Investment Management Regulatory Update

January 27, 2016

SEC Rules and Regulations

SEC Staff Issues Report on Definition of "Accredited Investor"

On December 18, 2015, the staff of the SEC (the "**Staff**") issued a report (the "**Report**") analyzing the adequacy of, and recommending changes to, the current definition of "accredited investor" in Regulation D under the Securities Act of 1933 (the "**Securities Act**"). Section 413(b)(2)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") requires the SEC to review the definition as it relates to individual investors every four years to evaluate whether adjustments should be made in the interest of investor protection, the public interest or changes in the economy. The Report was issued in connection with the first such review.

According to the Report, private funds typically rely on Regulation D under the Securities Act ("**Regulation D**") to offer their securities in private placements. Under Rule 506 of Regulation D, funds are generally able to privately sell their securities to "accredited investors" in unregistered transactions under the rationale that such investors, according to the Staff, have the financial sophistication and expertise to understand the risks of such an investment and thus do not need the protection afforded by registration. The Staff noted in the Report that the definition seeks to provide a bright-line test that is simple for market participants to administer. The current definition of "accredited investor," in part, uses financial thresholds to identify such investors. To qualify as an "accredited investor," an individual investor's net worth must exceed $1 million individually or with a spouse (excluding the value of a primary

residence), or the individual's income must exceed $200,000 (or joint income of $300,000) for the prior two years and he or she must reasonably expect to meet those thresholds in the current year. Rule 506 under Regulation D also specifically enumerates certain entity types with over $5 million in assets that can qualify as accredited investors, and other entity types that are not subject to an asset-based test.

The Staff noted several reasons why the current definition may require adjustments or amendments. First, the Staff expressed concern in the Report that the current financial thresholds set by Regulation D, which have not been adjusted since 1982, may be over-inclusive due to the effects of inflation. Second, the Staff also noted that financial products have become more complex due to innovations in financial products and processes. Third, the Staff explained that improvements in information availability and investor communication have changed the investment market since the current definition was implemented.

In the Report, the Staff recommended changes to the mechanics of the existing definition and additions to the definition to allow for other measures of sophistication. First, the Staff recommended that the existing definition's financial thresholds be revised. While the existing current income and net worth thresholds would remain in place under the Staff's proposal, investors qualifying under those thresholds would be subject to a limit on their investment in offerings under Regulation D based on a percentage of their income or net worth (such as an annual limit on total investments with any one issuer). Second, the Staff suggested that a new alternative inflation-adjusted income test be added as part of the definition, which would not be subject to such an investment limitation. Third, the Staff recommended that all financial thresholds be indexed for inflation on a going-forward basis every four years and that "spousal equivalents," not just legal spouses, be permitted to pool their finances for purposes of meeting the financial thresholds.

Fourth, the Staff recommended eliminating the existing list of specific entity types and instead allowing any entity with $5 million of investments that was not formed for the specific purpose of investing in the securities offered to qualify as an accredited investor. The Staff further recommended that the existing assets test for entities be replaced with a narrower test based on "investments." Such a test, according to the Staff, is already used in connection with the definition of "qualified purchaser" under Section 2(a)(51) of the Investment Company Act of 1940, as amended (the "**Investment Company Act**"). The Staff also suggested that certain regulated entities (e.g., banks, insurance companies and savings and loan associations) retain the ability to qualify without a financial threshold. Fifth, the Staff recommended that an issuer's current investors, whether individuals or entities, that continue to meet the existing definition of "accredited investor" should be deemed accredited investors in connection with future offerings of the same issuer's securities.

The Staff further recommended adding alternative measures of sophistication that are not currently provided by the definition of "accredited investor." First, the definition could be expanded to include individuals with certain professional credentials, such as those persons who have passed certain FINRA exams. Second, the definition could also include individuals who have previously invested in a minimum number of private offerings or who are knowledgeable employees of private funds investing in their employer's funds. Third, the Staff could also introduce an "investments" based test for individuals like it would for entity investors. Finally, the Staff further recommended that the SEC develop an accredited investor examination to test an investor's knowledge of finance, investments, private offerings and their associated risks as an independent avenue of accreditation.

- **See a copy of the SEC Press Release in connection with the Report**
- **See a copy of the Report**

SEC Staff Grants No-Action Relief Allowing Use of Rule 486(b) to File Post-Effective Amendments to Closed-End Fund's Registration Statement

On January 7, 2016, the SEC Staff issued a no-action letter (the "**Letter**") giving relief to a closed-end management investment company that sought to use Rule 486(b) under the Securities Act ("**Rule 486(b)**") to file post-effective amendments to its registration statement on Form N-2 (the "**Registration Statement**").

According to the incoming letter (the "**Incoming Letter**"), Fiduciary/Claymore MLP Opportunity Fund (the "**Fund**") is a closed-end management investment company registered under the Investment Company Act. The Incoming Letter stated that under the Fund's Registration Statement, the Fund may issue common shares of beneficial interest on a delayed and continuous basis in accordance with Rule 415(a)(1)(x) under the Securities Act ("**Rule 415**"). Since the Fund has been engaged in a continuous offering of securities, according to the Incoming Letter, it is required to file a post-effective amendment in accordance with Section 8(c) of the Securities Act ("**Section 8(c)**") on an annual basis to update its Registration Statement with audited financial statements and other non-material updates. According to the Incoming Letter, since Section 8(c) does not provide for automatic effectiveness, such post-effective amendments must go through an often lengthy process of SEC review and comment before each can be declared effective by the SEC. The Incoming Letter noted that during the period before such amendments are declared effective, the Fund is unable to issue new shares, which, the Incoming Letter argues, harms the Fund and its shareholders by potentially preventing them from taking advantage of favorable market conditions.

Pursuant to Rule 485 under the Securities Act, open-end management investment companies, unit investment trusts and face-amount certificate companies are generally allowed to file post-effective amendments with automatic or immediate effectiveness. Rule 486(b) generally allows closed-end funds that are operated as registered closed-end management investment companies or business development companies which make periodic repurchase offers under Rule 23c-3 of the Investment Company Act ("**Interval Funds**") to file post-effective amendments with immediate effectiveness on the date of filing or on a designated later date, provided that such amendments satisfy certain conditions, including non-materiality conditions. Since the Fund is neither an open-end management investment company nor an Interval Fund, according to the Incoming Letter, it is not permitted to file post-effective amendments without the delay that is imposed by Section 8(c).

The Incoming Letter noted that the SEC had previously stated, in the adopting release for Rule 486, that "[t]he initial proposal of Rule 486 recognized that closed-end interval funds may need continuously effective registration statements and would benefit if certain filings could become effective automatically." According to the Incoming Letter, such reasoning should be extended to the Fund since it is a closed-end fund that is conducting delayed or continuous offerings pursuant to Rule 415, and would benefit from having a continuously effective registration statement. In addition, the Incoming Letter claimed that the facts presented in the Incoming Letter were similar to the facts in several previous no-action letters, where the SEC granted relief to other closed-end funds based on the representations that (i) the respective funds' boards of directors had approved the funds' delayed or continuous offerings; (ii) each fund's post-effective amendments would comply with Rule 486(b); and (iii) in accordance with Section 8(c), each fund would file a post-effective amendment containing a prospectus prior to any offering of its common stock at a price below net asset value. The Incoming Letter argued that since the Fund would comply with the requirements of Rule 486(b) and Section 8(c) in issuing its post-effective amendments, the public policy of protecting investors would be safeguarded while providing the benefits of flexibility, cost reduction and quicker access to information to the Fund, its shareholders and potential investors. The Incoming Letter also stated that in relying on the requested relief to sell common shares of beneficial interest, the Fund would sell newly issued shares at a price no lower than the sum of the Fund's net asset value plus the per share commission or underwriting discount.

According to the Letter, the SEC would not recommend enforcement action under Section 5(b) or Section 6(a) of the Securities Act against the Fund based on the facts and representations in the Incoming Letter. The Letter specifically noted that the SEC's position in the Letter applies only to the Fund and may not be relied upon by any other entity, though the SEC is willing to consider similar requests from other registered closed-end management investment companies. The Letter further noted that the Fund has acknowledged that the SEC may withdraw its relief if it finds that the Fund is misusing Rule 486(b) or for any other reason.

- **See a copy of the Letter**
- **See a copy of the Incoming Letter**

SEC Issues Proposed Rule and Concept Release on Transfer Agent Regulations

On December 22, 2015, the SEC issued an advanced notice of proposed rulemaking for new requirements for transfer agents (the "**Proposed Rule**"), along with a concept release requesting public comment on the SEC's holistic review of the regulation of transfer agents (the "**Concept Release**"). The SEC discussed the role of transfer agents to registered investment companies in the Concept Release. The SEC stated that historically, many mutual fund investors purchased shares directly from the fund or through the fund's transfer agent. Today, however, according to the SEC, many investors purchase shares through an intermediary, such as a broker-dealer or an investment adviser, who may provide such investors with a broad array of financial services. The SEC explained that such intermediaries often have arrangements with the mutual fund or the mutual fund's transfer agent to perform the underlying shareholder recordkeeping and servicing for their customers' mutual fund positions, and pursuant to such arrangements, the intermediary performs recordkeeping on his or her own books and other services with respect to the beneficial owner, and in many cases aggregate their customer records into a single "omnibus" account registered in the intermediary's name on the mutual fund transfer agent's recordkeeping system. According to the SEC, this shift has resulted in a "lack of transparency" of beneficial owners, their trading activities and related records.

The SEC highlighted the increased complexity of mutual fund recordkeeping as the number of mutual fund share classes has increased over the last 30 years. This complexity has led to mutual fund transfer agents, according to the SEC, investing in technology to manage the more frequent and diverse transaction processing and shareholder communications, and relying on automation developed by the National Securities Clearing Corporation for both processing mutual fund transactions and exchanging and reconciling customer account information. The SEC explained that certain transfer agents have specialized in mutual funds, and that these "mutual fund transfer agents" are exempt from certain requirements (including key turnaround, processing, performance and recordkeeping requirements) applicable to transfer agents for operating companies because the redeemable investment securities that mutual fund transfer agents process are exempt under Rule 17Ad-4 under the Securities and Exchange Act of 1934, as amended (the "**Exchange Act**") from such requirements. Further, according to the SEC, mutual fund transfer agents are compensated and organized differently than operating company transfer agents, and often receive compensation based on a percentage of the mutual fund's net assets (as opposed to on a per securityholder basis, as is common with operating company transfer agents).

The SEC went on to discuss the increased complexity of transaction processing for mutual fund transfer agents, highlighting that mutual fund transfer agents (i) receive cash and perform calculations more regularly than operating company transfer agents, (ii) assist in the determination of the appropriate price for an investor's order through coordination with mutual fund administrators, (iii) provide investors with additional options that add additional complexity (including exchange options or systematic withdrawal plans) and (iv) function in a traditionally more central role than operating company transfer agents with respect to clearing and settlement of securities transactions. The SEC also noted that fee payments to intermediaries and different sales load structures and distribution methods add additional complexity. Mutual fund transfer agents also, according to the SEC, often assist mutual funds with their compliance

obligations, including implementing anti-money laundering programs and customer identification programs.

According to the SEC, a mutual fund frequently compensates a securities intermediary (such as a broker-dealer or a bank) that performs recordkeeping and processing services for customers that are beneficial owner investors in mutual funds pursuant to an agreement with the intermediary for the provision of such services to fund investors. Operating companies, on the other hand, do not typically compensate intermediaries for servicing their beneficial owner customers. The SEC discussed how the use of breakpoints (charging lower sales loads for larger investments) illustrates certain of the issues faced by mutual fund transfer agents that are associated with the recordkeeping and processing services provided by intermediaries, highlighting how the increasing prominence of omnibus account arrangements and sub-transfer agency services provided to certain accounts has made the application of breakpoints increasingly difficult. The SEC concluded by stating that it is examining issues that may arise due to the lack of transparency that issuers and transfer agents may have with respect to records maintained by intermediaries for customers who are beneficial owners of mutual funds being serviced through omnibus and sub-accounting arrangements.

The SEC is seeking comment on a number of issues regarding the regulation of transfer agents to registered investment companies, including, but not limited to, (i) the potentially different treatment of unit investment trusts and closed-end funds with respect to exemptions pursuant to Rule 17Ad-4(a) under the Exchange Act and (ii) the exemption pursuant to Rule 17Ad-4(a) for mutual fund transfer agents generally.

- **See a copy of the Press Release**
- **See a copy of the Proposed Rule and the Concept Release**

Industry Update

SEC's National Examination Program Releases Examination Priorities for 2016

On January 11, 2016, the National Examination Program (the "**NEP**"), administered by the SEC's Office of Compliance Inspections and Examinations ("**OCIE**"), published its examination priorities for 2016 (the "**Exam Priorities**"). The NEP identified the same three thematic areas of focus in the Exam Priorities as it did for 2015: (i) the protection of retail investors and investors saving for retirement, (ii) the monitoring of market-wide risk, and (iii) the use of data analytics to monitor and identify potentially illegal activity. In addition to the three main thematic areas, the NEP noted a few other initiatives that would likely receive examination resources in 2016. For a discussion of the 2015 NEP Exam Priorities, please see the **January 20, 2015 Investment Management Regulatory Update**.

Protection of Retail Investors and Investors Saving for Retirement

According to the Exam Priorities, one of the NEP's primary areas of focus in 2016 remains protecting retail investors and investors saving for retirement. The NEP noted that this would likely remain an area of focus for the foreseeable future. According to the Exam Priorities, the NEP is planning or conducting several initiatives to better understand risks to retail investors from the increasingly broad array of products and services being offered to them:

- **ReTIRE.** The NEP stated that it would continue its initiative focusing on the services that registered investment advisers and broker-dealers offer to investors with retirement accounts. Please see the **July 14, 2015 Investment Management Regulatory Update** for a detailed discussion of this initiative.

- **Exchange-Traded Funds ("ETFs").** The NEP will examine ETFs to assess their compliance with applicable exemptive relief and other regulatory requirements, and will focus on sales strategies, trading practices and disclosure involving ETFs.
- **Branch Offices.** The NEP will continue to inspect registered entities' supervision of registered representatives and financial adviser representatives in branch offices. The NEP will also use data analytics to identify registered representatives in branches that seem to be engaged in potentially inappropriate trading.
- **Fee Selection and Reverse Churning.** The NEP will continue to focus on investment advisers' and dually registered investment advisers' recommendations of account types and whether those recommendations are in the best interests of the client at the inception of the arrangement and thereafter with respect to the fees charged, the services provided and the disclosures made about such relationships.
- **Variable Annuities.** The NEP stated that it will assess the suitability of sales of variable annuities to investors and the adequacy of the disclosure surrounding such sales.
- **Public Pension Advisers.** The NEP will examine advisers to municipalities and other government entities, with a focus on pay-to-play and other key risk areas (including identification of undisclosed gifts and entertainment).

Market-Wide Risk Assessment

According to the Exam Priorities, the NEP will focus on structural risks and trends that may affect entire industries, including:

- **Cybersecurity.** The NEP will advance the efforts it focused on in 2015 by testing and assessing firms' implementation of cybersecurity controls and compliance.
- **Regulation Systems Compliance and Integrity ("SCI").** The NEP will examine SCI entities to evaluate whether they have established, maintained and enforced written policies and procedures reasonably designed to ensure the capacity, integrity, resiliency, availability and security of their SCI systems. The NEP noted that such examinations will include reviewing the resiliency of their primary and backup data centers, evaluating whether computing infrastructure components are geographically diverse and assessing whether security operations are sufficiently tailored to the relevant risks such entities face.
- **Liquidity Controls.** The NEP will examine advisers to mutual funds, ETFs and private funds that have exposure to potentially illiquid fixed income securities, along with registered broker-dealers that are either new or expanding liquidity providers. The NEP stated that in undertaking such examinations, they would review controls within these new business areas, including controls over market risk management, valuation, liquidity management, trading activity and regulatory capital.
- **Clearing Agencies.** The NEP will continue to conduct annual examinations of clearing agencies designated "systemically important."

Data Analytics

According to the Exam Priorities, the NEP will continue to expand and enhance its use of data analytics to focus on registrants and firms that are potentially engaged in fraudulent or illegal activity, including through the following initiatives:

- **Recidivist Representatives.** The NEP will continue to use its analytic capabilities to identify and monitor firms that employ individuals with a track record of misconduct.

- **Anti-Money Laundering ("AML").** The NEP will continue examining broker-dealer AML programs, focusing on firms that have not filed suspicious activity reports, have filed such reports late or have filed incomplete reports.
- **Microcap Fraud.** The NEP will continue to monitor the operations of broker-dealers and transfer agents for activity that indicates that they may be engaged in, or aiding and abetting, pump-and-dump schemes or market manipulation.
- **Excessive Trading.** The NEP will continue to analyze data obtained from clearing brokers to identify and examine introducing brokers and registered representatives that may be engaged in excessive trading.
- **Product Promotion.** The NEP will focus on detecting the promotion of new, complex and high-risk products and related sales practice issues to identify any potential fiduciary breaches or investor suitability issues.

Other Initiatives

In addition to its three main thematic areas of focus, the NEP has stated that it will devote examination resources to other priorities, including:

- **Municipal Advisers.** The NEP will continue to examine municipal advisers to assess their compliance with the SEC and Municipal Securities Rulemaking Board rules.
- **Private Placements.** The NEP will review private placements, including offerings under Regulation D of the Securities Act, to evaluate whether legal requirements with respect to due diligence, disclosure and suitability are being met.
- **Never-Before-Examined Investment Advisers and Investment Companies.** The NEP will continue to conduct risk-based examinations of certain registered investment advisers and registered investment company complexes that have not yet been examined.
- **Private Fund Advisers.** The NEP will examine private fund advisers, focusing on fees and expenses and evaluating the disclosure associated with side-by-side management of performance-based and purely asset-based fee accounts.
- **Transfer Agents.** The NEP will examine transfer agents providing paying agent services for their issues, with a focus on the safeguarding of security-holder funds.

According to the NEP, the areas of focus in the Exam Priorities are not exhaustive, although the NEP expects to allocate a significant portion of its resources to these issues in 2016.

- **See a copy of the Press Release**
- **See a copy of the Exam Priorities**

Division of Investment Management Issues Guidance on Mutual Fund Payment of Sub-Accounting Fees to Financial Intermediaries

In January 2016, the Division of Investment Management of the SEC (the "**Division**") issued an IM Guidance Update (the "**Guidance**") to clarify its views on whether a portion of payments made by registered open-end investment companies ("**mutual funds**") to financial intermediaries that provide shareholder and recordkeeping services for investors whose shares are held in omnibus and networked accounts are being used to finance distribution and therefore must be paid subject to the requirements of Rule 12b-1 under the Investment Company Act ("**Rule 12b-1**").

Overall, the SEC staff recommends that:

- mutual fund boards of directors have a process designed to evaluate whether a portion of sub-accounting fees is being used to pay directly (or indirectly) for distribution;

- as part of this process, advisers and other relevant service providers provide enough information to inform the board of the intermediary distribution and servicing arrangements for the mutual fund; and
- advisers and other relevant service providers inform boards if certain activities or arrangements that are potentially distribution-related exist in connection with the payment of sub-accounting fees, and if they do, that boards focus on evaluating the appropriateness and character of those payments.

Mutual funds are generally prohibited under Rule 12b-1 from engaging, directly or indirectly, in the financing of any activity which is primarily intended to result in the sale of fund shares except pursuant to a 12b-1 plan. This prohibition also applies to payments that are made ostensibly for purposes other than distribution but which may be used in ways that finance distribution (as determined based on the facts and circumstances surrounding any particular payment). According to the staff, Rule 12b-1 is meant to assist in limiting the conflicts of interest that arise when a mutual fund pays for distribution expenses out of its assets, where an adviser and other service providers who are paid a fee based on the size of the mutual fund may be incentivized to encourage the mutual fund to bear distribution-related expenses to enable the mutual fund to grow and therefore increase its assets under management (and subsequently the fees paid to the adviser and these other service providers).

The staff highlighted the increased use of omnibus accounts by broker-dealers and financial intermediaries, and that mutual funds or their service providers often compensate financial intermediaries for providing them with increased service through entering into "sub-accounting" arrangements. According to the staff, sub-accounting fees have the potential to be used to pay for distribution, particularly when the recipient of such fees distributes the mutual fund's shares. Therefore, the staff recommends that boards of directors of mutual funds have a process in place to enable them to determine whether a portion of a fund-paid sub-accounting fee is being used to pay directly or indirectly for distribution. The staff noted that a useful framework for determining whether an adequate process is in place could be found in an October 30, 1998 letter from the Division of Investment Management to the Investment Company Institute (the "**1998 Letter**"). The staff also noted that the boards could request the following additional information from the adviser or relevant service provider: (i) details regarding the specific services provided under the mutual fund's sub-accounting agreements; (ii) the amounts being paid; (iii) whether the adviser and other service providers are recommending any changes to the fee structure or if any of the services provided have materially changed; (iv) whether any of the services could have direct or indirect distribution benefits; (v) how the adviser and other service providers ensure that the fees are reasonable; and (vi) how the board evaluates the quality of services being delivered to beneficial owners.

The Division also recommends that mutual funds' advisers and other service providers provide the boards with information about sub-accounting fees and other intermediary payment flows made in support of mutual funds' distribution and servicing activities that are relevant to the analysis of whether the payments are distribution fees. In addition, the staff noted that information should be provided so the boards could sufficiently evaluate whether and to what extent sub-accounting payments might reduce or otherwise affect revenue-sharing obligations of the advisers or their affiliates, or the level of fees paid under a 12b-1 plan established by the funds.

In the Guidance, the staff provided the following scenarios that could potentially raise questions as to whether the payment of fees by the fund were for distribution outside of a 12b-1 plan in violation of Rule 12b-1:

- **Distribution-Related Activity Conditioned on the Payment of Sub-Accounting Fees.** According to the staff, if intermediaries condition providing certain distribution-related activity on a fund's payment or rate increase of sub-accounting fees, this may be problematic for Rule 12b-1 purposes because it may indicate that at least a portion of the sub-accounting fees is actually being paid to finance distribution.

- **No Existing 12b-1 Plan.** If a mutual fund does not have a 12b-1 plan, the staff advised that the board of the fund should gather enough information to determine how a fund's distribution expenses are paid.
- **Tiered Payment Structures.** The staff noted that it has commonly observed advisers entering into agreements with intermediaries whereby the intermediary provides a number of services that are paid for via a tiered payment structure. The staff noted the prevalence of a three-tier structure among funds that it has examined, where payments are made first from Rule 12b-1 fees, then fund-paid sub-accounting fees and lastly by the adviser or an affiliate from revenue-sharing. According to the staff, such tiered payment structures can be problematic because it is not clear what services the fund is paying for and a conflict of interest can arise if the fund-paid fees reduce any fees the adviser or other service providers need to pay.
- **Lack of Specificity or Bundling of Services.** The staff stated that the same concern described above with respect to tiered payment structures also applies where funds are paying sub-accounting fees to intermediaries that have not provided a clear list of services provided in exchange for such fees or who are providing both distribution and sub-accounting services under a single contract in exchange for a single payment. The staff observed that boards sometime evaluate whether the overall payment for a set of services is a payment for distribution-related services. However, according to the staff, this approach does not comply with Rule 12b-1, which requires that any activity which is primarily intended to result in the sale of fund shares be paid for with mutual fund assets and through a Rule 12b-1 plan.
- **Distribution Benefits Taken into Account.** The staff observed that, in certain cases, distribution and sales benefits stemming from the overall relationship with the intermediary were taken into account by the adviser or its employees when recommending sub-accounting fees. The staff cautioned advisers and other relevant service providers to provide mutual fund boards with information about who is negotiating the sub-accounting fees and other relevant considerations concerning the process for approval to limit the potential for conflicts of interest.
- **Disparate Sub-Accounting Fees to Comparable Intermediaries.** The staff noted that some mutual funds pay disparate sub-accounting fees to intermediaries that may be providing substantially the same set of services. Depending on the facts and circumstances, according to the staff, such disparate payment rates may indicate that a higher payment rate is for distribution-related activities.
- **Purchase of Sales Data.** The staff noted that if a fund purchases sales data from its intermediaries, such as the demographics of fund investors, the fund's board should consider to what extent the payment is for distribution and therefore should be made pursuant to a 12b-1 plan.

The staff noted that none of the scenarios highlighted above may be dispositive on the issue of whether sub-accounting fees paid by a fund to its financial intermediaries or a portion of such fees are indeed distribution-related, but they can serve as helpful guidelines for fund boards to establish a sufficient evaluation process.

- **See a copy of the IM Guidance Update**

Certain CPOs and CTAs Must Affirm Exemptions Before February 29, 2016

On December 1, 2015, the National Futures Association (the "**NFA**") published guidance (the "**Guidance**") on the annual affirmation required from entities that operate under an exemption or exclusion from commodity pool operator ("**CPO**") or commodity trading advisor ("**CTA**") registration. The CFTC requires an annual affirmation within 60 days of the calendar year-end, or February 29, 2016, from

any person or entity claiming an exemption or exclusion from CTA registration under CFTC Regulation 4.14(a)(8) or CPO registration under CFTC Regulation 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) or 4.13(a)(5).

Persons or entities failing to affirm their exemption or exclusion on or before February 29, 2016 will have their exemption or exclusion withdrawn on March 1, 2016. Registered CPOs or CTAs failing to make the required affirmation will become subject to Part 4 requirements. Non-registered CPOs or CTAs whose exemption or exclusion is withdrawn may be subject to a CFTC enforcement action.

- **See a copy of the Guidance for additional information**

SEC Director Grim Addresses ICI 2015 Securities Law Development Conference

On December 16, 2015, David Grim, Director of the Division of Investment Management of the SEC (the "**Division**"), delivered remarks to the ICI 2015 Securities Law Development Conference. Grim discussed the Division's reform efforts over the last year, as well as its plans for the upcoming year.

Grim began by noting that 2015 marked the 75th anniversaries of the Investment Company Act and the Investment Advisers Act of 1940, as amended (the "**Advisers Act**," and, together, the "**Acts**") and noted that, as primary regulator of funds and asset managers, the SEC must constantly improve and modernize. According to Grim, in 2015 the SEC reviewed many of its processes and current guidance with a view to addressing three areas especially in need of updating, which SEC Chair White outlined in her December 2014 speech: derivatives, liquidity management and data reporting for registered funds and investment advisers. For further discussion of SEC Chair White's remarks in her December 2014 speech, please see the **December 16, 2014 Davis Polk Investment Management Regulatory Update**.

Grim cited the dramatic growth in the volume and complexity of the derivatives market and the increased use of derivatives by certain types of funds as reasons for the need to enhance derivatives regulation. According to Grim, in 2011 the SEC published a concept release on funds' use of derivatives that solicited public comment on the existing regulatory framework for derivatives. Grim noted that after reviewing the public comments received and working with economists from the Division of Economic and Risk Analysis, the SEC proposed new exemptive Rule 18f-4 under the Investment Company Act ("**Proposed Rule 18f-4**") on December 11, 2015. Proposed Rule 18f-4, according to Grim, is designed to address the investor protection objectives found in Section 18 of the Investment Company Act and create an updated and more comprehensive approach to the regulation of funds' use of derivatives. According to Grim, Proposed Rule 18f-4 sets out three sets of conditions a registered fund must comply with in order to enter into derivatives transactions: (i) following one of two portfolio limitations intended to limit the amount of leverage a fund may use through derivatives and other senior securities transactions; (ii) maintaining a certain amount of "qualifying coverage assets" (generally cash or cash equivalents); and (iii) implementing a formalized risk management program if its derivatives exposure exceeds 50% of its net assets or if it uses complex derivatives. For further discussion of Proposed Rule 18f-4, please see the December 29, 2015 Davis Polk Client Memorandum, **SEC Proposes New Limits on Registered Funds' Derivatives Use**.

Next, Grim noted the minimal guidance on liquidity management practices, as well as recent industry developments, such as the growth of funds with less liquid strategies, as the drivers for reform in the area. In September 2015, according to Grim, the SEC unanimously approved proposed rules intended to promote robust liquidity risk management by open-end funds and to establish consistency across the industry in such practices. For further discussion of these proposed rule reforms, please see the **October 27, 2015 Davis Polk Investment Management Regulatory Update**. Grim explained that, under the proposal, mutual funds and ETFs would be required to establish liquidity risk management programs and enhance their disclosure regarding fund liquidity and redemption practices. According to Grim, the proposed rules would codify a 15% limit on illiquid assets, create a framework under which mutual funds may elect to use "swing pricing" and amend certain forms to include disclosure regarding, among other things, liquidity classification, swing pricing and lines of credit.

Next, Grim discussed the SEC's efforts to modernize the reporting scheme for registered investment companies and investment advisers. According to Grim, in May the SEC unanimously approved

proposed new rules (i) establishing a new monthly portfolio reporting form for registered funds (other than money market funds) to report portfolio-wide and position-level holdings, (ii) establishing an annual report requiring registered funds to provide census-type information to the SEC and (iii) updating and standardizing disclosures in the financial statements included in fund registration statements and shareholder reports. For further discussion on these proposed rules, please see the June 18, 2015 Davis Polk Client Memorandum, **SEC Proposes Rules to Modernize and Enhance Information Reported by Investment Companies and Investment Advisers**. According to Grim, the information reported in the new forms would be in a structured data format to enable the SEC and the public to better analyze information across funds. Grim highlighted that many commenters on the proposals noted concern regarding the security of fund portfolio holdings information required to be filed with the SEC under the proposed rules, and Grim noted that the SEC staff would focus on this issue when preparing a recommendation for adoption of final rules.

Grim next focused on the Division's rulemaking initiatives for 2016. According to Grim, the Division is considering a new requirement for registered investment advisers to create and maintain transition plans in the event of a major disruption in their business and new requirements for stress testing by large investment advisers and investment companies. In addition, according to Grim, the Division is also working on initiatives with other offices and divisions. First, Grim noted that the Division is working with the Division of Trading and Markets and staff throughout the SEC on developing a recommendation to establish a uniform fiduciary standard for broker-dealers and investment advisers when providing individualized investment advice about securities to retail customers. Second, according to Grim, the Division is working with the Office of Compliance Inspections and Examinations on a recommendation that would require registered investment advisers to establish a program of third-party compliance reviews.

Finally, Grim discussed the Division's non-rulemaking efforts. First, Grim highlighted the IM Guidance Updates the Division released in 2015 on a broad range of topics, including investment company consolidation, cybersecurity and co-investment transactions by business development companies. In addition, Grim noted the Division's publication of a series of Frequently Asked Questions on issues raised related to the money market fund rule amendments the SEC adopted in July 2014. Next, Grim discussed the Division's disclosure review process and how it helps to identify new and recurring issues that inform policy guidance and rulemaking. According to Grim, the Division's Disclosure Review and Accounting Office (the "**Disclosure Office**") remains focused on several areas, including fees, investment strategies and industry trends, such as derivatives use by funds and changes to existing variable annuity products. In addition, Grim noted the Disclosure Office's new project to annually evaluate staff comments on the disclosures it reviews to establish consistency throughout the Disclosure Office, assess the effectiveness of staff comments as disclosure evolves with the industry and provide guidance to registrants on important disclosure issues. Grim further addressed the efforts of the Division's Risk and Examinations Office (the "**REO**"), and specifically the release of the REO's first report in October 2015 on private fund industry statistics and trends. The report, according to Grim, included information collected through Forms PF and ADV and provided aggregated and anonymized data that the Division hopes will help identify trends and practices and help investors better understand the industry. Finally, Grim discussed the creation of an emerging risk committee to help inform the Division's policy on developing risks. According to Grim, the committee seeks to facilitate communication among staff members across the Division working on similar issues in an effort to identify potential risks and hopefully help the Division take or recommend more risk mitigation actions.

- **See a copy of the Speech**

Litigation

SEC Bars Steven A. Cohen from Supervising Hedge Funds for Two Years

On January 8, 2016, the SEC issued an order (the "**Order**") making findings and imposing remedial sanctions on Steven A. Cohen, the founder and owner of the hedge fund advisers, S.A.C. Capital Advisors, LLC ("**SAC LLC**") and S.A.C. Capital Advisors, L.P. ("**SAC LP**"), for failing to reasonably supervise a portfolio manager with a view to preventing violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. According to the Order, the SEC accepted Cohen's Offer of Settlement (the "**Offer**") which, among other things, (i) bars Cohen from holding a supervisory role at any broker, dealer or investment adviser that manages third-party assets until 2018, (ii) requires Cohen to submit to on-site SEC examinations at his family office firms and (iii) mandates that he retain an independent compliance consultant and adopt such consultant's recommendations for such firms.

The SEC initially charged Cohen in July 2013 for failing to "take reasonable steps to investigate and prevent" insider trading allegedly committed by a former employee, Mathew Martoma, whom he supervised. For a discussion of the initial charges, please see the **August 20, 2013 Investment Management Regulatory Update**. Martoma was formerly the portfolio manager of CR intrinsic Investors, LLC ("**CR Intrinsic**" and, together with SAC LLC and SAC LP, the "**SAC Entities**"), which was a wholly-owned subsidiary of SAC LLC and, later, SAC LP. On March 15, 2013, CR Intrinsic agreed to pay over $600 million to settle charges related to those charges brought against Cohen, with SAC LLC and four of their advised funds as "relief defendants." For a discussion of the SEC's charges against Martoma and CR Intrinsic, please see the **April 29, 2013 Investment Management Regulatory Update**. According to the Order, Cohen failed to investigate "red flags" that indicated Martoma might have access to material nonpublic information relating to a joint clinical trial by two pharmaceutical companies in which the SAC Entities had built substantial long positions. Such red flags, according to the Order, arose from Cohen's discussions with Martoma about his outlook for the investments and the SAC Entities' use of doctors as paid consultants. The SEC found that Cohen failed to supervise Martoma and to take reasonable steps to prevent violations of the federal securities laws.

The SEC ordered that Cohen be barred from associating with any broker, dealer or investment adviser that is not one of Cohen's family offices through December 31, 2017, with the possible extension of the period for future violations. In accordance with the Offer, Cohen has agreed to hire an independent consultant acceptable to the SEC through December 31, 2017 to review his family office firms' compliance with federal securities laws, issue reports to the SEC and such firms every six months and to recommend any additional policies and procedures the consultant believes are reasonably designed to ensure such firms' compliance. Cohen further agreed to implement any recommendations of the consultant, unless a mutually agreeable alternative can be found. Also through December 31, 2017, Cohen has agreed to consent to any on-site SEC examination of his family office firms and to perform internal investigations of any profitable trade the SEC staff identifies.

- **See a copy of the Press Release**
- **See a copy of the Order**

CFTC, SEC Order JPMorgan's Wealth Management Businesses to Pay Total of $307 Million for Failure to Disclose Conflicts of Interest

On December 18, 2015, JPMorgan Chase Bank, N.A. ("**JPMCB**") and J.P. Morgan Securities LLC ("**JPMS**"), two wealth management subsidiaries of JPMorgan Chase & Co. ("**JPMorgan**"), settled parallel actions instituted by the U.S. Commodity Futures Trading Commission (the "**CFTC**") and the SEC for failure to disclose certain conflicts of interest to their clients. The CFTC issued an order (the "**CFTC Order**") instituting and settling public administrative proceedings against JPMCB, and the SEC issued an

order (the "**SEC Order**," and, together with the CFTC Order, the "**Orders**") instituting and settling administrative and cease-and-desist proceedings against both JPMCB and JPMS.

JPMCB's Violations

The Orders alleged that JPMCB committed violations of the respective provisions of the Securities Act and Commodity Exchange Act by failing to fully disclose its preference for investing certain discretionary portfolio assets in (i) certain mutual funds operated by JPMorgan Asset Management ("**JPMAM**") ("**Proprietary Mutual Funds**"); (ii) certain hedge funds operated by JPMAM ("**Proprietary Hedge Funds**," and, together with Proprietary Mutual Funds, "**Proprietary Funds**"); and (iii) third-party managed hedge funds that shared management and/or performances fees with a JPMCB affiliate.

According to the Orders, JPMCB acted as the investment manager for certain discretionary portfolios which are primarily offered through J.P. Morgan's U.S. Private Bank ("**JPM Private Bank**") to its high net worth and ultra-high net worth clients. Such discretionary portfolios included certain investment management accounts ("**IM accounts**") as well as certain private funds ("**GAP**"), both of which could hold portfolios including mutual funds and/or hedge funds. In addition, the SEC Order alleged that JPMCB and JPMS had jointly developed the J.P. Morgan Investment Portfolio ("**JPMIP**"), a discretionary managed account program that was offered to certain of its banking clients and whose investments (including mutual funds) were identical to certain IM accounts. According to the Orders, JPMCB had a preference for investing a significant percentage of the portfolio assets of IM, GAP and JPMIP accounts in Proprietary Funds.

According to the Orders, from at least 2008 to January 2014, JPMCB made no disclosure of its preference for investing certain IM or GAP account assets in Proprietary Hedge Funds. With respect to Proprietary Mutual Funds, the Orders allege that prior to February 2011, JPMCB disclosed its preference for Proprietary Mutual Funds by distributing to relevant clients a set of investment principles (the "**Investment Principles**"). According to the Orders, the Investment Principles were included in the JPMorgan Fund Disclosure Statement (the "**FDS**"), which was provided to new IM, GAP and JPMIP account clients and to existing clients in an annual mailing. In January 2011, JPMCB removed the Investment Principles from the FDS, which was by that point the only means by which the Investment Principles were being distributed to clients. The Orders stated that from 2011 to 2014, although JPMCB disclosed that it had a conflict of interest when it invested client assets in Proprietary Funds, and informed clients of which funds were included in their portfolios and the amount of assets held, JPMCB did not disclose its preference for investing in Proprietary Funds in account-opening documents or marketing materials. According to the Orders, it was in January 2014 that JPMCB began including language stating that "[a]s a general matter, we prefer" Proprietary Funds into its account-opening documents, account statements, the FDS, marketing materials and other account documentation used with IM, GAP and JPMIP account clients.

Further, the Orders alleged that JPMCB did not disclose its preference for third-party hedge fund managers that paid "retrocessions." According to the Orders, retrocessions are placement agent fees paid by hedge funds to broker-dealer affiliates of JPMCB that act as placement agents for those hedge funds. For IM, GAP and JPMIP accounts, JPMCB used a list of funds called the "Private Bank Platform," on which most of the private hedge funds paid retrocessions to JPMCB affiliates. According to the Orders, the annual retrocession received by a broker-dealer affiliate from a third-party hedge fund was normally around 1.0% of the market value of the client assets invested. The Orders alleged that since at least 2005, JPMCB actively selected third-party hedge fund managers that agreed to pay retrocessions when determining which funds to include on the Private Bank Platform. The Orders stated that though JPMCB disclosed to its IM account clients that its affiliates may receive retrocessions from investments in third-party hedge funds, JPMCB did not disclose its preference for hedge fund managers that paid retrocessions until August 2015, when it added language to certain client documentation to address the use of such hedge funds.

According to the CFTC Order, JPMCB's conduct violated Section 4*o*(1)(B) of the Commodity Exchange Act and Section 4.41(a)(2) of the Commission Regulations, which generally prohibit a Commodity Trading Advisor from engaging in any transaction, practice, or course of business that operates as a fraud on a client or prospective client, or advertising in a manner that operates as a fraud on a client or prospective client. According to the SEC Order, JPMCB violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which prohibit making untrue statements of material fact or material omissions in the offer or sale of securities and engaging in a course of business which operates as a fraud or deceit in the offer or sale of securities.

JPMS's Violations

According to the SEC Order, JPMS designed and operated its retail unified managed account program, Chase Strategic Portfolio ("**CSP**"), with a preference for investing a majority of CSP assets in Proprietary Mutual Funds and other JPMAM-managed money market funds and separately managed accounts (together with the Proprietary Mutual Funds, "**Proprietary CSP Assets**"). The SEC Order stated that from 2008 to 2013, JPMS had invested 31% to 51% of CSP client assets in Proprietary Mutual Funds, and that during the same period, neither CSP's marketing materials nor its Schedule H (and later, Form ADV) disclosed that JPMS had designed and operated the program with a preference for Proprietary CSP Assets. The SEC Order further alleged that from May 2008 to 2013, JPMS had contracted with an affiliate of JPMAM to provide a variety of management services to CSP, and that such services were priced at a discount based on the amount of CSP assets invested in Proprietary CSP Assets. According to the SEC Order, JPMS also did not disclose this discounted pricing, nor the economic incentive that it presented, to its CSP clients.

In addition, the SEC Order alleged that JPMS did not disclose to its CSP clients that it had selected certain mutual fund share classes when other, less expensive mutual fund share classes were available. According to the SEC Order, from 2008 to 2013, certain Proprietary Mutual Funds in which JPMS invested CSP assets offered two different institutional share classes: a "Select" share class and an "Institutional" share class. The SEC alleged that in certain of these funds, JPMS invested CSP assets in the Select share class even though the Institutional share class was also offered and charged lower fees. According to the SEC Order, the shareholder servicing fee charged in the Select share class was also typically 15 basis points higher than that charged in the Institutional share class, which meant that JPMAM received higher fees when CSP assets were invested in the Select share class. The SEC Order stated that this practice continued until November 2013, when JPMS converted all CSP investments in Select shares to Institutional shares where available. During this time, according to the SEC, none of CSP's ADV filings disclosed JPMS's preference for Proprietary Mutual Funds, the discounted pricing provided to JPMS by a JPMAM affiliate that was based on the investment of CSP assets in Proprietary CSP Assets, or the availability of less expensive share classes in certain Proprietary Mutual Funds. In addition, while JPMS had written policies in place stating that any actual or potential conflict of interest would be disclosed to clients with discretionary managed accounts, the SEC stated that JPMS did not implement such policies.

According to the SEC Order, JPMS's conduct violated Section 206(2) of the Advisers Act, which generally prohibits investment advisers from engaging in any transaction, practice or course of business that operates as a fraud or deceit upon any client or prospective client. Further, the SEC Order found that JPMS had violated Section 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder, which require investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act. The SEC Order also stated that JPMS had violated Section 207 of the Advisers Act, which generally prohibits advisers from making misstatements or omissions in SEC reports or registration applications.

Remedial Actions and Settlement

According to the SEC Order, JPMCB and JPMS have engaged an independent compliance consultant to review their policies on conflict of interest disclosures, and have implemented such consultant's

recommendations. In addition, JPMCB and JPMS have agreed to provide notice of the proceedings instituted against them to their clients and prospective clients with CSP, JPMIP, IM and GAP accounts.

The CFTC ordered JPMCB to pay $40 million as a civil monetary penalty, along with $60 million in disgorgement. The SEC censured JPMS and ordered JPMCB and JPMS to jointly pay $127.5 million in disgorgement, $11.815 million in prejudgment interest and a $127.5 million penalty.

- **See a copy of the Press Release**
- **See a copy of the CFTC Order**
- **See a copy of the SEC Order**

Morgan Stanley and SG Americas Settle Charges in "Parking" Scheme

On December 22, 2015, the SEC issued orders against (i) Morgan Stanley Investment Management Inc. ("**MSIM**"), a registered investment adviser, and one of its former portfolio managers (the "**MS Portfolio Manager**") (the "**MSIM Order**") and (ii) SG Americas Securities LLC ("**SGAS**"), a registered broker-dealer, and one of its former portfolio managers (the "**SG Portfolio Manager**") (the "**SGAS Order**"), in both cases instituting and settling administrative and cease-and-desist proceedings against MSIM, the MS Portfolio Manager, SGAS and the SG Portfolio Manager in connection with the MS Portfolio Manager's and the SG Portfolio Manager's unlawful prearranged trading conduct, commonly referred to as a "parking."

According to the MSIM Order, from late 2011 through early 2012, the MS Portfolio Manager engaged in several sets of unlawful prearranged sales and buybacks of fixed-income securities with the SG Portfolio Manager, without any arm's-length negotiation. According to the SEC, for the first five sets of bond trades, the MS Portfolio Manager obtained bids from broker-dealers through a competitive bidding process and sold the securities to SGAS generally at the highest bid she received. The MSIM Order stated that the MS Portfolio Manager further prearranged a repurchase from SGAS of such securities at predetermined prices that were based on a minimal markup to the initial sale price. By not crossing these positions at the midpoint between the best bid and the best offer for such securities, according to the SEC, the MS Portfolio Manager generally allocated the full benefit of the market savings to her purchasing accounts, even though both purchasing and selling accounts were owed the same fiduciary duty. In addition, for certain of the trades, the MS Portfolio Manager, according to the MSIM Order, used buyback arrangements to cross bonds between accounts, and for two such trades, bonds from two separate registered investment companies advised by MSIM were purchased by an affiliated, unregistered fund, thereby causing the unregistered fund to engage in prohibited cross trades under the Investment Company Act. The SEC also stated that the MS Portfolio Manager engaged in a sixth set of prearranged trades that resulted in favorable treatment to the selling clients and a disadvantage to the buying clients. According to the SEC, the MS Portfolio Manager and MSIM became aware that certain bonds purchased for certain accounts subject to the Employee Retirement Income Security Act of 1974 ("**ERISA**") may have been prohibited purchases for those accounts and that the ERISA accounts would incur a loss if the positions were sold. Therefore, the MS Portfolio Manager sold those bonds at above-market prices to SGAS and, at the same time, sold two bonds from a client that was an unregistered fund to SGAS at below market prices, in order, according to the SEC, to offset the above-market prices of the bonds she was selling from the ERISA accounts. The SEC stated that by repurchasing bonds that had come from the ERISA accounts at markups from their sale prices, she was able to move approximately $600,000 in unrealized losses from the ERISA accounts to the unregistered fund.

Further, according to the SEC, in addition to these two trade sets, none of the transaction sets complied with MSIM's internal policies, which applied the requirements for cross trades under the Investment Company Act to all cross trades, regardless of whether a registered investment company was involved in the transaction. In addition, according to the MSIM Order, on several occasions the MS Portfolio Manager instructed a trader on her team to fabricate quotes from two randomly selected dealers in an effort to conceal her failure to obtain competitive bids and to falsely satisfy MSIM's best execution policy.

Sections 17(a)(1) and 17(a)(3) of the Securities Act, Section 10(b) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), and Rules 10b-5(a) and (c) thereunder, generally prohibit fraudulent conduct in the offer or sale of securities and in connection with the purchase or sale of securities, respectively. Further, Sections 206(1) and (2) of the Advisers Act generally prohibit fraudulent conduct by an investment adviser. The SEC found that, by engaging in prearranged trades between MSIM's advisory accounts, the MS Portfolio Manager individually violated the antifraud provisions of the Securities Act and the Exchange Act, and the MS Portfolio Manager aided and abetted and caused violations of Sections 206(1) and (2) of the Advisers Act. Similarly, as a result of the MS Portfolio Manager's conduct, the SEC found that MSIM willfully violated the antifraud provisions of the Securities Act, as well as Section 206(2) of the Advisers Act. In addition, the SEC found that MSIM willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which require, among other things, that a registered investment adviser adopt and implement written policies and procedures reasonably designed to prevent violations by the investment adviser and its supervised persons of the Advisers Act and rules. The SEC also found that MSIM willfully aided and abetted and caused a violation of Section 17(a)(2) of the Investment Company Act, which generally prohibits certain affiliated transactions with a registered investment company. Finally, the SEC found that MSIM failed to reasonably supervise the MS Portfolio Manager, with a view to preventing violations of the securities laws, within the meaning of Section 203(e)(6) of the Advisers Act.

According to the SGAS Order, from October 2011 to June 2013, the SG Portfolio Manager engaged in a series of unlawful prearranged trades with MSIM and another registered investment adviser ("**Firm A**"). On six separate occasions, according to the SGAS Order, the SG Portfolio Manager agreed to buy and resell bonds with the MS Portfolio Manager, and on 14 more occasions, the SG Portfolio Manager engaged in similar prearranged trades with Firm A. According to the SEC, the SG Portfolio Manager recklessly disregarded the fact that that she was facilitating the MS Portfolio Manager's inappropriate parking scheme, despite SGAS's policies prohibiting parking and prearranged trades.

The SEC found that the SG Portfolio Manager willfully aided and abetted and caused the MS Portfolio Manager's violations of Sections 17(a)(1) and 17(a)(3) of the Securities Act, Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c) thereunder, as well as SGAS's violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(2) thereunder, which requires a registered broker-dealer to keep current ledgers and records. In addition, the SEC found that SGAS willfully violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(2) thereunder, and that SGAS failed reasonably to supervise the SG Portfolio Manager.

MSIM, the MS Portfolio Manager, SGAS and the SG Portfolio Manager agreed to settle the charges without admitting or denying the SEC's findings. The SEC censured MSIM and SGAS, and the MS Portfolio Manager and the SG Portfolio Manager were barred from the securities industry for five years and three years, respectively. MSIM undertook to distribute a payment of $857,534 to compensate the pooled investment vehicles and separately managed accounts harmed by MSIM's and the MS Portfolio Manager's conduct. Further, MSIM and the MS Portfolio Manager were ordered to pay $8,000,000 and $125,000, respectively, in civil money penalties. SGAS was ordered to pay an $800,000 civil money penalty, $198,338 in disgorgement and $12,755 of prejudgment interest, and the SG Portfolio Manager was ordered to pay a $25,000 civil money penalty.

- **See a copy of the Press Release**
- **See a copy of the MSIM SEC Order**
- **See a copy of the SGAS SEC Order**

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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