Fiduciary Obligations for Identifying, Managing, and Disclosing Conflicts of Interest

Investment Adviser Association 2023 Compliance Workshops
(Virtual, Boston, New York, Chicago)
September 1, 2023 for Fall 2023 Workshops

A. Valerie Mirko, Partner &
Co-leader Securities Regulation and Litigation Practice, Armstrong Teasdale LLP[1]

Margaret Mudd, Partner
Armstrong Teasdale LLP

Under federal law, an investment adviser is a fiduciary to its clients, owing both a duty of care and duty of loyalty under the Investment Advisers Act of 1940 (the "Advisers Act").[2] Conflicts of interest—specifically, identifying, managing and disclosing conflicts of interest—have long been at the core of upholding the duty of loyalty component of the fiduciary duty standard under the Advisers Act.[3] In recent years, the U.S. Securities and Exchange Commission ("SEC" or the "Commission") and its staff have provided a Commission-adopted interpretation[4] (the "Interpretation"), additional staff guidance focused on financial conflicts of interest[5] (the "2019 Guidance") and a more recent staff bulletin further addressing standards of conduct for conflicts of interest[6] (the "Conflicts Staff Bulletin"). As discussed further below, the 2019 Guidance substantiates (and to some degree legitimizes) the positions previously articulated in the course of SEC examinations and enforcement actions. More recent guidance further legitimizes these positions. In this document, we summarize the Interpretation, the 2019 Guidance, the Conflicts Staff Bulletin, and certain other relevant regulatory developments and enforcement actions.[7] We note that, as expected, conflicts of interest have remained a priority for the SEC's examinations and enforcement programs. Significantly, more recent SEC staff guidance regarding or expanding the Interpretation (including the Conflicts Staff Bulletin) is not usually standalone guidance, but rather

---

[1] This material is provided for informational purposes only and does not constitute legal advice or create an attorney-client relationship. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.
[2] This discussion focuses solely on the fiduciary duty standard for SEC-registered investment advisers. We note that the fiduciary duty state-registered investment advisers owe their clients is largely similar, but individual state rules, usually based on the NASAA Dishonest and Unethical Practices for Investment Advisers, can provide added guidance and variations from federal fiduciary duty requirements.
[3] *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 194 (1963) ("*SEC v. Capital Gains*").
[4] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248, 84 FR 33669 (Jul. 12, 2019) (the "Interpretation").
[5] Frequently Asked Questions Regarding Disclosure of Certain Financial Conflicts Related to Investment Adviser Compensation, Oct. 18, 2019, available at https://www.sec.gov/investment/faq-disclosure-conflicts-investment-adviser-compensation (the "2019 Guidance").
[6] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, Aug. 3, 2022, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest (the "Conflicts Staff Bulletin").
[7] While recent developments regarding conflicts of interest have an increased focus on the duty of care, we have addressed the duty of care solely when the SEC or its staff have attempted to tie the duty of care into the duty of loyalty and conflicts of interest. For additional developments on the staff's position on the duty of care, see Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Adviser Care Obligations (Apr. 20, 2023), available at https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers. This is an evolving area of interpretation—and eventually potentially litigation—and additional developments will likely have occurred since the date of this document. See *infra* note 32 for a related discussion on the duty of care. We also note that the bulk of the SEC guidance and enforcement orders in this area of the law are focused on investment advisers who have retail clients as opposed to private fund advisers.

combined with guidance on Regulation Best Interest[8], the broker-dealer standard of care adopted in 2019. Therefore, more recent guidance must be read critically in the context of the Interpretation and the SEC's historical approach to investment adviser regulation.

The SEC's focus on conflicts of interest was extensively demonstrated during the SEC's Share Class Selection Disclosure Initiative (the "SCSD Initiative"), an initiative well known throughout the industry. The SCSD Initiative incentivized investment advisers to self-disclose conflicts of interest in relation to 12b-1 fees. The SCSD Initiative initially officially wrapped up on April 17, 2020[9] and resulted in firms being ordered to return almost $140 million to investors. Since the SCSD Initiative, the Division of Enforcement has brought additional enforcement matters focusing on selection practices, revenue sharing schemes, and financial entanglements such as loans (see *infra* Section 2).

Such large-scale enforcement actions are usually accompanied with complementary priorities arising out of the SEC's Division of Examinations ("Division of Examinations"). While conflicts of interest are a perennial Division of Examinations' area of focus, we note that the Division's 2023 Examinations Priorities specifically highlighted conflicts of interest:

> The Division will continue to prioritize examinations of broker-dealers and RIAs for compliance with their applicable standard of conduct. . . . [I]n the case of RIAs, examiners will review whether the conflicts of interest disclosures are sufficient such that a client can provide informed consent to the conflict, whether express or implied.[10]

While the SEC has been especially active in the conflicts of interest area in recent years—in the regulatory, examinations and enforcement areas—the long-standing obligations of investment advisers have kept conflicts of interest a constant living issue for investment advisers and the SEC. The renewed SEC interest is an opportunity for investment adviser registrants to re-examine their conflicts of interest policies, procedures and practices, as identifying, managing and disclosing conflicts remain a front and center concern for investment advisers.

> Under [both] Reg BI and the IA fiduciary standard, a conflict of interest is an interest that might incline a broker-dealer or investment adviser—consciously or unconsciously—to make a recommendation or render advice that is not disinterested. The staff believes that identifying and addressing conflicts should not be merely a "check-the-box" exercise, but a robust, ongoing process that is tailored to each conflict. It is therefore important that firms and their financial professionals review their business models and relationships with investors to address conflicts of interest specific to them.[11]

[8] Regulation Best Interest: *The Broker-Dealer Standard of Conduct*, Exchange Act Release No. 86031, 84 FR 33318 (Jul. 12, 2019); Form CRS Relationship Summary; *Amendments to Form ADV*, Exchange Act Release No. 86032, Investment Advisers Act Release No. 524784 FR 33492, 33501 (Jul. 12, 2019) ("Form CRS Adopting Release"); the Interpretation *supra* note 4; *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, Investment Advisers Act Release No. 5249, 84 FR 33681 (Jul. 12, 2019) ("Commission Interpretation Regarding the Solely Incidental Prong"). Note that we do not address Form CRS in this document but that is does contain questions that should elicit certain conflicts of interest. Investment advisers can generally draw from their Form ADV Part 2A to answer Form CRS, which is the Client Relationship Summary and is also known as Form ADV Part 3.

[9] SEC Press Release, *SEC Orders Three Self-Reporting Advisory Firms to Reimburse Investors* (Apr. 17, 2020) ("April 17th SEC Order"), available at https://www.sec.gov/news/press-release/2020-90.

[10] SEC, Division of Examinations, 2023 Examination Priorities (Feb. 7, 2023), available at https://www.sec.gov/files/2023-exam-priorities.pdf.

[11] The Conflicts Staff Bulletin, *supra* note 6.

While outside of the scope of this outline, the Commission has proposed new rules and amendments to address certain conflicts of interest that stem from the use of predictive data analytics.[12] We note that this proposal, while styled as focused on predictive data analytics, would actually threaten to upend longstanding policy positions—including the Commission's own Interpretation—regarding mitigation of conflicts in accordance with the fiduciary duty standard applicable to investment advisers.

1. The Advisers Act, Fiduciary Duties & Conflicts of Interest

a) The Regulatory Landscape for Conflicts of Interest Prior to 2019

Under federal law, an investment adviser is a fiduciary. The fiduciary duty an investment adviser owes to its client under the Advisers Act comprises a duty of care and a duty of loyalty,[13] but also draws from equitable common law principles.[14] The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship,[15] though the duty is not defined with any specificity in the Advisers Act or in Commission rules. Rather it is enforced through Sections 206(1) and 206(2) of the Advisers Act, part of the antifraud provisions held in Section 206 generally.[16] Furthermore, fiduciary duty reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[17] Until the Commission adopted the Interpretation in June 2019, fiduciary duty under the Advisers Act was derived from common law and defined through Section 206(1) and 206(2) enforcement matters, various Commission pronouncements in the context of Advisers Act rulemaking,[18] and the instructions to Form ADV. Notably, pursuant to current Form ADV instructions—adopted prior to the Interpretation—an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship, including a full disclosure of all material conflicts of interest.[19]

b) Summary: The June 2019 Commission Interpretation

As part of the Regulation Best Interest rulemaking (proposed in 2018,[20] adopted in 2019[21]), the SEC proposed and ultimately adopted the Interpretation, which purported to consolidate and reaffirm aspects

---

[12] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 FR 53960 (Jul. 9, 2023), available at https://www.sec.gov/rules/proposed/2023/34-97990.pdf.
[13] The Interpretation, *supra* note 4; see also *SEC v. Capital Gains*, *supra* note 3.
[14] *SEC v. Capital Gains*, *supra* note 3 (addresses the legislative and prior case law history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, noting that Congress recognized the investment adviser to be a fiduciary).
[15] The Interpretation, *supra note* 4, at 33670.
[16] *SEC v. Capital Gains*, *supra* note 3; *see also Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 17 (1979) ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.").
[17] *SEC v. Capital Gains*, *supra* note 3; *see also In the matter of Arleen W. Hughes*, Exchange Act Release No. 4048 (Feb. 18, 1948).
[18] *See e.g.*, Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106, 68 FR 6585 (Feb. 7, 2003).
[19] General Instruction 3 to Part 2 of Form ADV ("Under federal and state law, you are a fiduciary and must make full disclosure to your *clients* of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of interest with your *clients*, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship.").
[20] Regulation Best Interest, Exchange Act Release No. 83062, 83 FR 21574 (May 9, 2018); Proposed Commission Interpretation Regarding Standard of Conduct for Investment, Investment Advisers Act Release No. 4889, 83 FR 21203 (May 9, 2018); Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions in the Use of Certain Names or Titles, Exchange Act Release No. 83063, 83 FR 21416 (May 9, 2018).
[21] Regulation Best Interest: The Broker-Dealer Standard of Conduct, Investment Advisers Act Release No. 34-86031, 84 FR 33318 (July 12, 2019); Form CRS Relationship Summary; Form CRS Adopting Release, *supra* note 8; the Interpretation, *supra* note 4; Commission Interpretation Regarding the Solely Incidental Prong, *supra* note 8.

of fiduciary duty investment advisers owe their clients under section 206 of the Advisers Act. Both the comment process on the proposal and the commentary surrounding the adoption of the Interpretation uncovered confusion and disagreement among stakeholders regarding the purpose of the rulemaking and whether it reshaped fiduciary duty for investment advisers.[22] However, the Commission did note in the Interpretation that "[w]e stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes to its clients under section 206 of the Advisers Act."[23] And, while the Interpretation highlights principles relevant to an adviser's fiduciary duty, it is expressly *not* intended to be the sole authority on fiduciary duty, or replace authority pre-dating the Interpretation.[24]

The Commission specifically articulated the adviser's *fiduciary duty* in the Interpretation as follows:

> [An adviser's fiduciary duty] means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the 'best interest' of its client at all times… In our view, an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty.[25]

The Interpretation provides a discussion of both the duty of care and the duty of loyalty, as well as the overarching duty to act in the best interest of clients. The duty of care discussion focuses largely on (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.[26] The duty of loyalty discussion in the Interpretation is instructive with regard to conflict disclosure and mitigation, as described below.

c) The Interpretation's Discussion Regarding the Duty of Loyalty and Conflicts of Interest

i. Key Points

The Interpretation's approach to the duty of loyalty focuses on the requirement that an adviser not subordinate its clients' interests to the adviser's own interest. To uphold its duty, an adviser must make full and fair disclosure of its conflicts of interest—with the Interpretation adding some nuances to what constitutes a conflict—and ensure that the conflicts do not taint the advice. The Interpretation, while reaffirming the special relationship of trust and confidence an adviser has with its clients, does introduce a slight nuance as compared to the pre-Interpretation conflicts disclosure regulatory paradigm. As held in the current Form ADV instructions, historically the SEC has required that only material conflicts be

---

[22] See e.g., Rick Fleming, Investor Advocate, SEC, Statement Regarding the SEC's Rulemaking Package for Investment Advisers and Broker-Dealers (Jun. 5, 2019), available at https://www.sec.gov/news/public-statement/statement-regarding-sec-rulemaking-package-investment-advisers-broker-dealers.

[23] The Interpretation, *supra* note 4, at 33670.

[24] *Id.*, at note 3 ("This Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 ('ERISA')), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.").

[25] *Id.*, at 33671.

[26] *Id.*, at 33672-33674.

disclosed. However, the threshold standard for disclosure in the Interpretation does not include materiality, using instead the concept of whether the conflict might cause an investment adviser to provide advice that is not disinterested, whether that inclination is conscious or unconscious.

A separate but closely related concept within the Interpretation's discussion of disclosure of conflicts is the disclosure of all material facts relating to the advisory relationship, including capacity in which the advice is provided—particularly relevant to dual broker-dealer/investment adviser registrants—and any limited menus of product (securities) offerings. Applying this technical nuance within the context of a compliance program requires a fact-and-circumstances analysis tailored to the conflicts of an individual investment adviser.

We include below, in our discussion on informed consent, the Interpretation's brief engagement with the concept of mitigation. Specifically, while the Interpretation does not itself create an obligation to eliminate or mitigate conflicts, there is a strong suggestion that elimination or mitigation may be required if an adviser cannot disclose sufficiently to obtain informed consent. We note that, more generally, while the Advisers Act fiduciary standard is a disclosure regime, identifying and managing conflicts can sometimes require elimination or mitigation, based on the facts and circumstances surrounding the conflict and the type of client affected by the conflict. The Interpretation notes specifically that for retail clients, it may be difficult for advisers to provide disclosure that is both specific and understandable.

ii. The Interpretation's Discussion Regarding Effective Disclosure

The Interpretation includes a discussion of the necessary components to ensure disclosure is effective and can be used to uphold fiduciary duty.

- Full and fair disclosure: To be full and fair, disclosure should be sufficiently specific such that the client can understand the conflict and make an informed decision whether to provide consent. For example, it is inadequate to disclose that the investment adviser has "other clients" without describing how conflicts between clients will be managed. It is also inadequate to disclose that the adviser has "conflicts" without further describing what these conflicts are.

- Avoid may-based disclosures: The Interpretation notes that disclosure that an adviser "may" have a conflict is not sufficient if the conflict actually already exists. The Interpretation also notes that "may"-based disclosures risk "obfuscating" actual existing conflicts. However, may-based disclosure remain appropriate where the disclosure identifies a potential conflict that does not currently exist but might reasonably present itself in the future. An adviser should not use "may" to explain that a conflict exists only with respect to a subset of clients or services it provides, unless an adviser specifies the subset of clients/services where conflict applies. This area of the Interpretation is further reinforced in the 2019 Guidance, described below.

- Informed consent: The Interpretation's discussion of informed consent does not require an affirmative determination that a client understood the disclosure. Rather, informed consent can be implicit or explicit. However, the Interpretation emphasizes that it is improper to infer consent where an adviser "reasonably should have been aware" that the client did not understand the nature and import of conflict. The Interpretation further notes that if the adviser cannot fully and fairly disclose a complex or extensive conflict, the adviser should (i) eliminate the conflict, or (ii) mitigate the conflict such that disclosure and informed consent are possible. The Interpretation also notes that for retail clients, full and fair disclosure of complex or extensive conflicts may be difficult.

d) The 2019 Guidance: SEC Staff from the Division of Investment Management Address Financial Conflicts of Interest in FAQ

On October 18, 2019, just a few months after the Commission adopted the Interpretation and the first phase of SCSD Initiative cases were settled, the Division of Investment Management issued staff guidance, in the form of an FAQ, regarding disclosures of certain financial conflicts related to investment adviser compensation. As noted above, the 2019 Guidance substantiates—and somewhat legitimizes—the positions previously articulated in the course of SEC examinations and enforcement actions. Looking ahead, the 2019 Guidance also indicated that the SEC staff—across divisions—will continue to expand its focus beyond 12b-1 fees and revenue sharing to evaluate how investment advisers manage conflicts of interest associated with the receipt of compensation from investments the advisers recommend to their clients. Therefore, while references to the staff in our discussion on the 2019 Guidance refer to the staff of the Investment Management Division, advisers should note that the staff positions in the 2019 Guidance are aligned with the perspectives of a broader cross-section of SEC staff, including the Division of Examinations and the Division of Enforcement.

i. Highlights of the 2019 Guidance

The 2019 Guidance is notable in that this was the first time the staff of the Division of Investment Management affirmatively addressed disclosure obligations core to the SCSD Initiative cases, including SEC examinations and enforcement actions preceding and resulting from the SCSD Initiative. Accordingly, advisers should use this as an opportunity to review and enhance their disclosure about financial conflicts of interest. Although the 2019 Guidance does not alter or amend applicable law, nor does it have legal force or effect, adviser should consider the guidance, particularly with regard to the following concepts: all direct and indirect compensation, types of investments, and disclosure.

With regard to all direct and indirect compensation, the 2019 Guidance crystallizes that the staff's focus will extend beyond disclosure of conflicts of interest associated with the receipt of 12b-1 fees and revenue sharing. Rather, the 2019 Guidance makes clear that "many of the same principles and disclosure obligations [of 12b-1 fees and revenue sharing] apply to other forms of compensation," including service fees from clearing brokers, marketing support payments, compensation designed to defray the cost of educating and training sales personnel, and transaction fees. Importantly, the staff refers to "compensation" broadly to include the reduction or avoidance of expenses that the investment adviser incurs or would otherwise incur. The 2019 Guidance also requires thoughtfulness with regard to all investments. While much of the compensation referenced in the 2019 Guidance is related to the offering of mutual funds, the staff does not limit the discussion to mutual funds, rather it refers to "investments" broadly.

The 2019 Guidance also includes a warning that additional disclosure may not necessarily cure conflicts. Consistent with the direction the Commission has taken with regards to disclosure writing in recent years,[27] the staff makes clear in the 2019 Guidance that it expects Form ADV disclosure to be "concise, direct, appropriate to the level of financial sophistication of the adviser's clients and written in plain English. As a result, longer disclosures may not be better disclosures."[28] The 2019 Guidance therefore includes a warning that simply adding more disclosure will not address the staff's concerns, favoring

[27] See e.g., Form CRS Adopting Release, *supra* note 8 (The Form CRS "instructions state that the relationship summary should be concise and direct, and firms must use plain English and take into consideration retail investors' level of financial experience, as proposed").
[28] 2019 Guidance, *supra* note 5.

instead a focus on developing disclosure that is specific enough to explain whether and how the conflict could affect the advice a client receives.

The 2019 Guidance addresses the importance of an investment adviser being proactive while providing much-needed forward-looking guidance. We note one of the criticisms of the SEC staff's positions in the SCSD Initiative cases was that the SEC was evaluating disclosure with the benefit of hindsight, but that the staff of the Division of Investment Management had never precisely articulated principles that investment advisers should follow when seeking to satisfy their fiduciary obligation to disclose financial conflicts of interest under Section 206. Through the 2019 Guidance, the staff has now provided affirmative guidance, and it will be difficult to defend in examinations or enforcement investigations in the future if disclosure does not conform to the disclosure points referenced in the 2019 Guidance to the extent relevant to the adviser's business practices.

ii. The 2019 Guidance Addresses Disclosure of Material Facts

The 2019 Guidance provides examples of material facts that the staff believes should be disclosed in connection with the receipt of 12b-1 fees and revenue sharing payments. This list is not intended to be comprehensive, so advisers should consider whether they need to disclose different or additional facts depending on the firm's particular circumstances.

- Disclose the existence and effect of different incentives and resulting conflicts:
  - The fact that different share classes are available and that different share classes of the same fund represent the same underlying investments.
  - How differences in sales charges, transaction fees and ongoing fees would affect a client's investment returns over time.
  - The fact that the adviser has financial interests in the choice of share classes that conflict with the interests of its clients.
  - Any agreements to receive payments from a clearing broker for recommending particular share classes (e.g., no transaction fee mutual fund share classes or 12b-1-fee-paying share classes).
- Disclose the nature of the conflict:
  - Whether the conflict arises from differences in the compensation the adviser and its affiliates receive, or results from financial incentives shared between the adviser and others (e.g., clearing brokers, custodians, fund investment advisers, or other service providers). These financial incentives might include offsets, credits, waivers of fees and expenses. In the case of revenue sharing arrangements, these incentives could also include the receipt of payments and expense offsets from a custodian for recommending that the adviser's clients maintain assets at the custodian.
  - Whether there are any limitations on the availability of share classes to clients that result from decisions or relationships at the adviser or its service providers (e.g., where the clearing firm only makes certain share classes available, the fund or clearing firm has minimum investment requirements, or the adviser limits investment by type or class of clients, advice, or transactions).

- Whether an adviser's share class selection practices differ when making an initial recommendation to invest in a fund as compared to recommendations to convert to another share class, or buy additional shares of the fund. For example, the adviser could consider disclosing its practices for reviewing, in conjunction with its periodic account monitoring, whether to convert mutual fund investments in existing or acquired accounts to another share class.

- Disclose how the adviser addresses the conflict:
  - The circumstances under which the adviser recommends share classes with different fee structures and the factors that the adviser considers in making recommendations to clients (e.g., considerations associated with selecting between share classes that charge 12b-1 fees or transaction fees).
  - Whether the adviser has a practice of offsetting or rebating some or all of the additional costs to which a client is subject (such as 12b-1 fees and/or sales charges), the impact of such offsets or rebates, and whether that practice differs depending on the class of client, advice, or transaction (e.g., retirement accounts).

The 2019 Guidance also noted that in making disclosure determinations, an adviser needs to look both to "the specific disclosure requirements in Form ADV" as well as broader, general, disclosure obligations as a fiduciary. The 2019 Guidance did not expound on this latter point, but it serves as a reminder to advisers that during any examination or enforcement investigation, the staff will review Form ADV disclosures in a non-formulaic fashion and disclosures should be drafted and reviewed accordingly.

iii. The 2019 Guidance Emphasizes the Importance of Avoiding May-Based Disclosures

The 2019 Guidance reiterated the Interpretation's position that disclosure that an adviser "may" have a conflict of interest is not sufficient if the conflict actually exists. Here, the conflict would result from the receipt of compensation, whereas the Interpretation took a broader approach to the deficiencies of may-based disclosures. Compensation differential as a result of different share classes was a central point of contention in evaluating the adequacy of disclosure in the SDSC Initiative and related mutual fund share class cases. In this regard, the 2019 Guidance is consistent with the Interpretation, which warned that "may"-based disclosure could be appropriately used only in cases where the disclosure identifies a potential conflict that does not currently exist but might "reasonably present itself in the future." According to the Interpretation, investment advisers should not use "may" to explain that a conflict exists only with respect to a subset of clients or services it provides, unless the "may"-based disclosure specifies the subset of clients or services where the conflict applies. In the SEC's view, "may"-based disclosure that precedes a list of all possible or potential conflicts regardless of likelihood has the effect of "obfuscating" actual conflicts to a point that clients cannot provide informed consent.

iv. The 2019 Guidance Provides Further Clarification Regarding Available Share Classes and Account Monitoring

When evaluating the presence of a conflict of interest advisers are required to consider the "available" share classes. The 2019 Guidance clarified that references to "available" share classes means all share classes offered by the fund for which the client is eligible (based on, for example, minimum investment amounts) at the time of a recommendation, "except to the extent the adviser or the adviser's service

provider imposes limitations on the availability of a share class to certain types of clients and the adviser provides full and fair disclosure and receives informed consent from the client with respect to those limitations." In doing so, the staff clarified in the 2019 Guidance that advisers can limit the universe of funds they consider in making investment recommendations to those funds available on the clearing firm's platform or to particular classes of shares that the adviser decides to offer to its clients, so long as those limitations are clearly disclosed in a manner that is specific enough to meet the standard for informed consent under the Interpretation.

In clarifying this position, however, the staff also noted that eligibility for a particular share class is evaluated at the time of a recommendation "including a recommendation to continue holding current investments." Accordingly, the 2019 Guidance suggests that advisers that have an ongoing relationship with their clients should reevaluate whether a particular share class continues to be appropriate for a client over time consistent with the adviser's periodic account monitoring responsibility, and should consider whether to convert existing or new positions to a lower cost share class. This would be the case regardless of whether the adviser made the initial recommendation with respect to the investments in the account.

e) Staff Bulletin: Account Recommendations[29]

Conflicts of interest can arise outside of investment fees and other direct financial incentive. In the Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors (the "Account Recommendation Bulletin"), the staff addressed conflicts of interest associated with account type recommendations.[30] As part of the staff's recommendations, the staff provided the following, non-exhaustive list of practices for investment advisers seeking to meet their conflicts of interest obligations:

- Avoid compensation thresholds that disproportionately increase compensation through openings of certain account types;
- Adopt and implement policies and procedures reasonably designed to minimize or eliminate incentives, including both compensation and non-compensation incentives, for employees to favor one type of account over another;
- Implement supervisory procedures to monitor recommendations that involve the roll over or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA); and
- Adjust compensation for financial professionals who fail to adequately manage conflicts of interest associated with account recommendations.[31]

We note that certain of these practices are more applicable to dual registrants or investment advisers with broker-dealer affiliates. Furthermore, while not required by the Account Recommendation Bulletin, the staff encouraged firms to "eliminate or mitigate any incentive that pose[d] a risk of causing the firm or its financial professionals to place their interests ahead of the retail investor's interest." Accordingly, the bulletin demonstrates a clear preference for mitigating or eliminating conflicts of interest. We also

[29] As noted in the introduction, more recent SEC staff guidance regarding or expanding the Interpretation is not usually standalone guidance, but rather combined with guidance on Regulation Best Interest. Therefore, more recent guidance must be read critically in the context of the Interpretation and the SEC's historical approach to investment adviser regulation.
[30] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors (Mar. 30, 2022), available at https://www.sec.gov/tm/iabd-staff-bulletin (the "Account Recommendations Bulletin").
[31] Account Recommendations Bulletin, *supra* note 30, question 7.

see how staff guidance regarding conflicts has become more granular, where mitigation is heavily emphasized as opposed to being implied within conflicts disclosure and elimination, which was historically how the SEC staff has handled this issue. This evolution was also apparent in the comment process for both the Interpretation and Regulation Best Interest (see discussion above, pages 3-4), where guidance for the later has been more granular with regard to conflicts mitigation and elimination.

f) Staff Bulletin: SEC Staff Addresses Standards of Conduct for Conflicts of Interest

On August 3, 2022, the SEC staff issued the Conflicts Staff Bulletin with the narrative that the staff was reiterating its own interpretation of standards of conduct for both broker-dealers and investment advisers. While this new guidance addresses conflicts both under Regulation Best Interest for broker-dealers and fiduciary standards for investment advisers, it provides insight into how the staff is planning to treat conflicts issues in future exams. This bulletin notes that identifying and addressing conflicts of interest is an ongoing process that needs to be tailored to each conflict and further emphasizes that following industry practice is not sufficient to mitigate conflicts of interest, though we note that there may be a disconnect between the staff's understanding of how industry practice regarding conflicts includes both mitigation and elimination. Investment advisers should be mindful, in applying the guidance in this bulletin, to ensure that existing practices are evaluated against the bulletin and well documented, in addition to considering new practices.

Furthermore, the bulletin highlight the staff's belief that conflicts of interest undermine an investment adviser's obligation to provide advice and recommendations in the best interest of retail investors, which flows from the duty of care. This intermingling of the duty of loyalty (and conflicts of interest) with the duty of care is a theme that we continue to see and is a departure from how the Advisers Act fiduciary duty has been understood and applied by the SEC until recent years. As noted immediately in our introduction, as well as immediately below (and in footnotes 7 and 32), this is an area of flux. Furthermore, investment advisers should be aware of this area of flux when making risk-based decisions in managing their conflicts and making decisions on disclosures, whether those disclosures are to address a conflict to uphold the duty of loyalty, or to provide disclosures more generally, which could implicate the duty of care.

Importantly, while the bulletin provides an indication of the staff's current viewpoint, staff bulletins are not subject to notice and comment and therefore are staff-level guidance and not a Commission rule, regulation or statement of the Commission. The bulletin itself mentions that it has not been approved or disapproved of by the Commission and that staff statements "create no new or additional obligations of any person." Many components of the bulletin are specifically qualified as being "in the staff's view" or that "the staff believes" a particular interpretation, which indicate that the staff is aware that some of the guidance is not settled law as is highlighted by a recent dissenting statement in an enforcement matter that is a later generation SCSD matter.[32]

---

[32] For example, a recent dissenting statement from SEC commissioners Hester Peirce and Mark Uyeda questioned finding a violation of the duty to seek best execution under the duty of care in a case regarding share class selection practices. See Comm'rs Hester M. Peirce and Mark T. Uyeda, *Statement Regarding Huntleigh Advisors, Inc. and Datatex Investment Services, Inc.*, SEC (Feb. 27, 2023) (the "Huntleigh Dissent"), available at https://www.sec.gov/news/statement/peirce-uyeda-statement-huntleigh-datatex-022723.

While the duty of care has increasingly become part of the discussion on conflicts of interest, the way in which it is incorporated is shifting. In an enforcement action against two affiliated registered investment advisers (*In the matter of Huntleigh Advisors, Inc. and Datatex Investment Services Inc.*, Investment Advisers Act Release No. 6251 (Feb. 27, 2023)), the SEC found that both firms "failed to provide full and fair disclosure regarding their conflicts of interest" in connection with selection of share classes of mutual funds for their clients and

i. Conflict Inventories

Conflicts of interests are largely unavoidable for investment advisers and, as a result, creating conflicts inventories is a long-standing industry practice, pre-dating the Interpretation or this bulletin. However, the Conflicts Staff Bulletin provides a non-exhaustive list of steps to identify conflicts, noting it is applicable to both broker-dealers and investment advisers. With regard to investment advisers, the bulletin provides a window into the type of checklist and approach that the staff will use in assessing conflicts reviews during future exams. This in turn is helpful to investment advisers that may not have refreshed their conflicts process in recent years. The bulletin includes the following steps/checklist for conflict inventories:

- define conflicts in a manner that is relevant to the firm's business, including conflicts of the firm, its financial professionals and any affiliates (who may have their own independent conflicts in addition to those shared with the firm), and in a way that enables appropriate personnel, including compliance professionals, to understand and identify conflicts of interest;
- define conflicts in a manner that includes conflicts that arise across the scope of advice or recommendations associated with the relationship with the retail investor (such as conflicts associated with account recommendations; allocation of investments among accounts; allocation of investment opportunities among retail investors, such as initial public offering allocations; and cash management services);
- establish a process to identify the types of conflicts that the firm and its financial professionals may face and how such conflicts might impact advice or recommendations;
- provide for an ongoing (for example, based on changes in the firm's business or organizational structure, changes in compensation structures, and introduction of new products or services) and regular, periodic process to identify conflicts associated with the firm's business; and
- establish, and publish internally or otherwise communicate, training programs regarding conflicts of interest, including conflicts associated with the firm's financial professionals (both within and outside the financial professionals' association with the firm) and any affiliates, and how to identify such conflicts of interest, as well as

---

resulting transaction fees on certain accounts. But in addition to findings of disclosure deficiencies, the Commission also found that they breached their "duty to seek best execution" by failing to evaluate the reasonableness of certain transaction fees and default sweep accounts.

In the Huntleigh Dissent, Commissioners Peirce and Uyeda objected to what they believe to be an unwarranted application of the duty of best execution to mutual fund share class selection. They agreed with the premise that the advisers in question may have faced a conflict of interest, but they took the position that the Commission's Order overreaches and "create[d] novel regulatory interpretations through enforcement" because "there is no legal authority cited in the Commission Order for the finding that mutual fund share class selection implicates an investment adviser's duty to seek best execution."

The commissioners further noted that the decision to link the duty of best execution with the duty of care contradicts another recent Commission order which found that a failure to seek best execution was a violation of the duty of loyalty. Overall, the dissenting statement expressed concerns about the confusion in recent cases regarding the classification and enforcement of the duty to seek best execution and other standards of adviser conduct within both the duty of loyalty and the duty of care. Ultimately, the commissioners argued, "[i]f the Commission's interpretations regarding an adviser's standard of conduct are to have any meaning, the different categories of duties and the corresponding conduct that those duties implicate must be respected." Not only does this failure to clearly interpret the relevant statutory provisions undermine the Commission's authority, it "has detrimental consequences for all regulated entities." *See the* Huntleigh Dissent.

defining employees' and financial professionals' roles and responsibilities with respect to identifying such conflicts of interest and bringing any conflicts to management's attention.[33]

ii. Mitigation of Conflicts

Mitigation has historically been an important tool that investment advisers have used when addressing conflicts of interest, even with the Advisers Act disclosure based conflicts model. The Staff Conflicts Bulletin places a greater emphasis on mitigation and elimination of conflicts as important avenues to address conflicts, building on the Account Recommendations Bulletin discussed earlier. Much of this new concepts in the Staff Conflicts Bulletin rests on the staff's interpretation of when mitigation and elimination of conflicts is appropriate, focusing on both Regulation Best Interest and Advisers Act fiduciary duty. For investment adviser conflicts, the staff notes that advisers should eliminate conflicts if full and fair disclosure is difficult given the nature of the conflict. The bulletin goes a step further to claim that conflicts should be eliminated or conflicted/influenced advice or recommendations should be avoided to avoid violating an investment adviser's obligation to act in a retail investor's best interest. The specificity of this bulletin deviates from the historical, and well-established, framework of the Advisers Act disclosure based model. Instead, the bulletin emphasizes that the staff *believes* that conflicts should be eliminated where they cannot be fully and fairly disclosed such that the client can provide informed consent or where the firm is unable to provide advice or recommendations in the retail investor's best interest.[34] While this is not a completely new concept (and was part of the debate in the comment period for the Interpretation), the level of specificity is new. The examples in the Staff Conflicts Bulletin currently defer to a *firm's finding* of whether there is a conflict, but we expect that SEC examinations and enforcement efforts could in the future consider whether a conflict is sufficiently addressed under a disclosure regime or whether additional mitigation or elimination is prudent.

---

[33] The Staff Conflicts Bulletin, *supra* note 6, question 4 (internal citations omitted).

[34] When discussing the relevant factors to mitigation, the staff believes that the following are relevant to the nature and significance of incentives:

- the sources of the firm's compensation, revenue, or other benefits (financial or otherwise), whether or not it receives them directly from the retail investor;
- the extent to which a firm's revenues vary based on the type of account, products (including but not limited to share classes recommended), services recommended, or AUM;
- whether or not the firm or its affiliates recommend or provide advice about proprietary products;
- the extent to which the firm uses incentives to encourage financial professionals to recommend or provide advice about accounts or investment products that are more profitable for the firm;
- the extent to which the compensation of financial professionals varies based on the investment product recommended (e.g., variable compensation for similar securities);
- the nature of the payment structure for financial professionals (e.g., whether retrospective, the steepness of the increases between levels);
- the size or structure (e.g., broker-dealer, investment adviser, or dual registrant) of the firm or if the firm's financial professionals are dually licensed or engage in activities outside of the firm;
- whether the firm shares dually licensed financial professionals with affiliates or third parties;
- retail investor base (e.g., diversity of investment experience, total assets, and financial needs); and
- the complexity of the security or investment strategy involving securities that are recommended.

Id., question 17 (internal citations omitted). These factors are largely relevant to broker-dealers and dual registrants but are indicative of the staff's current focus on mitigation and stated preferences. These factors may be helpful to firms who are seeking to assess the severity of a conflict of interest.

While this bulletin indicates a staff preference for mitigation or elimination of conflicts, it stops short of requiring mitigating or elimination of conflicts. Instead, firms should consider mitigation or elimination of a conflict as part of their strategies when addressing conflicts of interest. Documenting these considerations help demonstrate that firms have a reasonable basis for believing that any recommendation or advice is in the best interest of a retail investor or that a particular conflict may be appropriately addressed through full and fair disclosure, mitigation or some other means (e.g. relying on product disclosures).

As examples of mitigation, the staff provides in this bulletin a number of possible mitigating efforts, including the following:

- minimizing compensation incentives for financial professionals to favor one type of account over another, or to favor one type of product over another (e.g., products that provide third-party compensation, such as revenue sharing, proprietary or preferred provider products, or comparable products sold on a principal basis), for example by basing differential compensation on neutral factors;
- implementing supervisory procedures to monitor recommendations or ongoing advice that result in additional compensation that: is near compensation thresholds; is near thresholds for firm recognition; or involve higher compensating products, proprietary products, or transactions that provide more compensation to the firm or financial professional;
- adjusting compensation for financial professionals who fail to manage their conflicts of interest adequately and to bring any conflicts to management's attention; and
- providing training and guidance to financial professionals on evaluating, selecting, and, as required, monitoring investments in the best interests of retail investors.

While these efforts are not specifically required, these potential mitigation steps are helpful insight into particular areas of focus for the staff and illustrate that mitigation steps may result in a firm putting additional restrictions on a conflict of interest rather than a substantive overhaul of a particular practice. As discussed in more detail below, documenting any mitigating action is a concrete component in demonstrating a firm's commitment to compliance, even when it relates to a firm documenting a decision to structure a practice in a particular way to minimize a future conflict.

iii. Disclosure Guidance

In addition to an outsized emphasis on mitigation and elimination of conflicts, the Staff Conflicts Bulletin provides additional guidance on disclosure of conflicts. Some of these items, such as cautioning the use of may-based disclosures, build off of the 2019 Guidance. Other recommendations are more granular than the prior guidance. For example, the staff provided the following as a list of the minimum facts that should be disclosed for compensation and benefit conflicts:

- the nature and extent of the conflict;
- the incentives created by the conflict and how the conflict affects or could affect the recommendation or advice provided to the retail investor (for example, where the availability of products that can be recommended to the retail investor is limited as a result of the financial professional only recommending products from certain preferred providers);
- the source(s) and scale of compensation for the firm and/or financial professional;

- how the firm and/or financial professional is compensated for, or otherwise benefits from, their recommendation or advice (for example, revenue sharing or other compensation related to cash sweep programs) and what, if any additional benefits they may receive (for example, cost reductions, merchandise, gifts, or prizes); and
- the nature and extent of any costs or fees incurred, directly or indirectly, by the retail investor as a result of the conflict.[35]

While this bulletin is styled as applying to both broker-dealers and investment advisers, it signals the staff's view that disclosure obligations under Regulation Best Interest mirror disclosure obligations under Form ADV. The bulletin further addresses proprietary products[36] and examples of third party compensation arrangements that the staff believes should be disclosed.[37] As noted above, investment advisers should evaluate existing practices against the bulletin as well as potentially consider changes, particularly as certain aspects of the bulletin (e.g. the discussion on proprietary products) may not be applicable.

iv. Documenting Compliance

Investment advisers should adopt and review, at least annually, written compliance policies and procedures to identify conflicts. Additionally, policies and procedures may need to be reviewed and updated based on subsequent events or actual experience of the firm. The staff suggests that advisers will face difficulty demonstrating compliance with fiduciary obligations without additional documentation to support how an adviser addresses conflicts. Documentation assists in illustrating a firm's engagement with its policies. Since conflicts can occur at multiple levels at a firm, the policies and documentation should address, at a minimum, conflicts at the firm level and at the financial professional level.

Investment advisers should consider reviewing their recommendations and advice to ensure that the firm is meeting its fiduciary standards both from a conflicts and a care perspective as part of its regular conflicts review. This review may include reviewing a firm's existing measures to address whether they

---

[35] *Id.*, question 12 (internal citations omitted).

[36] The staff provided the following examples facts that, in the staff's view, should be disclosed with respect to recommending or providing advice about proprietary products:

- whether the firm or an affiliate manages, issues, or sponsors the product;
- whether the firm, its financial professionals or an affiliate could receive additional fees and compensation related to that product;
- whether the firm prefers, targets, or limits its recommendation or advice to proprietary products or only those proprietary products for which the firm or an affiliate could receive additional fees and compensation; and
- the extent to which financial professionals receive additional compensation, have quotas to meet, or qualify for bonuses or awards based on their sale of proprietary products (such as mutual funds, annuities or REITs).

Id., question 12.a. (internal citations omitted).

[37] The staff provided the following examples of third party compensation incentives:

- whether the firm, its financial professionals or an affiliate could receive additional fees and compensation related to that product;
- agreements to receive payments from a clearing broker for recommending that the adviser's clients invest in no-transaction-fee or sales load mutual fund share class offered on the clearing broker's platform;
- any agreements to receive payments, loan forgiveness, and/or expense offsets from a custodian for recommending that the firm's retail investor maintain assets at the custodian; and
- any arrangements where the firm is compensated by mutual funds, exchange-traded funds, or other financial products out of product fees or by the products' sponsors, or other revenue-sharing arrangements.

Id., question 12.b. (internal citations omitted).

are working as intended and/or modifying such measures accordingly if a firm has concerns regarding their efficacy.

2. Relevant SEC Enforcement Developments

a) The SCSD Initiative

Rule 12b-1 of the Investment Company Act of 1940 authorizes funds to pay distribution, marketing, and certain shareholder service fees out of fund assets, passing these expenses through to the investor.[38] Rule 12b-1 payments can create a conflict of interest where an adviser is selecting share classes of a mutual fund, as some share classes may result in an additional payment under Rule 12b-1 to the adviser whereas other share classes (typically, institutional share classes), will not. As a result, the investment adviser may benefit by investing the client's assets in the share class with higher fees.

The Division of Enforcement brought and settled several enforcement actions against investment advisers over Rule 12b-1 prior to 2018.[39] The staff recognized the receipt of 12b-1 payments presented a conflict of interest and believed that investment advisers were "not adequately disclosing or acting consistently with the disclosure regarding conflicts of interest related to their mutual fund share class selection practices,"[40] creating harm to investors who were deprived of the ability to make informed investment decisions. However, the Division of Enforcement perceived that the systemic nature of the problem required a more systemic approach to address what it considered a widespread problem.

The SCSD Initiative sought to remediate the harm to investors and correct the flaws in disclosures by allowing investment advisory firms to avoid financial penalties if they "timely self-reported undisclosed conflicts of interest, agreed to compensate harmed clients, and undertook to review and correct their disclosure documents."[41] Eligible advisers who participated in the program would accept standardized terms to: (1) settle for violations of Sections 206(2) and 207 of the Advisers Act based on the adviser's failure to disclose the conflict of interest; (2) a settlement including an order to cease and desist from committing or causing any violations and future violations of Sections 206(2) and 207 of the Advisers Act and a censure; (3) disgorgement of the adviser's ill-gotten gain and to pay prejudgment interest on the disgorgement; and (4) a series of undertakings.[42] These undertakings required the adviser to: (1) review and correct its disclosures; (2) evaluate and address clients who could be moved to lower-cost share classes; (3) evaluate, review, and update their policies and procedures; (4) notify their clients of the settlement terms; and (5) certify their compliance to the staff.[43]

Between March 19, 2019, and April 17, 2020, the SCSD Initiative resulted in three waves of settlements with 98 self-reporting advisers. These settlements returned almost $140 million in fees to investors.[44]

---

[38] 17 CFR § 270.12b-1.

[39] *See e.g., In the matter of Packerland Brokerage Services, Inc.,* Investment Advisers Act Release No. 4832 (Dec. 21, 2017); *In the matter of SunTrust Investment Services, Inc.,* Investment Advisers Act Release No. 4769 (Sept. 14, 2017); *In the matter of Envoy Advisory, Inc.*, Investment Advisers Act Release No. 4764 (Sept. 8, 2017); *In the matter of Cadaret, Grant & Co., Inc.*, Investment Advisers Act Release No. 4736 (Aug. 1, 2017); *In the matter of Pekin Singer Strauss Asset Management Inc.*, Investment Advisers Act Release No. 4126 (Jun. 23, 2015); *In the matter of Manarin Investment Counsel, Ltd.*, Investment Advisers Act Release No. 3686 (Oct. 2, 2013).

[40] SEC Press Release, *SEC Share Class Initiative Returning More Than $125 Million to Investors* (Mar. 11, 2019), available at https://www.sec.gov/news/press-release/2019-28.

[41] *Id.*

[42] SEC Announcement, Share Class Selection Disclosure Initiative (Feb. 12, 2018), available at https://www.sec.gov/enforce/announcement/scsd-initiative.

[43] *Id.*

[44] April 17th SEC Order, *supra* note 7.

b) Failure to Self-Report Through SCSD Initiative

In its announcement of the SCSD Initiative, the Division of Enforcement noted that the Division, as well as Division of Examinations, would continue to make mutual fund share class selection practices a priority, and that the staff planned to proactively seek to identify investment advisers that may have failed to make the necessary disclosures related to mutual fund share class selection.[45] The Division of Enforcement telegraphed that settlements against eligible advisers that failed to self-report under the Initiative may include greater penalties than those imposed in past actions involving similar disclosure failures.

The Division of Enforcement announced its first settlement with an adviser who elected to not self-report under the SCSD Initiative in September 2019 at the time of the second wave of settlements under the Initiative. These settlements required the payment of a civil penalty and expanded the scope of the fees under consideration to include service fees from clearing brokers, marketing support payments, compensation designed to defray the cost of educating and training sales personnel, and transaction fees.[46] The settlements with advisers who did not elect to participate in the Initiative involved violations of Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-7 thereunder. As the following summaries show, the civil penalties required by the Division of Enforcement in connection with a settlement could be substantial:

- **Mid Atlantic Financial Management, Inc. (September 30, 2019)**: Mid-Atlantic Financial Management, Inc. failed to fully disclose the conflicts arising from its selection of more expensive mutual fund share classes for clients when lower-cost share classes for the same fund were available, the exact behavior the SCSD Initiative sought to address. In addition to approximately $1M in disgorgement and prejudgment interest, the settlement required the adviser to pay a $300,000 civil penalty.
- **BPU Investment Management, Inc. (February 13, 2020)**: BPU, a dual-registrant investment adviser and broker-dealer, failed to adequately disclose the conflicts arising from its selection of mutual fund share classes that charged 12b-1 fees, instead of lower-cost share classes of the same funds that were available to clients. Although BPU disclosed its arrangement with a clearing broker to its clients, it did not adequately disclose all material facts regarding the conflict of interest created by this arrangement. In addition, BPU breached its duty to seek best execution for its clients by causing certain of its advisory clients to invest in fund share classes charging 12b-1 fees when share classes of the same funds were available that would have been more favorable for those clients. BPU also failed to adopt and implement written policies and procedures designed to prevent these violations. In addition to almost $700,000 in disgorgement and prejudgment interest, the settlement required BPU to pay a $235,000 civil penalty.
- **VALIC Financial Advisors, Inc. (July 28, 2020)**: VALIC Financial Advisors, Inc. ("VFA"), a dual-registrant investment adviser and broker-dealer, had arrangements with its clearing firm that allowed it to receive revenue sharing payments the clearing firm received from mutual funds and 12b-1 fees paid on its client mutual fund investments. In addition, while VFA agreed to pay

[45] Share Class Selection Disclosure Initiative Announcement (May 1, 2018), available at https://www.sec.gov/enforce/announcement/scsd-initiative ("Eligible advisers are cautioned that staff from the Commission's Office of Compliance Inspections and Examinations and the Division of Enforcement plan to continue to make mutual fund share class selection practices a priority, and plan to proactively seek to identify investment advisers that may have failed to make the necessary disclosures related to mutual fund share class selection.").
[46] The Division of Enforcement also initiated several civil actions against advisers who elected not to participate in the SCSD Initiative. See e.g., Ambassador Advisors, Investment Advisers Act Release No. 24817 (May 13, 2020).

execution costs for clients participating in its wrap fee program, it could avoid paying execution costs for its clients' purchases or sales of certain funds in a no-transaction-fee program offered by the clearing firm. VFA did not disclose these conflicts of interest for a significant period of time and, even when it disclosed the receipt of revenue sharing, failed to fully and fairly disclose the conflict of interest. When VFA directed its clearing firm to cease the revenue sharing payments, it waited an additional six months before beginning the process of converting client mutual fund investments to available lower-cost share classes of the same funds. VFA agreed to pay about $15.4M in disgorgement and prejudgment interest and a civil penalty of $4.5M.

- **NPB Financial Group, LLC (August 20, 2020)**: NPB Financial Group, LLC ("NPB"), a dual–registrant, purchased, recommended, or held for advisory clients mutual fund share classes that charged 12b-1 fees when lower-cost share classes of the same funds were available to clients and did not disclose the receipt of said fees or the conflict of interest. NPB also failed to adopt and implement written compliance policies and procedures reasonably designed to prevent these violations. NPB agreed to pay disgorgement and prejudgment interest of approximately $625,000 and a civil penalty of $425,000.
- **Signature Financial Services, Ltd. (September 3, 2020)**: Signature Financial Services, Ltd. ("SFS") and its associated persons received 12b-1 fees for advising clients to purchase or hold mutual fund share classes charging 12b-1 fees when lower-cost share classes of the same funds were available to the clients. Although SFS disclosed its receipt of "commissions" in its brochure, it failed to fully and fairly disclose all of the material facts related to its receipt of 12b-1 fees. SFS agreed to pay prejudgment interest of approximately $276,000 and a civil penalty of $80,000.
- **Aventura Capital Management, LLC (September 6, 2022):** Aventura Capital Management, LLC ("Aventura Capital ") selected share classes that paid fees to its affiliate, registered broker-dealer Aventura Securities, LLC, pursuant to Rule 12b-1 under the Investment Company Act of 1940 ("12b-1 fees") instead of available lower-cost share classes of the same funds that did not charge those fees and did not self-report the receipt of the fees to the SEC pursuant to the SCSD Initiative. Additionally, Aventura Capital did not provide disclosure or obtain consent for using Aventura Securities for certain transactions. As part of the settlement, Aventura Capital agreed to pay disgorgement of $623,324 plus prejudgment interest of $90,432 and a civil penalty of $225,000.[47]

c) Litigation Outcomes

In addition to the many settlements agreed to by the Commission, certain advisers have elected to litigate the SEC's allegations.

CapWealth Advisors, a registered investment adviser, was charged by the Commission with fraud allegations stemming from 12b-1 fees. After a failed motion for summary judgment,[48] CapWealth Advisors took the allegations to a jury trial in the Middle District of Tennessee. The eight day trial resulted in a verdict that was favorable to CapWealth Advisors and, according to its counsel, included SEC witness difficulties (including an expert witness attempting to change his testimony) and other irregularities. While successful in court, the RIA claims that the lawsuit cost $1.5M in unreimbursed

[47] *In the matter of Aventura Capital Management, LLC*, Investment Advisers Act Release No. 6103 (Sept. 6, 2022).
[48] *Sec. & Exch. Comm'n v. CapWealth Advisors, LLC*, 599 F. Supp. 3d 693 (M.D. Tenn. 2022).

legal fees, far less than the amount of fees alleged by the SEC. This case highlights the potential downfall to litigating these allegations, even when the adviser can win on the merits of the case.

While CapWealth Advisors may have succeeded in court, not every investment adviser has successfully defended against the allegations. Ambassador Advisors took the Commission's allegations of failure to adequately disclose conflicts of interest related to its collection of 12b-1 fees to a jury trial. After an adverse finding, the judge ordered Ambassador and certain executives to pay more than $2M in combined civile penalties, disgorgement and interest.

While these cases highlight the variety of outcomes, the related cost and risks make litigation the less preferred approach for most registered investment advisers.

d) Other Conflicts of Interest Enforcement Actions

The conflicts of interest cases summarized below sometimes include additional claims that are not based on conflicts issues. We have focused on the conflicts of interest aspect of each matter.

Relevant Conflict: Selection Practices

- **In the matter of Lefavi Wealth Management, Inc. (September 3, 2019)**: Registered investment adviser Lefavi Wealth Management, Inc. ("LWM") recommended and invested advisory clients' assets in alternative investments that included a seven percent commission, while a majority of these investments could have been purchased at a lower share price that either did not include any commission or at a discounted commission for volume purchases. LWM did not disclose to its clients that: (1) it could have invested their assets in the exact same investments at the lower share price; (2) in virtually every instance, it invested advisory client assets in more expensive investments that generated higher compensation for LWM; and (3) the undisclosed conflict of interest from its receipt of additional compensation for investing advisory client assets in alternative investments at a higher share price. LWM violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 by failing to seek the best execution for client transactions, and failing to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act. As part of its settlement offer, LWM agreed to review and correct disclosures, review and update its policies and procedures, cease-and-desist from committing future violations, a censure, and disgorgement, prejudgment interest, and a civil monetary penalty totaling $1,288,735.22.[49]

Revenue Sharing or Additional Compensation

- **In the matter of MVP Manager LLC (August 13, 2019)**: MVP Manager LLC ("MVP") is an exempt reporting adviser that advises private funds and has assets under management that total less than $150M. MVP personnel arranged to receive a brokerage commission from the counterparty that was selling securities of venture-backed companies to MVP's client, and failed to disclose neither the agreements nor the conflict of interest. MVP submitted a settlement order in relation to its acceptance of undisclosed broker commissions for certain transactions with advisory clients' funds. The settlement order holds that MVP violated Section 206(2), 206(4) and 206(4)-8 of the Advisers Act. In accordance with its settlement offer, MVP agreed to cease-and-

[49] *In the matter of Lefavi Wealth Management, Inc.*, Release No. IA-5336 (Sept. 3, 2019).

desist from future violations, a censure, and to pay disgorgement of $150,058.88, prejudgment interest of $19,681.42, and a civil penalty in the amount of $80,000.[50]

- **In the matter of Foundations Asset Management, LLC, et. Al. (July 24, 2019)**: Registered investment adviser Foundations Asset Management, LLC and its two principals (referred to collectively herein as "FAM"), acted as unregistered brokers and also received undisclosed compensation for soliciting and recommending to retail advisory clients investments in a private real estate fund. FAM did not charge advisory fees for these specific investments, but the compensation, structured as a one-time upfront compensation based on the amount of the investment and trailing compensation based on the amount of investments that remained with AFC each quarter, was higher than the 1% advisory fee associated with other investments. The Commission found that FAM's written disclosure to some but not all investors was inadequate to communicate the nature of the conflict of interest. The order notes that merely stating that FAM received compensation for recommending ACF did not adequately disclose facts setting out the nature and magnitude of the conflict. Moreover, the one principal in control of drafting, reviewing, editing and approving FAM's Form ADV caused FAM's Form ADV filing to state that the firm did not receive any economic benefit for third party advice rendered to FAM's clients. FAM agreed to relinquish its right to certain compensation for the investments at issue, notify investors, and pay disgorgement of $253,784, prejudgment interest of $25,163, and a civil penalty of $85,000. Additionally, the Principal who was solely responsible for Form ADV updates—and caused multiple misleading statements—was required to pay a civil penalty of $50,000, while the second principal was required to pay $25,000.[51]

- **In the matter of Hefren-Tillotson, Inc. (September 25, 2019)**: Registered investment adviser Hefren-Tillotson, Inc. ("Hefren") charged its clients a service fee of $7.95 designed to meet its unaffiliated clearing broker fee. However, its clearing broker dropped its charge from $7.95 to $6.00 and Hefren did not adjust the charge to its clients. The Commission found that the difference in fees, $1.95, totaling $254,060 in excess fees from 2014-2017, constituted undisclosed financial compensation in violation of Hefren's duty of best execution for client transactions. Pursuant to a settlement order, Hefren agreed to cease-and-desist from committing future violations, a censure, and to pay disgorgement of $254,060, prejudgment interest of $45,905.29 and a $80,000 civil penalty.[52]

- **In the matter of U.S. Bancorp Investments, Inc. (June 1, 2020)**: U.S. Bancorp Investment ("USBI"), a dual-registrant investment adviser and broker-dealer, offered asset management services to its advisory clients through various wrap fee programs. By policy, USBI primarily purchased mutual fund share classes that charged 12b-1 fees and shareholder services for clients in its wrap fee program, even when lower-cost share classes of those same funds were available. USBI did not adequately disclose the conflict of interest resulting from its receipt of 12b-1 fees and shareholder servicing fees and its selection of mutual fund share classes paying such fees. Similar to BPU, USBI also breached its duty to seek best execution and failed to adopt and implement written policies and procedures designed to prevent these violations, resulting in violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. In

[50] *In the matter of MVP Manager LLC*, Investment Advisers Act Release No. 5319 (Aug. 13, 2019).
[51] *In the matter of Foundations Asset Management, LLC, Michael W. Shamburger, and Rob E. Wedel*, Investment Advisers Act Release No. 5306 (Jul. 24, 2019).
[52] *In the matter of Hefren-Tillotson, Inc.*, Investment Advisers Act Release No. 5369 (Sept. 25, 2019).

addition to almost $16M in disgorgement and prejudgment interest, the settlement required USBI to pay a $2.4M civil penalty.[53]

- **In the matter of Private Advisor Group, LLC (July 21, 2022):** Private Advisor Group, LLC ("PAG") was charged with failing to provide full and fair disclosure to clients concerning its use of mutual fund share classes through no-transaction fee programs offered by its clearing firm in wrap accounts and associated conflicts of interest. PAG was further charged with breaching its duty of care, including its duty to seek best execution, related to selecting higher-cost mutual fund share classes. The Commission alleged that PAG selected these share classes to avoid incurring transaction fees on client trades even though PAG did not receive any 12b-1 fees directly. The order found a violation of the antifraud and compliance provisions of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, and PAG consented to pay a civil penalty of $5.8M in addition to distributing funds to harmed clients.[54]

- **In the matter of HighPoint Advisor Group, LLC (April 27, 2022):** HighPoint Advisor Group, LLC ("HighPoint") settled allegations regarding conflicts disclosures, best execution, and duty of care. HighPoint and its representatives avoided transaction fees by recommending higher-cost share classes from a no-transaction fee program offered by its clearing firm. While HighPoint did not directly receive any 12b-1 fees, the share classes were more expensive than other, similar share classes, and HighPoint benefited from not having to pay transaction fees. In addition to finding inadequate disclosure, the order found a breach of the duty of care, including the duty to seek best execution, that HighPoint violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. As part of the order, HighPoint consented to cease-and-desist and a censure, and agreed to pay disgorgement of $508,995, prejudgment interest of $130,742, and a civil money penalty of $125,000.[55]

- **In the matter of Huntleigh Advisors, Inc. and Datatex Investment Services Inc. (February 27, 2023)**: Huntleigh Advisors, Inc. ("Huntleigh") and Datatex Investment Services Inc. ("Datatex"), both registered investment advisers, breached their fiduciary duty in connection with compensation paid to an affiliated broker-dealer. The claimed disclosure violations included failure to fully and fairly disclose conflicts associated with: (i) Huntleigh's receipt of transaction fees that advisory clients paid to the affiliated broker-dealer; (ii) revenue sharing payments an affiliated broker-dealer received and shared with Huntleigh from clients' investments in cash sweep vehicles; (iii) mutual fund share class selection practices that had 12b-1 fees instead of available lower-cost share classes of the same funds that did not charge those fees; and (iv) revenue an affiliated broker-dealer received and shared with Huntleigh based on the rate of margin interest charged to advisory clients. Neither adviser self-reported their affiliates receipt of 12b-1 fees through the SCSD Initiative, although both were eligible to do so. Additional allegations related to breaches of their duty of care. The SEC's order found that Huntleigh and Datatex violated the antifraud and compliance provisions of Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7 thereunder. Without admitting the findings, Huntleigh agreed to pay disgorgement of $608,251, prejudgment interest of $105,251, and a civil

[53] *In the matter of U.S. Bancorp Investments, Inc.*, Investment Advisers Act Release No. 5513 (Jun. 1, 2020).
[54] *In the matter of Private Advisor Group, LLC*, Investment Advisers Act Release No. 6069 (Jul. 21, 2022).
[55] *In the matter of HighPoint Advisor Group, LLC*, Investment Advisers Act Release No. 6003 (Apr. 27, 2022).

penalty of $130,000 and Datatex agreed to pay a civil penalty of $50,000. Further, Huntleigh agreed to distribute the funds paid by Huntleigh and Datatex to harmed investors.[56]

- **In the matter of Insight Venture Management, LLC (June 20, 2023)**: Insight Venture Management, LLC ("Insight") was charged with excess management fees due to its inaccurate application of its permanent impairment policy and its failure to disclose a conflict of interest to investors concerning that policy. The limited partnership agreements of funds advised by Insight set forth details regarding the calculation of certain fees, including adjustments if a portfolio investment suffered a permanent impairment in value which impacted the basis amount on which management fees could be charged. The Commission alleged that Insight failed to disclose to investors the existence of a conflict of interest in connection with its permanent impairment criteria and did not adopt or implement appropriate policies and procedures. As a result, the order found Insight violated Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder. Insight agreed to pay disgorgement of $773,754.41 and prejudgment interest of $91,203.76 to the funds and to pay a civil money penalty of $1.5M.[57]

<u>**Relevant Conflict: Financial Entanglements**</u>

- **In the matter of Fieldstone Financial Management Group, LLC (July 1, 2019)**: Fieldstone Financial Management Group, LLC ("Fieldstone") and Kristofor R. Behn ("Behn") recommended that its advisory clients invest more than $7M is Aequitas Commercial Finance, LLC ("ACF") without disclosing that ACF lent Fieldstone a $1.5M loan to pay its owners' personal expenses and a $2M line of credit for Fieldstone. The loan for $1.5M provided that if $25M of Fieldstone's advisory clients' assets was invested in ACF, Fieldstone could re-pay the loan by converting the debt into an equity interest in Fieldstone held by ACF. Moreover, the loan was backed by Fieldstone's owners' personal assets. The $2M line of credit was structured in a way that the amount of Fieldstone's advisory clients' assets invested in ACF correlated with the amount Fieldstone could draw on the line. Moreover, Fieldstone characterized the relationship as a "strategic affiliation" and though it admitted that ACF had provided funding, it failed to disclose the financial interest, particularly that the loans were for personal debt, with terms that created a financial incentive, and were backed by Fieldstones' owner's personal assets. As a result of this, the Commission found that Fieldstone violated Sections 206(1), 206(2) of the Advisers Act, Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act, which each prohibit fraudulent conduct, as well as Section 207 of the Advisers Act, which prohibits untrue or omitted statements of material fact. Fieldstone agreed to cease-and-desist from committing future violations, a censure, disgorgement of $984,778, prejudgment interest of $63,193, and a civil penalty of $275,000.[58]

- **AST Investment Services, Inc. and PGIM Investments LLC (September 16, 2019):** Respondents, subsidiaries of Prudential Financial, Inc. ("Prudential"), serve as investment advisers to 94 funds. In 2006, the funds were reorganized to allow Prudential to take advantage of certain tax incentives. Yet, the restructuring caused significant losses to the funds. Specifically, the funds lost tens of millions of dollars in interest income when Respondents recalled securities the funds had out on loan. This development was not disclosed to the board of

[56] *In the matter of Huntleigh Advisors, Inc. and Datatex Investment Services Inc.*, Investment Advisers Act Release No. 6251 (Feb. 27, 2023).
[57] *In the matter of Insight Venture Management, LLC*, Investment Advisers Act Release No. 6332 (Jun. 20, 2023).
[58] *In the matter of Fieldstone Financial Management Group, LLC*, Investment Advisers Act Release No. 5263 (Jul. 1, 2019).

directors nor the funds' shareholders. Additionally, the funds were subject to losses due to a less favorable tax structure in some jurisdictions, which Prudential promised to reimburse, but did not. Moreover, memos and presentations to the funds' boards described the benefits of the reorganization but did not disclose the conflict of interest and, for much of the period, failed to disclose the practice. In accordance with a settlement order, Respondents agreed to cease-and-desist from committing future violations, a censure, and disgorgement of $27,632,560 and a civil monetary penalty of $5M.[59]

- **BMO Harris Financial Advisors, Inc. and BMO Asset Management Corp. (September 27, 2019):** Two affiliated advisers, BMO Harris Financial Advisors, Inc. and BMO Asset Management Corp. failed to disclose conflicts of interest related to their retail investment advisory program, Managed Asset Allocation Program ("MAAP"). Respondents invested MAAP in favored proprietary mutual funds, resulting in additional management fees, and always selected higher-cost, non-institutional share classes for proprietary mutual funds in which Respondents benefited through a revenue sharing scheme with their clearing broker that incentivized this selection. Respondents did not disclose the practices or the associated conflict of interest to their clients. Pursuant to their settlement order, Respondents violated 206(2) and 206(4) of the Advisers Act, and agreed to cease-and-desist from future violations, censure, and disgorgement of $25M, prejudgment interest of $4.7M, and a civil monetary penalty of $8.25M.[60]

- **In the matter of Strategic Planning (September 24, 2019)**: Respondents Strategic Planning Group and its two principals ("SPG") invested clients' funds in the publicly traded stock, Ecoark Holdings, Inc., without disclosing to clients that the principals of SPG performed consultancy work for Ecoark in exchange for shares of the company's common stock and that the principals had also personally invested in the company. The principals breached their fiduciary duties to the adviser's clients by failing to disclose the inherent conflict of interest where they were incentivized to invest client funds in the company to support or increase its stock price. The Commission found that SPG's use of may-based disclosure in its firm brochure failed to disclose the nature of the conflict of interest, specifically, the connections to Ecoark, the consulting agreements, or the work they performed under the consulting agreements in violation of Section 206(2) of the Advisers Act. SPG agreed to provide notice to its clients, a censure, to cease-and-desist from committing any future violations, and to pay a civil penalty in the amount of $200,000. Separately, its two principals affiliated with the firm paid a civil penalty of $75,000 each.[61]

- **In the matter of RTW Investments, LP (May 30, 2023):** RTW Investments, LP ("RTW"), a registered investment adviser, failing to disclose conflicts of interest regarding its personnel's ownership of sponsors of special purpose acquisition companies ("SPAC") into which RTW advised its clients to invest. RTW failed to disclose conflicts of interest, made statements that omitted material facts, and failed to adopt reasonably designed written policies and procedures regarding RTW personnel's ownership interests in SPAC sponsors and RTW's practice of investing client assets in affiliated SPACs. As a result, the order found RTW violated Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder. As part of

[59] *AST Investment Services, Inc. and PGIM Investments LLC*, Investment Advisers Act Release No. 5346 (Sept. 16, 2019).
[60] *BMO Harris Financial Advisors, Inc. and BMO Asset Management Corp.*, Investment Advisers Act Release No. 5377 (Sept. 27, 2019).
[61] *In the matter of Strategic Planning,* Investment Advisers Act Release No. 5363 (Sept. 24, 2019).

the settlement, RTW agreed to a cease-and-desist order, a censure, and a $1.4 million civil penalty to settle the charges.[62]

Relevant Conflict: Financial Incentives to Avoid Reimbursement

- **In the matter of Franklin Advisers Inc., and Franklin Templeton Investments Corp. (July 2, 2020)**: Franklin Advisers Inc. ("FAV") and Franklin Templeton Investments Corp. ("FTIC") purchased certain exchange-traded funds ("ETFs") for client funds in excess of the limitations on investments found in Section 12(d)(1) of the Investment Company Act, which prohibits, subject to certain exceptions, so-called "fund of funds" arrangements in which one fund invests in the shares of another. To come into compliance, FAV sold shares of certain ETFs but the funds then realized losses on the corrective transactions. Against its own policies and procedures, FAV did not disclose the losses to its Board of Directors and did not reimburse the losses to investors in accordance with its trade error policy. FAV and FTIC agreed to cease-and-desist from committing future violations, a censure, and to pay a combined civil penalty in the amount of $325,000.[63]

- **WBI Investments and Millington Securities Inc. (August 5, 2020):** Two affiliated investment advisers, WBI and Millington (dual-registered), sent client orders to other brokerage firms for execution, and disclosed that Millington, as a broker-dealer received payments for order flow. However, they also assured clients that this arrangement did not affect the prices at which the client's orders were executed because the costs were absorbed by the executing brokerage firms. The Commission found that these statements were misleading because the executing brokerage firms did adjust execution prices to account for the arrangement, and thus the execution prices charged to clients. Pursuant to their settlement order, Respondents agreed to cease-and-desist from committing any future violations, and censure. Moreover, Millington was required to pay a civil penalty of $250,000 and WBI, $750,000 in penalties.[64]

- **In the matter of Moors & Cabot, Inc. (January 19, 2023)**: Two unaffiliated clearing brokers provided Moors & Cabot, Inc. with revenue sharing payments and financial incentives. These payments and incentives presented conflicts of interest because they created incentives for Moors & Cabot, Inc. to: (a) allocate clients' assets to cash; (b) recommend certain cash sweep options to certain customers; (c) recommend margin loans; and (d) utilize the clearing brokers. In addition to other disclosure claims, the Commission alleged that Moors & Cabot, Inc. did not adequately disclose the compensation arrangements or the associated conflicts of interest to advisory clients. As part of the settlement, Moors & Cabot, Inc. agreed to pay disgorgement of $1,436,182, prejudgment interest of $88,274, and penalties of $375,000.[65]

Overcharging Fees: Other Notable Settlements Regarding Excessive Advisory Fees

- **In the matter of Wells Fargo Clearing Services, LLC and Wells Fargo Advisors Financial Network LLC (August 25, 2023)**: Wells Fargo Clearing Services, LLC and Wells Fargo Advisors Financial Network LLC (collectively, "Wells Fargo") settled disputes alleging that it overcharged more than 10,9000 accounts more than $26.8 million in advisory fees relating to the

---

[62] *In the matter of RTW Investments, LP*, Investment Advisers Act Release No. 6318 (May 30, 2023).
[63] *In the matter of Franklin Advisers Inc., and Franklin Templeton Investments Corp.*, Investment Advisers Act Release No. 5531 (Jul. 2, 2020).
[64] *WBI Investments and Millington Securities Inc.*, Investment Advisers Act Release No. 5557 (Aug. 5, 2020).
[65] *In the matter of Moors & Cabot, Inc.*, Investment Advisers Act Release No. 6222 (Jan. 19, 2023).

failure to properly reflected agreed-upon changes in advisory fee rates into the appropriate billing systems. While the settlement did not address conflicts of interest, the Commission's order did find that the firm violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7. In addition to paying effected accountholders around $40M, Wells Fargo paid a $35M penalty.[66]

[66] *In the matter of Wells Fargo Clearing Services, LLC and Wells Fargo Advisors Financial Network LLC*, Investment Advisers Act Release No. 6387 (Aug. 25, 2023).