

December 28, 2016

## SEC Issues Guidance on Fund Changes Intended to Simplify Compliance with the Department of Labor's "Conflict of Interest" Rule

On December 15, 2016, the SEC's Division of Investment Management issued a Guidance Update titled, *Mutual Fund Fee Structures* (the "Guidance," available [here](#)). The Guidance focuses on disclosure issues and procedural requirements arising from (i) funds offering intermediary-specific variations (including waivers) of their sales loads, and (ii) funds offering a new share class. Both of these strategies are being contemplated by fund families to simplify intermediaries' compliance with the Department of Labor's "conflict of interest" or "fiduciary" rule (described in Ropes & Gray's Alert available [here](#)). The Guidance also discusses certain administrative procedures that can be used to expedite the SEC staff's review of fund disclosure filings required by both strategies.

**Variations in Sales Loads.** The Guidance notes that some fund families are considering adopting new variations to their funds' sales loads that would apply uniformly to investors who purchase fund shares through a single intermediary or category of intermediaries (each, an "Intermediary"). Rule 22d-1 under the 1940 Act permits a fund to sell its shares at prices that reflect scheduled variations in, or waiver of, sales loads, provided that the variations are applied uniformly to all offerees in a "class" of investors identified in the fund's prospectus. This requirement is reflected in Item 12(a)(2) of Form N-1A, which requires disclosure of each class of investors to which a sales load variation or waiver applies.

The Guidance confirms that investors who purchase shares through a specified Intermediary would be deemed a class under Item 12(a)(2). Therefore, the Guidance states, the prospectus should identify each Intermediary whose clients will receive a sales load variation or waiver. Moreover, the Guidance states, the narrative explanation to the fund fee table must disclose the variation or waiver, as well as a cross-reference to the section and page of the prospectus and statement of additional information describing the arrangement with each Intermediary.

Separately, the Guidance recognizes that, if a fund offers multiple Intermediary-specific sales load variations, the fund's prospectus disclosure might be lengthy and difficult for investors to navigate. To avoid these problems, the Guidance states that the SEC staff would not object if lengthy sales load variation disclosure applicable to multiple Intermediaries were included in an "appendix" to the fund's prospectus. Several conditions apply when using an appendix:

- The N-1A Item 12 disclosure must include a prominent statement that different Intermediaries may impose different sales loads, and that these variations are described in an appendix to the prospectus (the specific appendix must be named).
- The cross-reference in the narrative explanation to the fund fee table must cross-refer to the appendix.
- The appendix must identify the names of each Intermediary specifically, as required by Item 12(a)(2). An investor who purchases shares through a particular Intermediary must be provided with sufficient information to permit the investor to determine which scheduled variation applies to its investment (which may depend on the type of account held at the Intermediary).

The Guidance also states that the SEC staff would not object to an appendix that is a stand-alone document, provided the fund:

- Incorporates the appendix into the fund's prospectus by reference and files the appendix with the prospectus;
- Includes a legend on the front cover page of the appendix stating that the information in the appendix is part of, and incorporated in, the fund's prospectus;
- Includes a statement on the outside back cover page of the fund's prospectus that information about the sales loads variations is disclosed in a separate document that is incorporated by reference into the prospectus;
- Delivers the appendix with the prospectus; and
- If the fund uses a summary prospectus, posts the appendix on its website, consistent with Securities Act Rule 498(e).

The Guidance states that, to add disclosure about sales load variations, a fund will have to file an amendment to its registration statement under Securities Act Rule 485(a). The Guidance encourages funds to seek selective review of the filing, as described below, if only certain disclosures about the fund are changing, such as adding sales load variations or waivers. If sales load variation or waiver disclosures will be substantially identical for multiple funds within a fund complex, the Guidance states that the funds should consider the appropriateness of requesting relief under Rule 485(b)(1)(vii) ("Template Filing Relief"), as described below.

**New Share Classes.** The Guidance notes that funds are also considering offering new share classes that differ with respect to sales loads, transaction charges, and certain ongoing expenses. The addition of a new class of shares to an existing fund requires a filing under Rule 485(a). The Guidance states that, when the staff reviews a Rule 485(a) filing to add a new share class, the staff focuses on fees, performance and distribution arrangements. For Rule 485(a) filings where the only disclosure changes are to describe the new share class, the Guidance encourages funds to seek selective review of the filing, as described below. Further, because share-class specific information will be substantially identical across multiple funds within a fund complex, the Guidance states that the funds should consider the appropriateness of requesting Template Filing Relief, as described below.

**Administrative Procedures – Selective Review and Template Filing Relief.** To expedite the review process for funds offering intermediary-specific variations in their sales loads and funds offering a new share class, the Guidance encourages registrants to request a **selective review** of a filing that contains disclosure that is not substantially different from disclosure contained in one or more prior filings by the fund or other funds in the same complex.

- The Guidance states that a request for selective review may be appropriate for a Rule 485(a) filing by a fund that first incorporates sales loads variations or a new share class that is expected to be implemented for additional funds in the same complex.
- A request for selective review should be made in the cover letter accompanying the filing and include (i) a statement about whether the disclosure in the filing already has been reviewed by the staff in another filing (ii) a statement identifying the prior filings from which the current filing is not materially different (iii) a summary of the material changes in the current filing from the prior filings and (iv) any portions of the filing that the fund believes require heightened attention by the staff.

If a fund complex is making substantially identical changes to multiple funds, the Guidance states that it may be appropriate for a registrant to request **Template Filing Relief** under Rule 485(b)(1)(vii) to eliminate the need to file multiple Rule 485(a) filings. The Guidance states that a registrant could file a single Rule 485(a) "template filing," together with a Template Filing Relief request for the other funds with substantially identical disclosure. The Guidance encourages registrants to submit a request for Template Filing Relief promptly, and states that the staff will consider the request as expeditiously as possible.

A request for Template Filing Relief under Rule 485(b)(1)(vii) should be made by a registrant in correspondence filed on the EDGAR system under the central index key (“CIK”) of the template filing, and the request should provide (i) the reason for making the post-effective amendment, (ii) the identity of the template filing, and (iii) the identity of the registration statements that intend to rely on the relief (“replicate filings”). The request should also make these representations:

- The disclosure changes in the template filing are substantially identical to disclosure changes that will be made in the replicate filings.
- The replicate filings will incorporate changes made to the disclosure included in the template filing to resolve any staff comments thereon.
- The replicate filings will not include any other changes that would otherwise render them ineligible for filing under Rule 485(b).

Finally, the Guidance states that any Rule 485(b) filing relying on Template Filing Relief should include a cover letter or an explanatory note with the filing explaining that it is relying on the relief.

For further information about how the issues described in this Alert may impact your interests, please contact your regular Ropes & Gray contact.