

### SEC Chairman Schapiro Issues Statement on Money Market Fund Reform

On August 22, 2012, the U.S. Securities and Exchange Commission ("SEC") Chairman Mary L. Schapiro issued a statement announcing that a majority of the Commissioners would not support a staff proposal to reform the structure of money market funds. Despite the impasse, Chairman Schapiro continued to tout the proposed reform, citing the perceived risks brought to light during the events of the 2008 financial crisis.

In her statement, Chairman Schapiro highlighted two inherent structural issues with money market funds. First, "money market funds have no ability to absorb a loss above a certain size without breaking the buck," and, consequently, "investors of money market funds have every incentive to run at the first sign of a problem." Chairman Schapiro long offered two reform alternatives to address these perceived systemic risks. Her first proposed option suggested that "money market funds float the NAV and use mark to market valuation." Alternatively, Chairman Schapiro also supported the implementation of "a tailored capital buffer of less than 1% of fund assets, adjusted to reflect the risk characteristics of the money market fund."

Chairman Schapiro noted that a proposal would have provided the public with a chance to voice their views on the subject. However, as a result of the majority vote, this proposed regulation cannot be published for public comment.

Sources: [http://www.ici.org/my\\_ici/memorandum/ci.memo26409.print](http://www.ici.org/my_ici/memorandum/ci.memo26409.print)  
<http://www.sec.gov/news/press/2012/2012-166.htm>

### SEC Issues Cease-and-Desist Order Against Former CFO for Altering Documents

On August 23, 2012, the SEC issued an order instituting administrative and cease-and-desist proceedings (the "Order") against Frances M. Guggino for violations of Section 203(f) of the Investment Advisers Act of 1940, as amended ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940, as amended. According to the Order, Guggino formerly served as CFO and Treasurer of the Fixed Income Funds advised by Legg Mason Partners Fund Advisor, LLC up until 2010. The SEC alleges that Guggino willfully and knowingly altered the books and records of one of the mutual funds – a trial balance and Board Meeting Minutes – in order to deceive others at Legg Mason & Co. that the fund had received an advancement from the adviser in connection with an order to disburse under a SEC-approved Plan of Distribution. In actuality, no such disbursement had been advanced by Legg Mason. Under Section 34(a) of the Advisers Act, it is unlawful for any person to "willfully... destroy, mutilate, or alter any account, book, or other document the preservation of which has been required pursuant to Section 34(a)."

Pursuant to an agreed upon settlement whereby a respondent neither admits nor denies any SEC findings pursuant to this Order, Guggino is:

- Ordered to cease-and-desist from committing or causing any violations and any future violations of Section 34(a) of the Advisers Act;
- Ordered to pay a civil money penalty in the amount of \$15,000;
- Banned from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and
- Prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor or principal underwriter

Source: <http://www.sec.gov/litigation/admin/2012/ia-3449.pdf>

### HIGHLIGHTS

**SEC Chairman Issues Statement on Money Market Fund Reform**

**SEC Charges Legg Mason Employee with Section 34(a) Violation**

**ISDA Provides Guidance to Market Participants Affected by FATCA**

**SEC Alleges Investment Adviser Misconduct**

## **ISDA Publishes Protocol on Handling Derivative Transactions Under FATCA**

On August 15, 2012, the International Swaps and Derivatives Association Inc. ("ISDA"), in response to the Foreign Account Tax Compliance Act ("FACTA"), published a protocol relating to derivative transactions (the "Protocol"). FATCA was enacted in March 2010 and becomes effective January 1, 2013. FATCA requires certain foreign financial institutions or "FFIs" to report withholding information to the U.S. Internal Revenue Service ("IRS") for U.S. account holders.

ISDA provided language to be used by market participants to amend ISDA Master Agreements. According to ISDA, "the impact of the proposed language is to place the FATCA withholding tax burden on the recipient of the payment by eliminating this tax from the definition of 'Indemnifiable Tax' in the ISDA Master Agreement. The rationale is that the recipient is the sole party that has the ability to avoid the withholding tax by complying with the FATCA rules; therefore, the recipient should be the party burdened with the FATCA withholding tax if it chooses to not comply." The Protocol, which includes suggest text for the Master Agreement, and other information relating to ISDA and FATCA can be found at <http://www2.isda.org/functional-areas/accounting-and-tax/fatca/>.

## **SEC Files Administrative and Cease-and-Desist Proceedings against Registered Investment Adviser Peak Wealth Opportunities, LLC**

On August 10, 2012, the SEC instituted a public administrative and cease-and-desist proceeding against Peak Wealth Opportunities, LLC ("Peak Wealth") and David Dube, the president and sole managing member of Peak Wealth, for alleged misconduct while serving as both investment adviser and administrator of the now-liquidated Stock Car Stock Index Fund (the "Fund"). The Fund, which invested in NASCAR-related stocks, was the sole series of the former Stock Car Stocks Mutual Fund, Inc., a registered investment company.

According to the order filed, the SEC alleges that Peak Wealth willfully violated its duties to the Board of Trustees (the "Board") of the Fund under Section 15(c) of the Investment Company Act of 1940, as amended. As prescribed in Section 15(c), an investment adviser of a registered investment company has a duty "to furnish such information as may reasonably be necessary for fund directors to evaluate the terms of any contract whereby a person undertakes regularly to service or act as investment adviser of such company." In allegedly failing to provide the needed information, the Board was unable to conduct its annual assessment of the Peak Wealth's cost and performance under an advisory agreement with the Fund. "A fully-informed board is crucial to the advisory fee setting process, yet Dube failed to provide the

board with the most basic of information," noted Chad Alan Earnst, an Assistant Regional Director in the SEC Enforcement Division's Asset Management Unit. Upon the Fund's termination of the advisory agreement with Peak Wealth, the Board voted to liquidate and deregister the Fund.

Stemming from the SEC's examination staff's initial investigation of Peak Wealth's practices, the SEC Enforcement Division alleges that Peak Wealth willfully violated its responsibilities under Section 204 of the Advisers Act by failing to maintain and furnish to the SEC examiners upon request certain financial statements, bank records, income and expense statements, and other copies of books, records and reports as it related to its services to the Fund. Under Section 204, investment advisers are required "to make and keep certain records and furnish copies thereof, and to make and disseminate such reports as the [SEC], by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Upon the Board's termination of the advisory agreement with Peak Wealth, the SEC further charged Peak Wealth for failure to file a timely Form ADV-W under Rule 203(A) of the Advisers Act. As prescribed in Rule 203A-1(b)(2), once a registered investment adviser becomes ineligible for SEC registration, it must file a Form ADV notice to withdrawal within 180 days of its fiscal year end. As Peak Wealth's alleged misconduct resulted in the Board's ultimate termination, the SEC alleges that Peak Wealth failed to withdraw its registration in compliance with this standing regulator requirement.

**Sources:** <http://www.sec.gov/litigation/admin/2012/34-67640.pdf>  
<http://www.sec.gov/news/press/2012/2012-154.htm>

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