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Investment Services Regulatory Update

Public Statements, Press Releases and Testimony

OCIE Issues Risk Alert on Critical Systems Following “WannaCry” Ransomware Attack

On May 17, 2017, the SEC’s Office of Compliance Inspections and Examinations (OCIE) issued a Risk Alert to highlight the importance of conducting penetration tests and vulnerability scans on critical systems and implementing system upgrades on a timely basis in response to the widespread ransomware attack known by the names of “WannaCry,” “WCry” or “Wanna Decryptor” (WannaCry). The Risk Alert notes that the hacker or hacking group behind the attack infected the computers of numerous organizations across hundreds of countries with a malicious software that encrypts the computer users’ files and demands payment of ransom to restore access to the locked files. The Risk Alert encourages investment management firms and broker-dealers to (1) review the alert on the ransomware attack published by the United States Department of Homeland Security’s Computer Emergency Readiness Team (US-CERT)[1]; and (2) evaluate whether applicable Microsoft patches for Windows XP, Windows 8, and Windows Server 2003 operating systems are properly and timely installed.

The Risk Alert cites OCIE’s recent examination of 75 SEC-registered broker-dealers, investment advisers, and investment companies, assessing cybersecurity practices and preparedness, and notes that a number of the observations made following such examinations are relevant to the WannaCry ransomware incident, including the following:

- *Cyber-risk Assessment:* Five percent of broker-dealers and 26 percent of investment advisers and funds examined did not conduct periodic risk assessments of critical systems to identify cybersecurity threats, vulnerabilities, and the potential business consequences.
- *Penetration Tests:* Five percent of broker-dealers and 57 percent of investment advisers and funds examined did not conduct penetration tests and vulnerability scans on systems that the firms considered to be critical.

[1] The US-CERT alert is available at: https://www.us-cert.gov/ncas/alerts/TA17-132A.

- *System Maintenance:* All broker-dealers and 96 percent of investment advisers and funds examined have a process in place for ensuring regular system maintenance, including the installation of software patches to address security vulnerabilities. However, ten percent of the broker-dealers and four percent of investment advisers and funds examined had a significant number of critical and high-risk security patches that were missing important updates.

The Risk Alert also advises firms to consider the guidance and other materials issued by the Division of Investment Management and OCIE when assessing the effectiveness of cybersecurity programs and response capabilities.[2] Although the staff recognized that it is not possible for firms to anticipate and prevent every cyber-attack, the staff noted that "appropriate planning to address cybersecurity issues, including developing a rapid response capability is important and may assist firms in mitigating the impact of any such attacks and any related effects on investors and clients."

The Risk Alert is available at: https://www.sec.gov/files/risk-alert-cybersecurity-ransomware-alert.pdf.

SEC Commissioner Piwowar: SEC Staff Working on Amendments to the "Loan Provision" Concerning Auditor Independence

In opening remarks at the 2017 SEC/NASAA Annual Section 19(d) Conference on May 9, 2017 (the Conference), SEC Commissioner Michael Piwowar stated that he directed the SEC staff to begin working on amendments to the so-called "Loan Provision" in order to "address unnecessary compliance issues and instead focus attention on lending relationships that actually threaten auditor independence." Commissioner Piwowar added that "this rulemaking is consistent with my view that the Commission evaluate whether the rules and policies the agency implements are indeed achieving their intended objectives."

Background

As a reminder, Rule 2-01(c) under Regulation S-X sets forth a non-exclusive list of circumstances that are considered inconsistent with the "independence" of a registered public accounting firm (an Audit Firm), including the Loan Provision. The Loan Provision provides that an Audit Firm is not independent when the Audit Firm has a loan from "record or beneficial owners of more than ten percent of the audit client's equity securities." An "audit client," in turn, is defined to include any affiliate of the audit client and, when the audit client is an entity within an "investment company complex" (as defined by Regulation S-X), it also includes every entity within the investment company complex, regardless of whether the Audit Firm actually provides audit services to those other entities.

Loan Provision Compliance Challenges

In his remarks at the Conference, Commissioner Piwowar noted that the Loan Provision "is triggered even in situations where a lender may not be able to assert any influence over the entity whose shares it owns, including certain

[2] These materials include the Cybersecurity Guidance Update issued by the Division of Investment Management in April 2015 (available at: https://www.sec.gov/investment/im-guidance-2015-02.pdf), the Risk Alert issued by OCIE in April 2014 on its cybersecurity initiative (available at: https://www.sec.gov/investment/im-guidance-2015-02.pdf), the Cybersecurity Examination Sweep Summary issued by OCIE in February 2015 (available at: https://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf) and an update on OCIE's cybersecurity initiative, issued in September 2015 (available at: https://www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf).

instances in which the lender holds the securities as a custodian or an omnibus account holder for its customers without beneficial ownership." He added that "these situations may not have any effect on an auditor's objectivity and impartiality, because the lender does not have significant influence over the audit client. Yet these compliance challenges threaten to disrupt the operation of the asset management industry, which is relied upon to manage and invest trillions of dollars of investors' retirement savings."

Temporary No-Action Relief on Auditor Independence and the Loan Provision

On June 20, 2016, the staff of the SEC's Division of Investment Management, in consultation with the Office of the Chief Accountant and the Division of Corporation Finance, issued a no-action letter to Fidelity Management & Research Company (FMR) assuring that, for at least 18 months from the issuance date, and subject to certain conditions set forth in the letter, the staff would not recommend enforcement action to the SEC if a registered fund or other entity in its investment company complex employs an Audit Firm that has relationships causing non-compliance as a result of the Loan Provision. Thus, although the no-action letter issued to FMR helped alleviate some of the compliance challenges faced by mutual funds with respect to the Loan Provision, it did not provide a "permanent fix."

Any further developments on the Loan Provision will be addressed in a future issue of the Regulatory Update.

The transcript of Commissioner Piwowar's remarks is available at: https://www.sec.gov/news/speech/piwowar-opening-remarks-sec-nasaa-2017-19d-conference.

Litigation and Enforcement Actions

SEC Settles Charges Against Barclays Capital for Overcharging Advisory Clients

On May 10, 2017, the SEC announced settled administrative proceedings against Barclays Capital Inc. (Barclays) for improperly charging certain advisory clients of its wealth and investment management business.

According to the SEC order, from September 2010 through December 2014, Barclays falsely represented to advisory clients that it was performing ongoing due diligence and monitoring of certain third-party managers who managed advisory clients' assets in the wrap fee programs sponsored and administered by Barclays, when Barclays was not performing such due diligence. As a result, the SEC alleged that Barclays improperly charged 2,050 client accounts approximately $48 million in fees for these promised services. The SEC also alleged that from January 2011 through March 2015, Barclays charged 22,138 client accounts excess fees of approximately $2 million. Additionally, according to the SEC order, from at least January 2010 through December 2015, Barclays disadvantaged certain retirement plan and charitable organization brokerage customers (Eligible Customers) by recommending and selling them more expensive mutual fund share classes when less expensive share classes were available, without

disclosing that Barclays had a material conflict of interest – that it would receive greater compensation from the Eligible Customers' purchases of the more expensive share classes. The SEC also alleged that Barclays failed to disclose that the purchase of the more expensive share classes would negatively impact the overall return on the Eligible Customers' investments, in light of the different fee structures for the different fund share classes.

As a result of the foregoing conduct and related compliance and disclosure failures described in the SEC order, the SEC found that, among other things, Barclays violated: (1) Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice or course of business that operates as a fraud or deceit upon a client or prospective client; (2) 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 of the Advisers Act and the rules thereunder by the adviser and its supervised persons; (3) Section 207 of the Advisers Act, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission … or willfully to omit to state in any such application or report any material fact which is required to be stated therein"; and (4) Sections 17(a)(2) and 17(a)(3) of the Securities Act, which prohibit any person in the offer or sale of securities from obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make statements made not misleading, and from engaging in any practice or course of business which operates or would operate as a fraud or deceit in the offer or sale of securities, respectively.

Without admitting or denying the SEC's findings, Barclays agreed to pay "remediation" to advisory clients of approximately $3,504,285 (plus interest), disgorgement of $49,785,417, prejudgment interest of $13,752,242 and a civil monetary penalty of $30,000,000. Barclays also agreed to cease and desist from committing or causing any violations and any future violations of the statute and rules cited in the SEC order and was censured. In imposing the foregoing sanctions, the SEC considered Barclay's cooperation afforded to the SEC staff.

The SEC order is available at: https://www.sec.gov/litigation/admin/2017/33-10355.pdf.

FINRA Sanctions Cetera for Violations in Connection with Mutual Fund Sales

On May 3, 2017, FINRA accepted a Letter of Acceptance, Waiver and Consent (the AWC) submitted by Cetera Advisor Networks LLC (Cetera) for the purpose of settling certain alleged violations in connection with mutual fund sales.

According to the AWC, between July 1, 2009 and January 1, 2017, Cetera disadvantaged certain retirement plan and charitable organization customers that were eligible to purchase Class A shares of certain mutual funds without paying a front-end sales charge by instead selling them either Class A shares with a front-end sales charge or Class B or Class C shares with back-end sales charges and higher ongoing asset-based fees and expenses than Class

A shares. The AWC states that, although waivers of Class A front-end sales charges on certain mutual funds on Cetera's platform were disclosed in the funds' prospectuses, Cetera failed to apply the waivers, causing the eligible customers to pay higher fees and expenses than they were required to pay.

FINRA alleged that, during the relevant period, Cetera failed to establish and maintain a supervisory system and procedures reasonably designed to ensure that customers eligible for sales charge waivers on mutual fund purchases received the benefit of such waivers. According to the AWC, Cetera relied on its financial advisers to determine the availability of sales charge waivers but failed to maintain adequate policies and procedures to help the advisers make such determinations (including, e.g., identifying applicable sales charge waivers in mutual fund prospectuses). FINRA also alleged that Cetera failed to adequately notify and train its advisers on the availability of waivers and failed to adopt adequate controls to identify when eligible customers did not receive the benefit of applicable sales charge waivers in connection with mutual fund purchases. As a result of this conduct, FINRA alleged that Cetera violated NASD Conduct Rule 3100 (for conduct prior to December 1, 2014), FINRA Rule 3110 (for conduct on and after December 1, 2014) and FINRA Rule 2010.

According to the AWC, Cetera conducted an internal investigation on mutual fund sales practices and self-reported to FINRA that certain customers may not have received the benefit of sales charge waivers for which they were eligible. The AWC stated that FINRA recognized the "extraordinary cooperation" of Cetera in conducting the internal investigation, establishing a plan of remediation, self-reporting the matter to FINRA, taking steps to correct the violative conduct and revising its internal procedures to avoid a recurrence.

Cetera neither admitted nor denied the allegations but consented to the entry of FINRA's findings and the imposition of sanctions, including, among other things, a censure and the payment of restitution (including interest) of approximately $1.9 million.

SEC Settles Charges Against Calvert for Improper Use of Fund Assets for Marketing, Distribution and Sub-Transfer Agency Services

On May 2, 2017, the SEC announced settled administrative proceedings against Calvert Investment Management, Inc., a registered investment adviser (Calvert Management), and Calvert Investment Distributors, Inc., a registered broker-dealer affiliated with Calvert Management (Calvert Distributors) (together, Calvert), for (1) improperly using the assets of Calvert-advised mutual funds (the Funds) to pay for the distribution and marketing of Fund shares outside of the Funds' Rule 12b-1 plans, and (2) causing the Funds to incur expenses for sub-transfer agent services (sub-TA) in excess of the Funds' established expense limits. The SEC order also states that the Funds' prospectuses contained material misstatements concerning the Funds' payments for distribution-related services. In addition, the SEC alleged that in certain periodic reports provided by Calvert to the Funds' boards of trustees and directors

regarding payments for distribution and sub-TA services, Calvert inaccurately disclosed that the fees paid for distribution and marketing services were sub-TA fees.

Section 12(b) of the 1940 Act and Rule 12b-1 thereunder make it unlawful for any registered open-end fund to engage "directly or indirectly in financing any activity which is primarily intended to result in the sale of shares issued by such company" unless such financing is made pursuant to a written plan that meets the requirements of Rule 12b-1. Consequently, as noted in the SEC order, if there is no approved Rule 12b-1 plan that permits the fund's adviser to use fund assets to pay for distribution, then fund assets cannot be used to pay for such distribution. The adviser, however, may pay for those distribution services out of its own resources.

The SEC order also notes that, in addition to providing distribution services, intermediaries often provide shareholder services that typically would otherwise be provided by the fund's transfer agent. These services are commonly referred to as "sub-TA services" and are often paid out of the fund's assets. According to the SEC, the agreements between the Funds and Calvert provided that the Funds were not to incur expenses related to sub-TA services in excess of 30 basis points annually.

The order states that although certain of Calvert Distributors' agreements with intermediaries, such as its agreements with "Intermediary A and Intermediary B," called for the provision of distribution and marketing services, from January 1, 2008 through December 31, 2014 (the Relevant Period), Calvert treated those agreements as being for sub-TA services, and improperly caused the Funds to pay approximately $14.87 million for those services outside of a Rule 12b-1 plan. The SEC also alleged that over the same period of time Calvert improperly caused the Funds to pay intermediaries approximately $2.96 million for sub-TA services in excess of the annual 30 basis point expense limitation. According to the order, both of these categories of improper payments were in addition to payments made to the intermediaries pursuant to the Funds' written Rule 12b-1 plans.

Pursuant to the order, Calvert agreed to pay approximately $17.8 million in disgorgement and $3.8 million in interest, in addition to a civil monetary penalty of $1 million. The order notes that the penalty was reduced based on Calvert's self-reporting of the improper fee payments, cooperation with the SEC's investigation and prompt remediation, including the implementation of enhanced policies and procedures regarding payments for distribution and sub-TA services.

The SEC order is available at: https://www.sec.gov/litigation/admin/2017/ia-4696.pdf.

Legislative Developments

House Passes the Financial CHOICE Act of 2017: *Implications for Mutual Fund Excessive Fee Litigation*

On June 8, 2017, the Financial CHOICE Act (H.R. 10), the financial regulatory reform legislation that aims to repeal and replace various provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, passed the House along party lines, 233-186. Notably, the Financial CHOICE Act includes amendments to Section 36(b) of the 1940 Act that would impose heightened pleading standards and raise the burden of proof for plaintiffs in excessive fee litigation.

Section 36(b) imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing advisory services to funds and provides fund shareholders with an express private right of action to enforce this duty against advisers and their affiliates that receive compensation from funds. In such cases, the burden of proof rests on the plaintiffs to show, by a preponderance of the evidence, that the advisory fee is excessive, i.e., that the fee is "so disproportionate that it does not bear a reasonable relationship to the service the defendant rendered and could not have been negotiated at arm's-length."

The Financial CHOICE Act would require that a complaint brought under Section 36(b) "state with particularity all facts establishing a breach of fiduciary duty, and, if an allegation of any such facts is based on information and belief, the complaint shall state with particularity all facts on which that belief is formed." In addition to the heightened pleading standards, the Act would raise the burden of proof for plaintiffs from a "preponderance of the evidence" standard to a "clear and convincing evidence" standard. That is, under the Financial CHOICE Act, a fund shareholder would "have the burden of proving a breach of fiduciary duty by clear and convincing evidence."

The text of the Act is available at: https://www.congress.gov/115/bills/hr10/BILLS-115hr10eh.pdf.

House Passes the Financial CHOICE Act of 2017: *Implications for Exemptive Relief Process*

Another section of the Financial CHOICE Act of relevance to the fund industry is Section 848, "Streamlining of Applications for an Exemption from the Investment Company Act of 1940," which would significantly change the process for applying for exemptive relief from the SEC.

The 1940 Act provides the SEC with significant discretionary authority over the application of the statute. Section 6(c) of the 1940 Act authorizes the SEC to conditionally or unconditionally exempt any person, security or transaction from one or more provisions of the Act or SEC rules. To grant an exemption, the SEC must find that the exemption is "necessary or appropriate in the public interest and consistent with the protection of investors and the

purposes fairly intended by the policies and provisions of [the 1940 Act]."

Applicants seeking exemptive relief under section 6(c) must file an application with the SEC presenting a basis for the relief requested, and identifying any benefits expected for investors and any conditions imposed to protect investors. On many issues, the SEC has delegated the task of handling exemptive applications under the 1940 Act to its Division of Investment Management (IM), where applications are assigned to staff in the Office of Investment Company Regulation. Once the staff has reviewed an application, it will provide written comments on the application and may request clarifications or adjustments to the contents and/or structure of the application to ensure that the requested relief is consistent with statutory standards.[1] The applicant will then revise its application and file the amended application with the SEC. Depending on the complexity of the matter(s) at issue in the application, the comment process may be repeated multiple times.

Once the SEC staff has reviewed the application and has resolved its comments, the application is submitted by IM to the SEC with a recommendation that it be set down for a hearing. A notice, including a summary of the application, is then published in the Federal Register to give interested persons an opportunity to request a hearing on the proposed relief. Following a notice period of approximately 25 days, and unless a hearing is requested by an interested party or by the SEC on its own motion, an order granting the requested relief is issued.[2]

Section 848 of the Financial CHOICE Act would amend Section 6(c) of the 1940 Act to provide for the following application process: A party seeking exemptive relief would file an application with the SEC and, within 5 days of receipt of the application, the SEC must either: (1) publish the application, including on the SEC's website; or (2) if the SEC determines that the application does not comply with the proper form, manner or information requirements (as established by the SEC), reject such application and notify the applicant of the specific reasons the application was rejected. If the SEC does not reject an application but fails to publish it by the end of the 5-day period, such application will be "deemed to have been published" as of the end of the 5-day period.

Section 848 of the Financial CHOICE Act would require the SEC to act on the application within 45 days after publication. The SEC would have to take one of the following actions: (1) approve the application; (2) if the SEC determines that the application "would have been approved had the applicant provided additional supporting documentation or made certain amendments to the application," then the SEC must (i) provide the applicant with the specific additional supporting documentation or amendments that the SEC believes are necessary for the applicant to provide in order for the application to be approved; and (ii) request that the applicant withdraw the application and re-submit it with such additional supporting documentation and amendments; or (3) deny the application. Section 848 would permit the SEC to extend the 45 time period by an additional 45 days if the SEC determines that a longer period is appropriate and publishes the reasons for such determination, or if the applicant consents to the longer period.

Notably, if the SEC fails to approve, request the withdrawal of, or deny the application within the maximum 90 day period, the application will be "deemed to have been approved" by the SEC.

[1] The IM staff may recommend that an application be withdrawn if it believes that the requested relief is not justified.

[2] According to a 1985 SEC release, "Commission Policy and Guidelines for Filing of Applications for Exemption," (1940 Act Release No. 14492), IM guidelines require that (1) initial comments on an exemptive application be given at one time and within 45 days or receipt of the application (novel or complex applications may require a longer review period); (2) notices of routine applications which require no amendment be published within 60 days; and (3) orders under delegated authority be issued within two business days after the expiration of the notice period, if no hearing request is filed. The exemptive application process typically exceeds the foregoing time periods. In a June 6, 2017 article discussing the Financial CHOICE Act's impact on the exemptive application process, *BoardIQ* cited the SEC's latest budget proposal which notes that IM has a target of providing initial comments to applicants within 120 days and "has met that goal 100% or 99% of the time since its 2011 fiscal year."

House Passes the Financial CHOICE Act of 2017: *Implications for Closed-End Fund Capital Raising and Registration Process*

In connection with the passing of the Financial CHOICE Act, the House approved an amendment offered by Rep. Trey Hollingsworth (R-IN) (the Amendment) which would extend "well-known seasoned issuer" (WKSI)[1] status to registered closed-end investment companies (closed-end funds) that meet certain requirements. Currently, closed-end funds are excluded from the WKSI definition and thus, cannot benefit from the more flexible automatic registration process available to WKSIs. Form N-2, the registration form used by closed-end funds, is not included in the definition of automatic shelf registration statement.

The Amendment, which was designated as Subtitle X to the Financial CHOICE Act, "Modernized Offering and Proxy Rules for Closed-End Funds," directs the SEC, not later than one year after the enactment date of the Act, to revise any rules to the extent necessary to allow closed-end funds to use the securities offering and proxy rules that are available to WKSIs. In this connection, the SEC is directed to, among other things, remove the exclusion of a closed-end fund from the definition of a WKSI and add registration statements filed on Form N-2 to the definition of automatic shelf registration statement.

In his remarks in support of the Amendment, Rep. Hollingsworth stated:

> Closed-end funds … are currently under attack by unfair onerous filing and offering regulations. This commonsense amendment would provide parity for these certain closed-end funds by streamlining their registration process, offering and communications processes that are currently available to other publicly traded companies ... Giving qualifying closed-end funds the ability to enjoy well-known seasoned issuer status would help those funds better evaluate and access the market for their offerings and would enable them to more quickly access capital markets.

The Amendment was agreed to by a 231-180 vote. The Congressional Record concerning the Amendment is available at: https://www.congress.gov/amendment/115th-congress/house-amendment/129/text.

[1] A "well-known seasoned issuer" is an issuer that is required to file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act and satisfies the following requirements: (1) it meets the registrant requirements of Form S-3 or Form F-3; (2) as of a date within 60 days of filing its shelf registration statement, either: (a) it has a worldwide market value of its outstanding voting and non-voting common stock held by non-affiliates of $700 million or more; or (b) it has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities in registered primary offerings for cash; and (3) it is not an "ineligible issuer."

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