

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

Disclosure in Participant-Directed Individual Account Plans—New Fiduciary Requirements Proposed

On July 23, 2008, the Department of Labor requested comments on proposed regulations under the Employee Retirement Income Security Act of 1974 (ERISA) that would require certain uniform disclosures to be made to participants and beneficiaries of participant-directed individual account plans, such as 401(k) plans. Upon adoption, the proposed regulations under ERISA Sections 404(a) and 404(c) would require “plan-related information” and “investment-related information” to be disclosed on a regular and periodic basis.

Plan-related information includes the specific investment alternatives offered under the plan; any restrictions on transfers; any voting, tender or other rights or restrictions on such rights; disclosure of the day-to-day administrative fees and expenses (*e.g.*, legal expenses) that are assessed on a plan-wide basis; and the fees and expenses that are assessed at the individual participant or beneficiary level, such as fees for investment services. Under the proposal, this information must be furnished to an individual on or before the date on which he or she becomes eligible to be a participant or beneficiary under the plan, and at least annually thereafter. Any material changes to the required information must be furnished within 30 days after the adoption of such changes. In addition, participants and beneficiaries must be furnished quarterly statements of the dollar amounts actually charged during the preceding quarter to the participants’ or beneficiaries’ accounts for plan-wide administrative expenses and individual expenses, and the general descriptions of the services to which those charges relate.

Investment-related information includes specified performance data for each of the plan’s designated investment alternatives as well as basic fee and expense information related to the purchase, holding and sale of each of the plan’s designated investment alternatives. The Department has noted that if such information is too detailed, it may overwhelm participants, and therefore supports the disclosure of such information in a format that would facilitate comparison across the plan’s designated investment alternatives. The proposal also would require disclosure of such information via an Internet website in order to accommodate the different levels of interest in such information among participants.

The regulations would be effective for plan years beginning on or after January 1, 2009. Any comments should be received by the Department by September 8, 2008.

SEC and Department of Labor Agree to Cooperate on Regulatory Oversight

The Securities and Exchange Commission (SEC) and the Department of Labor (DOL) have formalized their informal working relationship to facilitate ongoing consultation and communication between the two agencies in a recent Memorandum of Understanding (MOU). The MOU provides that the agencies’ staffs will meet periodically to discuss matters that each believes would be of interest to the other, such as any regulatory requirements affecting each agency’s responsibilities, examination findings and trends and enforcement cases. The agencies’ staffs would also designate individuals who would serve as points of contact in each regional and headquarters office to facilitate communication between the staffs of the respective agencies. Staff members would be cross-trained on a periodic basis in order to improve each agency’s understanding of the mission and investigative jurisdiction of the other. The DOL will be granted standing

access to the SEC's non-public examination information related to investment advisers or other firms of interest to both agencies, and the DOL's staff will maintain the confidentiality of such information. Finally, the MOU outlines procedures to be followed in honoring any requests for enforcement information between the agencies. The procedures provide for the use of "access request letters" to streamline access to investigative files and enforcement information of the other agency, and allows for such information to be transmitted to criminal law enforcement authorities. The MOU was signed on July 29, 2008 and is effective for five years from that date.

Identity Theft "Red Flags Rule" to be Effective November 1, 2008

The Investment Company Institute recently notified its members that the SEC Staff believes certain types of mutual funds must establish an Identity Theft Prevention Program by November 1, 2008. In November 2007, the Federal Trade Commission (FTC) issued its so-called "Red Flags Rule", which requires "financial institutions" with "covered accounts" to establish and implement a program to detect, prevent and mitigate identity theft in connection with opening or maintaining covered accounts. For the purposes of this rule, mutual funds that permit shareholders to make withdrawals, or redemptions, payable to third parties by check, negotiable instrument or similar items may be considered "financial institutions." Covered accounts include accounts maintained by a financial institution for personal, family or household purposes that are designed to permit multiple payments or transactions and any other account that a financial institution offers for which identity theft poses a reasonably foreseeable risk to the customer or to the financial institution. The Identity Theft Program must identify, detect and respond to patterns, practices or specific activities that indicate the possible existence of identity theft ("Red Flags") and be updated periodically to respond to changes in identity theft risk. The fund's board of directors must approve the Identity Theft Program. Moreover, the board, a board committee or a senior management level employee must be charged with the oversight, development, implementation and administration of the Program. The financial institution also must train staff to implement the Identity Theft Program and exercise appropriate oversight over service provider arrangements.

UCITS Reforms Move Forward

On July 16, 2008, the European Commission (EU Commission) adopted most of the proposed revisions of the Undertakings for Collective Investment in Transferable Securities Directive (UCITS Directive) it had published for comment in 2007. The reforms adopted by the EU Commission include reforms of UCITS fund notification procedure, disclosure, asset pooling, fund mergers, and cooperation mechanisms. However, the EU Commission did not take action on reforms relating to the management company passport, which would permit funds authorized in a Member State to be managed by a management company located in a different Member State. Instead, the EU Commission invited the Committee of European Securities Regulators (CESR) to provide advice on the necessary supervisory and technical conditions needed "to ensure that the cross-border management of a UCITS does not weaken the ability of the competent supervisor to monitor and enforce compliance of the fund with its governing law and rules." CESR was asked to deliver its advice to the EU Commission by November 1, 2008. The EU Commission's proposed revisions must still be approved by the EU Council of Ministers and the European Parliament, and such approval is not anticipated to occur until the second quarter of 2009.

Other Developments

Since the last issue of our IM Update, Ropes & Gray has also published the following separate Client Alerts of interest to the mutual fund/investment management industry:

[SEC Proposes to Relax Foreign Broker-Dealer Rule, July 7, 2008](#)

[SEC Clarifies Application of Cash Solicitation Rule, July 23, 2008](#)

[SEC Moves Toward Web-Based Transparency in Muni Field, July 30, 2008](#)

[SEC Provides Guidance on the Use of Company Web Sites to Disseminate Investor Information, August 8, 2008](#)

[SEC Proposes Guidance on the Role of a Fund Board in Overseeing an Adviser's Portfolio Trading Practices, August 15, 2008](#)

Contact Information

For further information, please contact the Ropes & Gray attorney who normally advises you.

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