Investment Management Regulatory Update

January 20, 2015

SEC Rules and Regulations

SEC Extends No-Action Relief to Three Derivatives Clearing Organizations Regarding Custody Rule

On December 19, 2014, the Staff of the Division of Investment Management of the SEC issued a series of no-action letters (the "**Letters**") to ICE Clear Credit LLC, LCH.Clearnet Limited and LCH.Clearnet LLC and the Chicago Mercantile Exchange (each, an "**Applicant**" and together, the "**Applicants**"). In the Letters, the Staff stated that it would not recommend enforcement action under Section 17(f) of the Investment Company Act of 1940 (the "**Investment Company Act**") against a registered investment company (a "**RIC**") if such RIC or its custodian places and maintains cash and/or certain securities in the custody of an Applicant or a clearing member of an Applicant (a "**Clearing Member**") for the purposes of meeting such Applicant's or Clearing Member's margin requirements for certain interest rate, credit default, foreign currency and cash-settled commodity index swap contracts. According to the Letters, the Staff's position is temporary and will expire on December 31, 2015. The SEC had previously issued similar letters to all three Applicants on December 26, 2013, and to the Chicago Mercantile Exchange on July 10, 2013.

Section 17(f) of the Investment Company Act generally requires that a RIC place and maintain its securities and similar investments with certain custodians, typically qualified banks and companies which

are members of a "national securities exchange" (as defined by the Securities Exchange Act of 1934). Rule 17f-6 under the Investment Company Act ("**Rule 17f-6**") generally permits RICs to place and maintain cash, securities and similar investments with a futures commission merchant in amounts necessary to effect the fund's transactions in exchange-traded futures contracts and commodity options as long as the futures commission merchant maintains the fund's assets pursuant to a written contract with certain enumerated provisions.

The Applicants are derivatives clearing organizations registered with the Commodities Futures Trading Commission (the "**CFTC**") and the Clearing Members are futures commission merchants registered with the CFTC. According to the Letters, the Division would not recommend enforcement action against the RICs in the event that the RICs or their custodians place or maintain cash and/or certain securities in the custody of the Applicants or the Clearing Members based on the facts and representations described above and the additional representations that the Applicants will address each of the requirements of Rule 17f-6. To meet this latter requirement, the SEC requires that each RIC's assets must be governed by a written contract between the Clearing Member and the RIC providing that:

- the Clearing Member will comply with the requirements relating to the separate treatment of customer funds and property of the Clearing Member and the CFTC segregation rules for swap collateral under Part 22 of the CFTC's Regulations;
- the Clearing Member may place and maintain the RIC's assets as appropriate to effect the RIC's cleared swap transactions through the Applicant and will obtain an acknowledgement that such assets are held on behalf of the Clearing Member's customers in accordance with the provisions of the Commodity Exchange Act;
- the Clearing Member will promptly provide copies of or extracts from its records or such other information relating to the RIC's assets as the SEC through its employees or agents may request;
- any gains on the RIC's transactions, other than de minimis amounts, may be maintained with the Clearing Member only until the next business day following receipt of such gains; and
- the RIC may withdraw its assets from the Clearing Member as soon as reasonably practicable if the custodial arrangement no longer meets the requirements of Rule 17f-6.

The Staff also reiterated the SEC's view that maintaining assets in a futures commission merchant's custody is not without risk, and encouraged RICs to "carefully weigh the risks and benefits" of maintaining assets to effect transactions in interest rate, credit default, foreign currency and cash-settled commodity index swap contracts with the Applicants.

- **See a copy of the No-Action Letter for ICE Clear Credit LLC**
- **See a copy of the No-Action Letter for LCH.Clearnet Limited and LCH.Clearnet LLC**
- **See a copy of the No-Action Letter for the Chicago Mercantile Exchange**

Industry Update

SEC's National Examination Program Releases its Examination Priorities for 2015

On January 13, 2015, the National Examination Program (the "**NEP**"), administered by the SEC's Office of Compliance Inspections and Examinations (the "**OCIE**"), published its examination priorities for 2015 (the "**Exam Priorities**"). The NEP identified three thematic areas of focus in the Exam Priorities: (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 2015.

Protection of Retail Investors and Investors Saving for Retirement. According to the Exam Priorities, one of the NEP's primary areas of focus in 2015 will be protecting retail investors and investors saving for retirement. The NEP noted that retail investors are being offered a range of new products and services that were formerly characterized as "alternative or institutional," including private funds, illiquid investments and structured products. Additionally, the NEP observed that investors saving for retirement are being offered an increasingly broad array of information, advice, products and services to help them with retirement. According to the Exam Priorities, the NEP will focus its examination efforts in this area on certain issues, including:

- **Fee Selection and Reverse Churning.** The NEP will 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.
- **Improper Sales Practices.** The NEP will assess whether registrants are using misleading or otherwise improper practices when recommending the movement of retirement assets from employer-sponsored defined contribution plans into other investments and accounts, particularly when the other investments and accounts would pose greater risks or charge higher fees to the investor.
- **Suitability of Investments.** The NEP will examine the recommendations and determinations of registered entities to invest retirement assets into complex or structured products and higher yield securities with regard to, among other factors, the due diligence conducted, the disclosures made and the suitability of the recommendations or determinations in light of existing legal requirements.
- **Monitoring of Branch Offices.** The NEP will inspect registered entities' supervision of registered representatives and financial adviser representatives in branch offices. The NEP will also use data analytics to identify branch offices that may be deviating from their home office's compliance practices.
- **Alternative Investment Companies.** The NEP will assess funds offering alternative investments and using alternative investment strategies, focusing on: (i) leverage, liquidity and valuation policies and practices; (ii) the adequacy of the funds' internal controls (e.g., staffing, funding and empowerment of boards, compliance personnel and back-offices); and (iii) the marketing of such funds to investors.
- **Interest Rate Risk Exposure.** The NEP will review whether mutual funds with significant exposure to risks stemming from interest rate increases have sufficient compliance policies and procedures and controls on investments and trading to ensure that their disclosures are not misleading and that their investment and liquidity profiles are consistent with such disclosures.

Market-Wide Risk Assessment. According to the Exam Priorities, the NEP will focus on structural risks that may affect entire industries, including:

- **Monitoring Large Firms.** The NEP will continue to work with the Division of Trading and Markets and the Division of Investment Management to monitor the largest U.S. broker-dealers and asset managers to assess risks at those firms.
- **Cybersecurity.** The NEP will examine cybersecurity controls and compliance for broker-dealers, investment advisers and transfer agents.
- **Equity Order Routing Conflicts.** The NEP will review equity order routing to assess whether firms are prioritizing trading venues based on payments or credits from such venues which may create conflicts with the firms' best execution duties.

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 the following examination priorities:

- **Recidivist Representatives.** The NEP will use its analytic capabilities to identify and monitor firms that employ individuals with a track record of misconduct.
- **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 analyze data obtained from clearing brokers to identify and examine introducing brokers and registered representatives that may be engaged in excessive trading.
- **Anti-Money Laundering ("AML").** The NEP will continue examining broker-dealer AML programs, focusing on firms that have not filed suspicious activity reports or have filed such reports late or filed incomplete reports.

Other Initiatives. In addition to its three main thematic areas of focus, the NEP has stated that it will have several other priorities for examination, including:

- **Municipal Advisers.** The NEP will continue to examine municipal advisers to assess their compliance with the SEC and Municipal Securities Rulemaking Board rules.
- **Proxy Services.** The NEP will examine proxy advisory service firms in areas such as proxy voting recommendation and disclosure and mitigation of potential conflicts of interest. The NEP will also examine investment advisers' compliance with their fiduciary duty in voting proxies on behalf of investors.
- **Never-Before-Examined Investment Companies.** The NEP will conduct risk-based examinations of certain registered investment company complexes that have not yet been examined.
- **Fees and Expenses in Private Equity.** According to the NEP, there have been a high rate of deficiencies in connection with fees and expenses among private equity fund advisers. The NEP will continue to conduct examinations in this area.

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 2015.

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

IM Guidance Update Clarifies Restrictions on Business Development Companies' Co-Investments with Certain Second-Tier Affiliates

In December 2014, the Division of Investment Management of the SEC (the "**Division**") issued an IM Guidance Update to assist business development companies ("**BDCs**") in determining the restrictions imposed by the Investment Company Act on a BDC's co-investment transaction with certain second-tier affiliates.

The Investment Company Act places certain limitations on the ability of a registered investment company and a business development company to transact with certain affiliates. In the IM Guidance Update, the Division explained that, with respect to BDCs, the Investment Company Act generally distinguishes transactions involving "close affiliates" from those involving "remote affiliates": While certain transactions between a close affiliate and a BDC are prohibited, those between a remote affiliate and a BDC are permitted subject to approval by a required majority of the BDC's board of directors.

In the IM Guidance Update, the Division addressed whether certain second-tier affiliates of a BDC—limited partners of a partnership that is an affiliate of the BDC—may be treated as "remote affiliates" for purposes of determining which Investment Company Act restrictions apply to a transaction between the BDC and such second-tier affiliates. The Staff addressed the following situation: (i) a private fund organized as a limited partnership is under common control with a BDC, and is therefore a "close affiliate" of the BDC; (ii) a limited partner of such private fund is an affiliate of the private fund since it owns between 5% and 25% of the private fund's outstanding voting securities, and is therefore a close affiliate of the BDC (and thus unable to engage in certain transactions with the BDC under the Investment Company Act) and (iii) under the facts set out in (i) and (ii), if the private fund were instead organized as a corporation, the limited partner would be a shareholder of the private fund and therefore a remote affiliate of the BDC (and would subsequently be able to engage in certain transactions with the BDC subject to approval by a required majority of the BDC's directors).

The Division asserted that where a limited partner is a close affiliate of a BDC solely because the private fund is organized as a limited partnership, and the BDC seeks to co-invest with the limited partner, the limited partner may be treated as if it were a shareholder of a corporation for purposes of determining whether it is a close or remote affiliate of the BDC.

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

IM Guidance Update Advises on Whether Certain Key Employee Trusts Are "Family Clients" under the Family Office Rule

In December 2014, the Division of Investment Management of the SEC issued an IM Guidance Update regarding whether certain key employee trusts would qualify as family clients under Rule 202(a)(11)(G)-1 (the "**Family Office Rule**") under the Advisers Act of 1940 (the "**Advisers Act**").

Section 202(a)(11)(G) of the Advisers Act excludes any "family office" from the definition of "investment adviser." According to the IM Guidance Update, the Family Office Rule defines a family office as a company (including its directors, partners, members, managers, trustees and employees acting within the scope of their employment) that (i) has no clients other than "family clients," (ii) is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more "family members" and/or "family entities" (i.e., any family trust or estate, non-profit or charitable organization or other family entity qualifying as a family client under the rule, other than key employees and their trusts) and (iii) does not hold itself out to the public as an investment adviser. According to the Family Office Rule, key employee investment entities that would meet the definition of a family client include "[a]ny trust of which: each trustee or other person authorized to make decisions with respect to the trust is a key employee; and each settlor or other person who has contributed assets to the trust is a key employee." For additional discussion of the Family Office Rule, please see the June 29, 2011 Davis Polk Client Memorandum, ***SEC Issues Final Rules Implementing Dodd-Frank Amendments to the Investment Advisers Act of 1940***, the ***February 21, 2012 Investment Management Regulatory Update*** and the ***May 17, 2012 Investment Management Regulatory Update***.

According to the Guidance Update, a trust may qualify as a "family client" if a non-key employee makes non-investment decisions for the trust, as long as investment decisions are made by a key employee. The Staff based its conclusion on two factors. First, the Family Office Rule adopting release stated that "it is appropriate to allow the family office to advise trusts for which the key employee is the sole person making investment decisions." Second, the Division noted that the interpretation in the Guidance Update is consistent with previous Division guidance with respect to the definition of qualified purchaser.

Although the Advisers Act does not contain a definition of what constitutes an "investment decision," the Division prepared an illustrative list of purely administrative duties:

- preparing and filing taxes for the trust;

- keeping records for the trust; or
- distributing periodic statements or disclosures to trust beneficiaries.

The Guidance Update also discussed whether certain trust decision-making powers can be split between different key employees. According to the Guidance Update, the Division believes it generally is within the intent of the Family Office Rule for one key employee to make investment decisions on behalf of another key employee's trust.

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

SEC Chairman Mary Jo White Defends Coverage of Investment Advisers in Letter to the Chairman of the House Financial Services Committee

In a letter (the "**Letter**") to the Chairman of the House Committee on Financial Services (the "**Committee**") dated December 16, 2014, SEC Chairman Mary Jo White defended the SEC's examination coverage of the more than 11,000 investment advisers registered with the SEC. Her Letter responded to the Committee's letter suggesting the reallocation of existing SEC resources in lieu of the additional resources requested by the SEC in its budget request for fiscal year 2016.

According to the Letter, the OCIE has taken several measures to utilize existing resources to increase its examination coverage of investment advisers, including: (i) strengthening its examiner training program; (ii) recruiting industry experts to better identify issues, conduct more focused exams and train staff in specialized areas, such as derivatives, valuation, hedge funds, private equity and quantitative analysis; (iii) conducting desk reviews, which are analyses of registrants' businesses and risk profiles using available information, to better assess the need for an on-site exam; (iv) employing advanced quantitative techniques to enable the fast and systematic analysis of large amounts of data; (v) launching an initiative to examine previously unexamined non-private fund advisers that have been registered for at least three years; and (vi) establishing the Office of Risk Analysis and Surveillance within the OCIE to systematically review certain information available for all registered investment advisers and broker-dealers to refine risk profiles and better identify exam candidates. In addition, White explained that over the last several years broker-dealer examiners have been reassigned to examine investment advisers and broker-dealers that are dually registered as investment advisers. Further, according to the Letter, the SEC has also considered the use of third-party audits or compliance reviews of investment advisers as a way to supplement the examination program. White concluded by asserting that there is no substitute for the on-site examination of registered investment advisers for furthering the OCIE's mission of promoting compliance.

- **See a copy of the December 16, 2014 letter**
- **See a copy of the November 24, 2014 letter**

IM Director Discusses Compliance, Disclosure and the Role of Data

On December 10, 2014, Norm Champ, the Director of the SEC's Division of Investment Management, spoke at the ICI 2014 Securities Law Developments Conference in Washington, D.C. Champ detailed several points in his speech, including the role of data in risk monitoring and policy development, promoting a culture of compliance in funds through Rule 38a-1 and related enforcement actions and protecting investors through clear and concise prospectus disclosure. His speech also touched on the importance of regulatory transparency, the emergence of new investment products and the continued efforts by the Division to foster communication with the industry and the public.

In his speech, Champ examined the role of data in risk monitoring, policy development and enforcement. Champ highlighted one particular tool in risk monitoring, the Risk and Examinations Office ("**REO**"), whose industry monitoring program has provided both qualitative and quantitative financial analysis of the investment management industry since 2012. According to Champ, REO also conducts an examination

program that gathers information from the industry to help inform Division policy making. Champ also highlighted the recent money market reforms as an example of the importance of data to the Division's policy making and enforcement actions. The data-based economic studies and analyses provided by the SEC's Division of Economic and Risk Analysis in November 2012 were critical to the SEC's formulation of the money market reforms adopted in July of 2014. For a detailed discussion of the money market fund reforms, please see the August 5, 2014 Davis Polk Client Memorandum, ***SEC Adopts Money Market Fund Reforms***. Champ also noted the importance of the monthly data that is derived from Form N-MFP and stated that the enforcement action against Ambassador Capital Management in 2013 stemmed from an ongoing analysis of the data that involved a review of gross yield of funds as a marker of risk. For a detailed discussion of this enforcement action, please see the ***December 20, 2013 Investment Management Regulatory Update***.

Champ also explored compliance in light of the tenth anniversary of the compliance date for Rule 38a-1. According to Champ, Rule 38a-1 underscores both the importance of strong compliance programs in preventing violations of law and the role that compliance professionals play in promoting a robust culture of compliance. Champ noted that the issues that were originally highlighted by the rule, like the safeguarding of client assets, remain important, while emerging issues, such as cyber security and the proliferation of social media, emphasize the continuing importance of strong compliance policies and procedures. Champ further stressed the important roles chief compliance officers play by highlighting a recent enforcement action where a Colorado portfolio manager was banned from the securities industry for five years for misleading and obstructing a chief compliance officer.

Champ closed his speech by reiterating that protecting investors is the fundamental principle guiding the SEC's and the Division's operations and a key element of investor protection is promoting clear and effective disclosure. The Disclosure Review and Accounting Office, according to Champ, is analyzing the consistency and effectiveness of staff comments on disclosure documents in order to (i) identify emerging disclosure issues, (ii) promote consistency in staff comments, (iii) inform policy decisions and (iv) provide better guidance to registrants with respect to disclosure.

- **See a copy of Champ's speech**

IRS Internal Memorandum Concludes Offshore Fund Engaged in Lending and Underwriting Business in the United States

On January 2, 2015, the Internal Revenue Service (the "**IRS**") released a Chief Counsel Advice memorandum (the "**CCA**") that concludes that an offshore master fund and its offshore feeder fund were engaged in a trade or business in the United States as a consequence of the master fund's lending and stock distribution activities, which were conducted on behalf of the master fund by a fund manager based in the United States. Although the CCA does not constitute authority on which a taxpayer may rely, it does provide insight into the views of the IRS on these issues.

For a detailed discussion of the CCA, please see the January 8, 2015 Davis Polk Client Memorandum, ***IRS Internal Memorandum Concludes Offshore Fund Engaged in Lending and Underwriting Business in the United States***.

- **See a copy of the CCA**

Financial Stability Oversight Council Releases Request for Comment on Asset Management Products and Activities

On December 18, 2014, the Financial Stability Oversight Council (the "**Council**") voted unanimously to issue a notice (the "**Notice**") seeking public comment regarding potential risks to the financial stability of the United States posed by certain asset management products and activities, specifically in the areas of (i) liquidity and redemptions, (ii) leverage, (iii) operational risk and (iv) resolution (the "**Risk Areas**"). The Notice was published on December 24, 2014, and is the most recent measure in the Council's ongoing evaluation of the asset management industry's products and activities as part of its mandate to identify risks to U.S. financial stability and promote market discipline.

In May 2014, the Council hosted a public conference on the asset management industry and its activities, at which practitioners, academics and other stakeholders discussed various asset management-specific topics. Following the conference, the Council undertook a more focused analysis of the asset management industry's products and activities to evaluate potential risks, which in turn identified the Risk Areas as warranting further review. According to the Notice, the Council is interested in comments regarding potential risks posed by the asset management activities of various types of entities, including registered investment advisers, banks and thrifts, insurance companies, commodity trading advisors and commodity pool operators, and the asset management products these entities provide, such as pooled investment vehicles and separately managed accounts.

The Notice includes specific questions for public comment in each of the four Risk Areas, but the Council notes that comments on risks associated with other asset management activities and products that could impact U.S. financial stability are also welcome.

- **Liquidity and Redemptions**. The Council seeks public comment regarding whether investments in pooled investment vehicles offering redemption rights, and the management of such rights and liquidity risks, may influence investor behavior and affect U.S. financial stability in a different way than direct investments. According to the Notice, the Council is specifically interested in whether increased redemption incentives stemming from vehicles invested in less-liquid asset classes could make fire sales more likely in certain asset markets.
- **Leverage**. The Council seeks public comment regarding how different types of investment vehicles obtain financial and synthetic leverage and how the use of such leverage might increase the potential for forced asset sales or expose lenders or other counterparties to losses or other market risks and the extent to which these risks may impact U.S. financial stability. The Council also seeks comment regarding which risk management practices are employed to manage the leverage risk of different types of investment vehicles.
- **Operational Risk**. The Council is particularly interested in two areas of operational risk within the asset management industry: (i) risks associated with the transfer from one asset manager to another of significant levels of client accounts or assets and (ii) risks that may arise when multiple asset managers rely on only a small number of third parties for important services, such as asset pricing and valuation or portfolio risk management.
- **Resolution**. The Council seeks public comment regarding specific financial interconnections that present risks, particularly during a period of financial market stress, in the event an asset manager, investment vehicle or affiliate becomes insolvent, declares bankruptcy or announces an intent to close and liquidate.

All comments must be received by February 23, 2015. Comments must reference docket number FSOC-2014-0001 and may be submitted electronically through the Federal eRulemaking Portal at http://www.regulations.gov or by mail to the Financial Stability Oversight Council, Attn: Patrick Pinschmidt, Deputy Assistant Secretary for the Financial Stability Oversight Council, 1500 Pennsylvania Ave., NW, Washington, DC 20220.

- See a copy of the Press Release
- See a copy of the Notice

Litigation

SEC Charges Investment Manager F-Squared and Former CEO with Making False Performance Claims

On December 22, 2014, the SEC issued an order (the "**Order**") instituting and settling administrative and cease-and-desist proceedings against investment management firm F-Squared Investments, Inc. ("**F-Squared**") for violations of Sections 204, 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rules 204-2(a)(16), 206(4)-1(a)(5), 206(4)-7 and 206(4)-8 thereunder for defrauding investors through false performance advertising regarding its AlphaSector exchange-traded fund sector rotation strategy (the "**AlphaSector Strategy**"). The SEC further alleged that F-Squared aided and abetted and caused certain mutual funds sub-advised by F-Squared to violate Section 34(b) of the Investment Company Act. In addition, the SEC filed a complaint (the "**Complaint**") in federal court in Boston against the former F-Squared chief executive officer alleging that he made false and misleading statements to investors in connection with advertising the AlphaSector Strategy, thereby violating Sections 206(1), 206(2), 206(4) and 207 of the Advisers Act and Rule 206(4)-8 thereunder.

According to the Order, F-Squared and its CEO created the AlphaSector Strategy in 2008 using data derived from back-testing. The SEC explained that F-Squared created indexes based on the AlphaSector Strategy and sub-licensed these indexes to various third parties. According to the Order, F-Squared and its CEO made false and misleading statements about the AlphaSector Strategy and its track record from September 2008 to September 2013, stating that the AlphaSector Strategy had achieved successful results for its clients from 2001 to 2008, before the AlphaSector Strategy was even in existence. Although the data used in advertising was hypothetical and derived from back-testing, the SEC stated that F-Squared and its CEO made specific statements to the contrary. Furthermore, F-Squared incorrectly applied ETF trend data to create the back-tested track record of the AlphaSector strategy, which, according to the SEC, "substantially improved" the AlphaSector Strategy's advertised performance. Although the Order asserts that the F-Squared analyst who miscalculated the ETF trend data alerted the CEO of the error in September 2008, F-Squared and its CEO continued to use the inflated numbers in advertising for years afterward.

According to the Complaint, F-Squared's CEO had approval authority over F-Squared's advertising materials during the time period in question. In addition, he was responsible for the AlphaSector descriptions in F-Squared's SEC filings, and he certified to the accuracy of those filings. The SEC further alleged that the CEO endorsed the false statements with full awareness that such statements were false.

According to the Order, F-Squared acknowledged that its actions violated federal securities laws, and agreed to cease and desist from committing or causing violations of the aforementioned provisions. In addition, F-Squared agreed to retain an independent compliance consultant and pay $30 million in disgorgement and $5 million in penalties.

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

- See a copy of the Complaint

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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