Main Program

Regulatory Outlook: Exams, Enforcement and AIFMD

Investing in the Oil and Gas Sector

Co-Investments and Sidecars: Structuring Opportunities

24TH ANNUAL
PRIVATE INVESTMENT FUNDS SEMINAR
JANUARY 21, 2015

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Practices

Tax

Real Estate Capital Markets & REITs

Philippe Benedict

Philippe focuses his practice on the tax aspects of investment funds, mergers and acquisitions, international transactions, real estate transactions and financial instruments. He has advised on many major transactions involving sales or spinoffs of investment fund managers, including Senator Investment Group LP's sale of a minority stake to The Blackstone Group LP; Caxton Associates LP's sale of a minority percent interest to the Petershill II Fund affiliated with the Goldman Sachs Group Inc.; Credit Suisse's sale of Strategic Partners to The Blackstone Group LP; and Signet Capital Management's sale of its fund-of-funds business to investment management firm Morgan Creek Capital Management LLC. Philippe advises on the tax aspects of securitizations, including his recent representation of affiliates of Fortress Investment Group LLC and affiliates of Highbridge Capital Management in the securitization of their leveraged facilities. He has also advised multiple alternative asset managers on the formation and structuring of funds, including Mount Kellett Capital Management LP on the launch of a new fund; SG Capital Partners in the formation of a new fund; Gunnar Overstrom, formerly a partner at Maverick Capital Ltd., in the formation of Three Corner Global Investors LP; Junto Capital Management LP on the launch of Junto Capital Partners LP and Junto Offshore Fund Ltd.; Trian Fund Management LP on all aspects of launching new co-investment hedge funds; Incapture Investments LLC on the launch of a systemic trading fund that relies on proprietary technology called Rapture to trade in all markets; Sachem Head Capital Management LP with the launch of hedge funds and the establishment of long/short equity funds; and Capstone Investment Advisors LLC, MKP Capital Management LLC and Scopia Fund Management LLC in their respective sales of a passive minority interest to Neuberger Berman Group-managed private equity fund Dyal Capital Partners. Philippe's recent real estate transactions include advising the Related/Oxford joint venture developing Hudson Yards on closing nearly $1.4 billion in equity investments and debt financing for the center's first tower; advising Arel Capital in a number of equity investments, including operating multi-family properties with significant retail components and ground-up development projects for modern condominium buildings in Manhattan and Brooklyn; and advising Perella Weinberg Partners on the acquisition of 50-percent ownership of interests in two hotels and the structuring of a REIT joint venture with Loews Corporation.

Chambers USA, *The Legal 500 United States* and *Tax Directors Handbook* have recognized Philippe as a leading lawyer. He is a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press) and also speaks at prominent industry events. In the past year, he presented "A New Paradigm: Customized Solutions for Investors" and "Management Company Structuring and Operations" at the SRZ 23rd Annual Private Investment Funds Seminar, and he participated in "FATCA Update for Investment Fund Managers," an SRZ webinar.

Philippe earned his LL.M. in taxation and his J.D. from New York University School of Law. While pursuing his J.D., he was the recipient of a Gruss Fellowship and served on the staff of the *Journal of International Law and Politics*. He obtained his B.S., *summa cum laude*, from Adelphi University.

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Practices

Litigation

Securities Enforcement & White Collar Defense

Barry A. Bohrer

Barry has extensive litigation experience handling white collar criminal and complex civil matters in federal and state courts for individual and corporate clients. He also has an active trial and appellate practice. Barry has successfully defended clients, including major corporations, financial institutions, political figures, corporate executives and individuals, professionals and prominent law firms, in a wide variety of high-profile and complex cases, jury trials, regulatory actions and investigations. He regularly represents clients in matters pertaining to securities and commodities litigation and regulatory enforcement; other forms of financial fraud; antitrust litigation; and allegations of environmental offenses. Barry frequently represents clients in parallel enforcement proceedings involving the U.S. Department of Justice, the Securities and Exchange Commission and the Commodity Futures Trading Commission. He also conducts corporate internal investigations and counsels individuals involved in them. In his appellate practice, Barry has won appeals at all levels of the federal and state court systems throughout the nation, and is retained in high-stakes appellate cases where he is brought in by other legal teams specifically for his appellate proficiency.

Barry has been named a leading lawyer by *Chambers USA*, *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys*, *The International Who's Who of Investigations Lawyers*, *The International Who's Who of Business Crime Defence Lawyers*, *The International Who's Who of Business Lawyers*, *The Legal 500 United States*, *Expert Guide: Best of the Best USA*, *The Best Lawyers in America*, *New York's Best Lawyers* and *New York Super Lawyers* (Top 100 New York Super Lawyers). In 2014, Barry received The Norman S. Ostrow Award from the New York Council of Defense Lawyers in recognition of his outstanding contributions as a defense lawyer. He is a Fellow of the American College of Trial Lawyers, former president of the New York Council of Defense Lawyers, and chair of the Executive Committee of the Fund for Modern Courts and Committee for Modern Courts, non-profit organizations dedicated to judicial reform in New York State. He served on the board of directors of the Legal Aid Society (chairman of the Audit Committee) and received awards in 2005 and 2006 for Outstanding Pro Bono Service for his advocacy. Barry is also a member of the New York City Bar Association (former member of the Criminal Law Committee) and the New York State and American Bar Associations (Criminal Justice and Litigation sections). He was the author of the "White Collar Crime" column in the *New York Law Journal* from 2002 to 2013 and is on the Board of Editors of the *White Collar Crime Reporter*. He speaks frequently on issues relating to trial and appellate practice, securities enforcement and arbitration, internal investigations and insider trading.

Barry holds a J.D. from New York University School of Law and a B.A. from Duke University.

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Practices

- Investment Management
- Energy
- Financial Institutions
- Hedge Funds
- Private Equity

Stephanie R. Breslow

Stephanie is co-head of SRZ's Investment Management Group and a member of the firm's Executive Committee. Her practice includes investment management, partnerships and securities, with a focus on the formation of private equity funds (LBO, mezzanine, distressed, real estate, venture) and liquid-securities funds (hedge funds, hybrid funds) as well as providing regulatory advice to investment managers and broker-dealers. She also represents fund sponsors and institutional investors in connection with seed capital investments in fund managers and acquisitions of interests in investment management businesses, and she represents funds of funds and other institutional investors in connection with their investment activities.

Stephanie is chair of the Private Investment Funds Subcommittee of the International Bar Association, a founding member and former chair of the Private Investment Fund Forum, a member of the Advisory Board of Third Way Capital Markets Initiative, a founding member of the Wall Street Hedge Fund Forum and a former member of its Steering Committee, and a member of the Board of Trustees of 100 Women in Hedge Funds. She is listed in *Chambers USA*, *Chambers Global*, *The Legal 500 United States*, *Best Lawyers in America*, *America's Leading Lawyers*, *Who's Who Legal: The International Who's Who of Business Lawyers* (which ranked her one of the world's "Top Ten Private Equity Lawyers"), *Who's Who Legal: The International Who's Who of Private Funds Lawyers* (which placed her on its "Most Highly Regarded Individuals" list), *Expert Guide: Best of the Best USA* (Investment Funds), *Expert Guide to the World's Leading Investment Funds Lawyers*, *Expert Guide to the World's Leading Women in Business Law* (Investment Funds), *Expert Guide to the World's Leading Private Equity Lawyers* and *PLC Cross-border Private Equity Handbook*, among other leading directories. She was named "Private Funds Lawyer of the Year" at the Who's Who Legal Awards 2014 as well as a New York State Bar Association Empire State Counsel honoree in 2014. She was also named one of *The Hedge Fund Journal*'s 50 Leading Women in Hedge Funds and the *Euromoney Legal Media Group*'s "Best in Investment Funds" at the inaugural Americas Women in Business Law Awards. Additionally, Stephanie was recognized by the Girl Scouts of Greater New York as one of 2012's Women of Distinction. Stephanie is a much sought-after speaker on fund formation and operation and compliance issues, and she also regularly publishes books and articles on the latest trends in these areas. She recently contributed to the 2014 *Fund Formation and Incentives Report* (in association with Private Equity International) and co-authored *Private Equity Funds: Formation and Operation* (Practising Law Institute), the leading treatise on the subject. She also contributed a chapter on "Hedge Funds in Private Equity" for inclusion in *Private Equity 2004-2006* (PLC Cross-border Handbooks), contributed a chapter on "Advisers to Private Equity Funds — Practical Compliance Considerations" for *Mutual Funds and Exchange Traded Funds Regulation* (Practising Law Institute, Volume 2), and wrote *New York and Delaware Business Entities: Choice, Formation, Operation, Financing and Acquisitions* (West) and *New York Limited Liability Companies: A Guide to Law and Practice* (West).

Stephanie earned her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar, and her B.A., *cum laude*, from Harvard University.

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Practices

Finance

Energy

Distressed Investing

Kirby Chin

Kirby focuses his practice on financing and debt transactions and has substantial experience representing clients in transactions involving private and public debt financings, working with special distressed asset situations, and structuring and executing multi-layered debt tranches. He represents finance firms, public and private companies, and hedge and private equity funds on matters that have included debtor-in-possession and exit financings; workouts and restructurings; private equity portfolio financings, including acquisition and leveraged buyout financings; traditional asset-based and working capital financings; cash flow financings; factoring and related transactions; term "B" financings; second lien and first-out/last-out financings; investment fund financings, including fund of funds financings; capital call and liquidity facility transactions; and subordinated and mezzanine debt offerings.

Kirby has been recognized by *The Legal 500*, a listing of the top lawyers in the United States by practice area. A member of the Turnaround Management Association, the American Bar Association and the Commercial Law and Uniform State Laws Committee of the New York City Bar Association, he is often invited to speak at industry events. He most recently presented on the annual financing and lending outlook at the Argyle Executive Forum Leadership in the Distressed Markets.

Kirby earned his B.A., *cum laude*, from New York University and his J.D. from New York University School of Law, where he served on the *Journal of International Law and Politics*.

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Practices

Investment Management

Energy

Hedge Funds

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Private Equity

Brian T. Daly

Brian advises hedge and private equity fund managers and commodity pool operators on regulatory, compliance and operational matters, including registration and disclosure obligations, trading issues, advertising and marketing, and the establishment of compliance programs. Having spent nearly a decade serving in-house as general counsel and chief compliance officer at several prominent hedge fund management firms, he is well-versed in a wide range of legal and business challenges facing investment advisers, commodity pool operators and commodity trading advisors and has extensive experience designing and improving compliance processes and organizational systems. Brian has represented clients in the context of regulatory examinations, trading inquiries and enforcement actions, and in seeking no-action or similar relief, in the United States, the United Kingdom and Asia.

Brian is well-known for his thought leadership in the regulatory and compliance area as it affects alternative investment funds and is a key part of SRZ's educational outreach. In addition to hosting SRZ webinars, participating in firm-sponsored seminars and workshops, authoring SRZ alerts and white papers and co-authoring the SRZ Compliance Spark Twitter feed, he recently published "JOBS Act Update: CFTC Relief Removes Impediment to General Solicitation" and "'Knowledgeable Employees' — Recent SEC Guidance Also Details Broker-Dealer Registrations," in *The Hedge Fund Journal*. He presented "What, Me? Yes, You: The Surprising Reach of the Registration Requirements of the Commodity Exchange Act" at the ABA Business Law Section Fall Meeting, and he spoke at the Bank of America Merrill Lynch GC/CCO Hot Topics Dinner. Brian also teaches legal ethics at Yale Law School, focusing on the challenges faced by in-house counsel. He is a chair of the Steering Committee for the Managed Funds Association's CTA/CPO Forum and the CFTC Working Group for the Alternative Investment Management Association, and he formerly served as co-chair of the MFA's General Counsel Forum, its CTA, CPO & Futures Committee, and as a steering committee member of its Investment Advisory Committee.

Brian received his B.A., *magna cum laude*, from Catholic University of America, his M.A. from the University of Hawaii and his J.D., with distinction, from Stanford Law School.

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Practices

Investment Management
Hedge Funds
Private Equity

Jennifer Dunn

Jennifer advises hedge funds, private equity funds (including mezzanine and distressed funds), hybrid funds, funds of funds and investment advisers in connection with their structuring, formation and ongoing operational needs, general securities law matters, and regulatory and compliance issues. Her experience includes structuring and negotiating seed and strategic investments, advising investment managers regarding the structure and sale of their investment management businesses and the structure of their compensation arrangements, and representing investment managers in connection with managed accounts and single-investor funds.

Recognized by *The Legal 500 United States* and the *Expert Guide to the World's Leading Women in Business Law* (Investment Funds) and as an IFLR 1000 Rising Star (Investment Funds), Jennifer recently co-authored *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press) and presented at conferences sponsored by the New York City Bar Association, 100 Women in Hedge Funds, KPMG and Bank of America Merrill Lynch. She also presented "Marketing Opportunities and Challenges" at the SRZ 23rd Annual Private Investment Funds Seminar and participated in the "Allocation of Investment Opportunities Workshop" at an SRZ Investment Management Hot Topics seminar.

Jennifer earned her J.D. from Columbia University Law School, where she was a Harlan Fiske Stone Scholar, and her B.A., *cum laude*, from the University of Pennsylvania.

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Practices

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David J. Efron

David practices in the areas of domestic and offshore hedge funds, including fund formations and restructurings. Additionally, he advises hedge fund managers on structure, compensation and various other matters relating to their management companies, and he structures seed capital and joint venture arrangements. David also represents hedge fund managers in connection with SEC regulatory issues and compliance-related matters.

David is listed in *Chambers USA*, *The Legal 500 United States* and *Who's Who Legal: The International Who's Who of Private Funds Lawyers*. In particular, *Chambers USA* has noted that he is praised for his "excellent judgment" and for his "great combination of technical knowledge and street smarts which allows him to navigate the world of hedge funds," and *The Legal 500 United States* has recognized him as "an extraordinarily capable attorney," noting, "He has a mastery of the pertinent matters, but he also brings a pragmatic approach." A published author on subjects relating to investment management, David recently co-authored *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press). He is also a sought-after speaker for hedge fund industry conferences and seminars and a frequent guest lecturer at New York-area law and business schools. He recently presented "New Product Trends" and "Operational Due Diligence" for the Bank of America Merrill Lynch COO/CFO Hedge Fund Symposium.

David received his LL.M. in securities regulation, with distinction, from Georgetown University Law Center, his J.D. from Syracuse University College of Law, and his B.A. from Vassar College.

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Practices

Regulatory & Compliance
Hedge Funds
Investment Management
Litigation

Marc E. Elovitz

Marc is the chair of SRZ's Investment Management Regulatory & Compliance Group. He advises private fund managers on compliance with the Investment Advisers Act of 1940 and other federal, state and self-regulatory organization requirements, including establishing compliance programs, registering with the SEC and CFTC, and on handling SEC and NFA examinations. Marc provides guidance to clients on securities trading matters and represents them in regulatory investigations and enforcement actions, arbitrations and civil litigation. He also regularly leads training sessions for portfolio managers, analysts and traders on complying with insider trading and market manipulation laws, and has developed and led compliance training sessions for marketing and investor relations professionals. Marc works closely with clients undergoing SEC examinations and responding to deficiency letters and enforcement referrals. He develops new compliance testing programs in areas such as trade allocations and conflicts of interest. He also leads macro-level compliance infrastructure reviews with fund managers, identifying the material risks specific to each particular firm and evaluating the compliance programs in place to address those risks.

The Legal 500 United States, *Who's Who Legal: The International Who's Who of Private Funds Lawyers* and *New York Super Lawyers* have recognized Marc as a leading lawyer in his field. He is a member of the Steering Committee of the Managed Funds Association's Outside Counsel Forum, the American Bar Association's Hedge Funds Subcommittee and the Private Investment Funds Committee of the New York City Bar Association. A prolific writer in his areas of expertise, Marc recently co-authored "JOBS Act Update: CFTC Relief Removes Impediment to General Solicitation" for *The Hedge Fund Journal*. He is also a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press), the "Protecting Firms Through Policies and Procedures, Training, and Testing" chapter in the *Insider Trading Law and Compliance Answer Book* (Practising Law Institute, 2011-2015) and the "Market Manipulation" chapter in the leading treatise, *Federal Securities Exchange Act of 1934* (Matthew Bender). He also wrote the chapter on "The Legal Basis of Investment Management in the U.S." for *The Law of Investment Management* (Oxford University Press). Marc is also frequently invited to discuss current industry-related topics of interest at leading professional and trade association events. He most recently presented "Staying Ahead of the Curve(ball): How to Respond as Authorities Shift Focus from Creating New Regulations to Enforcing Them," at the Houlihan Lokey 2014 Alternative Asset Valuation Symposium, and "SEC Inspections and Examinations of Hedge and Private Equity Funds," at the PLI Hedge Fund and Private Equity Enforcement and Regulatory Developments 2014 conference.

Marc received his J.D. from New York University School of Law and received his B.A., with honors, from Wesleyan University.

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Practices

Investment Management
Hedge Funds
Private Equity
Regulatory & Compliance
Securities & Capital Markets

Steven J. Fredman

Steve is co-head of SRZ's Investment Management Group. He concentrates his practice in the areas of investment funds (domestic and offshore), investment advisers and broker-dealers, the acquisition and related financing of investment management firms, and securities regulation. Steve structures and organizes private investment partnerships and offshore funds, including general equity, arbitrage, global investment, private equity, distressed company, small cap and funds of funds, and he counsels clients on issues relating to partnership law, new product development and other matters. He also structures and organizes investment advisers and broker-dealers, handles the registration of commodity pool operators and commodity trading advisers, and provides ongoing advice to investment advisers on securities laws, rules, regulations and information. He represents clients in connection with the acquisition and sale of investment management firms or their assets as well.

Steve is recognized by many ranking publications, including *Chambers Global*, *Chambers USA*, *The Legal 500 United States*, *Expert Guide: Best of the Best USA* (Investment Funds), *Expert Guide to the World's Leading Investment Funds Lawyers*, *Expert Guide to the World's Leading Private Equity Lawyers*, *International Who's Who of Private Funds Lawyers* and *The Best Lawyers in America*. A past member of the American Bar Association's Committee on Partnership and the New York City Bar Association's Committee on Art Law, Steve is a frequent speaker and writer in his areas of expertise. He most recently presented at the Goldman Sachs Seventeenth Annual Hedge Fund Conference, and he discussed "Distressed Investments: Structured Products" at the SRZ 23rd Annual Private Investment Funds Seminar. He is a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press) and "Asset Manager M&A Deals," an SRZ white paper.

Steve holds a J.D. from Georgetown University Law Center, where he was an editor of *Law and Policy in International Business*, and a B.A. from Columbia University, where he was Phi Beta Kappa.

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Practices

Mergers & Acquisitions
Distressed Investing
Energy
PIPEs
Private Equity

Robert Goldstein

Rob's practice focuses on private equity and leveraged buyout transactions, mergers and acquisitions, PIPE transactions, and capital markets and general corporate representations. Some of Rob's recent M&A representations include Pouschine Cook Capital Management LLC in its sale of Great Lakes Caring Home Health & Hospice to Wellspring Capital Management; private equity fund Castle Harlan Partners V LP in its acquisition of Gold Star Foods Inc., its acquisition of Pretium Packaging Corporation and Pretium's contemporaneous acquisition of Novapak Corporation; Morton's Restaurant Group Inc. in its sale to affiliates of Tilman J. Fertitta; the sale of Ames True Temper to Griffon Corporation; the sale of Associated Packaging Technologies to Sonoco Inc.; and NewPage Corp. in its acquisition of the North American business of Stora Enso Oyj.

Rob has been recognized by *The Legal 500 United States* as a leading lawyer handling private equity buyouts and is often invited to write or speak on topics of interest to the industry. He authored "Distressed M&A: Lots of Distress and Not Much M&A — But Some Interesting Opportunities for Creative Private Equity Dealmakers" for *SRZ Private Equity Developments*, and he presented "Auctions" at the SRZ 2nd Annual Private Equity Fund Conference and "Private Equity M&A Panel: Harnessing the Capital Flood" at ACG Capital Connection.

Rob received his J.D., *cum laude*, from Tulane University School of Law, where he served as executive editor of the *Sports Lawyers Journal* and was elected into the Order of Barristers, and his B.A. from Columbia University.

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Practices

Mergers & Acquisitions
Nonprofit
Private Equity

Chris specializes in mergers and acquisitions in the financial industry, corporate governance and business issues for public and private corporations. He has successfully structured numerous acquisitions of control and non-control stakes in asset managers with varied investment strategies holding collectively over $100 billion in assets under management.

Prior to becoming a partner at SRZ, Chris was selected as the only associate in the United States for BTI's Client Service All-Star Team. Since 2009, he has been teaching popular courses at the New York University School of Law on the financial and legal aspects of investing in business transactions. Chris frequently speaks and writes on market trends in corporate law and is on the advisory board of Bloomberg's *M&A Law Report*. He authored *M&A Legal: Understanding and Negotiating Transactions* (Bloomberg Law, forthcoming 2015).

Chris earned his J.D., *cum laude*, from New York University School of Law, where he concentrated on law and economics. He received his B.A. from Friedrich-Schiller-Universität in Germany, where his work included statistical analysis and behavioral economics.

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Practices

Investment Management

Hedge Funds

Private Equity

Regulatory & Compliance

Daniel F. Hunter

Dan concentrates his practice on the design, structure and regulation of alternative investment products, including hedge funds, hybrid opportunity funds and private equity funds. Among the various investment advisers he represents are some of the larger and more well-known fixed income, bank loan and distressed debt managers. Dan also provides day-to-day regulatory, operational, mergers and acquisitions and restructuring advice to his fund clients, and advises funds regarding the receipt or allocation of seed capital.

Dan has been recognized in *The Legal 500 United States* in the Investment Fund Formation and Management and Private Equity Funds categories. A sought-after speaker, he recently presented "AIFMD: Practical Implications for U.S. Managers" at the KB Associates Global Fund Distribution: New Opportunities, New Challenges conference and "Global Regulatory Issues" at the IIR 3rd Annual InvestorOps conference. He is a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press), and he served as a guest lecturer at the New York University School of Continuing and Professional Studies, where he taught "Introduction to Hedge Funds."

Dan received his J.D. from the University of Michigan Law School, where he was articles editor of the *University of Michigan Journal of Law Reform*, and his A.B., *cum laude* and with high honors in history, from the University of Michigan.

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Practices

Investment Management
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Jason S. Kaplan

Jason's practice concentrates on corporate and securities matters for investment managers and alternative investment funds. He represents institutional and entrepreneurial investment managers, financial services firms and private investment funds in all aspects of their business. Jason's practice focuses on advising managers of hedge, private equity and hybrid funds regarding the structure of their businesses and on day-to-day operational, securities, corporate and compliance issues; structuring and negotiating seed and strategic investments and relationships and joint ventures; and advising investment managers with respect to regulatory and compliance issues.

Jason's recent speaking engagements include discussing "Marketing Opportunities and Challenges" at the SRZ London Investment Management Hot Topics conference and "Current Terms: Hedge Funds" at the IBA 15th Annual International Conference on Private Investment Funds. He co-authored *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press) and was recently quoted in "Co-Investments Enable Hedge Fund Managers to Pursue Illiquid Opportunities While Avoiding Style Drift (Parts One, Two and Three)" in *The Hedge Fund Law Report*.

Jason earned his J.D. from Fordham University School of Law, where he was a member of the *Fordham Law Review*, and his B.S. from the University of Michigan.

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Practices

Business Reorganization

Distressed Debt & Claims Trading

Distressed Investing

Energy

Regulatory & Compliance

Trading Agreements

David J. Karp

David leads the firm's Distressed Debt & Claims Trading Group, which provides advice in connection with U.S., European and emerging market debt and claims trading matters. His practice focuses on corporate restructuring, special situations and distressed investments, and distressed mergers and acquisitions. David has represented debtors, ad hoc and official committees, and individual secured and unsecured creditors. He also advises investment funds in connection with oil and gas royalty investments and distressed energy investments, and his recent energy representations include investors in Stallion Oilfield Services Ltd., Seahawk Drilling Inc., ATP Oil & Gas and Trident Resources Corporation. David frequently represents broker-dealers, investment funds, private equity funds and CLOs in connection with the auction and trading of distressed and non-performing assets and NPL portfolios across a wide range of issuers and in jurisdictions spanning the globe, including Arcapita, Swiss Air, Landsbanki, Glitnir, Kaupthing, Lehman Brothers Holdings Inc. and its affiliated debtors, MF Global Inc. and its affiliated debtors, and American Airlines.

Recognized as a leading lawyer by *New York Super Lawyers*, and by the founder of *Reorg Research* as "undoubtedly one of the best in the field at what he does best: making sure funds and their investments are protected when transacting and executing trades in distressed debt and claims," David is an active member of the American Bankruptcy Institute, Loan Market Association, Asia Pacific Loan Market Association, INSOL Europe, Emerging Markets Trade Association, National Association of Royalty Owners and the Loan Syndications and Trading Association. He is a frequent author and speaker on distressed investing and oil and gas topics and recently wrote articles including "Investing in Oil and Gas Royalties: Distressed Counterparty Risk Considerations," "Structuring Winning Bids: European NPL Portfolio Transactions," "Bank Debt Trading on the Modern Day Back of the Napkin" and "Trade Dispute Litigation: Debtor vs. Secondary Market Claims Purchaser."

David earned his J.D. from Fordham University School of Law and his B.S. from Cornell University.

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Founding Partner, CEO &
Portfolio Manager
Silver Point Capital, L.P.

Edward A. Mulé

Ed is the CEO of Silver Point Capital and Portfolio Manager of Silver Point's funds, having built and run the firm since its inception in 2002. Silver Point is a registered investment adviser specializing in credit and special situations investments. The firm has over 150 employees and manages approximately $8.5 billion in assets. Prior to founding Silver Point, Ed worked for more than 16 years at Goldman Sachs where he headed or co-headed Goldman's Special Situations Investing Business from 1999 to 2001 and the Asian Distressed Debt Investing Business from 1998 to 2001. Before joining Goldman's distressed debt efforts in 1995, he worked in the Office of the Chairman from 1991 to 1994, and prior to that as an investment banker in the Mergers and Acquisitions group.

Ed graduated *magna cum laude* from the University of Pennsylvania's Wharton School, contemporaneously receiving both his M.B.A. and B.S. degrees at the age of 21.

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Practices

Investment Management
Energy
Financial Institutions
Hedge Funds
Private Equity

David Nissenbaum

David's practice focuses on corporate, bank regulation and securities matters and he primarily represents institutional and entrepreneurial investment managers, financial services firms and private investment funds in all aspects of their business. David structures and advises investment management and financial services firms as well as hedge, private equity, credit, distressed investing and hybrid funds, funds of funds and scalable platforms for fund sponsors. He also advises on management company partnerships, succession planning, seed capital deals, mergers and acquisitions of investment firms and on all aspects of U.S. banking laws that affect investment and financial services firms and investment funds, including investments in banking organizations, bank-sponsored funds and investments in funds by banking organizations.

David has been recognized by *Chambers Global*, *Chambers USA*, *Expert Guide to the World's Leading Investment Funds Lawyers*, *The International Who's Who of Private Funds Lawyers*, *The Legal 500 United States* and *PLC Cross-border Private Equity Handbook*. A member of the advisory board of The Financial Executives Alliance and past member of the Banking Law Committee of the New York City Bar Association, David is a sought-after writer and speaker in his areas of expertise. "Just Like Starting Over: A Blueprint for the New Wall Street Firm," published by *The Deal*, "Hedge Fund Manager Succession Planning" and "Federal Reserve Provides Greater Flexibility for Non-Controlling Investment in Banks and Bank Holding Companies" are among his publications, and he also co-authored the chapter "Management Company Structures and Terms" in *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press). David recently participated in "The Final Volcker Rule: What Private Fund Managers Not Affiliated with a Bank Need to Know," an SRZ webinar, and presented a talk on capital raising at a prior SRZ Annual Private Investment Funds Seminar.

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Practices

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Omoz focuses his practice on the representation of sponsors and investors in the formation and structuring of private equity funds, hedge funds and hybrid funds. He has extensive experience representing sponsors and investors on funds employing real estate, buyout, credit, distressed investment, structured products, activist, multi-strategy and long-short equity strategies. He also represents hedge fund managers and investors in the negotiation of seed-capital transactions, and he advises sponsors of private equity firms in the structuring of complex carry-sharing arrangements among principals and employees. Recent representations of Omoz's include institutional sponsors and boutique firms in the formation of private equity funds, hedge funds and hybrid funds; lead investors on their investments in private equity funds; hedge fund managers and investors in seed-capital arrangements; investment managers in joint venture arrangements; and investment managers and investors in the formation of special purpose acquisition and co-investment vehicles.

Omoz regularly addresses investment managers about current developments relating to private investment funds. His recent speaking engagements include participating in "Private Equity Fund Compliance Update," an SRZ webinar, and presenting "Ongoing Operations and Firm Growth" at the SRZ 2nd Annual Private Equity Fund Conference and "Management Company Structuring and Operations" at the SRZ 23rd Annual Private Investment Funds Seminar. He also contributed to the *Fund Formation and Incentives Report*, released by Private Equity International and SRZ.

Omoz received his J.D. from University of Michigan Law School and his B.A., with highest honors, from Michigan State University.

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Seetha Ramachandran

Seetha focuses on white collar criminal defense and investigations, banking and securities enforcement, anti-money laundering issues and civil litigation. As a former Deputy Chief in the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, U.S. Department of Justice, Seetha has expertise in matters that include allegations of violations of the Bank Secrecy Act (BSA), complex money laundering, economic sanctions, and civil and criminal forfeiture. During her tenure at AFMLS, she served as one of the first co-heads of the Money Laundering and Bank Integrity Unit, where she supervised a broad range of investigations and prosecutions of global financial institutions including HSBC, MoneyGram, Standard Chartered Bank and ING, as well as emerging areas of money laundering and BSA enforcement such as online payment systems and virtual currencies. Seetha also worked closely with state and federal banking regulators and U.S. Attorneys' offices nationwide. Prior to her appointment at AFMLS, Seetha served as an Assistant U.S. Attorney for the Southern District of New York for nearly six years, where she worked in the Complex Frauds, Major Crimes and Asset Forfeiture units, investigating and prosecuting bank fraud, mail and wire fraud, tax fraud, money laundering, stolen art and cultural property, and civil and criminal forfeiture cases and appeals. She is also a former law clerk for the Hon. Richard J. Cardamone of the U.S. Court of Appeals for the Second Circuit.

An accomplished public speaker, Seetha has presented on topics that include enforcement trends in the financial services industry, effective AML programs and asset forfeiture. She most recently presented on sanctions penalties and financial institutions at ACI's 5th Annual Economic Sanctions Bootcamp, regulatory enforcement issues at ACI's 2nd National Forum on Virtual & Digital Currency and Payment Systems, and enforcement actions under the Bank Secrecy Act at the Pennsylvania Association of Criminal Defense Lawyers' White Collar Practice Seminar. Seetha is also the co-author of "The Interplay Between Forfeiture and Restitution in Complex Multi-Victim White Collar Cases" in the *Federal Sentencing Reporter*.

Seetha earned her J.D. from Columbia Law School, where she was articles editor for the *Columbia Law Review*, and her B.A., *magna cum laude*, from Brown University.

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Paul N. Roth

Paul is a founding partner of SRZ and chair of its Investment Management Group. Throughout his career, he has acted as counsel to leading public and private companies in financial services and to their boards of directors. Paul's extensive private investment funds practice, an area in which he has more than 45 years of experience, includes the representation of hedge funds, private equity funds, offshore funds, investment advisers and broker-dealers in connection with fund formations and compliance, securities regulation, mergers and acquisitions (domestic and cross-border) and other financial transactions.

Paul has been consistently recognized as a leading funds lawyer by *The Best Lawyers in America*, which also named him *New York City Private Funds/Hedge Funds Law Lawyer of the Year.* He continues to be recognized by *Chambers Global*, *Chambers USA*, *The Legal 500 United States*, *IFLR1000*, *Expert Guides: Best of the Best USA* (Investment Funds), *Expert Guide to the World's Leading Investment Funds Lawyers, Expert Guide to the World's Leading Private Equity Lawyers*, *Expert Guide to the World's Leading Capital Markets Lawyers*, *The International Who's Who of Private Funds Lawyers*, *Lawdragon 500 Leading Lawyers in America*, *PLC Cross-border Investment Funds Handbook*, *Who's Who in American Law* and *Who's Who in America*. He received a Lifetime Achievement Award from Hedge Funds Care in recognition of his prominence in the hedge funds industry and his extraordinary commitment to philanthropy, as well as The Hedge Fund Journal Award for Outstanding Achievement in the Hedge Fund Industry. He was also named to *HFMWeek's* 2010 list of the 50 most influential people in hedge funds.

Paul serves as a special adviser to the board of directors of the Managed Funds Association (MFA) and he is a former member of the Legal Advisory Board to the National Association of Securities Dealers (NASD). He chairs the Subcommittee on Hedge Funds of the American Bar Association's Committee on Federal Securities Regulation and is a former chair of the New York City Bar Association's Committee on Securities Regulation. Paul is a member of the boards of directors of the NAACP Legal Defense and Educational Fund and the Advisory Board of the RAND Center for Corporate Ethics and Governance, and he is a fellow of the New York Bar Foundation and the Phi Beta Kappa Society. He served on the Advisory Board of Harvard Law School's Center on Lawyers and the Professional Services Industry and formerly served as president, vice president and a trustee of the Harvard Law School Alumni Association of New York City. He is also a member of The Economic Club of New York and a former member of the board of directors of the Citizens Committee for New York City. Additionally, Paul has served as a lecturer at the University of Pennsylvania's Wharton School, where he taught "Responsibility in Professional Services." He is also an adjunct professor of finance at NYU Stern School of Business, where he has taught "Managing Financial Businesses," and an adjunct professor of law at New York University School of Law, where he teaches "Advising and Managing Financial Services Businesses." He is a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press).

Paul received his J.D., *cum laude*, from Harvard Law School, after which he was awarded a Fulbright Fellowship to study law in the Netherlands. He received his A.B., *magna cum laude*, from Harvard College, where he was Phi Beta Kappa.

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Shlomo focuses his practice on the tax aspects of onshore and offshore investment funds, registered investment companies and business development companies, private equity partnerships, real estate and corporate transactions, restructurings and workouts, securitizations, and existing and emerging financial instruments. He also provides ongoing tax advisory services to a number of hedge fund managers regarding fund structuring and formation, distressed debt investments and other complex transactions.

Recognized as a leader in his field by *Chambers USA*, *The Best Lawyers in America*, *The Legal 500 United States* and the *Tax Directors Handbook*, Shlomo is also a member of the Tax Section of the New York State Bar Association. He regularly speaks at industry conferences and events, and his most recent presentations include the SRZ webinar “FATCA Update for Investment Fund Managers” and “U.S. Tax” at the Bank of America Merrill Lynch COO/CFO Hedge Fund Symposium. He is also a co-author of *Hedge Funds: Formation, Operation and Regulation* (ALM Law Journal Press) as well as various SRZ alerts.

Shlomo earned his J.D. from Hofstra University School of Law, where he was an articles editor of the *Hofstra Law Review*.

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Steven's practice focuses on advising on the establishment and operation of hedge funds in the United Kingdom, Europe and a variety of offshore jurisdictions, and on the structuring and operation of hedge fund management groups, including LLP agreements, and on seed-capital arrangements. Steven also advises on the establishment and listing of closed-end public funds and U.K. onshore funds.

Steven has been cited by *Chambers UK* and *The Legal 500 UK* for his preeminence in the investment funds sector, with interviewees describing him as "top notch" and "fantastic." He is a member of the International Bar Association, a member of the Collective Investment Schemes Sub-Committee of The Law Society and the co-chair of the Sound Practices Committee and a member of the AIFMD Working Group of the Alternative Investment Management Association. He also chairs the AIMA working group which is updating the *Offshore Alternative Fund Directors' Guide*. Steven is the author of "Top 10 Things You Should Know About the New Swiss Rules on Distribution of Funds" which appeared in the *Hedge Fund Journal*. He most recently addressed the UBS Breakfast on Swiss Distribution and presented "Impact of AIFMD on Fund Governance" at the Infoline Fund Governance Thought Leadership Conference.

Steven graduated with an honors degree in law from Cardiff University and attended the College of Law.

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Regulatory Outlook: Exams, Enforcement and AIFMD

I. Examination Insights

A. SEC Examinations

1. Recent Examination Initiatives

(a) Presence Examinations

(i) The U.S. Securities and Exchange Commission's Office of Compliance Inspections and Examinations ("OCIE") created the "Presence Exam" Initiative in 2012 to introduce the new private fund adviser registrants to the SEC. Almost 400 presence examinations had been completed by the fall of 2014.

(ii) Key Issues in Presence Examinations

(1) Appropriateness of fees/allocation of expenses;

(2) Marketing (issues such as performance reporting, backtesting, portability of performance and cherry-picking);

(3) Custody rule compliance; and

(4) Valuation (issues such as differences between disclosures and actual practices, and changes to valuation methodologies).

(b) "Routine" Examinations

Even so-called routine or periodic exams by the SEC are now conducted on a risk basis. The staff has technology that allows it to identify the riskier advisers and leverage SEC staff reserves.

(c) "Cause" Examinations

The SEC staff is receiving record numbers of tips and complaints, particularly in light of new whistleblower provisions. Examinations for "cause" often look similar to SEC enforcement investigations.

(d) "Never Before Examined" Initiative

(i) In February 2014, OCIE announced a special examination initiative for advisers "never before examined" despite having been registered for three or more years.

(ii) This initiative is not focused on private fund advisers but a way to pick up dual registrants or hedge fund managers that also advise registered funds.

(e) Sweep Examinations. There have been two novel sweep examinations recently:

(i) Cybersecurity and Information Security Sweep Examination

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(1) Information-gathering exercise by OCIE, from which observations from OCIE are expected to be released in the coming year.

(2) Observations from the cybersecurity sweep are expected to be released in the coming year in order to help firms improve their systems.

(ii) "Liquid Alternative" Strategies Sweep Examination

(1) The rapid increase in registered fund products offering alternative strategies led to a sweep examination by OCIE in August 2014.

(2) The sweep focused on issues such as:

a. Liquidity;

b. Leverage limits and controls;

c. Allocation of investments; and

d. Governance.

(f) Corrective Action Reviews

(i) After finding deficiencies, the exam staff will often return in a year or two to evaluate whether appropriate "corrective action" was taken and followed through on.

(ii) Several such reviews have led to enforcement actions (see Section I.A.4, below).

(g) Examination of Non-U.S. Managers

(i) These examinations have historically been conducted by dedicated examination staff based in Washington, D.C.

(ii) Examination staff have more frequently been conducting on-site reviews in the United Kingdom and Hong Kong.

2. New Technologies Used in SEC Examinations

(a) The SEC has a new quantitative analytics unit staffed by experienced specialists, which is developing sophisticated data analytic tools. One use for these tools is in examinations of hedge fund managers.

(b) Machine Analyzed Risk Scoring ("MARS"): MARS assesses registered investment advisors in terms of risk, allowing OCIE staff to focus its finite resources on those firms it deems riskiest.

(c) National Exam Analytics Tool ("NEAT")

(i) Examination staff can use this tool to analyze large volumes of trade data.

(ii) NEAT can review trade data by using 50 different factors. Issues it can identify include suspicious trading ahead of large price movements and anomalous trade allocations or patterns of trade allocations that suggest improper cherry-picking of profitable trades.

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3. Common Examination Deficiency Areas for Private Investment Fund Managers

   (a) Valuations;

   (b) Compliance programs;

   (c) Principal transactions and cross trades;

   (d) Marketing; and

   (e) Insider trading.

4. Recent Enforcement Actions Arising Out of Examinations

   (a) *ZPR Investment Management, Inc*, Adv. Act. Rel. No. IA-3574 (April 4, 2013): SEC examinations of investment adviser found performance marketing was misleading because adviser claimed compliance with the Global Investment Performance Standards, though that was not the case.

   (b) *GMB Capital Management LLC*, Adv. Act Rel. No. IA-3399 (April 20, 2012): SEC examination of fund managers GMB (currently known as Clearstream Investments LLC) showed that performance claims had no basis, and personnel created false documents during the course of the examination to try to support the performance claims.

   (c) *F-Squared Investments, Inc.*, Adv. Act Rel. No. IA-3988 (Dec. 22, 2014): An SEC examination showed that backtested returns were not properly identified as such. The firm settled, agreeing to disgorgement and penalties of $35,000,000. The former CEO of the firm was charged with fraud under Sections 206 and 207 of the Advisers Act for his role in the misleading performance marketing.[1]

   (d) *Modern Portfolio Management, Inc.*, Adv. Act Rel. No. IA-3702 (Oct. 23, 2013): During an on-site examination in 2008, OCIE staff found the registered investment adviser had failed to complete an annual compliance review in 2006 and that it made misleading statements on its website. The firm failed to take corrective action, and it, along with its owners G. Thomas Damasco II and Bryan Ohm, agreed to pay $175,000 in penalties, hire an independent compliance consultant for three years, and undergo compliance training to settle the charges.

   (e) *Judy K. Wolf*, Adv. Act Rel. No. IA-3947 (Oct. 15, 2014): The SEC charged a compliance officer at Wells Fargo Advisors, LLC, a dually-registered investment adviser and broker-dealer, with fabricating reports produced to OCIE staff in order to make it seem as though she had conducted a more thorough investigation of insider trading than was actually the case. The SEC alleged that Wolf altered the reports after an investment adviser representative at Wells Fargo was charged by the SEC with insider trading in the securities that were the subject of the report in question.

   (f) *George B. Franz III*, Adv. Act Rel. No. IA-3826 (April 30, 2014): The SEC charged George B. Franz III, the CEO of Ruby Corporation, a registered investment adviser, with several violations of the Advisers Act, noting that he lied to examination staff when he told them that he first learned of any potential misconduct by his son involving firm clients earlier that year and that he immediately fired his son, when neither was the case. The SEC also charged Franz with providing fabricated documents to the enforcement staff to try to show that he spoke with

[1] Complaint at 1–4, *SEC v. Present*, No. 1:14-cv-14692 (D. Mass. Dec. 22, 2014).

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clients impacted by his son's fraud and addressed the issue in writing to these clients, as well as with lying under oath during the Enforcement Division's investigation.

B. NFA Examinations

1. The National Futures Association ("NFA") is the self-regulatory organization ("SRO") for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") registered with the Commodity Futures Trading Commission ("CFTC"). As part of its SRO functions, the NFA examines CPOs and CTAs for compliance with its and with the CFTC's rules and regulations.

2. The Examination Process

(a) Between one week and 30 days before beginning an exam, the NFA will contact the CCO or other compliance contact to announce the upcoming exam.

(b) At this time, the NFA will send a "first-day letter" outlining the following: (1) the anticipated duration of the exam; (2) a list of requested documents; and (3) a questionnaire on the examinee's business functions.

(c) Examiners will generally remain on-site for one to three weeks, during which NFA teams of four to five individuals review documents, observe operations and conduct interviews with management and employees. Subsequent off-site work follows.

(d) The NFA will conduct an exit interview summarizing findings and recommendations and issue a report after the on-site portion of an examination. However, due to the newness of the process, the NFA expects examinees to be prepared for follow-up visits and additional inquiries.

3. NFA Areas of Focus

(a) NFA examinations focus on noncompliance with CFTC and NFA rules. Some common violations the NFA focuses on include:

(i) Unregistered Associated Persons and Unlisted Principals: CFTC and NFA rules require all individuals employed by a CPO or CTA to be registered with the CFTC and to update their Form 7-Rs (registration forms) to reflect the addition of any new principal within 20 days.

(ii) Unregistered Branch Offices: NFA rules require all branch offices to be identified on a firm's Form 7-R and have an appointed branch manager.

(iii) Dealing with Non-NFA Members: NFA Bylaw 1101 — referred to as the "cornerstone" of NFA regulation — prohibits NFA registrants from doing business with any unregistered person or entity of which the CFTC and/or NFA requires registration.

(iv) Improper Promotional Materials and Sales Practices: NFA Rule 2-29 requires that promotional materials that communicate a level of performance contain specific data.

(b) At the beginning of each year, the NFA releases a list of issues that it will focus on during the examination process. For FY 2015, which began in July 2014, NFA exams will focus on compliance issues, including the role and function of compliance officers, implementation of and adherence to effective policies and procedures, due diligence, and risk management.

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(c) NFA examinations no longer simply review compliance with NFA and CFTC rules and regulations. Now, examinations are looking at *risk*, i.e., the potential that a firm will have problems arise in the future.

II. Enforcement Insights

A. Recent SEC Enforcement Actions Against Private Funds Cover Various Types of Conduct

1. Principal Transactions

(a) Section 206(3) of the Investment Advisers Act ("Advisers Act") prohibits an investment adviser acting as principal for his own account from knowingly buying or selling securities to a client without first disclosing his principal capacity to the client and obtaining written consent.

(i) *Paradigm Capital Management, Inc.*, Adv. Act Rel. No. IA-3857 (June 16, 2014): Candace King Weir, owner of Paradigm, conducted transactions between Paradigm and another broker-dealer that she owned while trading on behalf of a hedge fund client, yet never properly disclosed this conflict of interest to the client or obtained consent for principal transactions. Paradigm and Weir paid $2,200,000 to settle charges with the SEC.

(ii) *Strategic Capital Group, LLC*, Adv. Act Rel. No. IA-3924 (Sept. 18, 2014): An SEC examination found that Strategic Capital Group ("SCG") engaged in over 1,000 principal transactions, purchasing fixed-income securities from its affiliated broker-dealer on behalf of client accounts, without making disclosures to its clients. SCG paid nearly $600,000 to settle the SEC's claims. CCO N. Gary Price also paid a $50,000 penalty for failing to implement policies that effectively prevented principal transactions from taking place.

(iii) *Highland Capital Management, L.P.*, Adv. Act Rel. No. IA-3939 (Sept. 25, 2014): In September 2008, Highland purchased over $3,300,000 in securities from one of its advisory clients. It also and advised two of its clients to sell approximately $15,000,000 in debt securities to four accounts in which Highland had ownership interests. Highland did not disclose these principal transactions to its clients, paying $225,000 in penalties as a result.

2. Improper Expense Allocations

(a) Although no rule explicitly prohibits improper expense allocations, the SEC has many tools to enforce against this conduct. Sections 206(1), 206(2) and 206(4) of the Advisers Act prohibit fraudulent conduct by investment advisers. Similarly, Section 17(a) of the Securities Act ("Securities Act") and Section 10(b) of the Securities Exchange Act ("Exchange Act") widely prohibit fraudulent conduct in connection with securities transactions.

(i) *Clean Energy Capital, LLC*, Adv. Act Rel. No. IA-3955 (Oct. 17, 2014): The SEC filed its first action alleging fraudulent allocation of expenses to a firm's funds, claiming that the advisory firm and its manager Scott A. Brittenham used the assets of 19 funds to pay over $3,000,000 in expenses such as rent, salaries, employee benefits, and management bonuses. In October 2014, Clean Energy settled the charges, agreeing to pay $2,200,000 and hire an independent consultant to review and update its compliance and accounting procedures.

(ii) *Lincolnshire Management, Inc.*, Adv. Act Rel. No. IA-3927 (Sept. 22, 2014): Lincolnshire integrated two portfolio companies owned by two different private equity funds that it advised, but did not allocate expenses properly between them. The SEC particularly noted

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the misallocation of monitoring fees. Lincolnshire paid over $2,300,000 to settle the charges.

3. Improper Investment Allocations

(a) The SEC relies on the various fraud provisions of the securities laws, including Sections 206(1), 206(2) and 206(4) of the Advisers Act; Section 10(b) of the Exchange Act; and Section 17(a) of the Securities Act, to bring enforcement actions against firms and individuals that allocate trades improperly.

(i) *J. S. Oliver Capital Management, L.P.*, Decision Rel. No. 649 (Aug. 5, 2014): J. S. Oliver and its president, Ian O. Mausner, engaged in a cherry-picking scheme, allocating trades after the close of trading to give more favorably-priced securities to particular clients – four hedge funds that held investments for Mausner and his family. An administrative judge imposed a $15,000,000 penalty against J. S. Oliver, ordered Mausner to pay a $3,000,000 penalty, and required disgorgement of roughly $1,400,000. Additionally, J. S. Oliver's investment adviser registration was revoked and Mausner was permanently barred from associating with investment advisers, brokers and dealers.

(ii) *Structured Portfolio Management, LLC*, Adv. Act Rel. No. IA-3906 (Aug. 28, 2014): One trader acted as the portfolio manager for each of three funds yet traded daily in Treasury securities for each fund. Despite the potential for improper allocation of purchases among the three funds, Structured Portfolio Management failed to have effective, written policies and procedures in place to protect against trade misallocations. To settle the charges, it paid a $300,000 penalty and retained an independent compliance consultant to settle the charges.

(iii) *Transamerica Financial Advisors, Inc*., Adv. Act Rel. No. IA-3808 (April 3, 2014): Transamerica offered breakpoint discounts that reduced fees owed by clients that increased their assets in certain investment programs, allowing clients to aggregate accounts to obtain these discounts. However, Transamerica failed to process every aggregation request, leading to some clients being overcharged. It paid $1,100,000 and agreed to hire a compliance consultant to settle the claims.

4. Violations of the Custody Rule

(a) Rule 206(4)-2 of the Advisers Act sets forth a number of requirements intended to safeguard client funds and securities from an adviser's misappropriation. The Custody Rule applies to advisers or related persons that have the authority to hold and do hold client funds or securities.

(i) *Further Lane Asset Management LLC*, Adv. Act Rel. No. IA-3707 (Oct. 28, 2013): Despite maintaining custody of the assets of its managed funds, Further Lane failed to arrange an annual "surprise" examination to verify assets and failed to provide investors with quarterly account statements from a qualified custodian of the funds. Further Lane paid $347,000 in disgorgement to settle claims, and its CEO, Jose Miguel Araiz, agreed to pay a $150,000 penalty and be suspended from the securities industry for one year.

(ii) *Knelman Asset Management Group, LLC*, Adv. Act Rel. No. IA-3705 (Oct. 28, 2013): Knelman, an investment adviser, had custody of Rancho Partners I, a fund of funds, but never subjected Rancho's assets to surprise exams or distributed quarterly account statements to investors. To settle these and several other charges, Knelman agreed to pay

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$60,000 and implement compliance measures and training, and its CEO and CCO agreed to pay $75,000 individually and be barred from acting as CCO for three years.

5. Violations of the "Pay-to-Play" Rule regulating Political Contributions

    (a) Rule 206(4)-5 of the Advisers Act makes it unlawful for a registered investment adviser to provide advisory services to a government entity for compensation within two years after making a political contribution to an official of that government. Contributions of certain associates of the adviser are also prohibited under this rule.

        (i) *TL Ventures Inc*., Adv. Act Rel. No. IA-3859 (June 20, 2014): In the SEC's first case under the pay-to-play rule, it charged a Philadelphia-based private equity firm for receiving advisory fees from city and state pension funds although one of its associates made campaign contributions to the Pennsylvania state governor and a candidate for mayor of Philadelphia in 2011. TL Ventures paid nearly $260,000 of disgorgement and a penalty of $35,000.

6. Fraudulent and Manipulative Valuation Practices

    (a) The SEC uses the general fraud provisions of the Advisers Act, the Exchange Act, and the Securities Act to charge funds and managers for employing manipulative valuation techniques.

        (i) *GLG Partners, Inc.*, Exch. Act Rel. No. 34-71050 (Dec. 12, 2013): Due to poor internal controls, one of GLG's funds overvalued its equity stake in an emerging market coal company, resulting in inflated fees to GLG and the overstatement of assets under management in SEC filings. GLG agreed to pay nearly $9,000,000 to settle the charges.

        (ii) *Brian Williamson*, Adv. Act Rel. No. IA-3760 (Jan. 22, 2014): Williamson, a former Oppenheimer portfolio manager, valued the fund's largest investment at a significant markup and sent misleading marketing materials regarding internal rates of return to investors. To settle the claims, Williamson paid a $100,000 penalty and was barred from the securities industry.[2]

7. Misleading Advertising

    (a) Rule 206(4)-1 of the Advisers Act prohibits false or misleading advertisements by investment advisers. Additionally, the SEC relies on the general fraud provisions of the securities laws to file charges for misleading promotional materials.

        (i) *F-Squared Investments, Inc.*, Adv. Act Rel. No. IA-3988 (Dec. 22, 2014): F-Squared falsely advertised its "AlphaSector" investment strategy, claiming a successful seven-year track record although it was based on an algorithm not even in existence for seven years. The claim in the advertisements was based on back-tested hypothetical data that inflated results by roughly 350 percent. F-Squared paid $35,000,000 to settle the charges. The SEC filed a civil complaint against co-founder and former CEO Howard Present in federal district court in Massachusetts in December 2014.[3]

        (ii) *Navigator Money Management, Inc.*, Adv. Act Rel. No. IA-3767 (Jan. 30, 2014): Money manager Mark Grimaldi and his firm Navigator were charged with making false claims in

[2] Oppenheimer settled related charges with the SEC for $2,800,000 in 2013. *Oppenheimer Asset Mgmt. Inc.*, Adv. Act Rel. No. IA-3566 (Mar. 11, 2013).

[3] Complaint, *SEC v. Present*, No. 1:14-cv-14692 (D. Mass. Dec. 22, 2014).

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newsletters and on Twitter, exaggerating the success of investment advice. The advertisements cherry-picked specific successful recommendations made to clients while ignoring unsuccessful ones. To settle the charges, Grimaldi agreed to pay a $100,000 penalty and retain an independent compliance consultant for three years.

(iii) *Strategic Capital Group, LLC*, Adv. Act Rel. No. IA-3924 (Sept. 18, 2014): SCG provided prospective investors with misleading advertisements. One advertisement failed to disclose that the portrayed results were partly based on returns of an index rather than SCG's actual historical returns, and the other advertisement didn't disclose that the portrayed results included fees, thus materially overstating SCG's investment performance. SCG paid a $200,000 penalty and $368,459 in disgorgement to settle charges.

8. Rule 105 Violations

(a) Rule 105 of Regulation M prohibits a person from short selling a security within five business days of participating in an offering for that same security. No intent is required for the SEC to allege a Rule 105 violation.

(b) On Sept. 17, 2013, the SEC revealed charges against 23 investment advisers and private equity firms for Rule 105 violations. Twenty-two of the 23 firms charged settled the claims for a total of over $14,400,000 in sanctions.[4]

(i) In resolving these 2013 charges, the SEC impliedly made the point that there is no de minimis exclusion for Rule 105 violations; the one matter not immediately settled resulted in a civil penalty of $75,000 despite wrongful profits of merely $841.[5]

(c) On Sept. 16, 2014, the SEC sanctioned 19 firms and one individual trader for violating Rule 105. The 19 firms and the individual trader all agreed to settle the charges, paying a combined total of more than $9,000,000 in disgorgement, interest and penalties.[6]

(i) *Antipodean Advisors LLC*, Exch. Act Rel. No 34-73115 (Sept. 16, 2014): On August 22, 2013, Antipodean sold short over 150,000 shares of J.C. Penney during the restricted period for $13.18 per share. Five days later, J.C. Penney announced the pricing of a follow-on offering at $12.90 per share; Antipodean received 100,000 shares in this offering, profiting $27,970. It settled claims by disgorging the $27,970 in illicit profits and paying a $65,000 penalty.

(ii) *Seawolf Capital, LLC*, Exch. Act Rel. No. 34-73107 (Sept. 16, 2014): Seawolf short sold 105,600 shares of a REIT during the restricted period, and the REIT announced a follow-on offering at a lower price later that day. Seawolf received an allocation of 50,000 shares in the follow-on offering, profiting $192,730. It settled all claims by agreeing to pay $192,730 in disgorgement and a $96,365 civil penalty.

(d) *Worldwide Capital, Inc*., Exch. Act Rel. No. 34-71653 (March 5, 2014): From October 2007 to February 2012, Jeffrey Lynn and his proprietary trading firm, Worldwide Capital, participated in 60 public stock offerings covered by Rule 105 after having short sold those same securities during the pre-offering restricted period. Lynn agreed to pay $7,200,000 to settle the charges,

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[4] Press Release, Sec. & Exchange Comm'n, SEC Charges 23 Firms with Short Selling Violations in Crackdown on Potential Manipulation in Advance of Stock Offerings (Sept. 17, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539804376.

[5] *G-2 Trading LLC*, Exch. Act Rel. No 34-72231 (May 22, 2014).

[6] Press Release, Sec. & Exch. Comm'n, SEC Sanctions 19 Firms and Individual Trader for Short Selling Violations in Advance of Stock Offerings (Sept. 16, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542963767.

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marking the SEC's largest-ever monetary sanction for a Rule 105 violation. In July 2014, the SEC brought charges against five Worldwide traders for Rule 105 violations, who agreed to settle all claims for a collective total of nearly $750,000.[7]

9. Delinquent Disclosure of Beneficial Ownership

   (a) The SEC has increased enforcement of two provisions of the Exchange Act that require corporate insiders and major shareholders to file certain forms reporting beneficial ownership:

      (i) Section 13(d) requires shareholders to file beneficial ownership reports after acquiring 5 percent or more of a class of securities.

      (ii) Section 16(a) requires corporate officers, directors and shareholders with 10 percent or more ownership to file Form 3s initially disclosing their beneficial ownership and Form 4s and Form 5s disclosing subsequent transactions. Though the obligation to file is with the individual, Item 405 of Regulation S-K requires companies to annually review the Section 16 filings of their directors, officers and 10-percent shareholders and disclose to investors the names of those who failed to make required disclosures.

   (b) On Sept. 10, 2014, the SEC announced charges against 28 officers, directors or major shareholders for 13(d) and 16(a) violations.[8] It also charged six public companies for failing to report on filing failures, as required by Regulation S-K. Of the 34 individuals and companies charged, 33 agreed to settle the claims, paying penalties totaling $2,600,000. Ten of the 34 entities charged were investment firms, including:

      (i) *Ridgeback Capital Management LP*, Exch. Act Rel. No. 34-73032 (Sept. 10, 2014): Ridgeback violated Section 16(a) by failing to properly file multiple required reports regarding its transactions in Ironwood Pharmaceutical securities, which it executed on behalf of one of its managed funds. Ridgewood also violated Section 13(d) by failing to file reports disclosing its own beneficial ownership in Ironwood. Ridgeback settled the charges for $104,500.

      (ii) *Trinad Management LLC*, Exch. Act Rel. No. 34-73034 (Sept. 10, 2014): Trinad violated Section 16(a) by failing to disclose holdings and transactions in certain securities that it executed on behalf of an affiliated fund under its management and violated Section 13(d) by never disclosing its own beneficial ownership in those securities. Trinad paid a $95,000 civil penalty to settle the claims.

      (iii) *P.A.W. Capital Partners, L.P.*, Exch. Act Rel. No. 34-73038 (Sept. 10, 2014): PAW executed transactions in securities of Crumbs Bake Shop on behalf of affiliated funds it managed, but it didn't make the filings required by Section 16(a). PAW also violated Section 13(d), as it never disclosed its own beneficial ownership and ensuing transactions in Crumbs securities.

B. Increasing Regulation of Market Manipulation and Aggressive Enforcement by the CFTC

1. Overview of Market Manipulation Enforcement

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[7] Derek W. Bakarich, Exch. Act Rel. No. 34-72517 (July 2, 2014); Carmela Brocco, Exch. Act Rel. No. 34-75218 (July 2, 2014); Tina M. Lizzio, Exch. Act Rel. No. 34-15959 (July 2, 2014); Steven J. Niemis, Exch. Act Rel. No. 34-75250 (July 2, 2014); William W. Vowell, Exch. Act Rel. No. 34-72521 (July 2, 2014).

[8] Press Release, Sec. & Exchange Comm'n, SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings (Sept. 10, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678.

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(a) CFTC

(i) The CFTC is the agency tasked with regulating market manipulation and fighting fraud and other abusive practices in the derivatives markets. Recent anti-manipulation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") have expanded the CFTC's enforcement opportunities dramatically by prohibiting manipulation and fraud broadly (in connection with "any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity").

(ii) CFTC enforcement has surged in recent years. In FY 2014, the CFTC obtained a record $3,270,000,000 in monetary sanctions, bringing CFTC total monetary sanctions over the past two years to more than $5,000,000,000 — more than the total sanctions imposed during the prior 10 fiscal years combined.

(iii) Enforcement activity will likely increase; in November 2014, CFTC Enforcement chief Aitan Goelman announced the agency would soon begin bringing cases administratively, like the SEC.

(b) Exchanges and other self-regulatory organizations also regulate market manipulation. Enforcement efforts of these groups — including the National Futures Association ("NFA"), the Intercontinental Exchange ("ICE") and the Chicago Mercantile Exchange ("CME") Group — have increased over past years. A CFTC report faulted exchanges for lax enforcement in the past, so they are looking to change that by aggressively hiring from places like DAs' offices to enhance prosecutorial talent and expertise.

(c) Signaling increased efforts to regulate market manipulation, on Jan. 1, 2015, the Chicago Board of Exchange and the Options Regulatory Surveillance Authority ceded most of their regulatory responsibilities to the Financial Industry Regulatory Authority ("FINRA"), giving FINRA greater ability to bring enforcement actions based on market manipulation. The consolidation moves roughly 125 regulatory employees to FINRA, uniquely positioning it to detect cross-market and cross-product manipulation.

(d) The SEC and DOJ are two other primary regulators of market manipulation, often working in tandem with the CFTC. During FY 2014, approximately 95 percent of the CFTC's major fraud and manipulation cases involved a parallel criminal proceeding filed by DOJ.

2. Spoofing

"Spoofing" (a.k.a. "layering")[9] is the entering and canceling of orders without the intent to actually fill the orders. It continues to be a focus of enforcement actions by numerous regulators and across a wide swath of enforcement regimes.

(a) The Dodd-Frank Act

(i) Dodd-Frank Section 747 incorporated anti-spoofing concepts into the Commodity Exchange Act's ("CEA") prohibitions on "disruptive practices" (adding subparagraph (5) to Section 4c(a)).

[9] "Layering" is generally thought to be slightly different than spoofing because: (1) layering generally implies multiple orders at different price points; and (2) the orders may have a longer lifespan than in a typical spoofing case. However, for purposes of this summary, the two offenses are similar.

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(ii) Subparagraph (5) of CEA Section 4c(a) provides:

(5) DISRUPTIVE PRACTICES — It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that —
(A) violates bids or offers;
(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
(C) is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

(iii) On May 28, 2013, the CFTC issued an "interpretive guidance and policy statement" with respect to subparagraph (5).[10]

(b) CME Rule 575

(i) On Sept. 15, 2014, the CME Group exchanges (i.e., the CME, the Chicago Board of Trade, NYMEX and COMEX) adopted new Rule 575 ("Disruptive Practices Prohibited"). New Rule 575 (and its accompanying "Questions & Answers") effectively declares "spoofing" to be a type of "disruptive order entry and trading practices" that are "abusive to the orderly conduct of trading or the fair execution of transactions."

(ii) New Rule 575 states that:

A. No person shall enter or cause to be entered an order with the intent, at the time of order entry, to cancel the order before execution or to modify the order to avoid execution; [and]

B. No person shall enter or cause to be entered an actionable or non-actionable message or messages with intent to mislead other market participants[.]

(c) On Jan. 14, 2015, the ICE Futures Exchange will implement rules to prohibit "spoofing." It will also clarify the exact disruptive practices that will be barred, including entering orders with the intent to cancel or modify before their execution, as well as the very broad practice of disrupting the "orderly conduct of trading." The rules, which ICE announced in December 2014, will also bar traders from entering bids or offers for the purpose of making a market price that doesn't reflect the true state of the market.

(d) *CFTC v. Moncada*, No. 12-cv-8791 (S.D.N.Y. Sept. 30, 2014)

(i) By electronically entering and immediately canceling numerous large-lot orders for wheat futures, trader Eric Moncada attempted to create a misleading impression of rising liquidity in the marketplace for the affected futures contracts and to profit through executing opposite direction small-lot orders at market prices distorted by the illusory large-lot order activity.

(ii) The CFTC obtained a federal consent order against Eric Moncada for alleged manipulation of the wheat futures markets, imposing a $1,560,000 civil monetary penalty and trading and registration restrictions.

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[10] CFTC, Antidisruptive Practices Authority, Interpretive Guidance & Policy Statement, 78 Fed. Reg. 31,890 (May 28, 2013).

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(iii) This settlement is notable for many reasons, including the fact that the number of manipulative trades is relatively small, i.e., alleged attempts to manipulate the price of the #2 Soft Red Winter Wheat futures contract on eight days in October 2009 and allegedly entering into fictitious sales and non-competitive transactions on four days in October 2009. The CFTC Director of Enforcement Aitan Goelman characterized this as "the wholesale entering and cancelling of orders without the intent to actually fill the orders."

(e) *United States v. Coscia*, No. 14-cr-551 (N.D. Ill. Oct. 2, 2014)

(i) DOJ has also taken an interest in spoofing activity. In October 2014, in the first criminal prosecution for spoofing, DOJ obtained an indictment against Michael Coscia, a registered floor trader, for allegedly violating the Dodd-Frank Act's anti-spoofing provisions. The indictment is a parallel proceeding, building on civil and SRO enforcement actions against Coscia and his former trading firm (Panther Trading LLC) by the CFTC,[11] the CME Group[12] and the U.K. Financial Conduct Authority.[13]

(ii) As with *Moncada,* the number of alleged spoofing violations is in the single digits (six alleged instances). However, *Coscia* is also important for the level of DOJ and CFTC "parallel proceeding" cooperation it evidences. The 2013 CFTC enforcement settlement, for example, required Coscia expressly to waive "any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief."

(f) *Visionary Trading LLC*, Exch. Act Rel. No. 34-71871 (April 4, 2014):

(i) In April 2014, the SEC charged a trading firm, Visionary Trading LLC, and a number of affiliates and controllers for violations related to layering activity. According to the SEC's settlement order, the misconduct occurred from 2008 through 2011. The SEC's order found violations of Sections 9(a)(2) and 10(b) of the Exchange Act, Rule 10b-5 and Section 15(a)(1) of the Securities Exchange Act. It also found liability for willfully aiding and abetting violations, failures to supervise and registration violations. Total disgorgement and penalties agreed to were well in excess of $1,000,000.

3. The CFTC's Growing Power As Demonstrated Though a Range of Notable Enforcement Actions

(a) *CFTC v. Wilson*, No. 13-cv-7884 (S.D.N.Y. Nov. 6, 2013): The CFTC filed claims in federal court against Donald R. Wilson and his company, DRW Investments LLC, alleging they manipulated the prices of interest rate futures contracts by making bids they knew would not be accepted in order to influence settlement prices in their favor. This conduct generated illicit profits of at least $20,000,000. In June 2014, the CFTC successfully defeated a motion to dismiss.[14] The outcome of the action is still pending.

(b) *CFTC v. Hunter Wise Commodities, LLC*, No. 12-81311-cv (S.D. Fla. May 16, 2014): Hunter Wise claimed to arrange loans for investors to purchase metals, advising investors that the metals

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[11] *Panther Energy Trading LLC*, CFTC Docket No. 13-26 (July 22, 2013).

[12] CME Docket No. 11-8581-BC (July 22, 2013); CBOT Docket No. 11-8581-BC (July 22, 2013); NYMEX Docket No. 11-8581-BC-Michael Coscia (July 22, 2013); COMEX Docket No. 11-8581-BC-Michael Coscia (July 22, 2013). *All available at* http://www.nfa.futures.org/basicnet/CaseInfo.aspx?entityid=0465462&type=reg.

[13] Michael Coscia, Final Notice, Fin. Conduct Auth. (July 3, 2013), *available at* http://www.fca.org.uk/static/documents/final-notices/coscia.pdf.

[14] *CFTC v. Wilson*, No. 13-cv-7884 (S.D.N.Y. 2014).

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would be stored in a secure depository. However, Hunter Wise never purchased any metals nor arranged any loans for its investors to do so, while charging exorbitant storage fees and "interest" on the nonexistent loans. The scheme defrauded over 3,200 investors. At trial, a federal court in Florida held that Dodd-Frank required the type of precious metal transactions at issue to be executed on an exchange, and the post-trial verdict ordered Hunter Wise to pay $52,600,000 in restitution and a $55,400,000 civil penalty, the maximum allowable in the case. This enforcement action is a prime example of how the CFTC is using its new authority under Dodd-Frank to pursue persons looking to prey on investors in precious metal markets.

(c) *FirstRand Bank, Ltd.,* CFTC Docket No. 14-23 (Aug. 27, 2014); *Absa Bank, Ltd.*, CFTC Docket No. 14-30 (Sept. 25, 2014); *Fan Zhang*, CFTC Docket No. 14-33 (Sept. 29, 2014): In all three CFTC actions, defendants entered into prearranged, noncompetitive trades that negated market risk and stripped away price competition. FirstRand's and Absa's prearranged trades involved corn and soybeans futures contracts, and Zhang's involved housing market contracts, cheese futures contracts and ethanol futures contracts. All three parties entered into settlement agreements; First Rand and Absa each paid $150,000 in civil penalties to settle claims, while Zhang paid a penalty of $250,000.

(d) *CFTC v. EJS Capital Mgmt., LLC*, No. 14-cv-3107 (S.D.N.Y. May 1, 2014): EJS issued false account statements to customers that listed profits from foreign exchange trading, though no profits were ever generated from such activity. Several individuals affiliated with EJS also misappropriated customer funds for personal and business expenses, such as vacations and automobile leases. Federal District Judge Kevin Castel of the Southern District of New York entered a restraining order against EJS and some of its traders, freezing assets and prohibiting the destruction or concealment of books and records.

4. Regulation and Prosecution of the Manipulation of LIBOR and Other Foreign Exchange Benchmarks

(a) New Laws Increasingly Regulate Benchmark Manipulation

(i) The United Kingdom passed legislation in 2013 in response to LIBOR manipulation and is now attempting to amend this legislation to criminalize rate-rigging. Amendments currently in the pipeline would, if enacted, impose up to seven-year prison sentences on those found guilty of manipulating foreign exchange rates. The proposed amendments will also create additional oversight requirements for several of the U.K. indices, such as requiring them to appoint compliance personnel, keep records of suspicious benchmark submissions, and put oversight committees in place.

(ii) Though the United States does not have any similar legislation in the works, it is likely headed in that direction. In November 2014, CFTC Chairman Timothy Massad told U.S. policymakers that LIBOR regulations in Europe will affect U.S. markets and that the CFTC "stands ready to work with its counterparts in the U.S. financial regulatory sector to address this issue further."

(b) Notable Enforcement Actions and Settlement Agreements Addressing Benchmark-Rigging

(i) *United States v. Lloyds Banking Group* (D. Conn. July 28, 2014); *Lloyds Banking Group Plc*, CFTC Docket No. 14-18 (July 28, 2014): The CFTC and DOJ alleged that traders at the financial giant manipulated the bank's LIBOR submissions to benefit their own trading positions and the trading positions of their friends. Lloyds entered into a deferred prosecution agreement with DOJ in July 2014, agreeing to pay $86,000,000 and admitted

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to committing wire fraud, as alleged in a filed criminal information. Lloyds further agreed to cooperate with DOJ in its continuing investigations of other financial institutions, as well as nine of its traders who were criminally charged in connection with the rate-rigging. Lloyds settled claims with the CFTC by agreeing to pay a $105,000,000 civil penalty.

(ii) *United States v. Robson* (S.D.N.Y. Aug. 18, 2014); *United States v. Cooperative Centrale Raiffeisen-Borenleenbank, B.A*. (D. Conn. Oct. 29, 2013); *Cooperative Central Raiffeisen-Boerenleenbank B.A.*, CFTC Docket No. 14-02 (Oct. 29, 2013): DOJ alleged that Rabobank employee Paul Robson manipulated Rabobank's yen LIBOR submissions to benefit his own trades, charging him with wire fraud and conspiracy to commit wire fraud and bank fraud. DOJ and the CFTC also filed charges against Rabobank as a corporate entity for LIBOR manipulation. Robson pleaded guilty to one of 15 counts in August 2014. His sentencing is scheduled for June 9, 2017. Rabobank entered into a deferred prosecution agreement with DOJ in October 2013, pleading guilty to charges of wire fraud and paying a $325,000,000 penalty in connection with LIBOR manipulation. That same month, it settled charges with the CFTC for $475,000,000.

(iii) In November 2014, the CFTC filed settlements with five of the world's largest banks — JPMorgan, Citibank, UBS, RBS and HSBC — for manipulating foreign exchange benchmark rates to benefit the positions of certain traders.[15] In the aggregate, the five settlement agreements imposed over $1,400,000,000 in civil penalties. The penalties were allocated as follows: $310,000,000 each for Citibank and JPMorgan; $290,000,000 each for RBS and UBS; and $275,000,000 for HSBC. Repercussions may multiply for some of the banks in 2015; DOJ has launched criminal probes into the foreign exchange activities of both JPMorgan and UBS.[16]

C. Whistleblower Information Fuels New Enforcement Initiatives

1. Relevant Statutes and Regulations

(a) The False Claims Act ("FCA")[17] allows whistleblowers to file complaints against persons who submit false claims to the government for payment. These are known as qui tam complaints. The FCA was amended in 2009 to allow the government to file its own complaints based on whistleblowers' tips.

(b) Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") and Section 922 of Dodd-Frank provide for whistleblower reporting. While SOX's provisions do not provide for monetary awards to whistleblowers, Dodd-Frank's provisions require the SEC to reward individuals for voluntarily providing original information that leads to a successful enforcement action, with payouts of 10 to 30 percent of the total monetary penalties.

(c) Dodd-Frank also provides for awards for those who report information to the CFTC regarding violations of the CEA. These whistleblowers receive monetary awards if the information leads to a successful enforcement action imposing more than $1,000,000 in sanctions. Akin to payouts under Dodd-Frank's SEC whistleblower program, whistleblowers who tip the CFTC can receive

[15] Citibank, N.A., CFTC Docket No. 15-03 (Nov. 11, 2014); HSBC Bank plc, CFTC Docket No. 15-07 (Nov. 11, 2014); JPMorgan Chase Bank, N.A., CFTC Docket No. 15-04 (Nov. 11, 2014); Royal Bank of Scotland plc, CFTC Docket No. 15-05 (Nov. 11, 2014); UBS AG, CFTC Docket No. 15-06 (Nov. 11, 2014).

[16] Hugh Son & Michael J. Moore, JPMorgan Faces U.S. Criminal Probe into Currency Trading, Bloomberg News (Nov. 4, 2014), *available at* http://www.bloomberg.com/news/2014-11-03/jpmorgan-faces-u-s-criminal-probe-into-foreign-exchange-trading.html.

[17] 31 U.S.C. §§ 3729–3733.

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10 to 30 percent of total monetary penalties. In May 2014, the CFTC announced its first whistleblower award, in the amount of $240,000.[18]

2. Aggressive Enforcement Based on Whistleblower Tips

(a) Increasingly, DOJ has relied on FCA whistleblowers in its enforcement efforts. In FY 2014, it paid out $435,000,000 in whistleblower awards in connection with FCA cases and announced $5,690,000,000 in FCA settlements and judgments.

(i) Courts are approving high payouts to FCA whistleblowers. The U.S. Court of Appeals for the Fourth Circuit permitted a whistleblower to recover $24,000,000 in damages, although the defendant had only defrauded the government in the amount of $3,300,000.[19] In its decision, the court noted that under a civil damages provisions (where the penalty is calculated based on the number of individual false claims submitted), statutory damages can far exceed actual monetary damages. This decision shows a willingness to approve excessive awards for FCA whistleblowers, giving DOJ a powerful tool to obtain information.

(b) DOJ is employing new strategies to leverage whistleblower tips as part of its enforcement efforts.

(i) In September 2014, Leslie Caldwell, Assistant Attorney General for the Criminal Division, announced a new system where the Civil Division will share all qui tam complaints with the Criminal Division as "a vital part of the Criminal Division's future efforts."

(ii) Before 2010, the FCA contained a "public disclosure bar," preventing whistleblowers from filing complaints based on facts that had already been publicly disclosed. In 2010, the FCA was amended to allow the government to waive the public disclosure bar, enabling the government to bring an action after knowledge of the underlying fraud becomes public. This change makes it far easier for DOJ to file FCA claims.

(c) The number of whistleblowers reporting information to the SEC is steadily increasing. In FY 2014, the SEC received 3,620 tips, up from 3,001 in 2012 and 3,238 in 2013. The SEC issued whistleblower awards to more individuals in FY 2014 than in all previous years combined. The awards are also increasing in size — the SEC authorized an award of $30,000,000, its largest whistleblower award to date, in September 2014.[20]

3. Recent New York Federal Court Decisions Expand Potential FCA Liability

(a) In *United States v. Wells Fargo Bank N.A.*,[21] DOJ brought FCA claims against Wells Fargo for fraudulent loan origination activities occurring from 2001 to 2005, arguing that the statute of limitations was tolled by the Wartime Suspension of Limitations Act ("WSLA").[22] Congress authorized military force to combat terrorism in the days following the attacks of Sept. 11, 2001. Judge Jesse Furman, a New York federal judge, held that because no formal declaration to end

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[18] Press Release, Commodity Futures Trading Comm'n, CFTC Issues First Whistleblower Award (May 20, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6933-14.

[19] *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013).

[20] Press Release, Sec. & Exchange Comm'n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290.

[21] *United States v. Wells Fargo Bank N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013).

[22] The WSLA suspends the statute of limitations for offenses involving fraud against the United States while the country is at war or Congress has authorized the use of military force until five years after the conflict ends.

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hostilities has been made by the President or by Congress, the WSLA's suspension of the statute of limitations has not ended. Thus, FCA claims were not time-barred. The decision provides significant benefits to DOJ, allowing all false claims submitted since Congress's authorization of military force in September 2001 to be prosecuted, without any time constraint, until Congress or the President makes a formal declaration revoking the authorization. The decision grants seemingly unending amounts of time to bring FCA claims for post-2001 activity, giving DOJ ample time to investigate tips of whistleblowers and build cases.

(b) *In United States v. Countrywide Financial Corp.*,[23] Edward O'Donnell, a former executive at Bank of America subsidiary Countrywide Financial, gave the government information on the bank's mortgage fraud. Based on this information, the government filed FCA claims, alleging the bank engaged in fraudulent loan origination practices and misrepresented the quality of loans to Fannie Mae and Freddie Mac. New York federal judge Jed Rakoff recognized that the 2009 amendments to the FCA may extend FCA liability to false claims made to government-sponsored enterprises — such as Fannie Mae and Freddie Mac.[24] The decision gives DOJ the ability to bring claims against persons who submit false claims to government-sponsored *enterprises* as well as those who submit them to the government.[25]

4. Notable Settlement Agreements and Administrative Proceedings

(a) *United States v. JPMorgan Chase* (S.D.N.Y. Feb. 4, 2014): JPMorgan violated the FCA by originating and underwriting noncompliant mortgage loans and submitting them for insurance coverage to the Federal Housing Administration ("FHA") and the Department of Veteran Affairs. JPMorgan agreed to pay $614,000,000 to resolve the claims. The whistleblower, who worked in senior management for JPMorgan, was awarded $63,900,000, one of the highest FCA whistleblower awards ever.[26]

(b) *United States v. SunTrust Mortgage Inc*. (D.C. Cir. June 17, 2014): From 2006 to 2012, SunTrust originated and underwrote mortgages for submission to the FHA though as many as 50 percent of these mortgages did not comply with FHA requirements. To settle the claims, SunTrust agreed to pay $968,000,000, admit its wrongdoing, make changes in oversight and install an independent monitor to oversee compliance with the settlement agreement. The agreement also imposed fines of up to $1,000,000 for any violations of its terms.

(c) *United States v. U.S. Bank National Association* (N.D. Ohio June 30, 2014): DOJ alleged that the bank violated the FCA by originating and underwriting noncompliant loans, emphasizing its lack of an internal control system to identify deficiencies in the loan certification process. U.S. Bank settled DOJ's claims in June 2014 for a $200,000,000 penalty.

(d) *Whistleblower Award Proceeding No. 2014-9*, Exch. Act Rel. No. 34-72947 (Aug. 29, 2014): A compliance officer reported misconduct learned through his position to his employer-organization, and reported later to the SEC after the organization failed to respond or correct

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[23] *United States v. Countrywide Fin. Corp.*, 961 F. Supp. 2d 598 (S.D.N.Y. 2013).

[24] However, the court dismissed the claims on the basis that the 2009 amendments to the FCA do not apply retroactively. Countrywide's fraudulent submissions to Fannie Mae and Freddie Mac occurred prior to May 20, 2009 — the date the amendments were enacted — so they were not actionable.

[25] Though FCA claims were dismissed by this decision, DOJ reached a global settlement of $16,650,000,000 with Bank of America for omnibus financial fraud allegations, including FCA violations, in August 2014. In December 2014, New York federal judge Richard Sullivan approved an agreement granting O'Donnell $58,000,000 in whistleblower awards for providing information vital to the settlement.

[26] Jonathan Stempel, JPMorgan Whistleblower Gets $63.9 Million in Mortgage Fraud Deal, Reuters News (May 7, 2014), *available at* http://www.reuters.com/article/2014/03/07/us-jpmorgan-whistleblower-idUSBREA261HM20140307.

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the misconduct. Ordinarily, Dodd-Frank's whistleblower provisions prohibit awards to compliance, audit and legal personnel who obtain information in carrying out their job-related duties, and permit awards only for whistleblowers who obtain information through "independent knowledge" or "independent analysis." However, the SEC awarded the whistleblower $300,000, maintaining that employees in compliance roles can be eligible for awards if they first go to their companies, which then fail to take action in a timely fashion. The decision is an example of the "120-day look-back" provision of the whistleblower regulations at work.[27]

(e) *Whistleblower Award Proceeding No. 2014-5*, Exch. Act Rel. No. 34-72301 (June 3, 2014): Two whistleblowers provided information to the SEC, which led to a successful enforcement action. The SEC awarded $875,000 to be shared evenly by the two whistleblowers. In calculating this award, the SEC included a portion of the disgorgement and prejudgment interest that was deemed satisfied by the respondent's payment of that amount in another government action.

D. Regulators Incentivize and Reward Self-Reporting and Cooperation

1. Just as they reward whistleblowers for reporting securities violations and financial crimes, the SEC, DOJ and other regulators provide incentives to companies to report their own violations and cooperate in investigations. Regulators' approach to self-reporting and cooperation is a double-edged sword: The SEC and DOJ have declared that self-reporting will yield reduced sanctions yet also that failing to voluntarily come forth with information will lead to higher penalties.

2. The Principles of Federal Prosecution of Business Organizations, which guide DOJ in bringing charges against and reaching agreements with corporations, instruct prosecutors to consider "timely and voluntary disclosure of wrongdoing and … cooperation" with investigations. The Principles also state that cooperation can allow potential defendants to gain "credit in a case that otherwise is appropriate for indictment and prosecution."

3. The increasing use of deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") illustrates the importance the government places on cooperation. In 2014, DOJ entered into 19 DPAs and 10 NPAs, agreeing to defer or entirely forgo criminal prosecution against a party in exchange for that party's cooperation in other investigations and/or its promise to comply with specified remedial measures. The SEC entered into one DPA in 2014 — its third ever since its first in 2011 — and entered into its first NPA in April 2014 (see Section F.4.(a), below).

4. Recent Enforcement Shows Negative Effects of Insufficient Cooperation

(a) *United States v. Alstom Grid, Inc.* (D. Conn. Dec. 22, 2014): DOJ charged Alstom, a French power and transportation company, with violations of the Foreign Corrupt Practices Act ("FCPA"). It alleged that Alstom paid bribes to government officials and falsified its books in connection with power and transportation projects for state-owned entities around the world, namely in Indonesia, Egypt, Saudi Arabia and the Bahamas. Alstom pled guilty to FCPA violations and agreed to pay DOJ a record $772,000,000 — the largest ever criminal fine levied by the government against a company for bribery — on Dec. 22, 2014.[28] The DOJ cited Alstom's failure to voluntarily disclose its misconduct when it became aware of it and its failure to cooperate

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[27] The "120-day look-back" provision encourages internal reporting by allowing employees to remain eligible for whistleblower awards and giving them priority status over any subsequent whistleblower for 120 days after reporting misconduct to their companies. The provision also states that a whistleblower who reports internally will receive credit from the SEC for all information subsequently self-reported by the company.

[28] Alstom's sentencing hearing is scheduled for June 23, 2015.

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with DOJ investigations for several years as the reasons for the record penalty. On the other hand, DOJ agreed to defer prosecution of two of Alstom's U.S. subsidiaries — including one in Connecticut that carried out a substantial amount of the illegal conduct — because they agreed to cooperate in criminal investigations of Alstom executives and other subsidiaries.[29]

(b) *United States v. BNP Paribas S.A.* (S.D.N.Y. June 30, 2014): BNP Paribas knowingly moved over $8,800,000,000 through the U.S. financial system on behalf of Iranian, Cuban and Sudanese entities, in clear violation of U.S. economic sanctions. These violations occurred despite clear and repeated warnings of compliance officers that violations were occurring. Additionally, when contacted by law enforcement, the bank did not fully cooperate. In June 2014, BNP Paribas pled guilty to violating the International Emergency Economic Powers Act and the Trading with the Enemy Act and paid $8,900,000,000 in penalties. DOJ cited its failure to cooperate as a key reason for the steep penalty.

(c) *George B. Franz III, Adv. Act Rel. No. IA-3826* (SEC, April 30, 2014): George Franz owned and managed investment adviser Ruby Corporation. His son, Andrew Franz, misappropriated over $490,000 from roughly 50 of Ruby's client accounts. When the SEC investigated Andrew's fraud, George impeded the investigation, providing the SEC with fabricated documents, shredding key records and lying to SEC staff. Franz settled civil charges for a $675,000 penalty and $425,000 in disgorgement. An Ohio federal judge also sentenced him to three years' probation, imposed a $25,000 criminal fine and ordered payment of $250,000 to the SEC for diversion of investigative resources.[30]

(d) *Judy K. Wolf*, Adv. Act Rel. No IA-3947 (SEC, Oct. 15, 2014): Wolf, a former Wells Fargo compliance officer, admitted to altering a document before submitting it to the SEC in order to make her review of a particular broker's trading appear more thorough. Wolf's hearing is scheduled to begin on Feb. 23, 2015.

E. The Resurgence of FIRREA

1. Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")

(a) FIRREA[31] allows DOJ to seek civil money damages against persons who violate one or more of 14 enumerated statutes (such as the mail fraud statute and the wire fraud statute) in a manner that "affects" federally-insured financial institutions. It is a powerful weapon for the government for reasons that include the following:

(i) Because it is a civil statute, the burden of proof is low; the government need only prove that a defendant violated one of the enumerated predicate statutes by a preponderance of the evidence. By contrast, criminal suits require proof of guilt beyond a reasonable doubt.[32]

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[29] Press Release, Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $722 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), *available at* http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

[30] *SEC v. Franz III*, No. 1:15-cr-159 (N.D. Ohio 2014).

[31] 12 U.S.C. § 1833a.

[32] Notably, in a FIRREA case the government need not prove the violation of a predicate statute at the heightened standard required to be proven in criminal cases, even though the predicate offenses are in fact criminal offenses that if prosecuted alone would require the higher standard of proof.

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(ii) FIRREA grants the government broad subpoena powers, giving it the ability to depose key witnesses and compel the production of documents without obtaining prior judicial authorization.

(iii) FIRREA has a 10-year statute of limitations, far longer than the time period to bring most civil lawsuits (typically two to five years). The 10-year period affords DOJ a long time to conduct investigations before filing claims.

(iv) The monetary penalties for FIRREA violations can be extremely high; the statute authorizes penalties of up to $1,100,000 per violation. For continuing violations, the maximum increases up to $1,100.000 per day or $5,500,000 per violation, whichever is less. The statute also grants courts discretion to increase penalties to match the pecuniary gains of violators or the pecuniary losses of victims.

A 2014 decision of the federal court for Manhattan confirms that FIRREA monetary penalties can be very steep.[33] In a case against a Bank of America subsidiary for mortgage fraud, the court held that in calculating FIRREA penalties, the starting point is gross — rather than net — gains or losses attributable to a defendant's conduct. It stressed that FIRREA penalties are aimed at deterrence and punishment, not simply compensation for losses. Accordingly, the court imposed a $1,300,000,000 penalty.

2. Enforcement Developments and Trends

(a) FIRREA was passed in response to the savings and loans crisis of the 1980s, but until recently, was dormant. The statute was barely used since its passage in 1989 until the late 2000s, but DOJ has ramped up FIRREA enforcement, often bringing FIRREA claims in tandem with FCA claims. There is little case law limiting the scope of FIRREA claims to inhibit these DOJ efforts.

(b) Through its increasing use of FIRREA, DOJ wants to encourage individuals to provide information on FIRREA violations. On Sept. 17, 2014, U.S. Attorney General Eric Holder proposed amending FIRREA to increase whistleblower awards, which are currently statutorily capped at $1,600,000, in contrast to those under the FCA and Dodd-Frank, which authorize awards up to 30 percent of the government's recovery and the SEC's recovery, respectively.

(c) In the past two years, New York federal courts have made it easier for the government to bring FIRREA suits against financial institutions, finding that an institution can be liable for fraudulent behavior that only affects *itself* and has no other victims.[34] Courts have also held that fraud may "affect" an institution for purposes of FIRREA merely by exposing that institution to an increased *risk* of loss; *actual* loss is not necessary to show that fraud affected the institution.[35]

3. Notable Settlement Agreements and Administrative Proceedings

(a) *United States v. Citigroup Inc.* (E.D.N.Y. July 14, 2014): FIRREA claims were filed based on Citigroup's fraudulent securitization, packaging, sale and issuance of residential mortgage-backed securities. In July 2014, Citigroup reached a settlement agreement that included a $4,000,000,000 FIRREA penalty (which, at the time, was the largest penalty ever imposed

[33] *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, No. 12-cv-1422 (S.D.N.Y. 2014).

[34] *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013); *United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438 (S.D.N.Y. 2013).

[35] *U.S. v. Bank of N.Y. Mellon*, *supra* note 34.

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under the statute, only to be trumped the following month by DOJ's $5,000,000,000 agreement with Bank of America).[36]

(b) *United States v. McGraw-Hill Cos.,* No. CV13-000779 (C.D. Cal. Feb. 4, 2013): DOJ alleged that Standard & Poor's Financial Services (S&P) failed to objectively and accurately rate issuances of residential mortgage-backed securities and collateralized debt obligations in the onset of the 2008 financial crisis. DOJ claimed that this behavior violated the mail and wire fraud statutes, thereby affecting federally-insured financial institutions. DOJ's complaint invokes the statutory provision giving courts discretion to increase penalties to reflect the economic harm done, seeking over $5,000,000,000 in civil penalties. The case has been filed but has not yet been heard.

F. Developments and Trends in Insider Trading

1. Fiduciary Duties: It is a longstanding principle of the securities laws that to be liable for insider trading, the tipper — the person who provides material, nonpublic information — must: (1) breach a fiduciary duty to the source of the information; and (2) receive a benefit for sharing the information. Recently, federal courts have examined the intricacies of fiduciary breaches that can lead to insider trading liability for these tippers or their "tippees" (those who receive the inside information).

(a) *United States v. Newman*:[37] The Most Recent Word from Federal Courts

(i) The government alleged that Todd Newman and Anthony Chiasson, portfolio managers at two separate hedge funds, traded in Dell and Nvdia securities after receiving inside information. Evidence showed that analysts at the defendants' funds had received information about Dell and Nvidia earnings from insiders at those companies prior to public earnings announcements and passed it onto defendants, who then traded on the information.

(ii) The U.S. Court of Appeals for the Second Circuit reversed the defendants' convictions and remanded their charges to the trial court with order to dismiss the charges with prejudice, finding that for a tippee to be guilty of insider trading, the government must prove that he or she not only know that the tip came from a person who breached a fiduciary duty to the source of the information, but that he or she also *knew that the tipper received a personal benefit* by sharing inside information. Furthermore, the court opined on what constitutes a benefit, holding that nebulous benefits, such as social clout, are not enough; rather, the tipper must receive some concrete benefit, such as pecuniary gain, *and* the tippee must know about this benefit, for liability to attach.

(iii) The case and its repercussions will resound in 2015. Prosecutors have said that they are reviewing their options and could ask for the full Second Circuit to review the three-judge panel's decision or file a petition with the U.S. Supreme Court. In the aftermath of the decision, the Second Circuit has put appeals of insider trading convictions — such as the appeal of SAC Capital Advisors' Michael Steinberg — on hold while prosecutors plan their next step. It has also made judges question guilty pleas; Andrew Carter, a federal judge in New York, indicated in December hearings that he was inclined to vacate the guilty pleas of four defendants alleged to have traded on nonpublic information of an IBM acquisition.

[36] In August 2014, Bank of America Corp. entered into a global settlement agreement with DOJ for omnibus financial fraud, settling numerous claims for $16,650,000,000. It is the largest civil settlement with a single entity in U.S. history, as well as representing the largest FIRREA penalty to date ($5,000,000,000). *United States v. Bank of America Corp.* (D.N.J. Aug. 21, 2014).

[37] *United States v. Newman*, Nos. 13-1837 & 13-1917 (2d Cir. 2014).

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(b) *United States v. Rajaratnam*, No. 1:13-cr-00211 (S.D.N.Y. 2014): Rengan Rajaratnam, the younger brother of former hedge fund tycoon Raj Rajaratnam, who was convicted of insider trading and sentenced to 11 years in 2013, was criminally charged with insider trading violations in connection with the same activity that put Raj in prison. First, the court dismissed two insider trading charges because the government failed to present evidence that Rengan *knew* that the tip provided a benefit to the tipper. The remaining count, conspiracy to engage in insider trading, was submitted to a jury, which returned a verdict of not guilty. The jury didn't believe the evidence — wiretapped calls between Rengan and Raj — was sufficient to convict.[38]

(c) *Steginsky v. Xcelera, Inc*., 741 F.3d 365 (2d Cir. 2014): Steginsky was a minority shareholder of Xcelera, a Cayman Islands holding corporation. After its stock plummeted from $110 to just $1, three Xcelera officers created a separate entity and made a tender offer for Xcelera stock at a price of $0.25 per share. Steginsky sold pursuant to this offer, and then filed an insider trading suit. In its decision, the court reiterated the principle that insider trading liability requires that defendants breach a fiduciary duty in disclosing the inside information. It clarified that this duty is governed by federal common law, *not* the local law of the defendant. Because the law of the Cayman Islands does not recognize the duty of disclosure, defendant could not be found liable for insider trading.

2. Promoting Prevention of Insider Trading: Regulators have begun to prosecute financial institutions for failing to ensure that their employees and other affiliates abstain from insider trading, launching investigations of and imposing penalties for failures to oversee employees and implement compliance programs to prevent this activity.

(a) *Wells Fargo Advisors*, *LLC*, Adv. Act Rel. No. IA-3928 (SEC, Sept. 22, 2014): A broker at Wells Fargo learned confidential information about an acquisition from one of his clients. He then traded on the information ahead of the public announcement. In addition to an insider trading suit against the broker, the SEC brought charges against Wells Fargo for failing to have adequate controls in place to prevent its employees from trading on inside information learned from clients. The SEC claimed that multiple supervisory personnel were told that this broker traded on insider information but failed to act. Wells Fargo settled the claims for $5,000,000.

(b) *Liquidnet, Inc.*, Exch. Act Rel. No. 34-72339 (SEC, June 6, 2014): Employees of Liquidnet, a broker-dealer with a dark pool trading system, traded on confidential information about the dark pool's subscribers. The SEC brought charges for Liquidnet's failure to have a compliance system to protect the confidential information of dark pool subscribers and prevent insider trading by employees. Liquidnet settled the claims for $2,000,000.

(c) *Thomas E. Meade*, Adv. Act Rel. No. IA-3855 (SEC, June 11, 2014): Meade was the former CEO & COO of investment adviser Private Capital Management ("PCM"). A vice president of PCM — a firm of only four or five people — received a tip from his own father, the chairman of an audit committee of a public company, and traded on the information. He pled guilty to insider trading in an SEC enforcement action in 2011. In June of 2014, the SEC brought claims against Meade, alleging that he was aware of the vice president's relationship with his father and the father's position at a public company yet failed to put any oversight mechanisms in place to curb the high risk of insider trading (Meade failed to adequately collect and review personal trading records of his few employees, failed to maintain restricted stock lists and failed to investigate misconduct when alerted to it.) Meade was fined $100,000 and was barred from future

[38] However, Rajaratnam agreed to pay civil penalties of $840,000 and be barred from all future work in the securities industry in October 2014 to settle SEC claims. *SEC v. Rajaratanam*, No. 13-cv-1894 (S.D.N.Y. 2014).

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employment in any director or officer positions with investment advisers, effectively banning him from the securities industry.[39]

(d) *Jefferies LLC,* Exch. Act Rel. No. 34-71695 (SEC, March 12, 2014): The SEC alleged that Jefferies failed to supervise employees on its mortgage-backed securities desk, allowing them to lie to customers about pricing. The failure to supervise enforcement was based in part on the fact that one of the employees found to have lied to customers had been charged by the SEC for securities fraud in recent years; yet Jefferies did not enhance oversight of this rogue employee. Jefferies agreed to pay $25,000,000 to settle the claims.

(e) *Citigroup Global Markets, Inc*., FINRA Case No. 2013036054901 (Nov. 24, 2014): Research analysts at the financial institution hosted "idea dinners" with Citigroup's traders and institutional clients, at which they shared stock picks inconsistent with their public research. Though Citigroup issued roughly 100 internal warnings to analysts about impermissible communications, FINRA alleged that punishment was often untimely and not severe enough to deter similar conduct in the future. Citigroup was fined $15,000,000 in November 2014 as a result of these supervisory failures.

3. Courts Increasingly Approve High Penalties for Insider Trading

(a) *SEC v. Contorinis*, 743 F.3d 296 (2d Cir. 2014): Contorinis, a managing director at Jefferies, received multiple tips concerning the acquisition of supermarket chain Albertsons. He then traded on Albertsons stock on behalf of a Jefferies fund, reaping $7,000,000 in profits and avoiding $5,000,000 in potential losses. He also earned roughly $400,000 in compensation as a result of these trades. The court held that insider trading penalties are not confined to the disgorgement of personal profits derived from insider trading; the SEC can also seek recovery of profits realized by an innocent third party. Accordingly, the court affirmed the SEC's order that Contorinis disgorge the $7,000,000 in profits realized by Jefferies from the trades. But the court also capped disgorgement, saying it cannot exceed the total proceeds realized by insider trading.

(b) In 2014, the U.S. Supreme Court denied an application for certiorari filed by the defendants in *SEC v. Pentagon Capital Management PLC*.[40] In that case, the Second Circuit upheld a disgorgement award imposed jointly and severally on the two defendants (a hedge fund and its CEO), although neither defendant ever received, possessed or transferred the insider trading profits; rather, all profits were transferred to an independent third party. Though the cert petition cited the decision's "grave implications for the investment advisory industry," the Court implicitly approved of this broad penalty scheme by refusing to hear the case.

4. Rewarding Cooperation in Investigations: Regulators are taking steps to develop the cooperation of defendants (and uncharged parties) in insider trading schemes.

(a) In 2011, eBay had talks with executives at GSI Commerce Inc. about a potential acquisition. GSI's CEO, Christopher Saridakis, shared this information with friends, who profited over $300,000 from trading on it. In March of 2014, before bringing charges, the SEC entered into its first NPA

[39] In censuring Meade, the SEC found that Section 203(e)(6) of the Advisers Act — which provides a safe harbor in failure-to-supervise cases — wasn't available to Meade because his compliance failures were so pervasive.

[40] *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279 (2d Cir. 2013).

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ever with an individual involved in the insider trading scheme. It agreed not to prosecute him because he provided vital information early on in the investigation. [41]

(b) In the insider trading case against SAC Capital portfolio manager Mathew Martoma, Martoma's primary source of insider information, Dr. Sidney Gilman, cooperated with the government, earning lenient treatment for himself. Gilman, a respected neurologist, moonlighted as a medical consultant, receiving large sums of money for providing Martoma with nonpublic information on a potential treatment for Alzheimer's disease, which led to insider trading activity in pharmaceutical companies. Gilman avoided any criminal charges by entering into a non-prosecution agreement, agreeing to act as the government's primary witness in Martoma's trial. He paid a civil penalty of $234,000.[42]

(c) In 2012, the government charged Doug Whitman, the founder of Whitman Capital LLC, for trading on information received from his neighbor, a former employee of the Galleon Group. Wesley Wang, a former Whitman analyst, was also charged, for passing along inside information on Cisco — obtained from his neighbor, a Cisco employee — to his bosses. Though Whitman was found guilty of insider trading in 2012 and sentenced to two years in prison, Wang pled guilty pursuant to a cooperation agreement in 2013 and only received probation.[43]

G. The Importance of Compliance: Increasing Enforcement for the Failure to Act

1. Overview of Anti-Money Laundering ("AML") Compliance Programs

(a) Relevant Statutes and Regulations

(i) Money Laundering Control Act ("MLCA"), 18 U.S.C. §§ 1956 and 1957

(ii) Bank Secrecy Act ("BSA") of 1970, 31 U.S.C. §§ 5311 – 5330, as amended, by USA PATRIOT Act of 2001

(iii) Economic Sanctions enforced by the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") prohibit U.S. citizens, businesses and financial institutions from engaging in financial transactions with persons designated on OFAC lists (for example, entities OFAC designates as involved with terrorism or narcotics trafficking).

(iv) The Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), provides for a private right of action for damages to any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism."

(b) Entities Required to Have Effective AML Compliance Programs

(i) The BSA currently requires "financial institutions" to have effective AML compliance programs. "Financial institutions" currently include banks, broker-dealers, any entity required to register under the CEA (including FCMs, IB-Cs, CTAs and CPOs), mutual funds,

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[41] Press Release, Sec. & Exchange Comm'n, SEC Charges Six Individuals with Insider Trading in Stock of E-Commerce Company Prior to Acquisition of eBay (April 25, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541642140.

[42] Doug Cornelius, Now We Are Talking About Real Money — SEC Brings $250 Insider Trading Case, Compliance Building (Nov. 21, 2012), *available at* http://www.compliancebuilding.com/2012/11/21/now-we-are-talking-about-real-money-sec-brings-250-million-insider-trading-case/.

[43] *United States v. Wang*, No. 12-cr-00541 (S.D.N.Y. 2013).

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operators of credit card systems and prepaid cards, money service businesses, insurance companies, casinos, and dealers of precious metals, stones, and jewels.

(ii) The AML program rules instituted under the USA PATRIOT Act do not yet apply to private funds and investment advisers. On Sept. 26, 2002, the Financial Crimes Enforcement Network ("FinCEN") proposed an AML rule that would apply to hedge funds, private equity funds, venture capital funds, companies that invest primarily in real estate and/or interests therein, commodity pools and REITs, as well as investment advisers that are registered with the SEC or that have at least $30,000,000 under management.

(iii) This proposed rule was withdrawn on Sept. 30, 2008 but is widely expected to take effect at some point in the near future, particularly given the pace at which AML enforcement is expanding to very wide range of financial institutions. In the meantime, the best practice is to develop and maintain a AML program consistent with the proposed rule.

(c) An AML Program Must be Approved in Writing by Senior Management and Employ Four Pillars:

(i) A system of internal controls to ensure ongoing compliance;

(ii) Designation of a qualified individual responsible for coordinating and monitoring day-to-day compliance;

(iii) Training for appropriate personnel; and

(iv) Independent testing for compliance.

The government evaluates AML programs according to their effectiveness. Recent enforcement actions demonstrate that deficiencies in *any* of these four AML pillars can result in liability under the BSA.

(d) Corporate Anonymity and Beneficial Ownership: A "Fifth AML Pillar"

(i) On July 30, 2014, FinCEN proposed a new "customer due diligence" rule that goes beyond the customer identification program currently required of financial institutions under the BSA. The new rule requires a firm to determine the *beneficial owners* of legal entity customers. While there are some entities exempt from the rule, for which no beneficial owner needs to be identified, the exemption *does not apply to hedge funds*. This means that hedge funds and other non-exempt entities will need to provide beneficial ownership information to financial institutions.

(ii) The new rule contains four elements:

(1) Identify and verify the identity of customer (i.e., Customer Identification Program);

(2) Identify and verify the beneficial owners of (i.e., natural persons who own or control) legal entity customers;

(3) Understand the nature and purpose of customer relationships; and

(4) Conduct ongoing monitoring to maintain and update customer identification information and to identify suspicious transactions.

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(iii) OFAC's post-*Clearstream*[44] Guidance on Beneficial Ownership

(1) Clearstream, a Luxembourg-based financial institution, maintained an omnibus account at a financial institution in New York through which the Central Bank of Iran ("CBI") held a beneficial ownership in $2,800,000,000 in securities. Clearstream met with OFAC in late 2007 and early 2008 to discuss Iranian clients, ultimately deciding to terminate those clients. In February of 2008, acting on instructions from CBI, Clearstream transferred CBI's securities to a European bank's Clearstream account. The transfers, however, did not change beneficial ownership; the ultimate place of custody remained in the United States. OFAC alleged that a number of Clearstream employees should have known that the European bank was simply acting as a custodian for CBI's securities and that the transfer did not change beneficial ownership, thereby charging it with violations of the Iranian Transactions and Sanctions Regulations. Clearstream paid a $151,900,000 penalty to settle the claims.

(2) Following its settlement with Clearstream, OFAC issued guidance in the area of beneficial ownership and sanctions compliance, outlining the following best practices for firms in the securities industry:

a. Make customers aware of the firm's U.S. sanctions compliance obligations and have customers agree in writing to not use accounts in a manner that would violate U.S. sanctions.

b. Conduct due diligence to identify customers who do business in or with countries or persons subject to U.S. sanctions and enhance due diligence accordingly.

c. Impose restrictions and heightened due diligence on the use of certain products or services by high-risk customers.

d. Understand the nature and purpose of non-proprietary accounts, including information about third parties' assets.

e. Monitor accounts to detect unusual or suspicious activity — unexplained, significant changes in value, volume and types of assets — which may indicate a customer is facilitating a new, unvetted business for third parties.

(e) Recent Federal Court Cases Have Expanded Potential Liability Under the Anti-Terrorism Act

(i) In *Linde v. Arab Bank PLC*,45 297 individual plaintiffs who had family members harmed by terrorist attacks filed a civil complaint against Jordan-based Arab Bank, alleging ATA violations. They asserted that the bank processed and facilitated payments for Hamas and other terrorist organizations, as well as for members of these groups and their families — parties the bank should have known were involved in terrorist activities. A jury in federal court in Brooklyn found the bank guilty of violating the ATA, even after it raised the defense that the electronic funds transfers at issue were screened against OFAC's "specially designated nationals" lists and that it ceased processing funds for the accounts of any party added to that list.

[44] *Clearstream Banking S.A.*, Settlement Agreement No. IA-673090, U.S. Dep't of Treasury (Jan. 22, 2014).

[45] *Linde v. Arab Bank PLC*, No. 1:04-cv-2799 (E.D.N.Y. 2014).

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(ii) In *Weiss v. National Westminster Bank PLC*,[46] 200 individual plaintiffs harmed Hamas' violent acts filed ATA claims against National Westminster ("NatWest"), alleging that it financed Hamas' terrorist activities in Israel. One of the bank's account-holders was nonprofit Interpal, which the U.S. government had designated as a terrorist group that had funded Hamas, though British authorities had cleared it of terrorism-related allegations and given the bank permission to hold its accounts. Judge Irizarry in the Eastern District of New York granted summary judgment in NatWest's favor, stating that there was insufficient evidence that the bank had the knowledge that it was financing terrorists, as required by the statute. The plaintiffs appealed to the Second Circuit, which found that Judge Irizarry erred in dismissing the claims. It instead held that the ATA only requires a showing that the bank knew *or was deliberately indifferent to* the fact that its account-holders provided financing to terrorist groups. The conflicting information from U.S. and U.K. regulators was enough to convince the court that NatWest may have had sufficient knowledge of its violations for a guilty verdict. The case has been remanded to the Eastern District of New York for further proceedings.

2. Charges for compliance failures and failures to act are not limited to the AML realm. Regulators are bringing both criminal and civil failure to act claims in an even wider range of circumstances.

   (a) The Principles of Federal Prosecution of Business Organizations expressly direct DOJ to consider "the existence and effectiveness of [a] corporation's pre-existing compliance program" when deciding whether to bring criminal charges against the corporation.

   (b) Rule 206(4)-7 of the Advisers Act makes it unlawful for an investment adviser to provide investment advice without first adopting and implementing written compliance policies and procedures. 206(4)-7 also requires advisers to annually review and, as needed, revise compliance procedures and to designate a CCO to oversee compliance.

3. Recent SEC Enforcement Actions and Settlement Agreements

   (a) *SEC v. Avon Products, Inc.*, No. 14-cv-9956 (S.D.N.Y. Dec. 17, 2014): The SEC alleged that Avon, a global beauty products company, had failed to implement proper controls to detect and prevent payments made by its employees and consultants to Chinese government officials. Company personnel allegedly made $8,000,000-worth of payments to various Chinese officials in order to procure business licenses in the country. Furthermore, the books and records of the company did not reflect these payments. Though an internal audit in 2005 revealed these FCPA violations and management subsequently engaged an outside law firm to reform compliance, no changes were carried out at the Chinese subsidiary. On Dec. 17, 2014, Avon paid $135,000,000 to settle all claims.[47] The settlement agreement also requires the company to retain an outside compliance monitor to review its FCPA compliance program for 18 months and then carry out self-reporting on its compliance efforts for the following 18 months. The SEC noted that the settlement agreement took into account Avon's cooperation with the government and its remedial measures, including improvements to its compliance program and its implementation of FCPA training for employees worldwide.

   (b) *Bruker Corp.,* Exch. Act Rel. No. 34-73835 (Dec. 15, 2014): The SEC charged Bruker, a Massachusetts-based manufacturer of scientific instruments, with FCPA violations stemming

[46] *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014).

[47] The total penalties reflect Avon's settlement of the SEC proceeding, as well as a parallel criminal proceeding brought by DOJ. Avon entered into a DPA with the DOJ, in which it pled guilty to FCPA violations. *United States v. Avon Prods., Inc.* (S.D.N.Y. Dec. 17, 2014).

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from inadequate oversight of payments. Bruker's lack of internal controls allowed $230,000 paid to Chinese officials to be classified as legitimate business and marketing expenses in corporate records. Bruker agreed to pay $2,400,000 to settle the SEC's claims. The SEC took into account the company's extensive remedial measures, including the fact that it self-reported violations to the SEC and cooperated in the investigation.

(c) *Morgan Stanley & Co. LLC*, Exch. Act Rel. No. 34-73802 (Dec. 10, 2014): The SEC found that the brokerage arm of Morgan Stanley, which offers institutional clients market access through an electronic trading platform, failed to put adequate risk controls in place, thus violating of the market access rule. Morgan Stanley's risk management failures allowed a rogue trader to fraudulently trade in Apple stock. Morgan Stanley's control measures did not prevent this trader from hugely surpassing daily trading limits nor did they stop employees from increasing his limits without performing due diligence. Morgan Stanley agreed to pay a $4,000,000 civil penalty for this violation.

(d) *Bio-Rad Laboratories, Inc*., Exch. Act Rel. No. 34-73496 (Nov. 3, 2014): The SEC alleged that Bio-Rad, a clinical diagnostic and life research company based in California, lacked internal controls, and as a result of this compliance failure, allowed over $7,500,000 to be paid in bribes to officials in Russia, Vietnam and Thailand. Inadequate oversight and compliance resulted in these costs being recorded as legitimate advertising, training and commissions costs in the company's records. In November 2014, Bio-Rad paid $55,000,000 to settle the claims with the SEC, despite self-reporting its FCPA violations and extensive cooperation with the investigation. On the same day that Bio-Rad entered into this settlement agreement, DOJ announced a parallel investigation of the company.

(e) *E*TRADE Securities, LLC*., Exch. Act Rel. No. 34-73324 (Oct. 9, 2014): Broker-dealers, like E*TRADE, can sell unregistered securities if they make a reasonable investigation as to whether the issuer is relying on some exemption from registration. E*TRADE failed to perform this diligence while depositing billions in unregistered, penny stock securities into customer accounts. E*TRADE agreed to settle the SEC's charges, paying $1,500,000 in disgorgement to defrauded customers, plus a civil penalty of $1,000,000.

(f) *Barclays Capital, Inc.,* Adv. Act Rel. No. IA-3929 (Sept. 23, 2014): The SEC brought charges against the financial institution for failing to maintain an adequate internal compliance system when its wealth management division acquired the advisory business of Lehman Brothers in 2008. The SEC alleged that despite the acquisition, Barclays failed to enhance its compliance system to integrate the new business, and did not grow it to reflect the acquisition. Barclays agreed to pay a $15,000,000 penalty to settle the claims. It also agreed to take remedial measures, including hiring an independent compliance consultant to conduct an internal review of its advisory business.

4. Recent FINRA Investigations, Enforcement Actions and Settlement Agreements

(a) *FINRA v. Monex Securities, Inc.*, FINRA Case No. 2011025617702 (Dec. 30, 2014): Jorge Martin Ramos, the President and CCO of Monex, executed an agreement on behalf of Monex with its parent company in Mexico that permitted numerous employees to conduct securities business on Monex's behalf, allowing them to collect client information needed to open accounts, make investment recommendations to clients and transmit orders. Ramos, however, performed no diligence, so he failed to discover that the employee conducting securities transactions on Monex's behalf were not registered in any capacity with FINRA. In December 2014, Monex

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agreed to pay $1,100,000 in disgorgement and a $175,000 penalty to FINRA for its supervisory deficiencies. Ramos was assessed an individual fine of $15,000 and suspended for 45 days.

(b) *Merrill Lynch Professional Clearing Corp*., FINRA Case No. 20100229712 (Oct. 27, 2014): FINRA alleged that Merrill and its affiliated broker-dealer failed to have adequate supervisory systems in place to monitor traders. This failure in oversight allowed traders to engage in naked short sales in violation of SEC emergency orders. In October 2014, the entities paid $6,000,000 to settle FINRA's claims.

(c) *Goldman Sachs Execution & Clearing, L.P*., FINRA Case No. 2011030761501 (July 1, 2014): FINRA alleged that Goldman lacked proper written policies and procedure to prevent trade-throughs in its proprietary alternative trading system, SIGMA-X. The Order Protection Rule requires that trading centers trade at best-quoted prices. However, FINRA found that for a two-week period in the summer of 2011, nearly 400,000 trades were executed in SIGMA-X at a price inferior to the national standard. Goldman paid an $800,000 penalty to settle the claims.

(d) *Morgan Stanley Smith Barney LLC*, FINRA Case No. 2012032646901 (May 6, 2014): From Feb. 16, 2012 to May 1, 2013, Morgan Stanley sold shares to retail customers in 83 different IPOs without having adequate procedures and training in place to ensure its sales complied with financial regulations. Though regulations require certain discussions and disclosures to occur between employees and clients before sales of securities, Morgan Stanley's written policy used certain key terms for different types of sales offers — which trigger different disclosure obligations — interchangeably. The firm also failed to monitor compliance with the written policy and failed to properly train its sales employees as to their legal obligations. In May 2014, FINRA assessed a $5,000,000 fine against Morgan Stanley for its supervisory failures.

(e) *LPL Financial LLC,* FINRA Case No. 2011027170901 (March 24, 2014): FINRA alleged supervisory failures related to LPL's sale of alternative investments, including non-traded REITs, hedge funds, and oil and gas partnerships. Though these types of illiquid investments are subject to concentration limits imposed by some states and internally by firms (LPL itself had such limits in place), LPL failed to supervise sales to ensure that these limits were abided. LPL first used manual processes plagued by outdated information to review investments, and though it moved to an automated system later, the database was not updated to accurately reflect suitability standards. Lastly, LPL lacked training and supervision processes to ensure alternative investments were properly reviewed. LPL paid $950,000 in fines related to the supervisory failures. FINRA also required the group to conduct a comprehensive review of its compliance system, policies, procedures and training and to remedy any deficiencies it discovered as a result.

(f) *Berthel Fisher & Co. Financial Services, Inc*., FINRA Case No. 2012032541401 (Feb. 24, 2014): FINRA found that the brokerage had inadequate supervisory controls in place to ensure suitability of alternative investments, such as non-traded REITs, inverse exchange-traded funds, managed futures, and oil and gas programs. The firm did not enforce suitability standards, and it failed to train its staff on reviewing alternative investments for suitability. Berthel Fisher paid $775,000 to settle FINRA's claims.

(g) *Brown Brothers Harriman & Co*., FINRA Case No. 2013035821401 (Feb. 5, 2014): FINRA alleged compliance failures, including failure to have an adequate AML program in place to oversee and detect penny stock transactions. FINRA also alleged that Brown Brothers Harriman failed to put any system in place to prevent the distribution of unregistered securities and failed to investigate suspicious activity or file required Suspicious Activity Reports ("SARs"). FINRA

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imposed a fine of $8,000,000, the highest fine it has ever charged for AML-related violations. Additionally, the bank's former AML compliance officer was fined $25,000 and suspended from his post for one month.

(h) *Banorte-Ixe Securities International, Ltd.,* FINRA Case No. 2010025241301 (Jan. 28, 2014): FINRA alleged that Banorte-Ixe, a New York-based securities firm servicing Mexican clients investing in global securities, had inadequate AML compliance procedures in place. Due to these failures, Banorte-Ixe opened an account for a customer linked to a drug cartel without investigating the customer or the rapid movement of $28,000,000 in and out of his account. FINRA found that the AML program failed in three aspects: (1) there was no system to identify and investigate suspicious activity, in violation of the BSA; (2) given its interaction with Mexican clients, the firm had no procedures in place tailored to its inherent business risks; and (3) the firm failed to register 200 to 400 foreign finders who interacted with its clients. Banorte-Ixe was fined $475,000. In addition, the firm's former AML officer and CCO, Brian Anthony Simmons, was suspended for 30 days.[48]

(i) *Vertical Trading Group, LLC*, FINRA Case No. 2010022017301 (Jan. 10, 2014): FINRA alleged that Vertical's written AML procedures were not tailored to its business-specific risks and were largely unenforced, thereby allowing customers to sell $10,000,000 in unregistered securities. Vertical relied on reports from a clearing firm rather than do its own independent monitoring of suspicious activity. Additionally, although an executive was in charge of monitoring customers' trading, there were no written parameters guiding when review was necessary; the resulting random reviews did not allow for the discovery of suspect trading patterns. Finally, the firm failed to conduct due diligence on correspondent accounts of foreign financial institutions, despite knowing that some of these foreign firms' traders had disciplinary histories. The firm was fined $400,000 and was required to amend its AML compliance program and other internal controls to better suit the risks of its business model. Two executives were also fined, one for $15,000 and the other for $50,000. These executives were also both suspended from association with any FINRA member in a principal capacity for two months.

(j) *Transcend Capital LLC*, FINRA Case No. 2011029039801 (Dec. 18, 2013): FINRA alleged that Transcend, an Austin, Texas-based broker-dealer, failed to adequately monitor, detect and investigate suspicious activity, leading it to provide direct market access to high frequency traders and sell unregistered securities. Though the firm's written procedures included a list of red flags, when certain firm accounts exhibited a variety of red flags, they remained uninvestigated, and no SAR reports were filed. Furthermore, FINRA found that Transcend sold the restricted securities in reliance on attorney opinion letters that the securities would be exempt from registration requirements, although attorneys are prohibited from submitting opinion letters to OTC markets. Transcend paid $200,000 to settle the claims.

(k) *Legent Clearing LLC*, FINRA Case No. 2009016234701 (Dec. 16, 2013): Legent Clearing (now COR Clearing LLC), which provided clearing service for nearly 100 firms, failed to have an AML compliance program tailored to its business model; by processing orders for introducing broker-dealers, Legent's business was highly susceptible to money laundering and the sale of unregistered securities. Legent also failed to respond to red flags; though many of its correspondent firms had been subject to FINRA disciplinary action for AML failures, Legent didn't take extra measures to monitor their transactions. For several months in 2012, Legent's AML surveillance system nearly collapsed, the firm failing to conduct any regular review for

[48] Simmons thereafter left Banorte-Ixe to become the CCO and AMLCO of John Carris Investments LLC, where he also failed to monitor and detect suspicious activity related to penny stock trading. FINRA obtained a temporary cease-and-desist order against John Carris and its CEO in April 2014.

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suspicious activity. Lastly, Legent used a "Defensive SARs" program, in which it filed SARs on many transactions without investigating them as a blanket, preemptive defense to AML liability. FINRA fined the firm $1,000,000. The agreement with FINRA also required Legent to retain an independent consultant to conduct a review of its compliance policies and systems.

(l) *BB&T Securities, Inc.*, FINRA Case No. 2012033723601 (Dec. 13, 2013): FINRA alleged that BB&T failed to implement an AML program to effectively detect and report suspicious activity, thereby allowing the sale and liquidation of large amounts of unregistered securities. Furthermore, once its AML program identified this suspicious trading, it continued for four months. FINRA also cited a number of oversight and compliance failures; BB&T did not perform proper diligence on issuers, it did not maintain adequate records of its analysts' appearances to monitor their disclosures, and its automated systems suffered from technical deficiencies. BB&T paid $300,000 to settle the claims.

(m) *Argentus Securities, LLC*, FINRA Case No. 2011025621801 (Sept. 23, 2013): FINRA alleged that Argentus, a Dallas-based securities firm, failed to monitor activity in its customers' accounts. For example, the firm processed a significant amount of wire transfers for clients located in South America but failed to investigate these transfers for suspicious activity. Furthermore, the firm did not file any SARs. Stan Russell Hall, Argentus's AMLCO from 2004 to 2012, failed to put adequate supervisory procedures in place; and Argentus did not provide suitable AML training for personnel, failed to conduct audits at one of its branch offices and inappropriately allowed registered representatives to use outside email addresses to conduct securities activity. The firm was censured and fined $150,000 in late 2013. Hall was personally fined $20,000 and suspended from association with any FINRA member in a supervisory capacity for a period of three months.

5. Recent DOJ Enforcement and Settlement Agreements

(a) *United States v. Bank Leumi Group* (C.D. Cal. Dec. 22, 2014); *Bank Leumi USA*, N.Y. Dep't of Fin. Servs. Consent Order (Dec. 22, 2014): DOJ and the New York Department of Financial Services ("NYDFS") both alleged (in separate enforcement actions) that the Israeli bank helped U.S. taxpayers hide assets in unreported accounts around the world, including in Israel, Switzerland and Luxembourg. The bank referred U.S. clients to outside lawyers, who set up and maintained offshore corporations to hold undeclared accounts, hiding their U.S. tax status. It also executed a scheme to hold account statements abroad at foreign banks rather than send them to customers in the United States to help clients evade tax liability. The bank agreed to pay $270,000,000 to resolve criminal charges as part of a DPA with DOJ. It also entered into a settlement agreement with NYDFS in which it agreed to pay $130,000,000 and ban its former CCO and other responsible senior employees from conducting any compliance-related activities. Additionally, the settlement agreement with NYDFS requires the bank to install an independent, NYDFS-appointed monitor to conduct a comprehensive review of its compliance programs and procedures.

(b) *United States v. JPMorgan Chase Bank, N.A.* (S.D.N.Y. Jan. 4, 2014): Since 1985, JPMorgan was the primary bank through which Bernard Madoff ran his Ponzi scheme. Not only did Madoff keep several accounts at the bank, but the bank even appointed a "relationship manager" to in BSA responsibilities for the Madoff account. Over time, red flags about Madoff arose. For example, in the 1990s, another bank filed an SAR with law enforcement and shut down Madoff's account over check-kiting transactions, but JPMorgan continued to service his accounts and even took on the accounts that the other bank had shut down. Additionally, in the late 2000s, the London branch of JPMorgan grew suspicious of Madoff's funds and hired its own diligence

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staff and filed a report with U.K. regulators. Yet, the U.S. branch failed to take similar actions. On Jan. 7, 2014, the bank entered into a DPA with the government, in which it agreed to pay a $1,700,000,000 penalty to the victims of Madoff fraud, accept responsibility for its conduct, cooperate fully with the government and continue its BSA/AML compliance program. The government agreed to defer prosecution on the criminal charges filed — two felony violations of the BSA — for two years, at which point it will dismiss the charges at a subject to the bank's compliance with the agreement.

6. Pending Enforcement Actions and Investigations for Failures to Supervise and Failures to Act

   (a) *U.S. Dep't of the Treasury v. Haider*, No. 14-cv-9987 (S.D.N.Y. Dec. 18, 2014); *Thomas E. Haider*, FinCEN No. 2014-08 (Dec. 18, 2014): Thomas Haider was the CCO and head of the AML Department of MoneyGram International Inc. from 2003 to 2008. Over this time period, he received thousands of complaints from defrauded customers. In 2012, DOJ and MoneyGram entered a DPA in connection with these AML failures, but Haider himself was not prosecuted. Two years later — in December 2014 — FinCEN filed charges against Haider, alleging he *willfully* violated the BSA by failing to implement an effective AML program and file SARs. On Dec. 18, 2014, FinCEN imposed a $1,000,000 fine on Haider. Furthermore, the U.S. Attorney's Office for the Southern District of New York filed a complaint in federal court seeking a *civil injunction* barring Haider from future employment in the financial industry, and asking the court to convert FinCEN's fine into a judgment against Haider. The government's compliant seeking a civil injunction signals a new tool prosecutors will likely use in future cases.

   (b) *Wedbush Securities, Inc.*, Adv. Act Rel. No. IA-3971 (Nov. 11, 2014); *Wedbush Securities, Inc.,* FINRA Case No. 20090206344-01 (Aug. 18, 2014): Both the SEC and FINRA, in separate proceedings, alleged that Wedbush, a market access provider, failed to dedicate sufficient resources to risk management and compliance programs, thereby allowing traders to conduct manipulative trades. Wedbush failed to put such programs in place despite knowledge of risks of the market access business, such as disciplinary actions against other market participants and published industrywide notices. In addition to its compliance failures, Wedbush also allegedly paid its employees based on the trading volume of their customers, thus incentivizing them to turn a blind eye to fraudulent trading. FINRA filed a complaint on Aug. 18, 2014 setting forth these compliance failures. The FINRA proceeding is still pending. In November 2014, the SEC settled its own case against Wedbush for a $2,440,000 civil penalty. Two former Wedbush executives also settled SEC charges for a combined total of $85,000 in disgorgement and penalties.

   (c) *Thomas R. Delaney II*, Exch. Act Rel. No. 34-72185 (SEC, May 19, 2014): The SEC initiated administrative proceedings against Thomas Delaney (former CCO) and Charles Yancey (former CEO and president) of Penson Financial Services, a clearing firm, in connection with the firm's violation of SEC rules requiring it to deliver shares to a registered clearing agency. The SEC alleged that CCO Delaney knew that the firm was not complying with these regulations yet did nothing to fix procedures or supervise those committing violations. It claimed that CEO Yancey failed to supervise Delaney and others in his firm, despite red flags discovered in audits. The SEC filed an administrative proceeding in May of 2014. The claims against both individuals are still pending.

   (d) *Citigroup Inc.*, DOJ & SEC investigations (2014): In February 2014, Citigroup disclosed that its Mexico-based Banamex unit was defrauded by Mexican oil company Oceanografia. Banamex extended $400,000,000 in loans to this company, despite warnings from Citigroup's own bond investors that Oceanografia had been accused of corrupt practices and there were well-

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documented concerns of Mexican lawmakers and U.S. rating agencies regarding Banamex's poor financial condition. Citigroup's CEO Michael Corbat admitted that the misconduct was a result of poor oversight and self-reporting, stating that Banamex "was allowed to operate as its own fiefdom, with New York employees struggling to get information about how the unit operated." Along with making disclosures, Citibank fired 12 employees, including managing directors. Yet, despite Citigroup's self-reporting, the SEC launched a formal investigation into potential violations of the BSA and AML compliance failures. The U.S. Attorney's Office in Boston and the Federal Reserve Bank of New York also subpoenaed Citigroup.[49]

(e) *Charles Schwab Corp.* (SEC 2014); *Bank of America Corp*. (SEC 2014): Certain accounts of Charles Schwab, a broker-dealer, and Bank of America's Merrill Lynch brokerage arm, had unverified owners, despite BSA regulations that require brokerages to know the identity of customers before allowing them to trade or raise money through their platforms. These unverified owners were allegedly linked to shell companies with fake addresses, which were in turn linked to the funding of Mexican drug cartels. The SEC has initiated investigations into these two entities, probing their AML compliance.[50]

III. EU Marketing Regulations

A. AIFMD and Annex IV Reporting

1. Regulation of EU Marketing Under the Alternative Investment Fund Managers Directive ("AIFMD")

(a) The AIFMD became law across the EU with effect from July 22, 2014 when the last remaining transitional periods in certain EU countries expired.

(b) The AIFMD regulates marketing by alternative investment fund managers ("AIFMs"), or others on their behalf, of investments in alternative investment funds ("AIFs"), regardless of their investment strategy, structure or underlying investments. The marketing restrictions apply whenever an AIF is being offered *on the initiative* of the AIFM, or on its behalf, to an investor domiciled or with a registered office in an EU country.

2. What Remains Outside the Scope of the AIFMD?

(a) Certain services and products remain outside the scope of the AIFMD. These include:

(i) Offers of managed accounts;

(ii) Single investor funds (subject to certain conditions); and

(iii) UCITS funds.

(b) However, some EU jurisdictions (such as Ireland) do not accept that single investor funds are out of scope and the domestic Irish fund rules regulate them as if they are AIFs with AIFM and therefore subject them to AIFMD rules. In contrast, Malta and the United Kingdom treat them as out of scope of the AIFMD.

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[49] Dakin Campbell, Citigroup Says Banamex Fraud Cost $165 Million in Quarter, Bloomberg News (May 2, 2014), *available at* http://www.bloomberg.com/news/2014-05-02/citigroup-says-banamex-fraud-cost-165-million-in-first-quarter.html.

[50] Emily Flitter, Exclusive: SEC probes Schwab, Merrill, for Anti-Money Laundering Violations — Sources, Reuters News (May 21, 2014), *available at* http://www.reuters.com/article/2014/05/21/us-sec-brokerages-investigation-idUSBREA4K15S20140521.

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3. AIFMD and National Private Placement Regimes

(a) Each EU member state has amended its private placement regime to incorporate the minimum elements of the marketing regime set out in the AIFMD.

(b) The AIFMD obligations that are triggered by non-EU AIFMs marketing AIFs in the EU now include obligations to comply with prior and ongoing investor disclosure requirements, regulatory reporting obligations ("Annex IV reporting"), certain disclosures in the AIF's annual accounts, and the private equity provisions in the AIFMD.

(c) EU AIFMs are however required to Annex IV report whether or not they market their funds in the EU, but marketing in the EU also triggers a further requirement to ensure the AIF appoints a depositary.

4. Different EU Member State Approaches to AIFMD and National Private Placement Regimes

(a) EU member states are not required to have national private placement regimes, and some member states, have decided not to allow AIFMs who do not have access to the AIFMD marketing passport to market funds in their jurisdiction. Other member states (such as France) have effectively restricted their private placement regimes to offers of closed-ended funds, precluding the marketing of offshore hedge and other open-ended funds.

(b) EU regulators have taken different approaches to the procedure that must be followed before marketing can occur:

(i) Some EU regulators (such as the United Kingdom, Luxembourg, Malta and the Netherlands) only require a simple notice to be given that the AIFM proposes to market an AIF;

(ii) Other EU regulators require not only prior price notice but also that the prior approval of the regulator is obtained before marketing of an AIF occurs (such as Belgium, Finland, Sweden and Norway); and

(iii) Other EU regulators have gone even further and require that the AIF itself goes through a lengthy registration process before marketing can occur (such as Denmark and Germany, where it can take two to four months to register the AIF). Denmark and Germany have also included additional "gold-plating" by requiring the AIF to appoint a depositary (which is not otherwise required where the AIFM is non-EU).

5. Different EU Member State Approaches to Disclosure and Reporting Have Begun to Emerge

(a) A degree of variation has also emerged in individual country approaches to the investor disclosure and regulatory reporting requirements of the AIFMD. These include:

(i) A requirement for an AIFM to produce additional disclosure supplements (such as in Germany);

(ii) Some EU regulators (such as the United Kingdom) have issued guidance confirming that non-EU AIFMs only need to report feeder-level information with no look-through to the positions of the master fund; and

(iii) Other EU regulators (such as Germany and Sweden) expect separate Annex IV reports to be submitted in respect of both a feeder fund and the master fund and its investments.

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(b) Whilst there are a number of similarities between Annex IV reporting and Form PF, there are also many differences.

(i) Similarities include:

(1) Form PF and Annex IV require similar underlying information — approximately 60 percent of the data required in Form PF can be used in Annex IV;

(2) Similar reporting solutions are available — whether in-house or via a third party; and

(3) Form PF and Annex IV have similar filing frequencies (annual, semi-annual or quarterly).

(ii) Five key differences are:

(1) Annex IV report deadlines are shorter (typically 30 days versus 60 days);

(2) The AUM calculation differs under Annex IV by grossing up derivatives taking the absolute value of the underlying exposures;

(3) Annex IV reports do not allow the use of assumptions and explanations, whereas Form PF does;

(4) Annex IV reports require a special calculation of leverage; and

(5) Annex IV reports have to be filed with multiple regulators (in each EU country where the fund has been marketed), whereas Form PF is only filed with the SEC.

6. Future AIFMD Developments

(a) Looking to the year ahead, the European Securities and Markets Authority ("ESMA") has recently carried out a constitution exercise (as required by the AIFMD) seeking the views of managers, funds, investors and others in the marketplace as to how the marketing of AIFs in the EU under the national private placement regimes has been functioning.

(b) The purpose of this consultation is to guide ESMA when issuing its opinion to the European Commission as to whether the AIFMD marketing passport (currently only available to EU AIFMs in respect of EU AIF) should be made available to non-EU AIFMs and non-EU AIFs.

(c) ESMA is expected to issue its opinion to the European Commission by July 22, 2015. If the AIFMD marketing passport is granted, the likely timing for this is expected to be at the end of this year or early in 2016.

B. New Swiss Regime

1. A new regime governing the distribution of non-Swiss funds to Swiss investors comes fully into force on March 1, 2015, when the current transitional period under the Swiss Collective Investment Schemes Act expires.

2. The new regime segments Swiss investors into three categories:

(a) Unregulated Qualified Investors (pension plans, corporates, family offices, family trusts and high-net-worth individuals);

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(b) Regulated Qualified Investors (a more restricted list of Swiss-regulated financial entities, such as banks, securities dealers, fund managers and insurance companies); and

(c) Non-Qualified Investors (effectively retail investors).

Investment managers who expect to be distributing their funds to the first category — unregulated qualified investors — in Switzerland on or after March 1, 2015 must comply with the new requirements by that date. These include, among other things, requirements for the fund to appoint a Swiss-licensed representative and a Swiss bank as a paying agent and for the fund's investment manager to enter into a distribution agreement with the appointed Swiss representative.

3. There is a reverse inquiry exception to the new requirements, but the concept has been very narrowly defined and requires no prior action or contact from the manager. Swiss regulators are also expected to take a conservative approach to implementing the new regime. As a result, managers will find it difficult to rely on this exception.

4. Investment managers should consider whether they want the ability to distribute their funds to unregulated qualified investors and, if so, take steps to comply with the new requirements.

5. The new Swiss regime is much less onerous than the AIFMD regime since it does not require prior notice to or approval from the Swiss regulators; there is no Annex IV reporting; and the disclosure requirements are much simpler.

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Investing in the Oil and Gas Sector

I. Introduction

The energy sector has been one of the most active sectors for new investment in recent years. Capital has been in demand, and substantial amounts of capital have been raised in the sector, including through private investment funds. At the same time, the nature of finance in the energy sector is changing. More capital than ever before is being accessed from sources outside of the sector's traditional investor base, and the level of deal activity in the sector has been robust.

As oil and gas prices decline and the availability of reserve-based senior credit becomes increasingly scarce, more and more exploration and production ("E&P") companies are seeking to raise cash in a variety of ways, such as by carving out and selling portions of their working interests to investors. Although the energy story has clearly changed and moved into the distressed part of the cycle, many of the legal issues that require due diligence remain the same.

Whether you're a lender for the development of proven reserves or a purchaser of an overriding royalty interest, or you are entering into a joint development agreement with an operator, you will undoubtedly need to diligence the underlying leases and geology. This includes understanding the types of oil and gas reserves, the types of oil and gas royalty interests, and the intersection of these reserves and interests with the federal securities laws.

II. Private Investment Funds in the Energy Sector

A. Trends in Capital Raising

Capital has been in demand by the energy investment industry, especially in the oil and gas segment. In 2013, $35,000,000,000 was raised for energy-related investment funds, about $24,000,000,000 of that in private equity-style funds. Hedge funds increasingly trade energy stocks and commodities.

Many firms invest in energy through their existing funds. Others have created energy sector funds. Sector funds have a smaller investor audience, and sponsors must be prepared for long fundraising periods. With a sector fund, there may be few places to turn to get out of an investment and diversify the fund's holdings.

Co-investment opportunities in the energy sector are also on the rise. Co-investments are often created by large private equity players undertaking multi-billion-dollar projects, principally in the upstream segment. The co-investment sponsor benefits by reducing downside and concentration risk. Co-investments attract investors that do not traditionally take the lead on deals and enable those investors to leverage off of the resources of the sponsor and gain exposure to the larger E&P plays. Co-investments are frequently offered on a no-fee or reduced-fee basis.

B. Fund Terms

Generally, energy investments fit well in typical hedge fund and private equity fund structures and terms. For hedge funds, special considerations mainly involve tax issues. Investment professionals should be sensitized to tax issues that may surprise them. For example, publicly traded energy interests such as master limited partnerships ("MLPs") and royalty interests may trade like stocks but are subject to different tax treatment. For private equity funds, investment liquidity, exits and the investment cycle are important considerations. Many energy deals have the characteristics of real estate and

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infrastructure investments, and the long-term hold scenario must be considered — length of the investment period, the fund's term (and how long the management fee is paid), and the flexibility to do follow-on investments, including restructurings.

C. Other Considerations

Many energy investment opportunities will be outside of the United States and in emerging markets. Due diligence may take longer and be more complicated. High-risk issues may include environmental laws, political risk, local business practices (e.g., bribery, which may violate the Foreign Corrupt Practices Act) and typical emerging market risk factors, such as weak legal systems, sub-standard financial reporting and undeveloped and unregulated markets.

III. Types of Oil and Gas Reserves: SEC Definitions

A. Proved Developed Reserves

Proved "developed oil and gas reserves" are oil and gas reserves that can be expected to be recovered: "(i) Through existing wells with existing equipment and operating methods or in which the cost of the required equipment is relatively minor compared to the cost of a new well; and (ii) Through installed extraction equipment and infrastructure operational at the time of the reserves estimate if the extraction is by means not involving a well."[1]

B. Proved Undeveloped Reserves

Proved "undeveloped reserves" are "reserves of any category that are expected to be recovered from new wells on undrilled acreage, or from existing wells where a relatively major expenditure is required for recompletion."[2] "Reserves on undrilled acreage shall be limited to those directly offsetting development spacing areas that are reasonably certain of production when drilled, unless evidence using reliable technology exists that establishes reasonable certainty of economic producibility at greater distances."[3]

"Undrilled locations can be classified as having undeveloped reserves only if a development plan has been adopted indicating that they are scheduled to be drilled within five years, unless the specific circumstances[ ] justify a longer time."[4] "Under no circumstances shall estimates for undeveloped reserves be attributable to any acreage for which an application of fluid injection or other improved recovery technique is contemplated, unless such techniques have been proved effective by actual projects in the same reservoir or an analogous reservoir ... , or by other evidence using reliable technology establishing reasonable certainty."[5]

C. Probable Reserves

"Probable reserves" are those where "it is as likely as not that actual remaining quantities recovered will exceed the sum of estimated proved plus probable reserves" when deterministic methods are used, or

[1] 17 C.F.R. § 210.4-10(a)(6).

[2] 17 C.F.R. § 210.4-10(a)(31).

[3] 17 C.F.R. § 210.4-10(a)(31)(i).

[4] 17 C.F.R. § 210.4-10(a)(31)(ii).

[5] 17 C.F.R. § 210.4-10(a)(31)(iii).

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when there is "at least a 50% probability that the actual quantities recovered will equal or exceed the proved plus probable reserves estimates" when probabilistic methods are used.[6]

D. Possible Reserves

"Possible reserves" are those where "the total quantities ultimately recovered from a project have a low probability of exceeding proved plus probable plus possible reserves" when deterministic methods are used, or when there is "at least a 10% probability that the total quantities ultimately recovered will equal or exceed the proved plus probable plus possible reserves estimates" when probabilistic methods are used.[7]

E. Other Considerations

1. Society of Petroleum Engineers: a membership organization serving the upstream oil and gas industry that publishes its own definitions[8]

2. Other Countries Use Different Definitions

3. Discuss with Petroleum Engineers

IV. Oil and Gas Royalties: Types of Carved Out Interests

The "working interest" includes the operating interest under an oil and gas lease.[9] The lessee-owner of the working interest has the exclusive right to explore, drill and produce oil and gas from a specific tract of property.[10] As described below, overriding royalty interests ("ORRIs"), net profits interests ("NPIs") and production payments ("PPs") can be "carved out" of the working interest.

On one side of a carve-out transaction is the investor, who contributes capital in exchange for a financial interest in an oil- or gas-producing property and/or corresponding royalty payments. On the other side is the lessee-owner of the working interest in the property, who receives the investor's capital and subsequently distributes the agreed-upon royalty payments or proceeds to the investor. While carved out interests are all similar in this regard, they differ from one another in certain respects that may prove significant to investors when a lessee-owner becomes distressed.

A. Overriding Royalty Interests

An ORRI is an ownership stake in a percentage of production or production revenues from an oil- or gas-producing property. The investor's stream of payments from an ORRI are consistent in duration with the existing lease or working interest, and they continue for so long as the working interest exists. An ORRI can therefore be indefinite in duration. However, a "term ORRI" with a fixed duration is also possible.

ORRIs are generally not subject to production expenses for the development, operation or maintenance of the property. Production expenses are the costs associated with bringing oil and gas from the

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[6] 17 C.F.R. § 210.4-10(a)(18)(i).

[7] 17 C.F.R. § 210.4-10(a)(17)(i).

[8] These definitions can be found at http://www.spe.org/industry/docs/PRMS_Guidelines_Nov2011.pdf.

[9] *See* Howard R. Williams, Charles J. Meyers, Patrick H. Martin & Bruce M. Kramer, Oil and Gas Law (15th ed. 2012) at 1147-48.

[10] *Id.* A working interest is "a percentage of ownership in an oil and gas lease granting its owner the right to explore, drill and produce oil and gas from a tract of property." *Id.* at 1148.

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reservoir to the surface, and they commonly include labor, equipment, drilling, pipe and well completion costs. Production taxes may also be excluded for purposes of an ORRI.[11]

While ORRIs are free from production expenses, they are often subject to post-production expenses[12] after the oil or gas is removed from the "wellhead,"[13] which generally refers to the point at the top or "head" of the actual well where the oil or gas is severed or removed from the ground.[14] Post-production costs are the expenses associated with rendering the gas "marketable" and include dehydrating, compressing and transporting the gas to the market, as well as extraction costs resulting from processing.[15]

B. Net Profits Interests

An NPI is similar to an ORRI in that it is carved out of the working interest of an oil- or gas-producing property.[16] But NPIs differ in that that they are measured by, and paid from, the net profits rather than the revenues realized from operation of the property[17] and are generally not free from either production expenses or post-production expenses.

NPI owners are thus subject to a level of operating performance risk that ORRI owners are not. For example, since NPI owners share in the well's drilling expenses, they might assume a proportional share of the costs associated with certain operational risks such as well blowouts. However, though NPI owners share in the costs of production, their liability is generally limited to their invested capital.[18]

C. Production Payments

PPs are a type of ORRI[19] and are likewise carved out of the working interest and paid out free from production expenses, and are also subject to post-production expenses.[20] Additionally, PPs are subject to termination if the lease or working interest expires.[21] The duration of PPs is generally fixed, however, and the PP will terminate once a pre-determined production amount or dollar amount from the sale of production is reached.[22]

PPs that terminate after a specified production amount is reached are called volumetric production payments ("VPPs"), while PPs that terminate after a specified production revenue amount is reached are

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[11] *See* Chesapeake Energy Corp., SEC Staff Comment Letter, 2014 WL 1380751 (March 27, 2014).

[12] *See Martin v. Glass*, 571 F. Supp. 1406, 1414 (N.D. Tex. 1983), *aff'd*, 736 F.2d 1524 (5th Cir. 1984) (stating that "it appears that Texas and Louisiana law are the same; both jurisdictions allow the deduction of post-production cost when royalty is determined 'at the mouth of the well'") (citing *Haynes v. Southwest Natural Gas Co.*, 123 F.2d 1011, 1012 (5th Cir. 1941)).

[13] *See id.*; *see also* Williams & Meyers at 726 (an ORRI is an "interest in oil and gas produced at the surface"). Post-production costs can only be assessed once the oil or gas reaches the wellhead. *See ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 851 (New Mex. 2012) (citing *Ramming v. Natural Gas Pipeline Co. of America*, 390 F.3d 366, 369 (5th Cir. 2004)).

[14] *See* Williams & Meyers at 1133.

[15] *Martin v. Glass*, 571 F. Supp. at 1415.

[16] *See* Williams & Meyers at 647.

[17] *Id.*

[18] "While net profits interest owners are entitled to a percentage of the profits, they are not responsible for any portion of losses incurred in property development and operations. These losses, however, may be recovered by the working interest owner from future profits." *Id.* (citing Charlotte J. Wright & Rebecca A. Gallun, Fundamentals of Oil & Gas Accounting 15 (5th ed. 2008)).

[19] *See* 11 U.S.C. § 101(42A) and (56A), which define "production payment" as a type of term overriding royalty.

[20] Williams & Meyers at 827.

[21] *Id.*

[22] *Id.* (citing *QEP Energy Co. v. Sullivan*, 444 Fed. Appx. 284, 289 (10th Cir. 2011)).

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called dollar denominated production payments ("DDPPs"). Since DDPPs give the royalty owner the right to receive a fixed dollar amount generated from the property (usually with a stated rate of interest),[23] DDPPs are generally less correlated with the market risks associated with commodity prices. Whether the property's production output (or the price of oil or gas) rises or falls, a DDPP owner is still contractually owed his or her fixed dollar amount subject to a fixed interest rate.

This structure can create situations in which, if a DDPP owner is entitled to a contractually higher rate of interest for untimely (or missed) payments, he or she may be incentivized to hope for decreased production and/or commodity prices in order to receive slower payments and a higher rate of return. DDPPs are defined as "borrowings" by the Financial Accounting Standards Board ("FASB"), while VPPs are defined as "the transfer of a mineral interest."[24] The FASB considers VPPs not to be borrowings, but rather to be sales in which the entity's obligation is accounted for as an obligation to deliver, free and clear of all expenses associated with operation of the property, a specified quantity of oil or gas to the purchaser out of a specified share of future production.[25]

Characteristics	ORRI	NPI	VPP	DDPP
Carved out of working interest	✓	✓	✓	✓
Subject to pre-production costs	X	✓	X	X
Subject to post-production costs	✓	✓	X	X
Contractually determined termination point	X	X	✓	✓
Greater production volume equals greater profitability	✓	✓	✓*	X
Sensitivity to commodity prices	✓	✓	✓	X**

* Only until the pre-determined quantum of production is reached

** May benefit from decrease in commodity prices

V. Oil and Gas Interests and Securities Laws

A. Are Oil and Gas Interests Securities?

Generally, oil and gas interests will be securities subject to federal securities laws to the extent they are "fractional undivided interest[s] in oil, gas, or other mineral rights" or "investment contracts" as defined by federal statutes.[26]

[23] *See* Ernst & Young, The Revised Revenue Recognition Proposal — Oil and Gas (Feb. 2, 2012), *available at* http://www.ey.com/publication/vwluassetsdld/technicalline_bb2276_revrecoilgas_2february2012/$file/technicalline_bb2276_revrecoilgas_2february2012.pdf?OpenElement.

[24] *See* FASB, FAS 133 Derivatives Implementation, *available at* http://www.fasb.org/derivatives/issueb11.shtml; Securities & Exchange Commission, Technical Amendments to Commission Rules and Forms Related to the FASB's Accounting Standards Codification, *available at* http://www.sec.gov/rules/final/2011/33-9250.pdf; *see also* Ernst & Young.

[25] *See* Ernst & Young.

[26] Federal and state laws may exempt certain interests from registration with state or federal agencies. Those exemptions are beyond the scope of this outline and are not discussed herein. Regardless of whether or not registration is required, anti-fraud provisions will still apply to the extent a security is involved.

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Section 2(a)(1) of the Securities Act of 1933 specifically includes in its definition of a "security" a "fractional undivided interest in oil, gas or other mineral rights."[27] Section 3(a)(10) of the Securities Exchange Act of 1934 includes similar language.[28] Even if an oil and gas interest is not a "fractional undivided interest in oil, gas or other mineral right," it may still be a security if it is an "investment contract" included in those same definitions.

B. What Is a Fractional Undivided Interest in Oil, Gas or Other Mineral Rights?

A "fractional undivided interest in oil, gas or other mineral rights" generally arises "when a lessee of mineral rights sells part of its interest in the rights in order to finance the development of the minerals."[29] Courts have interpreted that statutory phrase broadly,[30] finding that it includes working interests (e.g., a fractional undivided leasehold interest), as well as interests in joint ventures and partnerships that invest in oil and gas activities.[31]

However, not every transaction involving the sale of a fractional undivided interest in oil and gas will constitute the sale of a "fractional undivided interest" within the meaning of the federal statutes. The most notable of these exceptions is where a party sells his or her entire interest to another. In such a case, there is no "fractionalizing" and therefore no sale of a "fractional undivided interest."[32] However, as discussed below, such a sale may still involve the sale of a security if the interest is deemed to be an "investment contract."

It is important to note that, as with many other areas of securities law, there are very few truly bright line rules, as many cases turn on the individualized facts of those cases. For example, in one decision, the U.S. Court of Appeals for the Tenth Circuit *declined* to find that the sale of a 50-percent working interest in a well (i.e., a fractional undivided interest) constituted a "fractional undivided interest" under the '33 Act.[33]

C. Application to Different Oil and Gas Interests

There are various types of potential investments in oil and gas, including working and non-working interests, and interests that are carved from those interests, such as NPIs, ORRIs and PPs. Given SEC guidance,[34] and many courts' broad interpretation of the statutory definitions as discussed above, a prudent investor should assume that an interest in oil and gas is a security.

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[27] *See* 15 U.S.C. § 77b(a)(1).

[28] *See* 15 U.S.C. § 78c(a)(10) ("'security' means any … certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease"). Although somewhat different, courts have long held that the definitions are functionally equivalent. *See, e.g.*, *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975). Courts will typically ignore the '34 Act definition.

[29] *Penturelli v. Spector, Cohen, Gadon & Rosen, Attorneys at Law, P.C.*, 779 F.2d 160, 165 (3d Cir. 1985).

[30] *See, e.g.*, *Adena Exploration Inc. v. Sylvan*, 860 F.2d 1242, 1252-53 (5th Cir. 1988) ("if a financial instrument is properly denominated a 'fractional interest in oil and gas' then the instrument is necessarily a security").

[31] *Id.* (buyer of 25-percent working interest held to have bought a "fractional undivided interest"); *Nolfi v. Ohio Kentucky Oil Corp*., 675 F.3d 538 (6th Cir. 2012) (interests in joint ventures and limited partnerships held to be "fractional undivided interest" under '33 Act definition; investments were "analogous to the working interest in oil … classified as a security under the Act in *Adena Exploration*" and created for the purpose of sale).

[32] *See, e.g.*, *Adena Exploration*, 860 F.2d at 1245 n.5 ("Where the owner of a fractional undivided working interest surrenders his entire interest whole, there is no sale of a 'fractional undivided interest' under the act."); *Woodward v. Wright*, 266 F.2d 108, 112 (10th Cir. 1959) ("If the seller transfers the whole of what he owns, there can be no creation of a fractional undivided interest in oil and gas, and this is so even though what he sold was a fractional interest therein."); *see also* 69 Am. Jur. 2d, Securities Regulation — Federal § 50; 79A C.J.S. Securities Regulation § 24.

[33] *See Ballard & Cordell Corp. v. Zoller and Danneberg Exploration, Ltd.*, 544 F.2d 1059, 1063 (10th Cir. 1976).

[34] *See* SEC Securities Act Release No. 185 (June 30, 1934), 11 Fed. Reg. 10951 ("The ordinary royalty interest which entitles the holder to share in the oil or gas produced from a particular tract of land clearly comes within this definition."); *Adena Exploration*, 860 F.2d at 1244 ("The [SEC] has consistently espoused the view that any fractional undivided interest in oil and gas is subject to regulation under both the 1933 and 1934 Acts … .").

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D. Are Working Interests Securities? How About Non-Working Interests?

Working interests, as discussed above, can be securities under both the "fractional undivided interest" and "investment contract" tests for securities. To the extent the purchaser of a working interest has decision-making authority over business strategy, the interest may not be an "investment contract."[35]

Non-working interests, such as royalty interests, are by their nature dependent upon the work of others and would be "investment contracts" to the extent they satisfy the other parts of the *Howey*[36] test (i.e., is there an investment of money; is there a "common enterprise"?). One noteworthy example of an instance where a non-working interest will *not* be an investment contract is where a landowner leases land in exchange for a royalty interest in a drilling operation. In such an instance, there is no sale of a security because there is no "investment of money" — the transfer of the royalty interest is considered to be consideration for the sale of the lease interest.[37]

E. Are Carve-Out Interests Securities?

"Carve-out" interests are those that are derivative of other interests, such as production payments, overriding royalty interests and net profit interests. Because these types of interests typically will depend on the work and labor of others, they are by their nature non-working interests and most likely "investment contracts," if not "fractional undivided interests," and have been found to be securities under both the "investment contract" and "fractional undivided interest" analyses.[38]

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[35] *See Stewart v. Ragland*, 934 F.2d 1033, 1038-39 (9th Cir. 1991) (no "investment contract" because purchasers maintained managerial powers and were sophisticated investors; "the proper focus is upon the managerial powers retained by the non-operators in a given relationship").

[36] *See SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946).

[37] *See, e.g.*, *Graham v. Clark*, 332 F.2d 155 (6th Cir. 1964); *Robertson v. Humphries*, 1978 WL 4096 (10th Cir. 1978); *Fearneyhough v. McElvain*, 598 F. Supp. 905 (C.D. Ill. 1984). This view is premised on the notion that securities laws were not intended to cover oil and gas *leasing* transactions. *See* Peter K. Reilly & Christopher S. Heroux, When Should Interests in Oil and Gas Be Considered Securities?: A Case for the Industry Deal, 34 S. Tex. L. Rev. 37, 53 (1993).

[38] *See, e.g., Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124 (4th Cir. 1970) (holding that broker's sale of production payments constituted sale of an investment contract); *Vale Natural Gas Am. Corp. v. Carrollton Resources 1990, Ltd.,* 795 F. Supp. 795 (E.D. La. 1992) (plaintiff sufficiently alleged that production payment constituted investment contracts under '33 Act); *Nor-Tex Agencies, Inc. v. Jones*, 482 F.2d 1093 (5th Cir. 1973) (royalty interests created for purposes of sale were fractional undivided interests and investment contracts).

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Co-Investments and Sidecars: Structuring Opportunities

I. Trends Toward Co-Investments and Sidecars

A. Co-Investments and Sidecars: What They Are

1. A co-investment opportunity is an opportunity to invest alongside (or outside of) a private investment fund in an investment that is too large (or not appropriate) for the private investment fund. These investments are typically less liquid assets.

2. A sidecar is an investment vehicle established to invest in a co-investment opportunity. Sidecars can be structured to invest in one or more co-investment opportunities, can be blind pool or not, and may be established for a single investor or may be offered to multiple investors.

B. Disappearing Side Pocket

1. Historically, hedge funds invested in liquid assets, whereas private equity funds invested in more illiquid assets.

2. A side pocket is a mechanic utilized by a private investment fund to segregate less liquid (or difficult to value) investments from the liquid portion of the fund's portfolio. The side pocketed investment is segregated from the rest of the portfolio, and incoming investors do not participate in existing side pockets. Investors generally are permitted to redeem amounts that are side pocketed only after the side pocketed investment is realized, and typically, performance compensation on the side pocketed investment is not taken until the time of realization. As hedge fund managers started to invest in illiquid assets, the industry saw a trend in the growth of side pockets. Prior to the financial crisis in 2008, managers were launching funds with side pocket thresholds that exceeded 30 percent in some cases and were able to make meaningful illiquid investments.

3. Since the financial crisis in 2008, funds with side pockets have been more difficult to market to prospective investors, and there are far fewer new hedge funds being launched with side pockets as a result. Many managers have eliminated the ability to use side pockets in new (and sometimes even in existing) funds due to investor concerns, which include concerns that: (1) side pockets lack sufficient investor protections; and (2) managers spend too much time managing side pocket assets at the expense of the liquid portion of the portfolio.

4. Some managers have attempted to launch products with side pocket opt-in/opt-out provisions, but the opt-in classes of such products have seen less interest among investors than the opt-out classes.

5. Deferred compensation laws that went into effect at the beginning of 2009[1] have also made structuring performance-based compensation from side pockets in a tax-efficient manner more challenging.

C. Illiquid Investing Without Side Pockets

[1] *See* Section 457A of the U.S. Internal Revenue Code of 1986, as amended (the "Code").

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1. The decline of side pockets has created a need for alternative ways to fund illiquid investment opportunities.

2. Co-investments, sidecars and traditional private equity funds are the alternatives available to achieve this.

3. There has been significant manager interest in co-investment opportunities. According to a recent survey, 38 percent of managers have offered co-investment opportunities to investors, and 28 percent would consider or are currently considering offering such opportunities.[2]

4. North America is the leading continent for co-investment appetite among investors. According to a 2012 survey, 44 percent of investors that seek to make co-investments are based in North America, 31 percent in Europe and the remaining 25 percent in Asia and the rest of the world.[3]

D. Common Co-Investment and Sidecar Strategies

1. Activism: Acquiring a significant position in the equity of a public company in order to effect changes in the company's strategy. These funds often need additional assets to make concentrated bets, especially when pursuing tender offers or proxy fights.

2. Distressed Credit: Acquiring securities of a company in bankruptcy or financial distress across the capital structure. These funds may need extra capital to, e.g., take control of the "fulcrum security" in a bankruptcy.

3. Concentrated Versions of Existing Strategies: Vehicles may have position limits, and a manager will structure a sidecar to make co-investments in opportunities to the extent the fund has filled up with its share of an investment.

4. Sector Opportunities: Managers focused on particular industry sectors may, in the course of their public markets investing, become aware of related private market or otherwise illiquid opportunities.

5. Hedge Funds and Private Equity Funds Run Side-By-Side: Strategies that lend themselves to both hedge and private equity vehicles often include investments in illiquid opportunities. Often, these managers will find opportunities that are appropriate for co-investments because their hedge funds have limited capacity for illiquid investments and their private equity funds have position limits.

II. Structuring/Terms

A. Flexibility

1. Since a sidecar is a newly formed vehicle, managers have flexibility to customize the terms and structure to attract capital. In some cases, managers may structure a sidecar with terms that mirror the main fund, and in other cases, investors may seek more private equity-style protections in recognition of the fact that the sidecar is illiquid. For instance, investors may ask that the sidecar be structured to include a key person event concept, a no-fault removal mechanism and back-ended carry structure.

[2] *See* Aksia's 2014 Hedge Fund Manager Survey.

[3] *See* Prequin Special Report: LP Appetite for Private Equity Co-Investments (2012).

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2. Tax Structuring

(a) If an asset sought by a sidecar is a United States real property interest,[4] including stocks in certain U.S. corporations that are considered "United States real property holding corporations,"[5] the sidecar or a special purpose vehicle ("SPV") may need to be structured as a U.S. vehicle so as to prevent a U.S. withholding tax from being imposed on such sidecar or SPV upon its disposition of the asset under Section 1445 of the Code,[6] even with respect to U.S. investors who would not otherwise be subject to any U.S. withholding tax on their investments.

(b) For European deals and deals in certain other jurisdictions, "BEPS" (base erosion and profit shifting) proposals[7] may require in the future that the sidecar or an SPV be structured in a jurisdiction (e.g., Ireland) that is more heavily regulated than jurisdictions commonly used today.

(c) Attention should be given to the Foreign Account Tax Compliance Act ("FATCA") and the expanded affiliated group ("EAG") rules.[8] If the sidecar may at some point in time have a majority owner that is a corporation (other than a tax-exempt U.S. entity), a non-U.S. sidecar or a non-U.S. SPV that is not a disregarded entity for U.S. tax purposes may be considered part of such owner's EAG, in which case, such sidecar's or SPV's FATCA-compliant status may be linked to that of the other members of such an EAG (which may include other investment funds unrelated to the sidecar's manager). Failure to comply with FATCA due to being part of such a noncompliant EAG can eventually lead to a 30-percent U.S. withholding tax on U.S. source interest, dividend and similar payments and, starting in 2017, a 30-percent U.S. withholding tax on gross proceeds from the sale or disposition of property that may generate U.S. source interest or dividend payments.

B. Fees

1. Fees depend on the rationale for the sidecar.

(a) For higher conviction opportunities that run parallel to a manager's main fund, fees are more likely to mirror the fees in the main fund.

(b) In deals where excess capital is needed from investors in order to close the transaction (e.g., in a control scenario), fees may be lower or, in some cases, zero, if the bargaining power lies more with the investor than the manager.

(c) When capital is used to enhance a strategy (e.g., an activist co-investment), fees are typically lower than as compared to the main fund, but the discount is usually smaller than the opportunities where capital is required to consummate a transaction.

2. Netting of P&L for Fee Purposes

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[4] As defined in Section 897(c)(1) of the Code.

[5] *See* Section 897(c)(2) of the Code.

[6] Foreign Investment in Real Property Tax Act ("FIRPTA").

[7] *See, e.g.*, Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries (July 2014), *available at* http://www.oecd.org/tax/tax-global/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf and Part 2 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries (Aug. 13, 2014), *available at* http://www.oecd.org/ctp/tax-global/part-2-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

[8] *See, e.g.*, Sections 1471(d)(1) and (e)(2) of the Code.

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(a) In general, netting of profits and losses across investments within a fund is common within blind pool vehicles, but less common where investors have discretion over whether to invest in a deal.

(b) Some managers that have investors below water in their main fund also offer netting arrangements for opt-in co-investment opportunities.

(c) In such arrangements, the investor's high-water mark in the main fund would count toward the fees charged to that investor in the sidecar vehicle, and the sidecar would not charge separate fees until the losses in the main fund are recouped.

3. Management fees for co-investments may be charged on capital commitments or capital contributions. Sidecars structured to invest in multiple co-investment opportunities may accept capital commitments from investors and charge fees on those commitments. Sidecars that make a single investment are more likely to charge on contributed capital (or net asset value), even if investors make capital commitments instead of a one-time contribution.

4. Performance fees and allocations with respect to co-investments vary on a case-by-case basis, but they often take the form of a back-ended private equity carry structure. Such compensation needs to be structured carefully to take into account tax considerations, both from the manager's standpoint and an investor's standpoint. Activist strategies that invest in publicly traded securities that are more easily marked to market may charge an annual incentive allocation based on realized and unrealized gains in the sidecar.

5. Time Sensitivity: Co-investment opportunities often present themselves on a relatively short timeframe, particularly where publicly traded securities are involved (e.g., activism). If a co-investment opportunity is time sensitive and the manager needs to raise co-investment capital quickly, the manager may offer lower fees to attract capital quickly.

C. Expenses that are specific to a particular sidecar vehicle (such as the vehicle's organizational costs) will generally be borne by the investors in such vehicle. If the expenses are common to the sidecar and the main fund (and other funds), each vehicle typically will bear its pro rata share of such common expenses. Expenses attributable to a particular opt-in co-investment opportunity are typically borne by the investors that opt into that particular opportunity.

D. Separate sidecar vehicles may be focused on a single investment or multiple related investments, and they may be organized at the same time or after the main fund is organized.

III. Conflicts and Regulatory Issues

A. Offering Co-Investments to Investors

1. Investors in the main fund (more often in private equity funds) may request the right to participate in co-investment opportunities offered by a manager. Managers should consider contractual obligations, investor relations concerns and fiduciary concerns when determining the allocation of co-investment opportunities across funds and investors.[9]

2. Fund documents typically provide managers with broad discretion to allocate co-investment opportunities and contain the allocation methodology for determining when an investment may be allocated to a sidecar.

[9] *See* Igor Rozenblit's (Co-Head of the Private Funds Unit at the SEC's Office of Compliance Inspections and Examinations) speech at the Compliance Outreach Program Seminar (Jan. 30, 2014).

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B. Allocation of Purchases and Sales

1. From a conflicts perspective, it would be ideal to buy and sell assets at the same time in all vehicles — and co-investors often request this — but simultaneous transactions are often not achievable because:

   (a) Funds may have investment restrictions and guidelines in their governing documents that limit potential exposure to illiquid investments. These provisions guide the allocation of purchases of investments. For instance, if a fund has reached its limit with respect to a particular investment opportunity, it may cease purchasing an investment while the sidecar continues to purchase the same investment.

   (b) Differing terms between a fund and a sidecar (e.g., liquidity provisions, investment periods) may result in a manager pursuing different exit strategies, even though both vehicles own the same asset. For instance, a manager may be forced to sell a co-investment in the fund in order to meet withdrawal requests, while the sidecar that holds the same co-investment may not have the same liquidity considerations.

   (c) A manager may sell a co-investment on behalf of a sidecar at the end of its term, while the manager's main fund may not be required to liquidate the position because it is evergreen.

   (d) A manager's main fund may have a cap on follow-on investments, which could lead to an over-allocation of a particular co-investment to a sidecar as compared to the manager's main fund.

   (e) Tax considerations may cause one vehicle to acquire or dispose of the asset at a different time from another and/or delay distributions to investors.

2. Managers often reserve the right to run multiple funds side-by-side and allocate investment opportunities across funds and investors. Managers should have a clearly written allocation policy that describes how such opportunities will be allocated across the manager's funds and investors. In some cases, managers may choose to structure a sidecar outside of the main funds in order to make a co-investment.

C. Confidentiality

1. Managers may offer blind pool co-investment opportunities where the investor does not learn what the target company is. In such cases, the investor does not typically need to sign a nondisclosure agreement to make the investment in the sidecar.

2. In other cases, a manager may disclose the name of the target company to prospective investors. In such case, a confidentiality undertaking from the prospective investors may be important to protect the interests of both the manager's main fund and the sidecar vehicle.

3. When a limited subset of investors from the manager's main fund participate in the sidecar, the manager must consider selective disclosure issues. Investors in a sidecar may receive detailed information about the co-investment opportunity. If that is the case, the manager should consider disclosing the same information to the investors in the main fund to avoid providing some investors with better information about the main fund's portfolio.

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D. Regulatory Scrutiny

1. Regulators have focused on the allocation of co-investment opportunities in their examination activities. In particular, regulators have focused their attention on whether the governing documents of a fund address co-investments, noting that governing documents often lack clearly defined protocols for mitigating conflicts of interest associated with co-investments.[10]

2. One area of focus is the allocation of co-investment opportunities to some but not all investors in the main fund without proper disclosure in the governing documents of the main fund.[11]

E. Conclusion

1. The decline of side pockets has resulted in increased use of alternative means of accessing illiquid investments, including one-off co-investments, sidecars and private equity funds.

2. These alternative techniques present new challenges for managers and investors with respect to legal structure, business terms and fiduciary issues.

3. Despite these challenges, co-investments are likely to be an increasingly important component of the offerings of investment managers, even where liquid investments are a primary focus.

[10] *See* Andrew Bowden's (Director of the SEC Office of Compliance Inspections and Examinations) speech at the Private Equity International Private Fund Compliance Forum 2014 (May 6, 2014).

[11] *See* Rozenblit's speech at the Compliance Outreach Program Seminar (Jan. 30, 2014).

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