June 11, 2020

Ropes & Gray's Investment Management Update April–May 2020

COVID-19-Related Alerts

Since our last IM Update, we have monitored the large number of COVID-19-related regulatory and legal developments affecting the mutual fund/investment management industry, many of which we covered in separate client Alerts and podcasts. The last section of this IM Update contains a short summary of, and a hyperlink to the full text of (or transcript of), each of these Alerts and podcasts.

The Ropes & Gray Coronavirus Resource Center also maintains these Alerts and podcasts, as well as additional materials regarding a range of COVID-19-related issues.

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

SEC Updates Guidance on Conduct of Shareholder Meetings

On April 7, 2020, the SEC staff published additional guidance regarding the conduct of shareholder meetings in light of COVID-19 concerns (the "Updated Guidance"), which supplements guidance published by the SEC on March 13, 2020 (described in a Ropes & Gray Alert). The following is a summary of the Updated Guidance.

Changing the Date, Time, or Location of an Annual Meeting

The Updated Guidance clarifies that the SEC staff's earlier guidance regarding an issuer that decides to change the date, time or location of its shareholder meeting applies to both annual and special shareholder meetings. The SEC staff will take the position that an issuer that has (i) decided to change the date, time or location of its annual or special shareholder meeting due to difficulties arising from COVID-19 and (ii) already mailed and filed its definitive proxy materials, can notify shareholders of the change without mailing additional soliciting materials or amending its proxy materials, provided that the issuer:

1. Issues a press release announcing the change in the date, time or location;
2. Files the announcement as definitive additional soliciting material on EDGAR; and
3. Takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants (such as any proxy service provider and the appropriate securities exchange, if applicable) of the change.

The Updated Guidance notes that the staff of the Division of Investment Management will take a similar approach regarding changes in the date, time or location of a shareholder meeting held by a registered fund in connection with a business combination or other transaction described in a registration statement on Form N-14. However, instead of the fund filing an announcement of the change as additional definitive soliciting material, the staff expects the announcement to be filed as a prospectus supplement pursuant to Rule 497 under the Securities Act.

Delays in Printing and Mailing of Proxy Materials

The Updated Guidance acknowledges that some issuers may be encountering delays in the printing and physical mailing of their proxy materials for upcoming shareholder meetings due to the impact of COVID-19 on the operations of their proxy service providers or transfer agents. The Updated Guidance states that the SEC staff is aware that, in response to these delays, some issuers would like to furnish proxy materials through the "notice-only" delivery option permitted by Exchange Act Rule 14a-16, but are concerned about their ability to comply with provisions of the rule (*e.g.*, an issuer must send the notice of the electronic availability of the proxy materials at least 40 calendar days before the meeting).

The Updated Guidance provides that, in circumstances where delays are unavoidable due to COVID-19-related difficulties, the SEC staff would not object to an issuer using the notice-only delivery option in a manner that, while not satisfying all elements of the notice and timing requirements of Rule 14a-16, will "provide shareholders with proxy materials sufficiently in advance of the meeting to review these materials and exercise their voting rights under state law in an informed manner." Specifically, this means that issuers relying on the Updated Guidance must announce the change in the delivery method by satisfying the steps described above with respect to the announcement of a change in a meeting date, time or location. In addition, affected issuers and intermediaries also are required to use their best efforts to send paper copies of proxy materials and annual reports to requesting shareholders, even if such deliveries would be delayed.

SEC Staff No-Action Letter Regarding Fund and BDC Participation in TALF 2020

In March 2020, the Federal Reserve announced the creation of its Term Asset-Backed Securities Loan Facility ("TALF 2020") to support the flow of credit to consumers and businesses in response to the impact of COVID-19 on financial markets. TALF 2020 is intended to support the issuance of asset-backed securities ("ABS") backed by student loans, auto loans, credit card loans, loans guaranteed by the Small Business Administration and certain other assets. Under TALF 2020, a special purpose vehicle ("the "SPV") created by the Federal Reserve Bank of New York (the "FRBNY") will lend on a non-recourse basis to holders of certain AAA-rated ABS backed by newly and recently originated consumer and small business loans.

In a May 27, 2020 no-action letter addressed to the Investment Company Institute and the Asset Management Group of the Securities Industry and Financial Markets Association (the "TALF Letter"), the SEC staff affirmed and expanded upon no-action positions taken in two 2009 no-action letters, as those letters relate to registered investment companies' participation in TALF 2020. Subject to conditions described below, the TALF Letter permits registered funds and business development companies ("BDCs") to borrow from the SPV on a non-recourse basis.

Background. In 2008, in response to the financial crisis, the U.S. Treasury and the Federal Reserve announced that they were establishing the Term Asset-Backed Securities Loan Facility ("TALF 2008"). TALF 2008 was created to assist the credit markets' accommodation of the credit needs of consumers and small businesses by facilitating the issuance of ABS and, more generally, improving the market conditions for ABS.

Under TALF 2008, the FRBNY provided non-recourse funding through loans to any "eligible company" that owned "eligible securities," as defined by the FRBNY. Broadly speaking, an "eligible company" included registered funds, and "eligible securities" were U.S. dollar-denominated ABS that had high-quality credit ratings.

TALF 2008 was structured such that borrowers were required to open a customer account with one or more primary dealers that acted as the borrower's agent with the FRBNY and BNY Mellon (the custodian and administrator for TALF 2008). A TALF 2008 requirement – that a primary dealer held a borrower's assets as its agent – did not satisfy the custody requirements of Rule 17f-1 under the 1940 Act (*e.g.*, for two business days before a TALF 2008 loan's closing, a primary dealer would be required to hold unsegregated cash and collateral provided for the loan by a registered fund).

The SEC staff issued two no-action letters in 2009 – to Franklin Templeton Investments (the "Franklin Letter") and to T. Rowe Price Associates, Inc. (the "T. Rowe Letter") – concerning registered funds and TALF 2008.

- The Franklin Letter stated that the SEC staff would not recommend enforcement action against a registered closed-end or open-end investment company: (i) under Section 18(a)(1), 18(c) or 18(f)(1) of the 1940 Act if the registered funds participated as borrowers in TALF 2008 without treating the loans as a senior security representing indebtedness under Sections 18(a)(1), 18(c) and 18(f)(1) of the 1940 Act and (ii) under Section 17(f) of the 1940 Act, or the rules thereunder, with respect to the registered fund's reliance on the TALF 2008 custody arrangements. The Franklin

Letter required each registered fund to segregate liquid assets in an amount equal to the fund's outstanding principal and interest under each TALF 2008 loan to the fund.

- The T. Rowe Letter stated that the SEC staff would not recommend enforcement action under Sections 17(a) or 17(d) of the 1940 Act or Rule 17d-1 thereunder against certain T. Rowe Price-advised registered funds and institutional separately managed accounts and common trust funds ("Accounts") if, without first obtaining an order from the SEC, the registered funds and the Accounts participated in TALF 2008 by purchasing interests in a Section 3(c)(1) or 3(c)(7) private fund that was organized for the purpose of acquiring eligible collateral and obtaining loans under TALF 2008. The T. Rowe Letter contained various conditions intended to protect the registered funds from overreaching by any of the following entities: the private fund, the Accounts that co-invested with the registered funds in the private fund, and T. Rowe Price and its affiliates.

The TALF Letter. The TALF Letter noted that, in the SEC staff's view, the terms and conditions of TALF 2020 are substantially similar to those of TALF 2008 for purposes of the staff no-action positions taken in the Franklin Letter and the T. Rowe Letter. The TALF Letter stated that the SEC staff reaffirms its no-action positions in the Franklin Letter and the T. Rowe Letter as they apply to registered funds' participation in TALF 2020. In addition, the TALF Letter expanded two items in the T. Rowe Letter by (i) confirming that the no-action position in that letter would now be available to third parties and (ii) expanding the T. Rowe Letter to Section 57(a) of the 1940 Act, thereby permitting BDCs to rely on the letter.

Accordingly, the TALF Letter will permit registered funds and BDCs to rely on the Franklin Letter and the T. Rowe Letter to borrow from the TALF 2020 SPV on a non-recourse basis, provided that each such fund or BDC satisfies the conditions of the Franklin Letter and/or the T. Rowe Letter, as applicable.

SEC Staff Permits BDC to Organize a Wholly Owned Registered Investment Adviser

Section 12(d)(3) of the 1940 Act prohibits, among other things, a registered investment company from purchasing or acquiring securities issued by a registered investment adviser. Section 60 of the 1940 Act makes Section 12(d)(3) applicable to BDCs.

In a May 11, 2020 no-action letter, the SEC staff agreed not to recommend enforcement action against an internally managed BDC under Section 12(d)(3) if the BDC organized and acquired the securities of a wholly owned subsidiary that will operate as a registered investment adviser (the "Adviser Subsidiary"). The SEC staff's position was subject to various conditions intended to assure that the BDC's ownership of the Adviser Subsidiary would not lead to conflicts of interest that could work to harm either the BDC's shareholders or the Adviser Subsidiary's clients, including:

1. At least a majority of the members of the BDC's board of directors who are not interested persons must approve the BDC's decision to enter into the investment advisory business through the Adviser Subsidiary.

2. The BDC will wholly own and control the Adviser Subsidiary, and the BDC itself will not have an external investment adviser. Only the directors, officers or employees of the BDC will provide investment advisory services to the BDC.

3. Prospectively, in each of the BDC's annual reports to its shareholders and any registration statement, the BDC will disclose the Adviser Subsidiary's existence and the fact that it provides investment advisory services to third parties, and include an assessment of the risks arising from the Adviser Subsidiary's existence and its provision of such services.

4. The Adviser Subsidiary will not make any proprietary investment that the BDC itself would be prohibited from making.

5. The BDC will deem the assets and liabilities of the Adviser Subsidiary as its own for purposes of satisfying the asset coverage requirements under Section 18 of the 1940 Act.

6. At least annually, the BDC's board will review the Adviser Subsidiary's investment advisory business to determine whether that business should be continued and whether the benefits accruing to the BDC from the Adviser Subsidiary's business justify continuing to own the Adviser Subsidiary and, if appropriate, approve any continuation by a vote of at least a majority of its members who are not interested persons.

In view of the very specific facts underlying its no-action position, the SEC staff stated that its no-action position in the letter would apply only to the applicants seeking relief, and that no other entity may rely on the no-action letter.

REGULATORY PRIORITIES CORNER

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

Statement on the Importance of Delivering Timely and Material Information to Investment Company Investors

On April 14, 2020, the staff of the SEC's Division of Investment Management published a Staff Statement (the "Statement") to emphasize to registered investment companies the continuing importance of updating and delivering required information to investors during the period of operational challenges caused by COVID-19.

The Statement reminded investment company issuers of their obligations under Section 10(a)(3) of the Securities Act to update the information in their prospectuses, including audited financial statements. The Statement also encouraged investment companies to consider whether their risk disclosures need to be revised to reflect how COVID-19-related events may affect the investment company and its portfolio.

The Statement emphasized that investment companies must continue to deliver the fund's prospectus or summary prospectus to new investors on a timely basis, following the delivery preference expressed by each investor.

In light of current circumstances, the Statement observed that investors may now prefer electronic delivery of investment company materials instead of paper-based delivery. Therefore, the Statement encourages investment companies to communicate with investors about their delivery preferences.

SEC Settles NAV-Overstatement Matter with Mutual Fund Adviser

On April 28, 2020, the SEC issued an order (the "April Order") settling an enforcement matter with Semper Capital Management, L.P ("Semper"), the adviser to a mutual fund (the "Fund") that invests principally in residential mortgage-backed securities ("RMBS"). The April Order stated that the enforcement matter arose from Semper's alleged overvaluation of the Fund's NAV from July 2013 through May 2014 due to the manner in which Semper valued odd-lot positions held by the Fund.

The SEC alleged the following facts:

1. During the relevant period, the Fund's investments consisted nearly entirely of odd-lot positions in RMBS, which normally traded at a discount to round-lot positions (typically positions with a face value of $1,000,000 or more). After Semper purchased odd-lot positions for the Fund, third-party pricing vendors provided prices for the odd lots that reflected pricing appropriate for round lots ("Pricing Vendor Marks"), and Semper relied on the Pricing Vendor Marks to value the Fund's odd-lot holdings.

2. A third-party administrator provided the daily NAV calculations for the Fund and, in turn, Semper published the Fund's NAV. Before the fund administrator incorporated Pricing Vendor Marks to value a security, the fund

administrator submitted them to Semper for review. Under the Fund's written procedures, if Semper believed that a price from a pricing vendor did not reflect the security's market value, Semper could issue a "price challenge," which either Semper or the fund administrator would then submit to the pricing vendor.

3. In instances when Semper issued price challenges to the Pricing Vendor Marks, the pricing vendors regularly responded by telling Semper and the fund administrator that the Pricing Vendor Marks were based on round-lot prices.

4. Semper failed to follow procedures and further challenge the fund administrator's use of the greater Pricing Vendor Marks for the Fund's odd-lot positions. In addition, Semper did not take adequate additional steps to obtain alternative pricing sources to provide market values for odd-lot positions or systematically validate the use of Pricing Vendor Marks.

Based on these facts, the SEC asserted that (i) Semper's actions resulted in overstatements of the Fund's NAV and caused the Fund to execute transactions in its shares based on the overstated NAV and (ii) in the Fund's 2013 and 2014 annual reports to investors, Semper made inaccurate statements about the reasons for the Fund's performance because it did not disclose that a material portion of the Fund's reported performance arose from overvaluation of the Fund's RMBS odd-lot positions.

As a result of the conduct described above, the SEC asserted that Semper had violated various provisions of the Advisers Act, the 1940 Act and the rules thereunder. Without admitting or denying the SEC's findings in the April Order, and solely for the purpose of settling the SEC enforcement proceedings, Semper consented to the SEC's censure and agreed to disgorge approximately $128,000, representing advisory fees with prejudgment interest thereon, and to pay a civil penalty of $375,000.

SEC Settles with Private Equity Adviser Regarding Procedures to Prevent Misuse of Non-Public Information

On May 26, 2020, the SEC issued an order (the "May Order") settling an enforcement matter with a registered investment adviser to private equity funds (the "Adviser"). The May Order stated that the enforcement matter arose out of the Adviser's alleged 2016 failure to implement and enforce its written policies and procedures intended to prevent the misuse of potential material nonpublic information ("MNPI") obtained by the Adviser (i) as an insider, through its representation on the board of directors of a publicly traded issuer (the "Public Company") and (ii) pursuant to provisions in a loan agreement between the Adviser and the Public Company. The SEC did not affirmatively conclude that any of the information received by the Adviser actually constituted MNPI, but instead referred to the information as "potential MNPI" throughout the May Order.

The SEC alleged the following facts:

1. The Adviser invested several hundred million dollars in client funds in the Public Company in the form of both debt and equity, which gave the Adviser the right to appoint two of the Public Company's directors, while the loan agreement between the Adviser and the Public Company contained confidentiality provisions.

2. The Adviser-appointed directors included a senior member of the Adviser's "deal team" involved in the debt and equity investment in the Public Company (the "Representative"). On multiple occasions during 2016, the Representative, and/or members of the deal team who worked under the Representative, received information from the Public Company through the Representative's status as an incoming and, later, sitting director that was potential MNPI. The Adviser also received loan-related potential MNPI subject to the confidentiality provisions of its loan agreement with the Public Company.

3. The Adviser's written policies and procedures concerning the treatment of MNPI provided for situations in which securities were subject to trading restrictions and tracked on a "restricted list." Specifically, the policies and procedures provided that, if the Adviser had an employee-representative sitting on the board of a publicly traded company whose securities were controlled by the Adviser (i) the company's stock would be placed on a restricted list, (ii) any trades in the securities of the company must be pre-approved by the Adviser's compliance staff and (iii) the Adviser's compliance staff would confirm with the subject company that any restrictive trading window applicable to directors was open and also "check with [Adviser's] director for MNPI."

4. While the Representative sat on the Public Company's board, the Adviser began to purchase the Public Company's publicly traded stock. The general parameters of these purchases were submitted as a recommendation by the Adviser's Public Company deal team for approval by an Adviser investment committee. In 2016, the Adviser purchased more than one million shares of the Public Company's stock in the public market, which amounted to approximately 17% of the available stock.

Based on these facts, the SEC alleged that, while the Adviser placed the Public Company on the firm's restricted list, its compliance staff failed to comply with policies and procedures designed to prevent misuse of potential MNPI by failing to sufficiently document, before the transactions were approved, that the Adviser's compliance staff had inquired of the Representative and members of the Public Company deal team whether any one or more of them had received potential MNPI.

As a result of the conduct described above, the SEC asserted that the Adviser had violated (i) Section 204A of the Advisers Act (requiring investment advisers to establish, maintain and enforce reasonably designed written policies and procedures to prevent the misuse of MNPI) and (ii) Section 206(4) of the Advisers Act (prohibiting deceptive or manipulative practices/conduct by an investment adviser) and Rule 206(4)-7 thereunder (requiring an investment adviser to have written policies and procedures). Without admitting or denying the SEC's findings in the May Order, and solely for the purpose of settling the SEC enforcement proceedings, the Adviser consented to the SEC's censure and agreed to pay a civil penalty of $1,000,000. Importantly, there is no suggestion in the May Order that the Adviser actually engaged in insider trading, or that the non-public information in question was actually material. In fact, the trading took place during an open trading window.

ROPES & GRAY ALERTS AND PODCASTS SINCE OUR FEBRUARY-MARCH UPDATE

The Department of Labor Provides a Road Map for Offering Private Equity and Other Alternative Investments in 401(k) Plans
June 8, 2020
On June 3, 2020, the U.S. Department of Labor issued guidance stating its view that plan sponsors of 401(k) and other defined contribution plans may offer participants access to alternative assets (including private equity funds) through broadly diversified investment options such as target date funds. Although this guidance does not change the law, it may encourage plan sponsors who have been hesitant to offer such products to incorporate alternative assets into their plans. As the various stakeholders choose to prepare for this opportunity, the following initial steps should be considered:

- Target date fund managers will need to decide whether and how they will incorporate alternative investments into their product offerings and how they plan to address the valuation and liquidity needs of plan sponsors and their participants.

- Alternative asset allocators (such as fund of funds managers) should consider how to construct durable asset allocation products that include a good pipeline for future opportunities as 401(k) plan participants' needs change over time and that can scale up or down in size. Additionally, they should consider how they will comply with their fiduciary duties under ERISA.

- Alternative fund managers should begin to explore whether and how they can tailor products and investments to better suit the needs of defined contribution plan investors.

- Plan fiduciaries should follow an objective, thorough and analytical process that considers all relevant facts and circumstances when evaluating investment products such as alternative assets.

Please stay tuned for details on our upcoming webinar covering the DOL guidance.

Podcast: COVID-19: European Regulatory Update for Asset Managers
June 8, 2020
This is the third installment of Ropes & Gray's European regulatory podcast for asset managers. These fortnightly podcasts and accompanying speaker notes are intended to provide an overview of updates relevant to GCs, CCOs and other compliance professionals to help you navigate both COVID-19 and other developments relevant to your business. The speakers on this podcast were Eve Ellis, a partner in Ropes & Gary's asset management group specializing in fund regulation; Rosemarie Paul, a partner in our litigation & enforcement group specializing in regulatory enforcement matters; and Jason Brown, a partner in our asset management group specializing in investment adviser regulation. They covered topics relating to market abuse, a recent SEC enforcement action relating to insider trading procedures, financial resilience, the Financial Conduct Authority's expectations of firms as we move towards a "new normal," as well as AI, big data and a European Securities and Markets Association supervisory briefing on UCITS and AIF costs.

SEC Staff Takes No-Action Position Regarding Closed-End Funds' Use of State Control Share Statutes
June 2, 2020
On May 27, 2020, the SEC's Division of Investment Management published a statement (the "Statement") that, effective immediately, withdraws the 2010 Boulder Total Return Fund no-action letter (the "Boulder Letter") concerning the interaction between Section 18(i) of the 1940 Act and a state control share acquisition statute ("Control Share Statute"). Control Share Statutes serve as a corporate defense against unwanted activist investors by restricting the voting power of any person who, directly or indirectly, acquires ownership of, or the power to direct the vote of, "control shares" of the company. The Statement replaces the Boulder Letter with a new no-action position. Under the new no-action position and subject to conditions within the Statement, the SEC staff would not recommend enforcement action to the SEC against a closed-end fund under Section 18(i) for opting in to and triggering a Control Share Statute.

Podcast: COVID-19: European Regulatory Update for Asset Managers
May 26, 2020
This podcast is the second installment of Ropes & Gray's European regulatory podcast for asset managers. These fortnightly podcasts and accompanying speaker notes are intended to provide an overview of updates relevant to GCs, CCOs and other compliance professionals to help you navigate both COVID-19 and other developments relevant to your business. The speakers in this podcast were Eve Ellis, a partner in our asset management group specializing in fund regulation; Rosemarie Paul, a partner in our litigation & enforcement group specializing in regulatory enforcement matters; and Rohan Massey, a partner and leader of our data, privacy and cybersecurity group. This update covered topics relating to liquidity, business interruption insurance, the Financial Services Regulatory Initiatives Forum, short selling, financial crime, data privacy, a recent collaboration agreement between the Financial Conduct Authority (the "FCA") and Her Majesty's Revenue and Customs, and the FCA's Dear CEO letters.

Federal Reserve Releases Additional Terms and Conditions and FAQs on the Term Asset-Backed Securities Loan Facility (TALF)
May 19, 2020
In the wake of the current global financial crisis caused by the COVID-19 pandemic, the Federal Reserve, in conjunction

with the Department of the Treasury, has established several fiscal and monetary stimulus programs to seek to address and mitigate market disruptions, including the Term Asset-Backed Securities Loan Facility ("TALF"). On May 12, 2020 the Federal Reserve published an updated Term Sheet for the TALF, which is maintained on its website, and the Federal Reserve Bank of New York published frequently asked questions relating to the TALF on its website.

Podcast: COVID-19: ESG Considerations for Asset Managers in Light of the Pandemic
May 18, 2020
In this Ropes & Gray podcast, asset management partners Isabel Dische and Melissa Bender discussed how the COVID-19 pandemic offers an opportunity for asset managers to evaluate how their portfolio companies are managing the pandemic (and likewise for institutional investors to evaluate their asset managers). They also discussed how investors may want to apply lessons learned from recent market events to their ESG programs going forward.

CFTC Proposes to Streamline Form CPO-PQR
May 14, 2020
The Commodity Futures Trading Commission ("CFTC") recently issued a proposal to streamline the reporting requirements on Form PQR applicable to registered commodity pool operators ("CPOs"). Among other things, the proposal would remove the lengthiest and most detailed sections of Form PQR and would unify the CFTC's version of the Form with the version used by the National Futures Association, which registered CPOs also must file. The CFTC asked CPOs to respond to specific questions, as well as requested comments in general. Comments are due by June 15, 2020.

Podcast: COVID-19: Credit Funds: Considerations for Credit Fund Managers Overseeing ERISA Plan Assets in Light of the Pandemic
May 13, 2020
Under normal circumstances, credit fund managers that invest retirement plan money face multiple fiduciary and conflict of interest issues under ERISA that require special attention. These issues have been amplified by the current global health emergency and related economic crisis. In this Ropes & Gray podcast, asset management partner Jessica O'Mary and ERISA & benefits partner Josh Lichtenstein addressed how credit fund managers that invest on behalf of ERISA accounts can navigate some of these legal challenges as they arise in the current climate.

Podcast: The Intersection of Private and Registered Funds: Interval Fund Investments in Private Open-End Real Estate Funds
May 12, 2020
In this Ropes & Gray podcast, asset management partners Matthew Posthuma and George Raine were joined by tax partner Pamela Glazier to discuss the legal, tax and operational issues involved when 1940 Act registered interval funds invest in unregistered open-end real estate funds, as private fund managers look for new sources of capital, and registered fund managers look for alternative investments for their retail investor base.

Podcast: COVID-19: European Regulatory Update for Asset Managers
May 11, 2020
This is the first installment of Ropes & Gray's European regulatory podcast for asset managers. These fortnightly podcasts and accompanying speaker notes are intended to provide an overview of updates relevant to GCs, CCOs and other compliance professionals to help you navigate both COVID-19 and other developments relevant to your business. The speakers in this podcast were Eve Ellis, a partner in our asset management group specializing in fund regulation, and Rosemarie Paul, a partner in our litigation & enforcement group who specializes in regulatory enforcement matters.

Podcast: Preferred Equity Financings: Tools for Both Fund Sponsors and Investors
May 7, 2020
In this Ropes & Gray podcast, asset management partner Isabel Dische was joined by tax partner Dan Kolb and asset management associate Adam Dobson to discuss preferred equity deals in the private funds context. Following a brief explanation of what these deals are, they shared why a fund sponsor or an investor may want to pursue a preferred equity

financing, and provided details on the structures and certain considerations for these deals that market participants may want to keep in mind.

[SEC Proposes Rule Permitting Boards to Assign Fair Valuation to Fund Advisers]
May 6, 2020
On April 21, 2020, the SEC issued a release containing proposed Rule 2a-5 (the "Rule") under the 1940 Act (the "proposing release"). The Rule is intended to "address valuation practices and the role of the board of directors with respect to the fair value of the investments of a registered investment company or business development company." If the Rule is adopted, the SEC plans to rescind previously issued guidance on the role of a fund's board in determining fair values. The Rule also would mandate more specific fair value practices, policies and procedures, reporting, and recordkeeping requirements. Most notably:

- The Rule would permit a fund's board to formally assign fair value determinations to the fund's investment adviser.
- If a fund's board formally assigns fair value determinations to a fund's investment adviser, the investment adviser would be subject to board oversight and detailed reporting, recordkeeping and other requirements intended to enhance the board's oversight of the investment adviser's fair value determinations.
- Regardless of whether a fund's board assigns fair value determinations to a fund's investment adviser, the Rule would prescribe detailed requirements for determining fair values.
- The Rule would define the criteria for concluding that a market quotation is "readily available," which is currently undefined in the 1940 Act and the rules thereunder.

[Podcast: COVID-19: Credit Funds: How Hybrid Facilities Offer a Unique Solution in Today's Climate]
April 28, 2020
In this Ropes & Gray podcast, finance counsel Patricia Teixeira and asset management associate Jeanna Simeone discussed hybrid facilities as an alternative option for private investment funds to combat the economic impact of COVID-19. In today's market climate, hybrid facilities offer a unique solution for sponsors to inject cash into portfolios that are in need of liquidity. Throughout this podcast, Patricia and Jeanna explained how hybrid facilities work, why they might be of interest to fund managers and whether we should expect them to increase in popularity.

[SEC Extends Securities Offering Reforms to Closed-End Funds and Business Development Companies]
April 27, 2020
On April 8, 2020, the SEC issued a release (the "Release") containing amended rules and forms intended to streamline the registration, communications and offering practices for business development companies ("BDCs") and registered closed-end investment companies ("registered CEFs"), including interval funds and tender offer funds (collectively, "Affected Funds"). The Release's rule and form amendments will permit Affected Funds, subject to certain limitations, to use the securities offering rules that are already available to operating companies.

[Podcast: Proposed Amendments to the Volcker Rule's Covered Fund Provisions]
April 27, 2020
In this Ropes & Gray podcast, asset management partner Joel Wattenbarger and associate Gideon Blatt discussed the federal banking agencies' proposed amendments to the Volcker Rule's covered fund provisions. They addressed the existing landscape, the agencies' notice of proposed rulemaking and the potential impact it may have on the asset management industry.

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 Asset Management group listed below.

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