ROPES & GRAY

Attorney Advertising

TABLE OF CONTENTS

General Counsel's Address 1

Keynote Address 1

General Session — It's a Small World After All: How Non-U.S. Regulators Affect Your Business 2

General Session — Closer to Home: U.S. Regulatory Developments Affecting Funds 4

Workshop 1-A — Beyond the Usual Suspects: New Issues in Fund Litigation 5

Workshop 1-B — Current Tax Developments 7

Workshop 1-C — Money Market Funds: The Regulatory Hot Potato 10

Workshop 1-D — You Mean I'm a What?! CPO Registration for Fund Advisers Under CFTC Rule 4.5 11

Workshop 2-A — Board Issues Roundtable: Independent Counsel Perspectives 14

Workshop 2-B — Reading ERISA Tea Leaves for Fund Lawyers 16

Workshop 2-C — Rules of the Road: Side-by-Side Management of UCITS and '40 Act Funds 16

Workshop 2-D — It Could Happen to You, Too: Lessons for Fund Complexes from Superstorm Sandy 18

General Session — Developing Products for the New Financial Era: Opportunities and Challenges 20

Workshop 3-A — I'm Not a Lawyer but I Play One on TV: The Increasing Role of Economists in Regulatory Policy 21

Workshop 3-B — The Omnibus Environment: Operational and Oversight Considerations 23

Workshop 3-C — Variable Insurance Products: Innovation and Challenges in an Evolving Environment 24

Workshop 4-A — Accounting and Auditing Update 27

Workshop 4-B — Swaps Regulation: The New Reality for Funds 29

Workshop 4-C — Compliance Never Sleeps: Global Compliance Challenges Facing Funds 31

General Session — OCIE and Enforcement: Current Priorities and What They Mean for the Fund Industry 33

General Session — Ethics and Finance: Some Perspectives from Law, History, and Science 35

Exhibit A — List of Valuation Controls from Workshop 4-A 37

General Counsel's Address

Speaker: Karrie McMillan, General Counsel, Investment Company Institute

Ms. McMillan's remarks focused on "regulatory climate change" for funds, noting that the cost of duplicative and conflicting regulations stemming from changing jurisdictional boundaries, including amendments to Commodity Futures Trading Commission ("CFTC") Rule 4.5, will ultimately be borne by fund investors. She reported that the ICI and U.S. Chamber of Commerce hope to know the outcome of their appeal challenging the amendments to Rule 4.5 before the end of the year. Ms. McMillan also expressed her view that it is dangerous for the Financial Stability Oversight Council ("FSOC") to intervene in money market reform, as it should defer to the extensive expertise and experience of the Securities and Exchange Commission ("SEC") in money market fund regulation.

Ms. McMillan noted the increasingly global nature of the regulatory environment, and the growing influence of global super-regulators such as the Financial Stability Board ("FSB") and the International Organization of Securities Commissions ("IOSCO"). These super-regulators are largely comprised of banking regulators, and therefore tend to discount the role of capital markets regulation, ignoring the concentration of risk associated with moving more financial activities, including money market funds, into the banking system. In her view, financial transaction taxes are harmful to investors and impede efficient markets, reducing investment returns.

Ms. McMillan reported that ICI Global, headquartered in London, was planning to open a new office in Hong Kong in May. ICI Global is working closely with members, regulators, and other thought leaders in Europe and in Asia, to develop and disseminate information to help promote efficient and appropriate regulation in those regions.

Keynote Address

Speaker: Norm Champ, Director, Division of Investment Management, U.S. Securities and Exchange Commission

Mr. Champ reported that he had launched a "change" program to help the Division of Investment Management develop a culture of continuous improvement, and discussed the role of the Division's new Risk and Examinations Group ("REG"). He stated that REG was intended to allow the Division to be proactive in anticipating, rather than reacting to, industry trends. Mr. Champ reported that REG, together with members of the SEC's Office of Compliance Inspections and Examinations ("OCIE"), has been meeting with senior management and fund boards of large and strategically important fund complexes, and intends to meet with firms of all sizes.

Mr. Champ emphasized the "exceedingly important" role of fund directors, suggesting that they serve as the "eyes and ears" of investors and regulators. He noted that the Division has been asking fund directors about the areas in which they provide the most value, and the maximum number of funds a board of directors can effectively oversee. Mr. Champ noted that many issues relating to fund expenses and performance do not lend themselves to consideration

on a complex-wide basis. The SEC staff is also asking fund directors whether they consider the appropriateness of the net fee retained by the adviser of a sub-advised fund in light of the different functions performed by the adviser and the sub-adviser.

Mr. Champ stated that the Division has expanded the level of specialized financial services experience among its own personnel by hiring professionals with substantial industry experience. He emphasized the importance to the Division of obtaining industry input on Division initiatives. As an example, he explained that Division staff has recently been meeting with accounting firms, ICI staff and ICI members regarding the valuation guidance the Division is currently developing. In response to questions, Mr. Champ stated that the Division's conversations with fund directors regarding valuation had been relatively informal, and had not involved providing directors with a list of questions in advance. Mr. Champ declined to predict when the Division's valuation guidance might be released.

Mr. Champ noted that Form N-MFP and Form PF have provided the SEC staff with a highly useful set of data regarding money market funds and private funds, and suggested that it would be useful for the SEC staff to develop similar information streams for registered funds that are not money market funds. He also reported that the Division staff is starting an initiative to streamline existing fund reporting forms in order to make them more useful for regulators and investors, while minimizing the reporting burdens on funds.

General Session — It's a Small World After All: How Non-U.S. Regulators Affect Your Business

Moderator: Susan M. Olson, Senior Counsel, Investment Company Institute

Speakers:
Peter Bonanno, Managing Director and General Counsel, Allianz Global Investors U.S. Holdings LLC
Norm Champ, Director, Division of Investment Management, U.S. Securities and Exchange Commission
Stuart E. Fross, Partner, K&L Gates LLP
Craig S. Tyle, Executive Vice President and General Counsel, Franklin Templeton Investments

This panel explored the impact of non-U.S. regulatory initiatives on the business and activities of U.S. asset management firms, and U.S. fund regulatory developments. Examples of various international policymaking groups cited by Mr. Champ include the G-20, FSB, IOSCO, IMF, OECD, ESMA, and securities and banking regulators from various jurisdictions.

Compensation. Mr. Fross discussed international recognition of the desirability of implementing compensation principles to mitigate the risks of excessive risk-taking. He noted that the Alternative Investment Fund Management Directive ("AIFMD") incorporates many compensation-related principles that impact the remuneration and reporting lines of a wide range of fund advisory personnel. These include senior staff, portfolio managers, traders, directors and non-executive directors, among others. Examples of principles applicable to fixed and/or variable components of compensation include requirements to defer at least 40% of variable compensation, and to link variable compensation to the risk management function of the fund

and the firm. ESMA has developed 171 sub-principles that apply to the AIFMD's 18 overarching principles.

Mr. Tyle pointed out that where private funds offered in Europe delegate advisory responsibilities to a U.S. adviser, the delegate must be subject to an "equally effective" compensation requirement or appropriate contractual arrangements must be put into place so there is no circumvention of the principles on compensation. There is a separate list of factors to consider in evaluating whether an alternative requirement is "equally effective." Mr. Bonanno commented that if a U.S. firm has any business in the European Union, these compensation principles will apply due to pending changes in the passport rules. Although the AIFMD compensation principles are lengthy and technical, they are not entirely inconsistent with evolving U.S. industry practices that seek to align shareholder and portfolio manager interests. Mr. Champ pointed out that parallel compensation-related initiatives are underway in the U.S. under Dodd-Frank rulemaking. The SEC is considering the public comments that it received on proposed rulemaking relating to disclosure of incentive compensation practices, prohibitions on practices that encourage inappropriate risk-taking and minimum deferral requirements.

Penumbra of Financial Stability. Mr. Fross reviewed various AIFMD principles relating to financial stability, including the requirement for a permanent risk management function. This risk management function must be entirely separate from portfolio management and compliance, and the chief risk officer's compensation must be set by the manager's board. Managers also must disclose a fund's "risk tolerances" and provide regular reports as to whether they are operating within those tolerances. Mr. Bonanno observed that by requiring a specific risk management structure, AIFMD principles effectively force global risk management practices to be adopted at many firms. According to Mr. Tyle, as managers respond to these requirements, risk management will become more of a dual function, including both risk management analytics embedded within portfolio management and a top down risk management function with a separate reporting line. Mr. Champ cited parallel regulatory efforts in the U.S., and noted that the SEC's 2011 concept release relating to derivatives included a summary of current foreign practices.

Unbundling of Distribution Remuneration. Mr. Tyle provided an overview of the U.S. registered fund distribution framework. He observed that in the U.S., the fund typically controls the pricing and FINRA regulates activities between a broker-dealer and its customer. In the UK and other similar jurisdictions, there are various limitations and/or prohibitions on commission-based compensation applicable to securities sold as a result of advice. He noted that the UK model limits the "dual roles" of intermediaries trying to serve both funds and clients. In his view, the U.S. model has led to a very competitive, open market. Mr. Champ stated that OCIE is taking a broad-based look at distribution-related compensation, including payments made to intermediaries for purported non-distribution services and how boards oversee these payments.

Impediments to Cross-Border Delegation. Mr. Fross discussed impediments to cross-border delegation of advisory services imposed by the AIFMD "Level 2" implementing regulations which will take effect in July 2013. An alternative investment fund manager ("AIFM") will be deemed a "letter box" entity and will no longer be considered to be the manager of the fund if it delegates too much of its authority or lacks the resources to supervise

delegated tasks and manage risks associated with the delegation. As a result, certain services must continue to be provided offshore rather than delegated entirely into the United States.

Money Market Funds. Ms. Olson stated that money market fund regulation provides another example of how regulation and debate outside the U.S. has a significant impact on U.S. regulation. Mr. Bonanno explained that the G-20 had issued a mandate to the FSB to draft recommendations to reform and strengthen the financial system to prevent another financial crisis, and that the FSB in turn asked IOSCO to develop policy recommendations for money market funds. Key provisions of the 2012 IOSCO report are tracked by the FSOC's proposed money market recommendations.

General Session — Closer to Home: U.S. Regulatory Developments Affecting Funds

Moderator: Karrie McMillan, General Counsel, Investment Company Institute

Speakers: Norm Champ, Director, Division of Investment Management, U.S. Securities and Exchange Commission
Stuart H. Coleman, Partner, Stroock & Stroock & Lavan LLP
Heidi W. Hardin, Senior Vice President and General Counsel, Janus Capital Management, LLC
Robert M. Zakem, Chief Compliance Office and General Counsel, RidgeWorth Capital Management, Inc.

Regulatory Initiatives of the Division of Investment Management. Mr. Champ identified three short-term priorities for the Division: money market fund reform, identity theft red flag rules, and valuation guidance. He urged firms to send "pre-comment" letters to him regarding best practices or problematic practices regarding valuation that the Division might address in the forthcoming guidance. Five longer-term priorities for the Division were identified: review of rules applicable to private fund advisers, follow-up to the derivatives concept release, an ETF exemptive rule, a variable annuity summary prospectus, and enhancements to fund disclosures about operations and portfolio holdings. The Division is in the process of considering the responses to the derivatives concept release, and might seek to address issues raised by derivatives in a series of smaller releases, rather than waiting for an omnibus release seeking to address all issues relating to derivatives. The Division currently has ten full-time personnel working on ETF applications, and Mr. Champ stated that he hoped that adoption of an exemptive rule for relatively routine ETFs might allow those personnel more time to consider innovative applications.

The Division is considering issues raised by private fund advisers regarding restrictions on advertising, and in particular the prohibitions on testimonials and past specific recommendations. The Division has also been working closely with the Division of Market Regulation on proposed amendments to Regulation D to implement the JOBS Act. Another regulatory initiative is to amend Form ADV to clarify the application of its requirements to private funds and to private fund advisers that use a single filing on Form ADV for multiple private fund advisers under common control and conducting a single advisory business. The Division is also pursuing an "IM — Moving Forward" initiative to improve the Division's own organization and operations. Projects underway as part of that initiative include a streamlining

of internal approval processes and the updating of the Division's website. In response to a question, Mr. Champ stated that the Division continued to work with the CFTC on harmonization of disclosure obligations for funds that are ineligible for the Rule 4.5 exemption, and that funds should "be on the lookout" for additional guidance in this area.

OCIE's 2013 Exam Focus on Fund Distribution. Mr. Coleman observed that OCIE's 2013 exam priority with respect to the distribution of registered funds appeared to be focused on the same issues that were raised 15 years ago and had culminated in the "fund supermarket" letter. Mr. Coleman reported that request letters relating to distribution had been mailed the previous week, but a show of hands indicated that no-one in attendance had yet received such a request (or, at least, would publicly admit to it). Mr. Coleman pointed out that OCIE's reference in this context to payments for "preferential treatment" appeared to harken back to a concern expressed in the proposing release for Rule 12b-2 that payments for preferential treatment could subject broker-dealers to a conflict of interest.

Social Media. Mr. Zakem commented on the challenges of fitting communications made using new technology into an older regulatory regime. Mr. Champ reported that on May 15, 2013, the Division had published "IM Guidance" on filing requirements with respect to communications through social media. He noted that many funds had clearly been erring on the side of filing all social media communications, and that the Division had given specific examples of communications that would, and would not, be subject to filing requirements. Mr. Zakem commented on a number of issues that had arisen under his firm's social media policy, including prohibitions on naming the firm or its products, and monitoring the use of social media by its personnel. Ms. Hardin noted that certain social media practices could potentially raise issues under state privacy laws and/or the National Labor Relations Act.

Workshop 1-A — Beyond the Usual Suspects: New Issues in Fund Litigation

Moderator: Daniel T. Steiner, Executive Vice President and General Counsel, ICI Mutual Insurance Company

Speakers: Phillip S. Gillespie, General Counsel and Executive Vice President, State Street Global Advisors
Mark Holland, Partner, Goodwin Procter LLP
Trevor W. Swett III, Member, Caplin & Drysdale

Prospectus Liability Litigation. Settlements in prospectus liability litigation under Sections 11 and 12 of the Securities Act of 1933 (the "1933 Act") arising from the financial crisis have now reached approximately $400 million in the aggregate. Mr. Gillespie attributed this figure to a number of factors: these cases are difficult to win at the motion to dismiss stage; suits often have accompanying regulatory issues as to which issuers seek closure; and the damages measure of rescission yields large figures when share prices are down. But in the more recent past, the numbers of these suits being filed has tailed off. One reason for this is that plaintiffs may bring 1933 Act claims directly against the fund and signers of the registration statement, but not necessarily the adviser. These claims are also governed by a short statute of limitations, requiring suit to be brought one year from discovery of the alleged misstatement. In addition, plaintiffs must overcome quite solid defenses, including the developing defense of lack

of causation. For example, in the recent *Yu v. State Street Corp.* decision in the United States District Court for the Southern District of NewYork, the court ruled that plaintiffs could not establish causation as a matter of law — namely, that the alleged prospectus misrepresentation regarding subprime mortgage-backed securities in the portfolio could not have caused the drop in share price. The reason was that the share price is statutorily set to equal the fund's net asset value ("NAV"), and NAV cannot be artificially inflated by alleged prospectus misstatements — it is driven solely by the value of the securities in the portfolio. This was the only one of the credit crisis cases to rule this way, and is significant in that it suggests that Sections 11 and 12 of the 1933 Act may not provide a remedy in the fund context in most cases. The case was settled before the Second Circuit ruled on plaintiffs' appeal. Finally, it is notable that a prospectus liability case asserted against ProShares, a provider of leveraged and inverse ETFs, was recently dismissed at the motion to dismiss stage — demonstrating that it is indeed possible to have sufficiently rigorous risk disclosures in a fund prospectus to defeat a suit in the early stages.

Rule 10b-5 Litigation. Mr. Holland explained that there continues to be some fall-out in Rule 10b-5 litigation involving funds in the wake of the *Janus* decision in the Supreme Court. For example, in the Citibank Smith Barney case alleging fraud in connection with transfer agency fees (*In re: Smith Barney Transfer Agent Litigation*), the plaintiff was forced to voluntarily dismiss the adviser as a defendant, because under *Janus* the adviser could not be deemed to have made the allegedly fraudulent prospectus statement. In addition, the court dismissed additional claims in a manner that calls into some question the availability of the "fraud on the market" theory of reliance.

Bankruptcy "Clawback" Litigation. Mr. Swett described the ongoing *Tribune* and *Lyondell* litigations, in which creditors in bankruptcy are seeking to recover amounts paid to investors in leveraged buyouts ("LBOs") that allegedly drove the companies at issue into bankruptcy. This puts funds and other investors in the position of having their receipt of LBO proceeds challenged as fraudulent conveyances, despite having had nothing to do with the transaction. Whereas the company and its principals may be challenged under a theory of *intentional* fraudulent transfer, passive investors like the fund defendants in *Tribune* and *Lyondell* are alleged to have benefited from a *constructive* fraudulent transfer. Defendants in both *Tribune* and *Lyondell* have filed motions to dismiss under a safe harbor provision in Section 546(e) of the Bankruptcy Code in both cases, which are awaiting decisions.

Derivative Litigation. Mr. Holland explained that derivative suits stand as the exception to the general rule that the decision to sue on behalf of a fund usually rests with the fund's directors. In a derivative suit, the shareholder seeks to wrest control of such a suit, with the recovery going to the fund — but a large fee to plaintiffs' lawyers. Shareholders must generally make a demand on the board that it take action before filing a derivative suit or demonstrate to the court that such demand would have been futile. When the board declines to sue and the shareholders proceed with a suit anyway, courts will typically defer to the board's decision and dismiss the shareholder suit, unless the board can be shown to have been not independent, not acting in good faith, or not reasonably diligent. In recent years, the plaintiffs' bar has attempted to bring derivative litigation in areas such as 12b-1 fees, auction rate securities, mortgage-backed securities, and investments in gambling stocks. In one recent decision that appears to be an outlier, the First Circuit held that demand on a fund's board of directors was excused as futile, because a majority of the board was not independent under the applicable Delaware law. In most

cases, however, courts tend to be quite deferential to board decisions that have followed well-documented processes for review and determination.

Excessive Fee Litigation. Excessive fee claims under Section 36(b) of the Investment Company Act of 1940 (the "Investment Company Act") are "quasi-derivative" in nature, because they are brought on behalf of the fund, but a direct right of action to bring the case lies with the shareholders or the SEC. Mr. Holland noted that there have been six new Section 36(b) cases since the Supreme Court's decision in the *Jones v. Harris Associates* in 2010 affirming the primacy of the "so disproportionately large" standard. Two of these cases challenging the "split" between advisory and sub-advisory fees as excessive have recently survived motions to dismiss in the District of New Jersey. The latest case has been asserted against BlackRock challenging securities lending fees paid to its affiliated lending agent as excessive because they allegedly exceed what unaffiliated lending agents are typically paid.

Workshop 1-B — Current Tax Developments

Moderator: Keith Lawson, Senior Counsel, Investment Company Institute

Speakers: Robert J. Creaney, Executive Director, Morgan Stanley
Jonathan G. Davis, Vice President, Assistant Treasurer of Tax Oversight, Fidelity Investments
Quyen P. Huynh, Senior Counsel, Office of the Associate Chief Counsel (International), Internal Revenue Service/U.S. Department of the Treasury
William P. Zimmerman, Partner, Morgan, Lewis & Bockius LLP

International Tax Issues — EU Reclaims. Mr. Davis reported that as a result of the May 2012 *Santander* decision in France establishing that Article 63 of the Treaty on the Functioning of the European Union ("EC Treaty") prevents imposition of higher taxes on a foreign fund, including a U.S. regulated investment company ("RIC"), than a domestic fund, some RICs are now taking steps to protect their right to claim refunds of withholding taxes improperly withheld. Mr. Davis admonished that although France has recently set aside money in its 2013-2014 budgets in order to pay these amounts, and, in response to *Santander* and a separate ruling in Sweden, France and Sweden have both repealed the withholding tax for foreign funds, one should not assume that the money will be refunded quickly or smoothly: France is only slowly thinking about paying RICs and, notwithstanding the *Santander* decision, the Swedish tax authorities are apparently still considering the eligibility of RICs for refunds on a fund-by-fund basis.

The prospect of receiving refunds raises significant technical issues concerning the treatment of the amounts that, in retrospect were both improperly withheld and resulted in the pass through of foreign tax credits in excessive amounts to fund shareholders. Ms. Huynh stated her personal view that the most technically correct result may be to require amended Forms 1099, in many cases for several years, and the filing of amended returns by shareholders. This is nobody's favorite result; it would be expensive, unpopular, and ultimately rather unproductive. The ICI suggests that preferable alternatives to this approach include (i) individual closing agreements with funds, although negotiating individual closing agreements would likely take many years and require enormous work on the part of both the IRS and individual fund groups;

and (ii) the ICI's recommended approach of a so-called "negative foreign tax credit" in which the reductions in foreign tax credits that RICs have previously passed through to shareholders occur in future years. This involves some shifting of the burden among shareholders in different years, but is understood to be the most likely to resolve the matter as quickly and as efficiently as possible. According to Ms. Huynh, the IRS is open to suggestions; that said, Mr. Lawson pointed out that the IRS is reluctant to come out with published guidance on which people can rely outside this specific context, ignoring or undermining the technical duty on funds' and shareholders' part to amend, so any such guidance is likely to take the form of an IRS notice that cannot be relied upon outside of this specific context and a specific time frame.

Financial Transaction Taxes ("FTTs"). Mr. Creaney reported that eleven EU countries have recently agreed to impose FTTs, with France and Italy leading the charge: (i) effective August 2012, France imposes a 0.2% FTT on the acquisition of publicly traded equity securities of companies whose market capitalization value exceeds 1 billion Euros (€) and a smaller tax on credit default swaps on EU sovereign debt, and (ii) effective March 2013 (July 2013 for derivatives), Italy imposes a 0.1% FTT (0.12% in 2013) on on-exchange, and a 0.2% tax (0.22% in 2013) on off-exchange, acquisitions of equity securities of companies whose market capitalization value exceeds €500 million, and a sliding-scale FTT on derivatives. Last month. eleven countries, including France, Germany, Italy and Spain, agreed to participate in a proposed European Union ("EU") FTT, with a proposed effective date of January 1, 2014. If and when it comes into force, it will supplant the individual French and Italian FTTs described above; it will also potentially have a significant impact on RICs and, in particular, U.S. money market funds, where, including because of repurchase transactions, there is a risk that an FTT will be assessed multiple times on the same assets each year. Proposals for a U.S. FTT appear to be going nowhere fast.

Foreign Account Tax Compliance Act ("FATCA"). FATCA imposes new documentation, reporting, withholding and/or account diligence requirements, to varying degrees, on foreign financial institutions ("FFIs"), non-financial foreign entities, and U.S. withholding agents. The final FATCA regulations ("Final FATCA Regulations"), published in January, provide for phased implementation of these requirements. U.S. funds are not themselves required to enter into tax compliance agreements with the IRS ("FATCA Agreements"), but will generally be considered U.S. withholding agents under FATCA. U.S. asset management companies similarly may be U.S. withholding agents under FATCA. Non-U.S. funds and asset management companies will very likely meet the definition of an FFI and therefore need to become so-called participating FFIs and enter into a FATCA Agreement. Alternatively, some of these non-U.S. entities may be able to mitigate FATCA's impact by obtaining deemed-compliant FFI status or being covered by an Intergovernmental Agreement ("IGA") in their country of organization, each as described below.

An increasing focus on IGAs between the United States and other countries has been developing. Nine IGAs have been signed or initialed; 60 more are in the works. IGAs are designed to resolve local law conflicts, and, in particular, conflicts relating to the provision of confidential tax information to anyone other than the local-country taxing authorities. There are two IGA models, the first of which can be either reciprocal or non-reciprocal, and allows FFIs to comply with local law by providing information to their local government, which, in turn, provides such information to the U.S. government. The second model is non-reciprocal and

anticipates that FFIs will provide information directly to the U.S. and likely still need to enter into FATCA Agreements with the IRS.

The Final FATCA Regulations evince a more targeted risk-based approach to reduce some of the operational burden on U.S. and non-U.S. entities, including by expanding the categories of deemed-compliant FFIs. There are two types of "deemed-compliant" FFIs: (i) "registered deemed-compliant" FFIs, including qualified collective investment funds, restricted funds, and sponsored investment entities; and (ii) "certified deemed-compliant" FFIs, including sponsored, closely held investment vehicles, limited-life debt investment entities, and owner-documented FFIs. FFIs not falling into one of these two categories generally must become participating FFIs and enter into a FATCA Agreement (unless they are covered by an IGA). In addition, the Final FATCA Regulations provide a few opportunities for fund complexes to centralize their FATCA compliance obligations (e.g., with a U.S. or non-U.S. asset manager).

The IRS has indicated that it will establish an online FATCA registration portal where participating FFIs and certain deemed-compliant FFIs and other entities will register with the IRS and receive a Global Intermediary Identification Number (GIIN); the portal will open no later than July 15, 2013. The IRS will publish the first IRS list of participating FFIs and deemed-compliant FFIs on December 2, 2013 and then update it monthly. The IRS has indicated that October 25, 2013 is the last date for FFIs to register on the portal, in order to be listed as FATCA compliant by January 1, 2014.

Foreign Bank and Financial Report ("FBAR"). FBAR forms are still due by June 30 of each year in respect of the prior calendar year. These are required for persons who have either a financial interest in, or signature authority over, a "foreign financial account." The panelists discussed some of the lingering concerns for fund sponsors regarding signature authority filings for some of their employees. For instance, concerns linger that employees with signature authority over, but no financial interest in, foreign financial accounts of unregistered funds or non-U.S. funds will ultimately need to file FBARs to report all of those accounts for current and certain prior years. Those accounts are not covered by the FBAR regulations' authorized service provider exception for employees and officers of SEC-registered investment advisers. For the past few years, FinCEN has extended the FBAR filing due date for these individuals in respect of these unregistered/non-U.S. fund accounts. Under the latest FinCEN guidance, the due date has been further extended by one year to June 30, 2014.

Camp Proposal. Mr. Lawson spoke about the so-called tax legislative proposal advanced by House Ways & Means Committee Chairman Dave Camp (R-MI) (the "Camp Proposal"). This would have three principal implications: First, it would standardize the tax treatment of and require many more derivative contracts to be marked to the market, resulting in ordinary income or loss in respect of any deemed gain or loss at the end of the taxpayer's year. Given the mark-to-market regime, the ICI is strongly recommending that the Camp proposal provide for short-term gain or loss, or that RICs be given the ability to carry forward net operating losses, which they currently lack, in order to avoid the whipsaw otherwise resulting from ordinary treatment (that is, being required to distribute gains in gain years and no benefit from losses in subsequent years). The Camp proposal would also require the use of average-cost basis — that is, prevent the specific identification or first-in, first-out (FIFO) methods of identifying particular securities being sold. The Camp proposal would also (i) require the current inclusion of market discount,

(ii) expand the wash sale rules to wash sales by related parties, (iii) change the treatment of hedges under financial accounting rules and (iv) change the rules for debt modifications.

Funds of Hedge Funds. Mr. Zimmerman started out by noting that, although registered funds of hedge funds have been the subject of a lot of attention, they do not represent a significant percentage of the industry in terms of assets under management. In the cases where the underlying hedge funds are advised by third-party advisers, those underlying funds are frequently organized as partnerships, which raised a number of interpretive issues affecting qualification issues, most notably relating to qualifying income and asset diversification. It is unclear whether, for Code Section 851(b)(3) diversification purposes, one can or must look through interests in partnerships to the underlying assets, in which case the reluctance of hedge fund managers to provide such data frequently requires the use of third-party service providers to test asset diversification compliance. Such partnerships also frequently fail to provide the information necessary to compute fund income and gains on a current basis, and thus to meet the distribution requirements necessary to ensure that the fund will not be subject to fund-level income and/or excise tax.

Clearing of Derivatives. The Dodd-Frank Act requires central clearing of derivatives in a number of new instances. In order to avoid any implication that the new clearing requirements brought new derivative contracts within the ambit of Code Section 1256, Congress enacted Section 1256(b)(2)(B), which excludes a list of specific types of swaps, including interest-rate swaps, currency swaps, basis swaps, and "any similar agreement[s]" from the definition of a Section 1256 contract. In September 2011, the IRS proposed a new regulation leading to some debate as to what is in or out of the definition of a Section 1.446-3 notional principal contract.

Original Issue Discount on TIPS and Bond Premium Guidance. In January, the IRS issued final and temporary regulations under Sections 171 and 1275 concerning original issue discount on bond premium carryforwards for Treasury inflation-protected securities ("TIPS"). These regulations have two effects: (1) effective for TIPS issued after April 7, 2011, requiring the use of the so-called "coupon bond method" for TIPS with non-*de minimis* premium, and (ii) effective for bonds acquired after January 4, 2013, permitting the deduction of bond premium not previously amortized on the sale of bonds as an ordinary deduction.

Workshop 1-C — Money Market Funds: The Regulatory Hot Potato

Moderator: Jane G. Heinrichs, Senior Associate Counsel, Securities Regulation, Investment Company Institute

Speakers: Dave Fishman, Managing Director, Goldman Sachs & Co.
Rick Holland, Managing Director, Charles Schwab Investment Management, Inc.
Stephen Keen, Counsel, Reed Smith LLP
Craig M. Lewis, Director and Chief Economist, Division of Risk, Strategy, and Financial Innovation, U.S. Securities and Exchange Commission

The panel discussed regulatory activity in 2012 relating to money market fund reform, including the proposed money market fund release that was delivered to the SEC commissioners in July 2012 and the SEC staff study.

Mr. Lewis said that the SEC staff study was undertaken in response to questions posed by Commissioners Aguilar, Paredes and Gallagher and that it addressed and analyzed: (1) the causes of investor redemptions from prime money market funds during the 2008 financial crisis; (2) the efficacy of the 2010 money market reforms; and (3) how future reforms might impact the demand for investment in money market fund substitutes and implications for investors, financial institutions, corporate borrowers, municipalities and states. With respect to the causes of investor redemptions, the staff tried to determine whether the redemptions from prime money funds occurred because the funds had a constant NAV or whether the redemptions were a result of a flight by investors to quality, liquidity and transparency. Mr. Lewis reported that the staff was unable to determine the true cause of the redemptions during the crisis and the study did not definitively determine what the effect of sponsor support was on the market. With regard to the efficacy of the 2010 money market reforms, Mr. Lewis reported that the staff modeled the reforms and found the probabilities of funds breaking the buck were lower with the reforms in place. He noted, however, that the reforms would not have prevented a fund that broke the buck as a result of the Lehman bankruptcy from doing so. Mr. Lewis also reported that it was difficult to determine whether the reforms affected money market fund gross yields. With regard to how future reforms might impact the demand for investments in money market fund substitutes, etc., Mr. Lewis said that those questions were essentially unanswerable.

Mr. Keen discussed the FSOC money market reform proposal and said the government and industry are in uncharted territory. With respect to the floating NAV option, Mr. Fishman noted that this proposal raises significant accounting, operational and tax issues. In discussing the option of imposing a capital requirement and balance at risk requirement, the panel discussed the complexities those elements would create for money market funds and the belief that money market funds have grown in asset size in part because of their simplicity. As part of the overall discussion, the panel discussed the proposal to float the NAV versus having a transparent shadow NAV, and whether there was any benefit to floating the NAV above and beyond what is achieved with a completely transparent shadow NAV. Finally, with respect to capital buffers, the panel discussed the complexities that would exist at banks if they were to provide the capital buffer because of the consolidation rules and capital requirements.

The panel next discussed other proposals under consideration, including redemption gates and standby liquidity fees, which would be triggered by the board of directors/trustees of a money market fund or by specific events that prevent first mover advantage.

Finally, the panel discussed the differences between institutional money market funds and retail money market funds and whether they should be treated differently. Mr. Holland noted that if the government feels compelled to make changes they should focus on large institutional prime money market funds instead of retail money market funds. Mr. Fishman noted a concern that when divisions are made, such as between institutional and retail money market funds, regulatory arbitrage may occur.

Workshop 1-D — You Mean I'm a What?! CPO Registration for Fund Advisers Under CFTC Rule 4.5

Moderator: Karrie McMillan, General Counsel, Investment Company Institute

Speakers: Paul B. Goucher, Vice President and Chief Counsel, Ameriprise Financial, Inc.
Cary J. Meer, Partner, K&L Gates LLP
Nancy M. Morris, Chief Compliance Officer, Wellington Management Company, LLP

This panel discussed the current status of the recent amendments to CFTC Regulation 4.5 that narrow the exclusion for operators of U.S. registered investment companies ("registered funds") from regulation as commodity pool operators ("CPOs").

Ms. Meer noted that a frequently asked question regarding the new Rule 4.5 regime is whether the adviser, as opposed to the fund, is the party who should be filing for a Rule 4.5 exemption and make annual affirmations with the National Futures Association ("NFA"). She noted that a benefit to having the adviser (rather than the registered fund) make the filing is that it is possible for the adviser to claim an exemption from CTA registration under CFTC Regulations 4.6(a)(2) or 4.14(a)(4). The conditions required to qualify for these exemptions may be less demanding than conditions required under the exemption set forth in 4.14(a)(8), which applies when the registered fund itself files for a Rule 4.5 exemption.

Ms. McMillan discussed the status of the legal challenge by the ICI and the U.S. Chamber of Commerce to the Rule 4.5 amendments, which is on appeal to U.S. Court of Appeals for the D.C. Circuit. She said that the oral argument for the appeal is scheduled for May 6, 2013, and a decision is expected during the third quarter of 2013. CPO registration and related requirements are not stayed during the pendency of the litigation.

The panelists discussed the *de minimis* trading thresholds, one of which must be satisfied in order to qualify for exemption under Rule 4.5 - the so-called "5% Test," and the "Net Notional Test". Ms. Meer noted that both tests are measured each time a new commodity interest position is established by the registered fund (including intra-day), and exclude "bone fide hedging" positions from the calculations. Mr. Goucher and Ms. Morris said that their firms and others in the industry have tended to utilize the Net Notional Test due to difficulties and complexities associated with satisfying and testing for compliance with the 5% Test, including the fact that margin levels for broad-based stock index and security futures often exceed levels for other commodity interests. The panelists generally agreed that the carve outs for "bone fide hedging" positions are complex and difficult to apply in practice, and that firms have tended to ignore them in day-to-day testing unless a registered fund is otherwise close to exceeding the applicable trading threshold.

Monitoring for registered fund compliance with the *de minimis* trading thresholds is more complex where the registered fund's portfolio is managed by one or more sub-advisers, particularly third-party sub-advisers. Ms. Morris advised that the adviser/manager should be prepared to engage in focused oversight and coordination with the sub-adviser(s) to ensure that a sub-adviser's trading activities do not cause the trading thresholds to be exceeded for the registered fund as a whole.

Mr. Goucher addressed the marketing restrictions component of Rule 4.5 eligibility. He suggested that advisers step back and consider the purpose for which a particular registered fund is established, how it will be marketed and how heavily trading in commodity interests will

factor into the registered fund's returns. It was suggested that advisers review derivatives disclosures in the prospectuses of their registered funds and consider whether the disclosures may be overly broad or detailed in relation to a registered fund's use or anticipated use of applicable derivative instruments, which could give the wrong impression with respect to compliance with the marketing restrictions. With regard to the status of the CFTC's proposed rulemaking to "harmonize" CFTC and SEC requirements applicable to CPOs, Ms. Meer indicated that the CFTC staff was expected to issue final harmonization rules in the first quarter of 2013. In addition, she stated that, pending further review, NFA staff will consider compliance by a registered fund's principal underwriter or other broker-dealer with applicable FINRA rules and requirements regarding registered fund promotional materials to satisfy analogous NFA rules applicable to CPOs and CTAs.

The panel discussed the use by a registered fund of a controlled foreign corporation ("CFC") for its commodities/derivatives trading. Ms. Meer noted that the CFC's operator, usually the registered fund's adviser, must be able to rely on an exemption separate from the registered fund's exemption, or the CFC operator/adviser will have to register as a CPO with respect to the CFC. In this circumstance, the CFC operator/adviser is unlikely to be able to qualify for the Regulation 4.13(a)(3) exemption in light of the applicable *de minimis* test and other conditions applied at the CFC level. The application of Rule 4.5 to "funds of funds" also gives rise to its own set of issues. Mr. Goucher observed that, in accordance with recent CFTC staff letters, a fund that invests in real estate investment trusts (REITs), business development companies (BDCs) and/or securitization vehicles, for example, could be deemed a commodity pool, unless the adviser and fund have taken advantage of temporary relief issued by the CFTC Division of Swap Dealer and Intermediary Oversight ("DSIO") dated November 29, 2012. Often it may be impossible for an adviser to determine whether an underlying REIT, BDC or other fund investment satisfies the *de minimis* trading thresholds in Rules 4.5 and 4.13(a)(3). The DSIO temporary relief is not available to sub-advisers.

Ms. Meer discussed NFA Bylaw 1101, which raises issues as to whether a CPO member of the NFA that advises a registered fund must ensure that all investors in the registered fund and various counterparties that need to be registered with the CFTC or need to be members of the NFA are registered or are members as required. She reported that the NFA has determined, until further notice, that a registered fund will be deemed to have complied with Bylaw 1101 if its CPO ensures that any futures commission merchant ("FCM") through which the registered fund transacts in commodity interests and any sub-adviser to the registered fund are properly registered with the CFTC and members of the NFA, or in the case of a sub-adviser, exempt from CTA registration. She noted that diligence need not be conducted for this purposes with respect to investors in the registered fund for the time being, and that the NFA intends to issue further guidance on this topic.

Ms. Morris discussed reporting requirements applicable to advisers that register as CPOs and/or CTAs as a result of the Rule 4.5 amendments, including CFTC Regulation 4.27, which requires registered CPOs and CTAs to file information about non-exempt pools with the CFTC on Forms CPO-PQR and CTA-PR, respectively. She noted that an adviser to a registered fund that is required to register as a CPO and/or CTA as a result of the Rule 4.5 amendments is not subject to the Regulation 4.27 filing requirements until harmonization is effective. She noted, however, that initial completion of these forms requires manual completion of perhaps thousands

of individual data fields on the NFA's EasyFile System, and recommended that newly registered CPOs/CTAs gives themselves substantial lead time to prepare for these and other applicable reporting requirements.

Workshop 2-A — Board Issues Roundtable: Independent Counsel Perspectives

Moderator: Amy B. R. Lancellotta, Managing Director, Independent Directors Counsel

Speakers: Marguerite C. Bateman, Partner, Schiff Hardin LLP
Thomas S. Harman, Partner, Bingham McCutchen LLP
Bruce G. Leto, Partner and Chair of Investment Management Group, Stradley Ronon Stevens & Young, LLP
Gregory D. Sheehan, Partner, Ropes & Gray LLP

This panel discussed the perspectives of independent counsel with regard to a number of issues currently facing independent fund directors.

Valuation. Mr. Sheehan provided an overview of the SEC's pending action against the former directors of the Morgan Keegan funds relating to the directors' alleged failure to properly oversee the valuation of fund holdings. He observed that the SEC had now brought charges against the same directors that it had previously asserted were victims of fraud. Mr. Sheehan noted that cases against fund boards are rare but not unprecedented. However, unlike Morgan Keegan, in most prior cases there were either affirmative bad acts by the directors or obvious red flags missed by the board. Expert reports prepared in support of each side of the case have been submitted, and former SEC Chairman Harvey Pitt's report on behalf of the SEC suggests limitations on the extent to which boards can rely on the fund's counsel, chief compliance officer and auditors. Mr. Sheehan reviewed several lessons learned from the Morgan Keegan case, noting that fund valuation procedures should (i) define carefully the role of portfolio managers in the valuation process and address related conflicts of interest, (ii) identify to whom responsibility has been delegated and establish clear oversight roles, and (iii) provide specific methodologies for pricing portfolio securities wherever practicable. Mr. Leto noted that, while it is important to review fund valuation procedures in light of the Morgan Keegan case, he recommended holding off on any major rewrites until the case settles out. Mr. Sheehan indicated that he agrees with that approach in most cases, but noted that where policies are deficient in obvious ways, he would not delay making changes.

Mr. Sheehan observed that the Morgan Keegan case raises questions as to the proper role of fund directors in valuation matters more generally, including the level of involvement required to discharge their responsibility to act "in good faith." He discussed the importance of creating a good record of oversight, and noted that many boards were in the process of evaluating the reporting they receive from fund advisers. As to the question of whether additional SEC valuation guidance would prove helpful, Mr. Sheehan observed that, at least based on Mr. Pitt's expert report, there may be a significant gap between the SEC's views and current board practices, and the industry needs to engage in a robust dialogue with the SEC before guidance is issued. In response to a question from the audience regarding a call between senior SEC staff personnel and the Morgan Keegan directors without their counsel present, the panelists agreed that directors should not participate in discussions with SEC staff without counsel present.

Alternative Investment Strategies. Mr. Leto reviewed key issues for independent directors with respect to registered funds pursuing alternative investment strategies. He stressed that it is in everyone's interest that fund directors fully understand new products, and discussed the importance of obtaining clear explanations from management that do not contain unnecessary complexity or jargon. In particular, risk management considerations, including whether a new fund or strategy will introduce new risks or complexities, should be fully explained. Operations and back office considerations also need to be vetted and understood prior to fund launch, including the use of new instruments or investment strategies and their effect on a fund's valuation procedures, use of leverage, liquidity, compliance monitoring, custody and third party service providers. Mr. Leto also noted these funds may present novel challenges in the Section 15(c) review, including the need to understand the comparability of any relevant performance data presented to the board and the proposed fee structure. There are also specific challenges associated with developing clear, accurate prospectus disclosure for alternative products.

Omnibus Relationships. Mr. Harman noted that, in 2012, the SEC began conducting sweep examinations looking at payments to intermediaries, and that the topic was featured in the SEC's 2013 Examination Priorities memorandum under the somewhat pejorative heading of "Payments for Distribution in Guise." A major industry shift from NSCC to omnibus sub-accounting has occurred in recent years, and a recent NICSA white paper estimates that 80-90% of registered fund assets are now held through omnibus accounts. The SEC is focusing on fees paid by funds and advisers for these services and the extent to which fund boards are overseeing these payments. Boards can authorize funds to make payments outside of Rule 12b-1 for non-distribution services, but a focus of the SEC is to determine whether certain of these payments involve a distribution component. According to Mr. Harman, boards should make an effort to understand these arrangements, such as conducting an annual review of omnibus relationships and receive regular quarterly reports of related expenditures and services. Mr. Leto commented that analysis of whether these payments are for non-distribution purposes may be made more difficult where the fees are calculated by reference to basis points rather than the number of sub-accounts.

Governance Issues. Ms. Bateman addressed the topic of mandatory retirement policies. She said that approximately 65% of fund boards report having adopted a retirement policy, and that the average retirement age set forth in those policies was approaching 75 years. An increasing number of boards have considered or implemented term limits on chair service. With regard to self-assessments, she indicated that a number of boards have adopted the practice of distributing lists of questions in advance of self-assessments but not asking directors to complete anything beforehand. In Mr. Leto's view, it is important that boards should keep the focus of self-assessments on the board's performance rather than criticizing the adviser. According to Ms. Bateman, peer reviews remain uncommon, as many boards find them uncomfortable. On the topic of maintaining good board minutes, she noted that many boards keep minutes of their executive sessions, although these minutes cannot be protected in litigation. She recommended that directors destroy all extraneous notes and allow the minutes to speak as the record of the meeting. Ms. Bateman also commented on the perils of email, and recommended that board members use email mainly to schedule meetings rather than to engage in substantive discussion.

Workshop 2-B — Reading ERISA Tea Leaves for Fund Lawyers

Moderator: Anna A. Driggs, Associate Counsel, Pension Regulation, Investment Company Institute

Speakers: Bradford P. Campbell, Counsel, Drinker Biddle
Robert J. Doyle, Vice President, External Affairs, Prudential Financial, Inc.
Lisa Hund Lattan, Partner, Utz & Lattan, LLC

Mr. Campbell discussed the 2010 proposed DOL regulation relating to the definition of "fiduciary." He stated that the proposed regulation was an unexpected revision to a 35-year old regulation defining fiduciary conduct, and that, most advisors, including broker-dealers, would be ERISA fiduciaries under the revised definition. The revised definition would also apply to IRAs. The implications of ERISA fiduciary status for current non-fiduciary advisors include the application of prohibited transactions rules on their conduct (e.g., no principal transactions or variable compensation) and the incompatibility of these organizations' current business models with the requirements that accompany being a fiduciary. Due to bipartisan congressional opposition, the proposed regulation was withdrawn. However, Mr. Campbell indicated that the industry expects that the DOL will re-propose the regulation in July of this year with certain modifications. The current expectation among practitioners is that the re-proposed regulations will still apply to IRAs and there may be class exemptions for broker-dealers. Ms. Lattan commented that these rules will affect those who distribute mutual fund products and even internal products because of the application of the new fiduciary definition to IRAs. Mr. Doyle expressed his belief that the revised rules will more likely be re-proposed in the fall because of the pending nomination of the new Department of Labor Secretary.

Ms. Lattan noted that with respect to Regulation 408b-2 (Service Provider Disclosures), many service providers, including transfer agents and sub-transfer agents for mutual funds, may be "recordkeepers" under the rules, and therefore, subject to the disclosure requirements of the rules. A summary or guide on how to make required disclosures is anticipated to be issued by the DOL in the near future. Ms. Lattan said that the DOL is lagging behind the SEC with regard to electronic disclosure issues.

Finally, the panel noted several topics that should be on the industry's "radar screen," including auto-IRAs, lifetime income disclosures, 401(k) simplification, tax reform, state sponsored retirement plans for private-sector employers/employees and recent enforcement/litigation about error correction and "float income" in recordkeeping.

Workshop 2-C — Rules of the Road: Side-by-Side Management of UCITS and '40 Act Funds

Moderator: Christopher D. Christian, Partner, Dechert LLP

Speakers: William E. Corson, Chief Compliance Officer, Manulife Asset Management (US) LLC
James S. Hamman Jr., Director, Artisan Partners Global Funds plc

Timothy B. Parker, General Counsel, Matthews International Capital Management, LLC

The panelists discussed distinctions between U.S. mutual funds registered under the Investment Company Act and under the Undertakings for Collective Investments in Transferable Securities ("UCITS") in such areas as fund governance, side-by-side management, valuation and the use of derivatives, and the challenges facing U.S. managers who offer both products simultaneously across global markets.

Mr. Christian summarized and compared the organizational and governance structures of U.S. mutual funds and UCITS. U.S. mutual funds are organized in corporate form (generally as corporations or business trusts) under U.S. state law, whereas UCITS may be organized either in corporate form or in contractual form, in each case under the laws of an EU Member State. Under the corporate form of UCITS, boards of directors have oversight responsibility. Contractual UCITS are not legal entities and delegate all management and oversight responsibilities to a separate management company (a "ManCo") and its directors/senior management. The common contractual UCITS form is utilized, in part, so that pension funds and other eligible investors may avoid foreign withholding taxes that would otherwise be imposed on investments through a corporate form UCITS.

Mr. Hamman noted that, unlike directors, of funds registered under the Investment Company Act, there are no independence requirements for UCITS directors, and often a majority of the directors of a UCITS are affiliated with the management company/sponsor. UCITS directors are required to be authorized and approved in advance by the applicable EU Member State and must be of good repute and have sufficient experience, among other requirements. Certain EU Member States require that a minimum number of directors be resident there. These requirements have led to the development of a group of "professional" UCITS directors who serve on the boards of multiple UCITS offered by different sponsors and bring a good deal of knowledge and experience to the position. Mr. Parker said that interaction between a U.S. investment manager and UCITS directors is similar to the relationship between an investment manager and the officers of a U.S. mutual fund (as opposed to its board of directors). He noted that an affirmative "watchdog" role is assigned to an independent custodian (depositary)/trustee of a UCITS to varying degrees, depending upon the regulations of the applicable EU Member State. These duties of the custodian include ensuring that the sale/redemption and valuation of the units of a UCITS are effected in accordance with applicable laws and the UCITS' governing documents and providing periodic reports to the UCITS' board, regulators and auditors.

Mr. Corson observed that, in contrast to U.S. law, the UCITS Directive imposes detailed investment parameters and restrictions on UCITS through specific regulations, including limiting investments to defined "eligible assets" and imposing requirements with respect to liquidity, diversification and concentration, derivatives and borrowings/leverage, investing in loans and short selling, among others. In light of divergent regulations, U.S. investment managers simultaneously operating under both regimes face challenges attempting to minimize performance dispersion between U.S. mutual funds and corresponding UCITS. The panelists discussed other discrepancies between the two regulatory frameworks, including issues related to trade allocation/aggregation, best execution, affiliated transactions, counterparty exposure and disclosure of portfolio holdings. The panelists indicated that their firms have generally

attempted to address these issues by starting with existing U.S.-based mutual fund compliance policies and practices and layering in UCITS requirements to develop as uniform an approach for both regimes as possible. Mr. Corson noted that this often involves working closely with the directors' office and/or the custodian/trustee of the UCITS to develop acceptable solutions. Mr. Hamman indicated that his firm utilizes daily fair valuation of non-U.S. securities for its U.S. mutual funds, but currently does not for its UCITS products.

Unlike a U.S. mutual fund, a UCITS investment manager may pay reimbursements or rebates of management fees to particular institutional investors in the UCITS. Mr. Parker pointed out that these arrangements for UCITS can complicate the Section 15(c) review and related disclosures in the case of side-by-side management, particularly with respect to the comparison of a U.S. mutual fund's fees with those of similar funds and accounts managed by the investment manager. The panelists agreed that U.S. managers should carefully consider requesting information regarding rebates/reimbursements from a UCITS, and stressed the need for transparency and open communications with the boards of U.S. mutual funds regarding these arrangements as part of the Section 15(c) process.

The panelists discussed the areas in which the UCITS regime in Europe specifically regulates a fund's use of derivatives, including the types of derivatives that may be used and requirements with respect to underlying instruments, eligible counterparties, valuation, liquidity, leverage and risk monitoring, among others. In contrast to the implicit leverage limits that have evolved under the U.S. regulatory regime as a result of interpretive guidance issued by the SEC and its staff under Section 18 of the Investment Company Act, the UCITS regime imposes a "global exposure" limit, which stipulates that a UCITS fund's exposure to derivatives may not exceed the total net value of its portfolio, taking into account the value of the assets underlying the derivatives, counterparty risk, potential future market movements and the time required to liquidate a position. Mr. Corson outlined different methods used to calculate global exposure for these purposes under the UCITS regime and related guidance, including the "commitment approach" and more complicated "value at risk" (VaR) approaches (including a relative VaR or absolute VaR measurement) for more complex investment strategies. UCITS are required to have a formal risk management process or system that includes, among other features, a process for providing an independent valuation of over-the-counter derivatives used by the fund. In response to these UCITS requirements, Mr. Corson's firm has established a separate risk committee within the advisory firm that reports separately to the fund or ManCo board (as applicable). Among other responsibilities, this risk committee calculates VaR for applicable funds on a daily basis.

Workshop 2-D — It Could Happen to You, Too: Lessons for Fund Complexes from Superstorm Sandy

Moderator: Lawrence H. Kaplan, Partner and General Counsel, Lord Abbett & Co. LLC

Speakers: Wayne Behrens, Vice President, Enterprise Business Resilience, Franklin Templeton Investments
Elizabeth Duggan, Managing Director, Global Evaluated Services, Interactive Data Corporation
Eileen Gilfedder, Managing Director, BNY Mellon Asset Servicing

The panelists described the unprecedented levels of damage from Superstorm Sandy, which included employees who had lost their homes; office buildings that were flooded, inaccessible, and without power; and commuters who could not get to work.

Lessons learned. Ms. Duggan stressed the need for funds to confirm that their pricing vendors have tested their business continuity plans. Her firm based its level of preparation for Superstorm Sandy, in part, on its experience with prior storms. She noted that approach proved to be inadequate in hindsight and stressed the importance of clear communication up front with clients about a firm's disaster recovery capabilities. Otherwise clients may have unrealistic expectations. The Superstorm Sandy event made clear to the panelists that clients have an expectation that businesses will remain open and functioning with respect to essential matters notwithstanding extremely difficult conditions.

Panelists suggested companies complete a geographic analysis of where their employees live to assess quickly how many and which employees will be (or have been) affected by an event. Another suggestion was for companies to consider having employees work from home two times per year as a way to iron out connectivity and other technological issues in a non-emergency setting. A company's technology support department plays a crucial role and it is important that they have the ability to work from home, as many are reluctant or unable to travel to work during an event. The panelists suggested some post-Superstorm Sandy diligence questions for funds to pose to their service providers: (i) how did the service provider plan for the storm? (ii) how was the provider's implementation of the business continuity plan overseen? (iii) what were the results? and (iv) how have changes to the plan been tested?

Mr. Behrens stressed the importance of having multiple back-up systems. Just having Citrix is not enough in the event of a major event. The more points of connectivity you have the better as some will inevitably fail. As an example, his company briefly had an issue with obtaining fuel for their backup generators and a generator that could work on either diesel or natural gas would have given the company more options. He also noted keeping employee contact information up to date is very important. Mr. Behrens said that many of his company's emergency communications were not getting through to employees because the company did not have current phone numbers for all of its employees.

Ms. Gilfedder noted certain practical issues proved to be of great benefit to her company. For example, many of her company's suburban office locations are located within walking distance of hotels, which proved very helpful to essential employees working from those facilities. She noted her company's clients expected continuous service and the ability of those clients to call and speak to a person proved most comforting to those clients even if operations were not at normal levels.

The panelists noted that one benefit of having a backup facility located geographically far from a main office is that the two locations are unlikely to both be affected severely by the same event. However, the panelists observed that geographic distance raises real concerns regarding how many employees will be willing and able to go to that backup location during the pendency of an event that may also have affected their homes and their ability to travel. Companies also need to consider whether they would be willing to relocate family members of critical employees

in order to assuage their employees' concerns regarding relocating during an event. Mr. Kaplan said that Lord Abbett has moved its back-up facility twenty-five miles away from its main office, but that the location was still close to the homes of a large group of its employees, providing some geographic protection while also making it easier for a significant number of employees to work from the back-up facility.

Other helpful resources available to fund families include the Independent Directors Council's webinar on lessons learned from Superstorm Sandy and the ICI's business continuity and technology committee, which is soliciting input from members on what additional information or materials it could produce that would be helpful. The ICI was recognized for being helpful in obtaining information and guidance from the regulators and exchanges and disseminating that to the industry in the immediate aftermath of the storm.

General Session — Developing Products for the New Financial Era: Opportunities and Challenges

Moderator: Brian Reid, Chief Economist, Investment Company Institute
Speakers: Joseph A. Carrier, Chief Risk Officer, Legg Mason, Inc.
Amy D. Duling, President of the DundeeWealth Funds and Chief Compliance Officer, DundeeWealth US
Michael A. Perry, Head of Wealth Management Advice & Platforms, UBS
Thomas S. Schreier, Jr., Vice Chairman of Wealth Management, Nuveen Investments

The panel began by discussing whether a new financial era had dawned, noting (i) changes in the global regulatory environment, (ii) changes in the relationships between governments around the world and their citizens and markets following recent financial crises, and (iii) the desire for the upcoming investing generation to access investment advice differently (for instance, electronically).

Mr. Perry then discussed product demand in today's environment. He said that, following the "Great Recession," investors were increasingly focused on not losing money, and on cash flow. Ms. Duling noted that demographics are also contributing to this trend: as investors age, their interest in capital protection and cash flow increases. Mr. Perry said that these goals were driving investors to assess the diversification of their portfolios at an increasingly granular level. For example, rather than being satisfied with an allocation to equity and fixed income investments, investors now seek exposure to narrower investment classes such as real estate and master limited partnerships. Investor flows are increasingly less product-oriented than in the past, meaning that investors focused on their needs first and then on products that can satisfy these needs. Mr. Schreier said that a significant portion of new flows over the last 10 years had gone into new products. He said that it is critical for asset management firms to bring out the *right* new products, which involves identifying the right investment themes (recently, international and alternative investments) and working with distribution channels to determine what products fit current and emerging client needs.

The panel discussed the key elements of product design in the current environment, identifying the following important features: (i) distinctive performance, (ii) credibility in the

product category, (iii) the ability to describe the product in simple terms, (iv) having a purpose (it's not enough to bring out a good product; the product must offer a solution to a real problem), and (v) delivering what was promised. It's very important to exercise imagination and consider all possible scenarios, i.e., does the product perform as expected across these scenarios? Mr. Carrier discussed the role of risk management and said that a "trust but verify" approach to risk management made sense when the right teams were performing the right functions (such as valuation or tax qualification testing). Risk management should serve "guardrail and streetlight" functions, permitting the portfolio management team to do its job while keeping the team informed.

The panel concluded by discussing the evolving discussions between advisers and boards of registered investment companies with regard to new products. The consensus was that the use of derivatives, sales strategies and anticipated asset growth, valuation, liquidity, and disclosure remained key topics of conversation. In addition, it is becoming more important to review with boards how these aspects of new products would evolve in various scenarios over the life cycle of a product. In light of FINRA's focus on complex products, Mr. Schreier said that there was increasing interest in how brokers make recommendations to their customers. Ms. Duling noted that it was increasingly important for asset management firms that were affiliated with banks or international organizations to consider the ramifications of their actions for their bank or foreign affiliates.

Workshop 3-A — I'm Not a Lawyer but I Play One on TV: The Increasing Role of Economists in Regulatory Policy

Moderator: Sean Collins, Senior Director of Industry and Financial Analysis, Investment Company Institute
Speakers: Barry P. Barbash, Partner, Willkie Farr & Gallagher LLP
Michael J. Downer, Senior Vice President, Secretary and Chief Legal Officer, Capital Research and Management Company
Satish M. Kini, Partner, Debevoise & Plimpton LLP
Erik R. Sirri, Professor of Finance, Babson College

The panel began with a review of the "sea change" over the last ten years, as Mr. Collins described it, in the ways in which economists and lawyers interact. Mr. Barbash reviewed the history of the requirement that regulators conduct a cost-benefit analysis of their proposed regulations. He said that the Sunshine Act, enacted following the Watergate scandal, had made it more difficult for the SEC commissioners to meet informally. He said that subsequent acts governing the regulatory process had been generally interpreted to require that rulemaking simply contain certain "incantations," but that when NSMIA was enacted in 1996, adding section 2(c) to the Investment Company Act (and analogous provisions to the other federal securities laws), the situation changed and it became necessary for the SEC to consider whether its rulemaking would "promote efficiency, competition, and capital formation" in addition to the protection of investors. This requirement lay dormant until it was used, successfully, to challenge the independent chair rule; it was subsequently used to challenge, among other things, the hedge fund adviser registration rule and the proxy access rule. As a result, the SEC must be much more rigorous in its economic analysis of new rules. Mr. Kini noted that the independent

agencies (such as the Federal Reserve and the FDIC) were not subject to these legal requirements, but had voluntarily agreed to perform cost-benefit analyses of their rulemaking.

Mr. Sirri observed that enhanced economic analysis of new regulations had two important benefits: (i) it improved the position of the regulator *vis-a-vis* subsequent court review; and (ii) it improved the effectiveness of regulation. Of the two benefits, Mr. Sirri (and the panel generally) considered the latter to be of much greater societal significance. He said the SEC appeared to tend towards using economic analysis as a defensive measure against challenges to its regulations, in contrast to institutions like the Federal Reserve, which is more inclined to first study empirical evidence and then design regulations based on those studies. Mr. Kini noted that economists at the Federal Reserve had great influence, and that they sought to influence policy debates through their studies and economic analyses.

Mr. Barbash pointed out the risk that the SEC's efforts at money market reform might be overturned if the related cost-benefit analysis is inadequate. He suggested that recent efforts to address systemic issues in the money market industry through manipulation of the conditions to the rule providing an exemption from valuation requirements may well be difficult to defend through a cost-benefit analysis. In his view, a court would likely apply an economic analysis that is broader than the analysis the SEC is likely to apply in determining how to tweak a complicated and detailed rule. This highlights a fundamental mismatch between trying to address a systemic industry issue with a finely tuned exemption. Mr. Downer noted that Rule 12b-1 reform was in a similar posture, in that it appeared premised on a conclusion rather than based on an objective economic analysis of all of the alternatives.

It was noted that economic analysis may go against the SEC's instincts if it suggests a rule that trades some investor protections away to increase efficiency or capital formation. As a result, Mr. Sirri observed, the SEC is somewhat biased towards rulemaking through enforcement actions which focus on investor protections without the need for an economic analysis. There was a general sense that the SEC would likely produce better rules if it were to embrace empirical economic analysis and consider a broader range of possibilities. The SEC appeared to be taking steps in this direction, as evidenced by its recent release seeking information in connection with its consideration of a fiduciary standard for broker-dealers. However, Mr. Barbash noted, it will be difficult for the SEC to rely too heavily on economic analysis, because this is unlikely to be a sufficient defense against a hostile Congressional committee. An SEC representative summoned to Capital Hill needs a better explanation than "the rule was economically efficient" when an event occurs that harms investors.

The panelists concluded by discussing the role that the industry could play in supplying the SEC with empirical data. Mr. Kini predicted that regulators would request more data of the industry in the future, and noted that the FOIA exception protecting such data does not clearly apply to all agencies (such as the FSOC). Some firms protect against this by providing aggregated data for the record, and particularized data to regulators only on the understanding that the regulator is not allowed to keep it. Mr. Barbash noted that even though industry data might improve the quality of regulation, there is not necessarily much of an incentive for the industry to do so, since the return to the industry is uncertain and the risk of disclosure is meaningful.

Workshop 3-B — The Omnibus Environment: Operational and Oversight Considerations

Moderator: Kathleen C. Joaquin, Chief Industry Operations Officer, Investment Company Institute

Speakers: Stuart J. Bateman, Senior Vice President, Franklin Templeton Investments
Peter G. Callahan, Senior Vice President, AllianceBernstein Investor Services, Inc.
William J. Galvin, Managing Director, Invesco Investment Services, Inc.

The panel discussion focused on operational challenges and trends relating to omnibus sub-accounting arrangements and omnibus retirement plan recordkeeping arrangements under which a broker or other intermediary serves as the primary recordkeeper for beneficial owners' accounts.

Managing Sub-Accounting and Recordkeeping Arrangements. Mr. Callahan reviewed the process for negotiating an agreement for sub-accounting and recordkeeping services and made several observations. A key point is to clearly allocate responsibilities between the parties for each activity and to lay out how monitoring will work. In negotiating the fee schedule, it is important to decide whether to calculate fees using basis points or the number of accounts. Since it is very difficult to add provisions later on, the initial contract negotiation is critical to establishing the working relationship. A significant recent change is the expanding scale of these types of arrangements. Mr. Callahan said that AllianceBernstein has moved from having 50% of its investor base held through broker omnibus accounts 5 years ago, to approximately 70% at present. Mr. Bateman stated that 75% of Franklin Templeton fund shareholders are now in omnibus accounts. In response to a question, Mr. Callahan stated that AllianceBernstein addresses potential disproportionality of per-account fees for small accounts and basis-point charges for large accounts by placing caps on the fees or, for certain arrangements, adopting a "lesser of" structure that flips the pricing for an arrangement between basis-point and per-account depending on which method would result in a lower aggregate fee.

Transparency in Intermediary Oversight Programs. The panelists agreed that fund companies have varied approaches to seeking a degree of transparency into omnibus arrangements. Noting that transparency should not be equated with oversight, Mr. Galvin stated that most fund companies prefer to perform targeted checks on their omnibus arrangements. These checks might seek, for instance, to test compliance with Rule 22c-2 under the Investment Company Act or to confirm whether the broker is appropriately policing the fund company's policies on low-balance accounts. Due to the large number of omnibus broker relationships, Mr. Callahan cautioned that a fund company can spend more time proofing data and confirming the data's completeness than actually conducting surveillance. As a result, a strong premium should be placed on receiving "smart" data in a usable format. Mr. Bateman observed that changes in technology facilitate improvements in the presentation and processing of data, and pointed to the possibility of working with DTCC to use its existing services to help standardize and automate data-flows efficiently. Mr. Galvin noted that despite industry-wide efforts to improve data-flow, many smaller intermediaries still provide information on CD-ROMs without much attention to standardization.

FICCA Intermediary Attestation Engagements. An ICI working group developed the concept of Financial Intermediary Control and Compliance Attestation (or "FICCA") engagements in 2008. These entail the engagement of an independent audit firm by an intermediary for a FICCA report intended to provide fund companies using that intermediary with reasonable assurance on the design and effectiveness of the intermediary's operational controls for specified activities. Whereas SSAE 16 (formerly SAS 70) reports may cover certain aspects of an intermediary's operations, the FICCA report was developed specifically for the mutual fund industry. The FICCA framework focuses on areas of most concern for fund companies, such as: document retention and recordkeeping, transaction processing, investor account set-up, communications, cash reconciliations, sub-accounting billing, fee calculations, and IT. Mr. Bateman described Franklin Templeton's efforts to encourage the use of the FICCA since 2010, which have resulted in FICCA engagements with a half dozen brokers. Mr. Galvin reported that Invesco has FICCA engagements with 5 intermediaries, typically covering around 12 of the 17 topics potentially addressed in a FICCA report. The panelists agreed that the FICCA framework is one of the best tools available for omnibus oversight and that it is a marked improvement over having each fund company perform its own audit of an intermediary.

Oversight Models & Compliance Reporting. The panel discussed a range of approaches to omnibus oversight. Mr. Bateman emphasized that oversight is not an annual event, but rather combines numerous tools across a spectrum of frequencies, from daily up to annual. Mr. Galvin outlined Invesco's risk-based approach, which focuses on larger intermediary relationships and modulates the frequency and detail of reviews accordingly. He noted the importance of making sure that the fees charged by a fund company's internal transfer agent ("T/A") are adjusted as services are increasingly provided by omnibus sub-accounting agents and recordkeepers. Mr. Callahan observed that intermediary oversight is of increasing interest to mutual fund boards, and stated that AllianceBernstein has begun combining its sub-T/A reporting with the board reports produced by its internal T/A.

Industry Initiatives. The panel touched upon several industry initiatives. In particular, Mr. Bateman pointed to the ICI Broker/Dealer Advisory Committee's focus on reducing the confusion and "noise" produced by an overload of data from intermediaries. He pointed to the Committee's support of the FICCA and to its current efforts to bring together service providers, DTCC and fund groups in order to streamline and automate data flows. One current initiative of the Committee seeks to develop a single form for the invoicing of fees by intermediaries.

Workshop 3-C — Variable Insurance Products: Innovation and Challenges in an Evolving Environment

Moderator: Patricia Louie, Executive Vice President and General Counsel, AXA Equitable Funds Management Group, LLC

Speakers: Paul G. Cellupica, Chief Counsel, MetLife, Inc.
Susan Nash, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission
Stephen E. Roth, Partner, Sutherland Asbill & Brennan LLP
Tamiko Toland, Managing Director, Retirement Income Consulting, Strategic Insight

Industry Responses to Market Events. Ms. Toland, noting the volatility of the market during and since the financial crisis beginning in 2008, highlighted the tremendous growth of variable annuity products with living benefits. She reviewed the challenges for insurance companies of living benefit guarantees during periods of low interest rates and periodic high equity volatility, and noted that insurance companies have made changes to their products in an attempt to limit their exposure on products with living benefit guarantees.

Mr. Cellupica then discussed the effects on underlying funds when there is a consolidation of assets at the variable annuity product level. He noted that underlying funds may merge or reorganize (either with or without shareholder approval, based on whether the conditions of Rule 17a-8 under the Investment Company Act have been satisfied); that SEC approval of fund substitutions may be sought; or that funds may liquidate. With respect to fund substitutions, Mr. Roth noted that the staff of the SEC generally will ask applicants whether the requested changes can be done through corporate action instead of pursuant to an SEC order. Ms. Nash then discussed the timing involved in seeking a substitution order, noting that the staff seeks to provide comments 45 to 60 days after the application for the order is submitted, but that it was hard to predict timing since it is affected by the number of funds being addressed in the application. With respect to fund liquidations, Mr. Cellupica noted that assets received in connection with the liquidation of an unaffiliated underlying fund can be re-allocated to a subaccount investing in a money market fund. Ms. Nash encouraged those considering whether a substitution order is needed to discuss the facts of particular situations with the staff, particular when the insurance company does not control the underlying fund.

Mr. Roth discussed the increasing number of underlying funds pursuing alternative investment strategies, including “volatility management” funds and funds whose investment programs are linked to the insurance company’s hedging program goals. Mr. Roth reviewed some of the potential legal issues associated with volatility management funds, including conflicts of interest and the potential for the activities of the fund to be viewed as joint transactions with the insurance company under Section 17(d) of the Investment Company Act. Ms. Nash noted that fund disclosure needs to clearly identify the potential conflicts of interest. Ms. Nash then discussed the potential joint transaction concerns, noting that the staff is considering whether interactions between the fund’s adviser and the insurance company give rise to situations in which the insurance company is able to influence the management of the fund for the insurance company’s interest. She noted that the SEC staff recently became comfortable that a situation did not give rise to Section 17(d) concerns because the use of data provided by the insurance company to the fund’s adviser was formulaic and subject to significant oversight by the fund’s board. In that situation, she said that the staff concluded that the fund was being managed for the benefit of the fund’s investors, but noted that each situation required a facts and circumstances analysis regarding the level of involvement of the insurance company in the fund’s operations. Mr. Roth suggested that fund complexes with volatility management funds should consider whether a specific compliance policy addressing potential issues under Section 17(d) would be warranted, noting that such a policy could establish guidelines for communications between the insurance company and the adviser to the volatility management fund.

Mr. Roth discussed other steps being taken by insurance companies at the variable contract level to reduce or mitigate the insurance company's risk, including asset transfer programs and model allocation programs. In asset transfer programs, account value is transferred between specified variable investment options and fixed income investment options according to a predetermined mathematical formula. Ms. Nash said that the SEC staff is looking for clear disclosure regarding the formula and parameters of asset transfer programs. In model allocation programs, the insurance company controls allocations among available investment options under the variable contract. Mr. Cellupica noted that even "open" architecture platforms, which allow unrestricted allocations by the contract owner to any investment options available for the specific variable product, have typically narrowed the investment options available and, in some situations, the only available options are managed volatility funds. He also mentioned "guided" architecture platforms, in which contract owners can make allocation decisions subject to limitations (e.g., minimums/maximums allocated to certain asset classes). Other measures being taken by insurance companies in response to market events were discussed, including limitations on subsequent purchases by contract owners and incentives to contract owners to surrender their contracts or exchange into new products. Ms. Nash stated that there is a range of disclosure across the industry regarding actions that may be taken by an insurance company, and that the SEC staff evaluates whether changes being made by insurance companies are consistent with prior disclosure. She also noted that the SEC staff, in considering exchanges proposed by insurance companies, considers suitability issues and may flag for OCIE or FINRA proposed exchange situations where the SEC staff believes that there may be a suitability concern.

Regulatory Developments. Developing a summary prospectus for variable products is one of the stated longer-term priorities of the SEC. Ms. Nash noted the difficulty of conveying concisely the many issues associated with variable products, and stated that this issue is present with or without a summary prospectus. The panelists also discussed the effect of amended CFTC Rule 4.5 on insurance products. Mr. Roth noted that if underlying funds are commodity pools, insurance companies and separate accounts need to consider whether to file for exclusion under the rule. Mr. Roth suggested that funds consider whether any changes are needed in participation agreements and compliance policies to address considerations raised by amended Rule 4.5.

Litigation and Enforcement. The panel reviewed an excessive fee claim brought by a variable annuity contract holder under Section 36(b) of the Investment Company Act. Ms. Louie noted that the case, involving her firm, is still pending and that her firm's motion to dismiss on the basis that the plaintiff lacked standing (among other arguments) had been denied. The panel also discussed *In the Matter of Massachusetts Mutual Life Insurance Company*, in which the SEC found that MassMutual failed to sufficiently describe in prospectuses and sales literature for certain variable annuity contracts the negative impact of withdrawals. The panel noted that this case arose as a result of a whistleblower. Ms. Nash and Mr. Roth suggested that insurance companies should review their disclosure controls on an ongoing basis and should make changes to disclosure if the insurance company identifies concerns regarding the disclosure, noting that the SEC had criticized MassMutual for not moving quickly enough to improve its disclosures after becoming aware that sales agents did not understand the effects of withdrawals.

Workshop 4-A — Accounting and Auditing Update

Moderator: Brian W. Wixted, Senior Vice President and Treasurer, OFI Global Asset Management, Inc.

Speakers: Martin F. Baumann, Chief Auditor and Director of Professional Standards, Public Company Accounting Oversight Board
Jaime L. Eichen, Chief Accountant, Division of Investment Management, U.S. Securities and Exchange Commission
Sean McKee, National Audit Leader — Investment Management, KPMG LLP

ASU No. 2011-04; Fair Valuation. Mr. McKee observed that quantitative thresholds work most of the time, but SEC guidance and professional standards require consideration of qualitative factors when assessing materiality. He noted that including weighted averages is important for making disclosure concerning quantitative information about level 3 fair value measurements meaningful when the ranges of unobservable inputs are wide. Ms. Eichen noted that is probably one of the most frequent comments from her office concerning ASU No. 2011-04.

Definition of Investment Company and Related Disclosures. Mr. McKee said that the final definitional standard is expected this year but that, due to a large number of operational issues with the proposed disclosure requirements, the disclosure changes that would have been triggered when an investment company has a significant investment in another investment company are being postponed by FASB.

Repurchase Transactions. Mr. McKee briefly covered proposed guidance on whether purchase and sale accounting or finance treatment applies to a transfer of assets associated with repurchase financing, such as repurchase agreements, mortgage dollar rolls or securities lending arrangements. Under the proposal, if the transferor of the collateral controls the collateral and is getting it back then that is a financing but if the transferor does not control the collateral the transaction should get purchase and sale treatment. Noting that treatment is not elective, Mr. McKee stated that the definition of effective control for these purposes is very narrow and only covers situations where the transferor is getting back the same collateral or substantially the same collateral.

Security Valuation Challenges. Mr. McKee noted the continued focus on the reliability and accuracy of valuations by auditors and regulators. He stated that the presentation of the fair valuation of investments has a significant impact on whether the financial statements are fairly presented, which is management's responsibility. Ms. Eichen emphasized that funds using broker quotes to value securities must have policies and procedures to ensure that such quotes fairly represent exit values that could be realized in current sales transactions in accordance with GAAP and regulatory requirements. She emphasized the importance of funds understanding what each broker quote represents, such as an actual or offered transaction price or other quote that reliably represents fair value, as contrasted with an indication of value or an accommodation quote, which may not necessarily represent fair value. She further remarked that in accordance with ASR 118, funds should seek to obtain quotes from multiple brokers to get a better range of fair value of a security. Mr. Baumann remarked that auditing fair values is among the largest

findings of the PCAOB in audits of financial institutions and funds, noting that auditors cannot outsource the auditing function by relying too heavily on values provided by third parties.

Issues and developments from the SEC's perspective. Ms. Eichen said that fair valuation, the use of pricing services and the importance of maintaining appropriate related internal controls to ensure that the prices received from vendors are in accordance with GAAP are hot topics at the SEC.

Ms. Eichen then recited a list of valuation controls the staff has seen in practice, noting that the list was not intended to serve as a roadmap or checklist for appropriate controls, but that it could be instructive for fund groups. The list can be found at Exhibit A of this report.

Ms. Eichen then recited the following themes of recent enforcement actions on valuation:

1. Failure to comply with internal valuation procedures;

2. Ignoring available dealer quotes and other off-market information that would negatively impact pricing;

3. Using prices provided by third-party pricing services or brokers that did not appear to take into account recent purchase transactions;

4. Concluding that all trades were distressed transactions even though in times of market dislocation GAAP says one cannot necessarily conclude that all market activity represents forced liquidations or distressed sales;

5. Stale pricing where prices were not periodically reevaluated;

6. Lax valuation committees resulting in a portfolio manager having too much influence over valuation where the portfolio manager may have ignored third-party quotes and submitted unsubstantiated price adjustments; and

7. Use of enterprise value by business development companies to value interests in debt securities of non-controlled companies that ignored market information, such as numerous quotes or actual trades, that would have reduced fair value.

Ms. Eichen observed that reviews of websites of closed-end funds that have managed distribution plans showed that funds often disclosed distribution yields that included significant amounts that were returns of capital. She expressed the view that such disclosure could be confusing and misleading to shareholders who are seeking yield.

Ms. Eichen then addressed disclosures relating to derivatives. She stated that where significant derivatives activity is indicated in the statement of operations, the staff expects to find related discussion in the management's discussion of fund performance. In addition, she said the staff is reviewing disclosures funds make when investing in total return swaps or options on customized baskets of securities or a customized index to see what level of transparency funds are providing about the underlying assets, as well as any fees that may be embedded in the derivative. She gave an example of a managed futures fund that had a total return swap on a

custom basket of securities with a notional value of approximately 110% of the net assets of the fund but there was no disclosure of any securities in that customized basket even though the swap was a primary way in which the fund was seeking to achieve its investment objective. She observed that other funds are being very transparent and providing detailed disclosure in the financial statements concerning every security in the customized basket.

Issues and developments from the PCAOB's perspective. Mr. Baumann noted that many of the challenges in recent years in auditing investment companies related to fair valuation and that fair valuation is the largest area of the PCAOB's inspection findings. The PCAOB's agenda includes updating audit standards for audit of fair values. He expects the standard to be issued in the last quarter of 2013. He then discussed Auditing Standard No. 16 regarding communications with audit committees, which is effective for 2013 audits. In particular, he highlighted the application of the communication rule for mutual funds that, in some cases, permits certain communications to the audit committee to occur after the filing of the auditor report. Although such communications may be permitted by the rule, the PCAOB does not view this as a best practice and will monitor this closely with the expectation that the auditor would be at least communicating with the chairman of the audit committee about any significant problems in the audit on a timely basis (e.g., before filing the auditor report).

Mr. Baumann said the PCAOB expects to put out a proposal around June 30, 2013 which would make changes to the standard audit report. He expects those changes to include refinement of where financial statements fall within the spectrum of "presents fairly." He further noted that the PCAOB concept release on auditor independence and skepticism garnered significant interest, saying the release was motivated by inspection findings revealing a lack of professional skepticism as a result of close auditor-client relationships. He reported a large number of comment letters made the point that auditors, management and audit committees do not like the idea of auditor rotation. He indicated that the PCAOB has no immediate next steps in mind, but that this topic is still high on the PCAOB's agenda particularly in light of focus on this by international accounting agencies.

Workshop 4-B — Swaps Regulation: The New Reality for Funds

Moderator: Jennifer S. Choi, Senior Associate Counsel, Securities Regulation, Investment Company Institute

Speakers: Susan C. Ervin, Partner, Davis Polk & Wardwell LLP
Tracey Jordal, Executive Vice President, Attorney, Legal and Compliance, PIMCO Funds
William C. Thum, Principal, The Vanguard Group, Inc.

Transactions with Swap Dealers. Ms. Ervin and Mr. Thum discussed the ISDA August 2012 Dodd-Frank Protocol, noting that dealers will likely require funds to adhere to the Protocol in order to continue entering into derivatives after May 1, 2013. Mr. Thum explained that the process of completing the questionnaire included in the Protocol documents can be time consuming for advisers who trade derivatives for many funds and accounts. Even after the fund has signed the required adherence letter and completed the questionnaire, the fund needs to wait

for the questionnaire to be posted and reviewed by dealer counterparties. Therefore, he recommends that funds complete the adherence process well in advance of the May 1 deadline.

Clearing. Mr. Thum noted that the move to mandatory clearing requires participants to select one or more futures commission merchants (FCMs) and that doing so involves an evaluation of the FCM's credit profile. Limited information was typically available regarding how FCMs hold and invest customer collateral. He suggested that a pending regulatory proposal from the CFTC may help level the playing field in this regard by making more information about FCMs publicly available. The panel noted that participants need to consider the health of their FCMs on an ongoing basis, as they will want to be in a position to move their business to a new FCM if they identify concerns with a current FCM. Some participants are considering whether they should have a "back-up" FCM ready to go if they ever need to port their business quickly. Mr. Thum then discussed the agreements that participants will need to put in place, including a futures agreement and a clearing addendum with each of their FCMs, as well as an execution agreement with each of their derivatives counterparties, and suggested that the clearing addendum should set forth clear portability rights.

The panel discussed how that the Legally Segregated, Operationally Commingled ("LSOC") Model will result in additional costs for participants. The CFTC's proposal to enhance protection of customer funds is intended to result in more accountability for the FCMs, thereby limiting the opportunities for fraud. However, Ms. Jordal observed that, absent a change to the bankruptcy code, even use of a tri-party or quad-party arrangement to hold margin and collateral would not insulate participants from the FCM's credit risk as assets held in those arrangements would, in the event of the FCM's bankruptcy, be treated as part of the FCM's bankruptcy estate. Mr. Thum noted that negotiating for special custody arrangements is likely to slow down the negotiating process for the agreements needed to engage in cleared swaps transactions.

Reporting and Recordkeeping. Ms. Ervin stated that swap counterparties will be required to report the economic terms of the transactions, although not all of the reported information will be made publicly available. Buy-side participants, like funds, must have CFTC Interim Compliant Identifiers (CICI) by April 10, 2013. She suggested that participants confirm that they have obtained the requisite identifiers. In some cases, brokers have registered participants for identifiers without the participant knowing, but that participants are still obligated to make the requisite certifications in connection with obtaining the identifiers and should log on to the CICI web portal to do so.

Pending Requirements. Ms. Jordal stated that the rules governing margin requirements for uncleared swaps are not yet finalized and that there are proposals for both unilateral and two-way margining outstanding. Thresholds for initial margin on uncleared swaps also have not been determined, but it is expected that they will be double the thresholds required for initial margin on cleared swaps. There is a potential risk that participants will be required to hold assets that are not invested in accordance with the applicable investment strategy in order to satisfy the margin requirements, and that this may result in a drag on performance. With respect to trading issues, Ms. Jordal reviewed several rules that are still pending and noted that, with respect to swap execution facilities that operate on a "request for quotes" basis, there continues to be substantial difference of opinion with respect to how many dealer quotes a participant must

obtain, with buy-side participants worried that any requirement to obtain multiple quotes may signal their trading intentions to the market.

Ms. Ervin noted that firms will no longer be able to trade short-term foreign exchange swaps and forwards on an undocumented basis and suggested that firms set up ISDA master agreements to cover such transactions. She noted that this may be particularly burdensome with respect to an adviser's separate account clients who may not otherwise engage in derivatives transactions, and suggested that advisers consider whether they have authority in the investment advisory agreements with clients to sign up the needed documentation.

Workshop 4-C — Compliance Never Sleeps: Global Compliance Challenges Facing Funds

Moderator: Robert C. Grohowski, Senior Counsel, Securities Regulation, Investment Company Institute

Speakers: Kristin V. Collins, Vice President and Senior Counsel, MFS Investment Management
Alan Fish, Partner, Americas Asset Management, Ernst & Young LLP
Carl H. Loewenson Jr., Partner, Morrison & Foerster LLP
Charles C.S. Park, Managing Director and Chief Compliance Officer, BlackRock Fund Advisors

The panel addressed compliance challenges facing global asset managers in an environment where geographic barriers are diminishing while local financial regulations proliferate.

Framework for Global Compliance Programs. Mr. Fish highlighted several critical elements of a compliance program that are impacted by expansion into new products and geographies.

- Outsourcing: As business considerations present efficiencies for outsourcing certain functions, compliance personnel should be closely involved in selecting service providers, in negotiating service level arrangements, and in establishing oversight and data collection protocols.

- Technology: Firms should involve compliance in the decisions over the degree to which they purchase technology or build their own systems.

- Data Management: The availability, timeliness and integrity of data is of key concern to regulators, particularly in light of the proliferation of reporting obligations and, hence, requires thoughtful oversight and input from compliance.

- Location Strategy: The physical location of different departments and personnel is a critical consideration. Mr. Park noted several models for geographical distribution, such as the "follow the sun" model in which compliance tasks are passed daily between worksites as trading moves across time zones, in contrast with a more centralized compliance model that may afford greater control but may create other challenges for a

24/7 worldwide organization. Ultimately, while regulatory concerns may militate in favor of one approach over another, the compliance program will be built around the geographic contours of the firm's business strategy.

- Overall Compliance & Risk Framework: Messrs. Fish and Park underscored the importance of having all parts of the business understand the compliance and risk framework, including the "three lines of defense" (business units, compliance & risk departments, internal audit), as well as the "tone from the top" and firm governance.

- Cost of Compliance: Given the high costs of a compliance program and technology, compliance should think strategically about its budget, and should communicate cost concerns clearly to the business. Mr. Park gave the example of social media, which comes with a high compliance price tag, saying that he had presented the cost of compliance as a gating business decision at the initial planning stages.

- Managing Risk Globally: Mr. Park pointed to the great time commitment and benefits associated with maintaining frequent communication among compliance personnel across the globe. He also noted that reducing the complexity and sheer number of compliance policies across different offices further helps to control risk.

Investing Outside the U.S. — Sanctions Laws. Ms. Collins described the oversight function of the Office of Foreign Asset Control ("OFAC"), which administers over 20 sanctions programs spanning more than 100 statutes, rules and executive orders. She outlined several mechanisms for setting up a compliance framework: (i) front-end compliance hard-halts; (ii) training of investment personnel and increasing awareness of these restrictions in the investment process; (iii) compiling a list of specific investments that are off-limits; (iv) pre-trade review of higher-risk types of investments; and (v) increasing pre-and post-trade screening of securities against lists and other resources.

Insider Trading and Personal Trading. Taking as a case in point the recent $616 million settlement by SAC Capital affiliates over insider trading, Mr. Loewenson observed that the significant insider trading issues for asset managers have historically not revolved around personal trading, but rather around trading on behalf of client accounts. He noted significant increases in enforcement in foreign jurisdictions such as the UK, Germany, France and Japan. There has also been increased cross-border cooperation among countries, as evidenced by widespread acceptance of the IOSCO memorandum of understanding, as well as a range of examples of bilateral cooperation.

Raising AUM Abroad — AML & FCPA. Ms. Collins observed that proposed rulemaking under consideration by the Financial Crimes Enforcement Network ("FinCEN") could significantly expand the information that funds require regarding the identity of beneficial owners, which could, in turn, expand the AML burden and trigger significant additional IT expenses. Mr. Loewenson outlined pitfalls for asset managers under the Foreign Corrupt Practices Act ("FCPA"), which comes into play when raising AUM from sovereign wealth funds and government pension plans. Ways to limit exposure include: (i) raising internal red flags whenever hiring third parties for marketing abroad; (ii) raising red flags when gifts or even

charitable contributions abroad are involved; and (iii) creating a strong compliance program that includes repeated training of employees with exposure to foreign markets and contacts.

General Session — OCIE and Enforcement: Current Priorities and What They Mean for the Fund Industry

Moderator: Tamara K. Salmon, Senior Associate Counsel, Securities Regulation, Investment Company Institute

Speakers: Thomas Biolsi, Principal, PricewaterhouseCoopers LLP
George S. Canellos, Acting Director, Division of Enforcement, U.S. Securities and Exchange Commission
Carl V. di Florio, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission
Charles A. Etherington, Senior Vice President and General Counsel, American Century Investment Management, Inc.

The panelists discussed OCIE's distribution-related compensation reviews, matters related to the examination and enforcement process, the focus of the enforcement division and other matters. It was conducted in a question and answer format.

Thoughts on Mary Jo White Joining the SEC. Ms. Salmon noted that, earlier in his career, Mr. Canellos had worked for SEC-nominee White. Mr. Canellos characterized her as non-partisan. He said her approach is to evaluate each case by following the evidence from the ground up to determine the correct parties to be sued without fear or favor.

Mr. Canellos's Outlook as a Former Prosecutor. Mr. Cannellos said he usually proceeds on the assumption that if the agency sues a regulated entity, the entity will settle because an entity often cannot afford to engage in a multi-year battle with its primary regulator. He characterized his view of his job when dealing with institutions as 60 – 80% judicial, with the remainder prosecutorial. He described the settlement process as a judicial function focused on the merits of the case. He said he generally does not negotiate or engage in "horse-trading" where his office proposes an amount and receives a counterproposal.

Decline in Number of Cases Filed by the SEC. Mr. Canellos explained his belief that the effectiveness of the enforcement program should be measured based on whether they are "getting it right" and bringing actions when the conduct warrants it based on the deterrent impact of the action and the culpability of those being charged, not the number of cases brought. He noted that the SEC has experimented with different ways to evaluate cases based on qualitative factors such as the deterrent impact of the case, whether the action would halt conduct that could result in significant investor loss if not halted (i.e., early detection and prevention) and complexity of cases, and that he believes those metrics are better than others that are often discussed.

Law Abiding Firms that Stub Their Toes. Mr. di Florio said that, when firms have a good approach and philosophy of trying to have good governance, risk management, compliance practices, that culture and tone in the organization goes a long way to impacting the reputation of

the firm and how regulators perceive the firm. He said firms receive "benefits" for the good work they do when it comes to an agency decision on how to proceed when issues arise.

Referral to Enforcement. Mr. di Florio said the decision is made collaboratively, not unilaterally, within the agency. If an exam concludes and there is a question of whether an issue warrants enforcement action, the matters are addressed in a referral committee, which brings together senior people in the exam program and enforcement program to talk about the specific matters and whether it is a good use of the agency's resources to pursue an enforcement action or an investigation. Mr. Canellos added that the flow of information is fluid in the agency and the referral process, in practice, is not rigid or formalistic. Mr. di Florio also acknowledged that, if a firm receives a deficiency letter at the conclusion of an exam, it is possible that matters have also been referred to enforcement behind-the-scenes.

Impact of Internal Corrective Action. Mr. di Florio said that to the extent the firm has been proactive in identifying and remediating an issue and matters stay at the exam level, the firm will get credit for its actions in the exam summary report. In these situations the exam team may engage in testing and validation of the remedial action and if the testing and validation reveals inadequate remedial action that would be reported to management.

Whether to Self-Report. Mr. Biolsi expressed his belief that industry practice favors not self-reporting unless several factors are in play, including the likelihood of a tip or complaint to the SEC, whether there is a press inquiry and whether it is a matter that will be reported to the board of a registered fund and will be described in the board's meeting minutes. He noted that the tendency to not self-report can create a challenge on inspection when the exam staff makes a specific inquiry, particularly for work papers and documentation, about annual compliance assessments and the steps undertaken by the chief compliance officer to assess whether there are any material weaknesses or problems with controls.

Sweep Exam of Distribution Compensation Arrangements. Mr. Etherington asked whether the SEC is seeing trends that are causing concerns and what is motivating the sweep. Mr. di Florio said that the issue of distribution payments came up in regular bi-weekly meetings of leadership across divisions within the agency. He acknowledged that this is not a new issue, noting that in exams and other reviews that initially occurred approximately twenty years ago, and were again conducted approximately ten years ago, the agency gained significant knowledge about distribution payments that helped inform proposed amendments to Rule 12b-1. He said that a lot has changed since the last reviews and this sweep generally is an effort to look at how payments to financial intermediaries have evolved. Mr. di Florio also acknowledged that the sweep will include visits to broker-dealers. Mr. di Florio further noted that fund chief compliance officers should be performing due diligence to understand the processes for these payments, to make sure the fund is approaching these payments in the right way and that the board is asking the right questions.

Risk Alerts. Mr. di Florio noted that the purpose of risk alerts is to share observations about effective practices and areas of concern, and it is not OCIE's intent to regulate through risk alerts. He explained that the alerts are reviewed by the whole agency. He further stated that he believes that distribution compensation is a subject ripe for a risk alert. He also said that matters recently identified in the exam priorities release are good candidates for additional risk alerts.

Enforcement Priorities. Mr. Canellos was reluctant to identify priorities for enforcement in light of his belief that enforcement needs to follow the issues and does not set out to bring certain types of cases. With that in mind, he acknowledged that the existence of specialized teams gives some indication of areas of focus. He specifically referred to the following areas as presenting critical risks: valuation (particularly in light of low liquidity levels during the past few years), trade practices, marketing, conflicts of interest and performance. With respect to conflicts of interest and performance, he expressed heightened sensitivity light of the convergence of alternative fund managers and mutual fund managers, where alternative fund track records are being used to sell mutual funds and where there is side-by-side management of alternative funds and mutual funds where there are incentives to favor certain funds, for example, a private fund that pays 2 and 20 as compared with a mutual fund.

Targeting Negligence of Gatekeepers. Mr. Canellos said it is frequently the case that there is a primary violator and there are secondary participants (such as legal, compliance or audit professionals) without whose lapses there would have been no violation. He said that he believes it is important for the agency's deterrent message to be felt at all levels and to bring actions when gatekeepers do not live up to their responsibilities, although that does not mean that negligent lapses of secondary participants should receive the same punishment as primary violators. He explained that the Dodd-Frank Act authorizes the agency to sanction secondary participants in certain situations.

Reasonableness of Compliance Programs. Asked how the reasonableness of adviser and fund compliance programs is assessed, Mr. di Florio acknowledged that the industry provides a good barometer of reasonableness and that there is a focus on significant outliers from industry norms. Mr. Canellos added that often cases are brought when policies and procedures have not been customized for the business. Such off-the-shelf policies and procedures often contain references to businesses that the firm does not engage in and fails to address areas in which the firm operates, making some of the policies and procedures nonsensical and resulting in portions of the firm's business not being addressed in the compliance program.

Fund Governance. Mr. di Florio said the key areas of focus through the risk assessment program are the 15(c) process, valuation, fees and expenses and conflicts of interest.

General Session — Ethics and Finance: Some Perspectives from Law, History, and Science

Speaker: Professor Frank Partnoy
George E. Barrett Professor of Law and Finance and Co-Director, Center for Corporate and Securities Law at the University of San Diego

Professor Partnoy's presentation covered two general areas: 1) the hazards of shifting from a principles-based legal or regulatory regime to one that is rules-based and 2) the benefits of managing delay, or active procrastination, in a number of areas, including ethical decision-making.

Hazards of Specific Rules versus Legal Principles. Prof. Partnoy characterized the shift from principles to specific rules in law as a move away from the Holmesian view of the law as a prediction of what a judge would do and toward a world in which compliance with the letter of

rules can be used to justify unethical decisions. He described the Holmesian view that people generally will not only think about the consequences of their conduct, but also how some "wise person" will assess their conduct after-the-fact. He espoused the view that the shift from a principles to highly-specific rules in law generally results in a shift from people thinking about ex post adjudication to ex ante following of rules. He finds no coincidence that the unethical behavior seen at some sell side firms goes hand-in-hand with highly specific rules. He gave an example of a sales force using highly specific credit ratings or risk assessments to evade the spirit of what they should be doing when selling financial products to investors who do not understand the risk they are buying, while complying with the letter of the law. As an example of the disadvantages of using highly specific rules instead of principles, he noted the absurdity of structuring a prohibition on murder by identifying a definitive list of prohibited forms of murder (e.g., use of a knife, rope or gun) because a person could engage in regulatory arbitrage to find a technique to murder someone that was not specifically prohibited (e.g., using a pillow). He claimed that there are few examples of senior banking executives doing jail time outside of the insider trading context, theorizing this is at least in part because in other areas of financial regulation it is easier to point to specific rules to justify conduct, even if that conduct might be considered unethical.

Benefits of Managing Delay. Prof. Partnoy highlighted the benefits of actively procrastinating when making decisions as well as the hazards of snap decision-making. He advocated a two-step approach to decision-making: first, determine the timeframe relevant to a decision (e.g., is a decision needed in seconds, minutes, hours or longer), and second, wait until the last possible moment to act.

He gave numerous examples where he believes managed delay leads to better, and more ethical, decision-making. He pointed to the benefits of delay in high frequency trading where faster is not always better. He explained that, by managing delay, high frequency traders can avoid reacting to the first wave of trades that can be decoys or deceptions (e.g., stub orders, fake orders, algorithms designed to make it look like they have inside information when they do not or designed to make it look like want to buy when they want to sell) and achieve significantly improved results. He further remarked that the military has recognized the benefits of managed delay in implementing its OODA protocol for fighter pilots — observe, orient, decide and act — finding that managing delay in this manner is less likely to result in mistakes than would snap decision-making. He also discussed studies that show physicians often systematically undertreat certain minority patients, but that doctors who resist the urge to make snap decisions regarding treatment and first consciously consider race are less likely to treat differently based on race.

He acknowledged that it can be challenging to determine the timeframe that is relevant for a given decision, but that part of being a professional is learning how to manage delay so that all relevant information can be taken into account while not waiting too long given the context of the decision. For example, one might be inclined to apologize for a transgression right away but studies show that apologies, particularly for more complex or intentional wrongs, are more effective after time has passed to allow the aggrieved time to express anger, process the details of the wrong and feel as though the apologizing party has taken those details into account. On the other hand, he pointed out that waiting too long can render the apology ineffective.

Exhibit A — List of Valuation Controls from Workshop 4-A

General Controls

1. Identifying the risks associated with the valuation of individual investment types;

2. Annual approval of pricing vendors and brokers, and determining pricing sources based on asset class;

3. Pricing vendor due diligence procedures designed to understand the vendor's processes and controls (e.g., due diligence questionnaires and onsite visits);

4. Understanding inputs and drivers for valuing non-exchange traded investments;

5. Procedures to detect situations where a security has become illiquid or thinly traded; and

6. Policies to review significant events that could impact valuation.

More Frequent Controls

1. Maintaining a price challenge process, including using a threshold to determine when to challenge a price and when to do "deep dives" and periodically evaluating the results of the challenge internally and with the vendor;

2. Having controls in place for price overrides, such as having fund accounting contact relevant parties in the organization prior to processing the price override;

3. Having procedures in place when the fund moves away from its primary source to use an alternative vendor or broker;

4. Performing internal analyses to assess the reasonableness of a counterparty quote;

5. Performing various price comparisons (e.g., comparing prices from primary and secondary sources, comparing next day open and prior day closing prices or reviewing day-to-day price fluctuations and investigating those that exceed a certain threshold);

6. Back-testing fair value determinations after positions are sold;

7. Procedures to identify and review stale prices; and

8. Procedures performed by portfolio managers, analysts or traders, which could include a daily analysis of the prices of non-exchange traded securities and communicating with fund accounting and mangement regarding findings or knowledge of events that might affect pricing.

Board-Related Controls

1. Maintaining a separate valuation committee that calculates fair value following board-approved fair value methodologies;

2. Board ratification of fair values determined by management without direction from the board;

3. Providing boards with the NAV impact of each investment that is fair-valued;

4. Providing boards with information relating to price challenges as well as the basis for how fair value is determined, any price changes or lack of changes after challenges are made; and

5. Providing boards with periodic information to assist boards in ascertaining the effectiveness of controls and continuously reviewing the appropriateness of fair value methods, such as how valuation controls are working in practice and how valuation issues are being resolved.

ATTORNEY ADVERTISING

This information should not be construed as legal advice or a legal opinion on any specific facts or circumstances. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

THE FOLLOWING LAWYERS ATTENDED THE CONFERENCE OR CONTRIBUTED TO THE PREPARATION OF THIS REPORT:

GREGORY C. DAVIS
JOHN D. DONOVAN
LEIGH R. FRASER
JOHN W. GERSTMAYR
THOMAS R. HILLER
SUSAN A. JOHNSTON
JOHN M. LODER
BRIAN D. MCCABE
GEORGE B. RAINE
ELIZABETH J. REZA
ADAM M. SCHLICHTMANN
GREGORY D. SHEEHAN
ROBERT A. SKINNER
JEREMY C. SMITH
DAVID C. SULLIVAN
JAMES E. THOMAS

BOSTON +1 617 951 7000 ◻ CHICAGO +1 312 845 1200
HONG KONG +852 3664 6488 ◻ LONDON +44 20 3122 1100
NEW YORK +1 212 596 9000 ◻ SAN FRANCISCO +1 415 315 6300
SEOUL +82 2 2141 5900 ◻ SHANGHAI +86 21 6157 5200
SILICON VALLEY +1 650 617 4000 ◻ TOKYO +81 3 6259 3500
WASHINGTON, D.C. +1 202 508 4600

ROPES
&GRAY

© Ropes & Gray LLP, 2013.