ROPES & GRAY

UPDATE

Asset Management

December 22, 2017

Ropes & Gray's Investment Management Update: October – December 2017

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

SEC Delays Form N-PORT EDGAR Filing Requirements by Nine Months; N-PORT Data Must be Maintained for the Delay Period

On December 8, 2017, the SEC adopted Temporary Rule 30b1-9(T) under the 1940 Act (the "Rule"). The effect of the Rule is to delay by nine months the EDGAR submission requirements associated with Form N-PORT. During the delay period, funds in "larger fund complexes" (as defined below) must satisfy their Form N-PORT reporting obligations by maintaining in their records the information required to be included in Form N-PORT, instead of submitting the information via EDGAR. The SEC noted that the rationale for the Rule is to provide time for the SEC to complete its review of EDGAR data security issues, as well as to provide SEC staff time to complete and review any modifications to EDGAR that are required to process Form N-PORT filings effectively and securely.

- For funds that, together with other funds in the same "group of related investment companies," hold net assets of at least $1 billion ("larger fund complexes"), the former implementation date of June 1, 2018 (first Form N-PORT filed via EDGAR by July 30, 2018) is delayed through March 31, 2019 (first Form N-PORT filed via EDGAR by April 30, 2019). For smaller fund complexes, the first Form N-PORT must be filed by April 30, 2020.

- Funds must continue filing public reports on Form N-Q until they begin filing reports on Form N-PORT using EDGAR. The compliance dates for the amendments to the certification requirements of Form N-CSR are also delayed.

- In a footnote to the Rule's adopting release, the SEC noted that the Rule also delays the liquidity-related EDGAR reporting requirements added to Form N-PORT, which the SEC adopted in connection with promulgating Rule 22e-4 (concerning liquidity risk management programs). The original compliance date for the additional liquidity-related reporting requirements[1] within Form N-PORT for funds in larger fund complexes was December 1, 2018. Giving effect to the Rule's delay, the liquidity-related EDGAR reporting requirements for such funds instead will coincide with their first Form N-PORT, due April 30, 2019. Nonetheless, larger fund complexes will be required to maintain in their records the liquidity-related information beginning no later than December 1, 2018.

[1] These requirements require disclosure in Form N-PORT of (i) the aggregate percentage of investments that are assets (excluding any investments that are reflected as liabilities) compared to total investments that are assets in each of the following categories: highly liquid investments, moderately liquid investments, less liquid investments and illiquid investments, and (ii) the percentage of highly liquid investments that consists of "Segregated Assets" that are segregated to cover, or pledged to satisfy margin requirements, in connection with derivatives transactions that are classified as moderately liquid investments and less liquid investments.

SEC Denies No-Action Letter Request; Rebukes Fund Complex for Failing to Obtain an Exemptive Order Under Rule 17d-1

Rule 17d-1 under the 1940 Act prohibits any registered fund's first- and second-tier affiliated persons, acting as principal, from participating in or effecting any "joint enterprise or other joint arrangement or profit-sharing plan" with the fund, unless the affiliated person obtains an exemptive order from the SEC, as specified in the Rule.

In an October 26, 2017 letter, SEC staff denied a request by Mutual of America Capital Management LLC ("MACM") requesting the staff to confirm that it would not recommend enforcement action with respect to MACM's proposed expense allocations among funds advised by MACM. Specifically, MACM proposed allocating some operating expenses of investing funds ("Top-Tier Funds") to underlying funds ("Underlying Funds" and, together with the Top-Tier Funds, "Funds") in which the Top-Tier Funds may or may not invest, without obtaining an exemptive order.

Under MACM's proposal, non-advisory operating expenses of the Top-Tier Funds would be allocated to and paid by the Underlying Funds, including costs of legal and compliance services, costs of printing and distribution of prospectuses and shareholder reports, as well as directors' fees and fees for legal, audit and custodial services. Under the proposal, the Funds' board of directors, including a majority of the directors who are not interested persons of the Funds (the "Independent Directors"), would determine the specific expense allocations. MACM contended that the proposed expense allocations would not constitute a joint arrangement under Rule 17d-1 because (i) the allocation decisions by the Independent Directors would not involve self-dealing or a profit motive by persons in a position to take advantage of the Funds, and (ii) boards of funds routinely oversee allocation of expenses incurred by affiliated funds without seeking exemptive relief from the SEC, consistent with directors making informed actions believed to be in the best interests of shareholders.

The SEC staff took a dim view of MACM's proposal, stating that "[a]fter consultation with the Division of Enforcement, we are issuing this letter denying your request *as a caution to you and others* against creating an arrangement" without an exemptive order from the SEC (emphasis added). The SEC staff noted that MACM had implemented the proposed expense allocation arrangement without first obtaining an SEC exemptive order and subsequently terminated the arrangement in 2015. The SEC staff highlighted that, for more than thirty years, the industry practice with respect to arrangements such as MACM's proposed expense allocations has been to obtain an exemptive order under Rule 17d-1 before implementing the arrangements, and the staff cited multiple examples of such orders.

The SEC staff rejected MACM's legal analysis. The staff concluded that the proposed arrangement would constitute a prohibited joint arrangement because "some of the operating expenses proposed to be allocated to the Underlying Funds would not be incurred by, or otherwise attributable to, the Underlying Funds, but rather would be incurred by or attributable solely to the [Top-Tier Funds]." According to the SEC staff, this fact pattern would create potential conflicts of interest because it permitted participation by a Fund on a basis less advantageous than that of other participants. The staff noted that this potential conflict was not present (or was present to a much lesser degree) in other situations in which shared expenses are allocated among participating funds within a family of funds without an exemptive order under Rule 17d-1.

SEC Announces Results of 2017 Enforcement Program

On November 15, 2017, the SEC's Division of Enforcement released its Annual Report, containing its enforcement results for its fiscal year ended September 30, 2017. According to the report, the SEC filed 754 enforcement actions in fiscal 2017 (compared to 868 such actions in the prior year) covering a wide range of misconduct, and obtained orders totaling $3.8 billion in disgorgement and penalties (compared to "over $4 billion" in the prior year). The report played down the importance of quantitative metrics and noted that "in most years, a significant percentage of the disgorgement and penalty totals are attributed to a small number of cases." Similarly, the report stated that "in

2017, $1.07 billion was distributed to harmed investors while $140 million was distributed in 2016, but much of the effort that resulted in the 2017 numbers occurred in prior years."

These sentiments echo the remarks of Commissioner Michael S. Piwowar in a speech given on October 26, 2017 at the FINRA and Columbia University Market Structure Conference. Commissioner Piwowar noted that, following the 2008 financial crisis, the SEC had "sunk a large portion of its scarce enforcement resources into a so-called 'broken windows' approach." He characterized this approach as a "misguided effort" that proved successful at boosting [the SEC's] enforcement statistics, but "did not meaningfully improve investor protection." He also said that "[f]ortunately, those days have passed, and we are charting a new course at the Commission."

IDC Urges SEC to Modernize Directors' Responsibilities

In an October 16, 2017 letter to Dalia Blass, the new director of the SEC's Division of Investment Management, the Independent Directors Council (the "IDC") urged the Division to give priority to "modernizing fund directors' regulatory responsibilities." The IDC first summarized developments in the fund industry that it believes have created a need for the SEC to review directors' responsibilities. The IDC then suggested a framework for considering the type of responsibilities that are appropriately imposed on fund directors in an oversight role and offered recommendations for regulatory changes that the IDC believes would enhance the effectiveness of directors.

The IDC highlighted that the SEC has continuously added new responsibilities for fund boards, without eliminating or paring down existing ones. The IDC maintained that recent rulemaking initiatives – *e.g.*, the liquidity risk management rule and the derivatives proposal – would expand directors' responsibilities "beyond the core role of overseeing potential conflicts of interest and management integrity to involvement in investment management functions."

Regarding the appropriate framework for evaluating independent directors' responsibilities, the IDC indicated that regulations should focus on director oversight of potential conflicts of interest. The IDC emphasized its view that regulations should recognize that a director's primary value is in providing oversight, instead of forcing directors to duplicate the role of a chief compliance officer or otherwise to act as a subject-matter expert in respect of certain activities of the funds.

The IDC made several recommendations for modernizing the existing regulatory regime, including:

- modernizing director responsibilities with respect to Rule 12b-1, suggesting that it is no longer productive for boards to review 12b-1 payments on a quarterly basis;
- revising director responsibilities in connection with fair valuation, and suggesting that the SEC propose a rule that would allow a fund board to delegate to a fund's adviser the responsibility to determine fair values, thereby permitting the board to serve in an oversight capacity with respect to the fair valuation process with a focus on those elements of the process that may present a conflict of interest;
- recommending modifications to Rule 18f-3 to remove the requirement that the fund board make certain determinations in connection with expense allocations; and
- revising certain governance requirements, including adopting a rule that allows a fund board to be exempted from the in-person meeting requirement to approve an advisory contract if an unforeseen circumstance arises, subject to certain conditions.

Delivering the keynote address on December 7, 2017 at the ICI's Securities Law Developments Conference, Ms. Blass said that the Division of Investment Management was analyzing the responsibilities of the fund board, in view of the accumulation of board responsibilities that has occurred over time. She stated that, "[a]s we gather information, we will be thinking about whether to recommend any recalibration of board duties."

REGULATORY PRIORITIES CORNER

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

SEC Regulatory Agenda – Business Continuity and Derivatives Proposals Deferred; ETF, Loan Rule and Investment Professionals Standard of Conduct Proposals Advance

In September 2017, in testimony to Congress, Chairman Clayton stated that the SEC's Regulatory Flexibility Act Agenda "must be streamlined to inform Congress, investors, issuers and other interested parties about what the SEC actually intends – and realistically expects – to accomplish over the coming year."

Two SEC rule-making proposals were notably absent from the Agenda, published in November 2017; both were formerly designated within the "Final Rule Stage" category. Specifically, in the Agenda, the rules proposed by the SEC in June 2015, in the *Adviser Business Continuity and Transition Plans* release, were classified as inactive, and the rule proposed in December 2015, in the *Use of Derivatives by Registered Investment Companies and Business Development Companies* release, was classified under the Long Term Actions category.

The Agenda included the following new items in the "Proposed Rule Stage" category:

- The Division of Investment Management is considering recommending that the SEC re-propose rules and rule amendments to allow certain exchange-traded funds to operate without first obtaining exemptive orders from the SEC. The SEC had proposed similar action in 2008.
- The Office of the Chief Accountant is considering recommending that the SEC amend Rule 2-01(c)(1)(ii)(A) of Regulation S-X the ("Loan Rule") regarding the independence of an accountant when the accountant has a lending relationship with an entity that holds equity securities of the accountant's audit client.
- The Division of Investment Management is considering making recommendations, jointly with the Division of Trading and Markets, regarding standards of conduct for investment professionals. This item was formerly categorized within the "Long-Term Actions" category.

SEC Names Marc P. Berger as Director of New York Regional Office

On December 18, 2017, the SEC announced that Marc P. Berger had been named the Director of its New York Regional Office. Currently, Mr. Berger is the global co-head of Ropes & Gray's Securities and Futures Enforcement Practice Group. Before joining Ropes & Gray, he was an Assistant United States Attorney for the Southern District of New York and Chief of that office's Securities and Commodities Fraud Task Force. Mr. Berger will join the SEC in January 2018.

Board Self Assessments Back on SEC Exam Request List

According to published reports, some recent SEC examination letter requests have included requests to review the results of fund boards' annual self-assessments. At this time, it is not clear whether this request will routinely be included in examination request letters.

Broadridge to Acquire Morningstar's 15(c) Board Consulting Services Business

On December 19, 2017, Broadridge Financial Solutions, Inc. announced that it had agreed to acquire Morningstar, Inc.'s 15(c) board consulting services business. The transaction will bring Morningstar's 15(c) business under common ownership with its major competitor, Lipper's 15(c) business (acquired by Broadridge in 2015). The implications for the information that mutual fund boards will be able to receive in connection with their annual investment advisory contact review process remain uncertain.

SEC Proposes Rules Regarding Incorporation by Reference and Hyperlinking by Investment Companies and Advisers

On October 11, 2017, at the first open meeting under Chairman Jay Clayton's tenure, the SEC proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K, mostly affecting operating companies (described in this separate Ropes & Gray Alert). The proposed amendments (the "Proposal") are intended to streamline the requirements associated with incorporation by reference and improve investor access to incorporated documents through the use of hyperlinks. To provide for a consistent set of rules, the Proposal includes parallel amendments to several rules and forms applicable to investment companies and advisers, including proposed amendments that would require certain investment company filings to be submitted in HyperText Markup Language ("HTML") format, and to include hyperlinks to certain information. Comments on the Proposal must be submitted to the SEC no later than January 2, 2018.

SEC Permits Purchaser of ETF Sponsor to Rely on Predecessors' Exemptive Orders for Interim Period

On October 6, 2017, the SEC staff issued a no-action letter confirming that it would not recommend enforcement action against the purchaser of an ETF investment adviser, its successor and the distributor of a family of ETFs that were covered by three respective existing exemptive orders (the "Existing Orders"), despite the fact that the purchaser had not filed an application for exemptive relief before the closing of the sale of the ETF business. In granting the requested relief, the staff noted that the successor investment adviser had received oral assurances from the staff before the closing of the acquisition, and that the applicants recently filed three applications with the SEC in which they requested exemptive orders that would effectively provide the same relief previously provided by the Existing Orders (the "Requested Orders"). The no-action letter applicants further stated that the purchaser would comply with the terms and conditions of the Existing Orders as if such terms and conditions were imposed directly on the purchaser, and would rely on each of the Requested Orders when issued, instead of continuing to rely on the respective Existing Orders. The no-action assurance was limited until the earlier of the issuance of the Requested Orders, or 150 days from the date of the closing of the sale of the ETF business. The staff also indicated that it would not object if third parties rely on the no-action letter to the extent they find themselves in similar circumstances if they promptly file an application for the relevant exemptive relief. However, the SEC staff stated, before doing so, the third party would need to confirm with the SEC staff that the staff would support granting such exemptive relief.

U.S. Treasury Publishes Report on the Investment Management Industry

In October, the Treasury Department published a report entitled *A Financial System That Creates Economic Opportunities: Asset Management and Insurance* (the "Report") in response to Executive Order 13772, which identifies several "Core Principles" intended to guide financial regulation by the Trump Administration. The following is a summary of the topics and Treasury recommendations in the Report that are most relevant to the investment management industry.

Systemic Risk, Solvency, and Stress Testing. Treasury believes that entity-based evaluations of systemic risk are generally an undesirable approach to mitigate risks arising in the asset management industry, and Treasury rejects the need to stress test asset management firms. The Report states that, while the possibility of liquidity risk may arise during mutual fund redemptions, a strong liquidity risk management regime is a better approach. Instead of focusing on entity-based evaluations, Treasury believes that federal regulators should focus on potential systemic risks arising from asset management products and activities. Treasury recommends eliminating Dodd-Frank stress testing for investment companies and investment advisers. As an alternative, Treasury supports the Rule 2a-7 stress-testing requirements and the Rule 22e-4 liquidity risk management program requirements (subject to additional comments, below).

Liquidity Risk Management. Treasury believes that Rule 22e-4 has resulted in funds assessing the adequacy of their liquidity management practices. Nevertheless, Treasury believes that the Rule mandates an overly prescriptive asset classification or bucketing methodology despite the fluid, and sometimes subjective, nature of liquidity. Treasury supports the 15% limitation on illiquid assets, but it rejects any highly prescriptive regulatory approach to liquidity risk management, such as the bucketing requirement. In its place, Treasury recommends that the SEC adopt a principles-based approach to liquidity risk management rulemaking and any associated bucketing requirements and, therefore, recommends that the SEC postpone the currently scheduled December 2018 implementation of Rule 22e-4.

Derivatives. Treasury believes that proposed Rule 18f-4's comprehensive approach to the regulation of funds' derivatives activities is an improvement from the current piecemeal approach. However, the proposed Rule raises these key concerns: (i) portfolio limits could unnecessarily restrict funds from using derivatives, even for hedging or other risk mitigating purposes, (ii) the proposed Rule's use of gross notional amount as a measure for derivatives exposure is misguided because similar notional amounts of derivatives across different underlying asset classes generally do not represent similar units of risk, and (iii) the proposed Rule's limiting of qualifying coverage assets to cash and cash equivalents could require funds to hold more of those assets than is optimal. Treasury recommends the SEC consider a derivatives rule that includes a derivatives risk management program and an asset segregation requirement, while reconsidering whether portfolio limits are desirable.

Exchange Traded Funds. Treasury recommends that the SEC move forward with a "plain vanilla" ETF rule permitting entrants to access the market without the cost and delay of obtaining exemptive orders. The SEC should either re-propose its 2008 ETF proposal or propose a new rule for ETFs. In addition, Treasury recommends that the SEC consider streamlining the process for ETFs by eliminating the existing requirement that multiple SEC divisions approve an ETF's application.

Business Continuity and Transition Planning. In June 2016, the SEC proposed a new Rule 206(4)-4 under the Advisers Act that would require registered investment advisers to adopt and implement written business continuity and transition plans. Treasury recommends that the SEC withdraw the proposed Rule in view of existing principles-based guidance from the SEC.

Dual CFTC and SEC Registration. In 2012, the CFTC narrowed the universe of SEC-registered investment companies and their advisers that were exempt from registration and regulation as commodity pool operators ("CPOs"). The Report states that the 2012 CFTC amendments had resulted in entities that do not resemble or compete with traditional commodity pools becoming subject to dual CFTC and SEC regulation. Accordingly, Treasury recommends amending the CFTC rules so an investment company registered with the SEC and its adviser are exempt from dual registration and regulation by the CFTC as a CPO.

Asset Management Reporting and Disclosure Requirements. In May 2015, the SEC proposed Rule 30e-3, which would permit registered funds to transmit shareholder reports electronically. The Rule was not finalized. Treasury recommends that the SEC finalize its proposed rule to modernize its shareholder report disclosure requirements and permit the use of implied consent for electronic disclosures.

Economic Growth and Informed Choices. Treasury supports the current efforts at the Department of Labor (the "DOL") to re-examine the implications of the DOL's fiduciary rule. Treasury believes it is appropriate to delay full implementation of the DOL fiduciary rule until issues, including standard-of-conduct issues, can be addressed with the participation of the SEC and other regulators.

U.S. Treasury Report on FSOC Designations

In November, Treasury provided a report to President Trump titled *Financial Stability Oversight Council Designations* (the "Report"). The Report provides recommendations regarding the process employed by the Financial Stability Oversight Council ("FSOC") to determine that a nonbank financial company shall be supervised by the Board of Governors of the Federal Reserve System or subject to new or heightened standards and safeguards by the company's primary financial regulatory agency. The Report stated that FSOC's authority to designate nonbank financial companies is a blunt instrument for addressing potential risks to financial stability. Treasury made several recommendations, including the following:

- FSOC should undertake greater engagement with a nonbank financial company's primary financial regulator during FSOC's evaluation of the company for a potential determination. The primary regulator can provide FSOC with unique insights into the company and its operations, activities and risks. Moreover, a primary regulator may be able to take action to mitigate risks identified by FSOC prior to FSOC's determination.
- FSOC should consider amending the consolidated assets threshold it applies to nonbank financial companies in Stage 1 of its process (currently, the Stage 1 threshold for consolidated assets is $50 billion).

SEC Provides Section 3(c)(5)(C) No-Action Relief

On September 5, 2017, the SEC staff published a no-action letter (the "Letter") to Redwood Trust, Inc. (including its subsidiaries, "Redwood"), an internally managed, residential mortgage finance company structured as a real estate investment trust. The Letter assured Redwood that the SEC staff would not recommend enforcement action if Redwood treats investments in credit risk transfer securities issued by Fannie Mae and Freddie Mac as "real estate-type interests" for purposes of relying on the exclusion from the definition of investment company set forth in Section 3(c)(5)(C) of the 1940 Act.

Background. Section 3(c)(5)(C) provides an exclusion from the definition of investment company for any person that is "primarily engaged in [the business of] purchasing or otherwise acquiring mortgages and other liens on and interests in real estate," even if such person owns investment securities exceeding 40% of its total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

In the past, the SEC staff has taken the position that Section 3(c)(5)(C) may be available to an issuer if (i) at least 55% of its assets consist of "mortgages and other liens on and interests in real estate" ("qualifying interests") and the remaining 45% of its assets consist primarily of "real estate-type interests," (ii) at least 80% of its total assets consist of qualifying interests and real estate-type interests, and (iii) no more than 20% of its total assets consist of assets that have no relationship to real estate (collectively, the "Asset Composition Test").

Although the term "real estate-type interests" is not defined in the 1940 Act, the SEC staff has previously expressed the view that certain mortgage-related instruments, such as "agency partial pool certificates," may be treated as real estate-type interests.

The Letter. In its incoming letter, Redwood represented that the credit risk transfer securities are notes (the "Notes") issued by Fannie Mae and Freddie Mac to transfer mortgage credit risk to the private sector, or otherwise share credit risk with the private sector. Redwood described the Notes as sharing similar characteristics with, and having the same economic substance as, agency partial pool certificates. Like these agency certificates, payments of principal and, therefore, the return on the Notes are tied directly to the credit and prepayment performance of a designated pool of residential mortgages guaranteed by Fannie Mae or Freddie Mac.

Based upon Redwood's representations, the SEC staff agreed not to recommend enforcement action if Redwood treated investments in the Notes as real estate-type interests for purposes of the Asset Composition Test, in order to rely upon the exclusion from the definition of investment company in Section 3(c)(5)(C) of the 1940 Act.

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:

Congress Sends Tax Reform Bill to President for Signature

December 20, 2017

On Wednesday, December 20, 2017, the House of Representatives voted to pass the most significant tax reform legislation in three decades (the "Act") just hours after the Senate passed the measure. The legislation's provisions will affect a broad range of taxpayers, making substantial changes to the taxation of businesses, individuals, and tax-exempt organizations, and adding significant complexity to the international tax regime. The Act will now be sent to President Trump's desk, and it is expected that he will sign the bill into law.

Unusual Conversion of a Mutual Fund to a Closed-End Fund

November 30, 2017

In an unusual move, a mutual fund converted to a closed-end fund with the same investment objective and strategy. The conversion was approved by the fund's board of trustees ("Board") and by a majority of shareholders in unusual circumstances to protect the interests of the fund's long-term shareholders. Shares of the fund now trade on the New York Stock Exchange (the "NYSE").

SEC Issues No-Action Letters to Ease U.S. and MiFID II Compliance; EC Issues Guidance on MiFID II Advisers' Receipt of Research from Non-EU Brokers

November 9, 2017

On October 26, 2017, the SEC staff issued three no-action letters to, respectively, the Investment Company Institute (the "*ICI Letter*"), the Securities Industry and Financial Markets Association's Asset Management Group (the "*SIFMA-AMG Letter*") and SIFMA (the "*SIFMA Letter*"). The three letters provide greater certainty to market participants regarding compliance with U.S. law as they seek to comply with the European Union's updated Markets in Financial Instruments Directive ("MiFID II") by January 3, 2018.

Changing status of EU local authorities under MiFID II

November 8, 2017

Asset managers located inside and outside the European Union ("EU") should be aware of the changing regulatory status of EU local authorities, and their pension funds, under the next iteration of the Markets in Financial Instruments Directive ("MiFID II"), that applies on 3 January 2018.

EU local authorities are active users of wholesale financial services, while their pension funds frequently invest in funds or engage investment managers to manage their assets. Any EU or non-EU firm that trades with or that is engaged directly by the local authority, or that is marketing a fund or other financial product to a local authority, will be affected.

Trending Video: Department of Labor's Fiduciary Rule

November 1, 2017

David Tittsworth, Ropes & Gray investment management counsel, analyzes the possible fate of the Department of Labor's Fiduciary Rule.

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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