INVESTMENT MANAGEMENT LEGAL + REGULATORY UPDATE

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REGULATORY UPDATES

SEC Proposes Money Market Reform

On June 5, 2013, the SEC voted unanimously to propose two alternative amendments to Rule 2a-7, the rule governing money market funds. The SEC could adopt either proposal alone or in combination with the other. The proposals mark the latest step in a long march toward money market reform since calls for change began after the Reserve Primary Fund "broke the buck" in the fall of 2008. They also put the SEC back in the regulatory driver's seat and avoid a standoff with other federal regulators, most notably the Federal Stability Oversight Committee (FSOC).

The first proposed alternative would require institutional prime money market funds to operate with a floating net asset value (NAV). A money market fund's share price would fluctuate daily, based on the market price of portfolio securities, rounded to the nearest 1/100th of one percent. This proposal would exempt government and "retail" money market funds, which would still be able to maintain a stable NAV. Retail money market funds would be defined as those funds that restrict shareholder redemptions to no more than $1 million per shareholder per day.

Under the second alternative, all money market funds would continue to transact at a stable share price but would have the ability (and sometimes the obligation) to use liquidity fees and redemption gates in times of market stress. Under this alternative, funds whose level of weekly liquid assets falls below 15 percent of total assets would be required to impose a 2 percent liquidity fee on redemptions *unless* the fund's board of directors determines the fee is not in the best interests of the fund or that a lesser fee would be more appropriate.

The second alternative would allow the fund's board to temporarily suspend redemptions of fund shares for up to 30 days if the fund's weekly liquid assets fall below 15 percent. The board would only be allowed to "gate" a fund for a maximum of 30 days in any 90-day period. Government money market funds would be exempt from the fees and gates requirement.

Regardless of which alternative is adopted, the proposed amendments would eliminate the ability of money market funds to value their portfolio securities at amortized cost, except to the extent permitted for all mutual funds. Funds that would be allowed to continue to maintain a steady NAV (that is, all funds other than prime retail funds under the first proposal) would be required to use the "penny rounding" method, rather than the amortized cost value method.

For more information on the proposed rules, and related disclosure changes, see our recent Client Alert.

MORRISON FOERSTER

Attorney Advertising

SEC Eases Ban on General Solicitation and General Advertising in Certain Private Placements

On July 10, 2013, the SEC adopted rules to implement the JOBS Act mandate to relax the prohibition against general solicitation in certain private offerings of securities. The final rule amending Rule 506 under Regulation D, as well as the SEC's proposed rules relating to private offerings, provided a glimpse into the continuing debate about how to balance the desire to facilitate capital formation with the need to protect investors.

The SEC also adopted the "bad actor provisions" for Rule 506 offerings that it was required to implement pursuant to the Dodd-Frank Act. Finally, the SEC proposed rules intended to safeguard investors in the new world of general advertising and general solicitation.

To read our alert on the SEC's new rules on general solicitation and general advertising in private offerings, click here.

To read our alert on the SEC's "bad actor provisions" for Rule 506 offerings, click here.

Click here to visit our Jumpstarter blog for current updates and analysis of the new rules and matters relating to implementation of the JOBS Act.

Click here to read more about private funds using social media on MoFo's Socially Aware blog.

SEC and CFTC Adopt Joint Rules to Address Identity Theft

On April 19, 2013, the SEC and the CFTC published joint rules and guidelines requiring certain registrants to establish programs to address the risk of identity theft. The SEC's rules apply to broker-dealers, mutual funds, investment advisers and other financial institutions. The CFTC's rules apply to commodity trading advisers, commodity pool operators and swap dealers, among others.

Although the release includes examples of "red flags" that registrants should monitor, the rules do not require that compliance programs address specific red flags, nor do they require specific policies and procedures to identify such red flags. Instead, the Commissions gave financial institutions flexibility to determine which red flags are relevant to their business models and the covered accounts that they manage. The Commissions noted their intent that registrants should adopt programs designed to "respond and adapt to new forms of identity theft and the attendant risks as they arise." Similarly, guidance about the definition of "covered account" is flexible to allow a financial institution "to determine which accounts pose a reasonably foreseeable risk of identity theft."

Policies and procedures adopted to comply with the new rules should also provide for appropriate responses to detected red flags, commensurate with the risks posed, taking into consideration factors that might heighten the risk of identity theft.

Click here to review more information about the identity theft rules. Compliance with the new rules is required by November 20, 2013.

FINRA Identifies Concerns with Marketing of Real Estate Investment Products

FINRA continues to focus on marketing of real estate-related products. It recently issued a Regulatory Notice expressing concerns about communications involving unlisted, or non-traded, real estate investment trusts (REITs) and real estate direct participation programs (DPPs).

While the Notice does not break new ground, FINRA explained that its recent reviews of communications have revealed compliance deficiencies in this area. The Notice follows closely on concerns expressed in recent FINRA disciplinary actions, and in FINRA's 2013 Regulatory and Examination Priorities Letter. Private real estate funds that engage FINRA-registered placement agents should carefully consider these issues.

Click here for additional details about FINRA's concerns.

SEC Discusses Private Fund Adviser Practices That Raise Broker-Dealer Status Issues

On April 5, 2013, David Blass, the Chief Counsel of the SEC's Division of Trading and Markets, addressed how certain activities of private fund advisers may raise broker-dealer status concerns.

Blass said that certain private fund advisers' payments to personnel of transaction-based compensation for selling interests in a fund could raise broker-dealer status issues under Section 15(a) of the Exchange Act. He noted a March 2013 enforcement action in which the SEC settled charges against a private equity fund adviser and one of its executives for paying transaction-based fees to an independent consultant to solicit investors in the fund when the consultant was not registered as a broker.

Other than transaction-based compensation, Blass said that "a dedicated sales force of employees working within a 'marketing' department" of the adviser could be another strong indicator of brokerage activities. Consistent with the requirements under a safe harbor contained in Rule 3a4-1, he encouraged advisers to evaluate whether employees who solicit investors have other responsibilities. Rule 3a4-1 is available to an associated person or employee of a broker-dealer that, among other things, (1) does not receive transaction-based compensation tied to securities transactions; (2) performs substantial duties for the issuer other than in connection with transactions in securities; (3) was not an associated person of a broker or dealer within

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the preceding 12 months; and (4) does not participate in selling an offering of securities for any issuer more than once every 12 months.

Blass also discussed the practice of charging transaction-based compensation for "investment banking activity" in connection with the acquisition or disposition of a private equity fund's portfolio company, including "negotiating transactions, identifying and soliciting purchasers or sellers of the securities of the company, or structuring transactions." Blass suggested that an adviser's receipt of such fees does not raise broker-dealer status issues when the adviser offsets its management fee by the amount of the transaction fee.

Blass emphasized the serious consequences of acting as an unregistered broker-dealer, noting the potential right of rescission of investors whose transactions are intermediated by an "inappropriately unregistered" broker-dealer.

FSOC Votes to Designate Systemically Significant Nonbank Financial Institutions

In a June 3, 2013 closed-door meeting, the FSOC proposed to designate three financial services companies as the first systemically significant nonbank financial institutions ("nonbank SIFIs") under section 113 of the Dodd-Frank Act. The FSOC decision did not identify specific firms, but AIG, Prudential Financial and GE Capital each publicly confirmed its proposed nonbank SIFI status.

If these proposed designations become final, the three firms will be subjected to stringent Federal Reserve Board oversight and supervision, as well as to capital and other regulatory requirements. Moreover, should a nonbank SIFI fail or be in danger of failing, it may become subject to the Dodd-Frank Act's orderly liquidation authority.

Click here to read our alert about FSOC's proposed designations.

SEC Exemptive Relief Allows NYSE Arca to Launch Pilot Incentive Program

On June 6, 2013, the SEC approved a one-year pilot program designed to incentivize market makers to take "lead market maker" assignments in certain low-volume exchange-traded products (including ETFs) by offering an incentive fee structure. Participating issuers (or their sponsors) would be charged fees that would be credited to the lead market makers. A similar program, the NASDAQ's Market Quality Program, was approved on a pilot basis in March 2013.

NYSE Arca believes that the program could result in more efficient, liquid markets for certain exchange-traded products. This could be good news for sponsors of startup ETFs, which tend to be smaller and less frequently traded. But the programs raise concerns about conflicts of interest and whether the program could lead to diminished market making activity in ETFs that are ineligible for the program. Critics have also suggested that the program could create a "pay-to-play" environment for eligible exchange-traded products. In implementing the program on a pilot basis, the SEC acknowledged the need for market participants, the exchange and the regulator to evaluate the overall effect of the program on the market for smaller and less frequently traded ETFs.

Rulemaking Petition to Shorten 13F Reporting Window

In February, the NYSE petitioned the SEC to amend the beneficial ownership reporting rules under Section 13(f) of the Securities Exchange Act of 1934. Under the proposed amendment to Rule 13f-1, institutional investment managers, including investment advisers to private accounts, mutual funds or pension plan assets, would be required to report their holdings within two days of a calendar quarter end rather than the current 45 days.

The NYSE argues that the shorter reporting period would improve market transparency because institutional managers would no longer be able to rely on the 45-day reporting window to delay reporting significant purchases or sales of securities. According to the NYSE, shortening the reporting window would be consistent with the objectives underlying Section 13(f), including "improv[ing] the body of factual data available and thus facilitat[ing] consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence."

Some commenters, including trade groups and institutional asset managers, have opposed the proposed rulemaking on the grounds that reducing the reporting time frame would increase the ability of speculators to exploit the information contained in Form 13F filings. In particular, they raise concerns about the ability of such investors to "front-run" a fund, particularly one with high levels of concentration or that holds a large number of thinly traded securities, and to benefit from institutional investors' research without compensating the managers for that research.

The Commission has not yet taken action on the petition.

New York Tax Advisory Opinion Finds Certain Bundled Investment Management Services Not Subject to NY Sales Tax

The New York Department of Taxation & Finance recently issued an Advisory Opinion stating that a financial services firm providing integrated portfolio management services to institutional clients in exchange for a single charge is not required to collect New York sales tax. The Advisory Opinion is a potentially important limitation of the so-called "bundled transaction" rule.

In this instance, the firm provides portfolio management, risk analysis, data transmission and related services under a bundled fee. It also provides a similar but more limited risk analysis

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product as a stand alone product for a fee. When it provides the stand alone product, it collects New York sales tax. The Department ruled that when viewed as a single, integrated transaction, the bundled investment services should be treated as nontaxable information technology operations and management services.

Click here to read the latest edition of MoFo's New York Tax Insights.

President Obama Nominates New SEC Commissioners

On May 23, 2013, President Obama nominated Kara M. Stein, a Democrat, and Michael Piwowar, a Republican, to act as SEC Commissioners. Ms. Stein currently serves as an aide to Rhode Island Democratic Sen. Jack Reed and would replace SEC Commissioner Elisse Walters. Mr. Piwowar currently works as an economist for the Senate Banking Committee and would replace SEC Commissioner Troy Paredes. Each nomination is subject to approval by the Senate.

EXAMINATIONS, ENFORCEMENT + LITIGATION

SEC Slaps Fund Directors for Violating Fair Value Responsibilities

On June 13, 2013, eight former directors of five mutual funds agreed to settle SEC charges that they failed to satisfy their fair valuation responsibilities under federal securities laws. No fines or penalties were assessed against the directors. In contrast, the funds' investment adviser and others previously agreed to pay $200 million to settle related charges.

The SEC's order makes clear that fund directors bear the responsibility to fair value securities for which market quotations are not readily available. Among other things, this may include:

- specifying a methodology for fair valuing various types of portfolio securities;
- continuously reviewing how portfolio securities are being valued;
- providing "meaningful substantive guidance" to any committee charged with determining fair value; and
- understanding how fair values are actually being determined.

In short, fund boards need to ensure that fair valuation procedures provide not only general guidance and the factors to be considered in making valuation decisions but also "meaningful methodologies or other specific direction on how to make fair value determinations for specific portfolio assets or classes of assets."

In addition to outlining its concerns with the directors' actions, the SEC's order criticized the procedures employed by the fund accountants and the quality of the reports provided to the directors. The SEC also chided outside counsel to the directors in connection with their advice on adopting the funds' valuation procedures and the funds' independent auditors for advising the directors that the procedures are appropriate and reasonable.

Click here to read our alert about this order.

SEC Sanctions Fund Trustees for Inadequate Disclosures and Failure to Follow Compliance Policies

On May 2, 2013, the SEC charged the trustees of two "turnkey" mutual fund trusts with causing untrue or misleading disclosures about their review of the funds' advisory contracts. The Commission also charged the trustees with failure to follow their own procedures in connection with approving compliance policies and procedures of certain service providers, and charged the funds' administrator and the firm providing the funds with chief compliance officer (CCO) services with related violations. Without admitting or denying the allegations, the trustees consented to cease and desist from future violations of Section 34(b) of the 1940 Act and Rule 38a-1 under the 1940 Act. The funds' administrator and CCO each agreed to pay a civil money penalty of $50,000.

The five trustees oversaw two fund structures, encompassing more than 70 series portfolios, which serve as platforms for various unaffiliated investment advisers to manage mutual funds. These so-called "turnkey" funds provide multiple advisers with the corporate, regulatory and compliance infrastructure needed to operate mutual funds that would be too costly or burdensome to operate individually.

The SEC staff found that some shareholder reports either misrepresented material information considered by the trustees, or omitted material information about how the trustees evaluated certain factors in reaching their decisions to approve the funds' advisory agreements, in each case in violation of Section 34(b) of the 1940 Act. The trustees were charged with "causing" this violation because the disclosures were based on board minutes that were reviewed and approved by the trustees.

Rule 38a-1 under the 1940 Act requires that fund trustees approve the policies and procedures of fund service providers through which the fund conducts its activities. In this case, the funds' compliance policies required the trustees to review copies of the investment advisers' policies and procedures or a summary of the advisers' compliance programs sufficient to provide the trustees with a good understanding of how the advisers' compliance programs addressed particularly significant risks. The Commission charged that, rather than complying with the funds' own compliance policies, the CCO simply reported to the trustees that the compliance policies and procedures maintained by the various investment advisers were "sufficient and in use." The Commission claimed that the CCO and the trustees "caused" the funds to violate Rule 38a-1(a)(1), and that the trustees failed to ensure that each fund implemented its own policies and procedures upon which the trustees could rely in approving the compliance manuals of the funds' advisers.

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This case demonstrates the Commission's willingness to peer into the boardroom and review the adequacy of boards' governance processes related to investment advisory contract renewals and oversight of fund compliance programs. The case also signals that the Commission considers turnkey mutual fund operations and fund complexes with multiple advisers to be active areas of inquiry.

For more information on the case, click here to read our alert.

Court of Appeals Rejects Challenge to CFTC's Rule 4.5

On June 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held that the CFTC lawfully adopted amendments to a rule that will require many investment companies to be regulated as commodity pools. The challenge was brought by the Investment Company Institute and the U.S. Chamber of Commerce (Appellants), which claimed that the arbitrary and capricious actions of the CFTC in adopting amendments to CFTC Rule 4.5 in 2010 amounted to violations of the Administrative Procedures Act and the Commodity Exchange Act.

The 2010 amendments to CFTC Rule 4.5 require, among other things:

- certified regular reports from commodity pool operators (CPOs); and
- that, to be eligible for exclusion from the definition of a commodity pool:
  - an investment company's non-bona fide hedging trading must be less than or equal to 5 percent of the liquidation value of the fund's portfolio; or
  - the aggregate net notional value of the trading must be less than or equal to 100 percent of the liquidation value of the pool's portfolio.

As amended, Rule 4.5 requires an investment company's investment adviser, rather than the fund itself, to register as a CPO.

The Court of Appeals rejected each of the Appellants' arguments, including, in particular, an argument that the CFTC failed to meet legal standards because it offered an inadequate evaluation of the rule's costs and benefits. The Court said that, unlike other cases when it threw out SEC regulations for deficient costs-benefits analysis, the CFTC concluded that it, rather than the SEC, was in the best position to oversee funds engaged in "more than a limited amount of non-hedging derivatives trading." Given the SEC's lack of a "comprehensive and systematic approach" to derivatives-related issues, the Court said, the CFTC could fill in the gaps in existing regulation.

The Court of Appeals' decision is yet another striking example of how the pendulum has swung toward the side of more regulation, following a period of "hands off" regulation leading up to the financial crisis of 2008. The CFTC has yet to finalize the harmonization rules, which are sure to generate some controversy and lead to additional compliance costs.

Click here to read our alert about the Court of Appeals decision.

FINRA Issues Sweep Letter Regarding Use of Social Media

Over the past few years, FINRA has consistently focused on broker-dealers' use of electronic communications and social media. In June, it took the next logical step, announcing a sweep examination to determine broker-dealers' compliance with FINRA's communication rules in electronic media.

FINRA's sweep letter seeks, among other things:

- an explanation of how the firm uses social media;
- an explanation of how the firm's registered representatives generally use social media in the conduct of the firm's business;
- the firm's written supervisory procedures concerning the production, approval and distribution of social media communications; and
- an explanation of the compliance measures adopted with respect to use of social media.

Click here for more information about FINRA's sweep exam.

Supreme Court to Decide Applicability of Whistleblower Law to Private Company

The U.S. Supreme Court recently granted *certiorari* in a case that considers whether an employee of a privately held contractor to a public company is protected from retaliation by the whistleblower provision of the Sarbanes-Oxley Act.

The case involves two former employees of a privately held mutual fund management company. One claimed to have been wrongfully terminated for raising concerns about inaccuracies in a draft registration statement for certain funds. The other claimed constructive termination relating to concerns she raised about cost accounting methodologies.

The mutual funds themselves are public companies but, as is common in the industry, they have no employees. Functions are performed largely through contractual arrangements with an investment adviser, sub-advisers and other contractors. In this case, those contractors were privately held.

At issue is whether the Sarbanes-Oxley whistleblower provisions protect an employee of a privately held contractor to a public company (e.g., a fund) from retaliation. The district court ruled in favor of the former employees. On an interlocutory appeal, the appellate court reversed and held that privately held contractors may retaliate against their own employees.

The Supreme Court decision will be of particular interest to mutual fund service providers, including auditing firms,

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many of which are privately held. The case is *Lawson v. FMR LLC*.

FINRA Sanctions Firm for Failure to Adequately Maintain Compliance Systems

A recent FINRA disciplinary action sends a strong message to broker-dealers that the development of their compliance systems—particularly with respect to email review and retention—must keep pace with the growth of their businesses.

FINRA fined a member firm for significant failures in its email system that prevented it from accessing hundreds of millions of emails, and from reviewing tens of millions of other emails over an approximately six-year period. Among other things, the inadequate systems and procedures caused the firm to provide incomplete responses to email requests from regulators, and also likely affected the firm's production of emails in arbitrations and private actions.

FINRA, which has a strong focus on the obligation of firms to report internal findings of compliance violations under Rule 4530, also chided the firm for failing to be fully candid when it reported the email lapses. FINRA also noted a breakdown of the firm's internal audit processes in following through on preliminary audit findings about its email systems.

To read our client alert on this FINRA action, click here.

SEC Charges Investment Adviser Executives in Scheme to Hide Theft from Pension Fund

On June 10, 2013, the SEC charged the CEO of a Detroit-based investment adviser with misappropriating more than $3 million from the Police and Fire Retirement System of the City of Detroit pension fund. The SEC also charged the firm's CFO, Chief Operating Officer, Chief Investment Officer, and CCO/General Counsel with assisting the CEO in covering up the theft.

According to the SEC complaint, the CEO stole the money from the pension fund in 2008 to purchase strip malls. The other charged officials allegedly became aware of the theft after the fact and hid it by misleading the pension fund.

The SEC's complaint alleges that the CEO and the firm violated Sections 206(1) and 206(2) of the Advisers Act and that the other charged officials aided and abetted these violations. In a proposed settlement pending court approval, the CEO and the firm agreed to pay back nearly $3.1 million and be permanently enjoined from future violations. They did not admit or deny the allegations. In a parallel criminal case, the CEO is awaiting sentencing in connection with his participation in a pay-to-play scheme involving the former mayor and treasurer of Detroit.

FINRA Fines Firms for Inadequate AML Programs

On May 8, 2013, FINRA announced that it fined three firms and four associated executives in connection with their failure to establish adequate anti-money laundering (AML) compliance programs.

Central to each action was a finding by FINRA that the firms failed to identify red flags of money laundering activities, and therefore failed to investigate suspicious activity and/or file a suspicious activity report. FINRA's release provides specific examples of red flags that went unnoticed by the firms, but that ultimately caught FINRA's attention. Broker-dealers and other financial institutions should carefully review the red flags identified by FINRA, which are important components of an adequate AML compliance program. Firms are also cautioned to heed the advice of third parties, such as clearing firms, that raise concerns regarding the legitimacy or propriety of certain transactions.

Click here to read our client alert, which provides more detail on these actions.

Trust Company and Fund Manager Charged with Insider Trading, Agree to $1.7 Million Settlement

The SEC charged a California trust company and one of its fund managers with insider trading, alleging that the fund manager knowingly received and traded upon inside information relayed to him by a subordinate. The case continues a series of cases arising out of investigations into so-called "expert networks."

The complaint describes information passing from insiders at the subject companies to a network of hedge fund analysts that allegedly regularly shared inside information, as well as information passing from a friend directly to the fund manager's subordinate. The SEC estimated illicit profits and avoided losses at more than $475,000. Pursuant to the proposed settlement, which is subject to court approval, the trust company agreed to pay disgorgement, prejudgment interest and penalties of more than $1.5 million, and the fund manager agreed to personally pay more than $150,000.

Investment advisers and similar entities should be mindful that they can be held liable for illicit acts of their employees, even when the firm is not complicit in the illegal acts. Firms should consider including in their compliance programs a process to monitor trading activity around earnings or other major announcements and that may be suspected of being related to insider trading. This would assist compliance personnel in determining whether increased scrutiny of trading by particular individuals is warranted.

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