April 13, 2016

Ropes & Gray's Investment Management Update: February – March 2016

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

District Court Dismisses Remaining Claims in *Northstar Financial Advisors Inc. v. Schwab Investments*

We previously reported that, on October 5, 2015, the U.S. District Court for the Northern District of California, on remand from the U.S. Court of Appeals for the Ninth Circuit, issued an opinion in *Northstar Financial Advisors Inc. v. Schwab Investments*, granting the defendants' motion to dismiss some state law claims but denying the defendants' motion to dismiss certain breach of fiduciary duty claims. The District Court's October 2015 decision followed the earlier remand decision by the Ninth Circuit Court of Appeals, which held that three novel state law claims were validly pled by a plaintiff seeking to represent a class of mutual fund shareholders.[1] In its October 2015 opinion, the District Court refused to dismiss the breach of fiduciary duty claims at the motion to dismiss stage of the case, after determining that the defendants had waived defenses under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") at an earlier stage of the proceedings. After the decision, the plaintiffs filed a motion asking the District Court for permission to file a motion for reconsideration, and the defendants filed a motion for judgment on the pleadings with respect to the remaining breach of fiduciary duty claims.

On February 23, 2016, the District Court issued an order denying the plaintiffs' motion for leave to file a motion for reconsideration and granting the defendants' motion for judgment on the pleadings as to all remaining claims. For procedural reasons, the defendants were able to assert a SLUSA defense at this stage, notwithstanding that it had been waived at the motion to dismiss stage. In its opinion, the District Court concluded that the remaining breach of fiduciary duty claims were based on a misrepresentation or omission and, therefore, were precluded by SLUSA. According to media reports, the plaintiff plans to appeal the District Court's decision.

While the District Court's opinion is favorable to funds and their advisers and board members, it remains to be seen whether plaintiffs can successfully assert state law claims that are actionable under the Ninth Circuit's decision – which allowed breach of contract and fiduciary duty claims to be asserted directly against funds, trustees and advisers – that are not precluded by a SLUSA defense.

SEC Guidance on Disclosure Reflecting Risks Related to Current Market Conditions

On March 9, 2016, the staff of the SEC's Division of Investment Management issued a Guidance Update titled, "Fund Disclosure Reflecting Risks Related to Current Market Conditions" (the "Guidance"). The Guidance reminds funds of the importance of reviewing risk disclosures on an ongoing basis and considering whether the risk disclosures remain adequate in light of current market conditions. Because risks may change over time, the Guidance states that a fund should consider whether disclosure that may have been adequate at one time may need to be reconsidered in light of new or changed market conditions. According to the Guidance, if a fund determines that its risk disclosure is not adequate, it should "consider the appropriate manner of communicating changed risks to existing and potential investors, for example, in the prospectus, shareholder reports, fund website, and/or marketing materials." The

[1] The state law claims were based on theories of breach of contract against the fund, breach of fiduciary duty against the trustees and adviser, and breach of the investment advisory agreement against the adviser.

Guidance outlines several steps fund advisers should take on an ongoing basis, including (i) monitoring market conditions and their impact on fund risks, (ii) assessing whether fund risks have been adequately communicated to investors in light of current market conditions, and (iii) communicating with investors when a fund determines that changes in current market conditions have resulted in material changes to the fund's risks such that current disclosures do not adequately reflect those changes.

The Guidance provides two specific examples of the types of disclosure updates a fund may wish to consider, based on the SEC staff's reviews of fund risk disclosures. The first concerns disclosures by fixed-income funds regarding interest rate risk, liquidity risk and duration risk during the current period of rising interest rates. The second example concerns investments by funds in debt securities issued by the Commonwealth of Puerto Rico and its agencies and instrumentalities (together, "Puerto Rico debt") in light of recent failures of issuers of Puerto Rico debt to make scheduled payments to bondholders.

With respect to fixed-income investments disclosure, the Guidance states the staff has seen interest rate risk disclosure that includes references to historically low interest rates, or to potential government policy changes that may affect interest rates. These disclosures indicate that current conditions may result in a rise in interest rates, which in turn may result in a decline in the value of the fixed-income investments held by the fund. The Guidance also states that some funds in their discussion of fixed-income liquidity risk disclose that a potential rise in interest rates may result in periods of volatility and increased redemptions. Some funds also state that, as a result of increased redemptions, they may have to liquidate portfolio securities at disadvantageous prices, which could reduce the returns of the fund. With respect to fixed-income duration risk, the Guidance notes that some funds disclose that longer-term fixed-income securities may be more sensitive to interest rate changes, and also include numerical examples illustrating how interest rate changes may have a greater impact on such longer-term securities.

With respect to funds that invest in Puerto Rico debt, the Guidance notes that some funds with disclosure about the risks associated with Puerto Rico debt have updated that disclosure to communicate the existence of heightened risk under current conditions. Other disclosures refer to current factors that may be expected to have an impact on the value of the Puerto Rico debt held by the fund. Examples of such disclosure include information about the Puerto Rico debt issuer's significant financial difficulties or budget deficits, as well as recent downgrades in the credit ratings of Puerto Rico debt.

Court Rejects MetLife's Too-Big-to-Fail Designation

On March 30, 2016, the U.S. District Court for the District of Columbia issued a sealed opinion striking down MetLife, Inc.'s designation by the Financial Stability Oversight Council (the "FSOC") as systemically important.[2] Under Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FSOC is authorized to determine that a nonbank financial company's material financial distress, or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities, could pose a threat to U.S. financial stability. Such systemically important companies become subject to supervision by the Federal Reserve and to enhanced prudential standards. The Treasury Department is appealing the District Court's MetLife decision to the U.S. Court of Appeals for the District of Columbia Circuit.

To date, in addition to MetLife, the FSOC has designated American International Group, Inc., General Electric Capital Corporation, Inc. and Prudential Financial, Inc. as systemically important entities. With respect to asset management firms (as reported in our prior Investment Management Update), in December 2014, the FSOC issued a notice inviting public comment on whether certain asset management products and activities could pose potential risks to the U.S. financial system. At the November 2015 FSOC open meeting, a Treasury staff member stated that the

[2] On April 7, 2016, the District Court unsealed its opinion, revealing the basis for its decision: (i) in determining that MetLife was systemically important, the FSOC's unexplained departures from its own published guidance (regarding when a nonbank financial company is systemically important) were arbitrary and capricious; and (ii) in its cost-benefit analysis, FSOC's omission of the regulatory costs *to MetLife* from being deemed systemically important was arbitrary and capricious.

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Treasury staff expected, in the spring of 2016, to be in a position to enable the FSOC to provide a public update on FSOC's review of asset management firms' products and activities.

ETF May Exceed Section 12(d)(2) and Rule 12d3-1 Investment Limits

On March 28, 2016, the SEC's Division of Investment Management provided a no-action letter to the SPDR S&P Dividend ETF (the "Fund") permitting the Fund to acquire more than (i) 10% of the total outstanding voting stock of an insurance company notwithstanding Section 12(d)(2) of the 1940 Act and (ii) 5% of an outstanding class of equity securities of a securities-related issuer notwithstanding Rule 12d3-1(b)(1).

The Fund is an "index fund" that seeks to track an independently provided index, which consists of issuers that are either insurance companies or derive a substantial portion of their revenues from securities-related activities, among others. As the Fund has grown, it has encountered the regulatory restrictions of Sections 12(d)(2) and 12(d)(3) of the 1940 Act and Rule 12d3-1 thereunder. Section 12(d)(2) limits to 10% the percentage amount a fund may acquire of the voting stock of an insurance company. Rule 12d3-1(b)(1) limits to 5% the amount that a fund may acquire of the voting stock of an issuer that, in its most recent fiscal year, derived more than 15% of its gross revenues from securities-related activities (*i.e.*, activities as a broker, dealer, underwriter, or registered investment adviser) (a "securities-related issuer").

With respect to the Section 12(d)(2) limit on fund ownership of an insurance company, the SEC staff agreed with the Fund's characterization of the purpose of the section – Congress believed that investment companies acquiring controlling blocks of stock of insurance companies would be undesirable because of possible negative effects of fund control of an insurance company. In this case, the Fund represented that the Fund would not own the securities of an insurance company in an amount exceeding the company's approximate weighting in the index the Fund tracks. The Fund also represented that it would avoid exercising a controlling influence over the management or policies of an insurance company by either (i) voting its shares in an insurance company as directed by an independent third party, or (ii) echo-voting its shares in an insurance company in the same proportion as the votes of all the insurance company's remaining shareholders. Based on these representations, the SEC staff stated that the Fund's investment activities would not be inconsistent with the intent of Section 12(d)(2) and, therefore, the staff would not recommend enforcement action if the Fund exceeded Section 12(d)(2)'s 10% limit.

With respect to Rule 12d3-1, the SEC staff agreed that the SEC had identified two apparent Congressional purposes for prohibiting investment company investments in securities-related issuers: (i) limiting a fund's exposure to the entrepreneurial risks of such issuers, and (ii) preventing potential conflicts of interest and reciprocal practices, such as directed brokerage. The Fund asserted that the concern about exposing funds to the entrepreneurial risk of securities-related issuers is adequately addressed by the Rule 12d3-1(c)'s prohibition on acquiring a general partnership interest of a securities-related issuer because virtually all securities-related issuers are currently organized as corporations and not general partnerships. To address concerns about conflicts of interest and reciprocal practices, the Fund represented that it would not acquire the securities issued by any securities-related issuer in an amount exceeding the issuer's approximate weighting in the index the Fund tracks. The Fund also represented that it would not use a securities-related issuer as the executing broker for any Fund transactions, and that it would comply with the provisions of Section 17(e) of the 1940 Act and Rule 17e-1 thereunder when using any *affiliated person* of a securities-related issuer. Based on the Fund's assertions and representations, the staff agreed that the Fund's investment activities would not be inconsistent with the concerns that underlie Section 12(d)(3) and Rule 12d3-1 thereunder and, therefore, it would not recommend enforcement action if the Fund exceeded Rule 12d3-1(b)(1)'s 5% limit.

SEC Broadens Scope of Co-Investment Exemptive Relief

On March 29, 2016, the SEC issued an exemptive order to the Apollo Group (notice and order) in which the SEC expanded the scope of permissible co-investment transactions under its "standard" co-investment relief orders. The applicants explained that, from time to time, its registered funds and private funds may have opportunities to make follow-on investments in an issuer in which registered funds and private funds previously have invested and continue to hold an investment. In some of these opportunities, the registered funds or private funds have not previously

participated in a co-investment transaction with respect to the issuer (*e.g.*, a registered fund and an affiliated private fund acquire the same issuer's securities in separate, non-joint transactions). Subsequently, negotiation is required with the issuer to make follow-on investments in (or dispose of) the securities. The SEC's prior standard co-investment orders would not permit these follow-on transactions where the registered funds or private funds have not previously participated in a co-investment transaction with respect to the issuer. However, the recent order permits the registered funds and private funds to rely on the order to make such follow-on investments without violating Rule 17d-1 under the 1940 Act, provided they have satisfied certain "enhanced review requirements." The order also permits co-dispositions where the registered funds or private funds have not previously participated in a co-investment transaction with respect to the issuer in which both types of funds hold an investment, provided they satisfy the same enhanced review requirements.

Separately, the exemptive order also provided relief from a condition in the standard co-investment relief orders requiring that registered funds always must be advised of, and be given the opportunity participate in, any co-investment transaction that falls within its investment objectives and strategies. The applicants explained that, unlike the organizations in prior co-investment orders, the applicants have multiple advisers with several registered funds and numerous private funds that have similar, but not identical, investment objectives and policies. The applicants asserted that, due to the size and complexity of their operations, an order based on existing precedents would not provide sufficient flexibility for their registered funds to participate in attractive and appropriate investment opportunities. Therefore, the applicants proposed to limit the prospective co-investment transactions of which each adviser would be required to be *advised of* to those investments that would be consistent with each fund's then-current objectives and strategies *and* pre-existing, board-established criteria that could be tested objectively (*e.g.*, industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size). This would reduce the scope of potential co-investment transactions required to be presented to a registered fund's adviser to those more consistent with the registered fund's emphasis. Nevertheless, board approval would still be required for all co-investment transactions.

Supreme Court Refuses to Hear Challenge to California's Unclaimed Property Law

On February 29, 2016, the U.S. Supreme Court denied a petition for a writ of certiorari in the case of *Taylor v. Yee*, in which the plaintiffs-appellants challenged the validity of California's Unclaimed Property Law as it has been applied by the California State Controller. The petition followed the decision of the U.S. Court of Appeals for the Ninth Circuit dismissing the plaintiffs-appellants' claims that the pre-escheat notice provided by the Controller was "constitutionally inadequate because the Controller does not attempt to locate property owners using the data sources required by [California's Unclaimed Property Law]." Further, the plaintiffs-appellants claimed that the procedures used before and after the unclaimed property is transferred to the Controller are insufficient and violated the plaintiffs-appellants' due process rights under the Due Process Clause of the Fourteenth Amendment.

Although the Supreme Court denied the petition, Justice Alito, in a concurring opinion, was critical of what he described as a recent trend of "combining shortened escheat periods with minimal notification procedures," and took note of advances in technology that make it easier to identify and locate property owners. Although Justice Alito conceded that that the "convoluted history" of the case made it a "poor vehicle" for addressing due process issues raised by state escheat laws, he signaled that the constitutionality of current state escheat laws is a question that may merit review in a future case.

In a related development, the Uniform Law Commission continues to work on a Revised Uniform Unclaimed Property Act (last revised February 2016) that has received input from the mutual fund/investment management industry. A complete list of revisions and comment letters being considered by the Uniform Law Commission is available here.

SEC Announces New Office of Risk and Strategy

On March 8, 2016, the SEC announced the creation of a new Office of Risk and Strategy ("ORS") within its Office of Compliance Inspections and Examinations (the "OCIE"). According to the announcement, the new office will

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consolidate and streamline the OCIE's risk assessment, market surveillance and quantitative analysis teams and provide operational risk management and organizational strategy for the OCIE. ORS is expected to lead the OCIE National Exam Program's risk-based, data-driven approach. Peter Driscoll, who will lead the new office, said that he will lead efforts to advance the SEC's "development of new tools and techniques that strengthen the OCIE's risk analysis, surveillance, and strategic abilities."

Regulatory Priorities Corner

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

SEC Chair Addresses the Mutual Fund Directors Forum

On March 29, 2016, SEC Chair Mary Jo White gave the keynote address at the Mutual Fund Directors Forum annual policy conference in Washington, D.C. in which she covered three topics of interest to independent directors. Chair White first provided her thoughts on the role of independent directors in assessing risks faced by funds. She then described how a board's role extends only to oversight and not to day-to-day management or to administration of a fund's compliance policies and procedures. Finally, she shared her thoughts about the limited circumstances in which enforcement actions against fund directors would be appropriate.

Risk Assessment. Chair White gave her views on the role of independent fund directors in assessing risks, citing two recent events. The first event was the August 2015 inability by a major service provider to provide timely NAVs to fund clients. The second event cited was the December 2015 suspension of redemptions by a mutual fund that focused on investments in high yield debt. Chair White stated that it is incumbent upon fund directors to consider what these two examples could mean for their funds prospectively, and that directors must be proactive in addressing risks, instead of reactive.

Chair White also underscored that cybersecurity remains a critical risk. She acknowledged that, while cyberrisks cannot be eliminated, funds and their advisers must nevertheless employ strong, state-of-the-art prevention, detection, and response plans. She added that independent directors must consider whether the funds, advisers and other key service providers are taking appropriate steps.

Finally, Chair White stated that directors also need to consider whether their board currently includes members with the necessary set of diverse skills, experience and expertise and whether the board should hire subject matter experts as consultants to the board. This was particularly important, she said, as areas of risk management – *e.g.*, cybersecurity, derivatives, liquidity and fund distribution – are becoming increasingly complex.

No Day-to-Day Management. Chair White sought to clarify what is *not* expected of independent directors. She emphasized that strong oversight of a fund should not be confused with the actual management of a fund. She said that the fund's adviser is normally responsible for day-to-day fund management, and the fund's chief compliance officer is responsible for administering the fund's compliance policies and procedures. She said that the "role of the board is to provide independent oversight of these and other critical functions, and to approve compliance policies and procedures, not to perform them." Chair White acknowledged that the appropriate dividing line between directors' oversight responsibilities and day-to-day management is a challenge to the SEC as it considers proposed reforms, and she stated that the SEC would continue to focus on this issue.

Enforcement Perspective on Fund Directors. In the final topic of her speech, Chair White sought to reassure directors in light of some SEC enforcement proceedings in which fund directors were named as respondents. She stated that judgments made by directors in good faith in performing their duties responsibly will not be second-guessed by the SEC. Only when directors fail to perform their duties, she said, should they expect action to punish and deter such conduct. As examples, she described two enforcement matters brought during her tenure as SEC Chair that illustrate where directors fell short. In the first, the directors had not, as required, approved any fair valuation methodology or regularly reviewed the application of an approved methodology. Instead, the directors in question had delegated these responsibilities to a valuation committee of their funds' investment adviser, without setting any

parameters or reviewing the committee's work. In the second enforcement matter, directors were charged with failing to satisfy their obligations under Section 15(c) of the 1940 Act to request and evaluate information that is reasonably necessary for the board to approve the terms of an advisory contract. The directors did not receive certain information they had specifically requested from the adviser, failed to follow up on the lapse, and did not seek clarification with respect to the incomplete, unclear and inaccurate information that had been provided.

William Blair May Face Enforcement Action Arising from SEC Distribution Sweep

In its December 31, 2015 annual report (filed February 29, 2016), the William Blair Funds disclosed that, in November 2014, the SEC had informed the funds' principal underwriter and distributor and former adviser, William Blair & Company, L.L.C. ("WBC"), that it had opened a non-public investigation with respect to shareholder administration fees paid by certain funds. The annual report further disclosed that WBC had recently received a Wells Notice from the SEC, informing WBC that the SEC staff intended to recommend an enforcement action against WBC to the SEC Commissioners. According to the annual report, WBC submitted a response to the Wells Notice, and WBC believed that any possible claims made by the SEC staff would be without merit. The annual report further noted that, in light of the preliminary concerns expressed by the SEC staff, WBC was waiving the shareholder administration fee for each applicable fund, and that the waiver would not be lifted without approval of the funds' board of trustees.

SEC Moves Forward on Cybersecurity Exam and Enforcement Initiatives

In panel remarks at the Investment Company Institute's March conference in Orlando, Andrew Ceresney, Director of the SEC's Division of Enforcement, stated that the SEC has enforcement actions in the works targeting the cybersecurity measures firms deployed to defend against cyberattacks. To date, the SEC has brought only one cybersecurity deficiency enforcement matter (discussed in this Investment Management Update). In his remarks during the same panel, Marc Wyatt, Director of the SEC's OCIE, stressed the importance of conducting adequate diligence with respect to service providers' adherence with their security measures. In a related development, the press has reported that, beginning in March, the OCIE substantially increased its examinations of firms' cybersecurity practices.

SEC Sanctions Managed Account Sponsor for Placing Clients in Higher Fee Share Classes

On March 14, 2016, the SEC announced it had settled an enforcement proceeding against three dually registered broker-dealer and investment advisory affiliates of American International Group, Inc., alleging breaches of fiduciary duty and multiple compliance failures relating to a fee-based managed account service that invested client assets in higher-fee share classes. In its settlement order, the SEC stated that the respondents had invested client assets in share classes that charged Rule 12b-1 fees despite the fact that the clients were eligible for lower-fee share classes in the same funds that were available without Rule 12b-1 fees. In addition, the SEC stated that the firms failed to disclose their conflicts of interest in the Forms ADV or implement effective compliance policies to monitor advisory accounts to avoid reverse churning of fee-based advisory and wrap accounts (generally, reverse churning refers to the practice where a client is charged a wrap fee that covers all advisory services and trading costs even though the client trades infrequently). Without admitting or denying the findings, the respondents agreed to pay more than $9.5 million to settle the allegations, consisting of a $7.5 million penalty and disgorgement of approximately $2 million in Rule 12b-1 fees.

Other Developments

Since the last issue of our Investment Management Update, we have also published the following separate Alert of interest to the investment management industry:

2016 ICI Mutual Funds and Investment Management Conference – Conference Summary
April 5, 2016

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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.

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