# Ropes & Gray's Investment Management Update: August 2013 - September 2013

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

## Adviser's Statements During 15(c) Process Provide Basis for SEC Enforcement Action

On August 21, 2013, the SEC filed an order instituting administrative proceedings against Chariot Advisors LLC ("Chariot"), a North Carolina-based investment adviser, and its former owner, Elliott Shifman, for misleading the board of trustees (the "Board") of the Chariot Absolute Return Currency Portfolio (the "Fund"), a series of the Northern Lights Variable Trust, in connection with the Board's evaluation and approval of the Fund's advisory contract with Chariot pursuant to Section 15(c) of the Investment Company Act (the "15(c) process").

The SEC alleged that Shifman, acting on behalf of Chariot, misled the Board during the 15(c) process conducted in connection with the formation of the Fund by stating that Chariot would implement the Fund's currency trading strategy using a computer model and algorithm that would permit the Fund to take advantage of currency arbitrage opportunities. Chariot also provided a proposed prospectus for the Fund that described the Fund's ability to engage in algorithmic currency trading, and similar statements were made in the Fund's initial registration statement filed with the SEC in June 2009. The SEC alleges that, contrary to what Shifman told the Board and what was stated in the prospectus, Chariot did not possess an algorithm or model capable of engaging in currency trading. According to the SEC order, for at least the first two months after the Fund launched in July 2009, the Fund's currency trading was under the control of an individual trader who was not using an algorithm but instead made trading decisions based on a combination of technical analysis and intuition. Chariot and Shifman have been charged with violations of Sections 15(c) and 34(b) of the Investment Company Act (the "1940 Act"), and violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act (the "Advisers Act").

The action against Chariot follows the recent settlement of an SEC enforcement action brought against the trustees of Northern Lights Variable Trust, which was based on inaccurate statements made by the trustees with regard to their approval of advisory contracts for other series of the trust. The current proceeding against Chariot demonstrates that the SEC staff will also scrutinize the statements made by investment advisers during the 15(c) process. The Ropes & Gray Alert summarizing the *Northern Lights Variable Trust* enforcement action can be found here. The full text of the SEC order against Chariot can be found here.

## Portfolio Manager Sanctioned for Misleading CCO

On August 27, 2013, the SEC settled an enforcement action by imposing sanctions against a former portfolio manager at Boulder Investment Advisers, LLC ("Boulder"), a Colorado-based investment adviser, for forging documents and misleading his firm's and the funds' chief compliance officer (the "CCO") in order to conceal the portfolio manager's failure to report his personal trading activities. In addition to violations of Rule 17j-1 under the 1940 Act, which requires reporting of personal securities transactions by portfolio managers and other "Access Persons," the SEC also asserted violations of Rule 38a-1(c) under the 1940 Act, which prohibits an officer, director, or an employee of a fund, or its investment adviser, from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence the fund's

CCO in the performance of his or her duties under the 1940 Act. According to the SEC's press release announcing the commencement of this action, this is the first case in which the SEC has asserted a violation of Rule 38a-1(c).

As alleged in the SEC's order, the portfolio manger failed to report or pre-clear with the CCO approximately 640 of the 850 total trades he made from 2006 to 2010, in violation of the 1940 Act and Boulder's code of ethics. These included at least 91 trades involving securities held or to be acquired by four closed-end funds managed by Boulder and its affiliates and 14 trades that did not comply with restrictions in Boulder's and the funds' joint code of ethics. In order to conceal his trading, the SEC asserted that the portfolio manager submitted false quarterly and annual reports and falsely submitted annual certifications of his compliance with the code of ethics. The SEC also alleged that the portfolio manager physically altered brokerage statements, trade confirmations, and pre-clearance approvals that were submitted to Boulder. After identifying certain irregularities in the documents detailing his securities transactions, the CCO began to make inquiries of the portfolio manager. According to the settlement order, the portfolio manager allegedly misled the COO by saying that certain brokerage accounts were closed when they remained open and reflected trades that were not pre-cleared as required by Boulder's code of ethics. The SEC also alleged that the portfolio manger then accessed the hard copy file of previously submitted brokerage statements and physically altered these records to create the false impression that his trading complied with the code of ethics.

The defendant neither admitted nor denied the SEC's findings, but agreed to pay monetary damages (including over $230,000 in disgorgement and a civil penalty of $100,000) and consented to a five-year ban from the industry. The SEC Settlement Order is available here.

## CFTC Grants No-Action Relief Regarding CFTC Regulations 4.27(c) and 4.22(c) to Commodity Pool Operators ("CPOs") of Controlled Foreign Subsidiaries ("CFCs") of Registered Investment Companies

On September 5, 2013, the Division of Swap Dealer and Intermediary Oversight of the CFTC issued a no-action letter that confirms that CPOs of registered investment companies that consolidate their wholly-owned subsidiaries (also known as controlled foreign corporations, or "CFCs") for financial reporting purposes may (i) report for the registered fund and its CFCs on a consolidated basis under CFTC Regulation 4.27(c); and (ii) file annual reports for the CFC with the National Futures Association (the "NFA"), to the extent required by CFTC Regulation 4.22(c), containing consolidated financial statements for the registered investment company, in lieu of a separate annual report for the CFC. The relief was a response to an April 10, 2013 letter from the Investment Company Institute and the Asset Management Group of the Securities Industry and Financial Markets Association. The no-action letter states that the CFTC will not take an enforcement action pursuant to Regulation 4.27(c) for failure to provide a separate report for the CFC to the NFA, provided that the CPO provides consolidated reports on Form CPO-PQR to the NFA in the manner described in the no-action letter. Similarly, the CFTC stated in the letter that it will not take an enforcement action pursuant to CFTC Regulation 4.22 for failure to distribute a separate annual report to the NFA for a CFC where the CPO of the CFC is also the CPO of the parent registered fund, if the CPO prepares a consolidated annual report in a manner laid out in the no-action letter for both the first annual report following the Compliance Date and all subsequent fiscal years. The no-action letter states that the relief granted in the letter is not self-executing; to rely on the relief, an eligible CPO must file a notice of claim with the CFTC as specified in the letter. The letter ultimately confirmed current practice with regard to financial reporting for CPOs of CFCs of registered investment companies; nonetheless, the letter should provide additional comfort for those CPOs that follow the letter's prescribed procedures.

## SEC Issues FAQ Regarding Form 13F Filings

Each institutional investment manager that exercises investment discretion over $100 million or more of certain enumerated securities must report its holdings on Form 13F, which is filed periodically and is available to the public on the SEC's EDGAR website. On May 20, 2013, the text-based ASCII format for 13F filings was discontinued and replaced with an online form. The substance of Form 13F was not changed, and the new online filing format is intended to simplify the filing process and help filers avoid technical errors, as well as enhance the utility of the reported data to end-users, such as operations and risk professionals, academics and regulators. On August 2, 2013, the Division of Investment Management staff released updates to the Form 13F FAQs (available here). The updated FAQs provide guidance on the transition from the text-based Form 13F to the new online form as well as additional clarification about the availability of confidential treatment. In particular, the updated FAQs provide filers with (i) links to instructions on how to create and file Forms 13F; (ii) information regarding a filer hotline that the SEC has established (202-551-8900, ext. 3); and (iii) further guidance regarding the availability of and process for requesting confidential treatment of information filed on Form 13F. The staff noted that confidential treatment is available, most typically for a non-risk arbitrage investment position(s), and, in certain limited circumstances, for an ongoing investment strategy, such as an ongoing program of acquisition or disposition.

## EU Proposes Regulation of Money Market Funds

On September 4, 2013, the European Commission released a proposal for regulation of money market funds established, managed and/or marketed in the European Union, meaning that the new rules would apply to U.S. fund managers that have money market funds offered in Europe. Although some of the proposed regulations have already been voluntarily adopted by a number of fund managers or otherwise track the SEC's proposed requirements, other aspects would impose expanded requirements that are not currently being contemplated by the SEC. For example, the proposed rules include a requirement for money market funds that hold constant net asset values to maintain a 3% capital cushion to support stable redemptions in the event a fund's assets decrease in value. The proposal would also limit the types of investments that can be held by money market funds and sets minimum requirements for liquid assets, requiring that a fund hold 10% in assets maturing daily and another 20% in assets maturing within a week. Additionally, the proposed rules would prohibit banks and other sponsors from supporting money market funds' share prices. The European Commission must obtain approval for the new rules from EU member states and the European Parliament before European elections next spring. The proposal has been met with criticism. The Investment Company Institute released a statement saying that the proposal, "neither serves investors nor meets those basic standards for rulemaking."

## SEC Sanctions Two Dually Registered Investment Advisers and Broker-Dealers for Best Execution Violations

On July 31, 2013, the SEC announced settlements of two separate enforcement actions in which the SEC alleged that the defendants violated their duties to seek best execution.

In the case against A.R. Schmeidler & Co., Inc. ("ARS"), a dually registered broker-dealer and investment adviser, the SEC alleged that ARS selected itself as the broker-dealer to execute trades for its clients, unless the client specifically instructed it not to do so. According to the settlement order, ARS contracted with a third-party clearing firm to provide certain execution, clearance and custody services. ARS thereafter amended its contract with the clearing firm to increase the amount that ARS would be paid in connection with the commissions charged for client trades. The SEC alleged that ARS failed to conduct sufficient analysis in approving this amended arrangement to determine whether ARS properly sought best execution for its clients. The SEC also asserted that ARS failed to implement its own policies and procedures regarding best execution.

In the other case, the SEC alleged that Goelzer Investment Management, Inc. ("GIM"), a dually registered broker-dealer and investment adviser, and Gregory W. Goelzer, GIM's Chief Compliance Officer, failed to comply with various statements in GIM's Form ADV regarding best execution. According to the SEC, GIM's standard practice was to act as a broker-dealer to execute trades for nearly all of its advisory clients, except when a client directed GIM to use a different broker-dealer. GIM's Form ADV Part 2 stated that GIM's recommendation that clients use GIM as their broker was based on GIM's consideration of several factors, including: the products offered; the level of service; the quality of trade execution; the record keeping and reporting capabilities; the trading platforms offered; and the ability to meet client needs. The SEC alleged that, in fact, GIM failed to evaluate brokerage options for its clients in this manner and never compared its commission rates to its competitors.

The SEC also alleged that GIM violated the Advisers Act because it failed to disclose the negotiability of its advisory fees in its Form ADV, Per Item 1.D of Form ADV Part 2. This omission was misleading because approximately 75% of GIM's clients paid less than the amounts set forth in the standard schedule GIM disclosed in its Form ADV Part 2.

In agreeing to the terms of the settlements, neither firm admitted or denied the SEC's findings, but agreed, among other sanctions, to pay disgorgement and civil monetary penalties. The ARS order is available here, and the GIM order is available here.

## PCAOB Proposes Changes to Auditor's Reports

On August 13, 2013, the Public Company Accounting Oversight Board ("PCAOB") proposed for public comment two audit standards that would lead to significant changes to the auditor's reporting model for public companies, including investment companies. The proposal retains the current pass/fail model and the basic elements of the current auditor's report, but requires that auditors communicate more audit-specific information (among other changes). Most significantly, the new proposal would require the auditor to include in the auditor's report "critical audit matters" unique to each audit. The required communication regarding critical audit matters would focus on the matters the auditor determined require the most difficult, subjective, or complex judgments; those issues that posed the greatest difficulty in obtaining appropriate evidence for the auditor; and matters that posed the greatest difficulty to the auditor in forming an opinion on the financial statements. Other new requirements for auditors would include a proposed extension of the auditor's responsibility for "other information" included in certain annual reports. "Other information" filed by an investment company on Form N-CSR would include, for example, the Code of Ethics, the Management's Discussion of Fund Performance, and the Expense Example. The PCAOB highlighted factors unique to investment companies that would affect the implementation of the proposal, including how disclosure for affiliated funds may be included in the same N-CSR filing and how masterfeeder funds and funds-of-funds may include funds that are not affiliated, have different auditors, and/or have different fiscal year ends. Comments on the proposal are due by December 11, 2013. If approved by the SEC, the proposal would be effective for audits of financial statements beginning on or after December 15, 2015.

## SEC Adopts Final Rule for Registration of Municipal Advisors

On September 20, 2013, the SEC adopted a Final Rule to establish a permanent registration regime for municipal advisors (the "Municipal Advisors Rule") as required to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which amended Section 15B of the Securities Exchange Act of 1934 (the "Exchange Act"). The Dodd-Frank Act prohibits municipal advisors from soliciting or providing certain advice to municipal entities without first registering with the SEC . The SEC had previously published a proposed rule to establish a permanent municipal advisors registration regime on December 20, 2010, which was discussed in a previous Alert. The Municipal Advisors Rule adopting release is over six hundred pages long and covers a wide range of issues that are beyond the scope of this Update. The following is a brief overview of certain issues that may be of most concern to investment managers.

In general, a municipal advisor is defined in the Municipal Advisors Rule as a person that "provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or an obligated person."

The definition of municipal advisor thus includes a broad range of participants in the municipal securities industry, such as guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors and other parties that that provide municipal advisory services, unless their activities fall within an applicable exclusion.

Under the Municipal Advisors Rule, registered investment advisers, registered broker-dealers and registered commodity trading advisors ("CTAs") are excluded from the definition of a "municipal advisor" with respect to specific types of activities. The exclusion for registered investment advisers is applicable to the extent that a registered investment adviser "is providing investment advice in such capacity." However, this exclusion does not apply to advice provided by an investment adviser "concerning whether and how to issue municipal securities, advice concerning the structure, timing, and terms of an issuance of municipal securities and other similar matters, advice concerning municipal derivatives, or a solicitation of a municipal entity or obligated person." The exclusion provided for broker-dealers applies when a broker-dealer is serving as an underwriter of a particular issuance of municipal securities, but only to the extent such activities are within the scope of an underwriting of such issuance of municipal securities. Similarly, CTAs are excluded with respect to advice that is related to swaps.

Although the SEC acknowledged that it received numerous comments requesting that these exclusions be more broadly or concretely defined, in general it declined to do so. This approach reflects the SEC's view that the exclusions are highly dependent on the particular facts and circumstances of the type of activity that is being conducted. However, the SEC incorporated a change in the definition of the term "proceeds of municipal securities" in order to narrow the scope of the rule. As a result of this change, investment advisers who provide investment advice to public employee benefit plans or participant-directed investment plans such as 529, 403(b) or 457 plans that do not include proceeds of municipal securities would not be required to register as municipal advisors.

Municipal advisors who are subject to the new registration regime must register by electronically filing a Form MA with the SEC. In addition, the Exchange Act, as amended by the Dodd-Frank Act, provides that municipal advisors are subject to the regulatory authority of the Municipal Securities Rulemaking Board ("MSRB") and imposes a fiduciary duty on municipal advisors. Municipal advisors must also separately register with MSRB and comply with its regulations, which impose a broad range of requirements, including rules relating to recordkeeping, advertising and training.

## Regulatory Priorities Corner

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

### *Revised Risk Retention Rules Published for Asset-backed Securities*

The Board of Governors of the Federal Reserve System, the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission jointly issued a revised version of their proposed rule implementing the credit risk retention requirements of section 15G of the Securities Exchange Act of 1934. Section 15G was amended by section 941 of the Dodd-Frank Act to require the securitizer of asset-backed securities to retain not less than 5 percent of the credit risk of the assets collateralizing the asset-backed securities. The credit risk retention requirement is intended to insure that securitizers, as a general matter, retain an economic interest in the credit risk of the assets they securitize. The rationale for this requirement is to provide securitizers with an economic incentive to monitor and ensure that the quality of the assets underlying a securitization transaction is in alignment with the interests of investors. The changes incorporated into the revised proposal are generally intended to increase the degree of flexibility that sponsors would have in meeting the risk retention requirements of section 15G. Comments on the proposed rule are due by October 30, 2013. The SEC's release can be found here.

### *SEC Issues Business Continuity Risk Alert*

The National Exam Program of the SEC's Office of Compliance Inspections and Examinations issued a Risk Alert summarizing the results of its review of the business continuity and recovery plans ("BCPs") of approximately 40 investment advisers, which the SEC conducted in response to wide-ranging damage and disruptions caused by Hurricane Sandy in October of 2012. In general, the Risk Alert focuses on the importance of anticipating and addressing the problems created by geographically widespread events. The Risk Alert emphasized the importance of an organization's geographical diversity when planning a successful BCP, particularly with respect to backup locations, systems and service providers. The SEC noted that BCPS should address situations where key personnel, such as portfolio managers, are unable to work from home or other remote locations. The Risk Alert also highlighted the importance of testing the operability of critical back-up systems, and noted that some advisers encountered disruptions because they opted not to conduct such tests in order to avoid paying additional fees charged by vendors. The Risk Alert can be found here.

### *SEC Enforcement Changes Enforcement Priorities to Focus on Complex Products*

In his remarks at a recent Practicing Law Institute conference, the co-head of the SEC's Division of Enforcement, Andrew Ceresney, said that the division's prosecution unit is looking more closely at "areas that have not received as much attention [until recently]," including complex financial instruments such as ETFs, derivatives, collateralized loan obligations, as well as at the credit-rating agencies. Ceresney also said that the division is newly concentrating on financial reporting and micro-cap fraud, market structure and the implementation of new rules and regulations, such as the 2012 Jumpstart Our Business Startups Act and the forthcoming Volcker Rule.

### *SEC Charges Investment Adviser in Alleged Cherry-Picking and Soft Dollar Schemes*

On August 30, 2013, the SEC charged J.S. Oliver Capital Management, a San Diego-based investment adviser, and its president for engaging in a cherry-picking scheme that cost clients approximately $10.7 million and for the misuse of approximately $1.1 million in soft dollars. In connection with the cherry-picking scheme, the adviser allegedly waited to allocate trades until the close of trading or the next day, and gave more favorably-priced securities to accounts held by the president and his family. In connection with the soft dollar scheme, the adviser allegedly failed to disclose the use of soft dollars for (i) more than $300,000 in payments to the president's ex-wife under his divorce agreement; (ii) more than $300,000 in "rent" for the advisory firm to conduct business at the president's home; (iii) approximately $480,000 for outside research and analysis to a company wholly owned by an employee of the adviser; and (iv) nearly $40,000 in maintenance and other fees on the president's personal timeshare in New York City.

## 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:

**CFTC Adopts Final Rules for Commodity Pool Operators of Registered Investment Companies and Amends Rules for All Registered Commodity Pool Operators**

September 3, 2013

On August 22, 2013, the CFTC published final rules ("Final Rules") intended to harmonize the compliance obligations for investment advisers to investment companies registered under the Investment Company Act of 1940 that also are required to register as commodity pool operators with the CFTC. The Alert provides an in-depth discussion of the Final Rules and the companion SEC guidance and includes a list of related action items.

**SEC Releases Guidance with respect to Privately Offered Securities and the Custody Rule**

August 5, 2013

The Division of Investment Management of the SEC released an IM Guidance Update that addresses the question of whether instruments evidencing a fund's ownership of certain privately issued securities, including non-transferable stock certificates or "certificated" limited liability company interests that were obtained through a private placement ("private security certificates"), meet the definition of "privately offered securities" under the Custody Rule.

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 member of the Ropes & Gray Investment Management group listed below.

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