October 9, 2020

Ropes & Gray's Investment Management Update August–September 2020

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

SEC Updates Framework for Fund of Funds Arrangements

On October 7, 2020, the SEC issued a release (the "Release") adopting new Rule 12d1-4 under the 1940 Act to streamline the regulatory framework applicable to funds that invest in other funds. In connection with the new rule, the SEC rescinded Rule 12d1-2 under the 1940 Act and certain exemptive relief that it has granted from Sections 12(d)(1)(A), (B), (C) and (G) permitting certain fund of funds arrangements. The Release also amends Rule 12d1-1 under the 1940 Act. The Release will be discussed in a forthcoming Ropes & Gray Alert.

Great-West Wins Excessive Fee Case

On August 7, 2020, an excessive fee case brought against Great-West Capital Management, LLC ("GWCM") and Great-West Life & Annuity Insurance Co. ("GWL&A") in the U.S. District Court of Colorado was decided in favor of the defendants following a bench trial that lasted for more than eleven days. The plaintiffs, who acquired their shares through employer-sponsored retirement plans or individual retirement accounts, alleged that the defendants charged fees to certain funds in the Great-West mutual fund complex that were excessive under Section 36(b) of the 1940 Act. The case was primarily based on a "manager of managers" theory, *i.e.*, that Great-West's advisory fees were too high and that it delegated essentially all of the real work to subadvisers.

A key factor underlying the court's reasoning was that plan sponsors "acting as fiduciaries who have a duty to select prudent investments . . . select which investment options to offer to plan participants." The court noted that the Great-West funds are principally distributed through retirement plans administered by GWL&A, under the brand name Empower Retirement. According to the opinion, Empower "is hired by plan sponsors as the recordkeeper for those plans, typically following a competitive bidding process." The opinion stated that Empower "offers 14,000 investment options from which plan sponsors may select, including the Great-West Funds." The court specifically highlighted the testimony of one of the defendants' witnesses, an independent advisor to a retirement plan that selected GWL&A to be its recordkeeper "after considering proposals from five retirement plan recordkeepers." The opinion noted that this expert's "testimony shows that one of the factors that both sponsors and their financial advisors consider is the investment advisor's fees, which means that investment advisors must compete with other advisors with respect to their fees. The existence of that competition is probative of whether a particular fee is reasonable because competition is a market force that constrains pricing." The court's recognition of the role of competition and its discussion of the independent adviser's selection process make the opinion notable because courts often fail to appreciate or discuss these points in Section 36(b) excessive fee litigation.

The trial judge found "that Plaintiffs failed to meet their burden of proof with respect to all of the *Gartenberg* factors." In addition, the court ruled that "even though they did not have the burden to do so, defendants presented persuasive and credible evidence that overwhelmingly proved that their fees were reasonable and that they did not breach their fiduciary duties." As an additional basis for its decision, the court determined that "Plaintiffs' claims fail for the independent reason that they did not establish that any actual damages resulted from Defendants' alleged breach of fiduciary duty."

The opinion in this case is a bit unusual in that the court essentially rejected all of the evidence presented by the plaintiffs and "adopt[ed], and incorporate[d] by reference, Defendants' proposed findings of fact and conclusions of law with regard to the *Gartenberg* factors and surrounding circumstances." As a result, the court's analysis of the *Gartenberg* factors was conclusory and takes up approximately one page of the opinion. In contrast, more than five pages of the opinion were devoted to discrediting the plaintiffs' damages expert, which resulted in the court finding that "his opinions were entitled to no weight." Further, the case is atypical relative to other Section 36(b) cases because the plaintiffs had attempted to bring suit against the entire Great-West fund complex rather than targeting specific funds with allegedly excessive fees. The court dismissed claims against all but about 20 funds prior to trial, and then ruled in favor of Great-West on the remainder after trial.

After the court's decision on the merits of the case, the defendants filed a motion for sanctions against the plaintiffs' attorneys under a federal statute that states "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The court recently ruled in favor of the defendants on that motion and issued an order finding that sanctions "are warranted in this case because Plaintiffs' counsel recklessly pursued their claims through trial despite the fact that they were lacking in merit." The court's order stated that "Plaintiffs' attorneys are personally liable for Defendants' excess costs, expenses, and attorney fees reasonably incurred from the period beginning on the first day of trial and ending on the date Defendants filed the instant Motion—i.e., January 13, 2020, through September 1, 2020. That amount shall not exceed $1,500,000."

REGULATORY PRIORITIES CORNER

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

SEC Sanctions Fund Adviser for Unlawful Cross Trades

On September 21, 2020, the SEC issued an order in an administrative proceeding brought against Palmer Square Capital Management LLC, a registered investment adviser (the "Adviser") concerning 351 cross trades between clients' accounts, including the accounts of registered investment companies. According to the SEC, between 2014 and 2016, the Adviser pre-arranged the cross trades between its clients' accounts through an inter-positioned independent broker-dealer. In each trade, the Adviser would sell a security from one client account to another client account, with the client on the buying side of the cross trade paying a markup that was retained by the executing broker-dealer. The cross trades, the SEC claimed, occurred among all types of the Adviser's clients, and thirteen of the trades were principal transactions.

The SEC found that the Adviser incorrectly believed that it did not need to comply with the requirements of Rule 17a-7 under the 1940 Act with respect to cross trades involving a registered fund. Consequently, the registered fund trades did not comport with the requirements of Rule 17a-7, thereby violating Section 17(a) of the 1940 Act. With respect to the thirteen principal trades, the trades occurred between private funds advised by the Adviser in which Adviser-controlling persons owned more than 25% of the private funds, and other private clients, resulting in the Adviser acting as principal for trades involving those private funds. The SEC found that the Adviser did not provide written prior disclosure to, or receive consent from, clients that were parties to the trades, thereby violating Section 206(3) of the Advisers Act.

To settle the administrative proceeding, and without admitting or denying the SEC's findings, the Adviser consented to the SEC's censure and agreed to pay a civil penalty in the amount of $450,000.

This proceeding demonstrates that the SEC is still actively pursuing cases in this area, even where the alleged harm is relatively small and does not result in any gain to the adviser. It also demonstrates that confusion continues to exist in the market as to whether it is permissible to execute cross trades through an independent broker-dealer for a small commission, even when the price of the traded security is otherwise fair to both the buying and the selling client (although the SEC has now repeatedly indicated that this is not permissible). In this proceeding, the SEC identified broker commissions totaling only $242,000 for approximately 350 trades – meaning average markup of $690 per cross trade, none of which was retained by the Adviser – the SEC imposed a $450,000 penalty on the Adviser, with the investigation costs likely exceeding that amount.

SEC Settles with Adviser Regarding Misrepresentations of Money Market Fund Expenses

On September 30, 2020, the SEC issued an order in an administrative proceeding brought against Transamerica Asset Management, Inc. ("TAM"), a registered investment adviser, regarding TAM's alleged material misstatements and omissions to investors regarding the annual operating expenses of four TAM-managed money market funds (the "Funds").
According to the SEC, the misstatements and omissions occurred between 2016 and 2019 (the "relevant period"). In particular, the SEC alleged:

- ***Expense Caps.*** Prior to and during the relevant period, TAM's contractual expense limitations with the Funds required TAM to waive fees and/or reimburse fund expenses in an amount necessary to avoid each Fund's total operating expenses exceeding an agreed-upon expense cap (stated as a percentage of a Fund's average net assets). The Funds disclosed the contractual expense limitations and the corresponding Fund expense cap in their prospectuses, SAIs and shareholder reports.

- ***Avoiding Negative Yields.*** Prior to and during the relevant period, TAM also had voluntary contractual expense limitations with the Funds that required TAM to waive a portion of its fees and/or reimburse some fund expenses to preclude the Funds from having a negative yield. Pursuant to these contracts, TAM was entitled to recapture any such waived fees or reimbursed expenses during the ensuing three years, provided the recaptured amounts did not result in any Fund having a negative yield.

The SEC alleged that, during the relevant period, TAM recaptured from the Funds amounts that it had previously waived or reimbursed under the voluntary contractual expense limitations (the "recaptured amounts"). The SEC claimed that, in some instances, the recaptured amounts caused the Funds to exceed their expense caps (by approximately $5.3 million, in aggregate).

TAM's written policies and procedures explicitly stated that recaptured expenses were to be included within the "Other Expenses" line item in a Fund prospectus' fee table. However, throughout the relevant period, TAM did not follow these policies and procedures with respect to the recaptured amounts. Consequently, the SEC alleged, the Funds' TAM-prepared prospectuses omitted the expenses arising from the recaptured amounts from the fee tables' "Other Expenses," thereby materially misstating the expenses that investors paid when buying and holding the Funds' shares.

To settle the administrative proceeding, and without admitting or denying the SEC's findings, TAM consented to the SEC's censure and agreed to disgorge $5.3 million and to pay nearly $700,000 in prejudgment interest.

OCIE Issues Risk Alert on Cybersecurity and Safeguarding Client Accounts

On September 15, 2020, the SEC Office of Compliance Inspections and Examinations ("OCIE") issued a Risk Alert (the "Alert") titled Cybersecurity: Safeguarding Client Accounts against Credential Compromise. The Alert is based on OCIE's recent observation of growing "credential stuffing" attacks against SEC-registered investment advisers and broker-dealers ("Firms"). These attacks use compromised usernames and passwords from the dark web to access investors' accounts. The Alert encourages Firms to consider various mitigation efforts to reduce the risk of credential stuffing, particularly the use of multi-factor authentication. Although the Alert is phrased as encouragement, OCIE is suggesting what the industry standard should be for Firms to protect against these attacks, notwithstanding the fact that these attacks stem primarily from a client's behavior in re-using username/password combinations and another website's loss of these combinations.

Credential Stuffing. Credential stuffing is a unique type of cyber-attack in which the attackers first obtain lists of usernames, email addresses and corresponding passwords from the dark web (after being stolen from another website). This attack only works because many people reuse usernames and passwords. The attackers then use automated scripts to enter those names and passwords on Firm sites to attempt to gain access to investors' accounts and steal assets or information. This can affect both web-based user accounts, as well as direct network login account credentials.

Suggested Solutions. The Alert identified several Firm practices observed by OCIE that help protect against credential stuffing attacks:

- ***Update Policies and Procedures.*** Firms should regularly review and update policies and programs, including those mandated by Regulations S-P and S-ID, and should apply strong password policies. By requiring stronger passwords, it becomes more difficult to re-use passwords.

- ***Implement Multi-Factor Authentication.*** Firms can use multi-factor authentication ("MFA") to authenticate individuals logging into accounts. Adding factors to the login process will help protect against credential stuffing attacks because attackers will not have access to the additional factors needed for access. However, the Alert warned that Firms should be aware that MFA methods using mobile phones carry some risk and should communicate this fact to investors.

- ***Use CAPTCHA ("Completely Automated Public Turing test to tell Computers and Humans Apart").*** Firms can use a CAPTCHA, which requires users to prove they are human before logging in, to prevent the use of bots or automated scripts on login.

- ***Install Controls.*** Firms can apply various controls to detect and prevent credential stuffing attacks, including (i) monitoring for numerous login attempts, (ii) using firewalls to deflect credential stuffing attacks and (iii) limiting online access to fund transfers and personally identifiable information.

- ***Watch the Dark Web.*** Firms can monitor the dark web for lists of leaked user credentials, or hire a firm that monitors the web for these leaks or alerts a Firm when a client is using a username/password combination that is known to be compromised.

While not all of these measures may be appropriate for smaller Firms, all Firms should review their current practices to confirm they are doing what they can to prevent these dangerous attacks. Some of the most basic measures, like strong password requirements and use of MFA, can significantly reduce the risk of these attacks.

OCIE Issues Risk Alert on COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers

On August 12, 2020, OCIE released a Risk Alert (the "COVID-19 Alert") titled Select COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers that summarizes various COVID-19-related issues, risks and practices OCIE has observed in Firms. While there is nothing particularly novel in the COVID-19 Alert, and the issues are consistent with those in prior examinations, some of the SEC's recommendations for addressing those issues are worth noting. Much of the COVID-19 Alert is geared toward issues relating to retail investment advisers. However, there are some issues relevant to institutional investment advisers highlighted below.

Protection of Investor and Other Sensitive Information. Consistent with recent SEC-published statements and alerts, the COVID-19 Alert emphasized an adviser's responsibility to protect investors' personally identifiable information ("PII"), noting the SEC staff observed many instances of Firms requiring their personnel to utilize videoconferencing and other electronic means of communication while working remotely. While OCIE recognized the benefits of this method of communication, the COVID-19 Alert reminds advisers that these practices can create weaknesses around the procedures and controls designed to protect sensitive information, including PII. OCIE noted that these weaknesses often are attributed to "(1) remote access of networks and the use of web-based applications; (2) increased use of personally-owned devices; and (3) changes in controls over physical records, such as sensitive documents printed at remote locations and the absence of personnel at Firms' offices." In addition, OCIE noted that the increased use of electronic communication provides greater opportunity for fraudsters to use phishing and other inappropriate means to improperly access a Firm's systems and accounts.

OCIE recommended that advisers evaluate and assess their policies and procedures around these controls, paying particular attention to risks regarding system access, investor data protection and cybersecurity. In addition, OCIE encouraged Firms to specifically consider:

- Enhancements to their identity protection practices, such as by reminding investors to contact a Firm directly by telephone for any concerns about suspicious communications, and for Firms to have personnel available to answer these investor inquiries.
- Providing Firm personnel with additional trainings and reminders, and otherwise spotlighting issues, related to (i) phishing and other targeted cyberattacks, (ii) sharing information while using certain remote systems (*e.g.*, unsecure web-based video chat) (iii) encrypting documents and using password-protected systems and (4) destroying physical records at remote locations.
- Conducting heightened reviews of personnel access rights and controls as individuals take on new or expanded roles in order to maintain business operations.
- Using validated encryption technologies to protect communications and data stored on all devices, including personally owned devices.
- Ensuring that remote access servers are secured effectively and kept fully patched.
- Enhancing system access security, such as requiring the use of multifactor authentication.
- Addressing new or additional cyber-related issues related to third parties, which may also be operating remotely when accessing Firms' systems.

Supervision of Personnel. The COVID-19 Alert also highlighted an adviser's obligation to supervise and oversee its personnel, including their investment and trading activities. Recognizing the various challenges and impacts resulting from COVID-19, OCIE noted that advisers should review and consider adjusting their policies and practices regarding employee supervision to address a variety of potential complications across an adviser's business. For example, OCIE noted that Firms may wish to modify or adjust their policies and practices to address:

- Supervisors not having the same level of oversight and interaction with supervised persons when they are working remotely.
- Supervised persons making securities recommendations in market sectors that have experienced greater volatility or may have heightened risks for fraud.
- The impact of limited on-site due diligence reviews and other resource constraints associated with reviewing of third-party managers, investments and portfolio companies.
- Communications or transactions occurring outside of Firms' systems due to personnel working from remote locations and using personal devices.
- Remote oversight of trading, including reviews of affiliated, cross and aberrational trading.

Practices Relating to Fees, Expenses and Financial Transactions. OCIE noted that market volatility often has the effect of increasing financial pressures on advisers and their personnel to compensate for lost revenues and fees, which, in turn, heightens the risk for misconduct around certain fee and expense practices. OCIE highlighted certain practices that were susceptible to misconduct including, for example, advisory fee calculation errors. In the COVID-19 Alert, OCIE recommended that advisers review their fee and expense policies and procedures and consider whether these policies and procedures should be enhanced to address, among other things, validating the accuracy of (i) disclosures, (ii) fee and expense calculations and (iii) the investment valuations used.

Business Continuity. Unsurprisingly, in the COVID-19 Alert, OCIE addressed advisers' ability to operate their businesses during times of significant disruptions, such as the transitions to working from remote locations and the ability of employees to work remotely. OCIE noted that these transitions during the pandemic may raise compliance issues and other risks, including policies and procedures requiring adjustments and enhancements to address some of the unique risks and conflicts that arise in a remote-working context that are not present under "normal operating conditions" and whether (i) additional resources and/or measures for securing servers and systems are needed, (ii) the integrity of vacated facilities is maintained, (iii) relocation infrastructure and support for personnel operating from remote sites are provided and (iv) remote location data is protected. If relevant practices and approaches are not addressed in business continuity plans and/or Firms do not have built-in redundancies for key operations and key person succession plans, mission-critical services and operations may be at risk. In addition, OCIE encouraged advisers to review and revise, as appropriate, their business continuity plans and disclose to investors any material impacts a business disruption has had on the Firm's operations and business.

Moody's and Fitch Propose Changes to Methodologies for Rating Closed-End Funds' Securities

In an August 11, 2020 request for comment, Moody's Investor Service ("Moody's") proposed a number of changes to the rating methodology it employs to rate securities issued by closed-end funds. In its request for comment, Moody's stated that, if its methodology were updated as proposed, it "expect[ed] few, if any, changes to outstanding ratings for securities issued by US closed-end funds."

In an August 19, 2020 exposure draft, FitchRatings proposed various changes to its methodology to rate securities issued by closed-end funds. In its exposure draft, FitchRatings noted that its proposed changes would result in a "net effect of a 'AA' debt and preferred stock rating cap for all CEFs" and an "'A' debt and preferred stock rating cap for CEFs exposed to emerging market debt, below-investment-grade and unrated debt . . . structured securities and equity."

ROPES & GRAY ALERTS AND PODCASTS SINCE OUR JUNE-JULY UPDATE

Podcast: SEC Updates to the Accredited Investor and Qualified Institutional Buyer Definitions
October 6, 2020
In this Ropes & Gray podcast, asset management partners Melissa Bender and Marc Biamonte, and asset management counsel Jessica Marlin discussed the changes recently adopted by the SEC to modernize the definitions of an "accredited investor" in Securities Act Rules 215 and 501(a) and a "qualified institutional buyer" under Rule 144A.

Podcast: Credit Funds: Operating Side-by-Side Open- and Closed-End Private Fund Structures
September 16, 2020
In this Ropes & Gray podcast, asset management partner Jason Kolman and counsel Jessica Marlin discussed the reasons for the increase in credit managers offering both open- and closed-end funds on a side-by-side basis. Jason and Jessica also discussed the benefits and challenges of pursuing this strategy, including how to consider allocation of investment opportunities, address conflicts that may arise, and explain these products to investors.

[Upcoming Deadline for Form BE-180]
September 15, 2020
The U.S. Department of Commerce, through the Bureau of Economic Analysis (the "BEA"), requires U.S. financial services providers that had financial services transactions with foreign persons in excess of $3 million during their 2019 fiscal year to file a report on Form BE-180 (a "BE-180 Filing"). The BE-180 Filing is a five-year benchmark survey and is due September 30, 2020 for paper filers and October 30, 2020 for electronic filers. Unlike certain other filings required by the BEA, any U.S. person that is a financial services provider and that satisfies the reporting threshold is required to make a BE-180 Filing, regardless of whether the BEA has contacted such person. Accordingly, investment advisers, general partners and the funds they advise may be required to make a BE-180 Filing as a result of several common scenarios, including (i) a U.S. investment adviser receiving advisory fees from a non-U.S. fund or separate account, (ii) a U.S. general partner receiving carried interest or other performance allocation from a non-U.S. fund and (iii) a U.S. fund paying fees to non-U.S. financial service providers (such as custodians or broker dealers). This Alert discusses the reporting thresholds and practical implications for asset managers.

[Effective September 8 – New CFTC Requirement for CPOs Who Rely on the De Minimis Exemption for Private Funds]
September 3, 2020
The U.S. Commodity Futures Trading Commission ("CFTC") has amended the requirements to qualify for an exemption from registration as a commodity pool operator ("CPO") under certain CFTC Rules including Rule 4.13(a)(3), which is commonly known as the de minimis exemption for private funds (each an "Exemption"). Beginning September 8, 2020 (the "Effective Date"), a CPO who seeks to claim an Exemption will be required to represent that neither it nor any of its principals has in their backgrounds a Commodity Exchange Act ("CEA") Section 8a(2) disqualification event ("Statutory Disqualification"). Where a CPO has claimed an Exemption prior to the Effective Date, the CPO is required to represent that neither it nor any of its principals is subject to Statutory Disqualification in connection with the 2021 Exemption renewal cycle.

[SEC Modernizes the Accredited Investor Definition]
September 2, 2020
On August 26, 2020, the SEC adopted amendments to expand the definition of "accredited investor." The amendments will allow individual investors to qualify as accredited investors based on defined measures of professional knowledge, experience or certifications, rather than solely based on net worth or income. The amendments also expand the list of entities that may qualify as accredited investors. The amendments, which will become effective 60 days after publication in the Federal Register, represent a modest expansion of the definition, designed to expand access to private capital markets to institutional and individual investors with presumptively sufficient knowledge and expertise.

The SEC also adopted amendments to the definition of "qualified institutional buyer" ("QIB") in Rule 144A that expand the list of entities that qualify as QIBs. These amendments should increase the number of potential buyers of Rule 144A securities, and thereby promote capital formation by issuers conducting Rule 144A offerings.

[Podcast: COVID-19: Credit Funds: Fundraising and Restructuring in the Pandemic Environment: U.S. v. Europe]
August 20, 2020
In this Ropes & Gray podcast, asset management partners Tom Alabaster (London) and Jason Kolman (Boston), along with business restructuring partners Matt Czyzyk (London) and Matt Roose (New York), compared recent trends in the credit/distressed space throughout Europe and the U.S. in light of COVID-19. These global colleagues shared the distinctions and commonalities between both geographies in regards to (i) changes in fund terms and structures, (ii) government support and (iii) market predictions.

SEC Proposes Modernized Fund Reports and Disclosure Amendments
August 14, 2020
On August 5, 2020, the SEC unanimously proposed rule and form amendments intended to modernize the disclosure framework for mutual funds and ETFs (the "Proposals"). This Alert summarizes the key provisions of the Proposals.

The Proposals, if adopted, would modify the disclosure framework for funds registered on Form N-1A (mutual funds and ETFs) to follow a "layered" approach to fund disclosure that highlights key information for retail investors.

- For existing shareholders, the Proposals would make streamlined (3-4 page) annual and semi-annual shareholder reports the primary source of fund disclosure. Certain information now required in a fund's shareholder reports, such as the fund's financial statements, would no longer appear in these reports. Instead, this information would be made available online and delivered free of charge upon request, and filed with the SEC on a semi-annual basis on Form N-CSR.

- Funds would no longer be required to deliver an updated prospectus to existing shareholders who purchase additional shares. Instead, funds would rely on their shareholder reports to keep shareholders informed, along with (i) timely notification to shareholders of any material changes to the fund through prospectus supplements and (ii) the availability of the fund's prospectus online and on request.

- The Proposals would also amend the advertising rules for funds (including closed-end funds and business development companies.

Podcast: CFIUS Considerations for Credit Funds
August 13, 2020
In this Ropes & Gray podcast, Ama Adams, Brendan Hanifin, and Emerson Siegle discussed recent changes to the Committee on Foreign Investment in the United States ("CFIUS") review process and implications for credit funds, including jurisdictional considerations, treatment of contingent equity interests, and risk mitigation strategies.

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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