

### **Drinker Biddle Proposes 408(b)(2) Service Provider Disclosure Voluntary Correction Program to the Department of Labor**

On October 16, 2012, a leading group of attorneys from Drinker Biddle & Reath LLP (“Drinker Biddle”) delivered a proposal to U.S. Department of Labor (the “DOL”) Assistant Secretary of Labor Phyllis Borzi, suggesting the Employee Benefits Security Administration (the “EBSA”) implement a voluntary correction program for service providers covered under Section 408(b)(2) of the Employment Retirement Income Security Act of 1974, as amended (the “Regulation” or “ERISA”). Under the Regulation, service providers including large insurance companies, mutual fund complexes, broker-dealers, investment advisory firms and third-party administration firms would be required to disclose information regarding compensation and potential conflicts of interest. “We believe that, despite the best efforts of the EBSA to publicize the requirements of the Regulation and several extensions of the deadline, and notwithstanding concerted efforts by covered service providers and responsible plan fiduciaries, the broad reach and relative complexity of the new Regulation have presented significant compliance challenges,” opined Drinker Biddle.

Drinker Biddle believes that while a “significant number” of service providers failed to make the proper disclosures thereby opening these providers to serious consequences, the potential harm to the plans and participants is minimal. The proposal, which the firm acknowledges is modeled after previous corrective programs of the DOL and the Internal Revenue Service, calls for service providers to file an application explaining the error or omission and the corrective action being undertaken. This application, which would be made on an anonymous basis and come with a submission fee, would apply to both “systemic” and “individual” disclosure failures. Once received, the applicant would receive a no action letter assuring the provider that it will not be subject to a subsequent investigation, will be granted relief from Section 502(i) penalties under ERISA, confirmation that no corrective action in the form of refund of compensation will be required, and relief from excise taxes stemming from the failure to disclose.

The summary of the Drinker Biddle proposal, complete with the letter to Secretary Borzi, may be accessed at: <http://www.drinkerbiddle.com/news/headlines/2012/408b2-Correction-Program>.

### **ICI launches ETF Educational Website**

In response to both the lack of common understanding between exchange-traded fund (“ETF”) firms and the overall lack of fundamental knowledge amongst investors, the Investment Company Institute, with the support of 14 ETF providers, launched a website dedicated to promoting investor learning and understanding. The website, [www.understandETFs.org](http://www.understandETFs.org), highlights nine fundamental questions regarding ETFs and links its visitors to various educational resources.

“Our ability to come together as an industry to offer them educational resources is timely and important,” noted ProShare Advisors CEO Michael Sapir. “All of us have a stake in ensuring investors have the knowledge and know-how they need to invest in ETFs with confidence to achieve their financial goals.”

#### **Sources:**

[http://www.ignites.com/c/425191/47791/industry\\_build\\_educational\\_website?referrer\\_module=emailMorningNews&module\\_order=5&code=ZEEdGNWJHOXIMbVV1Wm14bGJXbHVAMEJXY0cxmNtZGhiaTVqYjlwcOIESTNORE13TmPfcOIETTVOekxTVRZek9BPTQ](http://www.ignites.com/c/425191/47791/industry_build_educational_website?referrer_module=emailMorningNews&module_order=5&code=ZEEdGNWJHOXIMbVV1Wm14bGJXbHVAMEJXY0cxmNtZGhiaTVqYjlwcOIESTNORE13TmPfcOIETTVOekxTVRZek9BPTQ)

<http://www.indexuniverse.com/sections/news/14850-ici-launches-etf-education-website.html>

### **HIGHLIGHTS**

**Law firm seeks voluntary correction program for 408(b)(2) errors**

**ICI launches new ETF informational website**

**JBW Capital LLC and John B. Wilson charged with acting as an unregistered CPO**

**New order type proposed for trading ETFs**

## Unregistered Boston Based Commodity Pool Operator Charged with Fraud

On September 28, 2012, the U.S. Commodities Futures Trading Commission ("CFTC") filed a civil complaint in the U.S. District Court, District of Massachusetts, against JBW Capital LLC, an unregistered pooled investment vehicle (the "pool") and its manager, John B. Wilson ("Wilson"), for acting as an unregistered commodity pool operator ("CPO"). Neither Wilson nor the pool were registered or exempt from registration with the CFTC as a CPO, nor was the pool registered with the U.S. Securities and Exchange Commission. According to the complaint, Wilson and the pool solicited and raised approximately \$1.8 million from investors between July 2007 and May 2010, while falsely representing the pool's actual value to pool participants. In an e-mail sent to pool participants on September 13, 2008, Wilson falsely represented the pool's approximate value at \$2.5 million, but failed to disclose a nearly \$1 million loss in the pool that had occurred two days earlier. Wilson admitted to leveraging the pool 300 to 1, and as a result of two trades lost nearly 99% of the value of the pool. Wilson also failed to disclose the high risk of the pool's investment strategy to pool participants and shortly thereafter, solicited and obtained \$100,000 from a new pool participant while failing to disclose the actual losses to the new participant. Wilson then provided the new pool participant with a falsified statement showing his interest in the pool to be less than 4%, when in actuality it was approximately 75% of the pool. On December 12, 2008, Wilson e-mailed the new participant and falsely stated that the participant had made a 25% return on his initial investment. The participant then invested an additional \$100,000 into the pool. A related case has also been filed in the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth against Wilson (Docket No. E-2011-0026).

### CFTC Press Release PR6372-12:

<http://www.cftc.gov/PressRoom/PressReleases/pr6372-12>

### Administrative Complaint, Docket No. 2011-0026:

[http://www.sec.state.ma.us/sct/archived/sctma3ia/wilson\\_complaint.pdf](http://www.sec.state.ma.us/sct/archived/sctma3ia/wilson_complaint.pdf)

## NASDAQ Proposes INAV Pegged Order for Trading ETFs

On October 12, 2012, the NASDAQ Stock Market LLC ("NASDAQ") proposed a new order type for trading Exchange-Traded Funds ("ETFs") called the Intraday Net Asset Value ("INAV") Pegged Order. This new order type will price at the next available INAV of the fund's underlying portfolio and will update when the INAV updates, or at least every 15 seconds. The INAV is a way to approximate fair value of an ETF during the trading day prior to the NAV being calculated at the end of the day.

According to NASDAQ, "INAV Pegged Order will allow market participants the option to enter an order without concern about the value of the fund's underlying portfolio being drastically different and therefore resulting in an inferior execution, as the order will be dynamically re-priced/updated throughout the life of the order as the value of the underlying portfolio changes."

For more information on the proposed rule and examples of how the INAV Pegged Order will operate in the marketplace, please find the proposal at:

<http://www.sec.gov/rules/sro/nasdaq/2012/34-68042.pdf>

**For more information, please speak to your relationship manager or visit [jpmorgan.com/wss](http://jpmorgan.com/wss).**

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