BLANK ROME LLP
COUNSELORS AT LAW

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Fund and Investment Management

Regulatory Update and Recent SEC Enforcement Actions

REGULATORY UPDATE

SEC's New Cybersecurity Appointment

On June 2, 2016, the SEC announced that it hired Christopher R. Hetner, a cybersecurity expert, as the Senior Adviser to the Chair for Cybersecurity Policy. The hire is indicative of the SEC's focus on cybersecurity measures and compliance. Hetner's arrival at the SEC is foretelling of an increase in the SEC's enforcement activities, as well as, an improvement of its own internal security measures. Hetner's role will consist of three major responsibilities: (1) coordinating efforts across the SEC to address cybersecurity policy; (2) engaging with external stakeholders; and (3) further enhancing the SEC's mechanisms for assessing broad-based market risk. The creation of Hetner's role will most likely lead to a continuation of the SEC's focus on cybersecurity during examinations of registered entities, including investment advisers and broker-dealers, an increase in the number of SEC cybersecurity investigations, and an overall strengthening of the SEC's internal and external information security programs.

SEC Orders that Franklin Fund Permit Vote on Discount Plan Proposal

On June 17, 2016, Franklin Limited Duration Income Trust, a closed-end investment company, sought confirmation from the SEC that the SEC would not bring an enforcement action against the fund if the fund did not allow shareholders to vote on a proposal submitted by Saba Capital Management LP, requesting that the fund's board of trustees consider authorizing a self-tender offer. Saba claims that the reason for the proposal is to address the fact that fund shares have been trading at a discount to the fund's net asset value, which may lead to liquidity concerns, and investors' lack of competence in the investment adviser. Franklin argued that Saba's proposal consisted of two proposals, which violated the proxy rules that stockholders are not allowed to submit more than one proposal for each shareholders' meeting. On August 4, 2016, the SEC issued a response stating that they agreed with Saba's proposal and that the fund must permit shareholders to vote on Saba's proposal.

SEC to Require More Information about Board Diversity

On June 27, 2016, SEC Chairwoman Mary Jo White stated that the SEC intends to focus on requiring public companies to provide additional information on how they plan to improve diversity among board members. The SEC is currently drafting a proposal that will amend the current diversity disclosure rule, which requires companies to disclose whether, and if so how, their nominating committees consider diversity, if they have a policy on diversity, and how its effectiveness is assessed. The proposed new rule will require companies to include in their proxy statements "more meaningful" diversity disclosures relating to board members and nominees in an effort to provide information that is more meaningful to investors.

SEC Proposes Business Continuity Plan Rule

On June 28, 2016, the SEC proposed rule 206(4)-4 under the Investment Advisers Act of 1940 requiring investment advisers to adopt written business continuity and transition plans to mitigate the effects of significant disruptions in their operations. Under the proposed rule, investment advisers are required to implement a plan for maintaining their systems, protecting customer data and assets, and continuing their advisory services in the event of a temporary disruption such as a natural disaster, cyberattack or departure of key personnel. If the proposed rule passes, investment advisers will be required to draft a plan based on specific risks the firm faces and address how to maintain systems and protect data and assets in the event of a significate disruption, by pre-arranging alternative physical locations for the firm's operations, providing communication plans, and reviewing third party service providers. Additionally, firms would also be required to establish a transition plan that outlines how to transition client accounts to another adviser in the event of a disruption such as a merger or bankruptcy of the

adviser. The proposed rule would also require advisers to review the adequacy and effectiveness of their plans at least annually.

> *"One of the objectives of the proposed rule is to encourage investment advisers to engage in advance planning and preparation to help mitigate the effects of disruptions to its operations and in some cases minimize the likelihood of their occurrence."– SEC Chairwoman Mary Jo White*

Internal Revenue Service ("IRS") Issues New Rules for Money Market Funds

On July 7, 2016, the IRS issued its final rules on tax treatment for gains and losses in the money market funds as a way to make tax calculations and compliance with money market fund rules easier. The new IRS rules will require money market funds to adopt a floating net asset value instead of the current fixed $1 net asset value per share. Additionally, the new rules will allow money market fund boards to place limitations on investors' ability to withdraw the funds' money during market distress in the forms of fees and temporary redemption gates. The IRS will now allow investors to calculate their losses in money market funds according to variable-period net asset value calculations, so long as investors abide by certain rules such as keeping the variable taxable periods in a single tax year and keeping the same period for calculating different taxes (for both income and excise tax). Compliance with the final rules relating the floating net asset value will be implemented two years from the date in which the final rules are published in the Federal Registrar.

Investor Defeats Deutsche Fund in Dispute over Director Elections

Deutsche Bank, on behalf of the Deutsche Strategic Income Trust's KST fund, requested confirmation from the SEC's Investment Management Division that the SEC would not take action against the KST fund if it omitted a proposal by Western Investment LLC ("Western Investment") to subject its board to annual shareholder elections. KST's board is currently divided into three classes, which serve staggered three year terms. Western Investment claims that this board structure protects the board from shareholders' elections and limits accountability. Western Investment also proposed that KST's board has repeatedly acted undemocratically by not recognizing all votes cast, failing to seat dissident directors who won overwhelming majority votes, and by failing to hold timely annual meetings. KST countered that Western Investment's proposal contained materially false and misleading statements and should be omitted. Ultimately, the SEC advised KST that it could not guarantee no action against the fund if the Western Investment proposal was omitted.

SEC Launches New Initiative Focusing on Class Conflicts of Interest

On July 13, 2016, the SEC's Office of Compliance Inspections and Examinations ("OCIE") told financial advisers that it is launching a new initiative focused on investigating whether advisers improperly push more expensive types of mutual funds or college saving plans on to investors without disclosing the fees they receive. Certain mutual funds and 529 college saving plans offer various share classes that can lead to additional fees for brokers. Investment advisers have a fiduciary duty not to sell more expensive share classes when lower priced shares are available to investors. Advisers are also required to disclosure any conflicts of interest to clients. OCIE will be focusing on investment advisers to determine if any advisory practices breach the fiduciary duty, as well as evaluating proper disclosure protocols, including disclosure relating to conflicts of interest and compliance measures.

SEC Names New Co-Head of Investment Adviser Exams

On August 10, 2016, the SEC announced that Kristin Snyder, currently the SEC's regional director for examinations in San Francisco, would co-lead the SEC's Investment Adviser and

Investment Company examination program, which is conducted through the OCIE, with Jane Jarcho, the OCIE's deputy director.

MusclePharm Corp. v. Liberty Insurance Underwriters, Inc. – Directors and Officers Insurance May Not Cover Informal SEC Investigations

In a recent opinion issued by District of Colorado Judge Robert E. Blackburn in the case of *MusclePharm Corp. v. Liberty Insurance Underwriters, Inc.*, the court held that the D&O policy at issue did not provide coverage for the expenses incurred by the insured company relating to an informal SEC investigation. In May 2013, MusclePharm Corp. received a letter from the SEC's Division of Enforcement requesting various documents relating to the company's operations, which specifically stated that the request "should not be construed as an indication that the SEC or its staff believes any violation of law has occurred." In July 2013, MusclePharm Corp. received an order from the SEC Enforcement Division stating that it had "information that tends to show various possible violations," authorizing the SEC to conduct an investigation of potentially prohibited acts. In February 2015, two former officers of MusclePharm Corp. were served with Wells notices. MusclePharm Corp. requested that its D&O insurance carrier cover the costs of the informal and formal investigations issued by the SEC. However, the insurance carrier denied coverage of all expenses except those incurred after the two officers were served with Wells notices. MusclePharm Corp. then sued the insurer for breach of contract, statutory and common-law bad faith, and sought reimbursement. On August 4, 2016, the court granted the insurer's motion for summary judgment agreeing with the insurer that the investigation did not allege an actual nor alleged "wrongful act" within the meaning of the [insurance] policy." As a result, the insurer was not required to reimburse MusclePharm Corp. for any costs related to the investigation prior to the issuance of the Wells notices.

SEC to Require Advisers to Report Clients' Derivatives Risk in Form ADV and Provide Changes to Books and Records Requirements

On August 25, 2016, the SEC announced final changes to Form ADV, which will require investment advisers to disclose additional information about assets held in separately managed accounts including exposure to derivatives and borrowings. These changes will streamline the original disclosure requirements in order to enhance the quality of information clients and the SEC receive. In approving the modifications to Form ADV, the SEC stiffened record-keeping requirements, and will require advisers to retain copies of documents supporting performance assurances made to any single person as well as maintain original communications with a client about the performance of recommended investments. Specifically, the new changes will amend four areas of Part 1A of the current Form ADV including: (1) additional reporting requirements regarding portfolio investments of separately managed accounts; (2) "Umbrella Registration," which refers to registering multiple private fund advisers operating under a "relying adviser" structure as a single advisory business on a single Form ADV; (3) additional disclosures regarding investment advisers and their businesses such as the adviser's internet presence and physical office locations; and (4) particular clarifying and technical changes such as those with respect to "soliciting adviser's clients to invest in a private fund" and "audited financial statements." Investment advisers have until October 1, 2017 to begin complying with the new standards.

SEC Intends to Approve Municipal Securities Rulemaking Board, Financial Industry Regulatory Authority ("FINRA") Pay-to-Play Rules

On August 25, 2016, the SEC stated its intent to approve rules proposed by the Municipal Securities Rulemaking Board and FINRA, which would prohibit both municipal advisers and dealers from soliciting government business for two years after making a political contribution. Currently, the SEC has its own pay-to-play rules,

which bars an adviser for two years from receiving compensation from a government entity if the adviser's executives or other related associates make a campaign contribution to a candidate who could potentially select a firm to manage public pensions or similar accounts.

The FinCEN's Proposed AML Rule and its Implications for Registered Investment Advisers ("RIAs")

In September 2015, the Financial Crimes Enforcement Network ("FinCEN") proposed an anti-money laundering ("AML") rule that would require SEC RIAs to implement compliance programs similar to those required of banks and broker-dealers, governed by the Bank Secrecy Act ("BSA") and the U.S. Patriot Act. Under the proposal, AML programs for RIAs will be required to have: (1) written policies aimed at preventing an adviser from being used for money laundering practices; (2) independent analysis of the program's performance; (3) designated supervisors responsible for overseeing the operations and internal controls of the program; and (4) constant training of personnel. Additionally, RIAs will be obligated to monitor client and investor accounts for suspicious activity and must file suspicious activity reports accordingly. RIAs must also report transactions completed in cash. The proposed rule will also be governed by Section 314 of the U.S. Patriot Act, which permits sharing of financial information among various institutions for the purpose of identifying and reporting suspicious activities to the federal government. While FinCEN will retain enforcement authority over the proposed rule, the authority to examine RIAs for compliance will be delegated to OCIE.

OCIE Examinations to Focus Supervision on Those with Disciplinary History

On September 12, 2016, OCIE announced a focus on examining registered investment advisors who employ or have employed individuals with disciplinary history, such as having been barred or disciplined from a broker-dealer. With the hope of preventing future misconduct, OCIE will pay closer attention to the effectiveness of these advisers' compliance programs. OCIE will also evaluate policies and procedures put in place by these advisers that specifically target risks posed by employees with disciplinary history, and examine the disciplinary information reported on the adviser's Form ADV.

SEC Votes on New Liquidity Rules for Mutual Funds and Exchange Traded Funds ("ETFs")

On October 13 2016, the Securities and Exchange Commission ("SEC") voted to enact Rule 22e-4 under the Investment Company Act of 1940, which requires all registered open-end mutual funds and ETFs (excluding money market funds, or "MMFs") to implement "liquidity risk management programs." Under this new rule, such programs require funds to classify and periodically review the liquidity of portfolio positions, assess and review liquidity risk, and provide management of liquidity risk including a determination of the "three-day liquid asset minimum" – the proportion of a fund's net assets invested in "three-day liquid assets." A three-day liquid asset is defined as an asset the fund believes is convertible into cash within three business days at a price that does not materially influence the value of the asset. Additionally, funds (excluding MMFs and ETFs) will be allowed, but not required, to use "swing pricing" in order to neutralize dilution – a consequence of shareholder purchases and redemptions. Swing pricing generally refers to a fund's ability to adjust the net asset value of its shares by effectively passing on trading and other costs associated with purchases and redemptions to the shareholder. Ultimately, a fund's board, including a majority of independent directors, will be responsible for approving the liquidity risk management program as well as for annually reviewing the program's adequacy. As such, there have been growing concerns that the rule will require board members to be more involved in day-to-day management and technical matters of a fund, which can increase the potential for liability.

SEC ENFORCEMENT ACTIONS

SEC v. Ash Narayan et al., case number 3:16-cv-01417 (N.D. Texas 2016)

On May 24, 2016, the SEC filed suit against Ash Narayan, a former advisor at RGT Capital Management for defrauding clients, including a pitcher for the San Francisco Giants and Mark Sanchez of the Denver Broncos, by shifting client funds to his other business, The Ticket Reserve, Inc., without disclosing his interest in the company or receiving authorization for the investments. Additionally, Narayan received approximately $1.8 million in "finder's fees" from the fund prior to sending the funds to The Ticker Reserve and stated the fees were loans. Narayan also made Ponzi-like payments back to clients in an attempt to hide the fact that he syphoned money to his failing company, The Ticket Reserve, Inc. Since the filing of the suit, Narayan's assets have been frozen.

In the matter of Apex Fund Services (US) Inc. (SEC Admin. File Numbers 3-17299 June 16, 2016 and 3-17300)

The SEC is holding service providers such as fund administrators and accountants legally liable in cases where a fund manager commits fraud or makes material misstatements and the service provider had knowledge or should have had knowledge of the fraud or material misstatement. On June 16, 2016, a fund administrator for Apex Fund Services (US) Inc. ("Apex") was fined over $350,000 for failing to amend accounting errors and respond to illegal activity relating to two of its fund managers, EquityStar Capital Management and ClearPath Wealth Management LLC, each of which committed fraud and/or made false accounting statements. Despite knowing EquityStar's owner was withdrawing cash from its fund, Apex did not change the accounting figures nor disclosures in monthly statements to investors to reflect the same. With respect to Clearpath, it operated a fraudulent accounting scheme by using client money for personal investments, causing $11 million in losses. Apex knew that Clearpath's actions violated investor agreements, but did not report the inappropriate activity nor fix the accounting errors relating to the same. Apex settled the administrative proceeding without admitting liability, but agreed to pay the aforementioned fine and penalties.

> *"Apex failed to live up to its gatekeeper responsibility and essentially enabled the schemes to persist at each of these advisory firms until the SEC stepped in."*
> *– Andrew Ceresney, director of the SEC's Enforcement Division*

In the Matter of WFG Advisors, L.P., (Adm. Proc. File No. 3-17320 June 28, 2016)

The SEC Charged WFG Advisors, L.P. ("WFG"), a registered investment adviser managing approximately $1.4 billion in assets, with violating Sections 206(2), 206(3) and 207 of the Investment Advisers Act relating to improper fees and trading practices. From January 2011 through August 2013, WFG charged its clients a commission and advisory fee although it specifically told clients in its wrap account program that no such fees would be charged with respect to alternative investments. WFG, through its broker-dealer, was also involved in transactions with its advisory clients on a principal basis without providing disclosures and without receiving consent from the client. WFG will pay a civil penalty of $100,000, and consented to the entry of a cease and desist order.

In the Matter of Jan Helen (Adm. Proc. File No. 3-17319 June 28, 2016)

The SEC charged, Jan E. Helen ("Helen"), the owner of Janco Properties as well as the manager and investment adviser to JEP II and JEP III with misappropriating $165,200 worth of funds from pooled investment vehicles. In 2014, the SEC discovered the misappropriation while reviewing Helen's associated broker-dealer. Helen is charged with violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Section 206(4) of the Investment Advisers Act, and the proceeding will be set for hearing.

***Department of Enforcement v. Richard William Lunn Martin* (FINRA disciplinary proceeding number 2013035817701)**

On June 27, 2016, FINRA filed suit against financial adviser, Richard William Lunn Martin ("Martin"), for using false predictions of economic calamity to sell investments in risky exchange traded funds ("ETF"). From March 2011 to July 2015, Martin told clients to invest in leveraged or inverse ETFs to hedge against a future economic downturn. FINRA alleges that Martin did not understand how nontraditional ETFs were used because he recommended to clients to invest long term in ETFs when the prospectuses for the ETFs explicitly stated that the investments should be held for no more than one day. Martin's advice, FINRA claims, violated the rules requiring investment advisers to recommend investments that are suitable for a specific investor. FINRA seeks for Martin to repay investors $8 million in losses plus interest and return fees of $55,912 that he received.

***In the Matter of Dennis J. Malouf*, (Admin. Case number 3-15918)**

On July 27, 2016, the SEC issued an opinion that upheld an administrative law judge's penalty against Dennis J. Malouf, the former president of New Mexico-based investment advisory firm UASNM Inc., which permanently barred Malouf from the investment advisory industry and ordered him to disgorge $562,000 in profits. Malouf was charged with failing to disclose conflicts of interest and correcting disclosure statements relating to UASNM's relationship with a branch of Raymond James Financial Services Inc. The SEC brought an administrative proceeding against Malouf in June 2014, claiming that he failed to seek best execution for trades, correct misleading statements, and disclose conflicts of interests between UASNM and the Raymond James branch. The administrative law judge determined Malouf violated securities laws, barred Malouf from the investment advisory industry for seven and half years and imposed a fine of $75,000 due to Malouf's inability to pay more money.

***U.S. v. Caplitz, et al.*, (D. Mass.)**

On July 27, 2016, Rosaline Herman, a Massachusetts investment adviser, was convicted of conspiracy, investment adviser fraud, tax fraud and wire fraud, arising from her and her partner Henry Caplitz soliciting over $1.3 million from investors to invest in a non-existent hedge fund. The funds raised were used to pay personal expenses for Herman, Herman's family, and her partner, Captlitz. Herman was sentenced to seven years in prison and to pay approximately $1.8 million in restitution.

***U.S. v. Nicholas Mitsakos* and *SEC v. Matrix Capital Markets LLC et al.*, (S.D.N.Y.)**

On August 11, 2016, the U.S. Department of Justice charged Nicholas Mitsakos, the principal of Matrix Capital Markets LLC, ("Matrix Capital") with securities and wire fraud relating to the creation of a fake hedge fund and issuing false marketing materials to attract investors. In 2013, Mitsakos created Matrix Capital, claiming it was a "long short" hedge fund that invested in undervalued securities and sold short overvalued securities. Mitsakos created marketing materials that stated high returns based on a false portfolio. Utilizing the misleading marketing materials of a non-existent portfolio, Mitsakos raised $2 million from a Cayman Island based investor, and used approximately $1.2 million to purchase and sell stocks, and then used the remainder for personal use. This case is currently pending.

***USA v. Everett Miller* (3d Cir.)**

On August 12, 2016, the Third Circuit clarified the definition of an "investment adviser" defining it as "anyone who engages in the business of advising others either directly or through publications or writings, and for compensation, about investing, buying or selling securities and/or provides analyses or reports concerning securities." From June 2006 to December 2010, Miller, through Carr Miller Capital ("CMC") issued promissory notes guaranteeing returns between 7% and 20% per year. Miller then commingled and pooled the money received from investors into CMC's related

bank accounts and allocated the funds to repay prior investors, operating expenses and for personal use. Miller claimed that he never provided security advice to investors because he did not personally meet with CMC investors during the time frame in which the criminal acts occurred. The court rejected this argument stating that based upon Miller's securities advice, investors in CMC bought promissory notes, which the principal payment of those notes was Miller's compensation. Lastly, Miller argued that he was not registered as an investment adviser, but rather an investment representative. The court rejected this argument and relied on the D.C. Circuit's 2015 opinion in *Koch v. SEC*, which held that registration is not necessary to be an "investment adviser" under the Investment Advisers Act. Miller will face a 10-year prison sentence.

***Apollo Management V, LP, et. al.,* (Adm. Proc. File No. 3-17409)**

On August 23, 2016, four private equity fund advisers associated with Apollo Global Management agreed to settle with the SEC for charges of misleading fund investors over monitoring fees, and failing to supervise a senior partner who charged personal expenses to a fund. The SEC alleged that by accelerating the payment of future monitoring fees owed by the funds' portfolio companies, the advisers failed to adequately disclose benefits received to the detriment of investors. As a result, Apollo agreed to cease and desist from future violations without admitting nor denying the SEC's allegations, and agreed to pay $37.5 million in disgorgement of profits, $2.7 million in interest, and a $12.5 million penalty.

***North Valley GI Medical Group et al v. Prudential Investments LLC*, (D. Md.)**

On August 23, 2016, U.S. District Judge James K. Bredar denied Prudential Investments LLC's ("Prudential") motion to dismiss a suit brought by investors in mutual funds who alleged that Prudential breached its fiduciary duty under the Investment Company Act of 1940 by receiving excessive investment advisory fees. The plaintiff investors also criticized the amount of fees Prudential charged for managing contracted sub-advisers as excessive, who they claim performed the large majority of the work, because the fees allegedly had no relationship to the value of the service provided, and the money received as fees were profit, not compensation for services rendered. In his decision, Judge Bredar pointed to the 2010 U.S. Supreme Court case *Jones v. Harris Associates LP*, where the Court opined that in order to face liability under Section 36(b) of the Investment Company Act, an investment adviser must charge a fee that is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." While Prudential argued that the plaintiffs failed to plead any facts regarding fees paid by similar mutual funds, Judge Bredar ultimately denied Prudential's motion to dismiss

> *"A common theme in our recent enforcement actions against private equity firms is their failure to properly disclose fees and conflicts of interest to fund investors."*
> *– Andrew Ceresney, director of the SEC's Enforcement Division*

***In The Matter of Moshe Marc Cohen*, (Admin. Case number 3-15790)**

On September 9, 2016, the SEC upheld an Administrative Law Judge's January 2015 decision, and ordered investment adviser Moshe Marc Cohen to pay over $766,000 in disgorgement and $2.1 million in civil penalties and imposed an industry bar for his role in a variable annuities scheme whereby Cohen profited off the deaths of terminally ill patients. In March 2014, the SEC filed an administrative proceeding against Cohen and broker Michael A. Horowitz, claiming that Horowitz received personal health information of terminally ill patients in hospice care centers in California and Chicago, and then elected the patients as annuitants on variable annuities contracts with death benefits of which Horowitz then sold to investors as the nominees of two

hedge funds. In doing so, Horowitz sought the aid of Cohen to sell annuities to investors, and filled out applications and forms with false and misleading information. While Horowitz settled with the SEC in August 2014, Cohen disputed the charges, and after Administrative Law Judge Murray found that Cohen had violated anti-fraud provisions of the Securities Act.

***Sivolella v. AXA Equitable Life Insurance Company* (D. N.J.)**

On August 25, 2016, in *Sivolella v. AXA Equitable Life Insurance Company*, after a 25-day trial, the U.S. District Court for the District of New Jersey found for the defendants and concluded that the plaintiffs failed to meet their evidentiary burden to show that the defendants breached their fiduciary duty by charging excessive advisory and administrative fees to AXA mutual funds. Plaintiffs argued that AXA breached its fiduciary duty by charging excessive fees to AXA-sponsored mutual funds in violation of Section 36(b) of the Investment Company Act of 1940. The plaintiffs argued that AXA's fees were excessive because AXA had delegated all of its administrative responsibilities to sub-advisers and sub-administrators, yet retained most of the fees, which was unreasonable. AXA, however, utilized a "manager of managers" approach with respect to the role of advisers and administrators. Under this model, AXA remained responsible for advisory and administrative services provided and performing its own services. The court concluded that Plaintiffs failed to meet their burden to demonstrate that AXA's fees were excessive, which were broader than those encompassed to the advisory and administrative agreements, and AXA properly treated fees paid to sub-advisers and sub-administrators as expenses to the advisor in determining the adviser's profitability. Significantly, the court applauded the Board of Trustee's 15(c) review and approval of the advisory and administrative agreement, though the Board had also improved its 15(c) process as a result of filing the lawsuit.

***In the Matter of WL Ross & Co. LLC* (Admin. Proc. File No. 3-17491)**

On August 24, 2016, WL Ross & Co. ("WL Ross"), a private equity subsidiary of Invesco, settled with the SEC and agreed to pay a $2.3 million penalty because from 2011 to 2014 it failed to disclose its fee allocation practices to limited partners. The relative allocation methodology resulted in WL Ross receiving over $10 million from the funds in management fees. WL Ross was supposed to reduce the management fees it received from the funds, but retained the fees instead of giving the fees to the funds to offset management fees. WL Ross did reimburse the funds the $10 million in fees plus interest. WL Ross maintained a practice of allocating transaction fees between the funds it advised based on a given funds' relative investment shares within the portfolio company. The SEC found this practice to be problematic where portfolio company co-investors existed alongside the WL Ross funds. In other words, "WL Ross retained for itself that portion of the transaction fees that was based upon co-investors' relative ownership of the portfolio company, without subjecting such fees to any management fee offsets." Because of these practices, WL Ross made roughly $10.4 million more in management fees than it would have by merely allocating the transaction fees pro rata instead. By failing to disclose how the fees were allocated, the SEC found that WL Ross violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940.

***In the Matter of Orinda Asset Management, LLC* (Adm. Proc. File No. 3-17506)**

On August 25, 2016, Orinda Asset Management agreed to cease and desist, to be censured, and to pay $75,000 in penalties to the SEC for violating Section 34(b) of the Investment Company Act. Section 34(b) makes it unlawful for any person to make any untrue or misleading statement of material fact in any registration statement, application, report, account, record or other document filed with the SEC under the Investment Company Act, or to omit from any such document any fact necessary in order to prevent the

statements made therein from being materially misleading. In 2011, Orinda applied for an exemptive order seeking relief from the shareholder approval requirement with respect to entering or materially amending sub-advisory agreements as well as other disclosures. The Division of Investment Management did not initially approve of the application because it included provisions providing for termination payment should Orinda recommend its lead sub-adviser's termination for something other than cause. Thereafter, Orinda and Advisors Series Trust ("AST") agreed to remove the provisions, and filed an amended application. However, during the interim, Orinda and AST agreed to waive Orinda's ability to terminate or recommend the termination of the lead sub-adviser, and neither side informed the Division of Investment Management of this new arrangement. The Division of Investment Management then granted the exemptive order. Because the filed registration statements of each AST fund advised by Orinda incorrectly stated that the sub-advisory agreements could be terminated at any time by Orinda, and because the statements did not disclose the side agreement Orinda made with AST, the SEC charged Orinda with Section 34(b) violations.

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