

January 2007

The following summarizes recent Legal Developments of Note affecting the mutual fund/investment management industry:

## SEC Reopens Comment Period on Fund Governance Rules

The SEC announced that it is reopening the comment period established by its June 2006 request for comments regarding various proposed amendments to investment company (“fund”) governance requirements, which were invalidated by the Court of Appeals for the District of Columbia Circuit in U.S. Chamber of Commerce last year. (See the May 2006 issue of the Ropes & Gray Investment Management Update for details.)

The comment period is being reopened for the purpose of soliciting comments on two staff economic papers published by the SEC on December 29, 2006. These economic papers will study the relationship between different fund governance structures and how they may affect returns to mutual fund investors. The comment period will close on March 2, 2007.

## E-Proxy Rule Amendments Adopted

In an effort to decrease the expense of furnishing proxy materials to shareholders, the SEC announced that the Commission voted on December 13th to adopt amendments to its proxy rules to allow companies to provide shareholders access to such materials over the internet. In addition, the Commission voted to propose a rule change that would require all companies to use internet distribution for all solicitations (not related to a business combination transaction) in the future.

Under the Commission’s new notice and access proxy rules, a company may post its proxy materials on a website and send a notice that such materials are available on the internet at least 40 days before the meeting date. Among other things, the notice must include an e-mail address and a website that shareholders may use to request copies of the proxy materials. The company must send a copy of the materials within three business days after receiving a request from a shareholder. The effective date for the amendments is July 1, 2007.

## FIN 48 Implementation For Funds Clarified

Responding to a request submitted by the Investment Company Institute, the SEC has issued a no-action letter with respect to the implementation of FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes* (“FIN 48”). FIN 48, which was issued in July, 2006, requires the derecognition of any tax benefits which arise from a tax position which fails to meet the “more likely than not” standard of being sustained upon an IRS examination. FIN 48 became effective for fiscal years beginning after December 15, 2006.

The application of FIN 48 to registered investment companies gives rise to a number of unique problems. Unlike operating companies which present financial information on a quarterly basis, open-end funds must calculate and report their net asset value on a daily basis. Therefore FIN 48 would have required open-end funds with a fiscal year ending on December 31, 2006 to begin complying with FIN 48 as early as January 2, 2007.

Recognizing the unique issues presented by the application of FIN 48 to mutual funds, the SEC stated that “it would not object if a fund implements Interpretation 48 in its NAV calculation as late as its last NAV calculation in the first required reporting period for its fiscal year beginning after December 15, 2006.” Therefore, a fund having a fiscal year

ending on December 31, would not be required to implement FIN 48 until June 29, 2007 (i.e., the last business day of its semi-annual reporting period).

The SEC also clarified that informal guidance provided by a taxing authority and its administrative practices, such as the IRS practice to provide guidance that is prospective only, can and should be considered when applying FIN 48.

### Hedge Funds to Face New Requirements in 2007

The SEC recently voted to propose (1) a change in the definition of “accredited investor” with respect to individuals investing in hedge funds and other private investment pools, and (2) a rule that would make certain anti-fraud provisions of the Investment Advisers Act of 1940 applicable to investors in an investment pool. Comments on the proposed rules must be received by the SEC by March 9, 2007.

The SEC also recently proposed rules relating to short sales that would eliminate the “uptick” rule and a rule which would prohibit entering into a short sale with respect to a security within five business days prior to pricing of a public offering of such security and then purchasing such security in the offering. (See the December 21, 2006 Ropes & Gray Client Alert on these topics for further details.)

### Contact Information

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