Febrauary 11, 2022

Ropes & Gray's Investment Management Update December 2021 – January 2022

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

SEC Proposes Updates to Form PF

On January 26, 2022, the SEC issued a release proposing amendments to Form PF (the "Proposal"). The Proposal includes (i) new current reporting requirements for large hedge fund advisers[1] and advisers to private equity funds, obligating such advisers to report a number of specified events to the SEC within one business day of their occurrence, (ii) a lowered threshold for large private equity adviser reporting, (iii) certain revised reporting questions for private equity funds and (iv) enhanced large liquidity fund adviser reporting.

We provided a detailed summary and our commentary in a recent Ropes & Gray Alert.

SEC's Regulatory Agenda Criticized by Republican Commissioners

In the spring and fall of each year, the SEC updates its regulatory agenda. The items listed in the agenda "reflect only the priorities of the Chair of the [SEC] and do not necessarily reflect the view and priorities of any individual Commissioner." The SEC's fall regulatory agenda, reflecting Chair Gensler's priorities, was published in December 2021. Within days of publication, Commissioners Peirce and Roisman issued a joint public statement titled *Falling Further Back – Statement on Chair Gensler's Regulatory Agenda*, which included their criticisms of the agenda, including criticisms relevant to the investment management community.

Rule 17a-7

With respect to Rule 17a-7 (the rule permitting certain cross trades by registered investment companies), the commissioners' joint statement said:

> [T]he Agenda abandons the much-needed effort to amend Investment Company Act Rule 17a-7, which governs cross-trading by investment companies. In December 2020, with our support, the Commission adopted a new rule addressing investment company valuation practices. Commenters cautioned us that the rule's definition of "readily available market quotations" risked disrupting investment companies' ability to trade fixed income securities, which do not often have readily available market quotations, with affiliated funds. To assuage these concerns, the Division of Investment Management issued a request for comment "on ways to enhance the regulatory regime governing investment company cross trading." Commenters have been nearly unanimous in conveying the importance of funds' ability to trade fixed-income securities across affiliated funds. Many commenters also have recommended conditions to ensure the protection of fund investors. The Commission's Spring 2021 rulemaking agenda stated that the "Division [of Investment Management] is considering recommending that the Commission propose amendments to rule 17a-7[.]" Yet now, despite the demonstrated need for such amendments, the Agenda simply drops the planned rewrite of Rule 17a-7. As a consequence, we will not fix a problem of which we are aware – the impending inability of funds to cross-trade fixed-income securities – and we will miss a chance to modernize an outdated rule.

[1] Form PF defines a large hedge fund adviser to mean an adviser that, collectively with its related persons, has at least $1.5 billion in hedge fund assets under management. Form PF Instruction 3 (p. 2).

Digital Assets

At present, the SEC effectively prohibits registered investment companies from investing directly in digital assets, most notably, cryptocurrencies. Chair Gensler has previously recognized the variability of regulatory oversight of digital assets and cautioned about its potential pitfalls. He testified in May 2021 before a U.S. House of Representatives sub-committee that:

> There are many challenges and gaps for investor protection in these markets. Tokens currently on the market that are securities may be offered, sold, and traded in non-compliance with the federal securities laws. Furthermore, none of the exchanges trading crypto tokens has registered yet as an exchange with the SEC. Altogether, this has led to substantially less investor protection than in our traditional securities markets, and to correspondingly greater opportunities for fraud and manipulation.

In their joint statement, Commissioners Peirce and Roisman said:

> The Agenda also comes up short on furthering the investor protection prong of our mission by failing to provide more clarity on digital assets. First, the Agenda makes no mention of any regulation with respect to digital assets. In the last several years, this sector has grown in size, complexity, diversity, and investor interest. Rather than taking on the difficult task of formulating rules to allow investors and regulated entities to interact with digital assets, including digital asset securities, the Agenda – through its silence on crypto – signals that the market can expect continued questions around the application of our securities laws to this area of increasing investor interest. Such silence emboldens fraudsters and hinders conscientious participants who want to comply with the law.

Commissioner Roisman submitted his resignation from the SEC (indicating his intent to step down by the end of January 2022) approximately one week after Commissioner Peirce and he issued their joint statement.

SEC Issues Holding Foreign Companies Accountable Act Rules

On December 2, 2021, the SEC issued a release (the "Release") containing final rules and form amendments (collectively, the "Rules") to implement the disclosure and submission requirements of the Holding Foreign Companies Accountable Act (the "HFCA Act"), which became law on December 18, 2020.[2] The Rules, which became effective on January 10, 2022, provide for a process by which the SEC will identify a "Commission-Identified Issuer," most of which are expected to be issuers based in China, and potentially prohibit the trading of these issuers' securities on a national securities exchange or in the over-the-counter market.

- Commission-Identified Issuers are issuers that have filed an annual report containing an audit report issued by a foreign public accounting firm that the Public Company Accounting Oversight Board (the "PCAOB") cannot inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction (each such issuer, a "PCAOB-Identified Firm").[3]

- The Rules provide that a Commission-Identified Issuer must submit documentation to the SEC establishing that the issuer is not owned or controlled by a governmental entity in the foreign jurisdiction. This requirement does not apply to a Commission-Identified Issuer that is so owned or controlled.

[2] Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).
[3] More specifically, a PCAOB-Identified Firm is a registered public accounting firm that has a branch or office that (i) is located in a foreign jurisdiction and (ii) the PCAOB has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction.

ATTORNEY ADVERTISING

- If an issuer remains a Commission-Identified Issuer for three consecutive years, the SEC will prohibit the trading of that issuer's securities on a national securities exchange or over the counter. The earliest such a prohibition can apply is in 2024.
- Separately, additional disclosure requirements apply to any Commission-Identified Issuer that is a "foreign issuer," as defined under Exchange Act Rule 3b-4 (each a "Commission-Identified Foreign Issuer").

Designation as a Commission-Identified Issuer

The Release describes the process by which the SEC will provisionally identify a registrant as a Commission-Identified Issuer and by which a registrant that is provisionally identified as such may contest the designation with the SEC. The SEC's provisional identification of an issuer as a Commission-Identified Issuer will be conclusive if not contested by the issuer within 15 business days. The SEC will publicly disclose a list of provisionally and conclusively identified Commission-Identified Issuers on its website.

The SEC will begin to identify registrants as Commission-Identified Issuers on its website after registrants file their annual reports for 2021.

Submission Requirements and Disclosure Requirements

The Rules finalize amendments to Forms 10-K, 20-F, 40-F and N-CSR[4] to implement "submission requirements" and "disclosure requirements."

The earliest that the SEC can identify a Commission-Identified Issuer will be after a registrant files its annual report for 2021 (in which the public accounting firm that audited the financial statements is identified). This means that, if a registrant is identified as a Commission-Identified Issuer based on its annual report filing made in 2022 for the fiscal year ended December 31, 2021, the registrant will be required to comply with the submission requirements (described below) and, if applicable, the disclosure requirements (described below) in its annual report covering the fiscal year ended December 31, 2022, that the registrant is required to file in 2023. Thereafter, the applicable submission requirements and disclosure requirements continue for every year's annual report covering a period in which the registrant remains a Commission-Identified Issuer.

Submission Requirements. Once a registrant is identified as a Commission-Identified Issuer, the registrant is required to submit to the SEC through EDGAR, on or before the due date of each annual report that covers a period in which it is a Commission-Identified Issuer, documentation establishing that the issuer is not owned or controlled by a governmental entity in the foreign jurisdiction of the PCAOB-Identified Firm. Commission-Identified Issuers are permitted to determine the appropriate documentation to submit in response to the requirement, based on their organizational structure and other registrant-specific factors. This submission will be made publicly available on EDGAR. A Commission-Identified Issuer that is owned or controlled by a foreign governmental entity is not required to make this submission.

Disclosure Requirements. Additional disclosure requirements apply in the case of any Commission-Identified Foreign Issuer. Specifically, a Commission-Identified Foreign Issuer is required to make the following disclosures in its annual report.

[4] The Release notes, based on recent Form N-CEN filings, no registered investment company reported retaining a foreign public accounting firm for the preparation of the company's financial statements. Therefore, the Release states, based on this data and SEC staff's experience, no registered investment companies will be directly affected by the Rules' requirements.

ATTORNEY ADVERTISING

- That, during the period covered by the annual report, a PCAOB-Identified Firm prepared the audit report for the issuer;
- The percentage of the shares of the issuer owned by governmental entities in the foreign jurisdiction in which the issuer is incorporated or otherwise organized;
- Whether governmental entities in the relevant foreign jurisdiction in which the PCAOB-Identified Firm is located have a controlling financial interest in the issuer;
- The name of each official of the Chinese Communist Party (the "CCP") who is a member of the board of directors of the issuer or the operating entity with respect to the issuer; and
- Whether the articles of incorporation of the issuer (or equivalent organizing document) contain any charter of the CCP, including the text of any such charter.

Separately, the Rules make clear that a Commission-Identified Foreign Issuer must look through a variable interest entity ("VIE") or any similar structure that results in additional foreign entities being consolidated in the financial statements of the registrant, as well as provide disclosure about the operating company or companies in the relevant jurisdiction. Thus, any Commission-Identified Foreign Issuer that uses a VIE or other similar structure must provide the required disclosures for itself and its consolidated foreign operating entities.

Trading Bans

The HFCA Act requires the SEC to prohibit the trading on a national securities exchange or through any other method that is within the jurisdiction of the SEC to regulate, including through over-the-counter trading, the securities of certain Commission-Identified Issuers (a "trading prohibition"). Specifically, the HFCA Act requires the following:

- A Commission-Identified Issuer that is determined to be a Commission-Identified Issuer for three consecutive years will be subject to a trading ban (an "initial trading prohibition").[5]
- The SEC will end the initial trading prohibition with respect to an issuer if the issuer certifies to the SEC that it "has retained a registered public accounting firm that the [PCAOB] has inspected" to the satisfaction of the SEC (the "Required Certification").
- The SEC will impose an additional trading prohibition for a minimum of five years (a "subsequent trading prohibition") if an issuer formerly subject to an initial trading prohibition is again determined to be a Commission-Identified Issuer.
- The SEC will end the subsequent trading prohibition if, after the end of the five-year period, the issuer makes the Required Certification to the SEC.

[5] As noted above, the earliest that SEC can identify Commission-Identified Issuers will be after registrants file their annual reports for 2021 in 2022. The earliest an initial trading prohibition would apply is 2024, after an issuer has been a Commission-Identified Issuer for three consecutive years (2022, 2023 and 2024).

ATTORNEY ADVERTISING

The Release describes the process by which the SEC will impose and terminate trading prohibitions, which includes the following:

- The SEC will publicly disclose on its website a list of Commission-Identified Issues, the number of consecutive years an issuer has been a Commission-Identified Issuer, and the application of any prior trading prohibition to an issuer.
- Each initial and subsequent trading prohibition will take effect on the fourth business day after the order imposing the trading prohibition is published by the SEC.
- To make the Required Certification necessary to terminate an initial or subsequent trading prohibition, an issuer must file financial statements that include an audit report signed by a non-PCAOB-Identified Firm.
- Once the SEC receives a Required Certification from an issuer subject to a trading prohibition and verifies that the issuer has in fact filed financial statements that include an audit report signed by a non-PCAOB-Identified Firm, it will publish an order terminating the trading prohibition as soon as practical.
- The termination of a trading prohibition will take effect on the next business day after the order terminating the trading prohibition is published by the SEC.

REGULATORY PRIORITIES CORNER

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

Chair Gensler on Cybersecurity and Privacy Practices

On January 24, 2022, at Northwestern Pritzker School of Law's Annual Securities Regulation Institute, SEC Chair Gary Gensler delivered an address titled "Cybersecurity and Securities Laws." Chair Gensler stated that he had asked the SEC staff to make recommendations for the SEC's consideration regarding strengthening registered funds, investment advisers and broker-dealers' "cybersecurity hygiene and incident reporting, taking into consideration guidance issued by [the Cybersecurity and Infrastructure Security Agency (CISA)] and others." Such reforms, he stated, "could reduce the risk that these registrants couldn't maintain critical operational capability during a significant cybersecurity incident" and that these registrants "could give clients and investors better information with which to make decisions, create incentives to improve cyber hygiene, and provide the [SEC] with more insight into intermediaries' cyber risks."

Chair Gensler also reported that he had asked the SEC staff to consider recommendations around how the SEC might further address cybersecurity risk that comes from service providers, noting the critical role that those service providers often play within the financial sector. He explained that measures in this area could include requiring certain registrants to identify service providers that could pose such risks or holding certain registrants accountable for service providers' cybersecurity measures with respect to protecting against inappropriate access and investor information.

Chair Gensler also spoke regarding data privacy practices by registered funds, investment advisers and broker-dealers. He noted that the SEC had adopted Regulation S-P, which required those registered entities to protect customer records and information, in the wake of the enactment of the Gramm-Leach-Bliley Act of 1999. More than 20 years since Regulation S-P was adopted ("an eternity in the cybersecurity world"), he said, there may be opportunities to modernize and expand Regulation S-P. Chair Gensler reported that he had asked the SEC staff for recommendations about how customers and clients "receive notifications about cyber events when their data has been accessed, such as their personally identifiable information" and that those recommendations could include a proposal to amend the timing and substance of the notifications currently required under Regulation S-P.

ATTORNEY ADVERTISING

Staff Statement Regarding Form CRS Disclosures

The SEC's Standards of Conduct Implementation Committee (the "Committee") is comprised of staff from the Division of Trading and Markets, the Division of Investment Management, the Division of Examinations and the Office of Investor Education and Advocacy. On December 17, 2021, the Committee published its *Staff Statement Regarding Form CRS Disclosures* (the "Statement"). Most of the Statement is devoted to categorizing and describing "areas where compliance improvements appear to be needed." The following summarizes the Committee's observations. As noted in the Statement, firms may wish to review their relationship summaries in light of the Statement's observations to "confirm they address each item consistent with the form's instructions."

Use of Technical Language, Including Disclaimers. Firms must avoid legal jargon and highly technical business terms unless they are clearly explained. Additionally, firms are not permitted to include disclosures in their relationship summaries other than the disclosures that are required or permitted. Disclaimers and hedging language are neither required nor permitted.

Omission of Required Information. Firms must generally include all required headings, conversation starters and prescribed language. Firms may only omit or modify a required disclosure or conversation starter in limited circumstances, where it is inapplicable to the firm's business or the specific wording required by the form's instructions would be inaccurate with respect to the firm.

Reliance on Proposed, Rather than Final, Instructions. Some firms' relationship summaries omitted required information, modified prescribed language, or failed to follow the prescribed order or formatting requirements because firms appeared to rely on the proposed instructions to Form CRS (or portions thereof). Firms should confirm the disclosures in their relationship summaries comply with the adopted final instructions to Form CRS.

Lack of Specific References to More Detailed Information. Firms must include specific references to more detailed information in the relationship summary sections describing the firm's services, fees and costs and conflicts of interests. At a minimum, these references must include the same or equivalent information to that required by Form ADV, Part 2A and Regulation Best Interest, as applicable. Some relationship summaries did not include these required references.

Shortcomings in Descriptions of Relationships and Services, Fees, Costs, Conflicts and Standard of Conduct. Some relationship summaries did not include required information or included impermissible, extraneous or unresponsive disclosures. These shortcomings were most commonly observed in the following disclosures:

- Monitoring. Some relationship summaries did not explain how frequently the firm evaluates client investments or whether the firm imposes any material limitations on its monitoring services.

- Investment Authority. Some relationship summaries did not include a description of the firm's investment authority that would allow retail investors to understand who—the firm or the retail investor—ultimately makes the investment decision regarding the purchase or sale of investments in the types of accounts and services offered.

- Limited Investment Offerings. Some relationship summaries did not expressly state whether the firm has any product limitations, while others acknowledged limitations but did not describe such limitations, as required.

- Principal Fees and Costs. Some relationship summaries included only vague fee descriptions and/or did not appear to sufficiently address the frequency with which those fees are assessed and billed.

- Wrap Fee Program Offerings and Fees. Some firms' relationship summaries did not describe the services included as part of the wrap fee program. Other relationship summaries did not appear to adequately describe the fees and costs of the programs.

- Extraneous Disclosures Regarding Standards of Conduct. Some firms referred to themselves as "fiduciaries" or stated that they are subject to a "fiduciary duty" when describing the applicable standard of conduct instead of using the prescribed language in Item 3 of Form CRS.

- Firm and Financial Professional Compensation Arrangements and Conflicts of Interests. Some relationship summaries did not explain the incentives created by a particular conflict of interest or used vague phrasing to suggest the firm "may" have a particular conflict. Other relationship summaries explained how the firm addresses or mitigates its conflicts, rather than focusing on disclosing the conflicts.

Modification and/or Supplementation of the Disciplinary History Disclosure. Firms omitted or modified headings or the conversation starters and/or provided extraneous language explaining their response (beyond the permissible yes or no response) in their relationship summaries. Other firms, when responding to the disciplinary history heading, added descriptive or other qualitative or quantitative language that could obfuscate or otherwise minimize the disciplinary history.

Issues with Prominently Displaying Relationship Summary on Firm Website. In some instances, the SEC staff was unable to locate a relationship summary on a firm's website or was able to locate the relationship summary only after an extensive search of the firm's website.

Issues with Description of Affiliate Relationships. Affiliated firms that decide to prepare a single relationship summary must present the brokerage and investment advisory information with equal prominence, and clearly distinguish and facilitate comparison of the two types of services. Some firms were unable to clearly articulate affiliated structures in their relationship summaries.

Use of Marketing Language. Some firms' relationship summaries included marketing language, touted the firms' abilities, or used superlatives or similar descriptors.

Boilerplate. Some relationship summaries were not tailored to the particular firm's services, fees, relationships or conflicts. Instead, boilerplate language used in these relationship summaries seems to have been based on one or more widely shared relationship summary templates without appropriate modification.

SEC Staff Issues Statement on LIBOR Transition – Key Considerations for Market Participants

The publication of the one-week and two-month U.S. dollar LIBOR maturities and non-U.S. dollar maturities ceased after December 31, 2021, and the publication of remaining U.S. dollar LIBOR maturities will end after June 30, 2023.

On December 7, 2021, the SEC staff published a statement (the "Statement") to remind investment professionals of their "obligations when recommending LIBOR-linked securities and to remind companies and issuers of asset-backed securities of their disclosure obligations related to the LIBOR transition." The Statement included a section titled "Registered Investment Advisers and Funds," which is summarized below.

- The Statement said that investment advisers should consider (i) whether any LIBOR-linked investments they have recommended that clients purchase or continue to hold remain in the best interest of those clients and (ii) whether those investments or related contracts have robust fallback language providing for an alternative rate when LIBOR is no longer published or ceases to be representative of its underlying market.

- The Statement said that registered funds and business development companies should remain mindful of their disclosure obligations with respect to LIBOR. If a fund invests a significant portion of its assets in LIBOR-linked investments, it should disclose any principal risks related to the potential cessation of LIBOR, as well as the anticipated effects on the investments, including effects concerning volatility, value or liquidity.

- Because some valuation measurements use LIBOR as an input, the Statement reported, these measurements are likely to be affected by the transition to an alternative reference rate. Therefore, investment advisers, funds and fund boards should be mindful of any valuation risk and impacts to valuation inputs and assumptions arising from LIBOR's discontinuation.

- The Statement reminded investment advisers and funds that the transition away from LIBOR introduces operational complexities that may require market participants (including investment advisers, funds and their key service providers) to make significant changes to their operational processes and IT systems. Therefore, according to the Statement, prior coordination with market participants regarding changes to the terms of each LIBOR-linked investment held will be essential to navigate the transition.

SEC Staff Issues Risk Alert on Advisers that Manage Private Funds

On January 27, 2022, the SEC Division of Examinations (the "Division") released a Risk Alert titled *Observations from Examinations of Private Fund Advisers* (the "Alert"), which details certain compliance issues observed by the Division staff in examinations of registered investment advisers that manage private funds ("private fund advisers").[6] The observations in the Alert were drawn from over five years of examinations of private fund advisers by the Division staff and are intended to assist private fund advisers in reviewing and enhancing their compliance programs and also to provide investors with information concerning private fund adviser deficiencies. The following is a summary of the compliance issues detailed in the Alert.

Conduct Inconsistent with Disclosures

Limited Partner Advisory Committees ("LPACs")

- Advisers did not follow practices described in fund disclosures regarding the use of LPACs, including by:
  - Failing to bring conflicts to the LPACs for review and consent despite fund disclosures to the contrary.
  - Failing to obtain consent from the LPAC for conflicted transactions until after the transaction had occurred despite disclosures to the contrary.
  - Obtaining consent from the LPAC for conflicted transactions after providing incomplete information.

Post-Commitment Period Fund-Level Management Fees

- Advisers did not follow practices described in fund disclosures regarding the calculating of management fees, resulting in investors paying more in management fees than they were required to pay under the terms of the limited partnership agreement (the "LPA"). For example, advisers did not reduce the cost basis of investments when calculating their management fee after selling, writing off, writing down or otherwise disposing of a portion of an investment.

[6] The Alert cites the Division's prior risk alerts *Observations from Examinations of Investment Advisers Managing Private Funds* (June 23, 2020) and *The Five Most Frequent Compliance Topics* (Feb. 17, 2017) (for all advisers).

- Advisers used broad, undefined terms in the LPA (such as "impaired," "permanently impaired," "written down" or "permanently written down") but did not implement policies and procedures to apply these terms consistently when calculating management fees.

LPA Liquidation and Fund Extension Terms

- Advisers extended the terms of funds without obtaining required approvals and/or complying with LPA liquidation provisions. Such practices resulted in excess management fees being charged.

Investment Strategy

- Advisers did not comply with investment limitations in fund disclosures, including by:
  - Implementing investment strategies that diverged materially from what was described in fund disclosures; or
  - Causing funds to exceed leverage limitations described in fund disclosures.

Recycling Practices

- Advisers did not accurately describe "recycling practices" (contractual provisions that allow a fund to add realized investment proceeds back to the capital commitments of investors) or omitted material information relating to recycling practices from disclosures.

Adviser Personnel

- Advisers failed to adhere to the LPA "key person" process after the departure of adviser principals.
- Advisers did not provide accurate information to investors reflecting the status of key previously employed portfolio managers.

Performance and Marketing Disclosures

Track Record Information

- Advisers provided inaccurate or misleading disclosures about how benchmarks were used or how the portfolio for a track record was constructed.
- Advisers only marketed a favorable or cherry-picked track record of one fund or a subset.
- Advisers did not disclose material information about the material impact of leverage on fund performance.
- Advisers utilized stale performance information in presentations to potential investors.
- Advisers utilized track records that did not accurately reflect fees and expenses.

Performance Calculations

- Advisers presented inaccurate performance calculations to investors.

- Advisers used inaccurate underlying data when calculating track records. This incorrect underlying data included:
  - Data from incorrect time periods.
  - Mischaracterization of return of capital distributions as dividends from portfolio companies.
  - Use of projected rather than actual performance.

Predecessor Performance

- Advisers did not maintain books and records supporting predecessor performance at other advisers.
- Advisers marketed incomplete predecessor track records.
- Advisers marketed performance that persons at the adviser were not primarily responsible for achieving at the prior adviser.

Awards or Other Claims

- Advisers marketed awards received but failed to make full disclosures about the awards, such as:
  - The criteria for obtaining them.
  - The amount of any fee paid by the adviser to receive them.
  - Any amounts paid to the grantor of the awards for the adviser's right to promote its receipt of the awards.
- Advisers incorrectly claimed their investments were "supported" or "overseen" by the SEC or the U.S. government.

Due Diligence

Investigation into Underlying Investments or Funds

- Advisers failed to perform reasonable investigations of investments (including of the compliance and internal controls of the underlying investments or private funds in which they invested) in accordance with the advisers' policies and procedures.
- Advisers failed to perform adequate due diligence on important service providers, including alternative data providers and placement agents.

Policies and Procedures Regarding Due Diligence

- Advisers did not maintain reasonably designed policies and procedures regarding the due diligence of investments. For example, Advisers outlined due diligence processes in fund disclosures, but did not maintain due diligence policies and procedures that were tailored to their advisory business.

ATTORNEY ADVERTISING

Hedge Clauses

- Advisers included potentially misleading hedge clauses in documents that purported to waive or limit their Advisers Act fiduciary duty except for certain exceptions (such as a non-appealable judicial finding of gross negligence, willful misconduct or fraud).

ROPES & GRAY ALERTS AND PODCASTS SINCE OUR OCTOBER—NOVEMBER UPDATE

SEC Proposes Updates to Form PF
February 3, 2022
On January 26, 2022, the SEC issued a release proposing amendments to Form PF (the "Proposal"). The Proposal includes (i) new current reporting requirements for large hedge fund advisers and advisers to private equity funds, obligating such advisers to report a number of specified events to the SEC within one business day of their occurrence, (ii) a lowered threshold for large private equity adviser reporting, (iii) certain revised reporting questions for private equity funds and (iv) enhanced large liquidity fund adviser reporting.

Podcast: Private Fund Regulatory Update: Recent Developments Regarding Management Fee Calculation and Electronic Communications
January 24, 2022
In this Ropes & Gray podcast, asset management partners Joel Wattenbarger and Jason Brown discussed the regulatory consequences of recent enforcement actions involving management fee calculation and offset issues, and their respective electronic communication recordkeeping requirements. The Private Fund Regulatory Update is a series of podcasts discussing key issues of interest and updates in the regulatory and compliance space, focusing in particular on private fund managers.

Podcast: How Would an ESG-Friendly DOL Final Rule Change the Investment Marketplace for ERISA Plans?
January 18, 2022
In this latest installment of Ropes & Gray's podcast series addressing emerging issues for fiduciaries of 401(k) and 403(b) plans to consider as part of their litigation risk management strategy, ERISA and benefits partner Josh Lichtenstein, counsel Sharon Remmer, and associate Jon Reinstein continued the discussion from our prior episode about the Department of Labor's proposed regulation pertaining to ERISA investment duties and environmental, social, and governance ("ESG") considerations by focusing on (i) how the rule might change the market for retirement plan investing and (ii) what impact it could have on plan investment committees and asset managers who manage plan assets.

Podcast: Perspectives on the 2021 Secondaries Market and What May Lie Ahead in 2022
January 12, 2022
In this Ropes & Gray podcast, asset management partners Emily Brown, Isabel Dische, Adam Dobson, Lindsey Goldstein and Vincent Ip, and tax partner Dan Kolb shared key trends and developments from the 2021 secondaries market and what secondary buyers, sellers and fund sponsors can expect in 2022.

Upcoming Deadline for Form SHC – Holdings of Foreign Securities
January 10, 2022
Recently, the Department of the Treasury released the final instructions for the reporting requirements of the Treasury International Capital Benchmark Form SHC ("Form SHC") for the 2021 calendar year. Form SHC is filed every five years with the Federal Reserve Bank of New York. Data as of December 31, 2021 must be submitted no later than March 4, 2022.

ATTORNEY ADVERTISING

SEC Proposes Money Market Funds Reforms
January 10, 2022
On December 15, 2021, the SEC issued a release proposing amendments to certain rules that govern money market funds under the 1940 Act. The proposed changes to Rule 2a-7, new reporting requirements and form changes (the "Proposals") are intended to address problems experienced by certain money market funds in connection with the economic shock at the onset of the COVID-19 pandemic. This Alert provides both an overview and a detailed discussion of the changes the Proposals would effect if adopted in their current form.

Private Fund Cybersecurity Requirements Changing Significantly in 2022
January 5, 2022
Private funds that are excluded from the definition of "investment company" under sections 3(c)(1) or 3(c)(7) of the 1940 Act will face significantly stricter cybersecurity requirements under the FTC's revised Safeguards Rule, which comes into full effect as of December 9, 2022. The FTC's updated Safeguards Rule breaks new ground for the FTC by requiring specific security controls and accountability measures for consumer information expressly modeled on the New York Department of Financial Services' cybersecurity rule. For private fund entities covered by the Safeguards Rule, these changes will require prompt review, since many of the newly required controls will take time to implement. Among other things, the Safeguards Rule will now require multifactor authentication for any individual accessing information systems that store customer information (or compensating controls), encryption of all customer information both in transit and at rest (again with the option of alternative compensating controls), and updates to record retention procedures for customer information.

ATTORNEY ADVERTISING

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

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

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

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

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

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

Jeremy Liabo
Chicago, IL
+1 312 845 1326
jeremy.liabo@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

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

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

Chune Loong Lum
Hong Kong
+852 3664 6318
chuneloong.lum@ropesgray.com

ropesgray.com

This alert should not be construed as legal advice or a legal opinion on any specific facts or circumstances. This alert is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The contents are intended for general informational purposes only, and you are urged to consult your attorney concerning any particular situation and any specific legal question you may have. © 2019 Ropes & Gray LLP

ATTORNEY ADVERTISING