



## 2022 Third Quarter Newsletter

*Rule Proposals, Risk Alerts, & More for Investment Advisers*

This quarter, the market extended its pullback around the impact of continued inflation and other macroeconomic and political headwinds, which resulted in a third straight quarter of public market declines. SEC Chair Gensler ratcheted up his posture on digital assets and added to his private fund rulemaking agenda with what could result in expanded Form PF reporting, if adopted. A major headline came at the end of the quarter with over \$1 billion dollars of regulatory settlements for violations relating to retention and monitoring of electronic communications, which was foreshadowed in last quarter's bank earnings releases. Other notable SEC enforcement news included continued actions on private fund management fee calculation errors and omnibus settlements around otherwise technical violations involving custody and political contributions, which brings back past-SEC Chair Mary Jo White's "broken windows" approach to enforcement actions post-Dodd Frank. Finally, after an 18-month implementation period, the Marketing Rule compliance date is less than a month away and adding to compliance practitioners' fourth quarter workloads. Let's get into it.

### **This Quarter's Headlines**

#### **SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures**

On September 27, 16 Wall Street broker-dealers agreed to pay a total of more than \$1.1 billion for failures to maintain and preserve records of their employees' electronic communications. In the [ordering release](#), Commissioner Gensler stated that advisers must conduct their business communications on official channels and that those communications must be retained pursuant to recordkeeping requirements under the federal securities laws. He continued, "As part of our examinations and enforcement work, we will continue to ensure compliance with these laws."

#### **Risk Alert: Examinations Focused on the New Investment Adviser Marketing Rule**

On September 19, the SEC's Division of Examinations ("EXAMS") issued a [Risk Alert](#) stating that it was undertaking a number of national examination initiatives focused on amended Advisers Act Rule 206(4)-1 (the "Marketing Rule"). The Staff will review whether advisers (1) have adopted and implemented written policies and procedures reasonably designed to prevent violations of the Marketing Rule, (2) are able to substantiate material statements of fact included in advertising materials, (3) are in compliance with performance advertising requirements, and (4) are meeting the new books and records requirements under the Marketing Rule. The compliance date for the Marketing Rule is November 4, 2022.

#### **SEC Strategic Plan FY 2022-2026**

On August 24, the SEC [published](#) its draft strategic plan for FY 2022 through FY 2026. Among other things, the plan calls for the SEC to improve its data management and analysis capabilities through technology and data analytics, anticipates rule updates to reflect evolving technology and business models, prioritizes proactive engagement on digitization initiatives, and states the Commission's intent to "enhance transparency in private markets."

### **In The Pipeline**

#### **SEC Proposes to Enhance Private Fund Reporting**

On August 10, the SEC and the CTFC jointly proposed another set of [amendments to Form PF](#), which would, among other things, require:

- more detailed information about hedge fund investment strategies, counterparty exposures, and trading and clearing mechanisms;
- additional reporting about private funds, including withdrawal and redemption rights, inflows and outflows, and fund performance; and

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- separate reporting for each component fund in fund structures, such as master-feeder arrangements and parallel fund structures.

### Did You Know?

The SEC oversees \$100 trillion in the US capital markets. This represents 38% of the capital markets worldwide. Annual trading amounts of \$118 trillion in U.S. equity markets, \$2.8 trillion in ETFs, and \$237 trillion in fixed income markets are overseen by the SEC.

## Q3 Key Enforcement Actions and News

### SEC Charges Investment Adviser for its Reliance Upon Third-Party Proxy Voting Services

On September 20, the SEC announced a [settlement](#) with an adviser that had allegedly relied upon a third-party service provider to cast proxy votes without taking steps to determine whether the votes were cast in clients' best interests. While representing to clients in its Form ADV brochure that it "would vote proxies in the best interests of [its] clients," the adviser directed its service provider to vote all securities in favor of management. The SEC alleged that this practice amounted to willful violation of Sections 206(2) and 206(4) of the Advisers Act.

### SEC Charges Four Advisers in "Pay-to-Play" Case

On September 15, the SEC [charged](#) four investment advisers with violating Rule 206(4)-5 of the Advisers Act (the Pay to Play Rule). The prohibited contributions at the four firms, three of which were ERAs, ranged from \$400 to \$1,000 and included contributions to candidates who in some cases were ultimately unsuccessful in their run for office. Additionally, each violation involved advisers who already had established relationships with the government entities prior to the contributions. Following the announcement of charges, Commissioner Hester M. Peirce released a [statement](#) saying the cases did more harm than good and urged the Commission to revisit the Pay-to-Play rule. She said the rule is a "blunt instrument" that does not require evidence of quid pro quo and does not "require any assessment of whether the official receiving the contribution realistically could influence the decision to hire an investment adviser."

### Gary Gensler Testimony Before the U.S. Senate

On September 15, SEC Chairman Gary Gensler [testified](#) before the U.S. Senate Committee on Banking, Housing, and Urban Affairs. Gensler reiterated his view that the "vast majority" of tokens in the crypto market are securities. Thus, offers and sales of these assets must be registered with the Commission or made pursuant to an exemption, and intermediaries facilitating secondary transfers of such assets should register each of their regulated functions. Gensler also highlighted the SEC's need for more resources, citing decreased staffing levels, increased complaints, tips, and referrals, and the 40 percent increase in the number of private funds managed by registered investment advisers.

### SEC Charges RIA for Charging Undisclosed Fees to Funds

On September 12, the SEC announced a [settlement](#) with an adviser after it allegedly charged certain services to its funds on a cost-plus margin basis. As a limited partnership, the adviser's tax liability was payable by its founder; however, the SEC alleged that the adviser included the anticipated U.S. income tax liability of its founder as a cost component of its ancillary and underwriting fees to the funds without disclosure to fund investors.



### **SEC Charges Two Advisory Firms for Custody Rule Violations, One for Form ADV Violations, and Six for Both**

On September 9, the SEC announced [charges](#) against a number of private-fund advisers that either (1) failed to have audits performed and delivered to investors in a timely manner as required under Rule 206(4)-2, or, (2) had completed Section 7.B.1, Question 23(h) of Form ADV Part 1A to indicate that their private fund audit reports had not yet been received and then failed to update their response once they received the audited financial statements.

### **SEC Charges ERA for Overcharging Management Fees**

On September 2, the SEC [settled](#) charges against a venture capital fund adviser that had allegedly overcharged management fees due to, among other things, its incorrect use of capital commitments as the basis for management fees during a portion of the post-commitment period and its failure to account for portfolio company write-downs in fee calculations as required under its limited partnership agreements.

### **SEC Charges Hedge Fund Adviser for Breaches of Fiduciary Duties When Redeeming Two University Clients**

On August 3, the SEC [charged](#) an adviser for breaches of its fiduciary duties arising from its handling of redemptions for two university endowments, which sought to fully redeem their investments. The redemption represented 18% of the Adviser's more than \$3 billion in assets under management. The order finds that the adviser did not seek to liquidate, in a reasonable manner, certain illiquid securities held by both clients.

### **FINRA Reminds Firms of Their Obligation to Supervise Digital Signatures**

On August 3, FINRA released a [Regulatory Notice](#) highlighting the obligation of firms to supervise for digital signature forgery and falsification. The notice mentioned instances of firms digitally signing forms on behalf of customers and signing internal firm documents on behalf of another person.

### **SEC Charges Former Coinbase Manager, Two Others in Crypto Asset Insider Trading Action**

On July 21, the SEC announced [insider trading charges](#) against a former Coinbase employee, his brother, and his friend for an alleged long-running insider trading scheme that generated illicit profits totaling more than \$1.1 million. The former Coinbase employee helped to coordinate public listing announcements that included which crypto assets or tokens would be added to the widely used trading platform.

## **Q4 Upcoming Key Reporting and Disclosure Deadlines**

<b>October 14</b>	Form PF for Large Liquidity Fund Advisers
<b>October 30</b>	Employees' Transaction Reports Due for Q3 2022
<b>November 4</b>	Marketing Rule Compliance Date
<b>November 14</b>	Form 13F Quarterly Filing Due for Q3 2022
<b>November 29</b>	Form PF Due for Large Hedge Fund Advisers
<b>December 12</b>	Payment for Annual Renewal Program for IARD System

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### About HighCamp Compliance

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