE-13 form is required depending on the type of event that has occurred (e.g., formation, acquisition, merger, or expansion). If the 10% reporting threshold is crossed but the cost of the transaction does not exceed $3 million, a U.S. entity must file a BE-13 Claim for Exemption. The BE-13 forms are due no later than 45 calendar days after an acquisition is completed, a new U.S. business enterprise is established, or the expansion is begun.

The discussion above focuses on the regulatory obligations applicable to investment advisers to private funds. The filing obligations applicable to other types of investment advisers (particularly investment advisers to separately management accounts or retail investors, banks, bank holding companies and non-financial entities) may be different.

Annual U.S. Tax Elections and Filings

This section briefly summarizes certain U.S. tax filings and elections (and related deadlines) relevant to private funds, their investors, and related persons.

Form 8832 Filings. If an entity filed an IRS Form 8832 (an entity classification election) with respect to 2024, that entity must attach a copy of the Form 8832 with its U.S. federal income tax return. If that entity is not required to file a U.S. return, all direct or indirect owners of that entity generally must attach a copy with their U.S. federal income tax returns if they are otherwise required to file U.S. returns. The deadline will be the due date (including any applicable extensions) of the filer's 2024 U.S. federal income tax return.

"Qualified Electing Fund" (QEF) Election. If a private fund has invested in a non-U.S. portfolio company that is (or may be) a "passive foreign investment company" (PFIC), the first U.S. person in the PFIC's ownership chain (e.g., the fund itself, if a U.S. fund, or each U.S. investor, if a non-U.S. fund) may wish to file a QEF election with respect to that PFIC. The QEF election must be filed with that U.S. person's U.S. federal income tax return for the first year in which the fund invested in the PFIC. The deadline for PFICs acquired in 2024 will be the due date (including any applicable extensions) of that U.S. person's 2024 U.S. federal income tax return.

"Electing Investment Partnership" (EIP) Election. Private funds that satisfy certain requirements may opt out of otherwise mandatory tax basis adjustments (including those that may result from transfers of interests in a fund) by filing an EIP election. The EIP election must be filed with the private fund's U.S. federal income tax return for the first year in which the election is intended to apply. For funds wishing to be treated as EIPs with respect to 2024 (and subsequent years), the deadline will be the due date (including any applicable extensions) of the private fund's 2024 U.S. federal income tax return.

CbCR Reporting. A U.S. tax resident parent entity of a multinational enterprise (MNE) group that has revenues of $850 million or more during the taxable year must file IRS Form 8975 by the due date (including any applicable extensions) of its 2024 U.S. federal income tax return.

Certain U.S. Tax Filings with Respect to Non-U.S. Entities. U.S. private funds and their U.S. investors may be required to make certain filings with respect to non-U.S. entities owned by the private fund. These filings may include, without limitation:

- IRS Form 5471 (with respect to certain non-U.S. corporations, including "controlled foreign corporations," owned by the private fund);

- IRS Form 926 (with respect to certain contributions of property to a non-U.S. corporation);
- IRS Form 8621 (with respect to certain non-U.S. corporations that are PFICs; however, such reporting generally is not required of U.S. tax-exempt investors);
- IRS Form 8865 (with respect to certain non-U.S. partnerships);
- IRS Form 8858 (with respect to certain non-U.S. disregarded entities);
- IRS Form 8938 (with respect to certain non-U.S. financial assets); and
- IRS Form 8992 (with respect to certain U.S. shareholders of controlled foreign corporations to calculate their share of "global intangible low-taxed income" (GILTI)).

Generally, the deadline will be the due date (including any applicable extensions) of the U.S. person's 2024 U.S. federal income tax return.

Other Annual Requirements and Considerations

Audited Financial Statements Delivery

The Custody Rule requires registered advisers with custody of client assets to implement certain safeguards designed to protect client assets against the risk of loss, misuse, or misappropriation. Among other things, it requires assets of an adviser's clients to be held by a qualified custodian and to be subject to surprise annual examinations by an independent public accountant that is registered with and subject to inspection by the PCAOB. With respect to private fund clients, however, an adviser, rather than complying with the surprise audit requirement, may comply with the Custody Rule by relying on the Audit Provision under part (b)(4) of the Custody Rule. To rely on the Audit Provision, the adviser must have an independent public accountant that is registered with and subject to inspection by the PCAOB conduct an annual audit of each private fund client and deliver audited financial statements to all its private fund investors. The audited financial statements must be delivered:

- within 120 days of the private fund's fiscal year-end (by April 30, 2025, if the fiscal year ends on December 31); or
- within 180 days of the private fund's fiscal year-end, if the private fund is a fund-of-funds (by June 29, 2025, if the fiscal year ends on December 31).

Currently, only auditors to public companies are subject to regular inspection by the PCAOB. However, on December 11, 2019, the staff of the SEC's Investment Adviser Regulation Office in the Division of Investment Management issued a no-action letter that affirmed continuing relief that the SEC would not recommend enforcement action against an adviser engaging an auditor that is not subject to inspection by the PCAOB to audit the financial statements of a pooled investment vehicle in connection with the annual audit provision, on the condition that such auditor was (i) registered with the PCAOB, and (ii) engaged to audit the financial statements of a broker or a dealer as of the commencement of the professional engagement period and as of each calendar-year end. This relief was permitted by the SEC through the date the SEC would approve a PCAOB-adopted permanent program for the inspection of broker and dealer auditors.

Privacy Policy Delivery

Following changes to the Gramm-Leach-Bliley Act contained in Section 75001 of the Fixing America's Surface Transportation Act of 2015 (the FAST Act), and subsequent 2019 conforming rulemaking from the CFTC, 2018 rule amendments from the U.S. Bureau of Consumer Financial Protection and 2019 staff guidance from the Division of Examinations, delivery of annual privacy notices is now required only if a financial institution's privacy policies and practices have changed since the last distribution of a privacy notice. Specifically, if there has been any change to the privacy policy that would permit non-public client information to be disclosed to non-affiliated third parties, and the new disclosure is not covered in the existing notice, the financial institution must deliver an updated notice to clients and provide them a reasonable opportunity to opt out of the new disclosure.

Schedule K-1 Delivery

Under IRS rules, partnerships are required to deliver certain information on Schedule K-1 to their partners on or before the day on which the return for the relevant taxable year is required to be filed. As required by IRS rules issued in 2012, a partnership must obtain a partner's affirmative consent for the partnership to validly deliver Schedule K-1 to the partner electronically (e.g., via email or by posting the Schedule K-1 on a web portal). For the consent to be valid, it must be obtained from a partner in the same electronic way the partnership will deliver the Schedule K-1 to the partner. The applicable IRS rules also prescribe certain other requirements for electronic delivery of Schedule K-1s, including certain disclosures, which must be provided to partners regarding electronic delivery of Schedule K-1s. In addition to these IRS rules, states or other jurisdictions may impose security requirements for maintenance and transmission of sensitive personal information (such as individual Social Security numbers), which a partnership may need to comply with when delivering Schedule K-1s to its partners.

New Issues Investor Reaffirmations

If a private fund intends to invest in "new issues," the adviser will often obtain annual reaffirmations from each investor relating to its eligibility to participate in profits and losses from "new issues." Reaffirmation may be obtained by sending out notices asking each investor to notify the adviser if the investor's new issues status has changed or by including a representation in the investor's subscription agreement whereby the investor agrees to notify the adviser of any subsequent change in its new issues status.

ERISA/VCOC Annual Certifications and Compliance

Many private funds that accept investments from investors subject to ERISA are operated in such a manner so that the assets of such private funds do not constitute the "plan assets" of ERISA investors for purposes of ERISA. Typically, such a fund will either be operated as a "venture capital operating company" ("VCOC"), a "real estate operating company" ("REOC") or so that "benefit plan investor" equity participation is not "significant" (i.e., under the ERISA 25% limit), and the sponsor of such a private fund often will contractually agree with its ERISA investors to deliver an annual certification as to the private fund's continued compliance with the VCOC/REOC requirements and/or the 25% benefit plan investor limit. Private funds that accept investments from ERISA investors should conduct the VCOC/REOC or 25% benefit plan investor limit analysis as applicable, whether they are required to annually certify compliance with respect thereto and should be prepared to deliver any required or requested certifications in a timely manner.

Private funds that are designed to hold "plan assets" and that actually are holding "plan assets" of ERISA investors may need to provide the ERISA investors prior to their admission to the private fund with certain information (sometimes referred to as "408(b)(2) disclosures," by reference to the relevant section of ERISA) relating to any changes to the fees or expenses paid by the fund and/or certain other information relating to the private fund adviser's compensation that is requested by any ERISA investor and required for any ERISA investor's compliance with its reporting and disclosure obligations under ERISA.

California Financing Law Requirements

The California Financing Law generally requires lenders (including private funds) "engaged in the business of a finance lender" in California to obtain a license, although there is an exemption for a person making no more than five loans per year, so long as the loans are incidental to the business of the person relying on the exemption (e.g., bridge loans to a portfolio company) and the person is not engaged in the business of making loans. The licensing process is cumbersome and time-consuming, but willful violation of the law can result in civil and criminal penalties. A license holder is subject to certain inspection and reporting obligations.

Lobbyist Registration

Under a California law that became effective January 1, 2011, "placement agents" hired or engaged to solicit California state plans (e.g., CalSTRS, CalPERS and the University of California pension system) are required to register as lobbyists. Under existing law, lobbyists are restricted in their ability to provide gifts and make campaign contributions and are prohibited from accepting fees contingent upon the success of their lobbying efforts. Under the 2011 law, certain employees of a fund sponsor may be subject to the lobbyist registration requirements and the gift and campaign contribution limits, and sponsors that retain placement agents may have filing and recordkeeping obligations as "lobbyist employers." Any party contemplating retention of a placement agent or any solicitation of CalSTRS, CalPERS or the University of California pension system can contact a member of their Proskauer team for more information.

In addition, under New York City's Lobbying Law and based on regulatory guidance issued in 2010-2012, placement agents and/or employees of investment advisers may be required to register with New York City in connection with the offering of fund interests to any of the New York City pension funds (including New York City Employees' Retirement System, the New York City Police Pension Fund, the New York Fire Department Pension Fund, the New York City Teachers' Retirement System, and the New York City Board of Education Retirement System). Although the Lobbying Law had been in effect for 20 years, it had not been previously interpreted to apply to the marketing activities of investment funds and their agents.

As a reminder, other state and local plans have their own regulations and policies on the use of placement agents (including disclosure requirements or placement agent bans in some circumstances), and lobbyist registration may be relevant for marketing to other state or local plans.

Liability Insurance

Investment advisers should consider purchasing management liability insurance depending on their level of exposure and the extent to which their business and operations warrant such coverage. Given the heightened regulatory scrutiny of the private funds industry, investment advisers may benefit from protection against officer and director liability, fiduciary liability, error and omission liability and employment practice liability.

2024 - 2025 Federal Filings and Other Document Delivery Calendar[40]

Filing / Delivery	Who Must File	Deadline
December 2024		
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	December 16 (for November 2024) Note: Usually filed on the 15th calendar day of the following month, but if the 15th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	December 23 (for November 2024)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	December 30 (for November 2024)
January 2025		
Form PF	Large Liquidity Fund Advisers	January 15 (for the quarter ending December 31, 2024)
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	January 15 (for December 2024)
TIC Form BQ-1, BQ-2, and BQ-3	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), more than $50 million (no country limit) (Form BQ-2 Part 2) or in excess of $4 billion (no country limit) (Form BQ-3)	January 21 (for the quarter ending December 31, 2024) Note: Usually filed on the 20th calendar day of the following quarter, but if the 20th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.

[40] Any deadlines for filings to be made with the SEC that fall on a federal holiday, Saturday or Sunday may be filed on the first business day following such date.

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	January 23 (for December 2024)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	January 30 (for the quarter ending December 31, 2024)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	January 30 (for December 2024)
February 2025		
Schedule 13G Quarterly Initial Filing or Amendment	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (e.g., Qualified Institutional Investors and/or passive investors)	February 14 (for the fourth quarter ended December 31, 2024) Initial filings pursuant to Rule 13d-1(d) for IPOs in Q4 or for Rule 13d-1(b) filers who exceeded 5% (but below 10%) during quarter; amendments for "material" change from prior filing
Form 13H Annual Update	Large traders of Regulation NMS securities	February 14 (for 2024)
Form 5	Insiders required to report any exempt or other insider transactions not previously reported on Form 4	February 14 (if the issuer has a December 31 fiscal year-end)
CFTC Form CTA-PR	Registered CTAs	February 14 (for the quarter ending December 31, 2024)
Form 13F	Investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities	February 14 (for the quarter ending December 31, 2024)

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	February 18 (for January 2025) Note: Usually filed on the 15th calendar day of the following month, but if the 15th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	February 24 (for January 2025) Note: Usually filed on the 23rd calendar day of the following month, but if the 23rd day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
March 2025		
Form PF	Large Hedge Fund Advisers	March 1 (for the quarter ending December 31, 2024)
CFTC Form CPO-PQR	Large CPOs	March 1 (for the quarter ending December 31, 2024)
CFTC Registration Exemption Reaffirmations	CPOs exempt from CPO registration under CFTC Rule 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) or 4.13(a)(5) and CTAs exempt from CTA registration under CFTC Rule 4.14(a)(8)	March 1 (for 2024)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	March 2 (for January 2025)

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	March 17 (for February 2025) Note: Usually filed on the 15th calendar day of the following month, but if the 15th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	March 24 (for February 2025) Note: Usually filed on the 23rd calendar day of the following month, but if the 23rd day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	March 30 (for February 2025)
Form ADV Annual Update	Registered investment advisers and ERAs	March 31 (for an investment adviser with a December 31 fiscal year-end)
NFA Commodity Pool Annual Financial Statements Filing	Registered CPOs	March 31 (for a pool with a December 31 fiscal year-end)
CRS Information Reports	Financial institutions in “Participating Jurisdictions” (which currently do not include the US)	Consult local advisers for timing.
FATCA Information Report	Participating FFIs (except for FFIs in Model 1 IGA jurisdictions) FFIs in Model 1 IGA jurisdictions	Consult local advisers for timing.
April 2025		
FBAR	Hedge funds and private equity funds, and their investment advisers, if they have non-U.S. bank or other financial accounts	April 15 (with a six-month extension available)
Form PF	Large Liquidity Fund Advisers	April 15 (for the quarter ending March 31, 2025)

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	April 15 (for March 2025)
TIC Form BQ-1, BQ-2, and BQ-3	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), more than $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country-limit) (Form BQ-3)	April 21 (for the quarter ending March 31, 2025) Note: Usually filed on the 20th calendar day of the following quarter, but if the 20th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	April 23 (for March 2025)
Delivery of Annual Audited Financial Statements to Private Fund Investors	Registered investment advisers (except with respect to fund-of-funds)	April 30 (for private fund with a December 31 fiscal year-end)
Delivery of Updated Form ADV Part 2A to Clients	Registered investment advisers	April 30 (for an investment adviser with a December 31 fiscal year end)
Form PF	Registered investment advisers with at least $150 million in RAUM attributable to private funds, including Large Private Equity Fund Advisers	April 30 (for an investment adviser with a December 31 fiscal year-end)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	April 30 (for March 2025)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	April 30 (for March 2025)
May 2025		
NFA Form PR	All registered CTAs	May 15 (for the quarter ending March 31, 2025)

Filing / Delivery	**Who Must File**	**Deadline**
Form 13F	Investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities	May 15 (for the quarter ending March 31, 2025)
Schedule 13G Quarterly Initial Filing or Amendment	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (e.g., Qualified Institutional Investors and/or passive investors)	May 15 (for the quarter ended March 31, 2025) Initial filings pursuant to Rule 13d-1(d) for IPOs in Q1 or for Rule 13d-1(b) filers who exceeded 5% (but below 10%) during quarter; amendments for "material" change from prior filing
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	May 15 (for April 2025)
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	May 23 (for April 2025)
Form PF	Large Hedge Fund Advisers	May 30 (for the quarter ending March 31, 2025)
CFTC Form CPO-PQR	Large CPOs	May 30 (for the quarter ending March 31, 2025)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	May 30 (for the quarter ending March 31, 2025)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	May 30 (for April 2025)

Filing / Delivery	Who Must File	Deadline
June 2025		
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	June 16 (for May 2025) Note: Usually filed on the 15th calendar day of the following month, but if the 15th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	June 23 (for May 2025)
Delivery of Annual Audited Financial Statements to Private Fund Investors	Registered investment advisers (with respect to fund-of-funds)	June 29 (for a fund-of-funds with a December 31 fiscal year-end)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	June 30 (for May 2025)
July 2025		
Form PF	Large Liquidity Fund Advisers	July 15 (for the quarter ending June 30, 2025)
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	July 15 (for June 2025)
TIC Form BQ-1, BQ-2, and BQ-3	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), more than $50 million (no country-limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country-limit) (Form BQ-3)	July 21 (for the quarter ending June 30, 2025) Note: Usually filed on the 20th calendar day of the following quarter, but if the 20th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	July 23 (for June 2025)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	July 30 (for the quarter ending June 30, 2025)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	July 30 (for June 2025)
August 2025		
NFA Form PR	All registered CTAs	August 14 (for the quarter ending June 30, 2025)
Form 13F	Investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities	August 14 (for the quarter ending June 30, 2025)
Schedule 13G Quarterly Initial Filing or Amendment	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (e.g., Qualified Institutional Investors and/or passive investors)	August 14 (for the quarter ended June 30, 2025) Initial filings pursuant to Rule 13d-1(d) for IPOs in Q2 or for Rule 13d-1(b) filers who exceeded 5% (but below 10%) during quarter; amendments for "material" change from prior filing
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	August 15 (for July 2025)

Filing / Delivery	**Who Must File**	**Deadline**
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	August 25 (for July 2025) Note: Usually filed on the 23rd calendar day of the following month, but if the 23rd day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
Form PF	Large Hedge Fund Advisers	August 29 (for the quarter ending June 30, 2025)
CFTC Form CPO-PQR	Large CPOs	August 29 (for the quarter ending June 30, 2025)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	August 29 (for the quarter ending June 30, 2025)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	August 30 (for July 2025)
September 2025		
Form N-PX	All investment managers that file Form 13F	September 2, 2025 (for the 12-month period ended June 30, 2025) Note: Usually due August 31st, but the deadline is extended when August 31st falls on a Saturday or Sunday.
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	September 15 (for August 2025).
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	September 23 (for August 2025)

Filing / Delivery	**Who Must File**	**Deadline**
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	September 30 (for August 2025)
October 2025		
Form PF	Large Liquidity Fund Advisers	October 15 (for the quarter ending September 30, 2025)
TIC Form BC, BL-1, and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	October 15 (for September 2025)
TIC Form BQ-1, BQ-2, and BQ-3	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), more than $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country limit) (Form BQ-3)	October 20 (for the quarter ending September 30, 2025)
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	October 23 (for September 2025)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	October 30 (for the quarter ending September 30, 2025)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	October 30 (for September 2025)
November 2025		
NFA Form PR	All registered CTAs	November 14 (for the quarter ending September 30, 2025)

Filing / Delivery	Who Must File	Deadline
Form 13F	Investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities	November 14 (for the quarter ending September 30, 2025)
Schedule 13G Quarterly Initial Filing or Amendment	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (e.g., Qualified Institutional Investors and/or passive investors)	November 14 (for the quarter ending September 30, 2025) Initial filings pursuant to Rule 13d-1(d) for IPOs in Q3 or for Rule 13d-1(b) filers who exceeded 5% (but below 10%) during quarter; amendments for "material" change from prior filing
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities more than $50 million (or $25 million with respect to an individual country)	November 17 (for October 2025) Note: Usually filed on the 15th calendar day of the following month, but if the 15th day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
TIC Form SLT	U.S. resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	November 24 (for October 2025) Note: Usually filed on the 23rd calendar day of the following month, but if the 23rd day is a federal holiday, Saturday or Sunday, the filing deadline is extended until the next business day.
Form PF	Large Hedge Fund Advisers	November 29 (for the quarter ending September 30, 2025)
CFTC Form CPO-PQR	Large CPOs	November 29 (for the quarter ending September 30, 2025)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	November 29 (for the quarter ending September 30, 2025)

Filing / Delivery	**Who Must File**	**Deadline**
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	November 30 (for October 2025)
February 2026		
Form SHO	Institutional investors with monthly short sale positions exceeding thresholds specified in Rule 13f-2	February 14 (for short positions in January 2026)
Other Floating Deadlines		
Form D	Private funds conducting an offering under Regulation D	Initial Filing: Within 15 days of the initial sale of securities Annual Amendment: Anniversary date of the previous Form D filing if the offering is still ongoing Interim Amendment: As soon as practicable to correct material mistakes or errors after certain changes in information Note: Additional state blue sky filing requirements may apply.
Schedule 13D	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company	Initial Filing: Within 5 business days of crossing the 5% threshold or losing eligibility to file a Schedule 13G pursuant to Rule 13d-1(c) or (b) Amendment: Within two business days of any material change

Filing / Delivery	**Who Must File**	**Deadline**
Schedule 13G	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (*i.e.*, Qualified Institutional Investors and/or passive investors)	Initial Filing: Generally, within 45 days of quarter end (if a QII and below 10% or passive investor) or within 5 business days of crossing the 5% threshold (if a passive investor) Quarterly Amendment: Within 45 days of quarter-end if a material change (see above) Interim Amendment: Within 5 business days of month-end (if a QII) or 2 business days (if a passive investor) if holding exceeds 10% or if it thereafter increases or decreases by over 5%
Form 13H	Large traders of Regulation NMS securities	Initial Filing: Promptly (usually 10 days) after reaching reporting threshold Annual Amendment: Within 45 days of year-end (see above) Interim Amendment: Promptly after quarter-end if there is any change in information
Form 3	Beneficial owners of more than 10% of a class of equity securities of a U.S. public company, or officers or directors of a U.S. public company	Within 10 days of becoming a 10% beneficial owner, officer or director For an IPO, on the effective date of registration of the securities under the Exchange Act

Filing / Delivery	**Who Must File**	**Deadline**
Form 4	Beneficial owners of more than 10% of a class of equity securities of a U.S. public company or officers or directors of a U.S. public company that effect a transaction changing the beneficial ownership of securities previously reported on Form 3	Within 2 business days of the transaction
Hart-Scott-Rodino Filings	Persons contemplating a business transaction which is not "solely for the purpose of investment" and relates to either: (i) the acquisition of voting securities valued more than $84.4 million (adjusted annually); or (ii) the acquisition of most interests in certain unincorporated entities (such as certain partnerships or LLCs). The passive investor exemption is available only for holdings not exceeding 10% of an issuer's voting stock	Prior to completion of the proposed business transaction Note: Filers are generally subject to a 30-day waiting period after submitting their HSR notice filing
Form BE-13A or BE-13 Claim for Exemption	U.S. advisers to private funds in which a non-U.S. person acquires direct or indirect ownership or control of 10% or more of the voting securities If the cost of the transaction exceeds $3 million, then the U.S. entity should file Form BE-13A If the cost of the transaction does not exceed $3 million, then the U.S. entity should file a BE-13 Claim for Exemption	Within 45 days after a reportable transaction
New Issues Affirmations	Private funds that invest in new issues	Annually
Delivery of Privacy Policy Notice to Clients	Financial institutions who have changed their privacy policies and practices since the last distribution of a privacy notice (see above)	Annually

Filing / Delivery	**Who Must File**	**Deadline**
Delivery of ERISA/VCOC/REOC Annual Certification to ERISA Investors	Private funds operating as a VCOC/REOC or pursuant to the 25% cap	As per fund documents and/or other contractual agreements with ERISA investors (typically no more frequently than annually)
Delivery of Schedule K-1	Private funds that are partnerships for tax purposes	Due date (including any applicable extension) of the partnership's U.S. federal income tax return
Form 8832 Filing	Entities that filed an IRS Form 8832 with respect to 2024	Due date (including any applicable extension) of that entity's 2024 U.S. federal income tax return
QEF Election	In the case of a private fund that has invested in a non-U.S. portfolio company that is (or may be) a PFIC, the first U.S. person in the PFIC's ownership chain (e.g., the fund itself if a U.S. fund, or each U.S. investor if a non-U.S. fund)	Due date (including any applicable extensions) of that U.S. person's 2024 U.S. federal income tax return
EIP Election	Eligible private funds wishing to opt out of mandatory tax basis adjustments	Due date (including any applicable extensions) of that private fund's 2024 U.S. federal income tax return
CbCR – Form 8975	U.S. tax resident parent entity of a MNE that has revenues of $850 million or more during the taxable year	Due date (including any applicable extension) of that entity's 2024 U.S. federal income tax return

Filing / Delivery	**Who Must File**	**Deadline**
Certain U.S. Tax Filings with Respect to Non-U.S. Entities	Private funds and their U.S. investors may be required to make certain filings with respect to non-U.S. entities owned by the private fund, including, without limitation: IRS Form 5471 IRS Form 926 IRS Form 8621 IRS Form 8865 IRS Form 8858 IRS Form 8938 IRS Form 8992	Generally, due date (including any applicable extensions) of the U.S. person's 2024 U.S. federal income tax return

European Regulatory Timeline - 2025

Below is a summary of certain key European regulatory developments. For more information on any of the topics, please reach out to Proskauer Regulatory team at UKReg@proskauer.com.

Date in force	Regulatory Development	Commentary
January 2025		
1 January	**UK - Digital Markets, Competition and Consumers Act 2024** Commencement of Part 1 (digital markets regime) and Parts 2 and 5 (enhancement of the wider competition regime including changes to the merger control thresholds).	The UK Competition and Markets Authority (**CMA**) has a number of expanded / additional powers effective 1 January 2025, including: (i) the power to initiate investigations to designate digital businesses as having Strategic Market Status; once designated, such businesses will be subject to bespoke conduct obligations and certain mandatory merger reporting requirements; (ii) a new merger review threshold designed to catch transactions where the parties do not compete directly or the target has no UK turnover: transactions will now be reviewable where one party has a 33% share of supply in the UK and a UK turnover of £350 million, and any other party has a UK nexus; and (iii) the power to impose significantly higher penalties on companies and individuals who fail to comply with CMA investigations or breach undertakings / commitments / orders.
2 January	**US - U.S. Department of the Treasury Final Regulations implementing Executive Order 14105 (US Outbound Investment Program)** The Final Regulations are effective as of 2 January 2025 and target certain identified technologies in "Countries of Concern", including China, Hong Kong, and Macau.	The US Outbound Investment Program prohibits or requires notification of investments by US persons in China (including Hong Kong and Macau) in certain specified technology sectors including semiconductors, microelectronics, quantum computing and artificial intelligence. "US person" is defined broadly to cover US entities (including foreign branches, subsidiaries and "controlled foreign entities" as defined in the implementing regulations) as well as US citizens / permanent residents and individuals located in the US. LPs and GPs will need to consider compliance and diligence requirements and update documentation accordingly.
2025	**UK - Asset Management Regulation** The FCA is expected to consult on regulatory reporting regime as part of its work on a future regime for asset managers.	The FCA published a discussion paper (*DP23/2*) setting out its plans to improve asset management regulation in the UK. The FCA is expected to use feedback on DP23/2 to prioritise changes to the UK asset management regime in line with the

		government's commitment to ensure that the UK is attractive to financial services firms and activity.
2025	**UK - Asset Tokenisation** FCA to work with Project Guardian members to support the development and adoption of asset tokenisation.	The FCA joined Project Guardian in October 2023, an initiative launched by the Monetary Authority of Singapore (**MAS**) with the aim of advancing digital asset pilots in fixed income, foreign exchange and asset management products. The FCA will work with MAS in 2025 to assess regulatory and supervisory principles that could apply to the use of tokenisation to support consumers and protect market integrity. One of the aims of the initiative is to enable the adoption of asset tokenisation for the fund industry.
2025	**EU - AIFMD II** ESMA is expected to develop technical standards and guidelines to supplement the Directive (EU) *2024/927* (**AIFMD II**) requirements.	AIFMD II entered into force on 15 April 2024 and EU member states will be required to apply national measures to implement AIMFD II from 16 April 2026. AIFMD II amends the Alternative Investment Fund Managers Directive (*2011/61/EU*) (**AIFMD**) and UCITS Directive (*2009/65/EC*) (**UCITS Directive**). AIFMD II amends rules relating to delegation, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds (**AIFs**).
2025	**EU - Sustainability Risks** ESMA is expected to publish a report on disclosures and the integration of sustainability risks in the investment fund sector.	Sustainability considerations have become an increasingly important part of the European Commission's financial policies. An integral part of sustainable finance is transparency regarding risks related to ESG factors that may impact the financial system. ESMA is expected to publish a report on disclosures and the integration of sustainability risks in the investment fund sector in 2025.
2025	**EU - Money Market Funds (MMF)** ESMA is expected to publish updated guidelines on MMF stress testing.	The EU Regulation on money market funds (*(EU) 2017/1131*) (**MMF Regulation**) established rules on the operation of MMFs, their portfolio and valuation and reporting requirements. The regulatory regime for MMFs is currently the subject of scrutiny. ESMA published a report (*ESMA60-1389274163-2560*) on stress testing MMFs in the EU in June 2023. ESMA is expected to publish updated guidelines on MMF stress testing under the MMF Regulation in 2025.
2025	**EU - Cross-border Distribution of Funds**	ESMA is expected to publish its third report on marketing requirements and communications under the Regulation on cross-border

	ESMA is expected to publish its third report on marketing requirements and communications under the CBDF Framework.	distribution of funds (*(EU) 2019/1156*) (**CBDF Framework**) in 2025. The report is expected to provide an overview of marketing requirements across member states and analyses the effects of national laws, regulations and administrative provisions governing the marketing communications for investment funds.
2025	**UK - Corporate Transparency Reform** Further guidance / secondary legislation in relation to the second Economic Crime and Corporate Transparency Act is expected to be published.	The UK Government has passed legislation that will reform the corporation governance regime in the UK. This follows concerns that the UK's previous regime was facilitating criminal behaviour, through convoluted corporate structures that masked economic crimes such as money laundering. The changes introduced in the legislation include further transparency within limited partnership structures, but many of these requirements are yet to come into force and further guidance / secondary legislation will need to be published prior to the changes coming into effect. Please refer to our dedicated update on this topic here.
2025	**Climate-Related Risks** It is expected that the Financial Stability Board (**FSB**) will consider updating its recommendations on supervisory and regulatory approaches to climate-related risks.	The FSB publishes reports to address climate-related financial risks and announced in its final report on supervisory and regulatory approaches to climate-related risks that it will consider updating its recommendations in 2025.
2025	**UK – Cryptoassets Regulation** HM Treasury is expected to bring the financial services regulation of cryptoassets within the regulatory framework established by Financial Services and Markets Act 2000 (**FSMA**).	HM Treasury is expected to introduce the secondary legislation to bring the financial services regulation of cryptoassets and stablecoins within the FSMA regulatory framework, as early as possible in 2025. For unbacked cryptoassets this means expanding the list of specified investments in Part III of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (**RAO**) and requiring firms undertaking relevant activities involving unbacked cryptoassets by way of business to be authorised by the FCA under Part 4A of FSMA.
Q1	**UK - ISSB** Aim to consult on the exposure drafts of International Sustainability Standards Board's (**ISSB**) IFRS S1	The ISSB, which has incorporated TCFD (Task Force on Climate-related Financial Disclosures) reporting, published climate-related reporting standards IFRS S1 and IFRS S2 in June 2023. The UK's Sustainability

	and IFRS S2 to become part of the UK sustainability reporting standards.	Technical Advisory Committee has recommended in December 2024 that the UK government endorses the ISSB standards and it is expected that the UK government will consult on this in Q1 2025.
February 2025		
2 February	**EU - the EU's AI Act (EU AI Act)** Prohibited AI practices are banned and general provisions, including requirements relating to AI literacy, apply.	The EU AI Act, which came into force on 1 August 2024, is the world's first comprehensive AI law. The EU AI Act manages risks imposed by AI systems and prohibits certain AI practices. The EU AI Act has a broad extra-territorial scope and imposes high fines for non-compliance. UK and US organisations should therefore be mindful of the EU AI Act and should not assume that it does not apply to them. Following the EU AI Act coming into force in August 2024, prohibited AI practices will be banned and general provisions, including requirements relating to AI literacy, will apply from 2 February 2025. Please see our dedicated article on this topic here.
6 February	**UK - Green Taxonomy Consultation** The consultation on a UK Green Taxonomy closes to comments.	The UK government published a consultation to gather views on the value case for a UK Green Taxonomy as part of the UK's wider sustainable finance framework. The consultation window for this ends on 6 February 2025.
19 February	**UK - Stewardship Code (Code)** The Financial Reporting Council's (**FCR**) consultation on the Code closes to comments.	The FCR launched a consultation proposing significant updates to the UK Stewardship Code. The consultation aims to streamline reporting requirements and reduce burdens for signatories whilst clarifying the purpose of the Code and its intended outcomes. The consultation is running until 19 February 2025 and the updated Code is expected to be published in late 2025 for implementation with the first reporting cycle in 2026. Please see our dedicated article on this topic here.
March 2025		
12 March	**EU – AIFMD II RTS for open-ended loan originating AIFs** ESMA consultation on draft RTS on open-ended loan-originating AIFs under AIFMD II closes to comments.	ESMA published a consultation paper *(ESMA34-1985693317-1085)* on draft regulatory technical standards relating to open-ended loan originating AIFs under AIFMD II. The consultation is open for feedback until 12 March 2025 and the final

		RTS is due to be submitted to the European Commission in Q3 or Q4 2025.
Q1	**EU - Benchmarks Regulations – ESG Disclosures** ESMA's CSA with national competent authorities on ESG disclosures under the EU Benchmarks Regulation (**EU BMR**) closes to comments.	ESMA announced it would launch a common supervisory action (**CSA**) with national competent authorities on ESG disclosures under the EU BMR. The CSA will be carried out by ESMA and the NCAs during 2024 until Q1 2025.
	<u>April 2025</u>	
2 April	**UK – Naming and Marketing Rules under the UK Sustainability Disclosure Requirements (SDR)** Temporary flexibility period for firms to comply with the naming and marketing rules under SDR ends.	The FCA published its SDR and investment labels regime (*PS23/16*) on 28 November 2023. The FCA had allowed temporary flexibility for firms to comply with the naming and marketing rules under SDR until 2 April 2025 – the rules apply to UK funds with a retail client base.
16 April	**EU – AIFMD II RTS and Guidance on Liquidity Management Tools** ESMA to deliver the final RTS and guidelines.	ESMA published draft guidelines *(ESMA34-1985693317-1097)* and RTS *(ESMA34-1985693317-1095)* relating to liquidity management tools (**LMT**) under AIFMD II. In the draft RTS ESMA defines the constituting elements of each LMT, such as calculation methodologies and activation mechanisms. Additionally, they intend to clarify the functioning of specific LMTs, such as the use of side pockets, a practice that currently varies significantly across the EU. The consultation was open for feedback until 8 October 2024 and the final RTS and guidelines are due to be published by 16 April 2025.
April	**UK - Digital Markets, Competition and Consumers Act 2024 (DMCCA)** Expected commencement of Part 3 (consumer enforcement regime) and Part 4, chapter 1 (replacement of the unfair trading regulations).	The government has flagged that it expects to commence the provisions of the DMCCA which introduce enhanced, direct enforcement powers for consumer protection and replace the unfair trading regulations in April 2025. From commencement, the CMA will have the power to impose fines of up to 10% of annual global turnover on companies and up to £300,000 on individuals for breaches of consumer protection law, and will be able to resolve cases through undertakings or settlement, as well as imposing directions. The FCA is designated as public enforcer of these powers, meaning it can launch investigations and agree undertakings with businesses, although it must apply to court to impose orders or financial penalties.

May 2025		
2 May	**EU – the EU AI Act** Finalised Codes of Practice will be published.	The European Commission published the first draft of the Codes of Practice (technical guidelines for general purpose AI model compliance with the EU AI Act) in November 2024. The finalised Codes of Practice will be published on 2 May 2025. Please refer to our dedicated article on this topic here.
21 May	**EU – ESMA ESG Fund Name Guidelines (Guidelines)** Mandatory compliance with the Guidelines for existing funds comes into effect.	The Guidelines apply to all AIFs and UCITS managed by EU AIFMs or EU UCITS management companies. The Guidelines became mandatory for new funds from 21 November 2024 and will become mandatory for existing funds from 21 May 2025. The Guidelines are not clear on applicability to non-EU funds marketed into Europe and advice on such ESG-related named non-EU funds should be obtained. Please see our dedicated article on this topic here.
May	**UK – Motor Finance Review** FCA to confirm next steps in relation to its review.	FCA is expected to set out next steps by May 2025 relating to its review of firms' historical use of motor finance discretionary commission arrangements ("**DCAs**") and sales.
June 2025		
H1	**UK - Investment Research Payment Optionality for Fund Managers** The FCA is expected to publish its policy statement on investment research payment optionality for fund managers.	The FCA published a consultation paper (*CP24/21*) on investment research payment optionality for fund managers and the FCA intends to publish its policy statement containing new rules and guidance in the first half of 2025.
H1	**UK- Retail Disclosure Rules** The FCA is expected to deliver a reform on UK retail disclosure rules.	HM Treasury and the FCA announced plans to reform UK retail disclosure rules. The FCA intends to finalise the rules in H1 2025, subject to parliamentary approval and the FCA consultation process.
H1	**UK - Growth and Competitiveness Strategy** HM Treasury intends to publish financial services growth and competitiveness strategy.	HM Treasury is developing the strategy, which is intended to serve as the central guiding framework through which the government will achieve sustainable, inclusive growth for the financial services sector and secure the UK's competitiveness as an international financial centre. HM Treasury intends to publish the strategy in spring 2025.

H1	**UK – FCA Approach to Consumer Duty** The FCA is expected to publish findings following various reviews relating to the Consumer Duty.	To understand how firms are improving consumer outcomes the FCA has three cross-cutting projects, which it is grouping into packages of publications that have been or will be published in Q4 2024 and Q1 2025. It is also expected that the FCA will commence a market study into pure protection insurance in H1 2025 and plans to publish an interim report of its market study into premium finance (motor finance and home insurance) in H1 2025.
June	**EU - SFDR 2.0** Potential course of change for SFDR can be expected.	Two consultation papers launched in September 2023 seeking feedback on fundamental redesign and repurposing of Sustainable Finance Disclosure Regulation ((*EU) 2019/2088* (**SFDR**)). The feedback window ended on 15 December 2023. Whether SFDR should be developed or abandoned is the subject of considerable debate. Following the EU Sustainable Finance Platform's advice to the European Commission on SFDR 2.0 in December 2024, there are indications that the European Commission will publish its proposals on SFDR 2.0 in June 2025.
	August 2025	
2 August	**EU – the EU AI Act** Obligations on providers of general-purpose AI models take effect, Member States must have appointed their notifying authorities and bodies and the annual EU Commission review of, and possible legislative amendments to, the list of prohibited AI practices occurs.	Obligations on providers of general-purpose AI models take effect and the deadline for Member States to have appointed their notifying authorities and bodies is 2 August 2025. Annual EU Commission review of, and possible legislative amendments to, the list of prohibited AI practices will also occur. Please refer to our dedicated article on this topic here.
	September 2025	
29 September	**EU – MiFID III** Deadline for EU member states to bring into force the laws, regulations and administrative provisions to comply with Directive (*(EU) 2024/790*) **(MiFID III**).	The changes in MiFID III are aimed primarily at improving access to market data and trade transparency. EU member states have until 29 September 2025 to bring into force the laws, regulations and administrative provisions necessary to comply with MiFID III.

October 2025		
October	**EU - Fees to Investors** ESMA is expected to publish a report on fees charged to investors under the AIFMD and UCITS Directive.	ESMA announced the launch of its data collection exercise for a one-off report on costs linked to investments in UCITS and AIFs. A report based on these data will be submitted to the European Parliament, the Council and the European Commission in October 2025. This will also be part of an enhanced 2025 ESMA market report on costs and performance of EU retail investment products.
December 2025		
1 December	**UK - Bonds and Derivatives** FCA rules on trade transparency for bonds and derivatives come into force.	The FCA published a policy statement (*PS24/14*) announcing changes to improve transparency in the bond and derivatives markets. The new transparency rules will come into force on 1 December 2025. Until that date, the current transparency regime for bonds and derivatives will apply (as set out in the transitional provision in the FCA's policy statement).
4 December	**UK – Handling Rules for Motor Finance Complaints** FCA extension for firms to respond to motor finance-related claims.	The FCA published a policy statement *(PS24/18)* and has extended the time firms have to respond to complaints about motor finance agreements not involving a DCA. Firms have until after 4 December 2025 to provide a final response to motor finance non-DCA complaints received on or after 26 October 2024. This is in line with the extension that the FCA has already provided for complaints involving DCAs. Consumers who receive a final response to these complaints have until the later of either 15 months from when the final response is sent, or 29 July 2026, to decide whether to refer their complaint to the Financial Ombudsman Service (**FOS**).
December	**UK – Motor Finance Review** FCA to confirm approach to compensation.	FCA intends to confirm its final rules for how consumers will be compensated following its review into the historical use of DCAs in the motor finance industry.

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