April 12, 2023

Ropes & Gray's Investment Management Update February – March 2023

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

SEC Division of Examinations Announces 2023 Examination Priorities

In February, the SEC's Division of Examinations published its 2023 Examination Priorities, which include, among other priorities, the following:

Notable New and Significant Focus Areas – Compliance with Recently Adopted Rules Under the 1940 Act

- Rule 18f-4 (the "Derivatives Rule"). If a fund relies on the Derivatives Rule, the Division will:
    - assess whether registered investment companies (other than money market funds), as well as business development companies, have adopted and implemented policies and procedures reasonably designed to manage the funds' derivatives risks and to prevent violations of the Derivatives Rule pursuant to Rule 38a-1; and
    - review for compliance with the Derivatives Rule, including with respect to the adoption and implementation of a derivatives risk management program, board oversight, and whether disclosures concerning the fund's use of derivatives are incomplete, inaccurate or potentially misleading.
- Rule 2a-5 (the "Fair Value Rule"). The Division will:
    - assess funds' and fund boards' compliance with the Fair Value Rule's new requirements for determining fair value, implementing board oversight duties, setting recordkeeping and reporting requirements, and permitting a fund's board to designate a valuation designee to perform fair value determinations subject to oversight by the board; and
    - review whether adjustments have been made to valuation methodologies, compliance policies and procedures, governance practices, service provider oversight, and/or reporting and recordkeeping.

Focus Areas for Registered Investment Companies, Including Mutual Funds and ETFs (In General)

- Perennial areas, including an assessment of registered investment companies' compliance programs and governance practices, disclosures to investors, and accuracy of reporting to the SEC.
- Whether investment advisers to registered investment companies meet their fiduciary obligations, particularly with respect to their receipt of compensation for services or other material payments made by registered investment companies and other sources.
- As part of its review of registered investment companies' compliance programs and governance practices, a board's processes for assessing and approving advisory and other fund fees, particularly for funds with weaker performance relative to their peers.
- The effectiveness of funds' derivatives risk management programs and liquidity risk management programs, as applicable.
- Funds with specific characteristics, including:
    - turnkey funds, to review their operations and assess the effectiveness of their compliance programs;
    - mutual funds that converted to ETFs, to assess governance and disclosures associated with the conversion to an ETF;

  - non-transparent ETFs, to assess compliance with the conditions and other material terms of their exemptive relief;
  - loan-focused funds, such as leveraged loan funds and funds focused on collateralized loan obligations, for liquidity concerns and to review whether the funds have been significantly impacted by, and have adapted to, elevated interest rates; and
  - funds that are part of medium and small fund complexes that have experienced excessive staff attrition, to focus on whether such attrition has affected the funds' controls and operations.
- Monitoring the proliferation of volatility-linked and single-stock ETFs, potentially reviewing these funds' disclosures, marketing, conflicts, and compliance with portfolio management disclosures.
- Environmental, Social, and Governance (ESG) Investing.
  - Continued focus on ESG-related advisory services and fund offerings, including whether the funds are operating in the manner set forth in their disclosures.
  - Assessing whether ESG products are appropriately labeled and whether recommendations of such products for retail investors are made in investors' best interests.

Information Security and Operational Resiliency

- Continued review of broker-dealers and investment advisers' practices to prevent interruptions to mission-critical services and to protect investor information, records, and assets.
- Cybersecurity remains a perennial focus area for registrants, including broker-dealers, investment advisers, investment companies, and transfer agents.

Crypto Assets and Emerging Financial Technologies

- Continued focus on the offer, sale, or recommendation of, advice regarding and trading in crypto or crypto-related assets.
- Broker-dealers and investment advisers offering new products and services or employing new practices, including practices involving technological and online solutions to satisfy compliance and marketing requirements and to service investor accounts (*e.g.*, online brokerage services, internet advisers, and automated investment tools and trading platforms, including "robo-advisers").

SEC Issues Guidance on Registered Funds and Differential Advisory Fee Waivers

On February 2, 2023, the SEC's Division of Investment Management issued a Bulletin to remind open-end/mutual funds, their boards, and their legal counsel about the implications under the 1940 Act of fee waiver and expense reimbursement arrangements that "result in different advisory fees being charged to different share classes of the same fund" ("differential advisory fee waivers").

Background. The Bulletin noted that many mutual funds operate as multi-class funds in reliance on Rule 18f-3 under the 1940 Act. The rule provides a limited exemption from Sections 18(f)(1) and 18(i) to permit an open-end fund to issue multiple classes of shares, provided certain conditions are met.

- Rule 18f-3 requires, among other things, certain differences in the expenses, rights, and obligations of different classes, permits certain other differences among classes, and prescribes how income and expenses must be allocated across classes.
- Rule 18f-3(b) permits expenses to be waived or reimbursed by a fund's investment adviser, underwriter, or any other provider of services to the fund.

The Bulletin noted that, in the 1995 Rule 18f-3 adopting release,[1] the SEC was explicit that (i) although permitted under Rule 18f-3, waivers and reimbursements were not intended to become "*de facto* modifications of the fees provided for in advisory or other contracts so as to provide a means for cross-subsidization between classes," and (ii) a fund board "must monitor the use of waivers or reimbursements to guard against cross-subsidization between classes" consistent with its "oversight of the class system and its independent fiduciary obligations to each class."

Differential Advisory Fee Waivers. The Bulletin stated that one of the principles underlying Rule 18f-3 is that the advisory fees charged to shareholders of all classes of a mutual fund should generally be the same percentage amount. The reasoning is that shareholders of the same mutual fund all receive the same advisory services, regardless of the class of shares in which they are invested. The Bulletin stated that differential advisory fee waivers that are "long-term or permanent, or effectively long-term or permanent, and are not substantiated with a clearly defined temporal purpose, could . . . present a means for cross-subsidization between classes in contravention of Rule 18f-3."

The Bulletin also advised the following:

- Whether a differential advisory fee waiver constitutes a prohibited means of cross-subsidization between classes is a facts-and-circumstances determination that the mutual fund's board, in consultation with the investment adviser and legal counsel, should consider making and documenting after considering all relevant factors.
- As an example, a fund's board may be able to conclude that a long-term waiver of an advisory fee for one class of shares, but not other classes of shares, does not provide a prohibited cross subsidization if the board finds that:
    - shareholders in the waived class pay fees to the adviser at the investing fund level in a funds-of-funds structure for advisory services, and
    - such fees, when added to the advisory fees that are paid by the waived class (after giving effect to the waiver), are at least equal to the amount of advisory fees paid by the other classes, such that the waiver for the waived class is demonstrably not being subsidized by other classes.

In general, the Bulletin stated that, if a fund has differential advisory fee waivers in place, its board may wish to consider "whether such waivers present a means for cross-subsidization, whether the steps they are taking to monitor such waivers to guard against cross-subsidization are (and continue to be) effective, and/or whether alternative fee arrangements may be appropriate." A related point is that the fund should consider the extent to which the board's consideration of these issues under Rule 18f-3 should be disclosed to the fund's shareholders.

SEC Issues Statement Regarding Actively Managed ETF Risk Legend

On March 29, 2023, the staff of the Division of Investment Management issued a statement (the "Statement") applicable to sponsors that operate actively managed ETFs that do not provide daily portfolio transparency ("non-transparent ETFs") in reliance on exemptive orders granted by the SEC.

Under the terms of these orders, "unless otherwise requested by the staff of the [SEC]," each non-transparent ETF is required to include in its prospectus and on its website and any marketing materials a risk legend ("Risk Legend") that highlights the differences between the non-transparent ETF and fully transparent actively managed ETFs, as well as certain costs and risks unique to non-transparent ETFs.

The Statement noted that the SEC staff is now aware of space limitations in digital advertisements (*e.g.*, small banner ads) that make it impracticable to use the Risk Legend as worded and formatted in the exemptive orders. Therefore, in

[1] *See* Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares; Disclosure by Multiple Class and Master-Feeder Funds; Class Voting on Distribution Plans, Rel. No. IC-20915 (Feb. 23, 1995).

the Statement, the Division staff requested that, in digital advertisements, non-transparent ETFs use either the text and formatting of the Risk Legend or the following condensed text and formatting in relying on the exemptive orders:

> **This ETF is different from traditional ETFs – traditional ETFs tell the public what assets they hold each day; this ETF will not.** This may **create additional risks.** For example, since this ETF provides less information to traders, they **may charge you more money** to trade this ETF's shares. Also, the price you pay to buy or sell ETF shares on an exchange **may not match the value** of the ETF's portfolio. These **risks may be even greater in bad or uncertain markets.** See the ETF prospectus for more information.

MiFID II No-Action Letter Expiring July 3, 2023

In Ropes & Gray's August 2022 IM Update, we described a July 2022 speech by William Birdthistle, Director of the SEC Division of Investment Management, in which Director Birdthistle noted that, with MiFID II's advent in January 2018, the Division staff provided three no-action letters, including a temporary no-action letter stating that the SEC staff would not recommend enforcement action if a broker-dealer provides research services that constitute investment advice under Section 202(a)(11) of the Advisers Act to an investment adviser subject to EU MiFID II regulation (directly or by contract) (each, a "MiFID II Adviser"). This no-action letter (the "SIFMA Letter") permits a broker-dealer to be compensated for providing research to a MiFID II Adviser without the payments being deemed to be "special compensation" under Section 202(a)(11) merely because the payments are made in a manner required by MiFID II.

In his speech, Director Birdthistle announced that the Division did not intend to extend the temporary no-action position in the SIFMA Letter beyond its current expiration date on July 3, 2023.

In late 2022, SIFMA submitted a memorandum to the Division staff explaining the need for continued MiFID II relief. Among other things, the memorandum requested a further extension of the SIFMA Letter. However, as of this date, the Division staff has not provided an extension. Thus, the SIFMA Letter is scheduled to expire on July 3, 2023 and, after this date, broker-dealers will no longer be able to rely on the SIFMA Letter.

REGULATORY PRIORITIES CORNER

The following brief update exemplifies certain trends and areas of current focus of relevant regulatory authorities.

Director William Birdthistle's Remarks at ICI Conference

The Director of the SEC's Division of Investment Management, William Birdthistle, delivered the keynote remarks on March 20, 2023, the first full day of the ICI's annual investment management conference (the full text is available here). In his introductory remarks, Director Birdthistle noted that there were "three trends" on which the Division is focused, and that he would discuss these trends and offer his thoughts "on how several of the Division's recent rulemakings could address these coming developments and the risks they could pose to investors and the market at large."

The Pattern and Pace of Technological Advancement. Director Birdthistle noted that the Division has seen an "accelerating pace of technological advancement and complexity in the asset management industry with respect to how advisers offer their advisory services." As a consequence, the Division is devoting attention to the importance of asset managers' responsibilities in light of certain technological capabilities, "as a complement to more traditional areas of regulatory focus, such as conflicts-of-interest management and effective disclosure." He noted that:

- Despite technological advances and their attendant risks, at present, no SEC regulations require firms explicitly to adopt and implement comprehensive cybersecurity programs. To address these concerns, in February 2022, the SEC proposed cybersecurity risk management rules for investment advisers and registered funds (discussed in this Ropes & Gray Alert). Under the proposals, advisers and funds would be required "to take steps to mitigate

and disclose cyber security risks, to enhance adviser and fund disclosures of cyber security incidents, and to report significant cybersecurity incidents to the SEC."

- On March 15, 2023, days before his address, the SEC proposed amendments to Regulation S-P (discussed in this Ropes & Gray Alert). The proposed amendments would require registered funds and investment advisers to adopt written policies and procedures for incident response programs that address unauthorized access to or use of customer information, as well as requiring timely notification to individuals affected by an information security incident.
- On February 15, 2023, the SEC issued a release that would redesignate and amend the existing custody rule as Rule 223-1 (the "safeguarding rule") under the Advisers Act (discussed in this Ropes & Gray Alert). The proposals are "designed, in part, to address many new technological advancements in custody," including the use of blockchain technology as a method to record ownership and transfer assets.

Demographic Changes. Director Birdthistle discussed the second of the three trends on which the Division is focused. He noted one of the "biggest shifts that we will experience in our national population over the coming decade" is the continuing wave of "retirements within the Baby Boomer generation" and that "all Baby Boomers will be 65 or older by 2030."

Moreover, Director Birdthistle observed, as one American cohort advances into retirement, "we will welcome another into the workforce, and those new employees will be starting to invest for their futures." Consequently, the Division is acutely focused on ensuring that investors have the "highest quality disclosure available to make informed investment decisions," and the "seismic change in the generational makeup of the investing public" presents a timely opportunity to consider disclosure modernization. He noted that:

- In October 2022, the SEC adopted amendments to the requirements for annual and semi-annual shareholder reports provided by mutual funds and ETFs (discussed in this Ropes & Gray Alert). These streamlined reports "will be much shorter than before (with further detail available online), will highlight key information, and will facilitate comparisons amongst different products." Director Birdthistle encouraged the industry to engage the Division staff with any questions well in advance of the compliance date for these final rules in 2024.
- The Division's work on improving fund disclosure will also continue through the SEC's May 2022 release containing proposed changes to the Names Rule, Rule 35d-1 under the 1940 Act (discussed in this Ropes & Gray Alert). The proposed changes would require more funds to adopt an 80 percent investment policy by extending that requirement to any fund name with terms suggesting that the fund focuses on investments that have (or whose issuers have) particular characteristics.
- The Division is also "observant of demographic trends within the asset management industry itself." Director Birdthistle highlighted the work of the SEC's Office of Minority and Women Inclusion ("OMWI"), which invites regulated entities every two years to conduct and submit voluntary self-assessments of their diversity policies and practices. Last year, OWMI published a Diversity Assessment Report, and the results of the report "revealed a disappointingly low [nine percent] response rate." He encouraged firms to consider submitting survey data to OMWI.
- On a "related note," the Division published a staff FAQ in October 2022 regarding whether, consistent with its fiduciary duty, an investment adviser may consider diversity, equity, and inclusion ("DEI") factors when recommending other investment advisers to or selecting other advisers for its clients. The FAQ concluded that, provided that the use of DEI factors is consistent with a client's objectives, the scope of the relationship, and the adviser's disclosures, then an adviser may consider a variety of factors, including DEI factors, in such a recommendation (discussed in this Ropes & Gray Alert).

Market Growth and Outsourcing. The third trend on which the Division is focused is the rapid growth in both the asset management market and the number and type of underlying products. Director Birdthistle noted that, in response to growth in demand, "advisers are providing more types of services, offering a wider variety of investment products," while experiencing downward competitive pressure on fees. However, "[u]nbeknownst to some clients, one type of solution might involve the adviser engaging with several service providers: from model providers to software companies to compliance professionals." As a consequence, he noted:

- Many clients may be surprised to know the extent to which third-party service providers are involved in the provision of advisory services and "in some cases, clients may not even be aware that a service provider is serving certain functions, as advisory agreements typically represent or imply that the adviser will perform all necessary functions related to its advisory services."
- Outsourcing of the administration of records or compliance functions for personal trading, may involve a service provider "gaining access to a client's sensitive personally identifiable information, the mishandling of which could expose clients to identity theft and other harms."
- Engaging an index provider or subadviser may benefit both the adviser and its clients. However, the risk of client harm exists "when an adviser outsources to a service providers functions that are necessary to the provision of advisory services without appropriate advisory oversight."
- To address these trends and their related risks to investors, in November 2022, the SEC proposed the outsourcing rule (Rule 206(4)-11) (discussed in this Ropes & Gray Alert). At its core, the proposal would require "due diligence prior to engaging a service provider and ongoing monitoring of outsourcing arrangements with service providers." The growing prevalence of such arrangements "warrants enhanced focus by both advisers and the [SEC] to ensure that clients receive the benefits and protections afforded by advisers' fiduciary obligations."

Observations. Director Birdthistle discussed many of the SEC's proposals during the last year that, if adopted, would have a substantial impact on registered funds and their advisers. However, he did not mention the SEC's (i) November 2022 release, *Open-End Fund Liquidity Risk Management Programs and Swing Pricing* (discussed in this Ropes & Gray Alert), (ii) May 2022 release, *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about ESG Investment Practices* (discussed in this Ropes & Gray Alert), and (iii) December 2021 release, *Money Market Fund Reforms* (discussed in this Ropes & Gray Alert).

ICI Conference: What Can be Expected from EXAMS

On March 22, 2023, the closing day of the ICI Conference described above, Vanessa L. Horton, Associate Regional Director, SEC Division of Examinations, spoke as part of a panel titled, "Expecting the Unexpected: Looking Backward and Forward at the EXAMS and Enforcement Divisions." According to a press report, Ms. Horton provided her thoughts about what funds should expect from the Division of Examinations:

- The Division of Examinations staff will be specifically looking at board compliance with the Fair Value Rule, which had a compliance date in September 2022. Ms. Horton stated that the Division will be "looking to assess fund board compliance with Rule 2a-5 and the requirements for fair valuation implementation of board oversight duties" and looking to see "whether adjustments have been made to valuation methodologies, governance practices and governance oversight."
- In addition to the Fair Value Rule, the Division staff will assess board oversight of the Derivatives Rule, which had a compliance date in August 2022. Among other things, the staff will closely scrutinize board meeting minutes to ensure boards were not issuing "rubber stamp approvals" over things such as third-party service providers, as well as scrutinizing whether (i) compliance teams were ensuring appropriate board oversight of derivatives risk management programs under the Derivatives Rule, and (ii) disclosures by funds that use derivatives were incomplete, inaccurate or potentially misleading.

SEC Claims that Mutual Fund Share Class Selection Violated Adviser's Duty to Seek Best Execution

In a February 27, 2023 order the ("Order"), the SEC announced the settlement of an administrative proceeding against two affiliated registered investment advisers, Huntleigh Advisors, Inc. ("Huntleigh") and Datatex Investment Services, Inc. (together with Huntleigh, the "Advisers"). According to the SEC, for a seven-year period ending in 2022:

1. The Advisers advised clients to purchase or hold mutual fund share classes that charged Rule 12b-1 fees, notwithstanding the fact that lower-cost share classes of those same funds were available to those clients.
2. The Rule 12b-1 fees were paid to Huntleigh Securities Corp. ("HSC"), an affiliate broker-dealer of the Advisers that, in most cases, would not have collected the fees if the Advisers' advisory clients had been invested in the available lower-cost share classes.
3. The Advisers disclosed in their advisory contracts that they or their affiliates "may directly or indirectly receive Rule 12b-1 distribution fees, which will be in addition to the management fees and normal brokerage fees."
4. In their advisory contracts, the Advisers agreed to provide "continuous investment management" for clients in accordance with (i) the clients' objectives and express written guidelines, and (ii) the Advisers' investment strategy set forth in their Brochures, including investing and re-investing assets.

The SEC alleged that the Advisers did not disclose either the existence of a conflict of interest or all material facts regarding the conflict of interest that arose when they invested advisory clients in a share class that would generate Rule 12b-1 fee revenues for HSC (and/or its registered representatives) while a share class of the same fund was available that would not provide HSC with the Rule 12b-1 fees.

The SEC also alleged that the Advisers breached their fiduciary duty of care when (i) they failed to seek best execution by causing advisory clients to invest in mutual fund share classes that charged Rule 12b-1 fees when share classes of the same funds were available to the clients that presented a more favorable value at the time of the transactions, and (ii) failed to evaluate whether it was in the clients' best interest to hold Rule 12b-1 fee-paying share classes on a continuing basis when lower cost share classes of the same fund were available.

For the purpose of settling the administrative proceedings and without admitting or denying the SEC's findings (which included other actions not described here that amounted to violations of the Advisers Act and rules thereunder), the Advisers agreed to be censured and to pay approximately $900,000, representing disgorgement, prejudgment interest, and a civil penalty.

Commissioners Dissent. Commissioners Peirce and Uyeda issued a joint dissenting statement criticizing the Order's finding that mutual fund share class selection implicates an adviser's duty to seek best execution. The dissent stated that there "is no legal authority cited in the Commission Order for finding that mutual fund share class selection implicates an investment adviser's duty to seek best execution" and that "the duty to seek best execution is inapplicable to purchases of mutual fund shares" where shares are always purchased at NAV.

- The dissent acknowledged that there may be an argument that share class selection implicates "a different component of an investment adviser's duty of care: the duty to provide advice that is in the best interest of the client."
- However, when an adviser selects a mutual fund share class for its clients, there is no mechanism by which an intermediary can improve execution price and, therefore, "[s]crutinizing this conduct through the lens of the duty to seek best execution is forcing a square peg into a round hole."

The dissent also asserted that "[t]his action is only the latest in a long line of actions alleging that mutual fund share class selection implicates the duty to seek best execution," citing three administrative settlements reaching back to 2020.

ADDITIONAL ROPES & GRAY ALERTS AND PODCASTS SINCE OUR DECEMBER 2022 – JANUARY 2023 UPDATE

2023 Investment Management Conference
April 12, 2023
Ropes & Gray's memorandum summarizing the 2023 Investment Management Conference sponsored by the Investment Company Institute is available. The Conference included sessions that discussed the following industry and regulatory developments, among others:

Keynote Remarks by William A. Birdthistle, Director, Division of Investment Management, Securities and Exchange Commission and by Mark Uyeda, Commissioner, Securities and Exchange Commission

- Keeping up with the SEC's rulemaking activity including the Liquidity, Swing Pricing and Hard Close Proposals
- Trends in alternative products including interval funds, tender offer funds, BDCs and other investment vehicles
- The evolving landscape surrounding ESG investing
- A review of developments in mutual fund civil litigation

If you would like to discuss a specific session, or any other aspect of the conference, please contact any of the lawyers listed on the back cover of the memorandum or the Ropes & Gray lawyer with whom you regularly work.

Contingent Dislocation Funds: Nimble Structures Built for Market Events
March 23, 2023
In this Ropes & Gray podcast, asset management partners Melissa Bender and Jessica Marlin discussed how contingent dislocation funds, sometimes also referred to as market dislocation or contingent capital funds, can be used to capitalize upon recent market events. They discussed mechanics, event triggers, pros and cons of different capital call structures, and how these private funds can help sponsors and investors take advantage of market opportunities.

SEC Proposes to Amend Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information
March 21, 2023
On March 15, 2023, the SEC issued a release containing proposed amendments to Regulation S-P (the "Proposals") that, if adopted, would require broker-dealers, registered investment companies (with business development companies, "registered funds") and investment advisers to adopt written policies and procedures creating an incident response program to deal with unauthorized access to customer information, including procedures for notifying persons affected by the incident within 30 days. The Proposals would be in addition to the SEC's other pending cybersecurity regulations.

SEC Proposes Enhanced Safeguarding Rule for Registered Investment Advisers
March 20, 2023
On February 15, 2023, the SEC issued a release containing proposed Rule 223-1 under the Advisers Act (the "safeguarding rule") and proposing certain rule and form amendments to address how investment advisers safeguard client assets (the "Proposals"). If adopted as proposed, the Proposals would amend and redesignate Rule 206(4)-2 (the "custody rule") under the Advisers Act and amend certain related recordkeeping and Form ADV amendments, resulting in significant changes to the existing custody framework.

Navigating State ESG Investment Considerations – Battle Lines Are Drawn
March 15, 2023
Since 2021, Ropes & Gray has been closely monitoring the rapidly evolving landscape addressing what role, if any, ESG factors and alleged boycotts of certain industries play into the management of state retirement plan assets and other

public funds and asset manager selection. Based on our monitoring and the rate of escalation that we are observing, we believe this trend is likely to have a material impact on the asset management industry in the near and mid terms, at a minimum. We have launched an interactive website, Navigating State Regulation of ESG Investments, that tracks relevant ESG-related legislation, executive actions and initiatives, and coalition activities, as well as changes to state retirement plan investment policies, in 48 states and counting. In addition, the website offers a variety of podcasts and memos to provide users with easy access to our team's key insights in understanding this dynamic area.

Ropes & Gray Crypto Quarterly: Digital Assets, Blockchain and Related Technologies Update
February 14, 2023
The landscape of government enforcement, private litigation, and federal and state regulation of digital assets, blockchain and related technologies is constantly evolving. Each quarter, Ropes & Gray attorneys analyze government enforcement and private litigation actions, rulings, settlements, and other key developments in this space. We distill the flood of industry headlines so that you can identify and manage risk more effectively. This newsletter includes takeaways from this quarter's review.

Applicant Files for Vanguard-Type ETF as a Share Class Exemptive Relief
February 10, 2023
On February 8, 2022, applicants filed an application (the "Application") with the SEC for exemptive relief from various provisions of the 1940 Act and Rule 22c-1 thereunder to permit the applicants to create and operate an actively managed, exchange-traded share class of a traditional open-end registered investment company.

- A likely catalyst for the Application's filing is the anticipated 2023 expiration of the ETF share class patent obtained by The Vanguard Group, Inc.
- Currently, Vanguard funds are the only open-end funds that have ETFs operating as an exchange-traded share class of a multi-class registered investment company. These Vanguard funds operate pursuant to SEC exemptive orders issued beginning in 2000.

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

Jessica L. Reece
Boston, MA
+1 617 235 4636
jessica.reece@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