Investment Management Legal and Regulatory Update

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LATEST DEVELOPMENTS: FUNDS

SEC Proposes Enhanced Proxy Voting Disclosure

The SEC recently proposed amendments to Form N-PX to enhance the information mutual funds and exchange-traded funds (ETFs) report about their proxy votes.

The proposed amendments are intended to address issues that the staff identified, which may make it difficult for investors to utilize the information included in a Form N-PX. The staff noted that the organization and presentation of proxy voting records may vary considerably from fund to fund. Some funds may use abbreviations to describe certain proxy votes while other funds do not. The staff also noted that there are varying practices with regard to presentation of information on a Form N-PX that includes multiple funds. In some instances, the Form N-PX may present the entire voting record for each fund separately, while in other instances the Form N-PX will present the information by security, with each fund having voted a proxy for that security listed separately. The staff expressed concern that investors may find it difficult to analyze a Form N-PX due to the length of the filing and because the Form N-PX is not filed in machine readable or "structured" data language. The staff also sought to provide information concerning whether securities that had been out on loan were recalled prior to a proxy vote.

To address these concerns, the SEC is proposing amendments to Form N-PX to improve the utility of the form to investors and make it easier to analyze. As proposed, Form N-PX would be required to:

- Identify proxy voting matters (i.e., proposals) using the same language as disclosed in the issuer's form of proxy and in the same order as presented on the issuer's form of proxy.
- Select from standardized categories to identify the subject matter of each reported proxy voting item. Examples of proposed voting categories include board of directors, shareholder rights and defenses, extraordinary transactions, compensation, environment or climate and human rights or human capital/workforce.
- Disclose the number of shares that were voted on a matter and how those shares were voted (e.g., for or against a proposal or abstention).
- Disclose the number of shares that a fund loaned out but did not recall for purposes of the proxy vote.
- Provide Form N-PX disclosure separately by series for a fund that offers multiple series (for example, provide Series A's full proxy voting record followed by Series B's full proxy voting record).
- Present voting data in custom eXtensible Markup Language (XML)-based structured data language created specifically for reports on Form N-PX.

In addition to the proposed disclosure changes, the SEC is proposing changes to require that institutional investment managers that are subject to Section 13(f) reporting requirements report annually on Form N-PX how they voted proxies relating to shareholder advisory votes on executive compensation matters (say-on-pay votes). The amendment would require institutional money managers to report say-on-pay votes when it uses voting power to influence a voting decision with respect to a security.

The amendments do not propose any changes to the reporting timeframe for Form N-PX. Each Form N-PX will still need to be filed by August 31 and include information for the preceding 12-month period ended June 30. Once the proposal is published in the federal register, there will be a 60-day comment period.

Sources: Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, Release No. IC-34389 (Sept. 29, 2021), available here; SEC Proposes to Enhance Proxy Voting Disclosure by Investment Funds and Require Disclosure of "Say-on-Pay" Votes for Institutional Investment Managers, SEC Press Release 2021-202 (Sept. 29, 2021), available here.

Proposal Threatens Tax Benefits of ETFs

Senate Finance Committee Chair Ron Wyden released draft tax legislation and a discussion draft proposing changes to taxation of mutual funds and ETFs that would no longer allow funds to be exempt from recognizing gains when distributing property in-kind to redeeming shareholders, which ETFs routinely do when managing securities baskets. As drafted, the proposal would take effect in years beginning after December 31, 2022.

According to a recent study, the 25 largest ETFs distributed, tax-free, securities with unrealized gains of nearly $60 billion in 2015 alone. Under the existing legal structure, with in-kind redemptions to authorized participants, if there are enough withdrawals, an ETF can avoid recognizing taxable gains entirely. For investors, this means that, rather than paying a tax on a fund's gain each year, investors would not pay anything until they sell their ETF shares. According to Morningstar, just 5% of nearly 1,400 ETFs run by the 12 largest sponsors had year-end taxable distributions in 2020.

The Investment Company Institute issued a statement indicating strong opposition to the proposal. The ICI identified the legislation as penalizing investors by making it more expensive for investors to invest for the long term.

Sources: Joe Morris, ETF Tax Benefit Under Threat in New Senate Bill, IGNITES (Sept. 13, 2021), available by subscription; ICI CEO Statement Opposing Wyden Proposal to Penalize ETF and Mutual Fund Investors (Sept. 15, 2021), available here; Jackie Noblett, ETFs' Tax Efficiency Shines in Tumultuous 2020: Morningstar, IGNITES (Dec. 18, 2020), available by subscription; Wyden Draft Tax Legislation and Wyden Pass-Through Reform Discussion Draft, available here and here.

LATEST DEVELOPMENTS: ADVISERS

SEC Risk Alert on Fixed Income Principal and Cross Trades

The SEC's Division of Examinations (Division) recently issued a risk alert sharing its observations from recent examinations of advisers participating in principal and agency trades involving fixed income securities. An adviser that arranges for a security to be purchased from or sold to a client from the adviser's own account is engaging in a "principal trade." An "agency cross trade" occurs when an adviser arranges for a trade to be executed between a client and another party, and a "cross trade" occurs when an adviser effects a trade between two or more of its advisory clients' accounts but does not charge a fee for effecting the transaction. The risk alert is intended to supplement the Division of Examination's staff (Examinations staff) observations from a September 2019 risk alert that highlighted the most common compliance issues observed by the staff related to principal and agency cross trades under the Advisers Act.

The Division conducted over 20 examinations of advisers managing approximately $2 trillion in assets for over two million client accounts. The initiative focused on conflicts of interest, compliance programs and disclosure to clients with respect to advisers engaging in principal and cross trades. Nearly two-thirds of the examined advisers received deficiency letters from the Division.

Examples of common deficiencies identified by the Examinations staff with respect to adviser compliance programs and disclosures included the following:

- Adviser policies and procedures were inconsistent with the examined adviser's practices, its disclosures and/or regulatory requirements. Adviser policies and procedures often lacked procedures to validate that principal trades, cross trades or both were completed in a manner consistent with the adviser's disclosures to clients and the adviser's policies and procedures; and to validate that appropriate consent was received and disclosure provided to clients prior to completing the transactions.

- Compliance policies and procedures often lacked guidance to give advisory personnel the required information to achieve compliance, such as the factors the personnel should consider in determining whether a trade was in the best interest of clients, or steps personnel should take to ensure compliance with ERISA restrictions on principal and cross trades.

- Adviser policies and procedures were not effectively tested, which resulted in firms that prohibited principal or cross trades not preventing such trades from being executed and firms that permitted such trades not following procedures for review, approval and analysis of the trades.

- Contrary to the adviser's compliance policies, conflicts of interest associated with cross trades were not identified by the advisers and mitigated, disclosed or otherwise addressed by compliance programs (i.e., advisers did not execute cross trades at independent market prices and did not use best price and best execution efforts).

- Advisers often omitted relevant information regarding cross trading activities from their Form ADV, had no disclosures regarding the conflicts of interest associated with executing such trades in their brochure and did not include disclosures in their brochure, advisory agreements and written communications to clients regarding the conflicts of interest created by advisers providing guidance to clients on both sides of the trades.

The Examinations staff also identified practices that it believed were effective in promoting compliance with respect to principal and cross trades. In particular the staff highlighted the effectiveness of policies and procedures that (1) incorporate all applicable legal and regulatory requirements; (2) clearly articulate the activities covered by the advisers' written compliance policies and procedures; (3) set standards that address the firms' expectations for each of these activities; (4) include supervisory policies and procedures; and (5) establish controls to determine whether policies and procedures are being properly followed and documented in the required manner.

The staff observed that effective compliance programs relating to engaging in principal and cross trades often include the following components:

- Provide detailed and specific definitions of what constitutes a "cross trade" or "principal trade."

- Set expectations and standards for engaging in cross trades or principal trades that are tied to the legal requirements of the Advisers Act and otherwise promote compliance with the adviser's policies and procedures.

- Analyze the adviser's books and records to identify undisclosed principal and cross trades and undisclosed conflicts of interest.

- Place conditions, qualifications or restrictions on the execution of principal trades or cross trades within client accounts to ensure adherence to fiduciary obligations, legal requirements, clients' mandates, compliance policies and procedures, and disclosures.

- Provide clients with full and fair disclosure of all material facts surrounding principal and cross trades, including the conflicts of interest associated with cross trades.

Source: Observations Regarding Fixed Income Principal and Cross Trades by Investment Advisers from An Examination Initiative (Jul. 21, 2021), available here.

SEC Risk Alert on Advisers Managing Client Accounts that Participate in Wrap Fee Programs

The Division also released a risk alert detailing observations relating to advisers who participate in wrap fee programs. Participation in a wrap free program generally involves an advisory client paying a wrap program sponsor a consolidated fee that includes investment advisory services and the execution of transactions. The Division's observations were the result of over 100 examinations of advisers that served as portfolio managers in or sponsors of wrap fee programs and advisers that advised client accounts through unaffiliated wrap fee programs.

The Division's exams focused on whether:

- The advisers had fulfilled their fiduciary duty by having a reasonable basis to believe that the wrap fee programs were in the best interests of participating clients, both at the inception of the relationship and on an on-going basis.
- The advisers had provided full disclosure of all material facts to clients participating in wrap fee programs, particularly regarding fees, expenses, conflicts of interest and entities involved in the programs.
- The adviser's compliance policies and procedures were adequate, with a particular focus on determining whether the adviser had policies to determine whether wrap fee programs were in the best interests of clients.

Examinations Staff Observed Deficient Practices

The Examinations staff identified the following common deficiencies regarding adviser practices with respect to wrap fee programs:

Fiduciary Duty and Recommendations Not Made in Clients' Best Interest. The staff observed issues with respect to advisers' recommendations that clients participate in wrap fee programs, both with respect to trading practices and recommendations that participation was in the best interest of clients. For instance, the staff observed instances where an adviser continued to recommend client participation in a wrap fee program but did not consider that the clients may have incurred transaction costs in addition to bundled wrap fees or that infrequent trading in wrap fee accounts could cause clients to pay higher fees than they would in non-wrap fee accounts. The staff also observed instances where an adviser's recommendation of participation in a wrap fee program was deficient because the recommendation was made without conducting a best interest assessment, or having conducted an initial assessment but without considering whether participation remained in a client's best interest.

Potentially Misleading or Omitted Disclosures. The staff observed several types of deficient or inconsistent disclosure in documents provided by advisers to clients, such as brochures that failed to include full disclosure regarding fees that were not included in a wrap fee program (e.g., trade-away fees) or instances where advisory agreements indicated clients would pay brokerage commissions when wrap fee programs stated clients would not pay such fees.

The staff also observed instances of advisers omitting or inadequately describing conflicts of interest, such as disclosure relating to the financial incentives advisers have to make certain recommendations that could result in higher fees for clients while allowing the adviser to avoid paying transaction costs.

Deficient Compliance Programs. The staff noted several instances of advisers failing to implement written compliance policies and procedures for key business functions and risk areas, such as policies and procedures addressing the risks applicable to managing client participation in wrap fee programs. The staff also identified instances where advisers had internal guidelines or informal practices for key operational areas, such as conducting best interest reviews of client accounts or best execution analyses for wrap fee accounts, but had not memorialized such practices in written policies and procedures.

The staff also identified instances of advisers that had inadequate policies with respect to review of trading activity in wrap accounts, determining the suitability of wrap fee account participation by clients, conducting best execution analyses, identifying accounts over which the advisory firm maintained custody and delivering disclosure documents.

The staff also noted instances where advisers had been inconsistent in the application of their policies and procedures or had failed to fully implement such policies and procedures, in particular with respect to conducting due diligence on third-party portfolio managers recommended to clients, failing to review client accounts and fee billing as stipulated in policies or failing to implement policies applicable to participation in a wrap account program.

In addition, the staff observed that some advisers did not perform required annual reviews or performed the reviews inadequately.

Observed Practices to Assist With Compliance

The Examinations staff also identified policies and practices that can assist advisers with compliance matters relating to client participation in wrap fee programs, including the following:

- Advisers initially reviewing programs, collecting pertinent information from clients, and periodically assessing whether the recommended wrap programs continue to be in the best interests of clients.
- Advisers providing clients disclosure with respect to wrap program participation as it relates to (i) the adviser's receipt of compensation or other incentives from wrap fee program sponsors or portfolio managers, or the adviser's financial incentives to not migrate infrequently traded wrap fee accounts to brokerage or non-wrap advised accounts or not trade frequently in clients' accounts to avoid transaction costs; (ii) the possibility that a client may incur more costs by participating in a wrap program than if they received similar service provided in other types of accounts and that participation in wrap account programs could result in paying share class charges, such as Rule 12b-1 fees, when lower cost alternative classes of the same fund may be available.
- Advisers maintaining written policies and procedures that clearly identify the factors that an adviser will use when assessing whether to recommend client participation in a wrap fee program.

Source: Observations from Examinations of Investment Advisers Managing Client Accounts that Participate in Wrap Fee Programs (Jul. 21, 2021), available here.

LITIGATION/ENFORCEMENT ACTIONS

Mutual Fund Share Class Selection Disclosure Violations

The SEC recently settled an enforcement action with one former adviser and announced charges against another adviser in connection with each adviser investing client assets in more expensive mutual fund share classes than were available to the clients. As it relates to the risk alert on wrap fee programs, above, each enforcement action discussed below involved clients participating in wrap fee programs.

SEC Orders Former Adviser to Return Over $900,000 to Clients

Northwest Advisors, Inc. agreed to settle charges that it invested wrap fee client assets in more expensive mutual fund share classes, which provided the firm with financial benefits, without disclosing this conflict to clients. The order finds that Northwest purchased, recommended or held for clients mutual fund share classes that charged 12b-1 fees when lower-cost share classes of the same funds were available. Northwest did not have to pay transaction fees for trades placed in clients' accounts in share classes that charged 12b-1 fees but did have to pay transaction fees in connection with share classes of the same funds that did not charge 12b-1 fees. The SEC found that this practice caused clients to pay excess fees on their investments and allowed Northwest to avoid paying transaction fees for the trades placed in those clients' accounts. This created a conflict of interest, which Northwest did not adequately disclose to clients in its brochure or otherwise. The SEC found that Northwest had breached its duty to seek best execution by causing clients to purchase mutual fund share classes that charged 12b-1 fees when share classes of the same fund that presented a more favorable value to the clients were available. The SEC also found that Northwest had failed to implement written policies and procedures designed to prevent these violations. Northwest will pay disgorgement of $779,416, prejudgment interest of $123,084, and a civil penalty of $245,000.

SEC Charges Adviser for Investing Wrap Fee Client Assets in Higher Cost Mutual Funds to Avoid Paying Transaction Costs

The SEC announced charges against Buttonwood Financial Group, LLC and its president and chief compliance officer in connection with investing the assets of clients, most of whom were participating in a wrap fee program, in generally more expensive mutual funds so that Buttonwood could avoid paying transaction costs.

The complaint alleges that from at least 2014 until summer 2019, Buttonwood took steps to avoid paying transaction costs by directing client investments in more expensive mutual funds for which the broker did not charge Buttonwood a transaction fee when, in many instances, Buttonwood could have invested clients in a lower cost share class of the exact same mutual fund, which would have required Buttonwood to pay a transaction fee. The complaint alleges that they violated their fiduciary duty to their clients by not disclosing their financial conflict of interest to clients and repeatedly put their interests in not paying the transaction fees ahead of their clients' interests to earn greater returns.

The complaint also alleges that in 2016, Buttonwood's president initiated a 60/40 arrangement with Buttonwood's unaffiliated broker in which Buttonwood committed to invest at least 60% of its wrap fee client assets in share classes that did not charge a transaction fee (i.e., generally more expensive share classes) in exchange for the broker waiving all transaction fees on any other mutual fund or equity stock trades making up the remaining 40% of Buttonwood client assets. The SEC alleges that the 60/40 arrangement exacerbated Buttonwood's existing conflict of interest and Buttonwood had an even greater incentive to invest in more expensive, lower-performing mutual fund investments to the detriment of their clients. The SEC alleges that in violation of their fiduciary duty to their clients, Buttonwood and the president did not disclose their conflict of interest or the 60/40 arrangement until 2020, during the SEC's investigation.

The SEC also alleges that Buttonwood avoided paying millions of dollars in transaction fees by repeatedly investing clients in more expensive share classes of mutual funds when less expensive share classes of those same mutual funds were available to clients, thereby also breaching their fiduciary duty to their clients to obtain best execution.

Sources: SEC Orders Former Investment Adviser to Return Over $900,000 to Clients Harmed by Share Class Selection Disclosure Violations, (Aug. 24, 2021), available here; In the Matter of Northwest Advisors, Inc., IA Release No. 5830 (Aug. 24, 2021), available here; SEC Charges Investment Adviser and Its President for Investing Clients in Higher Cost Mutual Funds to Avoid Paying Transaction Costs, Litigation Release No. 25222 (Sept. 24, 2021), available here; Complaint, SEC vs. Buttonwood Financial Group, LLC and Jon Michael McGraw, Case No. 4:21-cv-686 (W.D. Mo. Sept. 23, 2021), available here.

SEC Chair Signals Possible Cybersecurity Rules Forthcoming as Advisory Firms Face Cyber-Related Enforcement Actions

On September 14, 2021, SEC Chairman Gary Gensler testified before the U.S. Senate Committee on Banking, Housing and Urban Affairs. As part of his testimony, Chairman Gensler indicated that he has requested that SEC staff develop rule proposals around cybersecurity disclosure to provide investors with consistent, comparable and decision-useful disclosures. Chairman Gensler also indicated in his testimony that a cybersecurity rule would address "cyber hygiene," or the practices that firms use to keep their data safe.

Chairman Gensler's testimony came on the heels of recent SEC enforcement actions that fined three groups of advisers and broker-dealers for failing to properly implement cybersecurity policies. The SEC's orders against each of the firms found that they had violated Rule 30(a) of Regulation S-P (Safeguards Rule), which is designed to protect confidential client information. In a release discussing the enforcement actions, Kristina Littman, Chief of the SEC Enforcement Division's Cyber Unit, stated "investment advisers and broker dealers must fulfill their obligations concerning the protection of customer information. It is not enough to write a policy requiring enhanced security measures if those requirements are not implemented or are only partially implemented, especially in the face of known attacks."

Cetera Fined $300,000 For Safeguards Rule Violation

The SEC found that between November 2017 and June 2020, unauthorized third parties had taken over the cloud-based email accounts of over 60 personnel from adviser and broker-dealer subsidiaries of Cetera Financial Group (collectively, the Cetera firms). As a result, the personally identifying information (PII) of over 4,300 clients of the Cetera firms was exposed.

In November and December 2017, email accounts of contractor representatives were taken over by unauthorized third parties via phishing, credential stuffing or other modes of attack. None of the compromised accounts had multi-factor authentication (MFA) turned on. Between January and March 2018, the Cetera firms turned on MFA for employee and contractor cloud-based email accounts. They also adopted a policy requiring MFA to be turned on "wherever possible." However, in September 2018, Cetera identified email accounts that still did not have MFA turned on. In October, the policies were amended to require MFA "wherever possible, but at a minimum for privileged or high-risk access." The SEC found additional instances of unauthorized third parties taking over contractor representative email accounts from October 2018 to June 2020. None of the compromised email accounts had MFA turned on, despite the 2018 policies.

The SEC also found that the Cetera firms did not implement MFA for offshore contractor email accounts until the end of 2019, even though these email accounts were accessible from any location around the world. The SEC found email accounts used by offshore contractors were taken over by third parties in 2018 and 2019.

In addition, the SEC found that certain breach notifications to clients prepared by outside counsel included misleading language suggesting that the notifications were issued sooner than they were after the discovery of the breaches. The advisers had policies and procedures for responding to cybersecurity incidents that required the firms' personnel to review client communications before the communications were sent. In addition to violating the Safeguards Rule, the SEC found that the advisers failed to implement their policies in violation of the Advisers Act because the review failed to correct the language that was misleading. Without admitting or denying the SEC's findings, the Cetera firms agreed to pay $300,000.

Cambridge Fined $250,000 for Safeguards Rule Violation

In an enforcement action against Cambridge Investment Research, Inc., a broker-dealer, and Cambridge Investment Research Advisors, Inc., an adviser (collectively, Cambridge), the SEC found that from January 2018 through July 2021, unauthorized third parties had taken over the cloud-based email accounts of over 121 Cambridge representatives via phishing, credential stuffing or other modes of attack, resulting in the exposure of PII of over 2,100 Cambridge clients. The SEC found that although Cambridge discovered the first email takeover in January 2018, it failed to adopt and implement firm-wide enhanced security measures, such as MFA, for cloud-based email accounts of its representatives until 2021. Without admitting or denying the SEC's findings, Cambridge agreed to pay $250,000.

KMS Fined $200,000 for Safeguards Rule Violation

In the third enforcement action, against KMS Financial Services Inc. (KMS), a dually registered broker-dealer and adviser, the SEC found that between September 2018 and December 2019, unauthorized third parties took over the cloud-based email accounts of 15 KMS financial advisers or their assistants, resulting in the PII exposure of approximately 4,900 KMS clients. Emails containing PII were forwarded to unauthorized email addresses outside of KMS. In addition, some clients received phishing emails that requested them to wire funds to a bank account, enter PII to access a document or click on a link to view an investment recommendation, which would grant access to the client's computer. After the email account takeovers were discovered, KMS had the affected financial adviser's email passwords reset, forwarding rules removed and MFA enabled. KMS also hired two forensic firms to investigate the email account takeovers, whose incident reports recommended expedited enabling of MFA for all KMS independent contractor email addresses. Despite the recommendations, KMS failed to adopt written policies and procedures requiring additional firm-wide security measures for all KMS email users, such as MFA, until May 2020, and did not implement those measures until August 2020, placing additional client information at risk. Without admitting or denying the SEC's findings, KMS agreed to pay $200,000.

Sources: Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (Sept. 14, 2021), available here; SEC Announces Three Actions Charging Deficient Cybersecurity Procedures, SEC Press Release 2021-169 (Aug. 30, 2021), available here; In the Matter of Cetera Advisor Networks LLC, Cetera Investment Services LLC, Cetera Financial Specialists LLC, Cetera Advisors LLC, and Cetera Investment Advisers LLC, IA Release No. 5834 (Aug. 30, 2021), available here; In the Matter of Cambridge Investment Research, Inc. and Cambridge Investment Research Advisors, Inc., IA Release No. 5839 (Aug. 30, 2021), available here; In the Matter of KMS Financial Services, IA Release No. 5840 (Aug. 30, 2021), available here.

Great-West Prevails in Appeal of Excessive Fee Challenge Case

On July 26, 2021, the U.S. Court of Appeals for the Tenth Circuit affirmed the decision of the U.S. District Court for the District of Colorado in favor of defendants Great-West Capital Management, LLC and Great-Western Life & Annuity Insurance Co. in an excessive fee suit filed under Section 36(b) of the Investment Company Act.

As discussed in our October 2020 Update, the plaintiffs, a group of investors who acquired shares of Great-West Funds as participants in retirement plans offered by their employers, brought suit in a consolidated shareholder derivative action in early 2016, alleging that the advisory and administrative service fees charged by Great-West were excessive. Following a bench trial, the court ruled that plaintiffs failed to prove that Great-West's fees were so disproportionately large that they bore no reasonable relationship to Great-West's services and could not have been the product of arm's length bargaining.

The district court adopted Great-West's proposed findings of fact and conclusions of law with respect to the *Gartenberg* factors. In doing so, the court found that: (1) the Great-West Funds Board of Directors' decision to approve Great-West's fees was entitled to substantial deference because the Board was independent, qualified and it engaged in a robust process in approving the fees; (2) the advisory fees and administrative fee were within the range of comparable funds; (3) plaintiffs failed to quantify any alleged economies of scale or show that those economies were not adequately shared with shareholders; (4) Great-West's profits were within the range of their competitors; (5) Great-West provided extensive, high-quality services in exchange for its fees; and (6) plaintiffs failed to identify any significant fall-out benefits to Great-West. Accordingly, the court found Great-West had not breached its fiduciary duties. In addition, the court found plaintiffs had failed to prove their actual damages at trial. Accordingly, the court entered judgment in favor of defendants and ordered payment of defendants' costs after four years of litigation.

On appeal, the Tenth Circuit emphasized the importance of the sixth *Gartenberg* factor, "the level of expertise, conscientiousness, independence, and information with which the board acts," stating that prior judicial treatment of this factor and its "unique basis in the statutory text" suggest that this factor is of prime importance in the consideration of Section 36(b) cases. The Tenth Circuit noted that the critical inquiry in a Section 36(b) suit is whether the board's process for negotiating and reviewing adviser compensation is robust, and where a board's decision had considered the relevant factors, such decision is entitled to considerable weight. The Tenth Circuit discussed at length the contract review process undertaken by the Board of Directors of the Great-West Funds, noting testimony that the Board was highly engaged in the process and that the Board's process followed best practices recommended by industry authorities, including the Mutual Fund Directors Forum, the Investment Company Institute and the Fund Director's Guidebook. The Tenth Circuit also noted that the Great-West Board met in advance of their 15(c) meeting to review materials related to the contract approval, evaluated material against the *Gartenberg* factors and evaluated an analysis of fees prepared by outside consultants—Lipper Inc. provided comparisons of peer funds' fees and performance, and JDL Consultants reported on the competitiveness and reasonableness of the fees and performance. The court also observed that the Great-West Board was advised by outside counsel, received the materials well in advance of their meeting and asked follow-up questions of Great-West related to the materials provided. Accordingly, the Tenth Circuit concluded that the Board's process was robust and the decision to approve the funds' fees should be granted substantial deference.

Source: Obeslo, et al. v. Great-Western Life & Annuity, et al., July 26, 2021 (No. 20-1310), available here.

COMPLIANCE DATES FOR FINAL RULES

Final Rule	Compliance Dates
New Fund of Funds Rule (Rule 12d1-4) and Related Amendments; Rescission of Rule 12d1-2	Rule 12d1-4 became effective on January 19, 2021, but, in order to provide funds with a transition period, the compliance date for the amendments to Form N-CEN and the recission of Rule 12d1-2 and fund of funds exemptive orders is January 19, 2022.
Derivatives Risk Management Rule (Rule 18f-4) and Related Amendments; Rescission of Prior SEC Guidance (Release 10666)	Rule 18f-4 and related amendments to Forms N-CEN, N-PORT and N-LIQUID (to be renamed Form N-RN) became effective on February 19, 2021, and the compliance date is August 19, 2022. The SEC will rescind Release 10666 and related staff no-action letters and guidance effective August 19, 2022.
Fair Valuation Rules (Rules 2a-5 and 31a-4)	Rules 2a-5 and 31a-4 became effective on March 8, 2021, and funds will have until September 8, 2022 to come into compliance.
Advertising and Cash Solicitation Rule Amendments (Rules 206(4)-1 and 204-2)	The rule became effective on May 4, 2021 and advisers will have until November 4, 2022 to come into compliance. The current cash solicitation rule (Rule 206(4)-3) will be rescinded. However, until an adviser transitions to the amended marketing rule, the adviser should continue to comply with the previous advertising and cash solicitation rules.