Ropes & Gray's Investment Management Update: May – June 2012

The following summarizes recent legal developments of note affecting the mutual fund/investment management industry:

FSOC Establishes Process for Designating Nonbank Financial Companies for Oversight by the Board of Governors of the Federal Reserve System

On April 3, 2012, the Financial Stability Oversight Council ("FSOC") issued a final rule and interpretive guidance under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") laying out the three-step process that the FSOC intends to use for determining which nonbank financial companies will be supervised by the Board of Governors of the Federal Reserve System ("Board of Governors") on account of posing possible threats to U.S. financial stability. The Board of Governors also set out prudential standards for such companies.[1] Potential supervised companies continue to include asset managers, registered and unregistered investment funds, financial guarantors and private equity firms. The three-step designation process is little changed from the FSOC's previously proposed methodology, and it leaves a significant degree of uncertainty about which companies (such as money market funds) will ultimately be designated. The final rule and interpretive guidance can be found here; they were effective on May 11, 2012.

The final release makes several general points of special interest to asset managers: (1) the FSOC does not intend to provide any industry-based exemptions; (2) the FSOC may provide additional guidance regarding metrics relating to asset managers; (3) the FSOC continues to evaluate the threat to U.S. financial stability posed by asset managers and to consider whether such threats can be mitigated through supervision by the Board of Governors; (4) FSOC evaluations of risk may not precisely follow corporate form (for example, certain risks faced by asset managers may be examined across different funds advised by the manager, particularly if the funds are similar); and (5) assets under management are to be distinguished from a manager's own assets (but how and to what end remains to be seen).

According to the release, the FSOC intends to use quantitative thresholds in Stage 1 of its review process to narrow the universe of nonbank financial companies to a smaller set that warrants further evaluation by the FSOC in Stage 2 and possibly Stage 3. To pass the quantitative thresholds of Stage 1, a nonbank financial company would have to have at least $50 billion in total consolidated assets and additionally would have to meet or exceed one of the following five other thresholds: (i) $30 billion in gross notional credit default swaps outstanding for which the company is the reference entity, (ii) $3.5 billion of derivative liabilities, (iii) $20 billion of outstanding debt (broadly interpreted), (iv) a 15-to-1 leverage ratio of total consolidated assets (excluding separate accounts) to total equity, or (v) short-term debt measuring 10% of total consolidated assets. The FSOC estimates that fewer than 50 companies will meet the quantitative thresholds of Stage 1.

Stage 2 review will be based on a wide range of quantitative and qualitative industry and company-specific factors beyond those considered in Stage 1. Stage 3 review will include a formal notice to the company and a request for further information. Final determinations will include the basis of the determination and whether the relevant metrics and factors specified in the interpretive guidance were used in reaching the determination. Nonbank financial companies designated for supervision by the Board of Governors would

[1] The Board of Governors' release proposing prudential standards can be found here. Pursuant to Dodd-Frank, the prudential standards will include enhanced risk-based capital and leverage requirements, enhanced liquidity requirements, enhanced risk management and risk committee requirements, a requirement to submit a resolution plan, single-counterparty credit limits, stress tests, and a debt-to equity limit and could contain other requirements as determined by the Board of Governors.

have the right to a hearing to contest the determination and, subsequent to the hearing, a right to petition the federal courts.

ICI and U.S. Chamber of Commerce Seek Summary Judgment Vacating Amendments to CFTC Rule 4.5 and New Rule 4.27

On April 17, 2012 the Investment Company Institute ("ICI") and the U.S. Chamber of Commerce ("U.S. Chamber") filed a lawsuit against the Commodity Futures Trading Commission ("CFTC") claiming that recent amendments to CFTC Rule 4.5 and the adoption of new Rule 4.27 violate the Commodity Exchange Act and the Administrative Procedure Act. The ICI and U.S. Chamber argue that the cost-benefit analysis undertaken by the CFTC was inadequate, citing CFTC Commissioner Sommers' statements that "I do not believe that the benefits articulated within the final rules outweigh the substantial costs to the fund industry" and "[i]t is unlikely, in my view, that the cost-benefit analysis supporting the rules will survive judicial scrutiny if challenged." The lawsuit seeks injunctive relief preventing the CFTC from implementing these rule changes. On May 18, 2012 the ICI and U.S. Chamber filed a motion for summary judgment. On June 18, 2012 the CFTC filed a response seeking summary judgment in its favor and dismissal of the lawsuit.

As described in our alert which can be found here, investment advisers to many registered investment companies could be required to register as commodity pool operators or commodity trading advisors as a result of CFTC rule changes announced on February 9, 2012. If implemented, these rule changes could impose a host of CFTC regulatory requirements on affected funds and their investment advisers, including registration, compliance, disclosure, recordkeeping and reporting requirements. The lawsuit does not affect recent CFTC rule changes that revised or rescinded CFTC registration exemptions for private funds, as described in our alert here.

The ICI is currently maintaining a website that contains information about the lawsuit, which can be found here.

SEC Publishes Guidance on Hedge Fund/Private Equity Fund Distinction for Purposes of Form PF

As discussed in more detail in our client alert on Form PF, which can be found here, there are different reporting obligations that apply to private fund advisers, depending on whether the adviser's funds are hedge funds or private equity funds.

In general, a private equity fund is a fund that is not a hedge fund (as long as it does not fall into any other fund categories described in the Form). Form PF defines a hedge fund as any private fund (other than a securitized asset fund):

1. With respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses);

2. That may borrow an amount in excess of one-half of its net asset value ("NAV") (including any committed capital) or may have gross notional exposure in excess of twice its NAV (including any committed capital); or

3. That may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).

If a fund satisfies any one of those three prongs, it is a "hedge fund" for purposes of the Form.

Prongs (ii) and (iii) of the hedge fund definition apply if the fund has the ability to borrow or short, even if it does not use that ability. Significantly, the Securities and Exchange Commission ("SEC") noted in the adopting release that:

> "a private fund would not be a 'hedge fund' for purposes of Form PF solely because its organizational documents fail to prohibit the fund from borrowing or incurring derivative exposures in excess of the specified amounts or from engaging in short selling so long as the fund in fact does not engage in these practices and a reasonable investor would understand, based on the fund's offering documents, that the fund will not engage in these practices."

However, on June 8, 2012 the SEC came out with further guidance regarding this distinction, as follows:

Q3.1: I advise a private fund that would be categorized as a private equity fund, except for the fact that the fund documents allow the fund to either employ large amounts of leverage or sell assets short. The fund does not in fact, nor does it intend to, incur leverage or short any assets. May I treat this private fund as a private equity fund instead of as a hedge fund for reporting purposes?

A3.1: No. In adopting the Form, the Commission considered, but did not accept, commenters' arguments that the leverage and shorting characteristics in the definition of "hedge fund" should focus on actual or contemplated use, rather than potential use. *See* Investment Advisers Release 3308, text accompanying footnote 78. (Posted June 8, 2012)

The distinction between a hedge fund and a private equity fund for purposes of Form PF is important for several reasons:

1. An adviser with a December 31 fiscal year-end and at least $5 billion in regulatory assets under management attributable to "hedge funds" as of March 31, 2012 must file its first Form PF by August 29, 2012. Advisers with a December 31 fiscal year-end and only private equity funds do not have to file their first Form PF until 2013, regardless of assets under management.

2. Large hedge fund advisers (those with $1.5 billion in regulatory assets under management attributable to hedge funds, including certain separately managed accounts) must file Form PF quarterly. All private equity advisers (large or otherwise) must file annually.

3. The information to be provided on Form PF differs greatly depending on whether a fund is a hedge fund or private equity fund.

In light of these consequences, advisers should consider reviewing fund documents to determine whether they are impacted by the SEC's new June 8 guidance.

CFTC Adopts Recordkeeping and Reporting Rules with Respect to Historical Swaps

Most of the new regulations under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank Act") with respect to over-the-counter derivatives will apply only to new transactions entered into after the applicable requirement becomes effective. However, the requirements to maintain records with respect to derivatives transactions and to report all derivatives transactions (whether cleared or uncleared) to a swap data repository will apply to any swap in effect at any time since the enactment of the Dodd-Frank Act in July 2010.

On May 18, 2012, the U.S. Commodity Futures Trading Commission (CFTC) adopted final rules regarding the recordkeeping and reporting requirements for swaps entered into prior to the enactment of the Dodd-Frank Act, which remained outstanding as of the date of enactment of the Dodd-Frank Act ("pre-enactment swaps"), and swaps entered into after the enactment of the Dodd-Frank Act but before the compliance date for the CFTC's final swap reporting rules (which is 60 days after the CFTC defines the term "swap") ("transition swaps"). These swaps are collectively known as historical swaps. In general, the rules require parties that are neither swap dealers or major swap participants to maintain records regarding certain minimum economic terms of each pre-enactment swap and transition swap, the swap confirmation, any related master agreement and any related credit support arrangement. These records must be maintained for the term of the swap and for five years thereafter. They may be maintained in either electronic or paper form and must be retrievable within five business days throughout the retention period. These requirements will become effective with respect to parties that are neither swap dealers nor major swap participants 240 days after publication in the Federal Register of the CFTC's final rule defining the term "swap." However, certain similar CFTC interim final rules are currently in effect, so this information should already be retained.

In addition, the rules require certain economic terms of each pre-enactment swap and transition swap be reported to a swap data repository ("SDR"). If the counterparty to a historical swap is a swap dealer, the swap dealer has the reporting obligation. Since we expect that the typical swap counterparties for funds will register as swap dealers, we do not expect most funds to have any reporting obligation. However, information regarding all swaps (cleared or uncleared) will be reported to an SRD and will therefore be available to regulators. Swap dealers will be required to report data with respect to *credit swaps* and *interest rate swaps* beginning 60 calendar days after publication in the Federal Register of the CFTC's final rule defining the term "swap," and will required to report data with respect to *equity swaps, foreign exchange swaps, and commodity swaps* beginning 90 days later.

Separate recordkeeping and reporting rules apply to swaps entered into 60 or more days after publication in the Federal Register of the CFTC's final rule defining the term "swap." Our alert describing those requirements is available here.

Goldman Sachs Fined $22 Million for Flawed Insider Trading Procedures

On April 12, 2012, Goldman Sachs was fined $22 million by the SEC and FINRA for allegedly failing to adopt adequate procedures to prevent insider trading. As the SEC's Enforcement Director characterized this case, "Goldman failed to implement policies and procedures that adequately controlled the risk that research analysts could preview upcoming ratings changes with select traders and clients."

Beginning in 2006, Goldman allegedly began holding weekly "huddles" at which research analysts discussed their "high conviction" short-term trading ideas and other "market color" with Goldman sales personnel. Beginning in 2007, Goldman allegedly began an "Asymmetric Service Initiative" ("ASI") in which analysts shared trading ideas from the "huddles" with select clients. Analysts were told that the performance of the ideas they discussed in the "huddles" would be monitored, as would the increases in commissions generated by ASI clients, and that these performance metrics would influence the analysts' evaluations and potentially their compensation. Although neither the SEC nor FINRA alleged that changes in Goldman's published research recommendations were leaked in advance of publication, both regulators saw the danger that this could have occurred. Both regulators criticized: (1) Goldman's policies and procedures relating to the "huddles," (2) its controls over the "huddles" and (3) its surveillance of trading ahead of research changes.

The Goldman case illustrates the regulators' thinking about a broker's ability to selectively disseminate changes in its research recommendations and the precautions that brokers should take to prevent insider trading. The case is a warning that a broker-dealer should not selectively disseminate word of upcoming changes in research recommendations; such selective dissemination could create insider trading liability in the wake of FINRA's repeal of the so-called Manning Rule and adoption of rule 5280(b) in 2009, particularly where selective disclosure is a breach of a confidentiality obligation to the company as a result of a company policy prohibiting selective disclosure. Additionally, the case highlights the kinds of insider-trading precautions regulators expect to see, namely: (1) procedures to prevent insider trading should clearly define proper and improper practices so that employees have clear guidance about what conduct is permitted; (2) sensitive meetings should be chaperoned by compliance personnel and events at those meetings should be documented so that surveillance mechanisms can be constructed to test whether improper conduct has occurred; and (3) back-end testing for insider trading should be robust and include reviews designed to detect improper conduct that could arise from sensitive meetings.

The SEC's release announcing the settlement can be found here.

NASDAQ and NYSE Propose Pilot Programs to Promote Improved Market Making for Thinly-Traded ETFs

In an effort to find ways to enhance market making for thinly-traded exchange-traded funds ("ETFs"), the NASDAQ Stock Market ("NASDAQ") and NYSE Arca ("NYSE") have each proposed rule changes to launch experimental programs that would permit ETFs to pay additional fees on top of the normal listing fee that would be used to incentivize market making activities for their shares.

Under the NASDAQ's pilot program, an ETF could elect to pay an annual fee in the range of $50,000 to $100,000, which would be paid to one or more market makers as they earn credits by satisfying specified market-making quality standards for the ETF. Amounts that are not earned by market makers would be refunded to the ETF. The NASDAQ has proposed that its pilot program last one year, pending approval of the program by the SEC.

Under the NYSE's pilot program, an ETF could pay an annual fee of $10,000 to $40,000 that would be used to compensate a single lead market maker in the ETF. The ETF would receive a prorated refund to the extent the lead market maker fails to meet or exceed its minimum performance standards for the security. If approved by the SEC, the NYSE program would be effective through December 31, 2013.

The NASDAQ proposal can be found here, and the NYSE proposal can be found here.

UK Financial Services Authority Fines Hedge Fund CEO

On May 29, 2012, the UK Financial Services Authority ("FSA") published a decision notice indicating that it has decided to fine Alberto Micalizzi (the former chief executive officer and a director of Dynamic Decisions

Capital Management Ltd ("DDCM"), a hedge fund management company based in London, £3 million and ban him from performing any role in regulated financial services for not being fit and proper. This is the FSA's largest fine for an individual other than in market abuse cases.

The FSA alleges that between October 1, 2008 and December 31, 2008, the master fund (the "Fund") managed by DDCM suffered catastrophic losses of approximately 85% of its value, over $390 million. According to the FSA, Micalizzi deceived investors about the true position of the Fund and entered into a number of contracts on behalf of the Fund for the purchase and resale of a bond (the bond contracts) to disguise these losses. The FSA alleges he knew that the bond was not a legitimate financial instrument when he entered into the bond contracts, but deliberately undertook the bond investment to create artificial gains for the Fund. Units of the bond were sold to the Fund at a discount to their face value, and then valued by the Fund at approximately their face value when reporting to investors.

In the FSA's view, Micalizzi used this mechanism to show alleged profits from the bond contracts of over $400 million in late 2008, which balanced the Fund's losses enabling it to report a profit each month. According to the FSA, although he knew that the Bond was not a genuine financial instrument, he used at least $7.5 million of investors' money in the bond contracts. The FSA says he continued to seek new investors, despite the losses suffered by the Fund and he deliberately concealed the true value of the Fund from one new investor who in late 2008 invested $ 41.8 million.

The Fund was placed into liquidation in May 2009, with assets on liquidation estimated to be worth approximately $10 million. The liquidator has not yet made a payment to any investor. In August 2010, the FSA informed Micalizzi that the FSA had opened an investigation into his conduct and during the course of that investigation the FSA claims that Micalizzi provided it with false and misleading information.

Micalizzi and DDCM have referred this matter to the Upper Tribunal (the "Tribunal") where they and the FSA will each present their case. The Tribunal will then determine the appropriate action for the FSA to take and may uphold, vary or cancel the FSA's decision. This is an example of the FSA using its new power to publish a decision to take a proposed action before a matter is referred to the Tribunal. Previously, the FSA could only publish a final notice, i.e. where the appeal process was exhausted.

The FSA announcement can be found here.

Non-U.S.Adviser Settles with FSA, SEC Over Conflicts of Interest in Transactions Involving a Registered Fund

On May 10, 2012, the SEC and the FSA each announced that they had reached separate settlements, totaling approximately $14 million, with Scottish investment manager Martin Currie for failing to manage conflicts of interest among itself and two fund clients with overlapping portfolio management teams: Martin Currie China Hedge Fund, L.P. (the "Hedge Fund") and The China Fund, Inc., a registered closed-end investment company (the "China Fund").

As described in the SEC settlement order, the Hedge Fund experienced significant redemptions in 2008. As it sold liquid holdings and the portfolio declined in value, its exposure to a single issuer (the "Company") increased significantly and the Hedge Fund nearly breached its policy of limiting investments in a single issuer to no more than 20% of net assets. Moreover, the Company's financial condition weakened and it was in jeopardy of defaulting on bonds held by the Hedge Fund. Various transactions were explored to help the Company. Ultimately the China Fund made a significant investment in the Company's subsidiary. The

Subsidiary in turn loaned some of the proceeds of the China Fund's investment to the Company's parent in order to redeem a significant portion of the Company's bonds held by the Hedge Fund. As described in the SEC release, at various stages the adviser sought conflict waivers from the China Fund's Board of Directors, but failed to adequetely describe the transaction or disclose the fact that the Hedge Fund would benefit from the China Fund's investment in the Company's subsidiary. Moreover, the SEC order questions whether the China Fund's investment in the subsidiary was in the China Fund's best interests, noting a failure of the China Fund to perform new financial due diligence or credit risk analysis for the transaction and that the China Fund relied on the subsidiary's pricing of the bonds rather than performing an independent analysis. In April 2011 the bonds were sold for half of face value.

Once these facts came to light, the adviser self-reported to the FSA and organized a comprehensive internal investigation in cooperation with the SEC. The adviser also compensated the China Fund for its related losses; refunded management fees attributable to the bonds; terminated or disciplined several senior employees, including one of the portfolio managers; ceased new unlisted bond and private equity investments; and made enhancements to its compliance policies, procedures and controls.

The adviser settled with the FSA and SEC for £3.5 million and $8.3 million, respectively. The FSA stated in its release that because the adviser settled at an early state of the investigation, the adviser qualified for a 30% discount under the FSA's executive settlement procedures. The FSA's Final Notice can be found here. The SEC found among other things that the China Fund's investment in the subsidiary was an unlawful joint transaction under §17(d) of the Investment Company Act of 1940, and that the adviser willfully violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 by advising the China Fund's Board of Directors to approve the transaction on the basis of material misrepresentations and omissions concerning, among other things, the Hedge Fund's involvement, the investment rationale for the China Fund and initial pricing of the bonds. The SEC's Order can be found here.

Moody's Revises Ratings Guidelines for Securities Issued by Closed-End Funds

On May 2, 2012, Moody's Investor's Service ("Moody's") released revised ratings guidelines for securities issued by closed-end registered investment companies. Accordingly, Moody's also announced that it will be conducting a ratings review of all of the closed-end fund securities which it rates using the new guidelines. Moody's has said that it expects that the revised guidelines will result in lower ratings for most securities issued by closed-end funds. Closed-end funds with outstanding securities rated by Moody's should evaluate the potential impact of these guideline changes on their credit ratings and should review their governing documents to determine the possible impact of a ratings downgrade.

Regulatory Priorities Corner

A summary of regulatory priorities that have been brought to our attention recently:

- *CFTC Suggests Derivatives Regulations Must Extend to U.S. Banks' Foreign Branches.* In a speech on May 21, 2012 before FINRA, CFTC Chairman Gary Gensler cited a number of financial calamities to support the view that "When one affiliate of a large, international financial group has problems, it's accepted in the markets that this will infect the rest of the group," and that "[i]f a financial run starts on one part of a group, almost regardless of where it is around the globe, it invariably means a funding and liquidity crisis rapidly spreads to the entire consolidated entity." He then noted that the CFTC staff will be recommending that the CFTC publish a release on the cross-border implementation of swap market reform. The text of his speech can be found here. A CFTC open meeting on the cross-border implementation of swap market reform was scheduled to occur on June 21, 2012, but it was cancelled and it has not been rescheduled as of the date of this update.

- *OSC Cooperation.* At a March 28 meeting, senior SEC staff members met with counterparts at the Ontario Securities Commission ("OSC") to discuss a variety of issues, including approaches to examinations, investor education initiatives and the status of regulatory reforms in each jurisdiction. Regulators also discussed increasing coordination of dually regulated entities and they agreed to meet regularly. The SEC press release regarding this meeting can be found here.

- *SEC Administrative Hearing.* On April 3, 2012, the SEC instituted public administrative proceedings pursuant to Section 203(e) of the Advisers Act against Locust Offshore Management, LLC, an investment advisory firm, and Andrey Hicks, the principal, partner, Managing Director and CEO of Locust, alleging that they engaged in a scheme to defraud investors by making misrepresentations when soliciting investors to invest in a non-existent pooled investment fund. These misrepresentations included statements about Hicks' background, the existence of the fund, and the existence of an auditor, prime broker, and custodian. The SEC alleged that at least $1.7 million was obtained from 10 investors. The SEC Order can be found here.

Other Developments

Since the last issue of our IM Update we have also published the following separate Alerts of interest to the investment management industry:

CFTC Proposes Modifications to Position Limit Aggregation Rules for Futures and Swaps

On May 30, 2012, the Commodity Futures Trading Commission published a notice of proposed rulemaking modifying the final position limit aggregation rules released October 26, 2011. The proposed rules would (i) permit a market participant with an ownership interest of from 10% to 50% in an entity to file for an exemption from aggregation by demonstrating independence in decision making, (ii) modify the definition of independent account controller, (iii) modify the exemption from aggregation based on federal law restrictions and extend the exemption to foreign and state law restrictions, and (iv) extend the exemption from aggregation based on underwriting activities. Comments on the proposed rules are due June 29, 2012.

CFTC and SEC Adopt Final Rules Excluding Most Non-Dealers from OTC Swap Registration Requirements

The CFTC and the SEC recently adopted final rules defining “swap dealer,” “security-based swap dealer,” “major swap participant,” and “major security-based swap participant” under the Dodd-Frank Act. These entities generally will be required to register with the CFTC (with respect to swap dealers and major swap participants) or the SEC (with respect to security-based swap dealers and major security-based swap participants) and adhere to a wide variety of new requirements, including capital, margin and business conduct requirements.

The final rules set a high bar for the “major swap participant” and “major security-based swap participant” categories, excluding most buy-side participants from the registration requirement. In addition, the “swap dealer” and “security-based swap dealer” definitions are construed narrowly, thereby including for the most part only traditional dealers in the OTC derivatives market and excluding most buy-side participants who are not undertaking traditional dealing activities.

The CFTC also adopted a revised definition of “eligible contract participant.” This final rule exempts most private funds from the requirement that each investor in the fund be an “eligible contract participant” in order for the fund to be able to enter into off-exchange foreign currency transactions without satisfying certain requirements under the CFTC’s retail foreign exchange rules.

If you would like to learn more about the developments discussed in this alert, please contact the Ropes & Gray attorney with whom you regularly work or any partner in the Ropes & Gray Investment Management group, listed below.

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