August 13, 2020

Ropes & Gray's Investment Management Update June–July 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 have covered in separate client Alerts and podcasts. The last section of this IM Update contains a short summary of each of these Alerts and podcasts, along with hyperlinks to the full text or transcript of each.

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 Proposes Modernized Fund Reports and Disclosure Amendments

On August 5, 2010, the SEC unanimously proposed rule and form amendments intended to modernize the disclosure framework for mutual funds, including ETFs (the "Proposals"). The Proposals, if adopted, would transform the disclosure framework for mutual funds and ETFs. First-time fund investors would continue to receive fund prospectuses. For existing shareholders, the Proposals make streamlined (three to four pages) annual and semi-annual shareholder reports the focal point of fund disclosure. Ropes & Gray anticipates publishing a detailed analysis of the Proposals in the coming days.

SEC Proposes to Update the Reporting Threshold for Institutional Investment Managers and to Modify the CTR Standard

On July 10, 2020, the SEC published a proposing release (the "Release") that, if adopted, would update the reporting threshold for Form 13F reports by institutional investment managers for the first time in 45 years and modify the applicable standard for making a successful request for confidential treatment of information in such a report. The changes proposed in the Release are described below.

Increasing the Form 13F reporting threshold to $3.5 billion. At present, Rule 13f-1 requires investment managers to file quarterly reports on Form 13F if the accounts over which they exercise investment discretion hold an aggregate of more than $100 million in Section 13(f) securities.[1] Investment managers that exceed the threshold are required to file holdings reports within 45 days of the end of a calendar quarter on Form 13F, which information becomes publicly available upon filing. The Release would amend Exchange Act Rule 13f-1 and Form 13F to increase the reporting threshold from $100 million to $3.5 billion.

Eliminating the omission threshold for individual securities on Form 13F. At present, Form 13F permits an investment manager to omit holdings of (i) fewer than 10,000 shares (or less than $200,000 principal amount of convertible debt securities) (the "share limit") and (ii) less than $200,000 aggregate fair market value (the "value limit" and, together with the share limit, the "omission threshold"). If adopted, the Release, in conjunction with the proposal to increase the reporting threshold, would eliminate the omission threshold from Form 13F. Thus, investment managers that

[1] In general, Rule 13f-1(c) defines "Section 13(f) securities" as equity securities of a class described in Section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange. The SEC, as required by Exchange Act Section 13(f)(4), publishes a list of these securities each quarter.

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satisfy the proposed $3.5 billion reporting threshold would be required to report smaller holdings on Form 13F that they are currently permitted to omit pursuant to the omission threshold.

Modified standard for confidential treatment of Form 13F information. The Release would amend the instructions on Form 13F concerning confidential treatment requests (each, a "CTR") to require an investment manager seeking confidential treatment of information disclosed within a Form 13F filing to show that the information is both customarily and actually kept private by the manager, and to show how the release of this information could cause harm to the manager. The Release states that the SEC believes the proposed amendment is necessary in view of the U.S. Supreme Court's recent decision[2] changing the legal standard for making a determination of whether information is "confidential" under the Freedom of Information Act ("FOIA") Exemption #4.[3]

Amending Form 13F to require filers to provide additional identifying information. If a Form 13F filer has a number assigned by the Central Registration Depository ("CRD") system of the Financial Industry Regulatory Authority, Inc. ("FINRA") or by the Investment Adviser Registration Depository ("IARD") system ("CRD number"), the proposed amendments would require the investment manager to provide its CRD number in its Form 13F filings. Similarly, if the SEC has assigned a filing number to an investment manager ("SEC filing number"), the proposed amendments would require the investment manager to provide its SEC filing number in its Form 13F filings.

Comments on the Release's proposals must be received by the SEC ***no later than*** September 29, 2020.

Observations

The focus of the Release is economic. The SEC estimates that increasing the reporting threshold to $3.5 billion would maintain disclosure of approximately 91 percent of the dollar value of Form 13F holdings data now being reporting, and eliminate Form 13F reporting requirements for approximately 4,500 Form 13F filers (approximately 89 percent of all current filers). The Release also emphasizes that the SEC believes, at present, the direct compliance costs related to Form 13F "are likely to be proportionately higher for smaller managers than they are for larger managers." In the Release, the SEC notes that the increase to the threshold "account[s] for the changes in the size and structure of the U.S. equities market since 1975."

The proposal to increase the Form 13F reporting threshold to $3.5 billion does not necessarily suggest that the SEC will be changing its approach to the regulation of the market for corporate control pursuant to Regulation 13D. The purpose of Form 13F is to fill gaps in information about institutional investors. In contrast, Regulation 13D, which requires filings of Schedules 13D and 13G, evolved from federal regulation of the market for corporate control – most notably, the Williams Act of 1968's additions of §§ 13(d)–(e) and 14(d)–(f) to the Exchange Act. Among other things, the Williams Act is directed at abusive practices associated with cash tender offers.

Separately, the proposal to modify the required standard applied to CTRs – from "likely to cause substantial competitive harm" to "could cause harm" – should make it easier for investment managers to obtain confidential treatment. However, at the moment, precisely how the SEC will interpret the "could cause harm" standard is unknown.

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[2] *See Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2366 (2019) ("At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4").

[3] Exemption 4, 5 U.S.C. § 552(b)(4), shields from FOIA disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The test formerly employed by the federal courts, and currently part of a Form 13F CTR determination, required the applicant for a CTR to show that disclosure was likely to cause substantial competitive harm to the person from whom the information was obtained. Therefore, the existing instruction to Form 13F requires an investment manager to demonstrate that disclosure "would be likely to cause substantial harm to the Manager's competitive position." The proposed amendment would align the Form 13F CTR determination with the newly established FOIA analysis.

SEC Amends Procedures for Exemptive Applications Under the 1940 Act

On July 6, 2020, the SEC issued a release (the "Release") adopting the following changes:

- Amending Rule 0-5 under the 1940 Act to establish expedited review procedures for obtaining exemptive relief where an application for relief is substantially identical to exemptive relief that the SEC has recently provided ("routine applications").
- Promulgating new Rule 17 C.F.R. § 202.13 to establish an informal time frame for the SEC staff to take action on applications for exemptive relief that seek novel, largely unprecedented relief or relief for which some SEC precedent exists, but that raise additional questions of fact, law or policy ("non-routine applications"), within 90 days of the initial filing or any of the first three amendments to, and within 60 days of any subsequent amendments to, a non-routine application.
- Amending Rule 0-5 to provide that, for any application that does not qualify for expedited review, the application will be deemed withdrawn if the applicants fail to respond in writing within 120 days to any request from the SEC staff for clarification or modification following the initial filing of the application.

These changes are described in detail below. The effective date of these changes is 270 days after the date of publication in the *Federal Register*.

Expedited review procedures for routine applications. The Release amends Rule 0-5 to establish expedited review procedures for routine applications. Amended Rule 0-5 provides that applicants are eligible to request expedited review if the application is "substantially identical" to two other applications for which an order granting the requested relief was issued within three years of the date of the applicant's initial filing. The Rule defines "substantially identical" applications as "applications requesting relief from the same sections of the [1940 Act and rules thereunder], containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested.

An application submitted for expedited review must include:

1. A prominent notation on its cover page stating: "EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0-5(d);"
2. Exhibits with marked copies of the application that show changes from the final versions of the two substantially identical applications; and
3. A cover letter, signed on behalf of the applicants by the person executing the application that (a) identifies two substantially identical application precedents and explains why the applicant chose those particular applications (and, if more recent applications of the same type have been approved, explaining why the applications chosen, rather than the more recent applications, are appropriate) and (b) certifies that the applicants believe that their application is substantially identical to the two application precedents and that their marked copies are complete and accurate.

Within 45 days from the date that an application requesting expedited review is submitted, amended Rule 0-5 requires the SEC staff either (i) to issue a notice that an application has been filed in accordance with the expedited review procedures (*i.e.*, notice of the application, followed by an order disposing of the matter) or (ii) to notify the applicants that the application is ineligible for expedited review because it does not satisfy the necessary criteria or because the SEC staff requires additional time to consider the application. In the latter case, the SEC staff would typically ask the applicants either to withdraw the application or to amend it so that the application can proceed outside of the expedited review process.

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Rules regarding the 45-day period. The 45-day period will stop running upon an SEC staff request for modification of a routine application and will resume running on the 14th day after the applicant has filed an amended application responsive to the SEC staff's request.[4] In the case of an unsolicited amendment of a routine application, the 45-day period will stop running and will resume running on the 30th day after such an amendment.

If an applicant fails to file an amendment that is responsive to the SEC staff's request for modification within 30 days of receiving the request, the routine application will be deemed withdrawn.

Time frame for non-routine application reviews. In addition to the proposed expedited review process, the Release adopts new Rule 17 C.F.R. § 202.13 (the "Informal Procedure") to provide a time frame for non-routine applications filed under Rule 0-5. More specifically, the Informal Procedure provides that the SEC staff "should take action" on a non-routine application within 90 days of its initial filing and following each of the first three amendments to the non-routine application, and within 60 days of any subsequent amendment. The SEC staff may grant 60-day extensions, with notice to the applicants of any such extension.

Consequently, under the Informal Procedure, the SEC staff's action with respect to a non-routine application would consist of (i) issuing a notice of application, (ii) providing the applicants with comments or (iii) informing the applicants that the application will be forwarded to the full Commission (in which case the application is no longer subject to the provisions of the Informal Procedure). The Release notes that, if the SEC staff does not support a non-routine application, applicants are typically notified that the SEC staff intends to recommend to the full Commission that the non-routine application should be denied, thereby providing applicants the opportunity to withdraw the non-routine application before the staff makes such a recommendation.

Inactive applications. The Release also amends Rule 0-5 to deem a non-routine application withdrawn if the applicants fail to respond in writing within 120 days to any request from the SEC staff for clarification or modification of an application. The deemed withdrawal is without prejudice, leaving the applicants free to refile. An application for expedited review is not subject to this deemed withdrawal because, as described above, the Rule 0-5 provisions applicable to expedited review of a routine application deem the routine application withdrawn if the applicants fail to file an amendment that is responsive to the SEC staff's request for modification within 30 days of receiving the request.

Recent SEC Actions Arising from the COVID-19 Pandemic

Between June 19 and June 25, 2020, the SEC and the SEC staff took several COVID-19-related actions that affect funds and their advisers and directors.

Virtual meetings of fund boards. On June 19, 2020 the SEC issued an order (the "Order") extending a March 2020 order providing temporary relief from certain in-person voting requirements under the 1940 Act and the rules thereunder applicable to the board of directors of registered investment companies and business development companies ("BDCs") (the "In-person Board Relief"). The Order provides In-person Board Relief until the date to be specified in a public notice from SEC staff stating that the relief will terminate (which date will be at least two weeks from the date of the notice and no earlier than December 31, 2020), and requires the following conditions, set forth in the March order, to be met – (i) reliance on the Order is necessary or appropriate due to circumstances related to current or potential effects of COVID-19, (ii) the votes required to be cast at an in-person meeting are instead cast at a meeting in which directors may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting and (iii) the board of directors, including a majority of the directors who are not interested persons of the registered investment company or BDC, ratifies the action taken pursuant to the Order by a vote cast at their next in-person meeting.

[4] The 45-day period also stops running upon any irregular closure for normal business of the SEC's Washington, DC office, and resumes upon the reopening of the office for normal business.

Manual signature requirements. On June 25, 2020, the SEC's Division of Investment Management, Division of Corporate Finance and Division of Trading and Markets issued a joint announcement (the "Announcement") extending a similar March 2020 statement regarding compliance with Regulation S-T's Rule 302(b). The rule requires that each signatory to documents electronically filed with the SEC "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing." The Announcement extended indefinitely the March 2020 statement and provided that the SEC staff will not recommend an enforcement action with respect to the requirements of Rule 302(b) if (i) a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b), (ii) the document indicates the date and time when the signature was executed and (iii) the filer establishes and maintains policies and procedures governing this process. Alternatively, the signatory may provide to the filer an electronic record (such as a photograph or pdf) of such document when it is signed.

International mail service suspensions. On June 24, 2020, the Division of Investment Management and the Division of Trading and Markets issued a joint statement regarding requirements under the federal securities laws to mail certain communications to persons who (i) have mailing addresses located in international jurisdictions where the U.S. Postal Service, other common carrier, or public or private foreign postal operator has temporarily suspended international mail delivery due to the COVID-19 virus and (ii) have not consented to electronic delivery of these communications.

The SEC staff announced in the joint statement that it would not recommend enforcement action against an SEC-regulated entity with respect to the failure to deliver an international communication if the entity is unable to mail the international communication due to mail service suspensions, provided, among other things, that the entity (i) notifies the SEC staff at a designated email address of the specific mailings that the entity will be holding temporarily due to mail service suspensions and updates that notification, as needed, to reflect any material changes and (ii) prominently publishes the information contained in the notification to the SEC on its public website and updates that information, as needed, to reflect any material changes.

Regulatory Priorities Corner

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

Changes to the SEC's Regulatory Agenda

In June, the federal Office of Information and Regulatory Affairs published the Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions (available here). The Unified Agenda is updated semi-annually and includes the SEC's Current Agency Agenda (the "Current Agenda") and the SEC's Current Long Term Actions (the "Long-Term Actions"). The following items are changes to the Current Agenda and the Long-Term Actions of interest to the mutual fund/investment management industry. The items listed below reflect only the priorities of SEC Chairman Clayton and do not necessarily reflect the view and priorities of any other Commissioner. The SEC has not provided any further detail regarding the matters described below.

New item on the Current Agenda

- ***Amendments to Form PF***. The Division of Investment Management (the "Division") is considering recommending that the SEC propose amendments to Form PF, the form on which advisers to private funds report certain information about private funds.

New items on the Current Agenda formerly among Long-Term Actions

- Amendments to Rule 17a-7 under the Investment Company Act. The Division is considering recommending that the SEC propose amendments to Rule 17a-7 under the 1940 Act concerning the exemption of certain purchase or sale transactions between an investment company and certain affiliated persons.

- Amendments to the Family Office Rule. The Division is considering recommending that the SEC propose targeted amendments to the family office rule under Section 202(a)(11) of the Advisers Act. Family offices, as defined in the Adviser's Act, are excluded from the definition of investment adviser, and are thus not subject to any of the provisions of the Advisers Act.

OCIE Issues Cybersecurity Ransomware Alert

On July 10, 2020, the SEC's Office of Compliance Inspections and Examinations ("OCIE") released a Risk Alert related to ransomware. In the publication, *Cybersecurity: Ransomware Alert*, OCIE alerted companies to the increase in sophisticated campaigns orchestrated to invade financial institution networks in order to obtain confidential information and plant ransomware. The attacks generally involve perpetrators using "phishing and other campaigns designed to penetrate financial institution networks . . . to access internal resources and deploy ransomware." Once the ransomware is deployed, institutions typically lose control of the ability to use and maintain the integrity of their systems and data until they pay a ransom to the attackers.

OCIE urged registrants and other market participants to monitor cybersecurity and work closely with third-party vendors who maintain client data. OCIE also drew attention to the cybersecurity alerts released by the Department of Homeland Security Cybersecurity and Infrastructure Security Agency.

To assist registrants with their security efforts, OCIE reiterated a series of measures that it has observed registrants using to increase cybersecurity preparedness. Many of these measures will be familiar from OCIE's January 2020 publication *Cybersecurity and Resiliency Observations*.

- **Incident response and resiliency policies, procedures and plans**. Periodically assess, test and update registrant's incident response and resiliency policies such as registrant's contingency or disaster recovery plan.

- **Operational resiliency**. Identify which critical systems and operational processes are capable of being restored during a disruption so that business services can continue uninterrupted.

- **Awareness and training programs**. Provide specific cybersecurity and resiliency training to help employees gain awareness of cyber threats such as ransomware, as well as training on identifying phishing e-mails.

- **Vulnerability scanning and patch management**. Frequently and consistently implement proactive vulnerability and patch management programs across the registrant's system to ensure the registrant's anti-virus and anti-malware solutions are up to date and regularly scanning the registrant's system.

- **Access management**. Implement systems and procedures to manage user access of the registrant's system to ensure the following: (i) user access is limited to what is appropriate and necessary, (ii) user access is regularly recertified by administrators, (iii) users use strong and periodically changed passwords, (iv) registrant utilizes multifactor authentication and (v) registrants revoke access immediately when access is no longer necessary (*i.e.*, termination of employment).

- **Perimeter security**. Implement perimeter security capabilities to enable registrants to control, monitor and inspect all incoming and outgoing network traffic to prevent unauthorized or harmful traffic.

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Like the January 2020 publication, OCIE noted that there is no "one size fits all" approach. While several of these measures may be impractical for smaller firms, OCIE does not provide guidance to help organizations assess which measures may be a good fit for enhancing the security of their systems and information. This lack of additional guidance about how smaller organizations can implement the measures may create a challenge for entities forced to make those difficult decisions and defend their choices in the future. However, some of the most cost-effective mechanisms are (i) employing email security filtering so that the phishing emails never get to the end users and (ii) training users to recognize and avoid such emails.

OCIE Examination Initiative: LIBOR Transition Preparedness

On July 18, 2020, OCIE issued a Risk Alert, *Examination Initiative: LIBOR Transition Preparedness*, announcing that OCIE intends to examine registrants to assess their preparations for the expected discontinuation of LIBOR, and the transition to an alternative reference rate. The Risk Alert is intended to provide registrants with additional information about the scope and content of these examinations.

LIBOR, which stands for the London Interbank Offered Rate, has been used extensively in the U.S. and globally as a reference or benchmark interest rate. It underlies a wide variety of financial contracts, including fixed-income securities, credit facilities, financing transactions and derivative instruments. OCIE identified registrants' LIBOR transition preparedness in its January *2020 Examination Priorities*.

The Risk Alert reports that OCIE will review whether and how a registrant has analyzed the potential impact of the LIBOR transition on the registrant's (i) business activities, (ii) operations, (iii) services and (iv) customers, clients and/or investors. The appendix to the Risk Alert lists the types of information and documents that are likely to be requested during OCIE's LIBOR transition examinations, which are already underway.

SEC Settles with Advisers for Causing Funds to Violate § 12(d)(1)(A) Limits on Investments in Other Investment Companies

In a July 2, 2020 Order, the SEC announced that it had settled an administrative proceeding brought against two affiliated U.S.-registered investment advisers within a large investment company group (the "Group"). The matter grew out of the SEC's allegations that each of the investment advisers had caused funds it managed to violate Section 12(d)(1)(A) of the 1940 Act, which limits an investment company's ownership interests in other investment companies.

The SEC's Allegations – Adviser 1

1. Adviser 1 was the adviser to each of the Group's U.S.-registered funds. According to the SEC, Adviser 1 caused the Group's U.S. funds to acquire shares of three ETFs – ETF 1, ETF 2 and ETF 3 – all registered, unaffiliated investment companies, causing eleven of the Group's U.S. funds to each have ETF holdings that exceeded 10% of the U.S. fund's assets, thereby violating Section 12(d)(1)(A)(iii).

2. The Group's U.S. funds attempted to rely on Section 12(d)(1)(F) to permit the funds to hold shares of investment companies in excess of the Section 12(d)(1)(A)(iii) limit. However, the SEC asserted that, during the relevant time period, Adviser 1's aggregate purchases of the ETFs caused the Group to have exceeded the complex-wide 3% ownership limit of Section 12(d)(1)(F) for each of the three ETFs.

3. According to the SEC, when Adviser 1's compliance department discovered the breaches of the Section 12(d)(1)(A)(iii) limit, Adviser 1 reduced its clients' positions in the ETFs to bring the Group's complex-wide ownership within the 3% limit of Section 12(d)(1)(F). Consequently, the Group's U.S. funds realized losses of $2.2 million from selling shares of ETF 1 and gains of $3.7 million and $4.7 million from selling their holdings of ETF 2 and ETF 3, respectively.

4. In contravention of its own written trade error policy and procedures, Adviser 1 concluded that, because the Group's U.S. funds' gains from selling shares in ETF 2 and ETF 3 exceeded their losses from selling shares of ETF 1, Adviser 1 would not reimburse the Group's U.S. funds' losses in ETF 1. Adviser 1 did not disclose the losses incurred or Adviser 1's conflict of interest to the boards of directors of the Group's U.S. funds.

The SEC's Allegations – Adviser 2

1. Adviser 2 was the adviser to six Group open-end investment companies formed under Canadian law and not registered with the SEC. The SEC alleged that Adviser 2 caused the Canadian funds to acquire shares of ETF 4, an unaffiliated, U.S.-registered investment company, each in excess of the 3% limit in Section 12(d)(1)(A)(i).

2. Separately, the SEC alleged, Adviser 2 caused five of the Canadian Funds to acquire shares of ETF 5, a registered, unaffiliated U.S.-registered investment company, each in excess of the 3% limit in Section 12(d)(1)(A)(i).

Settlement Terms

Without admitting or denying the SEC's allegations and solely for the purpose of terminating the SEC proceedings (i) Adviser 1 agreed to a be censured by the SEC and to pay a civil money penalty in the amount of $250,000 and (ii) Adviser 2 agreed to pay a civil money penalty in the amount of $75,000.

SEC Fines Adviser for Misallocating Costs Among its Private Funds

On August 7, 2020, the SEC issued an order settling an enforcement matter with an investment adviser concerning the adviser's performance of "third party tasks" for its real estate private equity funds. These tasks included asset-level due diligence, accounting, valuation and other similar services that are typically performed for private funds by outside professionals but may be performed by the adviser. The SEC alleged that (i) the adviser misallocated some costs and expenses to the private funds that should have been allocated to related co-investment vehicles that the adviser also managed, (ii) the adviser represented to the Advisory Committees that it had obtained information (required by fund documents) supporting that the costs and expenses were at or below market rates at the outset of the program but, over the four-year period that followed, never revisited its analysis and (iii) the adviser's cost allocation methodology increased general overhead expenses every year, but the adviser did not disclose that fact to the Advisory Committees.

Without admitting or denying the findings in the order, the adviser agreed to pay a civil penalty of $350,000 (it had previously reimbursed the funds over $3 million for costs and expenses that should have been allocated to the co-investment vehicles).

FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings

On July 1, 2020, FINRA issued Regulatory Notice 20-21 (the "Notice") to provide guidance to help FINRA member firms create, review, approve, distribute or use retail communications in connection with private placement offerings, most of which are conducted in reliance on one of three "safe harbors" under Rules 504, 506(b), and 506(c) of Regulation D under the Securities Act. According to the Notice, many private placement offerings to retail investors include marketing or sales communications that constitute a "retail communication" under FINRA Rule 2210(a)(5), and FINRA's reviews of retail communications concerning private placements have revealed a number of deficiencies.

The Notice provides guidance to assist member firms comply with the requirements of Rule 2210 with respect to retail communications concerning private placements of securities, including guidance on the following topics:

- **Third-Party Prepared Materials**. The Notice reminds member firms that Rule 2210 applies to retail communications prepared by a third-party that are distributed by the firm.

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- **Balanced Presentation of Risks and Investment Benefits**. The Notice states that Rule 2210(d) requires retail communications that discuss the potential benefits of investing in a private placement to balance such discussion with disclosure of their risks. According to the Notice, providing risk disclosure in a separate document, such as a PPM, or in a different section of a website does not substitute for disclosure contained in or integrated with retail communications governed by Rule 2210.

- **Distribution Rates**. The Notice reminds member firms that Rule 2210 prohibits misrepresentations of the amount or composition of distributions that include the return of principal or loan proceeds, and does not permit member firms to state or imply that a distribution rate is a "yield" or "current yield" or that investment in the program is comparable to a fixed income investment such as a bond or note. The Notice states that discussions of distribution rates, to be consistent with Rule 2210, must include various additional disclosures.

- **Internal Rate of Return (IRR)**. The Notice states that (i) FINRA interprets Rule 2210 to permit retail communications to include IRR for completed investment programs (*e.g.*, the holding matured or all holdings in the pool have been sold) and (ii) FINRA does not view as inconsistent with Rule 2210 retail communications that provide an IRR for a specific holding in a portfolio, provided the IRR represents the actual performance of that holding. The Notice observes that private equity funds and REITs may have a combination of realized investments and unrealized holdings in their portfolios. The Notice states that, for an investment program that has ongoing operations, FINRA interprets Rule 2210 to permit the inclusion of IRR if it is calculated in a manner consistent with the Global Investment Performance Standards ("GIPS") adopted by the CFA Institute and includes additional GIPS-required metrics such as paid-in capital, committed capital and distributions paid to investors.

Ropes & Gray Alerts and Podcasts Since Our April-May Update

Podcast: COVID-19: Credit Funds: Valuation Risks and Other Compliance Considerations in a Pandemic Market Environment
August 10, 2020
In this Ropes & Gray podcast, Jeremiah Williams and Caitlin Giaimo discussed key takeaways from an active SEC enforcement case related to credit fund valuation, along with other areas of enforcement priority for credit funds. At times of market destabilization—when retail and real estate loans in particular face heightened risk of default—credit funds are subject to increased interest but also increased regulatory scrutiny. Jeremiah and Caitlin provided observations and advice on key regulatory compliance steps for credit fund sponsors navigating the pandemic market environment.

Podcast: U.S. Anti-Money Laundering Compliance Considerations for Fund Sponsors
August 5, 2020
In this Ropes & Gray podcast, Ama Adams, Brendan Hanifin, and Emerson Siegle discussed anti-money laundering and economic sanctions considerations as well as best practices for fund sponsors, following recent reporting that U.S. law enforcement has developed concerns about potential widespread money laundering in the private equity and hedge fund industries.

Podcast: ICI Memo: LIBOR Update – SEC OCIE Issues Risk Alert on LIBOR Transition Preparedness
August 3, 2020
In this Ropes & Gray podcast, Jason Brown and Jill Kalish Levy discussed the recent Risk Alert published by the SEC Office of Compliance and Inspections concerning the end of LIBOR, and what that Risk Alert means for market participants. Since the announcement of LIBOR's cessation, the Fed has made great strides in pushing its replacement, "SOFR," but this transition has proven to be operationally and logistically complicated. In this podcast, Jill and Jason examined these issues and how to prepare for OCIE's examinations of various registrants to assess their efforts in preparing for the discontinuation of LIBOR.

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[Podcast: Introduction to Gender-Lens Investing]
July 30, 2020
In this Ropes & Gray podcast, asset management partners Melissa Bender and Isabel Dische discussed a subset of impact investing – gender-lens investing. In the course of their conversation, Melissa and Isabel provided an overview of both the objectives and different types of gender lens investments.

[SEC Supplements Guidance to Investment Advisers about Proxy Voting Responsibilities in View of Proxy Rule Amendments]
July 29, 2020
On July 22, 2019, the SEC adopted amendments to the proxy rules under the Exchange Act (the "Amendments") affecting firms that provide proxy voting advice (a "Proxy Adviser"). The Amendments are described in a separate Ropes & Gray Alert.

At the same meeting at which it approved the Amendments, the SEC also issued a supplement (the "Supplement") to its earlier interpretive guidance, *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, which was published in August 2019. The Supplement, like the Amendments, was adopted in a 3-1 vote, with Democratic Commissioner Lee dissenting. This Alert describes the Supplement.

[SEC Adopts Amendments to Regulate Proxy Voting Advice]
July 29, 2020
On July 22, 2020, the SEC adopted final amendments to its rules governing proxy solicitations and the filing exemptions for proxy voting advice (the "Amendments"). With Democratic Commissioner Lee dissenting, Chairman Clayton and the two Republican Commissioners closed the initial chapter in a more than decade-long attempt to rein in the influence of Proxy Advisers. The Amendments condition the exemptions for reports issued by Proxy Advisers from the filing and information requirements of the federal proxy rules on compliance with disclosure and procedural requirements. In addition, the Amendments codify in the definition of "solicitation" in Rule 14a-1(l) the SEC's longstanding view that Proxy Advisers' reports are "solicitations" subject to the anti-fraud provision of the federal proxy rules. This Alert summarizes key aspects of the Amendments.

[Podcast: Rethinking the "S" in ESG in Light of the COVID-19 Pandemic]
July 23, 2020
In this Ropes & Gray podcast, asset management partners Melissa Bender and Isabel Dische discussed how market participants are rethinking social factors—the "S" in ESG—in light of the COVID-19 pandemic. Their conversation focused on why asset managers may want to consider integrating social factors into their investment analysis and some challenges in doing so.

[Podcast: SEC Issues Risk Alert: Compliance Issues for Investment Advisers Managing Private Funds – What You Need to Know]
July 22, 2020
In this Ropes & Gray podcast, asset management partner Jason Brown and litigation partner Dan O'Connor discussed the OCIE risk alert providing observations and guidance on compliance issues for registered investment advisers that manage private equity funds or hedge funds. Based on years of experience representing registered investment advisers, Jason and Dan provided their own observations on the compliance deficiencies that OCIE highlighted: (1) conflicts of interest, (2) fees and expenses and (3) codes of ethics, including material nonpublic information.

[Podcast: COVID-19: Market Declines and Falling Out of Carry: Considerations for Fund Sponsors and Investors]
July 17, 2020
In this Ropes & Gray podcast, asset management partners Lindsey Goldstein and Isabel Dische discussed considerations both fund sponsors and investors will want to keep in mind if a fund "falls out of carry" because of COVID-19-related market declines.

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Podcast: COVID-19: European Regulatory Update for Asset Managers
July 13, 2020
This Ropes & Gray podcast covered topics relating to the extension of aspects of the Senior Managers and Certificate Regime as a result of COVID-19, the Climate Financial Risk Forum guide for banks, insurers and asset managers on the integration of climate change risks, the U.K.'s global human rights sanctions regulations, capital rules for investment firms and Brexit developments.

The Next Chapter in the DOL's Fiduciary Rule Saga: Relief for Investment Advice Fiduciaries
July 2, 2020
On June 29, 2020, the U.S. Department of Labor (the "DOL") returned to its long-running fiduciary rule project for the first time since 2018, proposing a new framework to address the receipt by an investment advice fiduciary to retirement plan investors of otherwise prohibited compensation (such as commissions, trailing fees or revenue sharing) and to permit certain principal transactions with fiduciaries. The latest proposal replaces the DOL's 2016 final regulation (the "2016 Fiduciary Rule") and related exemptions, which the U.S. Court of Appeals for the Fifth Circuit vacated on June 21, 2018. Unlike the 2016 Fiduciary Rule, the new approach by the DOL does not expand the definition of fiduciary beyond the 1975 regulation and its five-part test for defining an investment advice fiduciary. Instead, the DOL has created a new, permissive exemption, which existing investment advice fiduciaries and financial institutions can use to simplify compliance with ERISA. We expect further developments in the coming months, and we will monitor these developments closely.

Recent ETF-Related Developments
July 1, 2020
ETF-related product development continues apace and the ETF regulatory landscape continues to evolve notwithstanding recent market volatility and the work-from-home environment. This Ropes & Gray alert summarizes recent important developments, including the launch of the first non-transparent and semi-transparent ETFs, an upcoming reorganization of a traditional mutual fund into an ETF and the streamlining of certain exchange listing requirements.

DOL Proposes Rule to Severely Restrict ESG Considerations in Selecting ERISA Plan Investments
June 26, 2020
On June 23, 2020, the DOL proposed amendments to the investment duties regulations under ERISA that would make it clear that retirement plan fiduciaries must not consider non-financial factors in making investment decisions for ERISA-covered retirement plans (including 401(k) plans). This guidance is of particular importance in light of recent trends involving the flows into so-called ESG funds and the integration of ESG factors into investment decisions by retirement plans. If finalized as proposed, the rule would both expand on the DOL's longstanding position that decisions concerning the selection and monitoring of investments must focus solely on economic considerations and further add to the current administration's series of pronouncements that has generally discouraged allocating assets to ESG funds and ESG integration by ERISA plans.

Podcast: European Regulatory Update for Asset Managers
June 22, 2020
This Ropes & Gray podcast covered topics relating to business interruption insurance, the European Commission's review of AIFMD, the Financial Conduct Authority's enforcement action in relation to financial crime, and other developments relating to ESG, capital requirements and Brexit.

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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.

United States

Nathan Briggs
Washington DC
+1 202 626 3909
nathan.briggs@ropesgray.com

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

Jim Brown
New York, NY
+1 212 596 9696
james.brown@ropesgray.com

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

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

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

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

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

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

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

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

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

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

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

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

Josh Lichtenstein
New York, NY
+1 212 841 5788
joshua.lichtenstein@ropesgray.com

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

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

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

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

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

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

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

Amy Roy
Boston, MA
+1 617 951 7445
amy.roy@ropesgray.com

ATTORNEY ADVERTISING

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

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

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

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

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

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

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

London

Thomas Alabaster
London
+44 20 3847 9062
tom.alabaster@ropesgray.com

Eve Ellis
London
+44 20 3201 1530
eve.ellis@ropesgray.com

Anna Lawry
London
+44 20 3201 1590
anna.lawry@ropesgray.com

Asia

Vince Ip
Hong Kong
+852 3664 6560
vincent.ip@ropesgray.com

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