

MEMO# 35622

February 20, 2024

SEC Charges Investment Adviser for Failing to Disclose Influencer's Role in Fund Launch

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TO: ICI Members
Chief Compliance Officer Committee
Compliance Advisory Committee
ETF (Exchange-Traded Funds) Committee
ETF Advisory Committee
SEC Rules Committee SUBJECTS: Advisory Contract Renewal
Compliance
Exchange-Traded Funds (ETFs)
Litigation & Enforcement RE: SEC Charges Investment Adviser for Failing to Disclose Influencer's Role in Fund Launch

The Securities and Exchange Commission recently announced that a registered investment adviser to an exchange-traded fund has agreed to pay a \$1.75 million civil penalty to settle charges that the adviser failed to properly disclose a licensing arrangement it had with the ETF's index provider.[\[1\]](#) The index provider partnered with a social media influencer to promote the ETF's index, paying the influencer with a larger percentage of the licensing fee when the ETF's assets under management reached certain thresholds.

The SEC's order found that the adviser violated Section 15(c) of the Investment Company Act of 1940 when it failed to adequately inform the ETF's independent trustees of the influencer's planned involvement and compensation in connection with the initial approval and subsequent renewal of the investment advisory contract.[\[2\]](#) In particular, it found that the adviser failed to disclose information about the economies of scale and profitability associated with the advisory contract when it did not disclose the sliding scale arrangement with the influencer.[\[3\]](#) The order also found that the adviser failed to discuss the controversies surrounding the influencer and corresponding brand risk to the ETF and other funds in the complex.

In addition, the order found that the adviser violated: (a) Section 206(2) of the Investment Advisers Act of 1940 when it failed to adequately disclose details of the arrangement with the influencer to the fund board; and (b) Section 206(4) of the IAA and Rule 206(4)-7

thereunder when it failed to adopt and implement written compliance policies and procedures reasonably designed to prevent those violations.^[4]

Without admitting or denying the SEC's findings, the adviser agreed to an order to cease-and-desist from committing or causing violations and future violations of the above provisions, a censure, and the monetary penalty.

Kenneth Fang
Associate General Counsel

Notes

^[1] See *In the Matter of Van Eck Associates Corporation*, Administrative Proceeding File No. 3-21857 (Feb. 16, 2024), available at <https://www.sec.gov/files/litigation/admin/2024/ic-35132.pdf>.

^[2] Section 15(c) of the ICA makes it unlawful for a registered investment company to enter into or renew an investment advisory contract unless a majority of the fund's independent directors approves the contract. In approving the contract, Section 15(c) imposes a duty on the fund's adviser to furnish such information as may reasonably be necessary for the directors to evaluate the terms of the contract.

^[3] As part of the approval or renewal of an investment advisory contract, funds must include a discussion of the: (1) extent to which economies of scale are realized as the fund grows and whether fee levels reflect those economies of scale for the benefit of investors; and (2) costs of the provided services and the related profits of the investment adviser and its affiliates. See *Disclosure Regarding the Approval of Investment Advisory Contracts by Directors of Investment Companies* (June 30, 2004), Inv. Co. Act Rel. No. 26486, available at <https://www.sec.gov/rules/2004/06/disclosure-regarding-approval-investment-advisory-contracts-directors-investment>.

^[4] Section 206(2) of the IAA prohibits an investment adviser from engaging in "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Section 206(4) of the IAA and Rule 206(4)-7 thereunder require a registered investment adviser to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the IAA and the rules thereunder.