# Investment Management Regulatory Update

April 30, 2019

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## Rules and Regulations

### SEC Issues Notice of Intent to Grant Exemptive Relief for Non-Transparent Active ETFs

On April 8, 2019, the Securities and Exchange Commission (the "**SEC**") issued a notice (the "**Notice**") indicating that unless the SEC receives a request for a hearing by May 3, 2019, the SEC intends to issue an order granting the exemptive relief requested by Precidian Funds LLC ("**Precidian**") that would permit a "novel type of actively managed" exchange-traded fund (an "**ETF**"), which would not be required to disclose its portfolio holdings on a daily basis (an "**ActiveShares ETF**").

According to the Notice, Precidian requested an exemption from certain provisions of the Investment Company Act of 1940, which, if granted, would allow registered open-end investment companies that are ETFs and that are actively managed to operate without being subject to the existing daily portfolio transparency condition contained in orders that actively managed ETFs have received, which require such ETFs to publish their full portfolio holdings on a daily basis in order to help "ensure that ETF shares would trade at a price that is at or close to the NAV per share of the ETF." Instead, as more fully described in the exemptive application (the "**Application**"), in order to "protect the identity and weighting" of a creation basket and its portfolio securities, "the creation and redemption process…will require that transactions be effected through a confidential brokerage account…with an agent, which will be a broker-dealer ("**AP Representative**")." According to the Application, each AP Representative will be given, before the commencement of trading each business day, "the names and quantities of the instruments that constitute the [d]eposit [i]nstruments and the names and quantities of the instruments that constitute the [r]edemption [i]nstruments," which will generally correspond pro rata to the positions in an ActiveShares ETF portfolio. The Application notes that this "information will permit the AP Representative

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to buy and sell positions in the portfolio securities to permit creations or redemptions upon receiving a corresponding instruction…without disclosing the information."

To facilitate the arbitrage process, the relief would require ActiveShares ETFs to publish intraday values of their portfolios at one-second intervals. According to the Notice, each ActiveShares ETF would publish a Verified Intraday Indicative Value ("**VIIV**") reflecting the value of its portfolio holdings, which would be calculated every second during the trading day. Such VIIV calculations would be subject to specific requirements applicable to all ActiveShares ETFs. In addition, each ActiveShares ETF would only be permitted to invest in certain securities that are traded on a U.S. exchange, contemporaneously with the ActiveShares ETF's shares.

- **See a copy of the Notice**
- **See a copy of the Amended Exemptive Application**

## ADI 2019-07 – Review of Certain Filings under Automatic Effectiveness Rules

On April 2, 2019, the Disclosure Review and Accounting Office of the SEC released an Accounting and Disclosure Information ("**ADI**") regarding the review of certain filings under Rule 485(a) of the Securities Act of 1933, as amended (the "**Securities Act**").

Rule 485(a) provides automatic effectiveness within prescribed time periods for certain investment company registration statement amendments. The rule allows post-effective amendments to existing registration statements for new open-end funds organized as a new series of an existing registrant to become effective automatically in as few as 75 days after filing. Additionally, existing open-end funds and unit investment trusts can file post-effective amendments containing material changes to existing registration statements, which will become automatically effective in as few as 60 days. According to the ADI, no additional action is required by SEC staff (the "**Staff**") in either case.

In the ADI, the Division of Investment Management urges registrants to contact the Staff before making a filing under Rule 485(a) that may raise a material question of first impression or that "address issues in a manner inconsistent with previous precedent," as such filings can complicate efforts by the SEC to "effectively address investor protection interests." The ADI notes that this is "particularly the case where filings raise complex issues not easily resolved because of a lack of precedent[,]" and may relate to novel strategies, fee structures or operational policies. Further, the Staff requests responses from the registrant to any SEC comments received on a Rule 485(a) filing no later than five business days prior to the automatic effectiveness.

- **See a copy of the ADI**

## SEC Staff Doubles Down on Howey for Digital Assets

On April 3, 2019, the SEC Staff published new detailed guidance on its views of when a digital asset may be considered a security, in the form of two documents: a framework (the "**Framework**") issued by the SEC's Strategic Hub for Innovation and Financial Technology, along with a no-action letter from the SEC's Division of Corporation Finance (the "**No-Action Letter**"). The former sets out "a framework for analyzing whether a digital asset is an investment contract" under the Supreme Court's decision in *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946), and thus a security under federal securities laws, and "whether offers and sales of a digital asset are securities transactions." At the same time, the SEC's Division of Corporation Finance granted no-action relief for the offer and sale, without registration under the Securities Act, of a particular digital asset that is part of a proposed program for prepaid on-demand air charter services.

The Framework reaffirms the Staff's position that digital assets sold to investors to raise capital are generally securities, regardless of potential utility, and charts a narrow path for the sorts of digital assets that the Staff would not consider a security. The Framework also supports the view that a digital asset

sold as a security may not always continue to be a security, based upon reevaluation of the digital asset subsequent to its initial sale.

The No-Action Letter relates to a proposed digital asset program by TurnKey Jet, Inc. ("**TurnKey**") that would employ a private, permissioned, centralized blockchain network and smart contract infrastructure to allow the transfer and exchange of pre-paid non-refundable U.S. dollar-backed tokens redeemable for air charter services. In indicating it would not recommend enforcement action for offering and selling the tokens without registration under the Securities Act and the Securities Exchange Act of 1934 (the "**Exchange Act**"), the Staff emphasized the fact that TurnKey's platform and tokens will be fully developed and operational at the time any tokens are sold; the high degree of correlation between the token's value and the value of the air charter services; the marketing of the token in a manner that emphasizes its function over any potential increase in market value; and the transfer restrictions on TurnKey tokens. As such, the no-action relief is quite narrow and unlikely to provide meaningful guidance or practical utility for many types of currently available digital assets or firms considering issuing digital assets.

For a detailed discussion of the Framework and No-Action Letter, please see the April 9, 2019 Davis Polk Client Memorandum, **SEC Staff Doubles Down on Howey for Digital Assets**.

- **See a copy of the Framework**
- **See a copy of the No-Action Letter**

## Industry Update

### OCIE Issues Risk Alert Regarding Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S-P

On April 16, 2019, the Office of Compliance Inspections and Examinations ("**OCIE**") of the SEC issued a risk alert (the "**Risk Alert**") to provide investment advisers, investors and other market participants with information regarding common deficiencies in recent examinations with respect to compliance with Regulation S-P, the primary SEC rule regarding privacy notices and safeguard policies of investment advisers and broker-dealers.

According to the Risk Alert, Regulation S-P requires a registrant to: (1) provide a clear and conspicuous notice to its customers that accurately reflects its privacy policies and practices generally no later than when it establishes a customer relationship ("**Initial Privacy Notice**"); (2) provide a clear and conspicuous notice to its customers that accurately reflects its privacy policies and practices not less than annually during the continuation of the customer relationship (together with the Initial Privacy Notice, "**Privacy Notices**"); and (3) deliver a clear and conspicuous notice to its customers that accurately explains the right to opt out of some disclosures of nonpublic personal information about the customer to nonaffiliated third parties ("**Opt-Out Notice**").

Further, the Risk Alert states that the Safeguards Rule of Regulation S-P (the "**Safeguards Rule**") requires registrants to adopt written policies and procedures that: (1) "address administrative, technical, and physical safeguards for the protection of customer records and information"; and (2) are "reasonably designed to ensure the security and confidentiality of customer records and information, protect against any anticipated threats or hazards to the security or integrity of customer records and information, and protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer."

Privacy and Opt-Out Notices

OCIE staff found that registrants failed to provide Initial Privacy Notices and Opt-Out Notices to their customers or such notices failed to accurately reflect such firm's policies and procedures. Further,

according to the Risk Alert, the Privacy Notices did not provide notice to customers of their right to opt out of the registrant sharing their nonpublic personal data with nonaffiliated third parties.

Lack of Policies and Procedures

The Risk Alert noted that registrants did not have written policies and procedures as required under the Safeguards Rule. The Risk Alert noted that "firms had documents that restated the Safeguards Rule but did not include policies and procedures related to administrative, technical, and physical safeguards." Additionally, OCIE staff observed: (1) written policies and procedures that contained numerous blank spaces designed to be filled in by registrants; and (2) policies that addressed the delivery and content of a Privacy Notice, but did not contain any written policies and procedures required by the Safeguards Rule.

Policies not implemented or not reasonably designed to safeguard customer records and information

OCIE staff also observed registrants with written policies and procedures that did not appear implemented or reasonably designed to: "(1) ensure the security and confidentiality of customer records and information[;] (2) protect against anticipated threats or hazards to the security or integrity of customer records and information[;] and (3) protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to customers." For example, staff observed:

- Personal devices: Policies and procedures that did not appear reasonably designed to safeguard customer information on personal devices, such as by failing to address employees' personal devices, which stored and maintained customer information;
- Electronic communications: Policies and procedures that did not address the inclusion of customer personally identifiable information ("**PII**") in electronic communications, such as by failing to prevent employees from regularly sending unencrypted emails to customers containing PII;
- Training and monitoring: Policies and procedures that required customer information to be encrypted, password-protected, and transmitted using only registrant-approved methods were not reasonably designed because employees were not provided with adequate training and the firm failed to monitor whether the policies were actually followed;
- Unsecure networks: Policies and procedures that did not prohibit employees from sending customer PII to unsecure locations outside of the registrants' networks; and
- Outside vendors: Registrants that failed to follow their own policies and procedures regarding outside vendors, such as by not requiring outside vendors to contractually agree to keep customers' PII confidential, despite policies and procedures requiring them to do so.

OCIE encouraged registrants to review their written policies and procedures, including implementation of those policies and procedures, to ensure that they comply with Regulation S-P.

- **See a copy of the Risk Alert**

## Director of Division of Investment Management Speaks at ICI Mutual Funds and Investment Management Conference

On March 18, 2019, Dalia Blass, Director of the Division of Investment Management (the "**Division**") of the SEC, gave the keynote address to the ICI Mutual Funds and Investment Management Conference in San Diego, California. In her speech, Blass discussed (i) the Division's agenda and accomplishments from 2018; (ii) the Division's agenda for 2019; (iii) the proxy process and proxy advisers; (iv) international policy; and (v) 2019 trends in asset management.

**2018 Agenda and Accomplishments**

Blass discussed goals for the Division in 2018, including improving the investor experience, modernizing current regulatory approaches and using the Division's resources with the greatest efficiency possible.

With regard to the investor experience, Blass noted that the Division's initiatives in 2018 were intended to help retail investors find and use "important information and to empower them when choosing a financial professional or product." Blass pointed to the SEC's request for comment on how to improve investment company disclosures to the benefit of "Main Street" investors, as well as the proposed package of reforms to improve variable annuity disclosure, including the introduction of summary prospectuses for these products. Blass also noted that the Division adopted a notice and access approach to the delivery of shareholder reports and proposed for comment a package of rulemakings designed to bring the legal requirements and mandated disclosures of financial professionals in line with investor expectations. Blass discussed the development of Form CRS and the proposed interpretive guidance under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), which would address the investment adviser fiduciary duty. Finally, Blass highlighted the development of Regulation Best Interest.

With regards to modernizing the regulatory framework, Blass highlighted the Division's recommendations to the SEC on exchange-traded funds, funds of funds, fund liquidity reporting and fund research reports, along with the "Board Outreach Initiative," which was tasked with reviewing and evaluating what the Division asks of fund boards. Additionally, the Division, Blass noted, issued no-action letters on the affiliated transaction rules and in-person meeting requirements.

## Looking Ahead at 2019

Next, Blass discussed the Division's plan for 2019, including continued work on the "Investor Experience Initiative," modernization efforts, "good government" projects and improving efficiency.

To continue the Division's work in the Investor Experience Initiative, Blass noted that the Division would consider, among other things, comments on improving investment company disclosure and the variable annuity disclosure proposal. In particular, she noted a preliminary focus on exploring options for a summary shareholder report and ways to improve fee and risk disclosures.

With regard to modernization, Blass noted the high priority of the Division to finalize both exchange-traded fund and fund of funds rules. As for the Board Outreach Initiative, Blass stated that the Division will recommend updates to the SEC's valuation guidance. In addition, she added that the Division will likely advance into the public comment process a proposal for business development company and closed-end fund offering reform (which has since been proposed), modernization of the advertising and solicitation rules for investment advisers and a proposal for use of derivatives by investment companies.

Blass stated that the Division's "good government" projects would include the review of prior Staff statements to identify whether any such statements should be modified, rescinded or supplemented "in light of market or other developments." She further noted that the Division will also work to improve the exemptive application process to create a more streamlined approach, allowing the Division to focus on requests for exemptions that "represent the next generation of potential developments under the Acts."

## Proxy Advisers

Next, Blass addressed one area of interest on which she said the Division would spend significant time in 2019 – the proxy process. Blass addressed the November 2018 roundtable centered on the role of proxy advisory firms. The roundtable, she noted, revealed on the one hand a general recognition that proxy advisers can provide a valuable service to their clients, while on the other hand identified areas in which current guidance could be updated and clarified. For example, she added that certain matters put to a shareholder vote may call for company-specific analyses rather than application of industry-wide policies, and that investment advisers are well-positioned to perform such an analysis.

Blass stated that in 2019, the Division will explore ways to update current guidance with a focus on questions including: (i) how to promote voting practices that are in the best interest of advisory clients; (ii)

whether advisers are expected to vote every proxy; (iii) how advisers should evaluate recommendations of proxy advisers (particularly where the issuer disagrees with the factual assumptions of the recommendation); and (iv) how advisers should address conflicts of interest that a proxy adviser may have.

## International Policy

Blass next discussed the other significant focus area for the Division – international policy. She described two major themes for the Division's work in this area: (i) monitoring the effects of foreign policy on regulated entities; and (ii) engaging with international organizations that have shown an interest in asset management policy.

Regarding monitoring foreign policy, Blass discussed how regulatory change in Europe can pose significant challenges for U.S. firms, especially in regard to the European Union's Markets In Financial Instruments Directive ("**MiFID II**"). Blass highlighted the no-action letters released in 2018 to assist in compliance with MiFID II and noted that the temporary no-action assurances to broker-dealers that receive payments under MiFID II expire in July 2020. Blass stated that the Division has been engaging with interested parties and accepting data and recommendations to support further policy initiatives. As a result of this engagement, Blass shared four observations. First, she noted that any potential regulatory steps the Division takes will affect a wide range of investors and market participants. Next, she stated that the Advisers Act establishes a "principles-based regime," which provides flexibility "to accommodate relationships with both modest retail accounts and large institutional accounts." Third, she stated that certain market solutions, such as fund managers using reconciliation or reimbursement processes to deliver cost transparency while addressing compliance, may make extending no-action relief unnecessary. She added that some broker-dealers are exploring offering research through a registered advisory business as well. Finally, she noted that the Staff is requesting that market participants continue to submit comments and actively engage with the Division, including with respect to emerging market-based solutions, as the Staff is "not yet convinced, based on the data and analysis…received, that [they] can support a recommendation to create a permanent blanket exemption from the protections of the [Advisers] Act for providers of research to institutional asset managers."

Regarding the Division's engagement with international organizations, Blass noted that the Division will continue its dialogue with the International Organization of Securities Commissions and the Financial Stability Board, which have recently begun focusing on nonbank finance, to offer the Division's insight and expertise.

## Asset Management Trends in 2019

Blass discussed the past trends in asset management and the trends that the industry can expect in the next year. She noted that certain innovations in retirement funding, investment philosophies, technology and capital formation have led to a growth in assets under management and an increase in the variety of investment products available to Main Street investors. However, Blass said, despite investors enjoying a downward trend in fees, the same trend may mean that investors end up with less access to small advisers who do not have the scale of larger advisers. Blass acknowledged that such long-term trends have sparked public debate about common ownership, the effect of indexing on markets, the consequence of scale in asset management and the increased participation of funds in markets historically dominated by banks. Blass stated that "[w]here we find opportunities to ease compliance and promote choice while protecting investors, I will be the first to support change. But if we are discussing policy responses that could result in significant changes…we should have a clear understanding of costs and benefits and pay careful attention to unintended consequences."

Blass then discussed two steps the Division was planning to take in the coming year to address these global trends in asset management. First, to address whether innovations in technology, efficiencies of scale and investor preferences are making it harder for small and mid-sized fund sponsors to compete, Blass said that the Division will start a new outreach initiative targeted at small and mid-sized fund

sponsors, with the goal of hearing about those managers' experiences with regulatory barriers. Second, the Division is considering the formation of an asset management advisory committee to host discussions among industry participants surrounding trends in the asset management industry.

- **See a copy of the Speech**

# Litigation

## SEC Settles with Two Former Investment Advisers for Misappropriation of Investor Funds and Misrepresentation of Compensation

On April 5, 2019, the SEC settled proceedings against Alonzo R. Cahoon ("**Cahoon**"), manager of Turnkey Investment Fund Manager, LLC, which acted as an investment adviser to the Turnkey Investment Fund (the "**Turnkey Fund**"). The settlement arises out of a 2017 SEC complaint filed in the U.S. District Court for the Western District of Washington (the "**SMFG Complaint**") against Cahoon and Ronald A. Fossum ("**Fossum**") which alleged that Cahoon and Fossum made false and misleading statements about the Turnkey Fund and misappropriated investor funds.

According to the **SMFG Complaint**, between March 2011 and June 2016 Fossum raised over $20 million from more than 100 investors through unregistered securities offerings of three pooled investments funds that he owned and controlled: Smart Money Secured Income Fund, Turnkey Investment Fund and Accelerated Asset Group (collectively the "**SMFG Funds**"). The SEC alleged that Fossum solicited investments into the SMFG Funds by selling promissory notes to investors, promising them anywhere from eight to twelve percent in annual returns by investing the proceeds in distressed debt, such as real estate, oil and gas interests, domain names and websites, stocks, bonds, futures contracts, options, and other derivative instruments. Instead of making the promised investments, however, Fossum misappropriated the money for personal expenses including allegedly about $140,000 in mortgage payments on his home, $150,000 in personal taxes and $40,000 in travel expenses to seminars at luxury resorts in Fiji, Africa, Mexico and Hawaii. Between 2013 and 2015, Cahoon and Fossum allegedly defrauded the Turnkey Fund and its investors by representing in the offering documents that they would receive a one-time management fee of $2,990 per investment unit sold and no additional compensation, when in fact, the two of them received approximately $20,000 in compensation from each investment unit sold. In addition, the SEC alleged that Fossum and Cahoon sold unregistered Turnkey Fund securities without a valid exemption from registration and that they acted as unregistered brokers by effecting transactions in Turnkey Fund securities and earning transaction-based compensation as a result of the sales made to investors.

On June 7, 2018, Fossum, without admitting or denying the allegations, consented to a judgment permanently enjoining him from any future violation of the securities laws, and ordering him to pay $840,729 in disgorgement, including prejudgment interest of $110,823, and a civil monetary penalty of $320,000. The SEC also imposed on Fossum a conduct-based injunction that enjoins him from participating in the issuance, purchase, offer, or sale of any security other than for his own personal account.

On March 26, 2019, a consent judgment was entered against Cahoon permanently enjoining him from any future violations of the securities laws (including Sections 5(a), 5(c) and 17(a) of the Securities Act, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, as well as Sections 206(1) and 206(2) of the Advisers Act) and ordering him to pay $475,695 in disgorgement, including $54,695 in prejudgment interest. The SEC agreed to waive all but $74,000 of this disgorgement on account of Cahoon's representations about his financial condition. The SEC's administrative order further barred Cahoon from association with any broker-dealer or investment adviser.

- **See a copy of the Cahoon Order**

## SEC Brings Enforcement Action Against Private Equity Fund and Founder for Defrauding Investors

On April 11, 2019, the SEC filed a complaint in the United Stated District Court for the Southern District of New York against Abraaj Investment Management Ltd. (“**Abraaj**”) and its founder Arif Naqvi (“**Naqvi**”). According to the SEC complaint, Abraaj and Naqvi falsely represented to investors in the Abraaj Health Fund (the “**Health Fund**”) that their funds would be invested in healthcare businesses, while Abraaj and Naqvi misappropriated over $230 million of those funds to cover cash shortfalls at Abraaj.

According to the complaint, Naqvi founded Abraaj in 2002, and founded the Health Fund prior to 2015. By the time of the final closing of the Health Fund in 2016, it had a total of over $850 million in commitments. A U.S. government entity later committed an additional $150 million debt investment. The SEC alleges that the Health Fund represented to its investors that it would invest in healthcare companies and that Abraaj and Naqvi would advise the Health Fund as to the specific portfolio companies to target.

Beginning in December 2016, the SEC alleges, Naqvi and Abraaj misappropriated Health Fund assets by making transfers and drawdowns from the Health Fund’s account between December 2016 through at least September 2017 for the benefit of Abraaj. In December 2016, for example, Abraaj and Naqvi allegedly caused a transfer of $100 million from the Health Fund to Abraaj Holdings, an affiliate of Abraaj and Naqvi, and $40 million from the Health Fund to Abraaj; another $27 million was transferred in March 2017, and additional funds were transferred later in 2017. The complaint states that Naqvi and Abraaj sought to conceal their misappropriations by, among other means, representing that the misappropriations were “drawdowns” for Health Fund investments, and by misrepresenting the Health Fund’s available cash balance.

In late 2017 and 2018, and allegedly in response to investor demands, Abraaj returned much of the misappropriated money and over $13 million in interest to the Health Fund investors. According to the complaint, Naqvi and Abraaj’s fraudulent acts, material omissions, and false statements of material fact breached their fiduciary duties owed to Abraaj Health Fund to act in good faith, act in the fund’s best interests, provide full and fair disclosure of material facts, and not act in their own interests to the detriment of the fund. The SEC alleges that the defendants’ actions violated Section 206(1), (2), and (4) of the Advisers Act, which makes it unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; and (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative (as defined by the SEC), as well as Rule 206(4)-8 thereunder, which makes it unlawful for any adviser to a pooled investment vehicle to: (1) make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or (2) otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. The SEC seeks to impose a monetary penalty, disgorge the defendants’ gains, and enjoin them from further violations of the Advisers Act.

Naqvi’s management of Abraaj also led to his indictment, on April 11, 2019, on charges of securities fraud, wire fraud and conspiracy to commit securities and wire fraud. According to the indictment, Naqvi provided and caused others to provide Abraaj investors with false and inflated valuation metrics, which led Abraaj and Naqvi to reap inflated management fees, and misrepresented the use of investor funds—including through the misappropriations that form the core of the SEC complaint. The indictment alleges that this misconduct led to Abraaj’s collapse in 2018. Naqvi was arrested in the United Kingdom earlier in April, and extradition proceedings are ongoing.

- **See a copy of the Abraaj 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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