April 12, 2019

Ropes & Gray's Investment Management Update – February – March 2019

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

No-Action Letter Enhances Flexibility with Respect to In-Person Board Voting

In a February 28, 2019 no-action letter to the Independent Directors Council, the SEC staff agreed that it would not recommend enforcement action against fund boards that, in some instances, do not adhere to certain in-person voting requirements under the 1940 Act or the rules thereunder. Currently, an in-person board meeting is required by (i) Section 15(c) for the initial approval and annual renewal of an investment management agreement and an agreement with a fund's principal underwriter, (ii) Rule 12b-1 under the 1940 Act for the initial approval or annual renewal of a Rule 12b-1 plan, (iii) Section 32(a) for the selection of a fund's auditor and (iv) Rule 15a-4(b)(2) for the approval of an interim investment management agreement following the termination of an existing investment management agreement in certain circumstances (each a "Required Approval").

The no-action letter provides that, in two types of situations, instead of seeking a Required Approval at an in-person meeting, a board can effect a Required Approval telephonically, by video conference or by other means by which all participating directors may participate and communicate with each other simultaneously during the meeting. The two types of situations are:

1. The directors necessary for the Required Approval are unable to meet in person due to unforeseen or emergency circumstances, provided that (i) no material changes to the relevant contract, plan and/or arrangement are proposed to be approved, or approved, at the meeting and (ii) the directors ratify the Required Approval at the next in-person board meeting ("Situation 1").

2. The directors necessary for the Required Approval previously fully discussed and considered all material aspects of the proposed matter at an in-person meeting, but did not vote on the matter at that time, provided that no trustee requests another in-person meeting ("Situation 2").

The SEC staff's no-action position is available only with respect to the following Required Approvals, occurring in the specified situations:

1. Renewal (or approval or renewal in the case of Situation 2) of an investment management agreement or principal underwriting agreement pursuant to Section 15(c) of the 1940 Act.

2. Renewal (or approval or renewal in the case of Situation 2) of a fund's 12b-1 plan.

3. Selection of a fund's independent public accountant pursuant to Section 32(a) of the 1940 Act (in the case of Situation 1, such accountant must be the same accountant as selected in the immediately preceding fiscal year).

4. Approval of an interim investment management agreement pursuant to Rule 15a-4(b)(2) following the termination of an existing investment management agreement (in the case of Situation 2, only).

Note that the ratification requirement in Situation 1 means that the in-person requirement for a Required Approval is deferred, but not eliminated.

The no-action letter is another tangible outcome of the Division of Investment Management's "Board Outreach Initiative," announced in December 2017. Previously, the SEC staff issued a no-action letter to the Independent Directors Council permitting a fund's board to rely on quarterly written representations from the chief compliance officer that fund transactions effected pursuant to Rules 10f-3, 17a-7 and 17e-1 complied with written procedures adopted by the board, instead of the board itself making that determination.

SEC Changes Timing of Form N-PORT Filings

In a February 27, 2019 interim rule release, the SEC adopted an interim rule that changes the timing and frequency of filings of Form N-PORT reports. In the release, the SEC cited concerns about potential cybersecurity risks arising from its proposed monthly collection and maintenance of sensitive non-public data regarding fund holdings on Form N-PORT. Based on these concerns, the SEC amended Rule 30b1-9 and Form N-PORT to require funds to file Form N-PORT reports for each of the three months in a fund's fiscal quarter no later than 60 days after the end of that quarter. Prior to these amendments, funds would have been required to file their first Form N-PORT report by April 30, 2019, containing March 31 data, with subsequent monthly Form N-PORT reports, each due no later than 30 days after a month end.

Pursuant to amended Rule 30b1-9, a fund's reports on Form N-PORT for the first two months of each quarter will remain non-public, and the Form N-PORT report for the last month of each quarter will become publicly available immediately upon filing. In the release, the SEC stated that, by delaying the filing deadline for each fund's non-public first and second month Form N-PORT reports for each fiscal quarter to coincide with the fund's quarter-end report, the sensitivity of the non-public data filed with the SEC will be significantly reduced.

The SEC also recognized that requiring a full quarter's data could present compliance difficulties for some funds (*e.g.*, those with fiscal quarters ending in March or April 2019) and, therefore, provided for a phase-in of quarterly filings of Form N-PORT reports, as shown in this table:[1]

Fund Fiscal Quarter End	First Report on Form N-PORT must be filed on EDGAR by:	Required Monthly Data
March 31, 2019	May 30, 2019	March 2019
April 30, 2019	July 1, 2019	March, April 2019
May 31, 2019	July 30, 2019	March, April, May 2019

Excessive Fee Claims Rejected After Bench Trial

Following a bench trial, on February 8, 2019, a federal district court held that the plaintiffs in *In re BlackRock Mutual Funds Advisory Fee Litigation* had failed to establish their claims under Section 36(b) of the 1940 Act. *BlackRock* falls within a group of excessive fee cases in which the plaintiffs have alleged, among other things, that advisers are charging their proprietary funds higher advisory fees than they charge when serving as subadvisers managing external funds with a similar strategy. To date, only two of these cases pursuing the so-called "subadviser" theory have been dismissed before trial. *BlackRock* is the first case from this group of cases to have resulted in a decision following trial.

[1] The dates in this table apply to a fund that, together with other investment companies in the same group of related investment companies, have net assets of $1 billion or more as of the end of the most recent fiscal year of the fund.

Background. In June 2018, Judge Freda Wolfson of the U.S. District Court for the District of New Jersey denied the BlackRock defendants' motion for summary judgment with respect to plaintiffs' excessive fees under Section 36(b) regarding two BlackRock proprietary funds (the "Funds") advised by BlackRock Advisors LLC ("BRA"). The subadvised funds at issue were subadvised by Blackrock Investment Management LLC ("BRIM"). The plaintiffs primarily argued that the Funds relied on third-party service providers, not the adviser, for substantial work, that BlackRock's internal processes and systems supported *all* of its products without distinguishing between whether the work was for sponsored or subadvised funds and that BlackRock provided substantially all of the same services to the Funds as the subadvised funds.

In the June 2018 decision, Judge Wolfson granted BlackRock's motion for summary judgment with respect to board process, finding that the board process was robust, and that BlackRock had not misled the board or provided it with false or incomplete information. She otherwise denied the motion for summary judgment, explicitly mentioning three *Gartenberg* factors that were suitable for trial: (i) comparability between services offered by BlackRock as sponsoring adviser and as subadviser, (ii) economies of scale and (iii) profitability. The June 2018 decision was summarized in this Ropes & Gray Update.

The Decision. Following an eight-day trial in August 2018, Judge Wolfson filed a 72-page bench memorandum on February 8, 2019, holding that the plaintiffs failed to prove by a preponderance of the evidence that the fees charged by BRA were so disproportionate that they could not have been negotiated at arm's length.

A. Comparative Fee Structure

Judge Wolfson held that the advisory services offered by BRA and the subadvisory services offered by BRIM were not comparable. Specifically, the court stated that the trial evidence "demonstrated that the services that BRA offers the funds are *significantly more extensive and varied than what is described in the IMAs*, and, thus, a comparison between the fees charged by the Funds and the Subadvised Funds is inapt." Judge Wolfson noted that subadvised accounts are more akin to institutional accounts than mutual funds because BRIM manages the portfolio and provides only limited additional services to the primary advisers upon request. She also found that the trial record reflected specific differences in services related to compliance, board administration, regulatory and financial reporting, determination and publication of the daily NAV and overseeing service providers, providing tax services, determining dividends and distributions, and expense budgeting.

In particular, the court stated that the minimal compliance services that BRIM provided to the subadvised funds "pale in comparison to the comprehensive compliance program that BRA provide[d] for the Funds." With respect to board administration and reporting, the trial evidence demonstrated that BRA's extensive obligations to the Funds' board did not compare to the limited suite of services provided by BRIM, such as completing 15(c) questionnaires and periodic reporting. Similarly, BRIM provided only limited assistance to the primary advisers of the subadvised funds with respect to regulatory filings. For the Funds, BRA retained ultimate responsibility for the filings and overseeing their preparation. In addition, the court found that the trial testimony demonstrated that the risks faced by BRA as primary adviser and the BlackRock organization were "all-encompassing," concerning every aspect of the Funds' business and operations. BRIM, on the other hand, did not face similar risks in its role as subadviser. This indicated that the fees charged to the Funds and subadvised funds were not comparable.

B. Economies of Scale

The court held that the plaintiffs failed to meet their burden to show that BRA had experienced economies of scale. Judge Wolfson based her ruling on a finding that plaintiffs' expert failed to conduct a per-unit transaction cost analysis, which she held is a prerequisite to prove the existence of economies of scale, and improperly assumed that changes in BRA's allocated costs were the result of economies of scale. Because the plaintiffs failed to conduct a per-unit transaction cost analysis and, instead, offered an expert analysis that was based solely on the disproportionality between the growth in the Funds' AUM and the increase in operational costs, the plaintiffs did not meet their burden.

C. Profitability

Judge Wolfson found that the *Gartenberg* profitability factor favored BlackRock. In light of the trial evidence that "revealed vast differences in the services" provided by BRA and BRIM, Judge Wolfson held that the plaintiffs could not sustain their argument that BRA's profits were unjustified in light of similarity in services. Judge Wolfson also reasoned that there was no basis to distinguish her decision from other cases in which courts found similar or greater profit margins *not* to be indicative of excessive fees.

SEC Adopts Amendments to Modernize and Simplify Reporting

In a March 20, 2019 release, the SEC adopted amendments to modernize and simplify disclosure requirements in Regulation S-K, and related rules and forms, that apply to operating companies. To provide for a consistent set of rules that govern incorporation by reference and hyperlinking, the release contains parallel amendments to rules and forms that apply to investment companies, including amendments that require certain investment company filings to be submitted in HyperText Markup Language ("HTML") format. The principal amendments and their respective effective dates are summarized below.

Incorporation by Reference and HTML. Investment companies will no longer be required to file as an exhibit any document (or part thereof) that is incorporated by reference in a filing. Instead, investment companies will be required to file reports on Form N-CSR and registration statements and amendments thereto in HTML format and provide hyperlinks to exhibits and other information incorporated by reference if that information is available on EDGAR.

- ***Defective Hyperlinks.*** If a registration statement is not yet effective, the filer will be required to file an amendment to the registration statement correcting any inaccurate or nonfunctioning link or hyperlink. With respect to a registration statement that has become effective, the filer must correct an inaccurate or nonfunctioning link or hyperlink in the next post-effective amendment, if any, to the registration statement. Finally, with respect to a report on Form N-CSR, the filer will be required to correct any inaccurate or nonfunctioning link or hyperlink in its next report on Form N-CSR.

- ***Compliance Date.*** The SEC provided a transition period to give investment companies sufficient time to prepare filings that include hyperlinks to exhibits and to information incorporated by reference. All registration statement and Form N-CSR filings made on or after April 1, 2020 must be made in HTML format and comply with the rule and form amendments pertaining to the use of hyperlinks.

Redaction of Confidential Information. Investment companies may redact provisions or terms from exhibits filed as "other material contracts," without filing a confidential treatment request, provided the information is not material, and would likely cause competitive harm to the registrant if publicly disclosed. This change, as reflected in the revised investment company registration forms, became effective April 2, 2019, the date the amendments were published in the Federal Register.

Omission of Schedules and Attachments. Investment companies will be permitted to omit entire schedules and similar attachments to their required exhibits in registration statements and Form N-CSR, provided the schedules and attachments do not contain material information and were not otherwise disclosed in the exhibit or the disclosure document. Each exhibit that includes omitted schedules or other attachments in reliance on these new provisions must contain a list briefly identifying the contents of each such schedule or attachment. However, a separate list will not be required if that information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules and attachments. This change is effective for filings made on or after May 2, 2019.

REGULATORY PRIORITIES CORNER

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

FINRA Approves Use of Hypothetical Index Performance

In a January 31, 2019 interpretive letter (the "Letter"), the FINRA staff agreed that member firms may include hypothetical pre-inception index performance ("PIP") data in mutual fund marketing materials directed at institutional investors[2] ("institutional communications") without violating the content standards of FINRA Rule 2210(d). The Letter expands upon a 2013 FINRA interpretive letter permitting the use of PIP data in institutional communications regarding exchange-traded products, including ETFs.

The applicant underlying the Letter represented to FINRA that (i) the index in question serves as the benchmark index for the mutual fund, (ii) the fund had been in existence for more than one year, (iii) under normal circumstances, the fund invests at least 80% of the value of its net assets in investments providing exposure to the index's constituents and (iv) since the fund's launch, its performance had closely tracked the index.

The Letter's principal conditions for a fund to use PIP data in institutional communications are as follows:

- Marketing material that includes PIP data must be clearly labeled "For use with institutions only, not for use with retail investors." If the recipient is a financial intermediary, the recipient must be instructed not to circulate communications containing PIP data to retail investors.
- Marketing material containing PIP data must include an offer to provide an overview of the methodology of the index upon request, and electronic marketing material must include a hyperlink to such information.
- The presentation of PIP data must reflect the deduction of fees and charges currently applicable to the fund.
- PIP data must reflect a period of time that includes multiple securities market environments, and at a minimum, ten years of pre-inception data.
- PIP data must be current as of the most recently ended calendar quarter.
- PIP data must be clearly labeled and shown separately from the fund's performance, and must be presented along with disclosure of the applicable dates for the PIP data and the dates for actual performance since the fund's inception.
- If the fund has been in existence for more than one year, the use of PIP data must be accompanied by the prominent presentation of actual performance of the fund since inception, reflecting the deduction of fees and charges of the fund.
- PIP data must be accompanied by the following disclosures:

[2] "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).

- The fund is a relatively new product and any performance prior to the date of inception is hypothetical.
- The facts that (i) PIP data are based on criteria that has been applied retroactively with the benefit of hindsight and (ii) these criteria cannot account for all financial risk that may affect the actual performance of the fund.
- The actual performance of the fund may vary significantly from the PIP data.
- Reasons (if any) the PIP data would have differed from actual performance during the period shown (*e.g.*, transaction costs, liquidity, or other market factors).

The Letter is important because mutual fund marketers now may use PIP data when marketing mutual funds to institutional investors, including financial intermediaries, who may recommend these funds to their customers. This is particularly important in cases where an investment adviser has been employing an investment strategy based on a pre-inception index that will be used for a new fund that has a limited performance history.

The Letter underscores that FINRA's approach with respect to PIP data continues to be inconsistent with the approach countenanced by the SEC. The SEC's approach is that PIP data may be presented in a mutual fund's prospectus. In contrast, the Letter states that FINRA's "longstanding position" – that the presentation of hypothetical back-tested performance in communications used with retail investors does not comply with FINRA Rule 2210(d) – is unaffected by the Letter.

Court Enjoins Initial Coin Offering

On February 14, 2019, the U.S. District Court for the Southern District of California issued an order granting the SEC's motion for a preliminary injunction against defendants Blockvest LLC and its founder (together, "Blockvest"), enjoining Blockvest from offering and selling unregistered securities in the form of digital tokens in an initial coin offering ("ICO").

Blockvest argued that the digital tokens sold were not securities because it lacked any intent to realize a financial gain from the transaction and, instead, that Blockvest was motivated exclusively to raise funds for charitable purposes. The court rejected this argument and agreed with the SEC that the test set forth in *SEC v. W.J. Howey Co.* is an objective inquiry into the character of the instrument offered, based on what the purchasers were led to expect. Applying each prong of the *Howey* test, the court determined that the SEC has demonstrated that the ICO constituted an offer of securities under the Securities Act. Based on additional evidence that Blockvest was likely to violate the securities law in the future, the court granted the SEC's motion and enjoined Blockvest from pursuing the ICO until a trial is held.

SEC Issues Risk Alert on Activities of Transfer Agents as Paying Agents

On February 13, 2019, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a Risk Alert highlighting risks and issues related to the "paying agent" activities of transfer agents. A transfer agent acts a paying agent when it accepts payments from a securities issuer and distributes the payments to securityholders. As noted in the Risk Alert, paying agent activities vary, but commonly include:

- Processing and disbursing principal, interest, and dividend payments to bondholders or shareholders based on an issuer's payment schedule.
- Administering direct stock purchase and dividend reinvestment plans.
- Handling escheatment and lost shareholder search and report filing.

- Managing interest-bearing accounts or demand deposit accounts in the name of mutual funds for activities such as inflows and outflows from fund orders.

- Making distributions for mutual funds.

The Risk Alert was based upon OCIE's examinations, conducted over a three-year period, of transfer agents that also served as paying agents ("TAs"). The Risk Alert contains the OCIE staff's observations from those examinations and, generally, focuses on two areas of concern: (i) TAs' safeguarding of funds and securities as required by Exchange Act Rule 17Ad-12 (the "Safeguarding Rule") and (ii) TAs' maintaining an issuer's master securityholder files, searching for lost securityholders and sending notices to unresponsive payees, as required by Exchange Act Rule 17Ad-17 (the "Lost Securityholder/Unresponsive Payee Rule").

Safeguarding Rule. The Risk Alert provides examples of Safeguarding Rule deficiencies and weaknesses that OCIE staff observed, including TAs (i) misappropriating shareholder funds and physical certificates, (ii) with inadequate policies, procedures and controls for issuing and handling checks, distributing dividends and escheatment and (iii) with inadequate account reconciliation controls and procedures regarding comingling of shareholder funds with TA operating funds or with other shareholders' funds.

Lost Securityholder/Unresponsive Payee Rule. The Risk Alert also provides examples of Lost Securityholder/Unresponsive Payee Rule deficiencies and weaknesses that OCIE staff observed, including TAs' (i) failures to comply with database search requirements to identify lost securityholders using public resources, (ii) failures to identify securityholders as lost and record this lost status in required records and (iii) failures to send written notifications to unresponsive payees and failures to send these notifications in a timely manner.

The Risk Alert also stated that several TAs appeared to have implemented robust written policies, procedures and controls related to the processing of funds, handling of physical certificates, lost securityholder searches and unresponsive payee notifications, and included examples of these TAs' practices for all TAs to consider implementing.

FINRA 2019 Exam Initiatives and Priorities

On January 22, 2019, FINRA published its 2019 Risk Monitoring and Examination Priorities Letter (the "FINRA Letter"), which discusses new priorities and, in areas of continuing concern, aspects of those areas that FINRA has not articulated in prior letters. The FINRA Letter includes the following topics.

Suitability. As the number of exchange-traded products ("ETPs") continues to grow, including novel and increasingly complex ETPs, FINRA will evaluate whether member firms are meeting their suitability and risk disclosure obligations when recommending ETPs. This includes leveraged and inverse ETFs, floating-rate loan ETFs (also known as bank-loan or leveraged loan funds), as well as mutual funds that invest in corporate high-yield debt.

Supervision of Digital Assets Business. FINRA will review member firms' activities with respect to digital assets. This includes FINRA working closely with the SEC to assess how member firms determine whether a particular digital asset is a security, as well as assessing whether firms have adequate controls and supervision over compliance with rules related to the marketing, execution, control, recordkeeping and valuation of digital assets.

Customer Due Diligence and Suspicious Activity Reviews. FINRA will review member firms' compliance with the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") Customer Due Diligence ("CDD") rule, which became effective in May 2018. The CDD rule requires member firms (i) to identify and verify the identity of beneficial owners of customer accounts that are owned by legal entities and (ii) to understand the nature of customer accounts and conduct ongoing monitoring to identify and report suspicious transactions.

Market Manipulation. FINRA will focus on manipulative trading in correlated ETPs, including those that track common, broad market indices, to better identify exploitation of the characteristics of ETPs, such as the creation and redemption process and composition changes to the ETP portfolios.

OTHER DEVELOPMENTS

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

Technology Service Provider Contracts with Banks
April 5, 2019
Mindful of the growing reliance by financial institutions on technology service providers, the Federal Deposit Insurance Corporation (FDIC) issued a Financial Institution Letter this week identifying gaps, particularly involving business continuity and incident response risks, that some examiners had noted in their review of contracts between banks and technology services vendors. These gaps may require banks to take additional steps to mitigate the risks that arise from them. The FDIC took the opportunity to reiterate regulatory requirements for these contracts, noting that banks remain ultimately responsible when contracts do not adequately address certain risks. Cybersecurity threats remain at or near the top of risks of concern to federal banking regulators.

2019 Mutual Funds and Investment Management Conference
April 4, 2019
This is Ropes & Gray’s memorandum summarizing the 2019 Mutual Funds and Investment Management Conference sponsored by the Investment Company Institute and the Federal Bar Association. The Conference included sessions that discussed the following industry and regulatory developments, among others:

- Keynote Remarks by SEC Director Dalia Blass & Commissioner Elad Roisman.
- Near-term initiatives of the SEC that include investor protections and reexamining proxy voting requirements.
- The SEC’s current examination and enforcement focus areas.
- Cybersecurity.
- Liquidity risk management.
- A review of developments in mutual fund civil litigation.
- New operational and investment challenges affected by EU regulations.

SEC Scrutinizes Sale of Mortgage Interests Among Affiliated Funds
April 2, 2019
The sale of mortgage assets between investment vehicles managed by the same adviser has come under scrutiny by the SEC. In a recently settled case, the SEC alleged that an investment adviser arranged the sale of mortgage interests from one client (a CDO) to another (a private fund), but failed to run an adequate auction process for the loans.

The case is notable because it resembles other actions brought against advisers to enforce rules preventing cross trades. Such cases, however, have typically involved the purchase and sale of securities among affiliated client funds that are subject to specific cross trading rules, like registered investment companies such as mutual funds and funds holding ERISA assets. This case involved the purchase and sale of loan participations that occurred between private investment vehicles

[CFTC Adopts Swaps Proficiency Exam Requirement for Associated Persons of Asset Managers]
March 27, 2019
On March 25, 2019, the National Futures Association adopted rule amendments and a related interpretive notice that will, for the first time, impose a swaps proficiency exam requirement on Associated Persons ("APs") of registered Commodity Pool Operators ("CPOs") and Commodity Trading Advisors ("CTAs") that trade CFTC-regulated swaps. These swaps cover a broad range of instruments, including certain forward and option transactions. APs will be able to take the exam beginning in January 2020, and must pass the exam by January 31, 2021. Registered CPOs and CTAs that trade swaps should use the substantial lead time to develop a program to ensure all APs pass the proficiency exam before January 31, 2021.

Treasury Issues Final Regulations Reversing Proposed Rules on Mutual Funds' Investments in Non-U.S. Corporations
March 21, 2019
On March 18, 2019, the Treasury Department and IRS issued final regulations (the "Final Regulations"), which treat certain income imputed to a regulated investment company ("RIC") from its investment in a controlled foreign corporation or a passive foreign investment company as "good income" for RIC qualification purposes. Under the Final Regulations, a RIC may treat such imputations as "good income," even if the controlled foreign corporation or passive foreign investment company, as applicable, does not make a contemporaneous distribution that is attributable to the imputed income.

Private Fund Regulatory Update: Post-U.S. Government Shutdown
March 19, 2019
This Ropes & Gray podcast series highlighted developments in Washington, D.C., affecting private funds and their legal, regulatory and compliance obligations. In this second installment, asset management partner Joel Wattenbarger and counsel David Tittsworth picked up on their conversation from January 2019, when the U.S. government was in partial shutdown, to discuss the aftermath of the shutdown and other legislative updates from Capitol Hill, as well as recent developments at the SEC, the Commodity Futures Trading Commission and the Financial Stability Oversight Council. Topics include Regulation Best Interest and related SEC initiatives; legislative updates related to capital formation, data collection and FinTech; recent developments related to the CFTC; and FSOC's proposed changes to how non-bank financial institutions are designated.

Investment Firms Post-Brexit: EU Provisionally Agrees to Regulatory Supervision Framework
March 13, 2019
EU policy makers recently reached a provisional agreement on a package of measures, which may tighten UK financial services firms' access to EU clients when Britain leaves the EU, setting out legislative proposals for new prudential requirements for investment firms.

SEC Proposes to Expand "Test-the-Waters" Modernization Reform to All Issuers
February 26, 2019
On February 19, 2019, the SEC proposed new Rule 163B under the Securities Act that would permit all issuers to engage in "test-the-waters" communications with qualified institutional buyers and institutional accredited investors about a contemplated registered securities offering. These communications could take place prior to, or following, the filing of a registration statement relating to the offering. The proposed rule tracks the language of Section 5(d) of the Securities Act, which was adopted in 2012 as part of the JOBS Act and which permitted "emerging growth companies" to use test-the-waters communications.

Credit Funds: Withholding Tax on European Investments
February 25, 2019
In this podcast, tax partners Brenda Coleman and Andy Howard discussed strategies for credit fund managers to address interest withholding tax issues on European investments in light of a complex and changing landscape. With new rules

being introduced in line with the OECD’s BEPS (Base Erosion and Profit Shifting) Project and with treaty shopping being re-examined under BEPS, credit fund managers may be uncertain about how they should deal with withholding taxes on European investments. This podcast provided an overview of the current tax rules, the changing landscape and the actions credit fund managers may consider taking.

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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