Investment Management Regulatory Update

Debevoise & Plimpton

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SEC Chairman Continues Focus on Private Fund Disclosure

Securities and Exchange Commission ("SEC") Chair Gary Gensler continues to focus public statements on adopting new disclosure requirements for private funds. In prepared testimony before the United States Senate Committee on Banking, Housing, and Urban Affairs on September 14, Gensler highlighted SEC and staff efforts to "reform" disclosure requirements applicable to private funds, zstating "I believe we can enhance disclosures [of conflicts of interest and fees], better enabling [investors] to get the information they need to make investment decisions." Two weeks later, in prepared remarks before the Future of Asset Management North America Conference on September 29, Gensler remarked that he had asked the SEC staff for recommendations for consideration of enhanced reporting and disclosure through Form PF or other reforms.

Currently, advisers to private funds are required to provide information about funds, and relevant conflicts of interest and fees, in their Form ADV filings, while private funds are required to provide certain information to the SEC in Form PF and Form D about the funds themselves but not with respect to conflicts and fees. The SEC included potential amendments to Form PF and Regulation D under the Securities Act of 1933 (the "Securities Act") in its Spring 2021 regulatory agenda but otherwise did not specifically identify private fund disclosure as a formal agenda item. It is unclear whether "reforms" to private fund disclosure will be included in such amendments (Form PF and Form D are not investor-facing disclosure documents) or will be a part of other formal SEC efforts.

New Proxy Proposal

The SEC proposed new Rule 14Ad-1 under the Securities Exchange Act of 1934 (the "Exchange Act") and amendments to Form N-PX that would require institutional investment managers subject to disclosure requirements under Section 13(f) of the Exchange Act to report annually on Form N-PX on each of their "say-on-pay" votes. The Section 13(f) disclosure requirements currently apply to U.S. and non-U.S. managers with discretion over at least $100 million of "Section 13(f) securities." Under the new rule, these managers would also be required to annually report votes on "say-on-pay" issues on Form N-PX, the form currently used by funds registered under the Investment Company Act of 1940 (the "1940 Act") to report proxy votes. "Say-on-pay votes," for purposes of the proposed new rule, refers

to non-binding shareholder advisory votes on executive compensation matters pursuant to Section 14A of the Exchange Act. These votes generally include three categories of votes required by Section 14A: (1) whether to approve the compensation of certain named executives; (2) the frequency of say-on-pay votes; and (3) whether to approve executive compensation in connection with a merger or acquisition.

The SEC proposed similar rule amendments in 2010 to implement certain of the Dodd-Frank Act's "say-on-pay" provisions, but the amendments were never adopted.

New SEC General Counsel

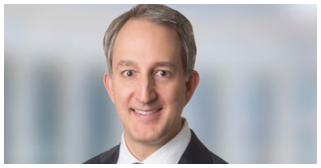
The SEC on September 28 named Dan Berkovitz as its new General Counsel. Berkovitz will leave his position as a Commissioner at the Commodity Futures Trading Commission (the "CFTC"), where he has been serving as a Democratic Commissioner since 2018. He previously served as the CFTC's General Counsel when Gary Gensler led that agency during the Obama Administration. Berkovitz was instrumental in moving forward the CFTC's regulatory and legislative agenda and is expected be a driving force in Gensler's efforts to enact a sweeping package of new regulations.

AMAC Makes Final Recommendations to SEC Regarding Retail Access

September 27, the SEC's Asset Management Advisory Committee (the "Committee") unanimously approved a recommendation to expand retail investor access to private investments. In its report to the SEC, the Committee noted that it "[Believes] that the SEC ought to consider wider access to private investments subject to (1) such investments providing similar to better returns than comparable public market investments; and (2) sufficient investor protection." The Committee also made seven specific recommendations for the SEC to consider, including a call to revisit the current SEC staff moratorium on listed 1940 Act funds that invest more than 15% of their assets in private funds. Consistent with its earlier recommendations, the Committee provided the SEC with its recommended "design principles" that seek to balance investor choice with sufficient investor protection; the Committee noted that many of the design principles could be fulfilled by a 1940 Act fund product. The design principles include the following:

- Investments with some measure of liquidity;
- "Chaperoned" access through structures with SEC-registered investment advisers;
- Standardized fee, risk, term and return disclosure; and
- Diversification of private investments, either through individual positions or in a pool of diversified private assets.

Authors



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Marc Ponchione, a partner in the firm's Investment Management Group, focuses on advising financial services firms on various regulatory, compliance and transactional issues arising in the asset management industry. Mr. Ponchione is based in the firm's Washington, D.C. office.

Mr. Ponchione represents asset managers, funds, sponsors and issuers of financial products on a broad range of regulatory and transactional issues inside and outside the United States. He regularly advises clients on issues under the federal securities laws, including the Investment Company Act of 1940 and the Investment Advisers Act of 1940 as well as various other regulations affecting investment managers, funds and financial product sponsors.

From 2001 to 2006, he served as senior counsel at the Securities and Exchange Commission (Division of Investment Management). Mr. Ponchione serves on the American Bar Association Subcommittee on Hedge Funds, the American Bar Association Subcommittee on Investment Companies and Investment Advisers and the New York City Bar Committee on Investment Management Regulation. He frequently writes on investment management best practices and issues for various legal and business publications, and is an adjunct professor at Georgetown University Law Center.

Mr. Ponchione received his B.A. from Marietta College in 1996 and his J.D. from Duquesne University in 1999. He serves on the Board of Trustees at Marietta College.

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Greg Larkin is a corporate counsel and a member of the firm's Investment Management Group, based in the Washington, D.C. office. Mr. Larkin focuses his practice on providing regulatory and compliance advice to financial services firms, particularly investment advisers and sponsors of private investment funds and other pooled investment vehicles. Mr. Larkin also counsels operating companies concerning status issues they may face under the Investment Company Act of 1940.

Mr. Larkin is the co-author of numerous articles, including "SEC Adopts Expanded Definition of Accredited Investor Increasing Access to Private Markets," *INSIGHTS* (October, 2020); "It's Time to Take Credential Stuffing Seriously," *Compliance & Enforcement* (October, 2020); "What Will The "Eyes And Ears" Of The SEC Choose To See And Hear This Year? OCIE Announces Examination Priorities For 2015," Vol. 16 No.2, *Journal of Investment Compliance*, (July, 2015); "Expense Allocation: The SEC Brings Down The Hammer," Vol. 16 No. 1, *Journal of Investment Compliance* (May, 2015); "FSOC: Are Asset Managers' Products And Activities Creating Systemic Risk?," *The Harvard Law School Forum on Corporate Governance and Financial Regulation* (January, 2015); "SEC Settles First "Pay-To-Play" Enforcement Action," *Financial Fraud Law Report* (October, 2014); "Debevoise & Plimpton Discusses Treatment of Special Purposes Vehicles under the Advisers Act," *The CLS Blue Sky Blog: Columbia Law School's Blog On Corporations and The Capital Markets* (August, 2014); "Options under the Volcker Rule for Banks to Sponsor Private Equity and Hedge Funds," *The Banking Law Journal* (June, 2014); "Options under the Volcker Rule for Bank Investment in Unaffiliated Private Equity and Hedge Funds," *The Hedge Fund Law Report* (March, 2014);"Time For Private Equity To Focus On Form PF," *The Deal* (June, 2012); and "SEC Risk Alert Discusses When Social Media Interactions May Constitute Prohibited Hedge Fund Client Testimonials," *The Hedge Fund Law Report* (April, 2012).

Mr. Larkin received a J.D. in 2008 from New York University School of Law, where he was named a member of the Order of the Coif, a Pomeroy Scholar and an articles editor in the *NYU Law Review*. He received a Bachelor of Science in Engineering *summa cum laude* in Operations Research & Financial Engineering from Princeton University in 2002.

Mr. Larkin is a member of the Bar of the District of Columbia.

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Sheena Paul is a counsel in the Investment Management Group's U.S. regulatory practice, based in the firm's Washington, D.C. office. Ms. Paul focuses her practice on providing regulatory advice to investment managers, with a particular focus on private equity clients. She works closely with the firm's other practices on regulatory advice related to domestic and cross-border corporate and capital markets transactions, and enforcement matters.

Ms. Paul has extensive experience advising asset managers and institutional investors on a broad range of U.S. regulatory matters, regularly advising on issues arising under the Investment Company Act of 1940, the Investment Advisers Act of 1940 and the Securities Act of 1933. She has also provided U.S. regulatory support for transactions and played an active role in private fund formations.

Ms. Paul previously worked in the asset management group of another international law firm.

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Ms. Burger joined Debevoise in 2018. She received a J.D. from Cornell Law School in 2018, where she was an articles editor of the *Cornell International Law Journal*. She received a B.A. from Yale University in 2011. Prior to law school, she worked as a Confidential Assistant at the United States Department of Justice. She is fluent in Spanish.