# Ropes & Gray's Investment Management Update: December 2012-January 2013

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

## Motion to Dismiss Denied in The Hartford Funds Excessive Fee Litigation

The U.S. District Court for the District of New Jersey recently declined a motion to dismiss a lawsuit alleging that the fees paid by certain funds advised by Hartford Investment Financial Services, LLC ("Hartford") were excessive under Section 36(b) of the Investment Company Act of 1940. The complaint, *Kasilag et al. v. Hartford Investment Financial Services,* alleges that Hartford pays subadvisers to perform "substantially all" of the investment management services it is obligated to provide to the funds "at a fraction of the fee it charges for such services." The court granted Hartford's motion to dismiss the plaintiffs' claims regarding excessive distribution fees, but held that the plaintiffs asserted sufficient allegations regarding their investment management fee claims to withstand dismissal at the outset of the case. The court's ruling is available here.

The court considered Hartford's motion to dismiss "through the lens of the *Gartenberg* factors," which were established in the Second Circuit's *Gartenberg v. Merrill Lynch Asset Management, Inc.* and endorsed in 2012 by the Supreme Court in *Jones v. Harris Associates L.P.* With regard to "the nature and quality of services provided to the fund and shareholders," the court found that the plaintiffs had pleaded with sufficient specificity regarding the investment management services provided by Hartford, the services provided by the subadvisers, and the difference between their fees for "substantially the same" services. The plaintiffs also alleged that "the investment management services provided by the subadvisers constitute the most expensive and important services required under the investment management agreement." Hartford disputed these allegations, noting, among other things, that it provides extensive administrative and investment management services that are not delegated to the subadvisers.

With regard to allegations in the complaint bearing on other *Gartenberg* factors, the court considered the plaintiffs' comparison between Hartford's fees and the fees charged by one of its competitors, Vanguard, as well as the fees charged by Hartford's affiliate to institutional clients. Hartford disputed the plaintiffs' comparison to competitor fees, noting that Vanguard "represents just one data point at the lowest end of the range of possible fees." The court noted that other courts had acknowledged that Vanguard is a low-cost option and had given such comparisons limited weight. The court concluded that, given that Vanguard and Hartford both employ the same advisory firm as a subadviser, the plaintiffs' comparison is potentially more apt than in a typical case, but nonetheless found that the "Vanguard comparison is extremely limited." Viewing all the *Gartenberg* factors collectively, the court found that, when construing all the alleged facts in the plaintiffs' favor (as required at the motion to dismiss stage), the plaintiffs had raised a "plausible inference" that Hartford's fees are excessive under Section 36(b). The case will now proceed to discovery.

## Dodd-Frank Rulemaking: Recent Developments and Upcoming Deadlines

There have been a number of recent developments in connection with rulemaking by the Commodity Futures Trading Commission (the "CFTC") and the SEC under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and otherwise. Below is a brief summary of the status of certain key rules and deadlines in this area.

*Rule 4.5 Amendments*

On December 12, 2012, the U.S. District Court for the District of Columbia dismissed a lawsuit brought by the Investment Company Institute (the "ICI") and the U.S. Chamber of Commerce, which challenged recent amendments to Rule 4.5 promulgated by the CFTC under the Commodity Exchange Act. Previous Ropes & Gray Alerts summarizing the court's decision and amended Rule 4.5 can be found here and here, respectively. The ICI and U.S. Chamber of Commerce appealed the decision to the U.S. Court of Appeals for the District of Columbia on December 27, 2012 and filed a motion for expedited consideration of their appeal on January 3, 2013, which was granted by the court on January 15, 2013.

The CFTC provided some relief to advisers required to register as commodity pool operators ("CPOs") or commodity trading advisers ("CTAs") in a no-action letter dated December 21, 2012. This no-action relief provides that an adviser's registration as a CPO or CTA need not be granted by December 31, 2012, so long as the completed application was filed with the National Futures Association (the "NFA") by such date and the applicant operates as though it were registered as of January 1, 2013.

On December 31, 2012, the ICI released a memorandum regarding the application of certain NFA requirements to advisers required to register as CPOs and CTAs, including recordkeeping, disclosure of performance fees and expenses, communications with the public and promotional materials, CTA performance reporting and disclosures, content and delivery of disclosure documents, and CPO and CTA reporting to the NFA. The memorandum explains that there are certain NFA rules with which registered advisers may defer compliance and, in some cases, substitute compliance with corresponding SEC and FINRA requirements, until the compliance date for the CFTC's harmonization rulemaking. The letter from the ICI to the NFA in which the relevant compliance obligations are discussed in greater detail can be found here.

Under the amendments to Rule 4.5, funds that are currently relying on the rule must reaffirm or withdraw their existing notice of exclusion by March 1, 2013. The NFA previously issued guidance, which can be found here, on how to complete the affirmation process through the NFA's Exemption System.

*Swaps-Related Rulemaking*[1]

- **January 1, 2013: Reporting (Phase I)**
  - Since January 1, interest rate swaps and certain credit default swaps have been required to be reported by swap dealers ("SDs") and major swap participants ("MSPs") to a swap data repository. Such data is available to regulators and certain information (not including the identity of the parties) is made available to the public. Although most advisers and funds will not be required to report swap transactions, they should be aware that data regarding their transactions is being reported by their SD counterparties and therefore is generally available to regulators and the public.
- **February 28, 2013: Reporting (Phase II)**
  - Rules requiring the reporting of all other CFTC-regulated swaps, including foreign currency, commodity, and index swaps, by SDs and MSPs will take effect on February 28. The reporting

[1] Many swap-related compliance deadlines have been extended through various CFTC no-action letters, as well as the interim final rules adopted by the CFTC in late December. For more background on the rules and their requirements, see Ropes & Gray Alerts regarding Reporting and Recordkeeping as well as Clearing.

rules are the same as those described under "Reporting (Phase I)" above.

- **March 11, 2013: Clearing (Phase I)**
  - Rules requiring the mandatory clearing of certain interest rate swaps, certain forward rate agreements, and certain credit default index swaps between two parties who are SDs, MSPs, or private funds who entered into a monthly average of 200 or more swaps per month during the 12-month period ended November 1, 2012 ("active funds") will become effective on March 11. These clearing rules will generally not impact registered funds until June 2013 (see "Clearing (Phase II)" below).
- **April 10, 2013: CICI Identifier**
  - All swap counterparties that are not SDs or MSPs, including funds, must obtain a CFTC Interim Compliant Identifier ("CICI") by April 10 to enter into any reportable swap transaction after that date. Following April 10, the CICI will be used for all U.S. swaps reporting until a global Legal Entity Identifier system is established. CICIs may be obtained at www.ciciutility.org.
- **April 10, 2013: Recordkeeping**
  - Beginning April 10, full, complete, and systematic records must be kept by swap participants who are not SDs or MSPs for all CFTC-regulated swaps. Funds that engage in swap transactions must ensure that they have adequate processes in place with respect to recordkeeping and preservation of data. Records must be maintained for 5 years after termination of the swap, must be retrievable within 5 business days, and are subject to inspection by various regulators.
- **May 1, 2013: External Business Conduct Standards**
  - The effective date for most rules concerning new external business conduct standards that apply to SDs has been delayed from January 1, 2013 to May 1, 2013. To comply with the regulations, SDs will seek to add certain provisions to existing derivatives agreements (such as ISDAs) with their counterparties. Accordingly, SDs will likely refuse to enter into new over-the-counter CFTC-regulated derivatives after May 1, 2013 with any funds or other counterparties that have not either (1) adhered to the ISDA 2012 Dodd-Frank Protocol, which is a market-wide mechanism to amend derivatives trading agreements to include these changes or (2) amended their trading documentation with their dealer counterparties to include relevant provisions and/or provided equivalent representations under a separate communication.
- **June 10, 2013: Clearing (Phase II)**
  - On June 10, the clearing requirements described under "Clearing (Phase I)" above will become effective for commodity pools (including mutual funds), private funds other than active funds, and other entities that are predominantly engaged in financial activities (other than ERISA plans and "third-party subaccounts" (as defined under "Clearing (Phase III)" below)).
- **July 1, 2013: Documentation**
  - The effective date for certain new documentation rules that apply to SDs and MSPs has been delayed from January 1, 2013 to July 1, 2013. Among other requirements, these rules will require SDs and MSPs to have written policies and procedures that are reasonably designed to ensure that the SD or MSP executes swap trading relationship documentation that contains certain terms with each of its counterparties before it enters into a transaction with such counterparty. To ensure compliance with these rules, SDs and MSPs may refuse to enter into new over-the-counter CFTC-regulated derivatives after July 1 with any funds whose derivatives trading agreements (such as ISDAs) do not include the provisions that SDs and MSPs will seek in order to comply

with these rules. While ISDA has circulated a draft protocol to make the changes contemplated by these rules, it is not yet clear whether such protocol will be finalized. If not, bilateral amendments to trading agreements may be required. In addition, funds that have been trading currency forwards and other derivatives without master trading agreements may need to enter into such agreements by July 1, 2013 in order to continue trading after such date.

- **September 9, 2013: Clearing (Phase III)**
  - The clearing requirements described under "Clearing (Phase I)" above will become effective on September 9 for all entities not covered by the effective dates in March and June. For example, ERISA plans and "third-party subaccounts," which are accounts managed by an investment manager that (i) is independent of and unaffiliated with the account's beneficial owner or sponsor and (ii) is responsible for derivatives clearing documentation for the account, will become subject to the clearing requirements on such date.

*Other Developments*

In November, the staff in the SEC's Division of Investment Management added to its Issues of Interest webpage a section for investment advisers registered with the CFTC that advise private funds, which can be found here. The staff clarified that a CFTC-registered adviser to a private fund may not rely on the exemption from registration under the Investment Advisers Act of 1940 provided by Section 203(b)(6) of that Act, as amended by the Dodd-Frank Act, if the adviser also advises a registered fund or business development company or if its business is predominantly the provision of securities-related advice (regardless of when its business became predominantly securities-related advice).

On December 14, 2012, the SEC issued an order granting certain exemptions in connection with portfolio margining of swaps and security-based swaps. The order permits collateral provided for a fund's credit default index swaps (which are under the CFTC's jurisdiction) to be used to margin single name credit default swaps (which are under the SEC's jurisdiction). On January 14, 2013, the CFTC issued a corresponding order permitting ICE Clear Credit LLC and its clearing members that are dually registered broker-dealers and futures commission merchants to hold in a cleared swaps account customer property used for both cleared swaps and cleared security-based swaps and to provide for portfolio margining of such instruments, subject to certain conditions enumerated in the order. These orders could allow a fund to net the margin requirements between cleared credit default index swaps and cleared single name credit default swaps and therefore under certain circumstances provide less overall margin.

## Prudential's Pruco Settles Mispricing Charges

On December 21, 2012, Pruco Securities, LLC ("Pruco"), a subsidiary of Prudential Financial, Inc., agreed to pay over $11 million to settle allegations by the Financial Industry Regulatory Authority, Inc. ("FINRA") that it mispriced mutual fund trade orders and failed to have an adequate supervisory system and written procedures regarding pricing of mutual funds orders. The settlement included $10.7 million plus interest in restitution to be paid to Pruco customers and a $550,000 fine.

Rule 22c-1 ("Rule 22c-1") under the Investment Company Act of 1940 requires, among other things, that mutual fund orders be priced at the "current net asset value of such security," which is generally the price on the day the order is properly received and complete prior to 4:00pm ET. FINRA alleged that from late 2003 through June 2011, a Pruco business unit was pricing certain mutual fund orders received by mail or facsimile ("paper orders") on a day other than that on which orders were received and complete prior to 4:00pm ET.

It alleged that personnel of the Pruco business unit thought that they had up to two days to process paper orders, and that such orders could be priced on the date the orders were processed, even if Pruco received the complete orders prior to that date. As a result, certain customers received inferior prices on their mutual fund orders, according to FINRA. Due to such alleged Rule 22c-1 violations, FINRA charged Pruco with violating FINRA Rule 2010 and NASD Rule 2110, which require registered and associated persons, in the conduct of their business, to "observe high standards of commercial honor and just and equitable principles of trade." FINRA also charged Pruco with violating certain FINRA rules for failing to have an adequate supervisory system and written procedures regarding the pricing of mutual fund orders. In entering into the settlement, Pruco neither admitted nor denied the charges, but consented to the entry of FINRA's findings. The text of the settlement can be found here.

## Independent Trustees of The Reserve Primary Fund sued by Bents

In connection with filing an answer to the complaint filed by former shareholders of The Reserve Primary Fund, defendants Reserve Management Company, Inc. ("RMCI"), Resrv Partners, Inc., Reserve Management Corporation, Bruce Bent Sr., Bruce R. Bent, and Arthur T. Bent (collectively, the "Bents") recently filed a third party complaint against the money market fund's independent trustees. The third party complaint seeks to impose liability on the independent trustees on a number of grounds including: (i) claims for contribution and/or indemnification under the securities laws, if the Bents are found liable for the claims asserted by the fund's shareholders, (ii) derivative claims on behalf of the fund to recover losses suffered by the fund on account of the independent trustees alleged mismanagement and use of fund assets, (iii) direct claims for reimbursement for amounts advanced by RMCI for payment of trustees fees and certain fund expenses which accrued during the period that RMCI continued to provide services to the fund after redemptions were suspended, and (iv) injuries suffered by the Bents as a result of the allegedly fraudulent alteration of certain Board Minutes, which the Bents claim were revised after the fact to make it appear that the Bents misled the trustees about the level of redemptions experienced by the fund on September 15, 2008 (the date Lehman Brothers filed for bankruptcy). As noted in our November 2012 Update, Bruce Bent Sr. and Bruce Bent II were recently cleared by a federal jury of civil fraud charges in an action brought against them by the SEC, though Mr. Bent II was found liable for one claim of negligence relating to certain communications he made to investors, and RMCI and Resrv Partners, Inc. (the fund's distributor) were found liable for fraud. A copy of our November Update can be found here. A copy of the Bents' third party complaint can be found here.

## Regulatory Priorities Corner

The following brief updates exemplify trends and areas of current focus of relevant regulatory authorities:

**SEC Enforcement Chief Enforcement Discusses Priorities in the Alternative Space**. In a December 18, 2012 speech, Bruce Karpati, former Chief of the SEC Enforcement Division's Asset Management Unit, discussed the Asset Management Unit's recent experience with hedge fund enforcement cases. Mr. Karpati noted that his division brought over 100 cases against hedge fund managers since 2010 in such areas as conflicts of interest, valuation, performance reporting, and compliance and controls. In his view, "it is clear that even the sophisticated class of investors who invest in hedge funds are by themselves unable to effectively monitor the industry." Mr. Karpati said that the SEC would continue to focus on the conduct of hedge funds in light of what he described as an emerging retail orientation of hedge funds, both directly and indirectly through pensions, endowments, foundations, and other retirement plans. The text of Mr. Karpati's speech can be found here.

**OCIE Examinations Focus on Mutual Fund Distribution Arrangements.** According to media reports based on interviews with OCIE director Carlo di Florio, SEC examiners have been investigating payments by funds and advisors to distributors and intermediaries. In particular, the SEC is concerned with whether these payments are being completely and accurately described to mutual fund boards.

**SEC Accuses California Investment Manager of Engaging in "Cherry Picking" Scheme.** In December 2012, the SEC instituted an enforcement action in U.S. District Court in California, alleging that an investment adviser and its CEO engaged in a scheme which delayed the allocation of option trades so that they could be "cherry picked" with the benefit of hindsight, namely by allocating "winning" trades to certain preferred accounts and the "losing" trades to other accounts. From mid-August 2009 through November 2011, these allocation practices allegedly resulted in approximately $4.14 million of profit for the favored accounts (including roughly $2 million in profit to the CEO's personal accounts), while two disfavored hedge funds sustained trading losses of approximately $4.4 million. The SEC's complaint is available here.

**SEC Plans to Pursue Fiduciary Rule in 2013.** In its Fiscal Year 2012 Financial Report to the President and Congress, the SEC indicated that it plans to "move forward" with recommendations from an SEC staff report to consider a uniform fiduciary standard of conduct for investment advisers and broker-dealers when they are providing personalized investment advice to retail investors. The report also states that the SEC will continue to assess ways to harmonize regulatory requirements applicable to investment advisers and broker-dealers when they are providing the same or substantially similar services to retail investors. A copy of the report is available here.

**Five Broker-Dealers Agree to Pay Fines to Settle FINRA Prospectus Delivery Cases.** Without admitting or denying findings made by FINRA, five broker-dealers, including affiliates of a mutual fund complex and a life insurance company, agreed to fines imposed in connection with disciplinary actions instituted by FINRA.[2] These disciplinary actions resulted from alleged failures in the timely delivery of mutual fund prospectuses and/or failures to adopt an adequate supervisory system and written supervisory procedures with respect to prospectus delivery.

**FINRA Highlights Regulatory and Examination Priorities for 2013.** In its annual discussion concerning areas of focus for the upcoming year, FINRA described the "unprecedented compression of credit risk premiums and yields" and the resulting elevated risks for investors in the current market environment. FINRA highlighted concerns about whether firms and registered representatives have the ability to effectively determine the suitability of complex or high-yield products and whether they adequately explain the risk-versus-return profile of such products to their customers. FINRA's discussion identifies the following products and investments for heightened scrutiny in 2013: Business Development Corporations, Leveraged Loan Products, Commercial Mortgage-Backed Securities, High Yield Debt, Structured Products, Exchange Traded Notes, Non-Traded REITs, and Closed-end Funds. FINRA's announcement is available here.

**Former Portfolio Manager Banned from Industry for Failure to Provide Information to Valuation Committee.** An administrative law judge ruled that the former portfolio manager of a fund that invested in CDOs should be banned from the industry for a period of five years due to her failure to inform other members of the fund's Valuation Committee that an event of default, acceleration and missed payment

[2] *See* Deutsche Bank Securities Inc. (December 31, 2012); LPL Financial, LLC (December 31, 2012); Scottrade, Inc. (December 31, 2012); State Farm VP Management Corp. (December 31, 2012); T. Rowe Prince Investment Services, Inc. (December 31, 2012).

notice had been issued for one of the CDOs owned by the fund. The judge found that, despite "an unblemished twenty-year record of outstanding performance," such a sanction was warranted because the portfolio manager's "willful, knowing lack of judgment on one security for a little over two months is contrary to the standard required of someone in her position." The judge's ruling is available here.

**Treasury Department and IRS Issue Final FATCA Regulations.** On January 17, 2013, the Treasury Department and the Internal Revenue Service (IRS) issued long-awaited final regulations implementing the information reporting and withholding tax provisions of the set of statutory rules commonly referred to as the "Foreign Account Tax Compliance Act" (FATCA). A client alert concerning this development is forthcoming.

## Other Developments

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

New State Laws Prohibit Employers and Academic Institutions from Requesting Usernames and Passwords to Monitor Social Media Activity, Creating Complications for Compliance with Federal Securities Regulations
January 22, 2013
Discusses legislation in an increasing number of states that prohibits employers and academic institutions from requesting or requiring employees, job applicants, students, and prospective students to turn over their social media usernames and passwords.

FBAR Filing Deadline Further Extended to June 30, 2014 for Certain Employees and Officers with Signature Authority Over Foreign Financial Accounts
January 9, 2013
On December 26, 2012, the Financial Crimes Enforcement Network (FinCEN) issued Notice 2012-2, further extending the filing deadline for U.S. Treasury Form TD F 90-22.1, the "Report of Foreign Bank and Financial Accounts" (FBAR), until June 30, 2014 for two groups of individuals with signature authority over, but no financial interest in, a foreign financial account.

D.C. District Court Rejects Challenge to CFTC Rule 4.5 Amendments
December 19, 2012
On December 12, 2012, the U.S. District Court for the District of Columbia dismissed a lawsuit challenging recent amendments to Rule 4.5 promulgated by the CFTC.

CFTC Staff Provides Registration Relief for Family Offices
December 14, 2012
On November 29, 2012, the CFTC staff published relief for family offices that would otherwise be required to register with the CFTC as commodity pool operators.

SEC Brings Enforcement Action Against Mutual Fund Directors for Alleged Failures in Oversight of Valuation Committee
December 13, 2012
On December 10, 2012, the SEC filed an order instituting enforcement proceedings against both the interested and the independent directors of five registered investment companies advised by Morgan Asset Management, Inc., alleging that the directors failed to properly carry out their duties during several months in

2007 with respect to overseeing the determination of the "fair value" of certain structured product securities owned by four closed-end funds and three series of an open-end investment company.

New UK Distribution Rules Effective December 31 – the Impact on Fund Managers
December 13, 2012
The UK's Retail Distribution Review ("RDR") came into force on December 31, 2012. Despite its title, the RDR will not be limited to the protection of investors that might traditionally be considered to be retail.

SEC Ends Moratorium on Active ETFs' Use of Derivatives
December 7, 2012
At a speech given at the ALI CLE 2012 Conference on Investment Adviser Regulation held on December 6th, SEC Division of Investment Management Director Norm Champ announced that the SEC staff will no longer defer consideration of exemptive requests under the Investment Company Act relating to actively-managed ETFs that make use of derivatives.

SEC's Charges Against China-Based Accounting Firms Have Broad Implications
December 5, 2012
As part of its effort to investigate potential accounting fraud at unnamed China-based companies that are publicly traded in the United States, on December 3, 2012 the SEC charged the Chinese affiliates of the "Big Four" accounting firms – Ernst & Young, Deloitte, KPMG and PricewaterhouseCoopers – with violating the Securities Exchange Act and the Sarbanes-Oxley Act.

CFTC Staff Delays Registration Deadline for Certain Fund of Fund Operators
December 3, 2012
On November 30, 2012, the CFTC staff published relief for fund of fund operators who would otherwise be required to register with the CFTC as commodity pool operators by December 31, 2012 but do not have access to information from the funds in which they invest necessary to determine whether registration is required.

CFTC Issues Final Clearing Determination for Certain Interest Rate Swaps and Credit Default Index Swaps
November 29, 2012
On November 28, 2012, the CFTC issued final rules that require certain interest rate swaps and credit default index swaps to be cleared.

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

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