

revised version of Rule 13q-1 and amendments to Form S-D in 2016. Less than one year later, the revised rules were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act. H.R.J. Res. 41, 115th Cong. (2017) (enacted). 5 U.S.C.A. 801 et seq. *See also* discussion *infra*.

<sup>9</sup>Disclosure of Payments by Resource Extraction Issuers, Release No. 34-87783 (Dec. 19, 2019), available at <https://www.sec.gov/rules/proposed/2019/34-87783.pdf>.

<sup>10</sup>*See* 156 Cong. Rec. S3816 (daily ed. May 17, 2010).

<sup>11</sup>*See* “How a well-intentioned U.S. law left Congolese miners jobless,” Sudarsan Raghavan, *The Washington Post* (Nov. 30, 2014), available at [https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2\\_story.html](https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html).

<sup>12</sup>Another important thing to note is that, with respect to disclosure requirements, the SEC primarily deals with public companies (which make up only a subset of companies). In order to make the greatest impact and create a level playing field, Congress or other federal agencies with direct oversight responsibility should deal with the “E” and the “S” issues directly, rather than having the SEC try to require information from only a subset of companies.

<sup>13</sup>*See, e.g.*, Request for Comments on Fund Names, Release No. IC-33809 (Mar. 2, 2020), available at <https://www.sec.gov/rules/other/2020/ic-33809.pdf> (the “Names RFC”). Note 23 references EDGAR data showing the number of ESG funds has increased over 300% in the last two decades.

<sup>14</sup>The SEC’s Asset Management Advisory Committee has formed a subcommittee focusing on ESG-focused investment products and disclosures. Their most recent presentation is available here: [https://www.sec.gov/files/ESGSubcommitteeUpdate\\_0.pdf](https://www.sec.gov/files/ESGSubcommitteeUpdate_0.pdf).

<sup>15</sup>*See* Names RFC, *supra* note 14. I am sure that the feedback we received will be informative, and I hope the Commission can set forth clearer parameters around how investment products, such as “ESG” mutual funds and ETFs, are named.

<sup>16</sup>The Department of Labor recently proposed a rule that would require plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk adjusted economic value of a particular investment. *See* Employee Benefits Security Administration,

Department of Labor, “Financial Factors in Selecting Plan Investments” (June 30, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-06-30/pdf/2020-13705.pdf>.

## SEC/SRO UPDATE: FINANCIAL REGULATORS MODIFY VOLCKER RULE; SEC CHARGES MICROCAP FRAUD SCHEME PARTICIPANTS ATTEMPTING TO CAPITALIZE ON THE COVID-19 PANDEMIC; SEC PROPOSES AMENDMENTS TO UPDATE FORM 13F FOR INSTITUTIONAL INVESTMENT MANAGERS; SEC AND JUSTICE DEPARTMENT’S ANTITRUST DIVISION SIGN HISTORIC MEMORANDUM OF UNDERSTANDING

*By Peter H. Schwartz and Stephanie G. Danner*

*Peter H. Schwartz is a partner and Stephanie G. Danner is an associate in the law firm of Davis Graham & Stubbs LLP in Denver, Colorado. The authors thank Sandra Wainer, a paralegal at Davis Graham, for her assistance in preparing this article.*

*Contact: [peter.schwartz@dgsllaw.com](mailto:peter.schwartz@dgsllaw.com) or [stephanie.danner@dgsllaw.com](mailto:stephanie.danner@dgsllaw.com).*

### Financial Regulators Modify Volcker Rule

On June 25, the Securities and Exchange Commission (“SEC”), along with four other federal regulatory agencies, finalized a rule modifying the Volcker Rule’s prohibition on banking entities investing in or sponsoring hedge funds or private equity funds—known as “covered funds.”<sup>1</sup>

The Volcker Rule generally prohibits banking enti-

ties from engaging in proprietary trading and from acquiring or retaining ownership interests in, sponsoring, or having certain relationships with a hedge fund or private equity fund.

The final rule, which is similar to the proposed rule released in January,<sup>2</sup> modifies three areas of the Volcker Rule by:

- Streamlining the covered funds portion of rule;
- Addressing the extraterritorial treatment of certain foreign funds; and
- Permitting banking entities to offer financial services and engage in other activities that do not raise concerns that the Volcker Rule was intended to address.

The final rule will be effective October 1.

### **SEC Charges Microcap Fraud Scheme Participants Attempting to Capitalize on the COVID-19 Pandemic**

On June 11, the SEC filed an emergency action and obtained an asset freeze against five individuals and six offshore entities for an alleged fraudulent scheme that generated more than \$25 million from illegal sales of multiple microcap companies' stock, including four that were the subject of recent SEC trading suspension orders: Sandy Steele Unlimited Inc., WOD Retail Solutions Inc., Bioscience Neutraceuticals, Inc., and Rivex Technology Corp.<sup>3</sup>

The SEC's complaint alleges that from at least January 2018 to the present, two key persons and others, enabled corporate control persons that were unknown to the public to conceal their identities while dumping their company's stock into the market for purchase by unsuspecting investors. The complaint alleges that these illegal stock sales were often boosted by promotional campaigns that, in some instances, included false and misleading information designed to fraudulently capitalize on the COVID-19 pandemic.

For example, the alleged promotions included claims that Sandy Steele could produce medical quality facemasks and that WOD Retail had automated kiosks for retailers to use in response to the COVID-19 pandemic. The complaint also charges some other participants with fraudulently dumping shares of Sandy Steele.

The SEC's complaint charged various participants with violating the antifraud and registration provisions of the federal securities laws. The SEC seeks permanent injunctions, conduct based injunctions, disgorgement of allegedly ill-gotten gains plus interest, civil penalties, and penny stock bars. Parallel criminal charges were also brought against one of the key individuals.

### **SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers**

On July 10, the SEC announced proposed amendments to Form 13F to update the reporting threshold for institutional investment managers (the "Proposal").<sup>4</sup>

Form 13F was originally adopted pursuant to a 1975 statutory directive designed to provide the SEC with data from larger managers about their investment activities and holdings, so that their influence and impact could be considered in maintaining fair and orderly securities markets. At the time Form 13F was adopted, the threshold for filing was \$100 million. The Proposal would raise the reporting threshold from \$100 million to \$3.5 billion, which reflects proportionally the same market value of U.S. equities that \$100 million represented in 1975. According to the press release, the Proposal would provide relief to smaller investment advisers currently required to file Form 13F, while retaining data on over 90% of the dollar value of the securities currently reported on Form 13F.

In addition to raising the reporting threshold, the Proposal would also require SEC staff to review the Form 13F reporting threshold every five years and rec-

ommend appropriate adjustments (if any) to the SEC. The Proposal would also eliminate the ability of managers to omit certain small positions, which would increase the overall holdings information reported by larger managers.

The comment period for the Proposal will be open until September 29, 2020.

### **SEC and Justice Department's Antitrust Division Sign Historic Memorandum of Understanding**

On June 22, the SEC announced that the SEC and the Antitrust Division of the Department of Justice (the "DOJ") signed an interagency memorandum of understanding (the "MOU") to "foster cooperation and communication between the agencies with the aim of enhancing competition in the securities industry."<sup>5</sup>

In addition to provisions that would facilitate communication and cooperation between the SEC and the DOJ's Antitrust Division, the MOU establishes a framework for the agencies to continue regular discussions and review law enforcement and regulatory matters affecting competition in the securities industry, including provisions to establish periodic meetings among the respective agencies' officials. The MOU also provides for the exchange of information and expertise the agencies believe to be potentially relevant and useful to their oversight and enforcement responsibilities.

#### **ENDNOTES:**

<sup>1</sup>See SEC Press Rel. No. 2020-143 (June 25, 2020), available at <https://www.sec.gov/news/press-release/2020-143>; see also <https://www.sec.gov/rules/final/2020/bhca-9.pdf> (final rule).

<sup>2</sup>See SEC Rel. No. BHCA-8 (Jan. 30, 2020), available at <https://www.sec.gov/rules/proposed/2020/bhca-8.pdf> (proposed rule).

<sup>3</sup>See SEC Press Rel. No. 2020-131 (June 11, 2020), available at <https://www.sec.gov/news/press-release/2020-131>.

<sup>4</sup>See SEC Press Rel. No. 2020-152 (July 10, 2020), available at <https://www.sec.gov/news/press-release/2020-152>; see also <https://www.sec.gov/rules/proposed/2020/34-89290.pdf> (proposed rule).

<sup>5</sup>See SEC Press Rel. No. 2020-140 (June 22, 2020), available at <https://www.sec.gov/news/press-release/2020-140>.