February 12, 2018

Ropes & Gray's Investment Management Update – January 2018

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

SEC Clarifies Liquidity Rule Requirements – Subadvisers and ETFs

On January 10, 2018, the staff of the SEC's Division of Investment Management posted FAQs responding to questions about liquidity risk management ("LRM") programs established by 1940 Act Rule 22e-4 (the "Liquidity Rule"). The FAQs provide the staff's views with regard to questions concerning (i) sub-advised funds and (ii) ETFs. The principal issues addressed by the staff are summarized below.

Sub-Advised Funds. The staff noted that the Liquidity Rule permits a fund's LRM program administrator to delegate responsibilities to a subadviser under the fund's LRM program, subject to appropriate oversight. A fund complex has broad authority to determine whether or to what extent the LRM program administrator may delegate its responsibilities – either for administering the entire LRM program or for handling discrete responsibilities under the fund's LRM program. However, the fund retains ultimate responsibility for complying with the Liquidity Rule, and the LRM program administrator remains responsible for the administration of the LRM program.

- The staff clarified that while an adviser (including a subadviser) may have responsibilities under multiple LRM programs that "differ from one another (including multiple programs within the same fund complex)," such an adviser is "under no obligation to reconcile the elements of those programs; the programs' underlying methodologies, assumptions, or practices; or the program outputs (*e.g.*, liquidity classifications of fund investments)."
- Different funds may classify the same instrument differently. The staff stated that funds – including funds in the same complex – could use different assumptions regarding a specific instrument, as well as assumptions regarding market depth and reasonably anticipated trade size. This would result in different liquidity classifications for the same instrument held by different funds, but this outcome is permitted.
- The staff observed that an LRM program administrator could adopt an approach where a fund's adviser and subadviser(s) both have input into the fund's liquidity classifications. In this case, the fund's adviser and subadviser may reach differing conclusions regarding an instrument's liquidity classification. The staff believes that the fund LRM program's policies and procedures could address how the fund would resolve the issue. The same problem would arise if a fund has multiple subadvisers, each with discretion to manage a sleeve of the fund (a "manager-of-managers" structure), and the LRM program administrator delegates responsibility under the LRM program for classifying the instruments in the subadvisers' respective sleeves to each subadviser. If more than one sleeve holds the same instrument, the subadvisers may classify the instrument differently. Here, again, the staff believes that the fund LRM program's policies and procedures could, but are not required to, have a process for resolving these differences.
- While the Liquidity Rule provides the above-described flexibility in determining an instrument's liquidity classification *for purposes of an LRM program*, Form N-PORT does not permit a fund to report more than one liquidity classification for a single instrument. For this reason, if a fund were to classify an instrument

held in multiple sleeves differently for purposes of compliance with the Liquidity Rule, the staff stated that the fund's policies and procedures should have a process to select one classification for that instrument for purposes of Form N-PORT reporting. In particular, the staff encouraged a fund that has different liquidity classifications for an instrument and a single liquidity classification for purposes of reporting that instrument in Form N-PORT to note this fact in Form N-PORT's Explanatory Notes section. The staff noted that the information in the Explanatory Notes section is non-public, provided the information is related to a non-public reporting item (such as the reporting item that requires a fund to report its monthly position-level liquidity classification information).

ETFs. The Liquidity Rule accords special treatment to "In-Kind ETFs" (*e.g.*, In-Kind ETFs are not required to classify their holdings into liquidity categories). An ETF is an In-Kind ETF only if the ETF meets redemptions through in-kind transfers of securities, positions and assets other than a *de minimis amount of cash*. In the FAQs, the staff provided its views concerning (i) the impact of an ETF losing its status as an In-Kind ETF and (ii) what constitutes a *de minimis*amount of cash.

- If an ETF were to lose its status as an In-Kind ETF, the staff stated that the ETF is required to comply with the classification and highly liquid investment minimum requirements of the Liquidity Rule "as soon as reasonably practicable after the ETF no longer qualifies for the In-Kind ETF exception." The staff also stated that an ETF that has lost its status as an In-Kind ETF does not face a specific time period before it can requalify as an In-Kind ETF. The staff believes that such requalification is a facts-and-circumstances determination. For example, an ETF that loses its status as an In-Kind ETF could requalify as an In-Kind ETF if it makes a reasonable determination that the event that caused it to lose its status was an "extraordinary one-time event that is unlikely to occur again."

- The staff confirmed that an ETF may exclude cash in redemption proceeds that is proportionate to the ETF's uninvested portfolio cash for purposes of defining and testing compliance with its *de minimis* cash amount (the "Excluded Amount").

- With respect to what constitutes a *de minimis* amount of cash, the staff acknowledged that this is a facts-and-circumstances question for each ETF and, therefore, what is *de minimis* may differ among ETFs. The staff stated that it "would be reasonable for an In-Kind ETF to determine that, if the percentage of its overall redemption proceeds paid in cash **does not exceed 5%"** (not including the Excluded Amount), such use would be *de minimis*. An In-Kind ETF may determine that cash use of more than 5% in redemptions is *de minimis*. However, in reaching this conclusion, the staff believes that an ETF should evaluate "its particular facts and circumstances, including the ETF's LRM program and whether a redemption(s) in cash in excess of 5% could give rise to liquidity risks substantially similar to those of mutual funds." Finally, the staff stated that, if an ETF's percentage of overall redemption proceeds paid in cash **exceeds 10%** (not including the Excluded Amount), it would be unreasonable to consider it a *de minimis* amount of cash to qualify as an In-Kind ETF.

- The staff stated that, if an ETF has agreed to accommodate an authorized participant's ("AP's") election to receive all cash redemption proceeds as a standard practice, the ETF would not be able to qualify as an In-Kind ETF. However, if the all-cash redemption to a single AP is made solely in the ETF's discretion, the staff believes that a redemption transaction consisting entirely of cash does not necessarily preclude an ETF from qualifying as an In-Kind ETF.

- The staff also provided its views regarding how an ETF should test whether it continues to qualify as an In-Kind ETF. In general, the staff said, an In-Kind ETF may take a variety of reasonable approaches to determine whether its cash use is *de minimis*, provided the approach is consistently applied. By way of example, the staff stated that it would not object if an In-Kind ETF were to determine that a reasonable approach includes (i) testing each individual redemption transaction to confirm that the proceeds contain no more than a *de minimis* cash amount or (ii) testing redemption transactions over a reasonable period of time to

confirm that, on average, the proceeds contain no more than a *de minimis* cash amount. The staff stated that a reasonable period of time for a fund with frequent redemptions may be a day or a week, while a reasonable period for a fund with less-frequent redemptions may be up to one month. The staff believes that longer periods would be unreasonable. The ETF's policies and procedures should describe the ETF's testing approach, including the time period used for the testing.

Fund Administrator Fined by SEC for Failing to Detect Asset and NAV Errors

On January 22, 2018, the SEC agreed to settle an enforcement proceeding against Gemini Fund Services, LLC ("Gemini"), the fund administrator for a mutual fund. According to the settlement order, as the fund's administrator, Gemini was responsible for calculating the fund's daily per-share NAV and communicating the NAV to the NASDAQ securities exchange, as well as reconciling fund asset data with the fund's custodian. The SEC settlement order alleged that Gemini provided NASDAQ with "inflated" NAVs that included "fictitious loans" that were not reflected in the records of the fund's custodian. The fictitious loans were fraudulently included in the fund's assets by a principal of the fund's adviser in order to conceal his misappropriation of the fund's assets. In the settlement order, the SEC asserted that, although Gemini did not know that the loans were fictitious when calculating the fund's daily NAV, Gemini knew, through its performance of the contractually required reconciliation process with the fund's custodian bank, that there were significant discrepancies between the assets underlying the NAVs that it was reporting to NASDAQ and the assets reflected in the records of the custodian. The settlement order stated that, although the discrepancies persisted for extended periods of time, Gemini failed to take any action to resolve them. Without admitting or denying the findings in the settlement order, Gemini agreed to pay a civil monetary penalty of $400,000, and to disgorge $147,334 and prejudgment interest of $14,072. In addition, Gemini agreed to appoint an independent compliance consultant.

SEC Grants Permanent Custody No-Action Relief to Derivatives Clearing Organizations

On December 19, 2017, the SEC staff issued no-action letters (the "Letters") to each of three derivatives clearing organizations (Chicago Mercantile Exchange, ICE Clear Credit LLC and LCH Limited) (each, a "DCO") providing permanent no-action assurances under Section 17(f) of the 1940 Act to any fund that maintains assets in the custody of a DCO or a DCO-member futures commission merchant ("FCM") for purposes of meeting the DCO or FCM's margin requirements for certain swaps cleared by the DCO. The Letters extend permanently prior temporary no-action assurances that the SEC staff provided and subsequently extended on an annual basis.

In general, Section 17(f) of the 1940 Act requires a fund to maintain custody of its assets only with certain types of entities (usually, banks). Rule 17f-6 permits a fund to maintain assets with an FCM when necessary to effect transactions in exchange-traded futures contracts and option contracts on futures, provided various conditions of the rule are satisfied, including the requirement that the FCM maintains fund assets pursuant to a written contract. By its terms, Rule 17f-6 does not provide relief for other types of derivatives, such as swaps.

In the Letters, the SEC staff noted that the CFTC has adopted rules and regulations that implement a framework for central clearing of swaps, including rules that enhance customer collateral protections pursuant to requirements in the Commodity Exchange Act (the "CEA") that were added or amended by the Dodd-Frank Wall Street and Consumer Protection Act. Therefore, the staff concluded that it was now appropriate to extend its prior temporary no-action assurances permanently. The staff relied on the DCOs' representations that each of the requirements of Rule 17f-6 would be addressed. Specifically, each DCO represented that each fund's assets would be governed by a written contract between the fund and each FCM that (i) prohibits commingling fund customer assets with DCO/FCM assets and requires compliance with CFTC swap collateral segregation rules, (ii) for each fund transaction, requires the FCM to place and maintain the fund's assets with the relevant DCO only in accordance with the CEA and the CFTC's rules thereunder, (iii) upon the SEC's request, requires each FCM to provide records concerning a fund's assets to the SEC, (iv) specifies that any transaction gains by a fund, other than *de minimis* amounts, can be maintained with the DCO only until the next business day following the receipt of the gains and (v) provides that a

fund may withdraw assets as soon as reasonably practicable if the custodial requirements of 17f-6, if applicable, are no longer satisfied.

REGULATORY PRIORITIES CORNER

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

Cryptocurrency Developments

The increasing interest in cryptocurrencies and cryptocurrency-related products continues to be a focus of regulatory attention, including the following developments.

1. **SEC Staff Letter: Engaging on Fund Innovation and Cryptocurrency-Related Holdings**

   On January 18, 2018, the staff of the SEC's Division of Investment Management published a letter (the "Letter") from Dalia Blass, Director of the Division of Investment Management, to the Investment Company Institute and the Securities Industry and Financial Markets Association in which Ms. Blass stated that the staff is ready to engage in a dialogue with sponsors regarding the development of registered funds that would hold cryptocurrencies and cryptocurrency-related products. The remainder of the Letter was devoted to describing the significant investor protection questions that the staff believes need to be examined before these funds could be offered to retail investors. The questions raised by the staff in the Letter, on which the staff solicited comments, are summarized below.

   - **Valuation.** The Letter asked whether funds have sufficient information to value cryptocurrencies or cryptocurrency-related products, especially in view of their volatility and the general lack of regulation of underlying cryptocurrency markets. In this vein, the Letter asked how funds would develop and implement procedures to value, and fair value, cryptocurrency-related products. Drilling deeper, the Letter asked how funds would address significant events related to a cryptocurrency, including a "fork," which could potentially lead to two prices for one cryptocurrency.

   - **Liquidity.** The Letter asked how funds would classify the liquidity of cryptocurrencies for purposes of the Liquidity Rule and, if classified as other than illiquid, what the rationale would be for that classification. In particular, the Letter questioned funds' ability to incorporate the trading history, price volatility and trading volume of cryptocurrency futures contracts, as well as such funds' need to include in their analyses sizable daily redemptions in view of the possibility of dramatic market declines.

   - **Custody.** In view of the fact that some funds plan to hold cryptocurrencies directly, the Letter asked how these funds would satisfy 1940 Act custody requirements, and how these funds would validate existence, exclusive ownership and software functionality of private cryptocurrency keys and other ownership records. On the last point, the Letter raised the question of whether cybersecurity threats impact the safekeeping of fund assets under the 1940 Act.

   - **Arbitrage (ETFs).** The Letter noted that ETFs are required to have a market price that would not deviate materially from the ETF's NAV. The Letter questioned how ETFs that invest in crytpocurrency could satisfy this requirement in light of the fragmentation, volatility and trading volume of the cryptocurrency markets. The Letter asked whether funds have engaged with potential authorized participants to understand how arbitrage would function for ETFs investing substantially in cryptocurrency and cryptocurrency-related products.

   - **Manipulation and Other Risks.** In SEC orders denying exchange proposals to list the shares of exchange-traded products that would hold cryptocurrency, concerns relating to the risk of fraud and

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manipulation in cryptocurrency markets have figured prominently. SEC Chairman Jay Clayton has noted publicly his concerns that cryptocurrency markets currently feature substantially less investor protection than traditional securities markets. Accordingly, the Letter asked how fraud and manipulation concerns have affected the responses to questions raised by the staff in the Letter, as well as how these concerns have affected sponsors' analysis of whether offering a fund would be appropriate for retail investors.

- **Filings to Invest in Cryptocurrency and Cryptocurrency-Related Instruments.** Lastly, the Letter stated that, until the questions identified in the Letter were addressed, it would not be appropriate for fund sponsors "to initiate registration of funds that intend to invest substantially in cryptocurrency and related products, and [the staff has] asked sponsors that have registration statements filed for such products to withdraw them." Moreover, the Letter stated that such funds should not rely on Rule 485(a) under the Securities Act, stating that, if a sponsor "were to file a post-effective amendment under rule 485(a) to register a fund that invests substantially in cryptocurrency or related products, [the staff] would view that action unfavorably and would consider actions necessary or appropriate to protect Main Street investors, including recommending a stop order to the Commission."

2. **SEC and CFTC Chairs Release Joint Statement Supporting Reexamination of U.S. Cryptocurrency Regulatory Framework**

SEC Chairman Jay Clayton and CFTC Chairman J. Christopher Giancarlo took the unusual step of publishing a joint statement that contained excerpts from their op-ed article published in *The Wall Street Journal* on January 5, 2018 titled "Regulators are Looking at Cryptocurrency." The article noted that the collective market capitalization of cryptocurrencies topped $700 billion in January. In response to the growth in cryptocurrency investments, the "key issue before market regulators is whether our historic approach to the regulation of currency transactions is appropriate for the cryptocurrency markets." The article noted that many of the internet-based cryptocurrency trading platforms have registered as payment services and that check-cashing and money-transmission services in the U.S. are primarily state regulated. As such, these products are not subject to direct oversight by the SEC or the CFTC. Messrs. Clayton and Giancarlo expressed their support for legislative efforts to revisit those frameworks, highlighting their concerns over whether the current U.S. regulatory structure is effective and efficient in the digital era.

3. **SEC Chairman Delivers Stern Message to Gatekeepers Regarding ICOs**

In his opening remarks at a meeting of the Securities Regulation Institute on January 22, 2018, SEC Chairman Jay Clayton took the opportunity to deliver a "simple but stern" message to market gatekeepers, such as securities lawyers, accountants, underwriters and dealers, calling on them to do a better job at carrying out their duties to act responsibly. As an example of conduct that he characterized as demonstrating a lack of proper legal advice, Mr. Clayton cited a scenario in which the lawyers involved in a new cryptocurrency product assisted promoters in structuring an offering that was called an "ICO," presumably to raise the implication that it is similar to an IPO, while at the same time taking the position that the products are not securities. He also pointed to ICOs in which the lawyers appear to have avoided taking a position on key issues, including whether the "coin" is a security and whether the offering qualifies for an exemption from registration, and have instead provided "it depends" equivocal advice. He noted that the clients of these lawyers have then proceeded with the ICO without complying with the securities laws because those clients are willing to take the risks left open by the ambiguity of the advice provided by legal counsel. In a fairly direct warning to legal professionals, Mr. Clayton informed the audience that he has "instructed the SEC staff to be on high alert for approaches to ICOs that may be contrary to the spirit of our securities laws and the professional obligations of the U.S. securities bar."

Guidance on Applicability of Accounting Bulletin No. 118 for Funds Affected by the Tax Cuts and Jobs Act

Staff Accounting Bulletin No. 118 (“SAB 118”) was issued by the SEC staff on December 22, 2017 to provide guidance for publicly traded companies, auditors, and others to help ensure timely disclosure of the accounting impacts of the newly enacted Tax Cuts and Jobs Act (the “Act”). In particular, in SAB 118, the SEC staff recognized that registrants may encounter situations for which the accounting for some income tax effects of the Act would be incomplete by the time that financial statements were issued for a reporting period that includes December 22, 2017 (*i.e.*, the date the Act was enacted).

In December 2017, the staff of the SEC’s Division of Investment Management published an Information Update (the “Update”) regarding whether investment companies may rely on guidance within SAB 118 in calculating their daily NAVs. In the Update, the staff confirmed that registrants could rely on SAB 118 in calculating NAVs and for financial reporting purposes. In addition, the Update reminded registrants to disclose information about the material impacts of the Act on NAV calculations and material provisions for which the accounting for income tax effects is incomplete. SAB 118 is discussed in greater depth in this Ropes & Gray Alert.

IOSCO Issues Statement Regarding the Use of Financial Benchmarks

The International Organization of Securities Commissions (“IOSCO”) recently published a statement (the “Statement”) directed at users of financial benchmarks that set out matters to be considered in selecting an appropriate benchmark and for contingency planning when a selected benchmark becomes unavailable. The Statement noted that the Financial Stability Board (the “FSB”) has undertaken efforts to strengthen existing benchmarks for key interbank offered rates in the unsecured lending markets and to promote the development and adoption of alternative nearly risk-free reference rates where appropriate. In particular, IOSCO and the FSB have recognized that certain widely used interbank offered rates (*e.g.*, LIBOR) have continued to experience decreased activity in their underlying reference transactions, giving rise to concerns about their long-term sustainability. These concerns have led the FSB and IOSCO to encourage market participants to increase the “contract robustness” for various financial products by including fallback provisions to apply in case an interbank offered rate is discontinued permanently.

The Statement set forth two categories of issues for benchmark users to consider. The first category contained issues concerning how well a particular benchmark meets user and client needs or hedging strategies. It suggested relevant considerations, including the following:

- the way in which the benchmark is determined, including the size, liquidity and potential evolution of the market being measured by the benchmark, as well as the transparency of the benchmark’s methodology;
- whether the benchmark provides an accurate and reliable representation of the market it seeks to measure, and is likely to remain so, and how factors that might result in a distortion of the price, rate, index or value of the benchmark are eliminated or reduced;
- the process by which changes to the benchmark’s methodology can be made (*e.g.*, relevant consultation procedures);
- the provisions that could apply if there are material changes to the benchmark and how the provisions would operate in practice; and
- whether, and under what circumstances, provisions relating to cessation of the benchmark should apply.

The Statement's second category of issues for benchmark users to consider involved contingency planning in case a benchmark is no longer available. The Statement encouraged benchmark users to develop fallback provisions whose operations are well understood. The Statement noted that the fallback provisions would have to be robust enough to avoid serious disruption to markets and market participants to assure the continuity of contracts. The Statement suggested various factors that should be considered in determining the suitability of a fallback rate or figure, including the following:

- how credible the alternative rate or figure would be, taking into account how closely the alternative matches the original benchmark's characteristics;
- whether and how the original benchmark and the alternative rate or figure could be maintained in parallel to effect an orderly transition to a new benchmark; and
- when the rate or figure would start to operate, which would require considering the term of affected contracts and the adequacy of notice involved.

SEC Invites Regulated Entities to Voluntarily Submit Self-Assessments of Diversity Policies and Practices

On January 25, 2018, the SEC Office of Minority and Women Inclusion ("OMWI") issued a press release announcing the publication of its Diversity Assessment Report for Entities Regulated by the SEC (the "Report"), as well as the availability of a related set of Frequently Asked Questions. The Report complements the Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, issued by the SEC and five other federal financial regulatory agencies in 2015. The Report is intended to assist SEC-regulated entities, including registered investment advisers and broker-dealers, to conduct voluntary self-assessments of their diversity practices, and the Report provides a form to submit information from self-assessments to OMWI.

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 Proposes Interpretation to Address Cryptocurrency Delivery Questions

February 8, 2018

On December 15, 2017, the CFTC issued its proposed interpretation of the term "actual delivery" in the context of virtual currency retail commodity transactions. Comments to the proposed interpretation are due to the CFTC by March 20, 2018.

CFTC Reasserts Its Role in Virtual Currency Regulation with Enforcement Actions and Joint Statement with SEC

January 31, 2018

On January 19, 2018, the CFTC filed separate enforcement actions against two individuals and their respective companies for fraudulent activity involving virtual currencies. The next day, shortly after announcing the charges publicly, the CFTC released a joint statement with the SEC reiterating their joint commitment to stopping and preventing fraud in the offer and sale of digital instruments. Then, on January 24, the CFTC announced that it had unsealed charges against a virtual currency exchange website and its controlling individuals. Collectively, these actions confirm a regulatory environment of increased oversight of this emerging asset class.

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New Partnership Audit Regulations Released as Permitting Push-Out Election Through Tiered Partnerships

January 17, 2018

In a trilogy of releases in the last six weeks, the U.S. Treasury provided much-needed guidance on the implementation of the partnership audit rules in the Bipartisan Budget Act of 2015 (the "BBA Rules"). On the eve of the BBA Rules coming into effect (for tax years beginning after December 31, 2017), Treasury has clarified that tiered partnerships generally will be permitted to push adjustments through to indirect partners under the new Internal Revenue Code Section 6226, a welcome clarification that had been broadly requested by practitioners and taxpayers.

What Asset Managers Can Expect from the SEC in 2018

January 1, 2018

It has been more than a year since Donald Trump's election. His nominee to lead the SEC, Jay Clayton, was confirmed by a vote of 61-37 in the full Senate, with several moderate Democrats joining Republicans in favor of his chairmanship. Clayton was sworn in as the 32nd chairman of the SEC on May 4, 2017, and has now been on the job for the better part of a year. This Alert lists 10 issues to watch during the coming year at the SEC.

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