Ropes & Gray's Investment Management Update: October 2013 - November 2013

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

SEC to Focus on "Broken Windows," Targeting Both Large and Small Violations of Federal Securities Laws

In remarks to the Securities Enforcement Forum on October 9, 2013, Securities and Exchange Commission ("SEC") Chairperson Mary Jo White stated that one of the SEC's goals for its enforcement program is to be "everywhere, pursuing all types of violations of our federal securities laws, big and small." She likened the approach to the "broken windows" policy pursued during the 1990s by then-New York City Mayor Rudy Giuliani, who regarded no infraction too small to be "uncovered and punished" (the theory being that when a window is broken and is immediately fixed, it signals that disorder will not be tolerated, whereas if it is not fixed, it signals that there is no cost to breaking additional windows). Chairperson White noted that the SEC's Division of Enforcement would pursue not just the biggest frauds, but also more minor violations such as control failures and negligence-based offenses, among others.

Chairperson White noted that the SEC will expand its reach in a number of ways, including leveraging its National Exam Program; pursuing "deficient gatekeepers" in our financial system; incentivizing individuals to report violations; expanding collaboration with other regulators; and utilizing advanced technologies to identify wrongdoing. With respect to pursuing "deficient gatekeepers," she emphasized that investment company boards serve as critical gatekeepers and that the SEC intends to focus on ensuring that they are appropriately performing their duties. She stated that "being a director or in any similar role where you owe a fiduciary duty is not for the uninitiated or the faint of heart," but the SEC "will not be looking to charge a gatekeeper that did her job by asking the hard questions, demanding answers, looking for red flags and raising her hand." Chairperson White also commented on independent auditors, noting that the SEC will continue to focus on auditors and had recently launched "Operation Broken Gate," an initiative to identify auditors who neglect their duties and the required auditing standards.

As an example of the SEC's efforts to target violations and violators regardless of size, Chairperson White noted the nearly two dozen enforcement actions brought by the SEC for violations of Rule 105 of Regulation M, which prohibits improperly participating in public offerings for a period of time after short selling those same securities (a link to a related Ropes & Gray Alert can be found here). She noted that these actions yielded disgorgements ranging from as high as $2.5 million to as low as $4,000. Chairperson White subsequently tempered her comments with regard to minor violations, noting that "it's not a game of gotcha" and that the SEC does not seek to bring an enforcement action in response to every minor violation, but intends to address such violations through engagement, deficiency letters, and other approaches short of enforcement action.

Chairperson White stated that while the SEC intends to target smaller violations, it will continue to focus significant attention on larger and more complicated cases. She noted that the SEC will strive for settlements "that have a deterrent effect, and where appropriate, the added measure of public accountability that an admission often brings." Chairperson White's full speech can be found here.

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New Excessive-Fee Suit Continues Trend of Targeting Sub-Advisory Relationships

Since March 2010, when the United States Supreme Court embraced the *Gartenberg* standard for examining excessive-fee cases in *Jones v. Harris Associates L.P.*, there has been a notable surge of cases alleging receipt of excessive fees by managers of sub-advised funds. In 2011, two such cases were brought against Axa Equitable Life Insurance Co. ("Axa Equitable") and Hartford Investment Financial Services ("Hartford"). In each case, it was alleged that sub-advisers performed substantially all of the investment management services provided to the funds, and the limited supervisory roles of the sponsoring investment advisers did not merit retention of the majority of management fees paid by the funds.

On October 17, 2013, a similar complaint (available here) was filed by a plaintiff shareholder derivatively against Russell Investment Management Company ("RIMC") ostensibly on behalf of ten RIMC-advised funds (the "Russell Funds"). Reminiscent of the arguments presented in the Axa Equitable and Hartford cases, the plaintiff alleged that RIMC's responsibilities of assigning, overseeing, and evaluating the assets managed by the Russell Funds' sub-advisers were "minimal compared to the day-to-day responsibilities of managing the Russell Funds' portfolio." By extension, the plaintiff argued that RIMC's retention of $107 million of the approximately $164 million in total management fees was excessive and in violation of Section 36(b) of the Investment Company Act of 1940 (the "1940 Act"). Moreover, the plaintiff cited the legislative history of Section 36(b) to note that RIMC's failure to share cost savings associated with the economies of scale that are inherent to sub-advisory relationships is a hallmark of an excessive fee violation. RIMC has not filed its response to the complaint as of the date of this Update.

SEC Takes More Expansive View on Adviser's Duty to Seek Best Execution in Selection of Fund Share Classes

On October 2, 2013, the SEC filed an order instituting administrative and cease-and-desist proceedings against, among others, Manarin Investment Counsel, Ltd. ("MIC"), a Nebraska-based investment advisory firm, for purchasing, on behalf of a registered fund (the "Registered Fund") and two private funds (the "Private Funds" and, collectively, the "Funds"), Class A shares of underlying mutual funds ("Underlying Funds") subject to ongoing 12b-1 fees even though the Funds were eligible to purchase lower-cost "institutional" shares of the same Underlying Funds that were not subject to 12b-1 fees. The 12b-1 fees were ultimately paid to Manarin Securities Corp. ("MSC"), an affiliated broker-dealer of MIC. The SEC found that MIC willfully violated Section 206(2) of the Investment Advisers Act of 1940 (the "Advisers Act") by failing to seek best execution for the Funds when selecting among available share classes.

The SEC further asserted that MIC willfully violated Section 206(2) by representing to the Registered Fund, through the Fund's board of directors, that MIC sought best execution on transactions for the Fund. In addition, because the Funds' offering documents stated generally that MIC uses its best efforts to obtain the most favorable price and execution available, the SEC also found that MIC and Roland R. Manarin, founder and president of MIC and MSC, had made materially misleading disclosures regarding best execution in the Private Funds' offering documents, and that Manarin, by signing the Registered Fund's registration statement as president of the Fund, made similarly materially misleading statements in such registration statement. The SEC further claimed that MIC, MSC and Manarin violated Section 17(a)(2) of the Securities Act of 1933 (the "Securities Act") by offering and selling interests in the Funds through the use of materially misleading offering documents.

It is noteworthy that the SEC framed this case as a violation of the adviser's duty of best execution. While, traditionally, an adviser's duty to "seek the most favorable terms" in this context has been viewed as an obligation to evaluate the execution performance of broker-dealers and select the appropriate broker-dealer for executing client transactions, the SEC now appears to be taking the view that the duty to seek best execution extends beyond selecting an appropriate broker to selecting an appropriate share class of underlying funds.

Finally, the SEC found that MSC violated Section 17(e)(2)(A) of the 1940 Act by receiving, on transactions in exchanged-traded funds ("ETFs") for the Registered Fund effected on a securities exchange, commissions that exceeded the usual and customary broker's commission for such transactions. In this regard, the SEC cited deficiencies in the Registered Fund's Rule 17e-1 procedures because the procedures did not require any investigation into the commissions actually charged by other broker-dealers for similar transactions. MSC and MIC agreed to reimburse the Funds and disgorge profits (with prejudgment interest) totaling over $2.8 million, and to pay an additional $100,000 civil monetary penalty to the SEC. The order can be found here.

SEC Releases New Guidance on Form 13F Confidential Treatment Requests

In an October IM Guidance Update, the SEC's Division of Investment Management provided additional guidance regarding requests for confidential treatment for information relating to an ongoing program of acquisition or disposition of a security reported on Form 13F (an "ongoing acquisition/disposition program"). Section 13(f) of the Securities Exchange Act of 1934 (the "Exchange Act") generally requires investment managers who manage more than $100 million in certain reportable securities to file with the SEC quarterly reports on Form 13F detailing their holdings. Section 13(f) also requires the SEC to promptly disseminate information appearing in such quarterly reports to the public, but permits the SEC to delay or prevent the public disclosure of such information if it determines it to be in the public interest or for the protection of investors in accordance with the Freedom of Information Act ("FOIA") and related rules. In particular, SEC FOIA rules permit information that "disclose[s] trade secrets and commercial or financial information obtained from a person and is privileged or confidential" to be treated as confidential under Section 13(f), and, under this exception, filers commonly request confidential treatment of information that would reveal an investment manager's ongoing acquisition/disposition program.

In a 1998 staff letter, the SEC provided detailed guidance to Form 13F filers making requests for confidential treatment relating to an ongoing acquisition/disposition program and elaborated on the five categories of information required to be included in such a request: (i) details about the specific investment program being followed with respect to a reportable security and its ultimate objective; (ii) an explanation of how the public would be able to discern the investment manager's strategy with respect to the reportable security from the data reported on Form 13F; (iii) information demonstrating that the program is ongoing, so that public disclosure would be premature; (iv) a demonstration of the likelihood of substantial harm to the investment manager's competitive position in the reportable security if the request for confidential treatment is not granted; and (v) the period of time for which confidential treatment is requested.

In this context, the SEC's latest guidance identifies specific information within the five categories noted above that may be helpful to SEC staff in determining whether information relating to an ongoing acquisition/disposition program should be treated as confidential. For example, the guidance suggests that

requests for confidential treatment should specifically explain the ongoing acquisition/disposition program's ultimate goal, including as a percentage of the reportable security issuer's total outstanding securities. The guidance also suggests that investment managers explain why public disclosure on Form 13F likely would reveal the program, notwithstanding that Form 13F disclosure generally provides only a historical "snapshot" of aggregated holdings in the reportable security. Investment managers seeking confidential treatment of information in their Form 13F filings relating to ongoing acquisition/disposition programs should take this guidance into account when considering requests for confidential treatment. This new guidance may be accessed here.

SEC Proposes Crowdfunding Rules

On October 23, 2013, the SEC proposed "Regulation Crowdfunding" pursuant to Title III of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). Crowdfunding is a method of raising money using the internet, typically through small contributions from a large number of people. The JOBS Act, enacted on April 5, 2012, established a regulatory foundation for start-ups and small businesses to conduct securities offerings over the internet using crowdfunding. Without the proposed regulation, crowdfunding offerings would be considered public offerings required to be registered with the SEC under Section 5 of the Securities Act. The proposed rules would create an exemption in Section 4(a)(6) of Title III of to JOBS Act (the "Crowdfunding Exemption") that would allow crowdfunding offerings transacted through an intermediary to proceed without SEC registration when certain conditions are met. Chief among these conditions are as follows:

- The size of any offering may not exceed $1 million in any rolling 12-month period.
- Issuers relying on the exemption must provide certain business and financial disclosures to the SEC, which vary depending on the size of the offering. The disclosures would be filed with the SEC on new Form C at least 21 days before any securities were sold. After the offering, ongoing disclosures would be required on an annual basis on new Form C-AR.
- An offering in reliance on the exemption must be effected through a single, online intermediary that is either a registered broker-dealer or registered funding portal.
- Securities sold in crowdfunding offerings would be restricted for a one-year period, except that such securities could be sold to the issuer, an accredited investor, as part of an SEC registered offering, or to a family member of the purchaser.

Certain categories of issuers will not be eligible to rely on the Crowdfunding Exemption, including (i) investment companies registered under the 1940 Act; (ii) companies excluded from the definition of investment company pursuant to Section 3(b) or 3(c) of the 1940 Act; (iii) issuers with SEC reporting requirements pursuant to Section 13 or 15(d) of the Exchange Act; (iv) and issuers organized outside the United States. The proposed rules can be found here.

SEC Compliance Program Initiative Leads to Three Enforcement Actions

The SEC recently sanctioned three investment adviser firms under its "Compliance Program Initiative" for repeatedly ignoring problems with their respective compliance programs. Under the Advisers Act, firms are required to adopt and implement policies and procedures that are reasonably designed to prevent violations of applicable securities laws. The policies and procedures must be reviewed at least annually for effectiveness

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and a chief compliance officer must be responsible for their administration. The Compliance Program Initiative was designed by the SEC to address repeated instances of compliance failures that, in its view, could lead to larger compliance problems in the future. Specifically, under the Compliance Program Initiative, the SEC targets firms that have been previously notified of compliance problems, but have not effectively addressed those warnings.

The SEC sanctioned the three firms for failure to correct ongoing compliance obligations including: failure to complete annual compliance reviews, inclusion of misleading statements in disclosure materials (*i.e.*, misstatements of the firm's assets under management on its website and misleading disclosures about historical performance, compensation, and conflicts of interest), over- and under-billing clients and failure to include compliance deficiencies to clients on certain due diligence questionnaires.

The firms charged agreed to settlements which include (among other things) payment of monetary penalties, hiring new compliance officers and compliance consultants to assist them with their compliance programs, undergoing compliance training, and reimbursing payments to over-billed clients.

SEC Sanctions Three Firms for Violations of Custody Rule

On October 28, 2013, the SEC announced that it had reached settlements in three separate enforcement actions relating to the "Custody Rule" (*i.e.*, Advisers Act Rule 206(4)-2). Investment advisers must comply with the Custody Rule if they have legal ownership or access to client assets or an arrangement permitting them to withdraw client assets. The SEC amended the Custody Rule in 2010 by requiring all advisers with custody to undergo an annual "surprise exam" to verify the existence of client assets. Advisers also must have a reasonable basis to believe that a qualified custodian is sending account statements to fund investors at least quarterly. Advisers with custody of hedge fund or other private fund assets may alternatively comply with the Custody Rule through fund audits by a PCAOB-registered auditor, after which financial statements must be delivered to investors.

In three separate enforcement proceedings against investment advisers, including GW & Wade, LLC ("GW & Wade"), Further Lane Asset Management, LLC ("FLAM") and Knelman Asset Management Group, LLC ("KAMG"), the SEC alleged that in each case there were arrangements that resulted in the adviser having custody of client assets, and that the adviser violated the Custody Rule by failing to do one or more of the following: obtain an examination by an independent public accountant, properly identify the assets of which it had custody, form a reasonable belief that a qualified custodian was sending account statements to fund investors at least quarterly, have an annual surprise examination of the funds' financial statements, and/or provide the fund's members with audited financial statements. In one instance, the SEC also found that the adviser's disclosures regarding custody in its Form ADV were inaccurate. The orders also detail other securities laws found by the SEC to have been violated. Each respondent agreed to pay civil money penalties and undertake other corrective measures.

The SEC's press release can be found here. For a copy of the GW & Wade order click here. For a copy of the FLAM order click here. For a copy of the KAMG order click here.

SEC Fines Adviser for Inadequate Policies Governing Valuation and Cross Trades

On November 19, 2013, the SEC imposed a $250,000 sanction on Agamas Capital Management, L.P. ("Agamas"), a hedge fund adviser, for failing to adopt and implement compliance policies and procedures reasonably designed to prevent violations of the Advisers Act concerning (i) the valuation of fund assets, (ii) the accuracy of valuation disclosures, and (iii) cross trades between clients. While Agamas had adopted detailed valuation procedures, the SEC concluded that it failed to fully document the basis for use of discretion in pricing certain securities, consistently discarding a higher number of low quotes than high quotes. Although the purchasing fund ultimately profited from certain of the cross trades at issue, the positions were sold when there were no other acceptable offers and the SEC sanctioned Agamas for failure to adopt written policies and procedures to determine the pricing of the cross trades and manage conflicts of interest. The full text of the order can be found here.

NY Fed Revises TIC Form B Reporting Requirements

The U.S. Department of Treasury recently amended the requirements for the Treasury International Capital Form B ("Form B") and, under the new requirements, certain mutual funds (including money market funds) may have Form B reporting obligations. Prior to the changes, Form B was required to be filed by certain depository and banking institutions located in the U.S., bank holdings companies and financial holding companies, and securities brokers and dealers. Under the new requirements, the required filers for Form B also include "all other U.S. financial institutions that are primarily engaged in proprietary investments and/or the provision of financial services to other organizations." The Federal Reserve Bank of New York, in its revised instructions to Form B, specified that "all other financial institutions" include (among other entities) private equity funds, hedge funds, real estate investment trusts, mutual funds and pension funds. Filing obligations would most commonly arise for funds that (1) invest directly in non-U.S. debt instruments, (2) provide credit to non-U.S. entities, (3) directly hold non-U.S. short-term securities, or (4) maintain credit facilities with non-U.S. financial institutions. For more information, please see the Ropes & Gray Private Investment Fund Update: November 2013.

Regulatory Priorities Corner

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

IDC Publishes Report on Investment Performance Oversight by Fund Boards

The Independent Directors Council recently published a white paper discussing a number of critical responsibilities that fund boards face when overseeing an adviser's management of a fund, including monitoring how the adviser is investing and managing the portfolio and monitoring the fund's investment performance, and discussing certain steps for overseeing a fund's portfolio structure, risks and performance results. The full paper can be found here.

SEC to Target "Never-Been-Examined" Advisers in 2014

At a meeting of the Regulatory Compliance Association, Andrew J. Bowden, director of the SEC's Office of Compliance Inspections and Examinations, warned that registered investment advisers that have never been

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examined by the SEC, particularly U.S.-based advisers that have been registered for more than three years, will be a focus of SEC examinations in 2014.

SEC Warns Against Use of Misleading Fund Names

The SEC staff recently issued an IM Guidance Update encouraging funds with names that suggest safety or protection from loss (*e.g.*, "protected" and "guaranteed") to reevaluate and consider changing their names to avoid misleading investors about potential losses associated with an investment in such funds. A copy of the staff's IM Guidance Update can be found here.

IDC Publishes Report on Considerations for Board Composition

The Independent Directors Council recently published a white paper designed to assist directors with the process of determining a board's composition, from the recruitment and selection of directors through retirement. The paper discusses, among other things, identification of candidates, selection criteria, involvement of fund management and interested directors, integration of new members, mergers and consolidations, self-assessment, length of service, and succession planning. The full paper can be found here.

FINRA Publishes Report on Conflicts of Interest

On October 14, 2013, FINRA published its Report on Conflicts of Interest, which reports on how firms across the broker-dealer industry identify and manage conflicts of interest. The report identifies a broad range of effective practices, divided into three critical areas: enterprise-level conflicts governance, new business and new products conflicts, and compensation and oversight. Please click here for the full text of the report.

SEC Publishes Guidance Regarding Mergers of Affiliated ETFs

In its September 2013 IM Guidance Update, the SEC concluded that a merger of two affiliated ETFs does not raise new or different shareholder protection issues that, in the staff's view, are not already covered by the existing requirements of Rule 17a-8 under the 1940 Act governing mergers of affiliated funds. The full IM Guidance Update can be found here.

NASAA Summarizes Results of State Examination Programs

The North American Securities Administrators Association ("NASAA") released a report summarizing the results of state-level investment adviser examinations conducted in 44 jurisdictions in the United States and Canada. The report noted a significant increase in both the number of exams and deficiencies identified since 2009, and identified a number of "best practices" based on the report data that investment advisers should consider implementing as part of their compliance programs. The full NASAA report may be accessed here.

OFR and IAA/NRS Release Investment Adviser Reports

Two reports relating to investment adviser activities were recently released. The first, issued by the Office of Financial Research of the Department of Treasury, provides an analysis of how investment advisers and their activities can introduce vulnerabilities that could threaten financial stability. The ICI submitted a comment letter discussing its criticisms of this report. The second, issued by the Investment Adviser Association and

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National Regulatory Services, profiles the registered investment adviser industry and identifies significant trends and developments based on information investment advisers file with the SEC on Form ADV.

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:

SEC Issues Guidance Regarding New General Solicitation Rules
November 19, 2013
On November 13, 2013, the Division of Corporation Finance of the SEC issued new Compliance and Disclosure Interpretations providing guidance regarding new rules allowing for general solicitation in private offerings. The new guidance will be of interest to any private fund sponsor engaged in or contemplating engaging in general solicitation in connection with a private fund offering under new Rule 506(c) under Regulation D, and to sponsors wishing to transition between a traditional Rule 506(b) offering and a general solicitation offering under Rule 506(c), or from a Rule 506(c) offering to an offering under Securities Act Section 4(a)(2).

CFTC Proposes Further Amended Position Limit Aggregation Rules
November 18, 2013
On November 15, 2013, the Commodity Futures Trading Commission (the "CFTC") published proposed revised aggregation rules for speculative position limits in certain commodity interests (the "Proposed Rules"). The Proposed Rules modify standards for determining when positions held by two or more persons must be aggregated for determining compliance with CFTC position limit rules.

Update on SEC Staff Position on Private Fund Broker-Dealer Issues
October 4, 2013
On September 26, 2013, David Blass, Chief Counsel of the SEC's Division of Trading and Markets, participated in a Practising Law Institute panel discussion on broker-dealer issues in the private fund industry. He provided an update on the SEC staff's thinking since his April 2013 speech on this topic, in which Blass raised concerns about the broker-dealer status of private fund managers in connection with sales of private fund interests and receipt of deal fees from portfolio company transactions.

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.

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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.

United States

Mark I. Bane
New York, NY
+1 212 841 8808
mark.bane@ropesgray.com

Jason E. Brown
Boston, MA
+1 617 951 7942
jebrown@ropesgray.com

Rajib Chanda
Washington, DC
+1 202 508 4671
rajib.chanda@ropesgray.com

Bryan Chegwidden
New York, NY
+1 212 497 3636
bryan.chegwidden@ropesgray.com

Sarah Davidoff
New York, NY
+1 212 596 9017
sarah.davidoff@ropesgray.com

Gregory C. Davis
San Francisco, CA
+1 415 315 6327
gregory.davis@ropesgray.com

Timothy W. Diggins
Boston, MA
+1 617 951 7389
timothy.diggins@ropesgray.com

Michael G. Doherty
New York, NY
+1 212 497 3612
michael.doherty@ropesgray.com

John D. Donovan
Boston, MA
+1 617 951 7566
john.donovan@ropesgray.com

John C. Ertman
New York, NY
+1 212 841 0669
john.ertman@ropesgray.com

Laurel FitzPatrick
New York, NY
+1 212 497 3610
laurel.fitzpatrick@ropesgray.com

Leigh R. Fraser
Boston, MA
+1 617 951 7485
leigh.fraser@ropesgray.com

John W. Gerstmayr
Boston, MA
+1 617 951 7393
john.gerstmayr@ropesgray.com

Thomas R. Hiller
Boston, MA
+1 617 951 7439
thomas.hiller@ropesgray.com

William D. Jewett
Boston, MA
+1 617 951 7070
william.jewett@ropesgray.com

Susan A. Johnston
Boston, MA
+1 617 951 7301
susan.johnston@ropesgray.com

Jeffrey R. Katz
Boston, MA
+1 617 951 7072
jeffrey.katz@ropesgray.com

Christopher A. Klem
Boston, MA
+1 617 951 7410
christopher.klem@ropesgray.com

John M. Loder
Boston, MA
+1 617 951 7405
john.loder@ropesgray.com

Richard D. Marshall
New York, NY
+1 212 596 9006
richard.marshall@ropesgray.com

R. Hardin Matthews
Boston, MA
+1 617 951 7259
hardin.matthews@ropesgray.com

Brian D. McCabe
Boston, MA
+1 617 951 7801
brian.mccabe@ropesgray.com

Stephen C. Moeller-Sally
Boston, MA
+1 617 951 7012
ssally@ropesgray.com

Deborah A. Monson
Chicago, IL
+1 312 845 1225
deborah.monson@ropesgray.com

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Mark V. Nuccio
Boston, MA
+1 617 951 7368
mark.nuccio@ropesgray.com

Jessica Taylor O'Mary
New York, NY
+1 212 596 9032
jessica.omary@ropesgray.com

Dwight W. Quayle
Boston, MA
+1 617 951 7406
dwight.quayle@ropesgray.com

George B. Raine
Boston, MA
+1 617 951 7556
george.raine@ropesgray.com

Elizabeth J. Reza
Boston, MA
+1 617 951 7919
elizabeth.reza@ropesgray.com

Gregory D. Sheehan
Boston, MA
+1 617 951 7621
gregory.sheehan@ropesgray.com

Robert A. Skinner
Boston, MA
+1 617 951 7560
robert.skinner@ropesgray.com

Jeremy C. Smith
New York, NY
+1 212 596 9858
jeremy.smith@ropesgray.com

Amy B. Snyder
Boston, MA
+1 617 951 7073
amy.snyder@ropesgray.com

David C. Sullivan
Boston, MA
+1 617 951 7362
david.sullivan@ropesgray.com

James E. Thomas
Boston, MA
+1 617 951 7367
james.thomas@ropesgray.com

Joel A. Wattenbarger
New York, NY
+1 212 841 0678
joel.wattenbarger@ropesgray.com

London

Anand Damodaran
London
+44 20 3122 1146
anand.damodaran@ropesgray.com

Andrew Henderson
London
+44 20 3122 1277
andrew.henderson@ropesgray.com

Matthew Judd
London
+44 20 3122 1252
matthew.judd@ropesgray.com

Asia

Daniel M. Anderson
Hong Kong
+852 3664 6463
daniel.anderson@ropesgray.com

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