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VIA EMAIL

To Our Investment Adviser Clients and Other Friends:

Re: SEC Charges Investment Adviser with Recordkeeping Failures Related to "Off Channel" Communications

On April 3, 2024, the U.S. Securities and Exchange Commission ("SEC") announced charges against Senvest Management LLC ("Senvest"), a registered investment adviser, for longstanding recordkeeping violations and failing to enforce its code of ethics. Senvest agreed to settle the charges by paying a $6.5 million penalty and taking steps to improve its compliance policies and procedures.

Circumstances. The Investment Adviser's Act of 1940 (the "Adviser's Act") requires investment advisers to preserve certain written communications under Rule 204-2(a)(7) (the "Recordkeeping Rule"), including originals of all communications received and copies of all written communications sent relating to recommendations made or proposed to be made; any advice given or proposed to be given; any receipt, disbursement or delivery of funds or securities; or the placing or execution of any order to purchase or sell any security.

According to the SEC's order, from January 2019 through December 2021, Senvest employees used personal texting platforms to communicate about Senvest's business both internally and externally and failed to preserve such communications in violation of the Recordkeeping Rule. This included senior employees communicating about Senvest's business, both internally and with external fund investors and industry participants, on an off-channel platform on personal devices that were configured to automatically delete messages after 30 days. These communications violated Senvest's policies, which banned employees from using non-retained electronic communications for business communications.

Takeaways. This is the first instance in which the SEC has charged an investment adviser that was not dually-registered as a broker-dealer or affiliated with a broker-dealer in connection with off-channel communications. While the order does not detail how the off-channel communications qualified as written communications required to be kept under the Recordkeeping Rule, it does confirm the SEC's view that even internal communications can be records that are required to be kept under the Adviser's Act.

This case is another example of the SEC's longstanding willingness to charge firms for violating their own policies and procedures (even if the records required by such policies and procedures are not required to be kept under the Recordkeeping Rule) and for failing to implement procedures to monitor whether employees were following those policies and procedures.

Recommendations. The SEC has stated that it seeks to ramp up its enforcement of recordkeeping failures and violations of internal compliance policies and procedures at investment advisory firms. Please contact one of the Shartsis Friese attorneys in the Investment Funds & Advisers Group if you have any questions about your firm's compliance policies and procedures and current recordkeeping practices.

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