# Ropes & Gray's Investment Management Update: October 2014 – November 2014

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

## SEC Increases Examinations of Fixed-Income Funds

During the fall, the SEC initiated a sweep examination of fixed-income funds due to concerns over potential shortages in bond fund liquidity. Examiners from the SEC have been evaluating investment managers' ability to sell certain debt instruments if liquidity for such instruments decreases and urging advisers to stress test their portfolios to ensure that they can meet redemption requests during long periods of market volatility and illiquidity. Additionally, examiners have been scrutinizing disclosures relating to the potential effects of a rise in interest rates on fixed-income investments.

The SEC's increased concern regarding fixed-income funds stems in part from the Federal Reserve's anticipated departure from policies fostering a near zero percent interest rate environment. In a recent speech, SEC Commissioner Daniel Gallagher echoed this concern, noting that there is a "clear and present danger of a liquidity cliff in the debt markets." He stated that the debt markets have grown exponentially in recent years due to low interest rates, while dealers have decreased their inventories in response to new regulatory constraints. As interest rates rise, he noted, outflows from high yield and less liquid debt investments may drive bond prices down, resulting in a liquidity crisis.

In January, the SEC's Division of Investment Management issued an IM Guidance Update, which provided steps for bond funds to consider when preparing for changing market conditions in interest rates.

## Enforcement Action Brought Against Former Compliance Officer for Altering Document Submitted During SEC Insider Trading Investigation

On October 15, 2014, the SEC announced an enforcement action against Judy K. Wolf, a former compliance officer at Wells Fargo Advisors, LLC ("Wells Fargo"), a dually registered broker-dealer and investment adviser, for allegedly altering a document that was produced to the SEC staff (the "Staff") during an investigation seeking to determine whether a Wells Fargo registered representative engaged in insider trading and whether Wells Fargo had adequate insider trading policies in place. According to the order, Wolf's duties included identifying potentially suspicious trading activity by Wells Fargo personnel or the firm's customers or clients and analyzing whether trades may have been based on material, non-public information (a "look back review").

The order alleges that, in connection with a 2012 SEC investigation regarding possible insider trading by a Wells Fargo registered representative, Wells Fargo produced an altered document to the Staff without any mention that it had been altered. Wolf had originally created the document in connection with a look back review in September 2010 regarding trades in Burger King securities by the Wells Fargo employee and his customers. In the document, Wolf summarized her review of such trading activities and closed her review with "no findings" (the "Report"). The SEC asserts that, in December 2012, more than two years after Wolf concluded her review, and following the SEC charging the Wells Fargo employee with trading the Burger King securities on the basis of material, non-public information, Wolf altered the Report to make it appear as though she had performed a more thorough review of the relevant trades in September 2010. During her initial testimony to the SEC in March 2013, Wolf denied altering the Report after September 2010. Subsequent to Wolf's March 2013 testimony, metadata analysis confirmed that Wolf had in fact altered the Report prior to its production to the Staff. Wells Fargo thereafter placed Wolf on administrative leave and terminated Wolf's employment with the firm in June 2013. After the termination of her employment, Wolf testified to the SEC again in June 2013 and admitted to altering the Report prior to producing it to the Staff.

The SEC asserts that, by producing the altered Report to the Staff without any mention that it had been altered, Wells Fargo violated the books and records requirements applicable to broker-dealers and investment advisors.[1] By altering the Report, the SEC also contends that Wolf willfully aided and abetted and caused Wells Fargo to violate Section 17(a) of the Securities Exchange Act of 1934, as amended, and Rule 17a-4(j) thereunder, and Section 204(a) of the Investment Advisers Act of 1940, as amended.

## SEC Grants Waiver of Disqualifications in Mortgage Securities Case

On November 25, 2014, the SEC issued a temporary order indicating that it had determined to grant the application of Bank of America and certain of its affiliates for an exemption from the disqualification provisions of Section 9(a) of the Investment Company Act of 1940, as amended (the "1940 Act"). Section 9(a) of the 1940 Act, in relevant part, disqualifies any person (and any company of which such person is an affiliated person under the 1940 Act) who, by reason of any misconduct, is permanently or temporarily enjoined from acting as an underwriter, broker, dealer or investment adviser, from serving as an employee, officer, director, member of an advisory board or investment adviser of a registered investment company or principal underwriter for any registered open-end company. According to published reports, however, certain SEC Commissioners continue to resist granting requests for such waivers, which the SEC has routinely granted in the past. Instead, these Commissioners have reportedly urged that the waiver process be viewed as a separate punishment that should be administered in a manner to serve as an additional deterrent to future misconduct.[2] This debate among the Commissioners is reported to have recently resurfaced in connection with a private meeting to decide whether to grant the waivers requested by Bank of America, who applied for such waivers as part of its settlement with U.S. regulators covering claims stemming from the 2008 financial crisis involving certain mortgage securities.

This development is noteworthy in that it highlights the increasingly significant role that regulatory waivers (including waivers of disqualifications from service as an investment company director, officer, adviser or principal underwriter) may play in future SEC settlements.

## SEC Issues IM Guidance Update Regarding Mixed and Shared Funding Orders

In October, the SEC's Division of Investment Management issued an IM Guidance Update (the "Mixed and Shared Funding Update") relating to mutual funds that offer their shares under variable life and/or variable annuity contracts. The Mixed and Shared Funding Update addresses questions received by the Staff regarding whether (i) a mutual fund that offers its shares as an investment option under a variable life and/or variable annuity contract is required to obtain a so-called "mixed and shared funding" order from the SEC prior to

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[1] The SEC settled a separate enforcement action against Wells Fargo in which Wells Fargo agreed to various sanctions, including, among other things, payment of a $5 million civil money penalty. See Exchange Act Release No. 73175 (September 22, 2014).
[2] See Dissenting Statement of Commissioner Kara M. Stein, in the Matter of The Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver From Being an Ineligible Issuer, dated April 28, 2014.

making any such offer; and (ii) a mutual fund that has previously obtained a mixed and shared funding order must, in all circumstances, comply with the terms and conditions of that order.

"Mixed funding" occurs when a mutual fund is offered as an investment option to various types of offerees, such as under both variable annuity and variable life insurance contracts or retirement plans. "Shared funding" occurs when sponsors seek to offer mutual fund shares as investment options under variable insurance contracts of multiple unaffiliated insurance companies. The Staff noted that, while neither mixed nor shared funding is prohibited by the 1940 Act, insurance companies typically obtain mixed and shared funding orders from the SEC. Such orders provide exemptions from certain restrictions under Sections 9(a), 13(a) and 15(a) and (b) of the 1940 Act applicable to insurance company separate accounts organized as unit investment trusts investing in underlying funds, which is the structure currently used by most insurers offering variable insurance contracts.

The Mixed and Shared Funding Update notes that, based on the Staff's experience and discussions with industry representatives, such exemptions "are relied upon very infrequently," and, therefore, the absence of an exemptive order may be of limited or no practical significance. The Mixed and Shared Funding Update also states that a fund that has previously obtained a mixed and shared funding order need not comply with the terms and conditions of such order if the exemptions granted by the order are not being relied upon by the insurer or its affiliate.

The Staff encouraged industry participants to carefully consider the Staff's views in determining whether to apply for mixed and shared funding orders and whether continued reliance on existing orders is necessary. The Staff also noted that insurers and funds may want to consider updating participation agreements to eliminate references to a mixed and shared funding order upon which the funds no longer intend to rely.

## MSRB Rule Imposing Supervisory and Compliance Obligations on Municipal Advisers Approved by SEC

On October 24, 2014, the Municipal Securities Rulemaking Board ("MSRB") announced that it had received approval from the SEC to adopt its first dedicated rule (MSRB Rule G-44) for municipal advisers regarding supervisory and compliance obligations along with related amendments to already existing rules on books and records to be made by brokers, dealers and municipal securities dealers (MSRB Rule G-8) and the preservation of records (MSRB Rule G-9).

MSRB Rule G-44 employs a primarily principles-based approach to supervision and compliance and is modeled after existing broker-dealer and investment adviser standards. In general, the new rule requires all municipal advisors to establish, implement and maintain a system to supervise their municipal advisory activities and those of their associated persons that is reasonably designed to achieve compliance with all applicable securities laws and regulations, including applicable MSRB rules. In addition, the new rule and related changes to existing rules require, among other things, that municipal advisers maintain written supervisory procedures, keep books and records and designate an individual to serve as the chief compliance officer who will have responsibility for and perform the compliance functions required by MSRB Rule G-44. Further, each municipal advisor (unless subject to substantially similar FINRA certification requirements) is required to have its chief executive officer certify in writing annually that the municipal advisor has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable rules.

The new rule and related rule amendments will become effective on April 23, 2015, except for the new rule's annual certification requirement, which will become effective April 23, 2016. MSRB Rule G-44 is the first of several proposed rules covering municipal advisers to gain SEC approval and is largely unchanged from the MSRB's proposal.

## SEC Issues Guidance on the Presentation of Consolidated Financial Statements for Master-Feeder Funds, Funds-of-Funds and BDCs

The Chief Accountant's Office of the SEC's Division of Investment Management issued an IM Guidance Update in October regarding the presentation of consolidated financial statements for master-feeder funds, funds-of-funds and business development companies ("BDCs") under Regulation S-X, which governs the form and content of financial statements filed pursuant to the Securities Act of 1933, as amended (the "Securities Act"), and the 1940 Act.

Regulation S-X, in relevant part, provides that "[t]here is a presumption that consolidated statements are more meaningful than separate statements and that they are usually necessary for a fair presentation when one entity directly or indirectly has a controlling financial interest in another entity." In this regard, the Staff commented that an investment company that is a feeder fund in a master-feeder structure or an investment company that is a fund-of-funds in the same group of investment companies may have "a controlling financial interest in another entity" for purposes of Regulation S-X, which would generally require consolidated financial statements. The Staff noted, however, that, subject to certain qualifications, the most meaningful financial presentation for these investment companies is generally unconsolidated. Because a feeder fund is one of several investors in a master fund, the Staff stated that unconsolidated disclosure provides a meaningful and appropriately transparent presentation of the financial position and results of operations of the feeder fund. According to the Guidance, instead of consolidating financial statements, a feeder fund should attach the financial statements of the master fund to its financial statements. Additionally, because a fund-of-funds invests in multiple underlying funds with varying levels of interest over time, consolidated financial statements may not be meaningful and may be confusing to the fund-of-funds' investors. A fund-of-funds, however, should consider whether its investment in an underlying fund is so significant that it should present its financials in a manner similar to a master-feeder fund.

The Staff also commented that it has observed a number of BDCs that have wholly-owned subsidiaries designed to act as an extension of the BDC's investment operations and to facilitate the execution of the BDC's investment strategy that do not consolidate such subsidiary's financial statements with the BDC's. The Staff commented that a BDC should generally consolidate its financial statements with such subsidiaries to provide investors with the most meaningful financial presentation. Additionally, in the Staff's view, a registered investment company in similar circumstances should consolidate its financial statements with those of any wholly-owned subsidiaries (*e.g.*, a wholly-owned subsidiary used as a "tax blocker").

## Former Hedge Fund Analyst's Roommate and Roommate's Friend Charged for Herbalife Insider Trading

On September 30, 2014, the SEC brought separate enforcement actions against Filip Szymik and Jordan Peixoto in connection with alleged insider trading transactions involving the securities of Herbalife Ltd. ("Herbalife"). According to the orders, Szymik's roommate (the "Analyst") was employed in 2012 at Pershing Square Asset Management, L.P., a hedge fund manager headed by well-known activist investor

William Ackman. The SEC alleges the Analyst, in violation of Pershing's confidentiality policy, told Szymik about an upcoming public presentation (the "Pershing Presentation"), at which Pershing would discuss its negative view of Herbalife. The SEC also alleges that, in a series of communications prior to December 19, 2012, Syzmik, in breach of his duty of trust and confidence to the Analyst, passed on the information to his friend Peixoto. Prior to the Pershing Presentation, which took place on December 20, 2012 and included, among other things, allegations that Herbalife was operating an illicit pyramid scheme, Peixoto purchased a number of Herbalife put options, from which the SEC alleges Peixoto ultimately obtained $47,100 in actual profits based on the decline in the share price of Herbalife stock during the days immediately following the Pershing Presentation. Neither Peixoto nor Szymik are alleged to have had any nonpublic information about the financial condition of Herbalife. Rather the SEC asserts that "all information concerning Pershing's Herbalife research – including its negative view of Herbalife, its thesis that Herbalife was operating as an illicit pyramid scheme, its short position in Herbalife stock, and the timing of its disclosure of that information – constituted material nonpublic information."

Szymik agreed to a settlement order which requires him to pay $47,100 and to cease and desist from further violations. Peixoto, a Canadian citizen, is defending the enforcement action brought against him, and has countersued the SEC, alleging, among other things, that the administrative proceeding brought against him violates Article II of the United States' Constitution with respect to executive power.

These enforcement actions indicate that the SEC considers information relating to an outside investor's opinion of a security formed on the basis of public information to be material, non-public information. In addition, the SEC decision to seek civil penalties against Peixoto in an administrative proceeding rather than in a federal court action is an example of the recent trend in which the SEC has instituted enforcement cases as administrative proceedings.

## Regulatory Priorities Corner

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

### SEC Publishes Regulatory Agenda for 2015

As required by Executive Order, the SEC has recently published an updated Agency Rule List, which identifies the most important significant regulatory actions that agencies expect to take in the coming year. Among other things, the SEC has included new proposed regulatory actions regarding (i) a proposed rule that would require a mutual fund to implement a "liquidity management program" and enhanced guidance relating to liquid assets in open-end funds; (ii) new requirements for stress testing by large asset managers and large investment companies; (iii) amendments to the forms used by open-end and closed-end registered investment companies to report fund operations and portfolio holdings information; and (iv) proposed rules relating to derivative use and disclosure by funds. The list also indicates that the staff of the Division of Trading and Markets is considering seeking public comment on Exchange-Traded Products ("ETPs"), including evaluating the listing and trading of ETPs, the risks posed by ETPs, and exchange proposals to list and trade ETPs.

### SEC Announces Results of 2014 Enforcement Program

The SEC announced that new investigative approaches and the innovative use of data and analytical tools resulted in a record number of enforcement actions and penalties spanning the entire securities industry in the fiscal year ended September 30, 2014. According to the announcement, the SEC filed 755 enforcement actions covering a wide range of misconduct, and obtained orders totaling $4.16 billion in disgorgement and penalties, according to preliminary figures. The numbers represent significant increases over the SEC's results for fiscal year 2013, which in turn represented an increase over fiscal year 2012 in terms of total disgorgement and penalties. The SEC's announcement noted that these results reflect the SEC's current enforcement priorities, including a number of "first-ever" cases, such as actions involving the market access rule, the "pay-to-play" rule for investment advisers, an emergency action to halt a municipal bond offering and whistleblower retaliation.

**Norm Champ Continues to Voice Concerns Regarding Alternative Mutual Funds**

In a recent speech before the SIFMA Complex Products Forum, Norm Champ, the director of the SEC's Division of Investment Management, again highlighted the SEC's concerns regarding alternative mutual funds, and specifically what he termed "the challenges of appropriately disclosing the heightened risks of alternative mutual funds to retail investors." In this regard Mr. Champ noted that a fund should evaluate its disclosures to ensure that they are (i) presented in plain English; (ii) tailored specifically to how a fund expects to be managed; (iii) providing investors with a complete risk profile; and (iv) reviewed on an ongoing basis to ensure accuracy in light of a fund's actual operations.

**Investment Company Institute Comments on IRS and U.S. Treasury Department's Money Market Fund Tax Guidance**

On October 23, 2014, the Investment Company Institute ("ICI") submitted a comment letter to the Internal Revenue Service ("IRS") and U.S. Department of the Treasury ("Treasury") in response to tax guidance released in connection with the SEC's adoption of amendments to its money market fund rule (the "MMF Rule"). The tax guidance attempts to set forth a new, simplified method of tax accounting for shareholders in a floating net asset value ("NAV") money market fund. Pursuant to this "NAV Method," shareholders in a floating NAV money market fund may report their gain or loss from the fund based on the change in the aggregate value of the shares of the fund during a specified computation period. The ICI's letter recommends three changes to the NAV Method: (i) shareholders should be allowed to use the NAV Method on an account-by-account basis; (ii) the NAV Method should be available for shareholders in stable NAV money market funds that charge a liquidity fee; and (iii) the IRS and Treasury should confirm that a regulated investment company is permitted to use the one-year period from November 1 to October 31 as its "computation period" for purposes of the excise tax. Additionally, the ICI asked the IRS and Treasury to provide guidance regarding, among other things, the tax implications if a stable NAV fund imposes a liquidity fee and guidance allowing a money market fund that separates existing institutional and retail share classes into standalone funds, pursuant to the MMF Rule, to treat such transaction as a tax-free reorganization under Section 368 of the Internal Revenue Code of 1986, as amended. The ICI's letter can be found here.

**SEC Continues to Provide No-Action Relief for Closed-End Funds Seeking Automatic Effectiveness of Shelf Registration Statement Amendments**

Consistent with relief granted in previous years, the Staff recently provided no-action relief (the "Rule 486(b) No-Action Letter") to Guggenheim Strategic Opportunities Fund (the "Fund") with respect to the Fund's shelf registration statement on Form N-2, allowing the Fund to file a post-effective amendment to such registration statement pursuant to Rule 486(b) under the Securities Act, pursuant to which such amendment would go automatically effective rather than have to be declared effective by the SEC. Such relief is meant to help ensure that the Fund has the ability to raise capital as the opportunity arises, and could reduce expenses incurred by the Fund in the post-effective amendment process. The SEC has periodically granted similar no-action relief to other closed-end funds, but, unlike many no-action letters, such relief specifically provides that it may not be relied upon by third parties and must be requested on a fund-by-fund basis. The Rule 486(b) No Action Letter is available 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:

New ISDA Protocol Will Limit Buy-Side Remedies in a Financial Institution Failure
November 24, 2014
The ISDA 2014 Resolution Stay Protocol, recently published by the International Swaps and Derivatives Association, Inc., represents a significant shift in the terms of the over-the-counter derivatives market. It will require adhering parties to relinquish termination rights that have long been part of bankruptcy "safe harbors" for derivatives contracts under bankruptcy and insolvency regimes in many jurisdictions. While buy-side market participants are not required to adhere to the Protocol at this time, future regulations will likely have the effect of compelling market participants to agree to its terms. This change will impact institutional investors, hedge funds, mutual funds, sovereign wealth funds, and other buy-side market participants who enter into over-the-counter derivatives transactions with financial institutions.

SEC Issues Notice of Intention to Grant Application for New Non-Transparent, Actively-Managed "Exchange-Traded Managed Fund"
November 7, 2014
On November 6, 2014, the SEC issued a notice of intention to grant an application for exemptive relief filed on behalf of Eaton Vance Management, Eaton Vance ETMF Trust, and Eaton Vance ETMF Trust II. If granted, the Application would permit the operation of a new type of exchange-traded fund, called an exchange-traded managed fund ("ETMF"), the shares of which would trade on an exchange at prices that are based on the net asset value ("NAV") next determined at the end of each day.

Regulatory Reporting Under AIFMD – an Update and Comparison to SEC's Form PF
October 29, 2014
The Alternative Investment Fund Managers Directive (the "AIFMD") introduces new regulatory reporting requirements for alternative investment fund managers ("AIFMs") established in the European Economic Area ("EEA") and non-EEA AIFMs that market their fund in an EEA state. These requirements are broadly similar to those already imposed in the U.S. on registered investment advisers that manage private funds, pursuant to the Form PF reporting regime, although there are important differences between AIFMD reporting and Form PF.

Surge in FOIA Requests to State Agencies Seeking Information About PE and Other Alternative Investment Fund Sponsors
October 21, 2014
We have recently observed a surge in freedom-of-information ("FOIA") requests made by media outlets to state pension funds and other state-government-affiliated investment entities. Although the requests have so far concentrated on information related to private equity sponsors, they have also sought information about

investments with other alternative investment fund sponsors. Many state-level FOIA laws exempt confidential business information, including private equity or other alternative investment fund information in particular, from disclosure. A prompt response, supported by the applicable state law, can help ensure that confidential information that is exempt from FOIA disclosure is not released.

CFTC Staff Issues Self-Executing Registration Relief for Certain Delegating CPOs
October 17, 2014
On October 15, 2014, the Commodity Futures Trading Commission ("CFTC") staff issued Letter 14-126 (the "October Letter"), which provides self-executing registration relief to a commodity pool operator ("CPO") of a fund that delegates its rights and obligations as a CPO to another entity that will serve as the registered CPO of the fund, if certain conditions are met. The October Letter replaces CFTC Letter 14-69, which required each CPO to receive its own no-action letter to be able to delegate its CPO functions to a registered CPO. If the conditions of the October Letter are not met, a CPO will still need to obtain its own no-action letter.

ESMA Plans Phased-in Approach to EMIR OTC Derivatives Clearing
October 1, 2014
The European Regulation on Derivative Transactions, Central Counterparties and Trade Repositories (known as the European Market Infrastructure Regulation ("EMIR")) requires counterparties to clear over-the-counter ("OTC") derivative transactions if the transaction is in a class of trades subject to the clearing obligation. Clearing is the process by which an OTC derivative trade is executed in the ordinary course and then novated to a clearing house, which is substituted as the counterparty to each party to the trade.

Regulators Re-Propose Minimum Margin Requirements for Uncleared Swaps
September 26, 2014
U.S. Federal banking regulators and the Commodity Futures Trading Commission recently re-proposed rules providing for minimum margin requirements for uncleared swaps executed by swap dealers and major swap participants. This Alert discusses some of the key features of the proposed rules.

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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