SEWARD & KISSEL LLP 125 YEARS

THE PRIVATE FUNDS BULLET REPORT

OCTOBER 2015

A publication of the Investment Management Group

Business Planning, Structural, Legal, Regulatory & Compliance Developments

- On October 5, 2015, the U.S. Supreme Court denied certiorari in *U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014) letting stand a ruling that limits the government's leeway in prosecuting insider-trading cases. The Court's refusal to hear the case is significant because *Newman* will continue to be an impediment to the government's ability to pursue certain insider-trading prosecutions.

- On August 24, 2015, the U.S. Department of Justice, at the request of the Federal Trade Commission ("FTC"), filed a proposed settlement in federal court in connection with allegations that three funds managed by Third Point LLC ("Third Point"), a registered investment adviser, violated the Hart-Scott-Rodino Act (the "HSR Act") by improperly relying on the "investment-only" exemption to the reporting requirements of the HSR Act when Third Point acquired shares of Yahoo! Inc. in 2011 in excess of the HSR Act filing threshold. The HSR Act exempts certain acquisitions of voting securities from the filing obligations imposed by the HSR Act, if the acquisition is made for less than 10% of the outstanding voting securities of the issuer and is made "solely for the purpose of investment." The FTC has explicitly stated, however, that the investment-only exemption is a narrow exemption, and that engaging in certain specified conduct will preclude reliance on it. Nominating a candidate for the board of directors, holding a board seat or being an officer, proposing corporate action requiring shareholder approval, soliciting proxies, or being a competitor of the issuer are all examples of conduct, according to the FTC, that is inconsistent with a claim of investment purpose. In this case, the FTC alleged that Third Point engaged in conduct inconsistent with the exemption between August 8, 2011 and September 16, 2011 when, for example, it (i) contacted individuals to gauge their interest in becoming the CEO or a potential board candidate of the issuer, (ii) assembled an alternate slate for the board of directors of the issuer, and (iii) internally discussed the possible launch of a proxy battle for the directors of the issuer. The FTC's proposed settlement with Third Point reiterates that the FTC interprets the investment-only exemption narrowly, and that an acquirer's intent, as well as its conduct, will be considered when determining whether the exemption applies. Clear evidence of non-passive intent, even if not accompanied by overt conduct, may render the exemption unavailable.

- On June 23, 2015, the SEC entered into a settlement order with Pekin Singer Strauss Asset Management Inc. ("Pekin"), a registered investment adviser, and three of its senior principals. In the order, the SEC alleged, among other things, that Pekin's then-president, Ronald Strauss, did not make the compliance program a priority for the firm, and directed the CCO to prioritize his investment research and other responsibilities over compliance, including naming him CFO in 2009. The SEC stated that during 2009 and 2010, the CCO conveyed to Mr. Strauss on multiple occasions that he needed help to fulfill his compliance responsibilities. Mr. Strauss told him that the firm's primary responsibility was serving clients, and that they could address any problems that arose in an SEC examination at such time. Without admitting or denying the SEC's charges, Pekin and its principals agreed to the settlement order and $285,000 in civil penalties. Mr. Strauss also agreed to a one-year suspension. (Order available at: https://www.sec.gov/litigation/admin/2015/ia-4126.pdf)

- On May 14, 2015, the NYS Appellate Division held that compensation allegedly owed to two hedge fund portfolio managers in the form of a percentage of the fund's profits did not constitute "wages" under the New York Labor Law. *See Beach v. Touradji Capital Mgmt., LP*, 128 A.D.3d 501 (1st Dep't 2015). Concluding that the unpaid compensation at issue depended on factors other than the plaintiffs' "personal productivity," including the work of the fund's principal and its analysts, the Court affirmed the dismissal. The implications of this decision are significant as a claim under the New York Labor Law carries with it the potential for liquidated damages and attorney's fees.

The information contained in this report is for informational purposes only and is not intended and should not be considered to be legal advice on any subject matter. As such, recipients of this report, whether clients or otherwise, should not act or refrain from acting on the basis of any information included in this report without seeking appropriate legal or other professional advice. This information is presented without any warranty or representation as to its accuracy or completeness, or whether it reflects the most current legal developments. This report may contain attorney advertising. Prior results do not guarantee a similar outcome.

Seward & Kissel LLP provides legal advice to its investment management clients on structure, business planning, regulatory, compliance, corporate finance, asset securitization, capital markets, business transactions, derivatives, bankruptcy/distressed debt, tax, ERISA, litigation, trademark, employment, trusts & estates, and real estate matters.

SEWARD & KISSEL LLP
One Battery Park Plaza, New York, New York 10004
Telephone: (212) 574-1200 **Fax:** (212) 480-8421 **Electronic Email:** sknyc@sewkis.com
www.sewkis.com
©2008 - present SEWARD & KISSEL LLP — All rights reserved. Printed in the USA.