GODFREY KAHN

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Investment Management Legal and Regulatory Update

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LATEST DEVELOPMENTS: FUNDS

SEC Amends Forms N-PORT and N-CEN and Provides Liquidity Risk Management Program Guidance

In August, the SEC (i) adopted amendments to Forms N-PORT and N-CEN, (ii) issued guidance related to liquidity risk management program requirements, and (iii) amended the defined term "exchange-traded fund" (ETF) in Forms N-PORT and N-CEN.

Amendments to Form N-Port

Form N-PORT is used by funds to report portfolio securities information as well as related risk information to the SEC. The SEC uses the information reported on Form N-PORT to inform its policymaking, regulatory, and enforcement functions. To better perform these functions, the SEC amended Form N-PORT to require more frequent and timely portfolio information reporting. In adopting the amendments, the SEC explained that investors will also benefit from public transparency of the information.

- *Filing Frequency*

  The amendments will require funds to report portfolio information monthly on Form N-PORT, within 30 days of the end of the month to which the report relates. Currently, funds are required to report portfolio information on a quarterly basis on Form N-PORT, within 60 days of the end of a quarter.

- *Publication Frequency*

  The amendments will also make monthly Form N-PORT filings publicly available 60 days after the end of each month. Currently, only Form N-PORT filings with portfolio information from the third month of every quarter are publicly available.

- *Other Amendments to Form N-PORT*

  Additionally, the amendments will require monthly reporting of return and flow information on Form N-PORT. Currently, funds are required to report return and flow information quarterly on Form N-PORT. The amendments will also permit public reporting of miscellaneous securities in the aggregate while requiring additional information related to such securities to be reported non-publicly.

Amendments to Form N-CEN

The SEC adopted amendments to Form N-CEN to require funds that are subject to Rule 22e-4 (Liquidity Rule) to report certain information related to their use of liquidity service providers. Specifically, the amendments require a fund to report (1) the name of each service provider, (2) identifying information

for each service provider, (3) any affiliations of the service provider with the fund or its investment adviser, (4) any asset classes for which a service provider provided classification, and (5) if a service provider was hired or terminated during the reporting period.

Guidance Related to Liquidity Risk Management Program Requirements

Included in the adopting release for the Form N-CEN amendments is guidance related to (i) the frequency of reviewing liquidity classifications, (ii) the meaning of "cash" in the Liquidity Rule, and (iii) the determination of highly liquid investment minimums.

- *Frequency of Reviewing Liquidity Classifications*

  The SEC shares its observations of funds unable to timely (intra-month) review security liquidity in times of market stress, as the Liquidity Rule requires. The SEC explains that this part of the Liquidity Rule is intended to help funds monitor highly liquid investment minimums as well as the Liquidity Rule's limit on illiquid investments. For example, the SEC suggests that funds review liquidity classifications as portfolio securities are bought and sold, as such transactions are likely to affect the liquidity classifications of other portfolio securities.

- *Meaning of "Cash"*

  The SEC reiterates previous guidance that "cash" in the Liquidity Rule means U.S. dollars and does not include foreign currencies or cash equivalents. The SEC emphasizes the conversion of securities to U.S. dollars when classifying the liquidity of an investment. This includes the time needed to convert non-U.S. dollar currencies into U.S. dollars. The SEC also states that a fund's foreign investments may become illiquid. For example, if a fund is not able to convert the security into U.S. dollars within seven calendar days or less, the investment may be an illiquid investment under the Liquidity Rule.

- *Determination of Highly Liquid Investment Minimums*

  The SEC emphasizes the importance of fund-specific highly liquid investment minimums (HLIMs). For example, the SEC explains that funds that invest in significantly less liquid or illiquid investments should likely establish an HLIM that is higher than funds that invest in liquid securities. The SEC reminds funds that the HLIM requirement is intended to ensure funds are able to meet redemption requests, though a specific procedure for doing so is not required for the HLIMs.

Transition Periods

The effective date of the above amendments is November 17, 2025.

For Form N-PORT, larger entities (funds with net assets of $1 billion or more) will be required to comply with the amendments for reports filed on or after the November 17, 2025 effective date, and smaller entities (funds with net assets of less than $1 billion) will be required to comply with the amendments for reports filed on or after May 18, 2026.

For Form N-CEN, all funds, including larger and smaller entities, will be required to comply with the amendments to the form for reports filed on or after November 17, 2025.

Sources: SEC Adopts Reporting Enhancements for Registered Investment Companies and Provides Guidance on Open-End Fund Liquidity Risk Management Programs, SEC Press Release 2024-110 (Aug. 28, 2024), available here; Form N-PORT and Form N-CEN Reporting; Guidance on Open-End Fund Liquidity Risk Management Programs, SEC Fact Sheet (Aug. 28, 2024), available here; Form N-PORT and Form N-CEN Reporting; Guidance on Open-End Liquidity Risk Management Programs, SEC Final Rule, Release No. IC-35308, available here.

LATEST DEVELOPMENTS: ADVISERS

SEC Sweep Exam on Adviser T+1 Compliance

The SEC has initiated a sweep exam focused on registered investment adviser (RIA) compliance with the new T+1 rules. Our July 2024 Regulatory Update provides an overview of the T+1 rules, but in summary, they prohibit broker-

dealers from engaging in any securities transaction that would settle after T+1. Broker-dealers are also required to adopt policies and procedures to facilitate the allocation, confirmation and affirmation process (ACA Process) on the trade date. Recordkeeping rules applicable to RIAs were also revised to require the retention of certain communications relating to the ACA Process.

The SEC's Division of Examinations indicated that they are "broadly focusing on the [a]dviser's policies, procedures, and practices associated with securities trade order processing or the trade life cycle," including T+1, as well as compliance with the related amendments to the advisers' books and records rule. The sweep examination requests the following information relating to the T+1 settlement process:

- All written compliance and operational policies and procedures addressing processes or operational protocols affected by the ACA Process or securities transaction settlement cycle (generally) and/or the T+1 settlement (specifically), including any material amendments to these policies and procedures;
- Any assessments or tests performed regarding measuring, monitoring, and documenting the timeliness for processing or completing the ACA Process (e.g., analysis of individual transaction processing times, aggregate percentage of institutional trades that are affirmed by T+1, delayed or failed trades);
- A current list of conflicts and other compliance factors relevant to the RIA's particular operations regarding trading and execution that create risk exposure for the RIA and its clients and form the basis for the RIA's compliance policies and procedures;
- Any trade-related compliance testing, internal control analyses, and/or forensic and transactions tests performed on the ACA Process, including the dates and/or frequency of such testing;
- A list and description of any automated systems or tools used to carry out compliance-related oversight functions and/or reporting obligations associated with trading, the trade settlement lifecycle, and the ACA Process;
- A record of any non-compliance with the compliance policies and procedures related to the ACA Process by the RIA's supervised persons, including: the date of the non-compliance, a description of the matter, any action taken as a result of such non-compliance, and the resolution date;
- Written guidance the RIA provided to its employees regarding the compliance program and documents evidencing employee compliance training regarding RIA trade and execution practices;
- Any written communications sent to or received from broker-dealers regarding the ACA Process; and
- Any written agreements between the RIA and broker-dealers or any third parties associated with trading, the trade settlement lifecycle, and other aspects of the ACA Process.

The examination request letter also asks for more general information, such as the RIA's organizational structure, service providers, client list, and trade blotter.

Godfrey & Kahn Take: While some think the exam letter suggests that RIAs need their own standalone T+1 policies and procedures, we note that under the final rule the onus is on broker-dealers to establish policies and procedures to address T+1 and the ACA Process. We recommend that RIAs revise and enhance their existing trading and books and records policies and procedures to be responsive to the new rules. For example, RIAs should ensure their books and records policy provides for preservation and adequate documentation of each confirmation received, and of any allocation and each affirmation sent or received, with a date and time stamp, for any transaction that requires completion of the ACA Process.

Sources: Examining the SEC's T+1 exam sweep letter, Regulatory Compliance Watch (Aug. 19, 2024), available here (by subscription); SEC Examination Information Request List, Regulatory Compliance Watch (Aug. 14, 2024), available here (by subscription).

DOL Fiduciary Rule Stayed

Earlier this year, the U.S. Department of Labor (DOL) issued a new rule (Fiduciary Rule) that expanded the meaning of "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA). A lawsuit was filed thereafter by an insurance trade group and three individual insurance agents licensed in Texas, seeking a stay of the Fiduciary Rule. The group and individual agents argued that (i) the new rule imposed an ERISA-fiduciary standard on "any insurance agent who merely complies with state insurance laws when dealing with an ERISA plan member or owner of an [IRA]," and would subject them to liability while the lawsuit was before the court, and (ii) the Amendment to Prohibited Transaction Exemption 84-24 (which would require insurance agents to adhere to specific standards, disclose specific items, and operate under a supervisory program established by an insurance company) was arbitrary and capricious. The U.S. District Court for the Eastern District of Texas (District Court) agreed with these arguments.

Specifically, the District Court agreed that (i) the Fiduciary Rule is in conflict with ERISA in several ways, including by treating individuals who engage in one-time recommendations to roll over assets from an ERISA plan to an IRA as fiduciaries under ERISA, (ii) the Amendment to Prohibited Transaction Exemption 84-24 is indeed likely an arbitrary and capricious exercise of the DOL's authority, and (iii) a stay is likely equitable.

A second lawsuit was filed by insurance industry trade groups with the U.S. District Court for the Northern District of Texas, Forth Worth Division, shortly after the first lawsuit. The suit similarly argued that the Fiduciary Rule is arbitrary and capricious, contrary to law, and unconstitutional, and the same result was achieved by the plaintiffs: the Fiduciary Rule is stayed.

Therefore, at this time, the Fiduciary Rule is stayed, so the existing 1975 rules remain in effect as well as the prohibited transaction exemption PTE 2020-02.

The DOL has appealed the stays with the U.S. 5th Circuit Court of Appeals to reinstate the new Fiduciary Rule.

Sources: Federation of Americans for Consumer Choice, Inc., et al., v. U.S. DOL, et al., Case No. 6:24-cv-163-JDK (July 25, 2024), available here; American Council of Life Insurers, et al., v. U.S. DOL, et al., Civil Action No. 4:24-cv-00482-O (July 26, 2024), available here; DOL Will Appeal Stay on Fiduciary Rule, Planadviser (Sept. 23, 2024), available here.

FinCEN Issues Final Rule on AML Program for Investment Advisers

The Financial Crimes Enforcement Network (FinCEN) recently issued a final rule subjecting certain investment advisers to anti-money laundering/countering the financing of terrorism (AML/CFT) requirements under the regulations that implement the Bank Secrecy Act (BSA).

Under the final rule, registered investment advisers (RIAs) and exempt reporting advisers (ERAs) are added to the definition of "financial institution" under the BSA's implementing regulations, subjecting them to various AML requirements described below, except that the following types of advisers are exempt:

- RIAs that register with the Securities and Exchange Commission (SEC) solely because they are mid-sized advisers, multi-state advisers or pension consultants;
- RIAs that do not report any assets under management on Form ADV;
- State-registered investment advisers;
- Foreign private advisers; and
- Family offices.

The final rule sets forth a number of requirements for RIAs and ERAs subject to the rule, including:

- Implement a risk-based and reasonably designed AML/CFT program;
- File certain reports, such as Suspicious Activity Reports (SARs), with FinCEN;

- Keep certain records, such as those relating to the transmittal of funds (i.e., comply with the Recordkeeping and Travel Rules and file Currency Transaction Reports as needed); and
- Fulfill certain other obligations applicable to financial institutions subject to the BSA and FinCEN's implementing regulations, such as special information sharing procedures.

Investment advisers are permitted to exclude the following types of clients for which the investment adviser provides investment management services from its AML/CFT program: mutual funds, bank- and trust company-sponsored collective investment funds, and any investment adviser advised by the investment adviser.

Minimum Requirements

At a minimum, the AML/CFT program must:

- Establish and implement internal policies, procedures, and controls reasonably designed to prevent the investment adviser from being used for money laundering, terrorist financing, or other illicit finance activities and to achieve compliance with the applicable provisions of the BSA and implementing regulations;
- Provide for independent testing for compliance to be conducted by the investment adviser's personnel or by a qualified third party;
- Designate a person or persons responsible for implementing and monitoring the operations and internal controls of the program;
- Provide ongoing training for appropriate persons; and
- Implement appropriate risk-based procedures for conducting ongoing customer due diligence, including but not be limited to:
  - Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and
  - Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

The AML/CFT program must be approved in writing by the adviser's board of directors, or if it does not have a board, by its sole proprietor, general partner, trustee, members of senior management or other persons that have functions similar to a board of directors.

Investment advisers may contractually delegate the implementation and operation of certain aspects of its AML/CFT program to third-party providers, however, the investment adviser will remain fully responsible and legally liable for, and be required to demonstrate to examiners, adherence to the AML/CFT program requirements.

SAR Filings

Investment advisers subject to the final rule will be required to file with FinCEN a report of any suspicious transaction relevant to a possible violation of law or regulation. A transaction requires reporting under the final rule if (1) it is conducted or attempted by, at, or through an investment adviser; (2) it involves or aggregates funds or other assets of at least $5,000; and (3) the investment adviser knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

- Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation;

- Is designed, whether through structuring or other means, to evade any regulations promulgated under the BSA;
- Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the investment adviser knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or
- Involves use of the investment adviser to facilitate criminal activity.

Suspicious transactions are reported by completing a Suspicious Activity Report and collecting and maintaining supporting documentation. SARs must be filed no later than 30 calendar days after the date of the initial detection of facts that constitute the basis for filing a SAR. Investment advisers must maintain a copy of any SAR filed and any supporting documentation for a period of five years from the date of filing.

Recordkeeping

Under the Recordkeeping and Travel Rules, financial institutions must create and retain records for transmittals of funds and ensure that certain information pertaining to the transmittal of funds "travels" with the transmittal to the next financial institution in the payment chain. The Recordkeeping and Travel Rules apply to transmittals of funds that equal or exceed $3,000.

Compliance Date

The compliance date for the final rule is January 1, 2026. FinCEN has delegated its examination authority to the SEC, given the SEC's expertise in the regulation of investment advisers and the existing delegation to the SEC of authority to examine broker-dealers and mutual funds for compliance with FinCEN's regulations implementing the BSA.

Godfrey & Kahn Take: Investment advisers subject to this new rule should consider comparing any current AML programs to the minimum requirements established under the new rule to determine whether policies or programs need to be updated. Ensuring adequate documentation of compliance with the new rule is also advised, given that the SEC will have exam authority.

Sources: FinCEN Issues Final Rules to Safeguard Residential Real Estate, Investment Adviser Sectors from Illicit Finance, FinCEN Release (Aug. 28, 2024), available here; Financial Crimes Enforcement Network: Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers, Federal Register Final Rule 2024-19260 (89 FR 72156) (Sept. 4, 2024), available here; FinCEN Issues Final Rule to Combat Illicit Finance and National Security Threats in the Investment Adviser Sector, FinCEN Fact Sheet (Aug. 28, 2024), available here.

SEC Will Not Seek En Banc Review of Private Fund Rules

On June 5, 2024, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) issued its opinion of the SEC's proposed private fund adviser rules (PFA Rules), striking down the PFA rules entirely. The Fifth Circuit ruled that the SEC exceeded its statutory authority in adopting the PFA Rules.

The SEC had the opportunity to thereafter file a petition to appeal the ruling by requesting an *en banc* review by Monday, July 22nd. According to the Fifth Circuit, a request for *en banc* review was never submitted by the SEC. The SEC still may appeal the Fifth Circuit's ruling to the U.S. Supreme Court; however, as mentioned in the July IM Regulatory Update, this is unlikely to occur. The SEC is likely evaluating its next regulatory step, including possibly re-proposing a new set of private fund adviser rules.

Sources: US SEC does not seek 5th Circuit review of private funds decision, throwing other rules into doubt, Reuters (July 25, 2024), available here.

LITIGATION/ENFORCEMENT ACTIONS

SEC Persists in Off-Channel Communication Enforcement as Total Fines Exceed $2 Billion

Off-channel communication settlements continue to make headlines and the SEC shows no signs of slowing down

its probe into companies' use of unapproved messaging applications and their failure to maintain and preserve electronic communications. The SEC recently announced fines against 26 broker-dealers, investment advisers and dually registered firms totaling $393 million for widespread and longstanding failures by the firms and their personnel to maintain and preserve electronic communications. According to their respective SEC orders, the firms admitted that their employees sent and received off-channel communications that were required to be maintained under the securities laws.

In early September, the SEC expanded its crackdown by levying fines against six rating agencies totaling over $49 million. S&P Global Ratings and Moody's Investors Service each agreed to pay penalties of $20 million after being charged for significant recordkeeping failures related to electronic communications.

In late September more fines were announced, this time totaling $88 million, against 11 firms including Invesco and Stifel Nicolaus & Co., who will each pay $35 million for their recordkeeping failures. One firm, Qatalyst Partners LP, self-reported and will not pay a penalty.

As with previous off-channel communication settlements, each of the firms and the six rating agencies have all agreed to improve their compliance policies and procedures to address the violations. Four of the six rating agencies and 25 of the 26 firms were ordered to retain compliance consultants (the remaining firm had already retained a compliance consultant prior to the SEC's investigation and the firm continues to use the consultant to monitor for potential non-compliance with firm policies). Similarly, nine of the eleven firms that settled in late September were ordered to retain compliance consultants while the other two had already done so.

Sources: Twenty-Six Firms to Pay More Than $390 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures, SEC Press Release 2024-98 (Aug. 14, 2024), available here; SEC Charges Six Credit Rating Agencies with Significant Recordkeeping Failures, SEC Press Release 2024-114 (Sept. 3, 2024), available here; In the Matter of Moody's Investors Service, Inc., Release No. 100906, File No. 3-22054 (Sept. 3, 2024), available here; In the Matter of S&P Global Ratings, Release No. 100907, File No. 3-22055 (Sept. 3, 2024), available here; Eleven Firms to Pay More Than $88 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures, SEC Press Release 2024-144 (Sept. 24, 2024), available here; In the Matter of Invesco Distributors, Inc. and Invesco Advisers, Inc., Release No. 1001141 and Release No. 6721, File No. 3-22165 (Sept. 24, 2024), available here; In the Matter of Qatalyst Partners LP, Release No. 101143, File No. 3-22167 (Sept. 24, 2024), available here.

SEC Charges Pay-To-Play Violation

In August, the SEC announced a settlement with Obra Capital Management, LLC (Obra) for providing investment advisory services to a government entity within two years of an Obra associate contributing to the campaign of an elected official whose responsibility it was to select investment advisers for the government entity.

Rule 206(4)-5 under the Advisers Act (the Pay-to-Play Rule) prohibits an investment adviser from providing investment advisory services to a government entity within two years of the adviser, or a "covered associate" of the adviser, making a campaign contribution to a state or local official of the government entity.

In 2017, the Michigan Department of Treasury, on behalf of the Michigan Public Employees' Retirement Fund, invested $100 million in a private fund advised by Obra. In 2019, an individual, unaffiliated with Obra at the time, made a $7,150 campaign contribution to an elected official in Michigan. The elected official was influential in hiring investment advisers for the Michigan Public Employees' Retirement Fund. In 2020, Obra hired the individual as a "covered associate" of the firm.

Under the Pay-to-Play Rule, a "covered associate" includes any individual who becomes a covered associate of an adviser within two years after a campaign contribution. The SEC found that Obra violated the Pay-to-Play Rule because Obra provided investment advisory services to the Michigan Department of Treasury, a government entity, in 2019, the date of the campaign contribution, and provided such advisory services after Obra hired the individual in 2020, before the end of the two-year period. As part of the settlement, Obra agreed to pay a $95,000 penalty.

Sources: In the Matter of Obra Capital Management, LLC., Release No. 6662, File No. 3-22019 (Aug. 19, 2024), available here; SEC Charges Investment Adviser for Pay-To-Play Violation Involving a Campaign Contribution, SEC Administrative Proceeding File No. 3-22019 (Aug. 19, 2024), available here.

Transfer Agent Charged for Failing to Protect Client Funds from Cyber Attacks

Registered transfer agent Equiniti Trust Company LLC (formerly known as American Stock Transfer & Trust Company LLC) (Equiniti) recently settled charges with the SEC for failing to ensure that client securities and funds were protected against theft or misuse in violation of Section 17A(d) of the Securities Exchange Act of 1934. According to the SEC's order, two separate cyber intrusions in 2022 and 2023 resulted in the loss of over $6.6 million of client funds. Equiniti was able to recover approximately $2.6 million and fully reimbursed the clients, in addition to paying a civil penalty of $850,000 to the SEC.

In September 2022, an unknown threat actor hijacked a pre-existing email chain between Equiniti and a public-issuer client. The hacker pretended to be an employee of the client and instructed Equiniti to issue millions of new shares of the client, liquidate those shares, and then send the proceeds to a bank in Hong Kong. The hacker used an email address that was almost identical to the client's real domain and imitated the business practices of the client displayed in the email chain the hacker accessed. The individual at Equiniti that carried out the hacker's request did not take steps to verify that the client did indeed want to issue and liquidate millions of new shares. In November 2022, the client noticed that its internal records showed fewer outstanding shares than what was actually outstanding in the market and alerted Equiniti of the discrepancy. Equiniti investigated and discovered the fraud, at which point it was able to claw back approximately $1 million of the $4.78 million transferred to the bank accounts in Hong Kong.

Equiniti had previously issued a notice in January 2022 alerting employees to increased fraudulent attacks and provided guidance on best practices to avoid cybersecurity breaches, including the practice of always performing a call-back to the requestor using a phone number from Equiniti's system to verify the request. However, Equiniti did not confirm that the notice was read by its employees, did not require any training for its employees on cybersecurity, and did not ensure that call-backs were being performed.

In April 2023, an apparently different threat actor used stolen Social Security numbers of real accountholders of Equiniti to open new fraudulent accounts. Equiniti's online platform had a default feature that automatically linked together any accounts opened with the same Social Security number, so that all accounts could be accessible from one main portal. The accounts would link even if accountholder names, addresses, emails or other identifying information did not match. The hacker was thus able to gain access to real client accounts by linking them to the fraudulent accounts and transferred client funds out of the legitimate accounts to external bank accounts. Similar to the 2022 incident, Equiniti did not discover the fraud, but rather the bank that received the transfers of the stolen funds flagged the transactions and Equiniti then investigated and confirmed they were fraudulent transfers. Equiniti was able to recover $1.6 million of the $1.9 million stolen from client accounts, and reimbursed the remaining $300,000.

Godfrey & Kahn Take: In light of the continued and increasing risk of cybersecurity attacks on transfer agents and other vendors, as well as the newly adopted Regulation S-P amendments that require increased service provider oversight as part of the incident response programs, vendor oversight is more important than ever. Funds and advisers should ensure they have a robust vendor oversight program in place, including procedures for enhanced due diligence for any vendors that encounter a data breach to confirm whether any confidential information was compromised, ensure the vendor has corrected any weaknesses that led to the breach, and has taken steps to prevent breaches in the future by enhancing data security.

Sources: In the Matter of Equiniti Trust Company, LLC f/k/a American Stock Transfer & Trust Company, LLC, Release No. 100780, File No. 3-22024 (Aug. 20, 2024), available here; SEC Charges Transfer Agent Equiniti Trust Co. with Failing to Protect Client Funds Against Cyber Intrusions, SEC Press Release 2024-101 (Aug. 20, 2024), available here.

OTHER NEWS OF INTEREST

Federal Ban of Non-Competes Held Unlawful by Federal Court

The U.S. Federal Trade Commission's (FTC) rule banning most non-compete clauses (Non-Compete Rule) was struck down on August 20, 2024, by a United States District Court in Texas. The Non-Compete Rule was set to go into effect on September 4, 2024, and would have effectively banned existing and future non-compete clauses, with limited exceptions. The Court found that the FTC lacked the statutory authority to promulgate the Non-Compete Rule

and found the Rule to be arbitrary and capricious in a decision that renders the Non-Compete Rule unenforceable nationwide. It is unclear whether the FTC will appeal this or other decisions striking down its ban, but for now, existing and future non-competes may continue to be used in compliance with applicable state laws.

Godfrey & Kahn Take: In light of this development, firms do not need to issue notices rescinding their non-compete clauses, and those that have already done so should work with legal counsel to determine appropriate next steps.

Sources: Breaking: FTC Non-Compete Rule Held Unlawful by Federal Court, G&K Client Alert (Aug. 21, 2024), available here.

COMPLIANCE DATES FOR FINAL RULES

Final Rules	Compliance Dates
Investment Company Names Rule Amendments	Larger fund groups (net assets of $1 billion or more): December 11, 2025. Smaller fund groups (net assets of less than $1 billion): June 11, 2026.
Corporate Transparency Act	Subject entities in existence on January 1, 2024 must file an initial report by December 31, 2024. Entities created on or after January 1, 2024 must file an initial report within 30 days after receiving notice of their creation or registration.
Modernization of Beneficial Ownership Reporting	▪ Schedule 13G filing deadline: September 30, 2024. ▪ Compliance with the structured data requirement: December 18, 2024.
Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information	Rule amendments were effective August 2, 2024, with tiered compliance dates: Larger entities (investment companies with net assets of $1 billion or more, registered advisers with assets under management of $1.5 billion or more, and broker-dealers and transfer agents that are not small entities under the Securities Exchange Act of 1934): December 21, 2025. Smaller entities (covered institutions who do not meet the "larger entity" thresholds): June 21, 2026.
Form N-PORT and Form N-CEN Reporting; guidance on Open-End Fund Liquidity Risk Management Programs*	The final rule is effective November 17, 2025 with tiered compliance dates: Larger entities (funds that, together with other investment companies in the same "group of related investment companies" with net assets of $1 billion or more as of the end of the most recent fiscal year): November 17, 2025. Smaller entities (funds that, together with other investment companies in the same "group of related investment companies" with net assets of less than $1 billion as of the end of the most recent fiscal year.): May 18, 2026.

STATUS OF PROPOSED RULES

Proposed Rules for Funds and Advisers	Status
Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices	The SEC has indicated final rules will be issued in October 2024.
Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies	The SEC has indicated final rules will be issued in October 2024.
Outsourcing by Investment Advisers	The SEC has indicated final rules will be issued in October 2024.
Safeguarding Advisory Client Assets	The SEC indicated a second notice of proposed rulemaking is scheduled for October 2024.
Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers	The SEC indicated a second notice of proposed rulemaking is scheduled for October 2024.
Customer Identification Program Requirements for Registered Investment Advisers and Exempt Reporting Advisers	Comments were due July 22, 2024.

*Discussion included in this IM Update