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Ropes & Gray's Investment Management Update: June 2015 – July 2015

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

SEC Imposes Sanctions for Violations of Auditor Independence Rules

On July 1, 2015, the SEC announced that it had agreed to settle enforcement proceedings brought against the auditor, the administrator and a board member of three registered funds for violations of the independent auditor requirements contained in Rule 2-01 of SEC Regulation S-X. Rule 2-01 sets forth restrictions on an auditor's financial and business relationships with audit clients and is designed to ensure that an auditor is independent from its audit clients. According to the SEC settlement order, the auditor's independence from the funds was impaired because a member of the funds' board of trustees had provided business consulting services to an affiliate of the auditor.

In the settlement order, the SEC noted that, as required by SEC rules, the auditor had stated in each of the funds' audit reports (over a period of several years) that the funds' financial statements were prepared in accordance with generally accepted auditing standards ("GAAS"). GAAS requires that an auditor maintain its independence from the audit client and, therefore, the SEC concluded that the auditor reports did not comply with GAAS. The SEC found that the funds violated federal securities laws each time audit reports, or information concerning its "independent" auditors, was provided in annual reports or proxy statements, and that these violations were caused by the board member and the auditor. In addition, the SEC determined that the funds violated 1940 Act Rule 38a-1 because the funds' policies and procedures governing auditor independence, and more generally, the selection, retention, and the engagement of the auditor, were inadequate. In this regard, the SEC noted that, although the trustee questionnaires circulated by the administrator covered the trustee's business relationships with the auditor, they did not request information concerning business relationships with the auditor's affiliates. The SEC also faulted the administrator for not providing sufficient training to assist the funds' board members in the discharge of their responsibilities concerning auditor independence. Because the administrator contracted to assist the funds in discharging their responsibilities under Rule 38a-1 and had written the funds' policies and procedures, the SEC found that the administrator should have known that its conduct would cause the Rule 38a-1 violations by the funds.

As part of the settlement, the accounting firm agreed to disgorge $613,916 in fees (including prejudgment interest) and pay a civil monetary penalty of $500,000. In addition, the funds' administrator agreed to a civil penalty of $45,000, and the board member agreed to disgorge $35,328.71 (including prejudgment interest) and to pay a civil monetary penalty of $25,000.

Failure to Provide and Evaluate 15(c) Information Leads to SEC Enforcement Action

On June 17, 2015, the SEC settled enforcement proceedings brought against the investment adviser, administrator and the interested trustees of the World Funds Trust ("WFT") and World Funds, Inc. ("WFI"), and the independent board members of WFT, based on numerous alleged violations of Section 15(c) of the 1940 Act. As part of the required advisory contract renewal process, Section 15(c) imposes a duty on directors to request and evaluate, and a duty on the adviser to furnish, such information as may reasonably be necessary to evaluate the terms of advisory contracts. According to the settlement order, the trustees of WFT and WFI, with the assistance of independent counsel, requested that the adviser and subadvisers provide certain materials and information in advance of the board meetings at which the contracts in question were to be considered. Among other things, the trustees requested that the adviser complete a questionnaire prepared by independent counsel that contained numerous questions about the adviser's and subadvisers' operations, compensation and compliance procedures. The questionnaire also requested information regarding fees paid by comparable funds.

In the settlement order, the SEC cited numerous deficiencies in the information provided by the adviser in connection with the Section 15(c) process. With respect to the contracts approved for WFT funds, the SEC found that the adviser did not provide any information regarding the fees paid by comparable funds, and provided only limited, unclear information regarding the nature and extent of the services to be provided by the adviser compared to the services that would be provided by subadvisers. Significantly, the SEC noted that the WFT funds did not pay any advisory fees, and the adviser reimbursed the majority of the operating expenses incurred by the WFT funds during the relevant period. Nevertheless, the SEC states that the trustees were still obligated to evaluate the adviser's services as compared to the fees provided for in the advisory contracts.

With regard to the contracts for WFI funds, the adviser used a standard industry database to provide fee information for share classes that were comparable in size to WFI funds' class A shares and that had an investment strategy that was comparable to the WFI funds. The SEC was critical of this information for various reasons, including the fact that it contained information pertaining to share classes of funds that were not directly comparable to WFI funds' class A shares. The adviser also provided two additional charts that contained comparative fee and expense information. Again, the SEC found this information to be inadequate for various reasons, including the fact that the information failed to take account of differences in the expenses of different types of share classes and fee structures. The SEC also found that other materials provided by the adviser were deficient on several grounds, including the failure of the adviser to provide a description of the basis and methodology for allocating indirect costs, overhead, and other costs to WFI funds for purposes of estimating profitability, and the inclusion of erroneous information regarding fee waivers and breakpoints.

As a result of these deficiencies, the SEC determined that the adviser did not provide all the necessary information requested by the boards of WFT and WFI in connection with the Section 15(c) process. Further, the SEC found that the trustees of WFT violated Section 15(c) because they did not follow up to obtain the requested information and approved the initial advisory contracts for the WFT funds without having all the information they requested as reasonably necessary to evaluate the terms of advisory contracts. In settlement of these alleged violations, the two independent trustees of WFT and one interested trustee (who was an the owner of the adviser) each agreed to pay a civil monetary penalty of $3,250, and the adviser, the administrator and the interested director (who was the owner of the adviser) agreed to pay a joint civil monetary penalty of $50,000.

Rule 24f-2 Fees – Jackson National No-Action Letter (July 10, 2015)

On July 10, 2015, the SEC staff issued a no-action letter to Jackson National Life Insurance Company and affiliates that should reduce registration fee payments by fund registrants organized in three-tier structures. Generally, under Section 24(f)(2) of the 1940 Act and Rule 24f-2 thereunder, a registered fund must pay registration fees to the SEC based on the fund's "aggregate net sales." In the case of master-feeder or three-tiered fund structure, this can lead to registration fees being paid two or three times on the same initial investment.

Jackson National Life Insurance Company and Jackson National Life Insurance Company of New York ("Jackson") and certain Jackson separate accounts and feeder funds have a three-tiered structure consisting of insurance company separate accounts registered as unit investment trusts (the "Divisions") that invest in feeder funds ("Feeder Funds"). The Jackson-managed Feeder Funds invest substantially all of their assets in shares of corresponding unaffiliated registered funds (each a "Master Fund"). In the no-action letter, the SEC staff agreed with Jackson that "triple Rule 24f-2 registration fees" were being paid for the same investment proceeds from contract owners of variable insurance products that were invested in the Divisions that purchased Feeder Fund (and, indirectly, Master Fund) shares. Accordingly, the staff agreed that each Division and Feeder Fund, in calculating its portion of annual Rule 24f-2 registration fees, could exclude from the aggregate net sales of its securities the aggregate net sales of Master Fund shares that are, in effect, sold through a Feeder Fund to a Division, provided the Rule 24f-2 registration fees had been paid on the aggregate net sales of Master Fund shares to a Feeder Fund.

SEC Extends Fund-of-Funds Rule in No-Action Letter (June 29, 2015)

On June 29, 2015, the SEC staff issued a no-action letter with respect to Sections 12(d)(1)(A) and (B) of the 1940 Act to Grant Park Multi Alternative Strategies Fund (the "Fund"), a series of Northern Lights Fund Trust (the "Trust"). The Fund invests in other series of the Trust (the "Underlying Funds").

Under Section 12(d)(1)(A) and (B) of the 1940 Act, the Fund would be limited with respect to both its investment in any particular Underlying Fund and its aggregate investment in all of the Underlying Funds. Section 12(d)(1)(G) of the 1940 Act provides an exemption to the (A) and (B) limitations and permits the Fund to be a "fund of funds" by investing in the Underlying Funds, which are part of the same "group of investment companies" (as defined in Section 12(d)(1)(G)(ii) of the 1940 Act), as well as government securities and commercial paper. Rule 12d1-2 extends the 12(d)(1)(G) exemption by permitting the Fund also to invest in securities other than securities issued by an investment company. However, because Rule 12d1-2(a)(2) extends the reach of Rule 12d1-2 only to securities, the Fund could not invest in assets that might not be securities under the 1940 Act, such as exchange-traded futures contracts.

In the no-action letter, the SEC staff advised that it would not recommend enforcement action if the Fund observes all requirements of Section 12(d)(1)(G) and Rule 12d1-2, except for Rule 12d1-2(a)(2) to the extent that it restricts the Fund from investing in assets that might not be securities under the 1940 Act. The SEC staff noted that, in 2008, the SEC has proposed amendments to Rule 12d1-2 to permit, among other things, a fund of funds relying on Section 12(d)(1)(G) to invest in assets that might not qualify as securities under the 1940 Act. At that time, the SEC had noted that it had issued exemptive orders providing such relief and that such greater flexibility did not appear to present any additional concerns that Section 12(d)(1)(G) was intended to address. While the proposed amendments were not added to Rule 12d1-2, the staff also noted that the SEC had continued to issue exemptive orders providing the relief that would have been codified in the proposed Rule 12d1-2 amendments.

In brief, the no-action letter represents what is equivalent to blanket relief that embodies the exemptive orders that have extended Rule 12d1-2. Funds of funds relying on Section 12(d)(1)(G) now may rely on Rule 12d1-2 to invest in assets that may not qualify as securities under the 1940 Act, without having to obtain an exemptive order.

SEC Issues No-Action Letter to ETFs to Include Long/Short Indexes in the Definition of the Term "Index" (June 24, 2015)

On June 24, 2015, the SEC staff issued a no-action letter stating that it would not recommend enforcement action to the Commission against certain trusts consisting of individual funds operated as ETFs or their adviser if the funds include "Long/Short Indexes" (including indexes that use a 130/30 or similar investment strategy) in the definition of "Index" in the ETFs' existing exemptive orders (the "Orders"). The adviser that requested the relief, SSgA Funds Management, Inc. ("SSgA FM"), serves as investment adviser to SPDR Series Trust and SPDR Index Shares Fund (each a "Trust" and, together, the "Trusts").

Each Trust consists of individual series that are operated as ETFs pursuant to the Orders. Under the terms of the Orders, the ETFs may invest in domestic equity securities, foreign equity securities and fixed-income securities. The Orders do not specifically address the possibility of the Funds tracking indexes that include both long and short positions in securities, although the SEC has issued numerous exemptive orders that permit ETFs to track Long/Short Indexes.

The no-action letter permits the ETFs to include Long/Short Indexes in the definition of "Index" in the existing Orders. In providing the no-action relief, the SEC staff noted that the no-action position would not apply to any index-based ETF that operates in a manner that is similar to funds that are currently known as "leveraged," "inverse," "inverse leveraged," or "geared" funds.

Excessive Fee Case Survives Motion to Dismiss

In 2014, the adviser and administrator to the SEI Funds asked a Pennsylvania federal district court to dismiss a lawsuit in which plaintiffs had claimed that the adviser and administrator defendants had breached their fiduciary duties to the SEI Funds by charging excessive management and administrative fees, in violation of Section 36(b) of the 1940 Act. The plaintiffs in the case claimed that that the adviser's retention of approximately 40% of the management fee was excessive in view of the fact that the adviser relies on a manager-of-managers approach and, therefore, relies on subadvisers for day-to-day management of each of the SEI Funds. In their motion to dismiss, the adviser and the administrator defendants argued that plaintiffs had failed to allege sufficient facts to satisfy the *Gartenberg* test.

In the last few years, more than ten Section 36(b) lawsuits have been filed that focus on the relationship between advisory and subadvisory fees.

In a July 13 decision, the court rejected the defendants' motion to dismiss, first noting the relatively low threshold required to survive a motion to dismiss. The court went on to hold that the plaintiffs had alleged "facts relevant to all of the *Gartenberg* factors" and that, while not all of the plaintiffs' allegations were sufficient to state a claim on their own, taken together, the allegations "raise a plausible inference that [the adviser's] fees are so disproportionately large that they bear no reasonable relationship to the services provided to the SEI Funds and could not have been the product of arm's length bargaining." In particular, the court stated that it found the plaintiffs' allegations about both the nature and quality of the services provided to the SEI Funds and the adviser's failure to share cost savings realized by economies of scale through fee breakpoints demonstrated a plausible claim under Section 36(b).

Nevertheless, the court dismissed the lawsuit with respect to the funds' administrator because Section 36(b) authorizes claims only against advisers, their affiliated persons and certain persons enumerated in Section 36(a) (e.g., an officer, director or principal underwriter of a fund). Because the plaintiffs had failed to allege that the administrator was an affiliated person of the adviser or among the persons enumerated within Section 36(a), the court dismissed the plaintiffs' Section 36(b) claims against the administrator.

Regulatory Priorities Corner

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

Massachusetts Investigates State-Registered Advisers' Recommendations of Alternative Funds

On July 15, 2015, the Massachusetts Securities Division (the "Division"), led by Massachusetts Secretary of the Commonwealth William Galvin, announced that it was beginning an open-ended investigation into the recommendations that state-registered investment advisers make to retail investors about "alternative" registered funds. In its announcement of the sweep, the Division listed 25 alternative funds about which it will ask the RIAs, based on the funds' sales volume and investment strategy. The examination includes, among others, large alternative funds from many well-known fund complexes. The Division requested information on the diligence that advisers conduct when recommending alternative funds to retail investors. In an accompanying press release, Secretary Galvin described alternative funds as "accidents waiting to happen" when sold to retail investors without adequate disclosure of potential risks.

Investments in alternative mutual funds have increased six fold since 2008 to over $300 billion. This rapid growth has led to increased regulatory focus on alternative mutual funds, including the SEC's continuing examinations of such funds.

SEC Commissioner Discusses Cybersecurity Priorities

On June 25, 2015, SEC Commissioner Luis Aguilar addressed cybersecurity issues within the securities industry while speaking at the SINET Innovation Summit in New York City. Commissioner Aguilar discussed a variety of issues, including recent enforcement actions and the results of the SEC's cybersecurity sweep exam of broker-dealers and investment advisers published in February. In particular, he noted that the sweep exam revealed that firm cybersecurity policies and procedures generally failed to specify how firms would determine responsibility for client losses stemming from a cyber-attack, that some firms were not conducting periodic risk assessments of their vendors' systems, and that cybersecurity insurance was not carried by many broker-dealers and investment advisers. Most notably, he emphasized that the SEC continues to perceive cybersecurity as a serious and persistent threat, and that it will proactively examine how it can bring more cybersecurity enforcement actions using its existing authority.

Federal Reserve Board and SEC Clarify Seed Capital Period for Registered Funds

On July 16, 2015, the staff of the SEC's Divisions of Trading and Markets, Investment Management, and Corporation Finance[1] amended their FAQ on the final rule (the "Final Rule")[2] implementing Section 13 of the Bank Holding Company Act, commonly referred to as the "Volcker Rule." The FAQ responds to industry concerns that, although the Final Rule excludes registered investment companies, foreign public funds and SEC-regulated business development corporations (collectively "Public Funds") from the definition of "covered funds," a Public Fund could nevertheless become subject to the Volcker Rule's restrictions on proprietary trading if the Public Fund were deemed to be a "banking entity" as defined in the Final Rule. A "banking entity" is defined to include, among other things, any entity (such as a Public Fund) that is "controlled" by a bank and/or its affiliates. Such control can arise if a bank and/or bank affiliates own 25 percent or more of the entity's outstanding voting securities. Although the Final Rule provides an exception for investments in covered funds during a seed capital period, there is no similar provision in the Final Rule for seed capital investments in Public Funds. Under existing banking law precedents, banks and their affiliates are permitted to make seed capital investments of 25 percent or more of voting shares of a registered investment company during a limited seeding period.

The FAQ states that the staffs of the Agencies would not advise the Agencies to treat a Public Fund as a banking entity solely because of the level of ownership in a Public Fund of its bank-affiliated sponsor during a limited seeding period. The staff further recognized that the seeding period for Public Funds "may take some time, for example, three years, the maximum period of time expressly permitted for seeding a covered fund under the [Final Rule]." The FAQ also states that the staff does not expect that it would be necessary for an application to be submitted to the Federal Reserve Board by a banking entity to determine the length of the seeding period.

The general compliance date under the Final Rule was July 21, 2015.

SEC Considers Audit Committee Disclosure

On July 1, 2015, the SEC issued a concept release (the "Release") soliciting public comment on expanding audit committee reporting requirements. In particular, the Release focused on expanding an audit committee's reporting of its responsibilities and activities with respect to its oversight of a firm's independent auditor. The SEC posited that disclosure of additional information by the audit committee with respect to its oversight of the auditor may provide useful information to investors as they evaluate the audit committee's performance in connection with investors' "vote for or against directors who are members of the audit committee, the ratification of the auditor, or their investment decisions." The Release is a "concept" release intended only to provide the SEC with information regarding audit committee reporting. Any changes to the SEC rules concerning audit committee reporting would require the SEC to publish the proposed rule changes for public comment.

The Release solicited public comment on potential disclosure changes in four areas: (i) the audit committee's oversight of the auditor; (ii) the audit committee's processes for appointing or retaining an auditor; (iii) the qualifications of the auditor and members of the engagement team selected by the audit committee; and (iv) the location of audit committee disclosure in SEC filings.

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[1] The FAQ was issued in coordination with the staffs of other agencies charged with implementing the Volcker Rule: the Federal Reserve Board, Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Commodity Futures Trading Commission (with the SEC, the "Agencies").
[2] 12 C.F.R. Parts 44, 248, and 351 and 17 C.F.R Part 255.

The Release discussed only listed operating companies, the boards of which are required to have an audit committee. However, listed closed-end funds' boards, which are also required to have an audit committee, could be affected by any rule changes ultimately resulting from the Release and subsequent rulemaking. Open-end funds are not required to provide an audit committee report, and the Release does not refer to open-end funds. However, the Release does ask for comment on whether new disclosure requirements should extend to "all issuers." Therefore, it is conceivable that any rule changes resulting from the Release could extend to open-end fund disclosures.

Comments on the Release must be submitted no later than September 8.

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:

Treasury Department and IRS Release Proposed Regulations on Management Fee Waivers
July 24, 2015
On July 22, 2015, the Treasury Department and the IRS released proposed regulations regarding fee-waiver arrangements commonly used by private investment funds. If finalized, the new rules would recharacterize certain partnership interests received in connection with fee waivers ("waived-fee interests") as disguised compensation arrangements that result in ordinary income. In preamble language, the government also stated that an existing administrative safe harbor treating certain grants of "profits interests" as nontaxable events will be interpreted and revised to exclude waived-fee interests. As a result, even if a waived-fee interest is not deemed to be a disguised compensation arrangement, the government may take the position that it is taxable on receipt.

SEC Releases Guidance on Code of Ethics Personal Securities Reporting
July 7, 2015
On June 26, 2015, the SEC's Division of Investment Management released a Guidance Update titled, "Personal Securities Transactions Reports by Registered Investment Advisers: Securities Held in Accounts Over Which Reporting Persons Had No Influence or Control" (the "Guidance"). The Guidance increases the compliance obligations for an adviser administering its code of ethics – required under the Investment Advisers Act (Rule 204A-1) – with respect to certain personal transactions of the adviser's "access persons" (a defined term). Specifically, with respect to a securities account belonging to an adviser's access person, an adviser will no longer be able simply to rely on the access person's assertion that he/she cannot influence or control securities transactions within the account. Instead, the Guidance provides a compliance framework for the adviser to establish a reasonable belief that transactions within the access person's securities account, in fact, are not subject to the access person's influence or control. Separately, the Guidance also may have implications for advisers to registered investment companies in administering a code of ethics required under the 1940 Act (Rule 17j-1).

SEC Requests Public Comment on Issues Concerning Exchange-Traded Products
June 26, 2015
On June 12, 2015, the SEC published a Request for Comment (the "Request") seeking public comment on topics related to the SEC's oversight of the listing and trading of exchange-traded products ("ETPs") on national securities exchanges. The Request classified ETPs into three categories: (i) exchange-traded funds registered under the Investment Company Act of 1940, (ii) pooled investment vehicles that do not invest primarily in securities, registered under the Securities Act of 1933, and (iii) exchange-traded notes (debt instruments issued by financial institutions) that are registered under the Securities Act.

Second Circuit Decision Could Disrupt Secondary Market for Bank-Originated Loans
June 17, 2015
A May 22, 2015 decision by the U.S. Court of Appeals for the Second Circuit appears to disturb the generally settled body of law concerning the status of non-bank investors with respect to applicable usury laws for bank-originated loans. As assignees of a national bank, such non-bank investors were generally deemed to stand in the shoes of the

bank with respect to applicable usury laws. However, in *Madden v. Midland Funding*, LLC, the Second Circuit rejected this principle and held that the usury laws of the debtor's jurisdiction could apply to non-bank investors. Consequently, unless reversed, *Madden v. Midland Funding* could significantly disrupt the secondary market for bank loans originated by national banks, as well as affect the valuation of such loans already held by non-bank investors. Bank lenders, securitization platforms and non-bank investors, including specialty debt funds, could be affected.

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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