

A Publication of Seward & Kissel Regulatory Compliance

SEC Clarifies Application of the Custody Rule

The staff of the SEC's Division of Investment Management ("IM Division") recently provided additional guidance on Rule 206(4)-2 (the "Custody Rule") under the Investment Advisers Act of 1940 (the "Advisers Act"). Specifically, the staff addressed whether an investment adviser has custody of client assets under three scenarios: (1) standing letters of instruction established by a client with a qualified custodian that grant an investment adviser the authority to disburse client assets to one or more third parties; (2) arrangements that grant an investment adviser the authority to transfer a client's assets between the client's accounts maintained at one or more qualified custodians; and (3) circumstances under which an investment adviser may inadvertently have custody through a custodial agreement entered into between the client and the custodian. See Seward & Kissel's memorandum on the staff's guidance [here](#).

Guidance for Robo-Advisers

The SEC's IM Division staff recently released a [Guidance Update](#) for automated advisers (commonly referred to as "robo-advisers"), which are typically registered investment advisers that use innovative technologies to provide discretionary asset management services to their clients through online and algorithmic-based programs. The staff outlined key topics that robo-advisers should consider as they seek to meet their legal obligations under the Advisers Act. According to the staff, robo-advisers should consider: (1) the substance and presentation of disclosures to clients about the robo-adviser and the investment advisory services it offers; (2) the obligation to obtain information from clients to support the robo-adviser's duty to provide suitable advice; and (3) the adoption and implementation of an effective compliance program designed to address particular concerns relevant to providing automated advice. See Seward & Kissel's memorandum on this Guidance Update [here](#).

Guidance Update for Foreign Affiliates of Registered Advisers

The SEC's IM Division staff recently released an [Information Update](#) for registered investment advisers that rely on a line of SEC no-action letters known as the "Unibanco letters" wherein the SEC agreed not to recommend enforcement action if a non-U.S. advisory affiliate of the registered adviser, often referred to as a "participating affiliate," shares personnel with, and provides certain services to U.S. clients through, the registered adviser. While not required, the Information Update lists the documentation, representations and undertakings by a participating affiliate that advisers seeking to rely on the Unibanco letters may submit to the staff.

Portfolio Managers and Advisory Firms Settle Charges of Beneficial Reporting Violations

The SEC [settled](#) charges against multiple portfolio managers and advisory firms for violating the beneficial reporting requirements of Section 13(d) and Section 16(a) of the Securities Exchange Act of 1934 by failing to disclose, among other things, the formation of a group or the purpose of acquiring stock during a series of joint shareholder activist campaigns with respect to various issuers. See Seward & Kissel's memorandum on this settlement [here](#).

Adviser Settles Charges for Failure to Disclose Conflicted Revenue Arrangements

The SEC [settled](#) charges against an investment adviser for failing to disclose compensation it received through arrangements with a third party broker-dealer that it retained to provide clearing and custody services for its clients. The arrangements provided for the adviser to be paid a portion of revenues and service fees the broker received from certain of its mutual funds. The SEC found that these payments created a conflict of interest in that they provided an incentive for the adviser to favor the broker's mutual funds. See Seward & Kissel's memorandum on this settlement [here](#).

CPO Settles Charges for Failure to Register with the CFTC

The Commodity Futures Trading Commission (the "CFTC") [settled](#) charges against an investment adviser and its principal for failure to register as a commodity pool operator ("CPO") in reliance on an invalid claim of exemption under CFTC Regulation 4.13(a)(2) and failure to comply with reporting and disclosure requirements of operating an exempt commodity pool under CFTC Regulation 4.7. In settling the charges, the adviser and its principal agreed to a fine and a five year ban from, among other things, trading in commodity interests or registering or claiming an exemption as a CPO. This settlement highlights the ongoing need for CPOs to comply with the requirements of any CFTC exemptions claimed.

Key Upcoming Compliance Dates

- Code of Ethics Quarterly Transaction Reports (April 30)
- Form PF Annual Update for non-"large hedge fund advisers" (May 1)
- Form 13F; BE-185; TIC Form S (May 15)
- TIC Form SLT (May 23)
- Form PF Quarterly Update for "large hedge fund advisers" (May 30)

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