SEWARD & KISSEL LLP

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SEC Adopts Proxy Rule Amendments Requiring Issuers and Other Soliciting Persons to Post their Proxy Materials on an Internet Web Site

At its June 20, 2007 meeting, the SEC adopted amendments to the proxy rules under the Securities Exchange Act of 1934 making it mandatory for registered investment companies ("funds") to post their proxy materials on a specified, publicly accessible web site and provide their shareholders with a notice informing them that the materials are available and explaining how to access those materials. Funds must comply with the rule amendments by January 1, 2009.

Under the amendments, funds have two options for furnishing proxy materials to their shareholders, the "notice only" option and the "full set delivery" option. Funds are not required to choose one option or the other as the exclusive means for providing proxy materials. A fund may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders.

Notice Only Option

The notice only option requires a fund to post its proxy materials on a secure web site and send a notice to its shareholders informing them of the electronic availability of the proxy materials at least 40 calendar days prior to the shareholder meeting date. If no meeting is to be held, the fund must post the proxy materials and provide the notice at least 40 calendar days prior to the date that votes, consents, or authorizations may be used

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Complying with State Gaming Regulations

On June 15, 2007, Penn National Gaming, Inc. announced that it had entered into a definitive agreement to be acquired by certain funds managed by affiliates of Fortress Investment Group LLC and Centerbridge Partners LP. The offer of $67 per share represents a premium over the company's share price as of the market's close the day prior to the announcement.

Investments in publicly traded gaming companies, however, bring additional regulatory and compliance burdens for funds and advisers. Investors acquiring securities of publicly traded companies with state gaming licenses often become subject to state gaming regulations as a result of the acquisition of those securities. Accordingly, funds and advisers investing in publicly traded gaming companies should ensure that their compliance policies and procedures address the regulatory and compliance obligations resulting from these investments.

A standard compliance procedure would require:

- identification of those states where a publicly traded gaming company maintains a license and the types of gaming license maintained by the company;

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to effect a corporate action. If a fund chooses this option, it must respond to shareholder requests, including any "standing" request, for copies of proxy materials by providing paper or e-mail copies of the materials to shareholders at no charge.

The notice sent to shareholders under this option must contain certain required disclaimers and information. Among other things, the notice must: (i) provide a toll-free telephone number, an e-mail address, and web site address where shareholders can request a copy of the proxy materials; (ii) include the date, time and location of the shareholder meeting, the matters to be acted on at the meeting and a list of materials being made available on the specified web site; (iii) provide the control/identification numbers that a shareholder will need to access the proxy card and instructions on how the shareholder can access the proxy card; and (iv) provide information about attending the shareholder meeting and voting in person. The notice may contain other information only if the fund elects to combine the notice with any shareholder meeting notice required by state law.

A fund must make all proxy materials identified in its notice publicly accessible, free of charge, on the web site specified in the notice on or before the date that the notice is sent to shareholders, and shareholders must be provided with a method to execute proxies as of the time the notice is first sent to shareholders. A fund may not send a paper or e-mail proxy card to a shareholder until 10 calendar days or more after the date it sent the notice to shareholders, unless the proxy card is accompanied or preceded by a copy of the proxy statement and any annual report, if required.

The web site on which proxy materials are posted must protect information provided by persons accessing the site, and a fund may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder. For example, the web site cannot contain "cookies" or other tracking features.

If a fund chooses the notice only option, it must provide its intermediaries with information in sufficient time for them to prepare and send notices and post proxy materials on their web sites at least 40 calendar days before the shareholder meeting. An intermediary's notice must contain the same types of information as a fund's notice, but must be tailored specifically for beneficial owners.

Full Set Delivery Option

The full set delivery option, which is substantially similar to the traditional method for delivering proxy materials, requires a fund to deliver a full set of proxy materials to its shareholders, together with a notice, and post the proxy materials on a publicly accessible website no later than the date the notice is first sent to shareholders. Under this option, if a fund includes all of the information required in the notice in its proxy statement and proxy card, it need not send a separate notice.

Several requirements relating to the full set delivery option are similar to the requirements relating to the notice only option. For example, a fund must make all proxy materials identified in its notice, or in its proxy statement and proxy card, publicly accessible, free of charge, on the web site specified in the notice on or before the date that the notice, or proxy statement and proxy card, is sent to shareholders, and shareholders must be provided with a method to execute proxies as of the time the notice is first sent to shareholders. And, like the notice only option, the web site on which proxy materials are posted must be maintained in a manner that does not infringe on the anonymity of a person accessing the web site, and a fund may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder.

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Several requirements relating to the full set delivery option differ, however, from the requirements relating to the notice only option. Unlike the notice only option, a fund operating under the full set delivery option:

- may accompany the notice with a copy of the proxy statement, annual report (if required) and proxy card;
- need not provide a separate notice if it incorporates all of the information required for the notice in its proxy statement and proxy card;
- need not provide shareholders with copies of the proxy materials upon request as they will have received such copies.
- need not send a notice and the full set of proxy materials at least 40 days prior to the shareholder meeting;
- need not provide another means for voting at the time the notice is provided unless it chooses to do so; and
- need not include certain information in the notice relating to how shareholders can request copies of the proxy materials.

If you have any questions about the rule amendments, please contact Kathleen Clarke via e-mail at clarke@sewkis.com or by phone at (202) 737-8833 or Paul Miller via e-mail at millerp@sewkis.com or by phone at (202) 737-8833.

Complying with State Gaming Regulations

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- identification of any reporting requirements required under a particular state's statutes and regulations; and
- consideration of whether ownership in the company subjects the fund or adviser to a state's reporting and "suitability" determination requirements, and if so, whether a waiver from such requirements is available.

A portfolio manager or compliance officer should review the gaming company's Form 10K or other similar report to identify those states where the company maintains a license and the types of gaming license maintained by the company. These reports often include a section describing the governmental regulations affecting the company. In some instances, these sections include a detailed description of the state gaming requirements applicable to beneficial owners of the company's securities.

Once the states and licenses have been identified, the manager or officer should review the state gaming requirements that apply to beneficial owners of securities of the gaming company. Most states maintain a web site where information concerning the state's gaming statutes and regulations can be obtained.

In many states, beneficial ownership of more than 5% of the voting securities of a publicly traded gaming company triggers the state's reporting requirements. Some states require the beneficial owner (e.g., the adviser or fund) to file a copy of its Schedule 13D or Schedule 13G with respect to the gaming company with the state gaming authority. Other states require only that the beneficial owner notify the state gaming authority of the acquisition.

In some states, beneficial ownership of any voting security of a publicly traded gaming company, regardless of amount, may subject the beneficial owner to the state's "suitability" determinations. Through this process, the state gaming authority determines whether the beneficial owner is suitable to hold a state gaming license. The process for applying for a finding of

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suitability is lengthy and expensive and involves submitting detailed financial information with respect to the owner's business. Any person failing or refusing to apply for a finding of suitability after being ordered to do so may be found unsuitable automatically. If such a person continues to beneficially own any voting securities of a publicly-traded gaming company beyond the period prescribed by the state gaming authority, that person may be guilty of a criminal offense.

More typically, a suitability determination is triggered when a beneficial owner exceeds a threshold of ownership (e.g., 10%) in the gaming company. Many state gaming statutes and regulations provide exemptions from or waivers of the provisions requiring a suitability determination for "institutional investors." Institutional investors ordinarily include investment companies registered under Section 8 of the Investment Company Act of 1940 (the "1940 Act") and investment advisers registered under Section 203 of the Investment Advisers Act of 1940 (the "Advisers Act").

To obtain an exemption from or waiver of the suitability requirements, the institutional investor must submit an application that typically includes representations by the institutional investor that the securities were acquired and are held in the ordinary course of business as an institutional investor and not for the purpose of causing, directly or indirectly, the election of a majority of the members of the board of directors or any change in the corporate charter, bylaws, management, policies or operations of the company. Like the process for suitability determinations, the process for submitting an application for an exemption can also be lengthy and expensive. In many cases, examiners from the state gaming authority will investigate the institutional investor, including control persons of the institutional investor. If granted, the exemption or waiver is typically limited. The order granting the exemption or waiver may require the owner to provide periodic reports to the gaming authority and request periodic renewals if the institutional investor intends to maintain beneficial ownership above the specified threshold (e.g., 10%).

If you have any questions about complying with state gaming regulations, please contact Paul Miller via e-mail at millerp@sewkis.com or by phone at (202) 737-8833.

Legislative and Regulatory Update

SEC Adopts Rule 206(4)-8 under the Investment Advisers Act of 1940 ("Advisers Act")

On July 11, 2007, the SEC voted unanimously to adopt proposed Rule 206(4)-8 under the Advisers Act. The rule will prohibit investment advisers to hedge funds, private equity funds, venture capital funds and mutual funds (whether or not required to be registered under the Advisers Act) from making false or misleading statements or engaging in any fraudulent, deceptive or manipulative conduct with respect to investors and prospective investors in such investment vehicles. In the proposal, the SEC staff indicated that the rule would apply to any materials or statements prepared or made by an adviser to any prospective or existing investor, regardless of whether the pool is offering, selling or redeeming securities, including any false or misleading statements made to existing investors in account statements or letters to investors or to

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prospective investors in private placement memoranda or offering circulars. The new rule will take effect on September 10, 2007.

SEC Roundtable on Rule 12b-1 under the Investment Company Act of 1940 ("1940 Act")

On June 19, 2007, the SEC held a public roundtable to discuss Rule 12b-1 under the 1940 Act. Panelists included representatives from mutual fund firms, fund distributors, consumer groups, academia, law firms and other fund service organizations. The roundtable was divided into four panel discussions addressing: (1) historical perspectives on the rule, (2) the role of Rule 12b-1 plans in current distribution practices, (3) the costs and benefits of Rule 12b-1 plans, and (4) options for reforming the rule. At the roundtable, Chairman Cox indicated that the SEC would issue a proposal on Rule 12b-1 later this year, but he gave no indication as to the nature of the proposal.

An unofficial transcript of the roundtable discussion is available at http://www.sec.gov/news/openmeetings/2007/12b1transcipt-061907.pdf.

"ComplianceAlerts"

On June 14, 2007, the SEC released its first "ComplianceAlert" letter, a new feature designed to share with compliance personnel of SEC registered firms (broker-dealers, as well as funds and advisers) areas of particular concern to SEC examiners based upon their recent examination findings. Of interest in the current "ComplianceAlert" letter are advisers' performance advertising deficiencies, mutual funds' policies and procedures for processing "as-of" transactions, and closed-end funds' compliance with Rule 19a-1 notice requirements.

The "ComplianceAlert" letter is available at http://www.sec.gov/about/offices/ocie/complialert.htm.

Fund-of-Funds Expenses

On May 23, 2007, the SEC staff released a Q&A to respond to certain questions that have arisen regarding the amended fee table adopted by the SEC in its June 2006 Fund of Funds release. The amended fee table requires funds to add a new line item to their fee tables disclosing the expenses of investing in other funds. The new line item is labeled "Acquired Fund Fees and Expenses" ("AFFE"). Among other things, the Q&A clarifies that the term "Acquired Fund" encompasses all pooled investment vehicles, such as hedge funds and private equity funds, in addition to registered funds, but does not include investments in structured financial vehicles, collateralized debt obligations or other entities not traditionally considered pooled investment vehicles. However, expenses associated with a Fund's investment of cash collateral received in connection with loans of portfolio securities in a money market fund or other cash sweep vehicle do not have to be included in the calculation of the AFFE. The Q&A also clarifies that the total annual operating expense ratio used to calculate AFFE is the annualized expense ratio disclosed in the Acquired Fund's most recent shareholder report, and does not include expenses an Acquired Fund has incurred through its investment in other companies; however, feeder funds are subject to a pre-existing rule that requires the disclosure of aggregate expenses of the feeder fund and the master fund.

The Q&A is available at http://www.sec.gov/divisions/investment/guidance/fundfundfaq.htm.

"FIN 48"

On June 28, 2007, the SEC's Chief Accountant, together with the Chief Accountant of the Division of Investment Management, responded to a request submitted by Fidelity Investments, Massachusetts Financial Services Company and OppenheimerFunds for interpretive guidance regarding the implementation of FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes ("FIN 48") by funds. FIN 48 provides issuers with a method and criteria for the recognition and measurement of an uncertain tax position in their financial

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statements. A tax position that reduces an issuer's income tax and that is "more likely than not" to be sustained by the relevant tax authorities has to be recorded in financial statements as a benefit; however, if the tax position does not meet that threshold, then it has to be recorded as a liability. FIN 48 presents unique compliance difficulties for funds, as opposed to operating companies, both with respect to the determination of a potential tax liability and with respect to its impact on the daily calculation of NAV. The staff had previously indicated that it would not object if a fund implements FIN 48 in its NAV calculation as late as its last NAV calculation in the first required financial statement reporting period for its fiscal year beginning after December 15, 2006.

The letter is available at http://www.sec.gov/divisions/investment/fin48_letter_062807.htm.

IDC Task Force Report

In June 2007, the Independent Directors Council (affiliated with the Investment Company Institute ("ICI")) released a report entitled "Board Oversight of Certain Service Providers," which discusses the factors that fund boards should consider in the selection of service providers, including administrators, custodians, fund accounting agents, transfer agents and securities lending agents. The report also provides guidance with respect to the ongoing oversight of service providers.

Please contact Michele Downey (downey@sewkis.com) for a copy of this report.

ICI Rulemaking Petition

On June 13, 2007, the ICI submitted a petition for rulemaking to the SEC concerning Rule 19a-1 under the 1940 Act, which sets forth the manner in which a fund must notify its shareholders of the source of any dividend or distribution when the source is other than accumulated undistributed net income. The ICI has recommended that the SEC modernize the acceptable methods of shareholder notification by, among other things, permitting such notification to be posted on a fund's web site. The ICI has also recommended that the SEC prescribe the accounting treatment for calculating the sources of fund distributions.

The ICI's petition is available at http://www.sec.gov/rules/petitions/2007/petn4-542.pdf.

NYSE Proposal on Broker Voting

The NYSE has submitted to the SEC proposed amendments to NYSE Rule 452 (Giving Proxies by Member Organizations). Rule 452 currently permits voting by brokers of uninstructed shares on certain specified routine matters, including an uncontested election for a company's board of directors. The proposed amendments to Rule 452 would designate the election of directors as a non-routine matter, for which broker voting is not permitted. Although not in the NYSE's initial proposal, an amended version provides an exception for companies registered under the 1940 Act. In addition, the NYSE has added another item that will be considered non-routine – material amendments to investment advisory contracts with investment companies. The addition of that item is meant to codify prior NYSE interpretations. The SEC has not yet published the NYSE proposal for public comment.

Please contact Michele Downey (downey@sewkis.com) for a copy of the NYSE Proposal.

Fee-Based Brokerage Rule

The U.S. Court of Appeals for the District of Columbia Circuit has granted the SEC's request for a stay of the court's mandate vacating the SEC's fee-based brokerage rule (Rule 202(a)(11)-1 under the Advisers Act). The mandate has been stayed to October 1, 2007.

Please contact Michele Downey (downey@sewkis.com) for a copy of the court's March 30, 2007 opinion.

XBRL

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For the past several years, the SEC has been evaluating the use of interactive data tagging in SEC filings. Data tagging translates text-based information into an automated format that facilitates the retrieval and analysis of the information, thus making the information more useful for investors. The method that has gained recognition by the financial reporting community for achieving this is known as eXtensible Business Reporting Language ("XBRL"). Currently there are several dozen companies that are participating in a voluntary program that permits them to use interactive data tagging in financial statements. Effective August 20, 2007, the SEC has extended the voluntary program to permit mutual funds to use interactive data tagging in the risk/return summary section of their prospectuses by using a taxonomy developed by the ICI and recently recognized as an acknowledged XBRL. Any fund may participate in the program, without pre-approval, by submitting the data tagged risk/return information as an exhibit to their post-effective amendments on Form N-1A. Because it is an experimental program, the tagged exhibit will not be considered part of the "official filing." The SEC annouced on August 21, 2007 that several funds had already volunteered to participate including the Vanguard, Soo Index Fund and American Funds Europacific Growth Fund.

A copy of the SEC's release is available at http://www.sec.gov/rules/final/2007/33-8823.pdf.

SEC Staff Issues No-Action Letter Interpreting "Qualified Purchaser" Definition

On July 26, 2007, the SEC staff issued a no-action letter interpreting the definition of "qualified purchaser" under Section 2(a)(51)(A)(iv) of the 1940 Act. The incoming letter sought the staff's assurance that it would not recommend enforcement action to the SEC under Section 7 of the 1940 Act against private investment funds qualifying for the exclusion from the definition of investment company set forth in Section 3(c)(7) of the 1940 Act (i.e., Section 3(c)(7) funds) if the trustee of several large family trusts, who is a qualified purchaser under Section 2(a)(51)(A)(iv) of the 1940 Act, and the spouse of the trustee, who is not a qualified purchaser, invest jointly in Section 3(c)(7) funds. In granting the no-action request, the SEC staff applied the spousal joint interest position reflected in Section 2(a)(51)(A)(i) of the 1940 Act and prior no-action letters to Section 2(a)(51)(A)(iv) of the 1940 Act.

A copy of the no-action letter is available at: http://www.sec.gov/divisions/investment/noaction/2007/mcdermott072607-3c7.htm.

Possible Upcoming SEC Rulemakings

On April 30, 2007, the SEC's semi-annual regulatory agenda was published in the Federal Register. In addition to providing a status report for each pending rulemaking, the agenda identifies certain rulemaking projects that SEC staff is currently contemplating and the dates on which it projects recommending that a notice of proposed rulemaking be issued. While the agenda does not commit the SEC to any particular action at any particular time (the projected dates are particularly fluid), it nonetheless serves to alert the industry of possible upcoming rulemakings. Of interest in the current agenda are the following:

- updating investment adviser books and records requirements (12/07);
- disclosure and recordkeeping requirements for investment advisers regarding brokerage allocation and soft dollar practices (10/07);
- calculation and payment of investment company registration fees (3/08);
- comprehensive reform of investment company disclosure requirements on Form N-1A (6/07); and
- updating investment adviser cash solicitation rule (3/08)

A copy of the SEC's regulatory agenda is available at http://www.access.gpo.gov/su_docs/fedreg/a070430c.html.

Compliance Reminders

- Does your firm have a standard operating procedure for the risk identification and assessment process, which is the process by which your firm identifies risks and problems relevant to your firm's business? Does this risk assessment correspond to your firm's compliance policies and procedures and annual reviews? One of the first items requested by the SEC staff in connection with its examination of your firm will be your firm's standard operating procedure for risk identification and assessment.
- Form N-PX: Funds must file a copy of their proxy voting record on Form N-PX by August 31, 2007.
- Rule 22c-2: Funds must be able to request and promptly receive shareholder identity and transaction information pursuant to shareholder information agreements by October 16, 2007.

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If you have any questions or comments about this newsletter, please feel free to contact any of the attorneys in our Investment Management Group specializing in registered investment companies or registered investment advisers by telephone at (202) 737-8833 (DC) or (212) 574-1200 (NY) or via e-mail.

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