December 11, 2020

Ropes & Gray's Investment Management Update October–November 2020

Since our last IM Update, the SEC finalized rulemakings concerning the framework for fund fair valuation practices, funds' use of derivatives and fund of funds arrangements. Each of these rulemakings was the subject of a previously issued Ropes & Gray Alert:

SEC Updates Framework for Fund Fair Valuation Practices

On December 3, 2020, the SEC issued a release adopting Rule 2a-5 (the "Rule") under the 1940 Act. 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." The Rule will permit a fund's board to designate the fund's primary investment adviser to perform the fund's fair value determinations, which will be subject to board oversight and certain reporting and other requirements intended to ensure that the board receives the information it needs to oversee the investment adviser's fair value determinations.

SEC Adopts Rule 18f-4 Concerning Registered Funds' Use of Derivatives

On October 28, 2020, the SEC adopted Rule 18f-4 under the 1940 Act, which will dramatically change the regulation of the use of derivative instruments and certain related transactions by mutual funds (other than money market funds), ETFs, closed-end funds and business development companies.

SEC Adopts Changes for Fund of Funds Arrangements

On October 7, 2020, the SEC issued a release (the "Rule 12d1-4 Release") adopting new Rule 12d1-4 and making several related rule and form amendments under the 1940 Act intended to streamline and enhance the regulatory framework applicable to funds that invest in other funds ("fund of funds" arrangements). The Rule 12d1-4 Release is intended to establish "a consistent and efficient rules-based regime for the formation, operation, and oversight of fund of funds arrangements."

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

SEC Updates Auditor Independence Rule

On October 16, 2020, the SEC issued a release containing amendments to its auditor independence rule, Rule 2-01 of Regulation S-X (the "Release"). The Release follows the SEC's 2019 proposing release (and is described in this Ropes & Gray Alert). As adopted, the Release amends the definitions of "affiliate of the audit client" and "investment company complex" by adding "dual materiality" qualifiers to the common control provisions within these definitions. These definitional changes narrow the affiliates of an "entity under audit" that an auditor must monitor for relationships that can impair the auditor's independence.

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Below are key aspects of the final amendments.

BACKGROUND

Under the existing auditor independence rule, the term "**audit client**" includes any "**affiliates of the audit client**" (each, an "**AAC**"). An AAC is defined to include:

- Any entity that has control over the audit client, or over which the audit client has control, or which is under common control with the audit client; and
- When the audit client is an investment company or investment adviser, each entity in the investment company complex. The term "investment company" for these purposes includes both registered funds and private funds.

The term "**investment company complex**" ("**ICC**") includes any entity controlled by or controlling an investment adviser, as well as any entity under common control with an investment adviser if the entity (i) is an investment adviser or (ii) is engaged in the business of providing administrative, custodian, underwriting or transfer agent services to any investment company or investment adviser.

Under these definitions, entities that are under common control with an entity under audit are deemed AACs and, therefore, fall within the definition of audit client. In addition, when an audit client is an entity within an ICC, each of the entities within the definition of ICC is an AAC and similarly falls within the definition of audit client. Therefore, an auditor's lack of independence with respect to one entity within a complex corporate organization or within an ICC potentially renders the auditor ***non-independent with respect to every entity in the corporate organization or in the ICC***. Consequently, to assure its independence from an entity under audit, an auditor must devote significant compliance resources to identify those entities that fall within an audit client's ICC and that are an audit client's AAC and monitor its relationships with each of those identified entities.

The amended definitions address this compliance issue by introducing dual materiality qualifiers intended to "focus the independence analysis on those relationships or services that are more likely to pose threats to an auditor's objectivity and impartiality."

AMENDMENTS

I. Common Control and the "Affiliate of the Audit Client" Definition

The Release amends the AAC definition [Rule 2-01(f)(4)] to include a dual materiality qualifier with respect to operating companies that are under common control.[1] When applying the amended AAC definition to operating companies, including portfolio companies, the AAC definition narrows the auditor independence analysis to include only some entities under common control ("sister entities") with the entity under audit. Specifically, as amended, the AAC definition includes an entity that is under common control with an entity under audit only "when the entity and the entity under audit are each material to the controlling entity."[2]

[1] The Release states "the term 'operating company' . . . refers to entities that are not investment companies, investment advisers, or sponsors, and the term 'portfolio company' refers to an operating company that has investment companies or unregistered funds in private equity structures among its investors."
[2] The Release notes that the proposing release's materiality qualifier would be consistent, in part, with the definition of "affiliate" used by the American Institute of Certified Public Accountants ("AICPA") in its ethics and independence rules. Consequently, the Release states, "[a]uditors therefore have experience in applying a materiality standard when identifying affiliates, whether applying the independence rules of the Commission or the AICPA."

II. Investment Company Complex Definition

A. Entity Under Audit and Investment Companies

When the entity under audit is an investment company or investment adviser, the amended AAC definition [Rule 2-01(f)(4)(v)] directs an auditor to apply the amended ICC definition [Rule 2-01(f)(14)], discussed below, to identify entities that are AACs.

An "investment company," for these purposes, includes registered investment companies and entities that would be investment companies but for the exclusions provided by Section 3(c) of the 1940 Act, including those in Sections 3(c)(1) and 3(c)(7) that apply to certain privately offered funds.

B. Common Control with an Investment Company or Investment Adviser

The Release amends the common control prong of the ICC definition with a dual materiality qualifier, consistent with the modification to the common control provision adopted in the AAC definition, above. Specifically, any entity that is under common control with an investment company/investment adviser under audit (*i.e.*, a sister entity) is within the ICC definition only when (i) the sister entity and the entity under audit are both material to the controlling entity or (ii) the sister entity is engaged in the business of providing administrative, custodian, underwriting or transfer agent services to the investment company or investment adviser with which it is under common control (the "Services").

C. Portfolio Companies Controlled by Sister Investment Companies

When an investment company is the entity under audit, the ICC may include a portfolio company controlled by a sister investment company (*i.e.*, an investment company with the same investment adviser as the investment company under audit).

The amended ICC definition applies a new dual materiality qualifier to this fact pattern, as well. Specifically, when an investment company is the entity under audit, a portfolio company controlled by a sister investment company is within the ICC definition only when the sister investment company and its controlled portfolio company are both material to the shared investment adviser (or when the controlled portfolio company provides Services to the investment company or investment adviser with which it is under common control).

When an investment company is the entity under audit, the amended ICC definition does not change auditor independence analyses with respect to investment companies that ***share an investment adviser***. The auditor would still be required to monitor, as part of its independence analyses, investment companies that share the same investment adviser as an investment company under audit.

D. Investment Companies Advised by an Affiliate Investment Adviser

As described above in section B, an investment adviser under common control with the investment adviser to an investment company under audit would be included in the ICC definition only if the affiliate investment adviser and the investment company under audit are both material to the controlling entity (or when the controlled portfolio company provides Services to the investment company or investment adviser with which it is under common control). If an affiliate investment adviser satisfies this dual materiality qualifier, the investment companies advised by the affiliate investment adviser are included as part of the ICC in evaluating the auditor's independence, regardless of the materiality to the control entity of the investment companies advised by the affiliate investment adviser to the control entity.

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E. Significant Influence Added to the ICC Definition

As described above in section A, when the entity under audit is an investment company or an investment adviser, the AAC definition directs an auditor to apply the amended ICC definition to identify entities that are AACs. To align the ICC definition with the existing "significant influence" analysis that applies to operating companies in the existing AAC definition, the Release adds a "significant influence" prong to the ICC definition. Therefore, the amended ICC definition is expanded to also include any entity (i) over which an investment company/investment adviser that is the entity under audit has significant influence, unless the entity is not material to the entity under audit and (ii) that has significant influence over an investment company/investment adviser that is the entity under audit, unless the entity under audit is not material to the entity that has significant influence.

III. Rule 2-01(b) Remains Effective

For an entity under audit, the amendments are likely to narrow the number of common control affiliates to which an auditor must devote compliance resources to monitor its relationships.

Nonetheless, despite the Release's amendments, the SEC stated that the auditor's non-audit services to, and relationships with, sister entities that are no longer deemed AACs as a result of the amended definitions remain subject to the general independence standard set forth in Rule 2-01(b).[3] Thus, Rule 2-01(b) continues to apply to those relationships with, and services by, an auditor to sister entities that are no longer covered by the *per se* prohibitions within Rule 2-01(c) as a result of the amendments.[4]

IV. Effective Date

The amendments to Rule 2-01 will become effective on June 10, 2021.

SEC Staff Solicits Comments on Custody of Digital Assets

On November 9, 2020, the staff of the SEC's Division of Investment Management, in consultation with the SEC's FinHub[5] staff, issued a statement (the "Staff Statement") following the publication of a no-action letter on October 26, 2020 (the "Letter") by the Wyoming Division of Banking (the "WDB"). The Letter addressed whether the WDB would pursue an enforcement action against Two Ocean Trust LLC ("Two Ocean"), a Wyoming-chartered public trust company, if Two Ocean held itself out to the public as a "qualified custodian," under the Advisers Act and Rule 206(4)-2 thereunder (the "Custody Rule"), in providing custodial services for both digital and traditional assets.

Background. In general, the Custody Rule requires SEC-registered investment advisers that have custody of client funds or securities to maintain them with a "qualified custodian," as that term is defined in the rule. Paragraph (d)(6) of the Custody Rule defines qualified custodian to include a bank, and Section 202(a)(2) of the Advisers Act defines a bank to include:

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[3] Rule 2-01(b) provides, in part: "The Commission will not recognize an accountant as independent . . . if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement."
[4] Rule 2-01(c) contains a non-exhaustive list of relationships that render an auditor non-independent of an audit client. The relationships include financial, employment, and business relationships, as well as relationships where an auditor provides certain non-audit services to an audit client.
[5] FinHub is the SEC's Strategic Hub for Innovation and Financial Technology and acts as a "resource for information about the SEC's views and actions in the FinTech space."

> [a] trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a *substantial portion* of the business of which consists of receiving deposits *or exercising fiduciary powers similar to those permitted to national banks* under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations . . . . (Emphasis added).

In the Letter, the WDB noted that the question of whether Two Ocean was a bank under the Advisers Act's definition turned, in part, on whether Two Ocean was "exercising fiduciary powers similar to those permitted to national banks." The Letter recognized that this is a "complicated question, one that has elicited interest and confusion in the digital asset community," and stated that (i) the Office of the Comptroller of the Currency (the "OCC"), the federal regulator of national banks, generally does not consider custody services to be a fiduciary activity and (ii) the SEC has historically refrained from issuing no-action relief to trust companies seeking clarification of the definition of "bank" under the federal securities laws. However, the WDB noted that existing OCC guidance is to the effect that "custody is not generally a fiduciary activity for national banks in the absence of discretion (again, such as providing custody in conjunction with investment management-type activities)."

Conducting its own analysis, the WDB concluded that a non-depository trust company "which is providing *discretion-based* fiduciary services, including investment management and adviser-type activities, is exercising 'fiduciary powers similar to those permitted to national banks.'" (Emphasis added). Based on the description of the discretionary services that Two Ocean provides to its customers, the WDB determined in the Letter that Two Ocean is exercising fiduciary powers similar to those permitted to national banks. In analyzing whether Two Ocean met the definition of a bank, the WDB also considered a number of other factors, including Two Ocean's representation that the discretionary services it provided are a substantial portion of its business and critical to its competitive position. After considering each factor, the WDB concluded that Two Ocean falls within Section 202(a)(2)'s definition of a bank and may serve as a qualified custodian of both digital and traditional asset classes under the Custody Rule.

The Statement. In the Statement, the SEC staff noted that the Letter addresses issues of both federal and state law, and that the Letter expressly stated that it "should not be construed to represent the views of the SEC or any other regulatory agency." In a footnote in the Statement, the SEC staff also observed that the SEC and the SEC staff are not bound by statements or views expressed by state regulators' interpretations of the Custody Rule.

The Statement noted that "[d]etermining who qualifies as a qualified custodian is a complicated, and facts and circumstances based, analysis given the critical role qualified custodians play within this framework by safeguarding the client assets entrusted to investment advisers." Moreover, the Statement observed, the SEC has limited the types of financial institutions permitted to serve as qualified custodians to entities that have "key characteristics, including being subject to extensive regulation and oversight, that help to ensure that client assets are adequately safeguarded."

After noting that the SEC staff has engaged extensively with investment advisers, custodians and other market participants that are interested in the application of the Custody Rule to digital assets, the Statement solicited feedback on issues related to the development of SEC staff recommendations to amend the Custody Rule, including feedback on the following questions:

- Do state-chartered trust companies possess characteristics similar to those of the types of financial institutions the SEC identified as qualified custodians? If yes, to what extent?
- In what ways are custodial services that are provided by state-chartered trust companies equivalent to those provided by banks, broker-dealers, and futures commission merchants? In what ways do they differ? Would there be any gaps in – or enhancements to – protection of advisory client assets as a result of a state-chartered trust company serving as qualified custodian of digital assets or other types of client assets?

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The Statement noted that all comments will be "made publicly available to further a dialogue on these issues as the SEC staff prepares recommendations for amendments to the Custody Rule for Commission consideration."

SEC Withdraws No-Action Letters Related to Fund of Funds Arrangements and to ETFs

The Rule 12d1-4 Release stated that no-action letters applicable to specific circumstances related to Section 12(d)(1) of the 1940 Act would be withdrawn one year from Rule 12d1-4's effective date (*i.e.*, one year from January 19, 2021). On October 28, 2020, the SEC staff published an Information Update identifying twelve no-action letters concerning fund of funds arrangements that will be withdrawn on January 19, 2022.

In the SEC release adopting Rule 6c-11 under the 1940 Act (the "ETF Rule") (described in this Ropes & Gray Alert), the SEC stated that effective one year following the effective date of the ETF Rule (*i.e.*, one year from December 23, 2019), it would rescind those portions of its prior ETF exemptive orders that granted relief related to the formation and operation of an ETF. On November 6, 2020, the SEC staff published an Information Update identifying four no-action letters, each of which related to a prior ETF exemptive order, that will be withdrawn on December 23, 2020.

SEC Adopts Amendments to Business Development Companies' MD&A and Financial Disclosures

On November 19, 2020, the SEC issued a release (the "S-K Release") adopting amendments to Regulation S-K that are intended to eliminate duplicative disclosures and modernize and enhance Management's Discussion & Analysis of Financial Condition and Results of Operations ("MD&A") disclosures for the benefit of investors, while simplifying compliance efforts for registrants. A separate Ropes & Gray Alert discusses the S-K Release's most important changes, including the following changes to Regulation S-K (i) eliminating Item 301 (selected financial data), (ii) streamlining Item 302 (supplementary financial information) and (iii) restructuring and expanding Item 303 (MD&A). Once effective, these Regulation S-K changes will impact disclosure by business development companies ("BDCs") in Form N-2 and in Form 10-K.

REGULATORY PRIORITIES CORNER

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

OCIE Provides Overview of Common Investment Adviser Compliance Program Deficiencies

On November 19, 2020, the SEC Office of Compliance Inspections and Examinations ("OCIE") issued a Risk Alert (the "Alert") titled OCIE Observations: Investment Adviser Compliance Programs in which OCIE provided an overview of notable compliance issues identified by OCIE related to Rule 206(4)-7 (the "Compliance Rule") under the Advisers Act. The Alert noted that deficiencies related to the Compliance Rule have been among the most common cited by OCIE in its exams and categorized the deficiencies into the following categories:

1. Inadequate compliance resources;
2. Insufficient authority of Chief Compliance Officers;
3. Annual review deficiencies;
4. Implementing actions required by written policies and procedures;
5. Maintaining accurate and complete information in policies and procedures; and
6. Maintaining or establishing reasonably designed written policies and procedures.

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OCIE Issues Risk Alert Regarding Advisers Operating from Numerous Branch Offices

On November 9, 2020, OCIE issued a Risk Alert (the "Branch Alert") titled Observations from OCIE's Examinations of Investment Advisers: Supervision, Compliance and Multiple Branch Offices in which OCIE summarized the results of a series of examinations that focused on investment adviser firms operating from numerous branch offices (defined as any office that is not the investment adviser's "principal office and place of business").

The Branch Alert first summarized a broad number of deficiencies that were not unique to advisers with branch offices but to which such advisers may be more susceptible. For example, OCIE staff had observed advisers that (i) had custody of their clients' assets due to a variety of practices, including instances where the adviser commingled its assets with those of its clients and (ii) did not have policies and procedures that included identifying and remediating instances where undisclosed fees were charged to clients. The Branch Office Alert also summarized deficiencies relevant to branch offices, including the following:

- Compliance policies and procedures that referenced entities no longer in existence and personnel that had changed roles and responsibilities, were not applied consistently in all branch offices, or were inadequately implemented or not enforced.
- Inadequate oversight and supervision of supervised persons when an investment adviser oversaw branch office personnel with higher-risk profiles, including instances related to the identification and documentation of disciplinary events.
- Lack of oversight over fee billing practices in cases where billing was not centralized.

The Branch Alert also cited practices that OCIE believes could assist an investment adviser in designing and implementing its policies and procedures as they relate to branch offices. For example:

- Adopting and implementing written compliance policies and procedures that (i) were applicable to all office locations and all supervised persons, (ii) included elements that took into account aspects of individual branch offices and (iii) specifically addressed compliance practices necessary for effective branch office oversight.
- Centralizing processes to monitor and to approve the personal trading of all supervised persons located in all office locations.
- Performing compliance testing or periodic reviews of key activities at all branch offices at least annually.
- Establishing procedures to check for prior disciplinary events when hiring personnel and periodically confirming the accuracy of disclosure regarding such information.
- Requiring compliance training for branch office employees.

Bank Sanctioned for Failing to Register Common Trust Funds and Collective Trust Funds

On September 30, 2020, the SEC issued a settlement order ending enforcement proceedings against Great Plains Trust Company, Inc. ("Great Plains"), a state-chartered trust company, regarding the offer and sale of investment units in nine common trust funds ("CTFs") to non-retirement investors and nine collective trust funds for retirement investors ("Retirement CTFs") (collectively, the CTFs and the Retirement CTFs, the "Trust Funds"). The SEC alleged that, from at least 2015, Great Plains operated the Trust Funds as unregistered investment companies and offered the Trust Funds' securities without an exemption from the Securities Act's registration requirements.

According to the SEC, since the Trust Funds' respective inceptions until 2019, Great Plains (i) hired an affiliated investment adviser ("IAF"), an SEC-registered investment adviser, to provide investment advisory services to the Trust Funds and (ii) was responsible for the oversight of IAF. However, the SEC alleged, from the Trust Funds' inception and through 2018, Great Plains' oversight of IAF was minimal. While Great Plains' board received reporting materials from IAF each quarter, and met annually with an IAF representative to discuss the Trust Funds, the SEC asserted that the board's review of the quarterly reports was cursory and the annual meetings with an IAF representative involved receiving information instead of having an active role in managing the Trust Funds. The SEC further claimed that, from 2015 to 2019, Great Plains advertised the Trust Funds to the public as an investment option.

With respect to the Retirement CTFs, Great Plains sought to rely on the exclusion from the definition of investment company in Section 3(c)(11) of the 1940 Act. To rely on Section 3(c)(11), among other things, the Retirement CTFs must be "maintained by" a bank. According to SEC staff interpretations, the "maintained by" provision required that Great Plains exercise "substantial investment responsibility" managing the Retirement CTFs. The SEC alleged that Great Plains failed to satisfy the "maintained by" provision because of its complete reliance on IAF.

With respect to the CTFs, Great Plains sought to rely on the exclusion from the definition of investment company in Section 3(c)(3) of the 1940 Act. To rely on Section 3(c)(3), among other things, the CTFs must be "maintained by" a bank and, with limited exceptions, cannot be advertised or offered for sale to the general public. Here, again, the SEC alleged that Great Plains failed to satisfy the "maintained by" provision because of its complete reliance on IAF. In addition, the SEC also asserted that Great Plains' advertisement of the CTFs meant that Great Plains could not rely on Section 3(c)(3) of the 1940 Act.

The SEC asserted that Great Plains effected the offer and sale of securities in the Trust Funds without filing any registration statements to register the securities under the Securities Act. Because the Trust Funds were investment companies, the SEC claimed that the Trust Funds' securities were ineligible to qualify for the registration exemption under Section 3(a)(2) of the Securities Act (exempting securities issued by a common trust fund that is excluded from the definition of the term "investment company" under Section 3(c)(3) of the 1940 Act) or any other Securities Act registration exemption.

In settlement of the proceedings, and without admitting or denying the SEC's findings, Great Plains agreed to pay a civil monetary penalty of $300,000.

SEC Commissioner Hester Peirce issued a public dissent from the SEC's settlement order, basing her dissent on the fact that the SEC has never issued any guidance on what is required to satisfy the "maintained by" requirement in Sections 3(c)(3) and (11) of the 1940 Act. Commissioner Peirce noted that, instead, the only interpretive guidance is derived from a 1980 release summarizing the views of the SEC staff, and that the existing SEC guidance "leaves an enormous amount of uncertainty as to precisely what constitutes 'exercis[ing] substantial investment responsibility,' especially in those instances where the bank employs an investment adviser to assist it in managing the trust's investments."

ROPES & GRAY ALERTS AND PODCASTS SINCE OUR AUGUST-SEPTEMBER UPDATE

SEC Updates Framework for Fund Fair Valuation Practices
December 9, 2020
On December 3, 2020, the SEC issued a release adopting Rule 2a-5 (the "Rule") under the 1940 Act. 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." The Rule will permit a fund's board to designate the fund's primary investment adviser to perform the fund's fair value determinations, which will be subject to board oversight and certain reporting and other requirements intended to ensure that the board receives the information it needs to oversee the investment adviser's fair value determinations.

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[SEC Adopts Rules Permitting Electronic Signature Authorizations]
November 19, 2020
The SEC adopted final rules that permit a signatory to an SEC filing to electronically sign a document that authenticates his or her typed signature in the filing. The rules were adopted without notice and comment because the SEC concluded the changes were simply administrative and did not affect any substantive rights. They apply to filings under the Securities Act, the Exchange Act and the 1940 Act.

[SEC Adopts Rules Affecting Private Offerings]
November 13, 2020
The SEC adopted new rules under the title "Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets." The concept release from which this rulemaking arose signaled the potential for a grand harmonization of the various private offering exemptions. This rulemaking achieved important, but far more modest, objectives. The new rules tackle the nuts and bolts of various aspects of private offerings – integration, general solicitation and accredited investor verification, among others – and seek to reduce sources of regulatory friction. The result should help improve the efficiency of the private markets and provide more certainty for issuers that access them.

[Two Major Bank Regulatory Final Rules with Asset Management Impact Now in Effect: (i) FRB's Control Framework and (ii) Volcker Rule Covered Funds Provisions]
November 12, 2020
Two final rules affecting the scope of bank involvement in the asset management industry went into effect September 30, 2020. The first revises the Federal Reserve Board's rules regarding the definition of control in the Bank Holding Company Act to provide greater clarity as to what constitutes "controlling influence" of a given investment. The second revises the Volcker Rule's covered funds provisions to remove various activities from the purview of the Volcker Rule's restrictions on banks' involvement in the private fund space.

Together, these rules could facilitate partnerships within the asset management industry, including between banks and fintech companies and banks and other asset managers, by redefining non-controlling relationships and encouraging bank participation in the private fund industry. Each is discussed briefly in this Alert.

[Podcast: What's Happening Now: Current Developments for ETFs as the ETF Rule's Compliance Date Approaches]
November 11, 2020
In this inaugural episode of our ETF podcast series, Ropes & Gray asset management attorneys Paulita Pike, Jeremy Smith, Brian McCabe, and Ed Baer discussed recent developments in the ETF industry, as well as sharing some insights to help sponsors prepare for the December compliance date for the ETF Rule.

[CFTC Finalizes Revised Rules on Position Limits for Futures and Swaps]
November 9, 2020
In a three-to-two vote on October 15, 2020, the Commodity Futures Trading Commission finalized revised speculative position limit rules (the "Final Rule"), wrapping up a ten-year endeavor. The Final Rule establishes new and amended spot month speculative position limits for certain physical and cash-settled commodity futures and options contracts and economically equivalent swaps. In addition, the Final Rule revises certain exemptions from speculative position limits, including for bona fide hedges, and adds new exemptions. Asset managers and other market participants should analyze the Final Rule's impact to determine whether the revised limits will affect their hedging and trading activities and whether they will be required to aggregate commodity derivative positions with accounts, investment vehicles or other entities under their ownership or control, which might include portfolio companies.

Podcast: Single Asset Recapitalizations: Considerations for Both Fund Sponsors and Investors
November 9, 2020
In this Ropes & Gray podcast, asset management partners Isabel Dische, Peter Laybourn and Adam Dobson, and tax partner Dan Kolb discussed single asset recapitalization transactions. They provided a brief explanation of what these deals are, followed by a discussion of the typical structure for these deals and certain considerations fund sponsors will want to keep in mind, as well as certain key tax considerations.

SEC Adopts Rule 18f-4 Concerning Registered Funds' Use of Derivatives
November 6, 2020
On October 28, 2020, the SEC adopted Rule 18f-4 (the "Rule"), which will dramatically change the regulation of the use of derivative instruments and certain related transactions by mutual funds (other than money market funds), exchange-traded funds, closed-end funds and business development companies. The adopting release (the "Release") follows a proposal of the Rule in December 2015 and a re-proposal of the Rule in November 2019. Both proposals received extensive comments.

DOL Finalizes Rule on ESG Considerations for ERISA Plan Investments
November 2, 2020
On October 30, 2020, the U.S. Department of Labor (the "DOL") finalized its amendments to the investment duties regulation under ERISA (the "Final Regulation"), which sets out the standards for plan fiduciaries selecting investments and provides guideposts for the consideration of non-financial objectives such as environmental, social and governance ("ESG") aims. The overarching principle of the Final Regulation, which is now the DOL's definitive guidance on the topic, is that when making decisions on investments and investment courses of action, an ERISA plan fiduciary must focus solely on the plan's financial risks and returns and the interests of plan participants and beneficiaries. In response to the vociferous opposition the proposed rule generated from various stakeholders including asset managers, plan sponsors and individual plan participants, the DOL eliminated all ESG-specific references in the Final Regulation and clarified that there is no *per se* prohibition on selecting or considering investment strategies that incorporate ESG, as long as they are based solely on material economic considerations.

Podcast: Cryptocurrency Custody Considerations
November 2, 2020
In this Ropes & Gray podcast, asset management partner Melissa Bender and counsel Ed Baer and Charlie Humphreville discussed the various considerations that an investor should take into account when engaging a custodian to hold cryptocurrencies or digital assets such as Bitcoin or Ether.

BDCs and New Fund of Funds Arrangements
October 23, 2020
The SEC adopted new Rule 12d1-4 (the Rule) under the 1940 Act intended to streamline the regulation of registered funds that invest in other registered funds and BDCs ("fund of funds" arrangements). Among other things, the Rule increases the limits now applicable to registered funds' investments in BDCs.

SEC Proposes Exemption from Broker Registration for Private Placement Finders
October 19, 2020
The SEC recently proposed an exemption from the broker-dealer registration requirements of Section 15(a) of the Exchange Act for "finders" who help issuers raise capital from accredited investors in private placements. If adopted, the proposed exemption would provide a clear path for a natural person who is not registered as, or associated with, a broker-dealer to receive transaction-based compensation in exchange for certain capital-raising activities, and would end decades of uncertainty surrounding the regulatory status of so-called "finders." Such an exemption could prove useful for private fund sponsors and for other companies that seek to raise capital through a person who is not a broker-dealer registered with the SEC.

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[Podcast: Minding the Gap in LIBOR Transition Between Commercial Loans and Interest Rate Hedges]
October 19, 2020
In this Ropes & Gray podcast, asset management attorneys Egan Cammack and Andy Des Rault discussed the LIBOR transition and the key differences between the approaches that are currently being taken in the U.S. loan and OTC derivatives markets.

[SEC Adopts Changes for Fund of Funds Arrangements]
October 14, 2020
On October 7, 2020, the SEC issued a release (the "Rule 12d1-4 Release") adopting new Rule 12d1-4 and making several related rule and form amendments under the 1940 Act intended to streamline and enhance the regulatory framework applicable to funds that invest in fund of funds arrangements. The Rule 12d1-4 Release noted that the current combination of statutory exemptions, SEC rules and exemptive orders has created a regime in which substantially similar fund of funds arrangements are subject to different conditions. The Rule 12d1-4 Release is intended to replace the existing regime with "a consistent and efficient rules-based regime for the formation, operation, and oversight of fund of funds arrangements."

While Rule 12d1-4, as adopted, differs substantially from the version of the rule proposed by the SEC in 2018 (the "Proposed Rule"), and does not include the Proposed Rule's widely criticized redemption limits, many existing fund of funds arrangements may nonetheless require modifications.

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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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