August 14, 2017

Ropes & Gray's Investment Management Update: June – July 2017

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

Investment Company Reporting Modernization FAQs

On July 18, 2017, the SEC's Division of Investment Management posted Investment Company Reporting Modernization FAQs to its website, containing FAQs classified into four categories: Compliance Dates and General Filing Obligations, Form N-PORT, Regulation S-X and Form N-CEN. Salient points from the FAQs are summarized below.

Compliance Dates and General Filing Obligations

- **Form N-PORT**: For larger funds – a fund within the same group of related registered funds with net assets of at least $1 billion or more as of the end of the most recent fiscal year of the fund – the compliance date is June 1, 2018 (smaller funds have a compliance date of June 1, 2019). Each fund must file reports on Form N-PORT no more than thirty days after the end of each month, and compliance is based on the end date of a reporting period. For example, larger funds with a June 1, 2018 compliance date would file their first reports on Form N-PORT, reflecting data as of June 30, 2018, no later than July 30, 2018. Assets of private funds should not be included in calculating the $1 billion threshold.

- **Form N-CEN**: The compliance date is June 1, 2018. Funds must report on Form N-CEN within 75 days of the fund's fiscal year end. Compliance is based on the end date of a reporting period. For example, a fund with a June 30 fiscal year end should make its first filing for the year ended June 30, 2018 on Form N-CEN by September 13, 2018. A fund with a May 31 fiscal year end would not need to make its first filing on Form N-CEN until the fiscal year ending May 31, 2019 (filing within 75 days after that date).

- **Regulation S-X**: The compliance date is August 1, 2017. Compliance is based on the end date of the reporting period. For example, financial statements contained in a report on Form N-CSR for the period ended June 30, 2017 are not required to comply with the amendments to Regulation S-X, despite the fact that the Form N-CSR in this case must be filed by September 8, 2017 (70 days after the period's end date). Financial statements in reports on Forms N-CSR, N-Q, 10-K or 10-Q for the period ended August 31, 2017 should comply with the amendments to Regulation S-X because the period ends after the compliance date of August 1, 2017.

- **Securities lending disclosures**: The compliance date for the amendments to Form N-1A and Form N-3 (and, for closed-end funds, Form N-CSR) relating to securities lending disclosures is August 1, 2017. Compliance is based on the end date of the reporting period. Thus, open-end funds and separate accounts offering variable annuity contracts with fiscal year ends following the compliance date should reflect these amendments as part of their next annual update of their registration statements. For example, a July 31 fiscal year end *open-end* fund should first incorporate the new disclosures in its annual update following its July 31, 2018 fiscal year end. A February 28 fiscal year end *closed-end* fund should first incorporate the new disclosures in the first Form N-CSR relating to an annual reporting period ended after the compliance date (*i.e.*, for its fiscal year ending February 28, 2018). The new securities lending disclosures do not apply to semi-annual reports on Form N-CSRS, and therefore the new disclosures would not be included in the semi-annual report filed by the closed-end fund on August 31, 2017.

- **Form N-SAR**: For a fund with a fiscal year end of April 30 or May 31, the fund's final filing on Form N-SAR (due 60 days after its fiscal year end) would be after the effective date of the rescission of Form N-SAR on June 1, 2018. The FAQs clarify that funds with a fiscal year end on April 30 or May 31, 2018 may file their reports for these fiscal year end dates on either Form N-SAR (60 days after the reporting period end) or Form N-CEN (75 days after the reporting period end). In addition, despite Form N-SAR's June 1, 2018 rescission, EDGAR will accept Form N-SAR filings, including amendments to previously filed reports on Form N-SAR, until June 30, 2019.

Form N-PORT

- If a fund uses T+1 accounting to report portfolio holdings on Form N-PORT, the fund may (but is not required to) calculate and report security- and portfolio-level risk metrics required by Form N-PORT on a T+0 basis.

- Funds must file reports on Form N-PORT up to 30 days after the end of each month, but have up to 60 days after the end of the reporting period to add Part F (complete portfolio holdings) to the filing. The EDGAR Filing Manual provides detail regarding how Part F attachments and amendments thereto should be filed as EDGAR submission types NPORT-EX and NPORT-EX/A, respectively.

- Some multiple-series trusts with the same fiscal year end for each fund (*i.e.*, series) in the trust now include in their shareholder reports and on Form N-Q portfolio schedules for each of the different funds, as well as one set of financial statement notes that cover all of the different funds. This practice may be effectively continued. Specifically, the Part F attachment for a multi-series trust may include the portfolio schedules for all of the funds (series) in the trust with the same fiscal year-end and one set of financial statement notes that cover all such funds combined into one Part F attachment.

- Reports on Form N-PORT filed for the month ended December 31, 2018 will be the first reports made public. Thus, reports filed on Form N-PORT for the months ended June 30 through November 30, 2018 will be non-public, and reports filed for the months ended December 31, 2018 and later will be made public (but only those filings for the third month of a fund's fiscal quarter).

- Closed-end funds that do not calculate their NAV on at least a monthly basis are permitted to report information on Form N-PORT by using their internal methodologies consistent with how they report internally and to current and prospective investors, as allowed by General Instruction G to Form N-PORT. These funds may provide additional information in Part E (explanatory notes to Form N-PORT) explaining the internal methodology.

- Form N-PORT requires in Item B.6 that funds provide aggregate flow information for the preceding three months. Master portfolios should provide flow information at the master portfolio level for transactions between the master portfolio and its feeder funds.

- Form N-PORT Items C.2.b and C.2.c require a fund to report, for each investment, the currency in which such investment is denominated and the value in U.S. dollars (and, if the currency is not denominated in U.S. dollars, the exchange rate used to calculate the U.S. dollar value). For foreign forward currency contracts, funds must report each contract's value in U.S. dollars (Item C.2.c), but funds may report "N/A" regarding the contract for the other reporting requirements in Items C.2.b and c because that information is separately reported in Items C.11.e.i and ii (amount and description of currency sold and purchased, respectively).

- In responding to Form N-PORT Item C.4.a (asset type), for investments in the shares of other funds, a reporting fund should report the asset type as either "short-term investment vehicle" (*e.g.*, money market fund, liquidity pool, or other cash management vehicle) or "equity-common" (other funds). In responding to Item C.4.b (issuer type) for investments in shares of other funds, the reporting fund should report the issuer as "registered fund" or "private fund," as applicable.

- For purposes of N-PORT Item C.6 (identifying restricted securities), funds may consider the SEC guidance provided for amendments to Article 12 of Regulation S-X regarding identification of restricted securities in financial statements.
- Form N-PORT Item C.9.b.i requires funds to select the category that most closely reflects the coupon type of debt securities from among the following categories: fixed, floating, variable, none. Funds may look to definitions in Rule 2a-7 to make these determinations. For example, Rule 2a-7(a)(13) defines "floating rate security," and Rule 2a-7(a)(27) defines "variable rate security."
- A derivative transaction's notional amount must be reported for various types of derivatives transactions on Form N-PORT and in the amendments to Regulation S-X. The FAQs recognize that Funds currently use different methods to calculate the notional amounts of derivatives transactions, and notes that funds would not delta-adjust the notional amount for options because Form N-PORT separately requires delta and Article 12 of Regulation S-X specifically requires notional amount without a delta adjustment.
- To Be Announced ("TBAs") is a term used to describe forward mortgage-backed securities trades. Some funds now disclose TBAs in their financial statements either as derivatives or securities, depending on, among other factors, whether TBAs are cash settled or physically settled. Instruction G to Form N-PORT provides that funds may report with respect to TBAs using their own internal methodologies and the conventions of their service providers, provided the information is consistent with information that they report internally and to current and prospective investors.

Regulation S-X

- Article 12 of amended Regulation S-X requires, in certain circumstances, for derivatives where the underlying asset is an index or basket of investments, that funds disclose the 50 largest components in the index or basket. For purposes of these calculations, the notional values of short positions should be treated in terms of their absolute values. In addition, if a notional amount or some other metric is used to determine the size of a component included in the index or basket, the FAQs recognize that the metric utilized can differ based on the nature of the investment. For example, notional amount should be used for swaps, while the staff believes that par value and value could be used for bonds and equities, respectively.
- Rules 12-13 through 12-13D of amended Regulation S-X require funds to "[i]ndicate by an appropriate symbol each investment which cannot be sold because of restrictions or conditions applicable to the investment." A fund may be able to exit a derivatives transaction by means other than a sale, such as through the execution of an offsetting transaction or negotiated agreement with the fund's counterparty. The fund should identify a derivatives transaction as restricted if, as of the balance sheet date, the fund would not have been able to exit the transaction through a sale or other means.

Form N-CEN

- Some open-end funds and exchange-traded funds consist of a series without an "authorized" class (*i.e.,* funds that have not adopted a multi-class plan pursuant to rule 18f-3). Such a series would have a class ID only because EDGAR issues every series a corresponding class ID. A series without an authorized class should report "0" for Item C.2.a of Form N-CEN (number of authorized classes of shares of the fund). However, although the series will report that it has no authorized classes, it must report its ticker and class ID if applicable in response to Item C.2.d (which requests the name, class ID and ticker of each class with shares outstanding).

- Item C.10.vii of Form N-CEN requires funds to report information on sub-transfer agents, including arrangements where systems, transaction processing and services are provided by sub-transfer agents in supporting the fund's primary transfer agent systems and recordkeeping functions (such as part of a remote systems or hybrid or fully outsourced arrangement. This requirement does not include identifying intermediary arrangements (*e.g.*, with broker-dealer firms and other intermediaries such as retirement plan third-party administrators) that are administrative service type arrangements (also sometimes referred to as "sub-accounting" and "sub-transfer agent" arrangements) where the intermediary or administrator engages with the primary transfer agent as record owner of fund shares and conducts transactions for its customers whose shares are maintained in omnibus accounts with the fund's primary transfer agent.

SEC Report on Virtual Currencies

Virtual organizations and associated persons contemplating an initial offering of a new virtual currency should be aware of the potential application of the federal securities laws.

On July 25, 2017, the SEC released a report based on an investigation of the Division of Enforcement (the "Report") concerning the application of the federal securities laws to the offer and sale of a virtual currency, DAO Tokens, by the Decentralized Autonomous Organization ("The DAO"), a "virtual" organization embodied in computer code and executed on a distributed ledger or blockchain. In 2016, DAO Tokens were offered and sold publicly within the U.S. by The DAO in exchange for units of Ether ("ETH"), another virtual currency. At the close of the DAO Tokens' offering, ETH valued at approximately $150 million had been raised. In late May 2016, just prior to the expiration of the offering period, concerns about the safety and security of The DAO's system began to surface due to vulnerabilities in The DAO's code, and The DAO's operations were put on hold while the organizer of the DAO took steps to address the vulnerabilities. On June 17, 2016, an unknown individual or group (the "Attacker") diverted ETH from The DAO's Ethereum Blockchain address to an Ethereum Blockchain address controlled by the Attacker. Subsequently, various steps were taken by the DAO and its investors that had the effect of transferring all of the funds raised (including those held by the Attacker) from The DAO to a recovery address, where DAO Token holders were able to exchange their DAO Tokens for ETH and thereby avoid any loss of the ETH they had invested.

The Report noted that a critical threshold question was whether DAO Tokens are "securities" under the Securities Act and the Exchange Act. A "security," as defined in Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act, includes an "investment contract." The Report analyzed the issue by applying the principles developed under the Supreme Court's long-standing *Howey* test and the test's progeny, which interpret an investment contract to mean an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.[1]

The Report stated that The DAO had been created to operate as a for-profit entity that would use the funds raised through the sale of DAO Tokens to invest in "projects." The holders of DAO Tokens would participate in the earnings from these projects as a return on their investment in DAO Tokens. Separately, holders of DAO Tokens could convert their DAO Tokens into cash or another virtual currency by re-selling their DAO Tokens on a number of web-based platforms ("Platforms").

The Report concluded that investors who purchased DAO Tokens were investing in a common enterprise and reasonably expected to earn profits through that enterprise when they sent ETH to The DAO in exchange for DAO Tokens. The expected profits were to be derived from the managerial efforts of others; namely, from the acumen of The DAO creator-sponsor and individuals chosen by the creator-sponsor to manage The DAO. Accordingly, the Report concluded that the DAO Tokens were "securities under Section 2(a)(1) of the Securities Act and Section

[1] *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

3(a)(10) of the Exchange Act. Thus, the Report concluded that The DAO was an issuer of securities subject to the registration requirements of the Securities Act.

Section 3(a)(1) of the Exchange Act defines an "exchange," and Exchange Act Rule 3b-16(a) provides a functional test to assess whether a trading system meets the definition of exchange under Section 3(a)(1). Under Exchange Act Rule 3b-16(a), an organization or any group of persons shall be deemed an exchange under Section 3(a)(1) if such group or persons "(i) brings together the orders for securities of multiple buyers and sellers; and (ii) uses established, non-discretionary methods . . . under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of the trade." The Report concluded that the Platforms satisfied the criteria of Rule 3b-16(a) and, therefore, were exchanges for purposes of the Exchange Act.

Notwithstanding the Report's conclusions, the Report stated that the SEC determined not to pursue an enforcement action in the matter. However, the Report states that the SEC is aware that virtual organizations and associated persons increasingly are using distributed ledger technology to offer and sell instruments such as DAO Tokens to raise capital. These offers and sales have been referred to, among other things, as "Initial Coin Offerings" or "Token Sales." The Report stated that the SEC "deems it appropriate and in the public interest to issue this Report in order to stress that the U.S. federal securities law may apply to various activities, including distributed ledger technology, depending on the particular facts and circumstances," and "considers the particular facts and circumstances of the offer and sale of DAO Tokens to demonstrate the application of existing U.S. federal securities laws to this new paradigm."

Finally, the Report stated that the question of whether The DAO was an investment company, as defined in Section 3(a) of the 1940 Act, was not analyzed, in part, because The DAO never commenced its business operations and did not invest in any "projects." The Report cautions "[t]hose who would use virtual organizations should consider their obligations under the [1940 Act].

Division of Investment Management Expands Form ADV FAQs

In June 2017, the Division of Investment Management added to the Frequently Asked Questions on Form ADV and IARD (announcing the additions in an Information Update). The FAQs provide new guidance regarding seven items within Form ADV, most of which relate to the amendments to Form ADV adopted in August 2016 (the "Amendments").

As we described in our prior Alert, the Amendments are intended to improve the quality of information that clients and the SEC receive, fill data gaps that the SEC has identified and facilitate the SEC's risk monitoring initiatives. More specifically, the Amendments modify the requirements under Part 1A of Form ADV to require (among other things) (1) additional reporting requirements with respect to separately managed accounts, (2) registration on a single Form ADV of multiple private fund advisers operating as a single advisory business in a "relying adviser" structure, (3) additional disclosures about investment advisers and their businesses and (4) certain clarifying and technical changes. The compliance date for the Amendments is October 1, 2017, and advisers must implement the amendments in their next Form ADV update following the compliance date. Thus, for firms with a December 31 fiscal year end, which describes the majority of investment advisers, this means compliance with respect to Form ADV updates no later than the annual amendment filing by the end of March 2018.

SEC Issues Cybersecurity Risk Alert

On August 7, 2017, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a Risk Alert (the "Risk Alert"), titled *Observations from Cybersecurity Examinations*, providing observations from its cybersecurity sweeps of broker-dealers and investment advisers.

Overall, the Risk Alert strikes a more prescriptive tone than past cybersecurity alerts (which we described in our prior Alerts here and here).

In the Risk Alert, OCIE appears to be saying that most broker-dealers and advisers appreciate the cybersecurity risks that their organizations face and are taking appropriate steps to mitigate those risks. This means the industry baseline for what is "reasonable security" has moved far forward, and those firms that are not keeping up could face criticism or enforcement concerns in the future. However, the Risk Alert describes some issues that OCIE observed in the majority of its exams and provides some overall recommendations, including the following:

- *Policies and procedures not being reasonably tailored.* This includes policies and procedures that are vague, narrowly scoped (i.e., addressing requirements of an incomplete list of relevant regulators), or that offer only general guidance or identified limited examples of safeguards for employees to consider. This underscores that the SEC expects comprehensive policies applicable to the firm's business and good, written procedures underlying those policies.
- *Firms not adhering to their policies and procedures, or their policies and procedures not reflecting actual firm practices.* This includes not actually requiring employees to undergo training; conducting reviews of policies, procedures or systems less frequently than stated in policies; and conflicts between policies.
- *Firms with inadequate systems maintenance* (*e.g.*, using outdated software or not installing critical patches promptly).
- *Firms relying on stale, or not addressing risks noted in, security assessments.*

The Risk Alert also stated that OCIE had observed commendable elements that it believes are indicative of a firm with robust controls, including:

- Firm policies and procedures that were vetted and approved by senior management.
- Firm policies and procedures that indicate that the firm has a complete inventory of data and information.
- An active security program in place to protect data and information, including penetration testing, security monitoring, system auditing and regular reporting.

While the Risk Alert may present no surprises as to individual techniques the SEC prefers, it clearly signals that, prospectively, a robust, comprehensive information security program is a baseline SEC expectation.

FINRA Extends Approval of Related Performance to Closed-End Fund Marketing Materials to Institutional Investors

On June 9, 2017, the FINRA staff published an interpretive letter (the "Letter") permitting FINRA members to include Related Performance Information (defined below) in a registered closed-end fund's marketing materials directed at institutional investors ("institutional communications"). The Letter extends to closed-end funds prior relief provided to open-end mutual funds in a 2015 interpretive letter (described in our prior Alert) (the "Mutual Fund Letter").

The Letter is important because closed-end fund marketers, like mutual fund marketers, now may use Related Performance Information when marketing closed-end funds to institutional investors, including financial intermediaries, who may recommend the closed-end funds to their customers. This is particularly important in cases where an investment adviser has been employing an investment strategy that will be used for a new closed-end fund that lacks its own performance history. Multiple conditions, which are virtually identical to the conditions contained in the Mutual Fund Letter, apply.

According to the Letter, “Related Performance Information” means the actual performance of all separate or private accounts or funds that have “(i) substantially similar investment policies, objectives, and strategies, and (ii) are currently managed or were previously managed by the same adviser or sub-adviser that manages the closed-end fund that is the subject of an institutional communication” (“Related Accounts”). “Institutional investors” include broker-dealers, SEC- or state-registered investment advisers, banks, insurance companies, governmental entities, certain qualified plans, and any person (whether a natural person or otherwise) with total assets of at least $50 million (this list is non-exhaustive).

We believe that the Letter will be useful to FINRA members in marketing closed-end funds to financial intermediaries, who may sell or recommend these funds to their customers and to other institutional investors.

The Letter and the prior Mutual Fund Letter underscore that FINRA’s approach with respect to Related Performance Information continues to be at odds with the approach countenanced by the SEC. The SEC’s approach, as stated in various no-action letters, continues to be that Related Performance Information may be presented to retail investors in a closed-end fund’s or mutual fund’s prospectus. Prior to the Mutual Fund Letter, FINRA generally did not permit Related Performance Information to be included in sales literature. In the Mutual Fund Letter, FINRA allowed the use of Related Performance Information in communications to institutional investors. The Letter reiterates that FINRA continues to maintain its “longstanding position” – that the presentation of Related Performance Information in communications with retail investors is not permitted.

REGULATORY PRIORITIES CORNER

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

No-Action Letter Extends Rule 15a-4 Interim Contract Period

In a letter dated June 20, 2017, the SEC staff provided no-action assurance to Nuveen Fund Advisors, LLC (“Nuveen”) and its common-control affiliate, NWQ Investment Management Company, LLC (“NWQ”), permitting NWQ continuing to serve as investment sub-adviser to two series of registered investment companies (the “Trusts”) pursuant to interim advisory agreements beyond the 120-day period provided under Rule 15a-4. In its request for no-action relief, Nuveen represented that an extension of the 120-day period was necessary because, despite the efforts it had made to obtain shareholder approval of a new advisory agreement, there was a high probability that the Funds would not receive the number of votes necessary to reach a quorum before the expiration of the 120-day period.

The relief granted is similar to that granted in Claymore Advisors, LLC SEC No-Action Letter (pub. avail. Apr. 27, 2010), in which the SEC staff permitted an extension of the 120-day period under Rule 15a-4 to permit the funds in question to receive the number of votes necessary to constitute a quorum. Nevertheless, the Nuveen no-action letter is a reminder that an extension of the Rule 15a-4 period may be possible in appropriate circumstances.

OCIE Sweep Exam Targeting Hot IPOs

In June 2017, a financial news outlet reported that the Chicago branch of the SEC’s Office of Compliance Inspections and Examinations (“OCIE”) was spearheading an examination of how hedge funds are handling the allocation of shares obtained in “hot” initial public offerings (an “IPO”). IPO allocation is an area the SEC often reviews during routine examinations. The current sweep appears to focus on the same types of issues that have historically concerned the SEC – possible unfair allocation to proprietary accounts, accounts that pay performance fees and accounts with poor performance.

New SEC Enforcement Chiefs See Cybercrime as Major Enforcement Priority

In a June 8, 2017 news article, the SEC’s newly appointed co-directors of enforcement, Stephanie Avakian and Steven Peikin, voiced their deep concern with cyberattacks on brokerage firms, calling cyberthreat the greatest threat to the markets right now and seeing this topic as a major enforcement priority. According to the article, the SEC has seen an increase in the number of investigations involving cybercrime, as well as in attempts to break into brokerage accounts through cyberattacks. The agency is now gathering statistics on cybercrimes in order to identify broader market-wide issues.

SEC Sweep Exam to Target Robo-Advisers

According to a June 14, 2017 press report, this year, the SEC will launch a sweep exam to look at how investment advisers are employing robo-advisers (*i.e.*, automated advisers that provide services directly to clients over the Internet), or using robo-advisers to supplement their investment advice. The sweep is expected to focus on issues identified in the February 2017 Guidance Update from the Division of Investment Management, which we reported on in our prior Alert.

FSB Releases Final Report on Voluntary Climate-Related Financial Disclosure

In June 2017, the Financial Stability Board's Task Force on Climate-Related Financial Disclosure (the "Task Force") released a final report, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (the "Report"). The Report contains the Task Force's recommendations for voluntary climate-related financial disclosures intended to permit persons, including asset managers, to account for material risks arising from climate change. The Task Force is chaired by Michael Bloomberg.

The Report's recommended disclosures are voluntary. It noted that "several asset owners expressed concern about being identified as the potential 'policing body' charged with ensuring adoption of the Task Force's recommendations by asset managers and underlying organizations." Nevertheless, the Report encouraged asset owners "to help drive adoption of these recommendations" and stated: "[b]ecause asset owners and asset managers sit at the top of the investment chain, they have an important role to play in influencing the organizations in which they invest to provide better climate-related financial disclosures."

An Annex to the Report, *Implementing the Recommendations of the Task Force on Climate-Related Financial Disclosures*, contained guidance regarding how different types of organizations can apply the Report's recommendations. Among other recommendations, the Annex recommended that asset managers consider making certain disclosures to clients:

- The asset manager's governance or board characteristics regarding oversight of climate-related risks and opportunities, and management's role in assessing and managing these risks and opportunities.
- The climate-related risks and opportunities the asset manager has identified over the short, medium, and long term, as well as the impact of climate-related risks and opportunities on the asset manager's businesses, strategy and financial planning.
- The asset manager's processes for identifying, assessing and managing climate-related risks, as well as how these processes are integrated into the asset manager's overall risk management.
- The metrics used by the asset manager to assess climate-related risks and opportunities consistent with its strategy and risk management process.
- The targets used by the asset manager to manage climate-related risks and opportunities and performance against targets.

OTHER DEVELOPMENTS

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

CFTC Staff Provides Relief from Position Limit Aggregation Rules, Including August 14, 2017 Filing Deadline

August 11, 2017

Just days before a new notice filing requirement for certain position limit aggregation exemptions was to take effect, on August 10, 2017, the staff of the U.S. Commodity Futures Trading Commission (the "CFTC") Division of Market Oversight granted broad no-action relief to market participants subject to aggregation rules. The relief addresses not only the notice filing requirement, but also certain aspects of the aggregation exemption rules that did not reflect market realities and were unduly burdensome on market participants. This relief expires on August 12, 2019. *Notably, the relief from the filing requirement does not affect the requirement to comply with the aggregation rules themselves, and market participants must be prepared to make the filing within five days of a request*. The CFTC staff states in the no-action letter that it understands that exchanges intend to apply the same notice filing requirements for exchange position limits.

Department of Labor to Propose 18-Month Delay in Applicability Date for Portions of Fiduciary Rule

August 10, 2017

On August 9, 2017, the U.S. Department of Labor (the "DOL") filed a notice in connection with pending litigation that revealed a portion of its current plans for the fiduciary rule. In the filing, the DOL stated that it has submitted to the Office of Management and Budget (OMB) proposed amendments to the Best Interest Contract (BIC) Exemption and other exemptions that would effectively delay the applicability date of many of the requirements for fiduciaries to comply with the fiduciary rule until July 1, 2019. If the proposed amendments emerge from the OMB review process unchanged, this would permit financial institutions to maintain their transition-period compliance practices without an immediate need to move forward with resource-intensive plans to comply with the requirements included in the full BIC exemption. However, if the applicability date for the full requirements under the exemptions is not delayed, then full compliance would be required by January 1, 2018, which would require institutions to devote significant resources to their compliance efforts in the near term.

Department of Labor Requests Information on Fiduciary Rule

July 6, 2017

On July 6, 2017, the U.S. Department of Labor (the "DOL") published a public request for information on the fiduciary rule. Although the request does not contain substantive guidance on the rule or on how the DOL is interpreting it, the questions included in the request may provide clues about the DOL's thinking on possible changes or additions to the rule and the associated prohibited transaction exemptions. The DOL has asked for input on a variety of topics, which are described in this Alert.

FCA Publishes Final Policy Statement on MIFID II Implementation

July 4, 2017

The UK Financial Conduct Authority ("FCA") has published its final policy statement on implementation of the revised EU Markets in Financial Instruments Directive ("MiFID II"), which takes effect in the EU in January 2018.

The statement includes some significant policy decisions by the FCA, affecting the impact of MiFID II on UK asset managers.

FCA Publishes Final Report on Competition in UK Asset Management

June 28, 2017

The FCA published its Final Report on its asset management market study. The report is the culmination of almost two years' work on the UK asset management sector by the FCA, focusing on matters such as weak price competition among asset managers (particularly in the active retail sector), perceived high profitability, price clustering for asset management fees and a lack of customer focus on fund charges.

The Final Report sets out the FCA's conclusions on its work, and the FCA will now focus on specific remedies. Because remedies will be the subject of various future consultations, there are no immediate rule changes, although the FCA includes a Consultation Paper (CP 17/18) to set out its proposed specific new rules on a number of areas covered in the Final Report.

Key Considerations for Asset Managers under the DOL's Fiduciary Rule

June 13, 2017

On June 9, 2017, the long-anticipated compliance date for the DOL's fiduciary rule arrived. As a result, many financial institutions and individual representatives may become fiduciaries to their retirement investors, including private pensions and IRAs. In general, any individual or institution that makes a recommendation to a retirement investor about buying, holding or selling a security or other investment property and receives a fee (direct or indirect) will be a fiduciary, unless an exception applies. This means that carrying on with business as usual may cause you to be a fiduciary, even if your interactions with clients remain unchanged. This Alert highlights key areas for review and steps to take in order to maintain compliance.

Supreme Court Applies Five-Year Statute of Limitations to SEC Disgorgement Claims in *Kokesh v. SEC*

June 7, 2017

On June 5, 2017, after years of industry debate and litigation, the Supreme Court put to rest a billion dollar question: can the SEC seek disgorgement beyond the general five-year statute of limitations period that constrains much of its other enforcement activity? In *Kokesh v. SEC*, 581 U.S. — (2017) (No. 16-529), a unanimous Court held that disgorgement orders are in fact time-barred under 28 U.S.C. § 2462, a statute governing claims brought by the SEC and many other federal agencies. In doing so, the Court granted a significant victory to market participants and disarmed an increasingly powerful tool in the SEC's vast enforcement arsenal. We also note that the decision will have several consequential impacts in terms of the scope of future investigations and a few other areas.

If you would like to learn more about the developments discussed in this Update, please contact the Ropes & Gray attorney with whom you regularly work or any member of the Ropes & Gray Investment Management group listed below.

United States

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

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

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

Sarah Clinton
Boston, MA
+1 617 951 7375
sarah.clinton@ropesgray.com

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

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

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

Isabel R. Dische
New York, NY
+1 212 841 0628
isabel.dische@ropesgray.com

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

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

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

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

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

Pamela Glazier
Boston, MA
+1 617 951 7420
pamela.glazier@ropesgray.com

Mark Gurevich
New York, NY
+1 212 841 0657
mark.gurevich@ropesgray.com

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

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

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

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

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

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

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

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

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

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

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

Paulita A. Pike
Chicago, IL
+1 312 845 1212
paulita.pike@ropesgray.com

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

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

Adam Schlichtmann
Boston, MA
+1 617 951 7114
adam.schlichtmann@ropesgray.com

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

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

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

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

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

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

London

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

Monica Gogna
London
+44 20 3122 1110
Monica.Gogna@ropesgray.com

Matthew Judd
London
+44 20 3201 1633
matthew.judd@ropesgray.com

Michelle J. Moran
London
+44 20 3122 1148
michelle.moran@ropesgray.com

Asia

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