IA Watch
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INSIDE...

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Cybersecurity concerns cause SEC to relax Form N-Port filing deadlines

A new **SEC** interim final rule turns the planned monthly Form N-Port reporting by mutual funds into quarterly reports. The Commission also relaxes the initial reporting, which begins this year for larger mutual funds, for certain funds.

The changes come after the SEC's "evaluation of the data security protocols relating to Form N-PORT," which would be submitted via its EDGAR system. The change will reduce "the potential cybersecurity risks arising from the collection and maintenance of sensitive non-public data on EDGAR," according to the rule.

The new rule follows news two years ago of a massive hack of EDGAR data as well as related criminal indictments tied to that hack released earlier this year (**IA Watch**, Jan. 17, 2019).

The rule doesn't push back the deadline for Form N-PORT – May 30th for certain larger funds and April 30, 2020 for smaller funds.

The new rule gives a break to those larger fund groups with fiscal quarters ending in March and April as they won't have to report a full quarter's worth of data (see the table on page 3).

Given that some Form N-PORT filings will be public and others will be for SEC eyes only, the rule urges funds to file their public and private filings via EDGAR on

(Form N-PORT, continued on page 2)

Lawsuit claims Fidelity pockets hundreds of millions in secret 'infrastructure' fees

Federal court in Boston will be the sparring ground over questions of whether **Fidelity** has violated ERISA by charging a secret fee to allow mutual funds access to the custodian's platform.

In *Wong v. Fidelity*, the plaintiffs claim the giant custodian "literally has lined its pockets with at least hundreds of millions of dollars in secret payments by and through self-dealing, other prohibited transactions and breaches of its fiduciary duties."

The class-action lawsuit brought by a participant in a **T-Mobile USA** 401(k) plan asserts that Fidelity's mutual fund "supermarket" that allows 24,000 retirement plans to invest in various funds is "a pay-to-play scheme" in which the mutual fund advisers must pay to be on the Fidelity platform, according to the plaintiff's complaint.

An emphatic denial

A Fidelity spokesman e-mailed **IA Watch** to state

(Fidelity Sued, continued on page 2)

Subscriber suggested story

Pick among several approaches to dispense your coinvestment opportunities

How you set up your investors' coinvestment opportunities are up to you but, as so often happens under the Advisers Act, be sure you do what you pledge. The issue has come up in private equity for years (**PF Watch**, Oct. 15, 2015).

A compliance peer at a real estate advisory firm asked us to sample how firms decide who gets to participate in coinvestments. Approaches vary.

A CCO at a real estate advisory firm in the south reports that investors were clamoring for coinvestment opportunities. When the RIA finally announced a couple recently, strangely, investors were cool to them.

A percentage-based approach

The firm's approach relies on a pro-rata calculation based on the capital an investor has committed or pledged to commit. For instance, if an investor has put $30 mil-

(Coinvestments, continued on page 2)

Fidelity Sued *(Continued from page 1)*

that the company "emphatically denies the allegations in this complaint. Fidelity fully complies with all disclosure requirements in connection with the fees that it charges."

"If the allegations could be established, Fidelity is in deep trouble," says **Ben Anderson**, principal with **Anderson PLC** in Minneapolis. **IA Watch** asked Anderson to review the complaint. If the plaintiffs can prove their allegations, "this is going to be absolutely enormous," he adds.

The law firm behind the complaint, **Shepherd Finkelman Miller**, often pursues class-action lawsuits. It's rare for plaintiffs attorneys to not talk with the press after filing such a complaint. However, none of the nine attorneys spread throughout the country who jointly filed the lawsuit in U.S. District Court in Boston returned **IA Watch** inquiries for comment.

Platform access

Although the supermarket concept has been in existence since 1989, the plaintiffs allege that around 2017, Fidelity began requiring mutual funds, investment advisers and others "to make secret payments ... to Fidelity for its own benefit in the guise of 'infrastructure' payments or so-called relationship-level fees in violation of" ERISA.

In addition, the plaintiffs claim Fidelity forbid "the mutual funds from disclosing the amount of these secret payments, despite their legal obligation to do so."

Should the lawsuit prevail, the fallout could hit the mutual funds that paid the fees and even their investment advisers, believes Anderson. It would be wise for the boards and the investment advisers for the funds that appeared on the Fidelity platform to investigate any possible "exposure," suggests Anderson.

The lawsuit alleges the payments amount to "indirect compensation" that violates ERISA.

The **Investment Company Institute**, which advocates on behalf of mutual funds and investment advisers, declined to comment on the lawsuit. ■

Form N-PORT *(Continued from page 1)*

separate days "to reduce the risk of the fund incorrectly identifying a non-public filing as public." The EDGAR system will be revised forcing funds to indicate whether a filing is to be public or private.

Separate new proposal

The SEC also released a new proposed rule, *Solicitations of Interest Prior to a Registered Public Offering*. The proposed Securities Act change would "permit issuers to engage in oral or written communications with" qualified institutional buyers or institutional accredited investors before a security is registered. Investment advisers would be free to engage in such communications should the rule be finalized. This flexibility currently exists only for emerging growth companies but would be expanded to all issuers if finalized. You have until April 29 to comment on the proposal. ■

Coinvestments *(Continued from page 1)*

lion into a $100 million fund, that investor could get up to 30% of a coinvestment opportunity, says the CCO.

But the adviser already is contemplating revising this to go with a "next-in-line" allocation method whereby the next investor who didn't get a prior coinvestment opportunity would be first to get in on the next one. The person would have "the opportunity to pass" without losing his place in line, says the CCO. He concedes the process can get "real complicated real quick."

The method favored by an adviser in Boston mirrors

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