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FINANCIAL SERVICES ALERT

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In this Issue:

Developments of Note

Other Item of Note

DEVELOPMENTS OF NOTE

Supreme Court to Review Seventh Circuit Decision Rejecting Gartenberg Analysis in Excessive Fee Suit Against Mutual Fund Adviser

The US Supreme Court has agreed to review the decision by the US Court of Appeals for the Seventh Circuit (the "Seventh Circuit") in *Jones v. Harris Associates L.P.*, 527 F.3d 627 (7th Cir. 2008) ("Harris Associates"), an excessive fee suit brought under Section 36(b) of the Investment Company Act of 1940, as amended (the "1940 Act"), against an adviser (the "Adviser") for registered open-end funds (the "Funds") in which the plaintiffs had invested. As discussed in the June 3, 2008 *Alert*, Harris Associates affirmed the suit's dismissal by the US District Court for the Northern District of Illinois (Eastern Division). Although it affirmed the District Court's decision, Harris Associates expressly rejected the multi-factor analysis for suits under Section 36(b) of the 1940 Act established by the US Court of

Appeals for the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982). By a unanimous vote, a panel of Seventh Circuit denied a petition for rehearing of its decision in Harris Associates (as discussed in the August 19, 2008 *Alert*). A request for rehearing *en banc* was also narrowly denied, occasioning a dissent by one of the Seventh Circuit's leading judges. The split in authority among the circuits on this issue created by Harris Associates was the basis for the plaintiffs' request for Supreme Court review.

US District Court Finds Private Right of Action under Section 13(a) of 1940 Act in Ruling on Motion to Dismiss Shareholder Suit Alleging Index Fund's Investments in Non-Agency CMOs Violated Fund's Investment Objective and Concentration Policies

The US District Court for the Northern District of California (the "Court") granted in part a motion to dismiss a complaint filed by a registered investment advisor (the "Adviser") on behalf of all persons who owned shares of a bond market index fund (the "Fund") against the Fund and the Fund's sponsor and related entities, but gave the Adviser leave to amend the complaint to address the shortcomings in its pleadings found by the Court. The Adviser had invested its clients' assets in the Fund. The complaint alleged that the defendants violated Section 13(a) of the Investment Company Act of 1940 as amended (the "1940 Act"), by failing to follow the Fund's investment objective of tracking a specified broad bond market index that includes investment grade government, corporate, mortgage-, commercial mortgage- and asset-backed bonds with maturities greater than one year (the "Index") by investing in high-risk, non-US agency collateralized mortgage obligations ("CMOs") that were not part of the Index and entailed a substantially greater risk than the Index. The Complaint also alleged that the Fund violated Section 13(a) by improperly changing its concentration policy of investing no more than 25% in any industry so that the Fund could invest more than 25% of its total assets in US agency and non-agency mortgage-backed securities. The plaintiff claimed that Fund shareholders suffered losses when there was a sustained decline in the value of non-agency mortgage-backed securities and that the Fund would not have sustained these losses had the Fund complied with its investment objective and concentration policy, noting that during the period September 4, 2007 through August 27, 2008 the Fund incurred a negative total return of 1.09% as compared to the Index's positive return of 5.92%.

Standing. The defendants contended that the Adviser lacked standing to bring the suit because the Adviser had only purchased shares for its clients, not for itself. The defendants cited a 2008 Second Circuit decision holding that an investment adviser acting as attorney-in-fact for its clients lacked standing to bring a claim on its clients' behalf against a fund in which it had invested client assets. (See the December 9, 2008 *Alert*) for a discussion of the Second Circuit decision.) Noting that the Adviser never actually owned shares of the Fund, and did not qualify for any of the prudential exceptions to the third-party standing rules, the Court granted the motion to dismiss. The Court, however, granted the Adviser leave to amend the complaint, noting that the Adviser could cure this deficiency by revising the complaint to include the fact that one of its clients had assigned the client's claims to the Adviser. The Court also observed that the Adviser could have standing if it alleged that Fund losses resulting from the improper investments caused the Adviser to lose advisory fee income because its clients' Fund holdings, the value of which served as the basis for the Adviser's fee, declined in value.

Implied Private Right of Action under Section 13(a). The Adviser alleged that by deviating from the Fund's investment objective of tracking the Index and its policy of limiting investments in any one industry to no more than 25% assets, the defendants had violated Section 13(a) of the 1940 Act, which in relevant part prohibits a registered investment company from deviating from certain investment policies absent shareholder approval. Among the policies subject to this condition, which are generally referred to as fundamental policies, are a registered investment company's concentration policy and any policy designated in its prospectus as fundamental in its registration statement filed with the SEC, which in the Fund's case included its investment objective.

The Court noted that Section 13(a) does not expressly provide for a private remedy, but proceeded to find an implied private right of action under Section 13(a) based on Congress' enactment of an amendment to Section 13 in 2007. The 2007 amendment added Section 13(c), which prohibits any person from bringing an action against a registered investment company, or employee, officer, director or investment Adviser to a registered investment company, based solely upon the investment company's divestment from, or avoidance of investments in, securities of issuers determined to conduct or have direct investments in business operations in Sudan. The Court reasoned that if there were no private right of action under Section 13(a), Congress would not have needed to restrict the actions that could be filed under Section 13 by adding Section 13(c). The Court further observed that if Congress had intended for Section 13(c) to operate as a stand alone safe harbor provision, Congress easily could have added Section 13(c) as an entirely new provision of the 1940 Act rather than amending Section 13, or could have stated that there was no private enforcement of Section 13 whatsoever. On this basis, the Court concluded that there was an implied private right of action under Section 13(a).

Investment Objective Claim. The complaint alleged that by making sizable investments (27.3% of Fund assets according to one shareholder report) in non-agency CMOs that were significantly more risky than the agency-issued mortgage backed securities that were part of the Index, the Fund failed to comply with its fundamental investment objective of seeking high current income by tracking the Index. The Court was unpersuaded by the defendants' arguments that Fund documents disclosed that (a) the Fund's investments would be managed through statistical sampling and other procedures to closely approximate the Index's characteristics, (b) the Fund may invest in CMOs, (c) the Fund only "seeks" and will "attempt" to track the Index, (d) "[t]here can be no guarantee that [the Fund] will produce the desired results," and (e) the Fund may invest in securities that are not part of the Index, including mortgage-backed securities and CMOs. The Court found that whether the Fund's investments in non-agency CMOs were, in fact, inconsistent with its investment objective was a factual matter that could not be resolved on a motion to dismiss the complaint.

Concentration Policy Claim. The Adviser alleged that in 2006 the Fund violated its concentration policy, which limited investments in any one industry to less than 25% of Fund assets, by redefining non-agency mortgage-backed securities as no longer constituting an industry for purposes of that policy. The Adviser claimed that this change enabled the Fund to increase its investments in mortgage-backed securities without seeking shareholder approval to modify the concentration policy. In analyzing this claim, the Court noted that neither the 1940 Act nor the SEC define "industry" for the purposes of investment company concentration policies. The Court cited Guide 19, "Concentration of investments in particular industries," a guideline for mutual fund registration statements first published by the SEC in 1982, as indicating that industry classifications must meet a reasonableness standard, but held that whether mortgage-backed securities are properly considered an "industry" was a factual matter that could not be resolved at the current stage of the pleadings. (The Court did not note that in its 1998 amendments to Form N-1A, the SEC indicated that the Guides would not apply to mutual fund registration statements going forward, except as they might subsequently be incorporated into a new Investment Company Registration Guide, which the SEC staff has yet to issue.) The Court did, however, observe that if mortgage-backed securities constitute an "industry," the Fund bypassed, and effectively violated, its concentration policy by improperly reclassifying mortgage-backed securities. The Court also observed that if, as the defendants contended, the Fund's reclassification of mortgage-backed securities was reasonable, there was no violation of the concentration policy.

Other Claims. The Court refused to rule on the defendants' defense that because the Fund had disclosed its investments in non-agency CMOs and its concentration percentage in mortgage-backed securities in SEC filings more than one year before the claim was filed, the Adviser's claims were barred by the statute of limitations. The Court indicated that the defendants could renew their statute of limitations defense on a fuller, factual record. The Court granted the Adviser leave to amend its state law breach of fiduciary duty claim to address whether each of the defendants named in the claim could in fact be sued for breach of fiduciary duty and whether the breach of fiduciary claim was governed by California law as the Adviser contended. The Court also granted the Adviser leave to amend its state law breach of contract claim to add more specific allegations regarding language in the Fund's 1997 proxy statement and in subsequent prospectuses that caused the formation of a contract as to the Fund's investment objective and concentration policy. Finally, the Court found that the Adviser had sufficiently pled its state law claim of breach of covenant of good faith and fair dealing.

FDIC Adopts Interim Final Rule on Mandatory Convertible Debt under the Temporary Liquidity Guarantee Program

The FDIC adopted an interim rule that makes minor modifications to the Temporary Liquidity Guarantee Program ("TLGP"). For further discussion of the TLGP, please see the February 17, 2009, November 25, 2008, and October 28, 2008 *Alerts*. Under the interim rule, entities that are participating in the TLGP debt guarantee program would be able to issue certain mandatory convertible debt ("MCD") that would be guaranteed by the FDIC under the TLGP. To be eligible for the guarantee, MCD must (a) meet the definition of senior unsecured debt under the TLGP; (b) be newly issued on or after February 27, 2009; and (c) provide in the debt instrument for the mandatory conversion of the debt into common shares of the issuing entity on a specified date no later than June 30, 2012. No FDIC-guaranteed MCD may be issued without the FDIC's prior written approval. Entities must file a written application with the FDIC and the appropriate federal banking agency before issuing MCD. This interim rule will not result in a change to an eligible entity's existing debt guarantee cap. The amount of the assessment fee for the FDIC's guarantee of MCD will be based on the time period from issuance of the MCD until its mandatory conversion date. Institutions that issue FDIC-guaranteed MCD will have to comply with specific disclosure requirements.

FRB Issues Guidance on Dividends, Stock Redemptions and Stock Repurchases

The FRB issued a supervisory letter (SR 09-4, the "Letter") to bank holding companies ("BHCs") and FRB supervisory staff concerning BHC payment of dividends, stock redemptions and stock repurchases. The FRB stated that the Letter largely reiterates longstanding FRB supervisory policies and guidance, but reflects the current deterioration in economic conditions. In the current economic environment, the FRB states, it has "heightened expectations" that BHCs will inform and consult with FRB staff sufficiently in advance of: (1) declaring and paying dividends that could raise safety and soundness concerns, *e.g*., dividends that exceed earnings for the period for which the dividend is being paid; (2) redeeming or repurchasing regulatory capital instruments when the BHC is experiencing financial weaknesses; or (3) redeeming or repurchasing common stock or perpetual preferred stock that results in a net reduction of these elements of capital.

The FRB noted that while the Letter is addressed to all BHCs, it is "especially relevant" for BHCs experiencing financial difficulties or receiving public funds under the Emergency Economic Stabilization Act of 2008. The Letter states that BHC recipients of such public funds should not use them to pay dividends on trust preferred securities or to repurchase or redeem debt securities.

The Letter stresses that a BHC should hold capital commensurate with its overall risk profile and that voting common stockholders' equity should be the dominant element of a BHC's Tier 1 capital. The Letter directs FRB supervisory staff to evaluate the comprehensiveness and effectiveness of a BHC management's capital planning.

With respect to dividends, the Letter cautions BHCs' Boards of Directors that in declaring dividends and dividend planning, the Board should ensure that the BHC's dividend level "is prudent relative to the organization's financial position and is not based on overly optimistic earnings scenarios." BHC boards are expected to reduce or eliminate dividends when: (a) the quantity and quality of earnings have declined; (2) the BHC is experiencing other financial problems; or (3) the macroeconomic outlook for the BHC's primary profit centers has deteriorated.

ICI Publishes White Paper on Financial Services Regulatory Reform

The Investment Company Institute published a white paper entitled *Financial Services Regulatory Reform: Discussion and Recommendations*. The white paper offers a number of recommendations on how to strengthen and modernize regulatory oversight of the financial services industry.

Systemic Risk Regulator. The white paper recommends that Congress create a "Systemic Risk Regulator" to identify, monitor and manage risks to the financial system as a whole. The Systemic Risk Regulator should have responsibility for: (1) monitoring the financial markets broadly; (2) analyzing changing conditions in domestic and overseas markets; (3) evaluating the risks of practices as they evolve and identifying those that are of such nature and extent that they implicate the health of the financial system at large; and (4) acting to mitigate such risks in coordination with other responsible regulators. The white paper suggests that a Systemic Risk Regulator could be given the authority to identify financial institutions that are "systemically significant" and to oversee those institutions directly. The white paper cautions, however, that the Systemic Risk Regulator should not be structured to simply add another layer of bureaucracy or to displace the primary regulator(s) responsible for capital markets, banking or insurance.

Capital Markets Regulator. The white paper also recommends creating a single independent federal regulator responsible for oversight of US capital markets, market participants, and all financial investment products. According to the white paper, this "Capital Markets Regulator" should combine the functions of the SEC and the CFTC, and would serve as the first line of defense with respect to risks across the capital markets. As the regulatory standard setter, the Capital Markets Regulator should have the authority to address gaps in regulation relating to hedge funds, derivatives, and municipal securities, and to harmonize the legal standards applicable to investment advisers and broker-dealers. In the area of hedge funds, the white paper proposes that the Capital Markets Regulator be authorized to provide oversight over hedge funds and other unregulated pooled products with respect to, at a minimum, their potential impact on the capital markets (*e.g.*, require nonpublic reporting of information such as investment positions and strategies that could bear on systemic risk and adversely impact other market participants). In the area of derivatives, the white paper proposes that the Capital Markets Regulator have clear authority to adopt measures to increase transparency and reduce counterparty risk of certain over-the-counter derivatives, while not unduly stifling innovation. In the area of municipal securities, the white paper proposes that the Capital Markets Regulator be granted expanded authority over the municipal securities market, and use this authority to ensure that investors have timely access to relevant and reliable information about municipal securities offerings.

Banking and Insurance. The white paper includes several other recommendations for reforms in response to the financial crisis. While acknowledging regulation of the banking industry is not a primary focus of the ICI, the white paper nevertheless recommends that Congress consider consolidating the regulatory structure of the banking industry to clarify regulatory missions, eliminate duplicative regulatory agencies, and achieve a more rational regulatory structure. The white paper also supports authorizing an optional federal charter for insurance companies to create a comprehensive approach for insurers operating in national and often international markets.

President's Working Group on Financial Markets (the "PWG"). The white paper recommends that the Executive Order authorizing the PWG, whose membership consists of the heads of the Treasury Department, the Federal Reserve, the SEC and the CFTC, provide for a broader scope of coordination and information sharing among those regulatory bodies.

NYSE Proposes to Eliminate Broker Discretionary Voting for Director Elections Except as to Registered Investments Companies

The SEC published for public comment a New York Stock Exchange ("NYSE") proposal to amend its rules to (a) eliminate broker discretionary voting for the election of directors for all issuers except registered investment companies and (b) codify two interpretations regarding broker discretionary voting on proxy proposals to approve investment company advisory contracts. NYSE rules allow brokers to vote on a "routine" shareholder proposal if the beneficial owner of stock entitled to vote on the proposal has not provided specific voting instructions to the broker at least ten days before a scheduled meeting. Current NYSE rules treat as routine an uncontested election for an issuer's board of directors, which is generally any election in which there are no competing solicitations. On "non-routine" matters, generally those involving a contest or any matter which substantially effect the rights or privileges of stockholders, brokers may not vote without receiving instructions from beneficial owners. NYSE rules currently list 18 examples of non-routine matters.

Proposed Changes. The NYSE proposal would amend NYSE Rule 452, and corresponding NYSE Listed Company Manual Section 402.08, to eliminate broker discretionary voting for the election of directors, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"). The NYSE proposal would also codify long standing interpretations of Rule 452 that prohibit a broker from voting without stockholder instructions on any material amendment to an investment advisory contract with an investment company and on any proposal to obtain shareholder approval required by the 1940 Act of an investment advisory contract between an investment company and a new investment adviser due to an assignment of the investment company's investment advisory contract, including an assignment caused by a change in control of the investment adviser that is party to the assigned contract.

Effectiveness. The SEC must act on the proposal by June 4, 2009, subject to certain conditions, either to approve it or institute proceedings to determine whether it should be disapproved. The proposed amendment regarding broker discretionary voting for the election of directors would be applicable to proxy voting for shareholder meetings held on or after January 1, 2010. However, if the SEC does not approve the proposed amendment until after August 31, 2009, the effective date would be delayed until at least four months after the approval date, provided that the effective date may not fall within the first six months of the calendar year. The proposed amendment will not apply to a meeting that was originally scheduled to be held prior to the effective date but was properly adjourned to a date on or after the effective date.

Public Comment. Comments on the NYSE proposal must be received on or before March 27, 2009.

US Court of Appeals for the Seventh Circuit Affirms Dismissal of Mutual Fund Investors' Breach of Contract Claim against Investment Adviser over Best Execution

The US Court of Appeals for the Seventh Circuit (the "Appeals Court") affirmed the decision of the US District Court for the Southern District of Illinois (the "District Court") dismissing a claim by former investors in mutual funds (the "Funds") managed by an investment adviser and its affiliate (collectively, the "Adviser") that they were entitled to damages as third party beneficiaries of "confirmation agreements" between the Adviser and the broker-dealers through which the Adviser executed transactions on behalf of the Funds. The plaintiff investors alleged that the confirmation agreements (which their attorneys did not produce) contained an implied term providing that the broker-dealers were chosen on the basis of their ability to provide best execution for the Funds. The plaintiffs alleged that this implied term arose under the rules of the National Association of Securities Dealers (now, FINRA) and the New York Stock Exchange. The plaintiff investors based their allegations regarding the Adviser's failure to achieve best execution on the findings in settled administrative procedures brought by the SEC against the Adviser and certain of its personnel related to travel, entertainment and gifts provided by brokerage firms executing transactions for the Adviser's clients, and by the SEC and NASD against one of those brokerage firms (See the December 19, 2006 *Alert*, the March 25, 2008 *Alert*, and the December 16, 2008 *Alert* for a discussion of those proceedings).

The District Court dismissed the suit on the grounds that it was precluded by the Securities Litigation Uniform Standard Act of 1998, ("SLUSA"). In general terms, SLUSA prevents a plaintiff from bringing certain class actions based on state law in either state or federal court if the plaintiff alleges "a misrepresentation or mission of material fact" or "a manipulative or deceptive device or contrivance," and the conduct to which the allegations relate is "in connection with the purchase or sale of a covered security." The District Court found that the plaintiffs' claims amounted to "allegations of untrue statements or missions or a material fact" because according to the plaintiffs' allegations, at the time they entered into the confirmation agreements, the Adviser and the broker-dealers did so based on the receipt of gifts and other benefits rather than on the promise of best execution, and thus the agreements reflected a misrepresentation of a material fact, rather than a promise that was not subsequently kept. In affirming the District Court, the Court disallowed any state law contract claim under the facts alleged and observed that a securities law claim based on the plaintiffs' allegations would fail given the expiration of the federal statute of limitations and the class' inability to show loss causation.

FinCEN Proposes Guidance and Regulations on Sharing SARs with Affiliates and the Scope of Confidentiality Requirements for SARs

The Financial Crimes Enforcement Network ("FinCEN") joined with the federal financial institution functional regulators to issue proposed interpretive guidance (the "Guidance") and proposed regulations ("Regulations") to clarify when suspicious activity reports ("SARs") may be disclosed. Comments on both proposals are due by June 8, 2009.

SAR Sharing with Affiliates. The Guidance would extend previously issued guidelines about sharing SARs within a corporate enterprise. Specifically, the Guidance would provide that a depository institution, securities broker-dealer, or other US financial institution obligated to file SARs (a "SAR Reporter") may share a SAR that has been filed, and information that would reveal the existence of the SAR, with the SAR Reporter's affiliates that also are subject to SAR rules. The Guidance calls on a SAR Reporter to have written confidentiality agreements in place with its affiliates to protect SARs from disclosure.

In 2006, FinCEN stated that SARs could be shared, but only with head offices and parent companies, and not among affiliated entities. The Guidance – long-requested by industry participants – would expand the 2006 guidelines to allow affiliate sharing, so long as the affiliate with which a SAR is shared also is subject to SAR reporting requirements. Under the Guidance, a SAR Reporter could not, however, share a SAR with a US or foreign affiliate that is not subject to the SAR rules (*e.g.*, a registered investment adviser affiliate). Moreover, the Guidance would not allow an affiliate receiving a SAR from a SAR Reporter to, in turn, reveal that SAR to any other party, including to another affiliate.

Clarification of Confidentiality Requirements. In a contemporaneous release, FinCEN proposed the Regulations to clarify the scope of the confidentiality provisions of the SAR rules. Among other things, the Regulations would clarify that SAR confidentiality requirements extend to any information that would reveal the existence of a SAR filing and that SAR Reporters may not disclose SARs to any person, not just those involved in the suspicious transaction. The Regulations would also clarify that, in response to subpoenas or other requests for disclosure, SAR Reporters may neither disclose a SAR filing nor any information that would reveal the existence of such a filing. The Regulations would allow certain SAR disclosures to government and self-regulatory organizations that examine a financial institution for compliance with the Bank Secrecy Act. Under the Regulations, governmental and self-regulatory entities with access to SAR information would also be subject to SAR confidentiality requirements.

CFTC Proposes Modifications to Period Account Statements and Annual Financial Reports for CPOs

The Commodity Futures Trading Commission (the "CFTC"') issued for public comment a proposal to amend its regulations governing (a) the periodic account statements that commodity pool operators ("CPOs'') are required to provide to commodity pool participants and (b) the annual financial reports that CPOs are required to provide to commodity pool participants and file with the National Futures Association ("NFA''). The proposed amendments would: clarify the reporting obligations of commodity pools with more than one series or class of ownership interest; clarify that the periodic account statements must disclose either the net asset value per outstanding participation unit in the pool, or the total value of a participant's interest or share in the pool; extend the time period for filing and distributing annual reports of commodity pools that invest in other funds; codify existing CFTC staff interpretations regarding the proper accounting treatment and financial statement presentation of certain income and expense items in periodic account statements and annual reports; streamline annual reporting requirements for pools ceasing operation; and clarify and update several other requirements for periodic and annual reports prepared and distributed by CPOs. Comments must be received by the CFTC no later than March 26, 2009.

OTHER ITEM OF NOTE

SIPC Announces Increase in Annual Member Firm Assessments

On March 2, the Securities Investor Protection Corporation ("SIPC"), which assists customers of member brokerage firms that fail in recovering those customers' cash and securities (including providing protection up to $500,000 per customer), announced that it will be increasing member assessments. Starting April 1, 2009, SIPC member assessments will be based on one-quarter of 1% of the net operating revenues of the member firm. From 1996 through 2008, SIPC members only paid the minimum $150 annual assessment. In a letter to SIPC member firm CEOs, the SIPC Chairman indicated that "SIPC has determined that the SIPC fund balance is reasonably likely to aggregate less than $1 billion and will remain less than $1 billion for a period of six months or more." As of January 27, 2009, the SIPC fund balance totaled $1.7 billion. The Securities Investor Protection Act ("SIPA"), under which SIPC operates, caps member assessments at 1% of net operating revenues. SIPA permits annual assessments in excess of one-half of 1% only if SIPC determines that such a rate of assessment, during any twelve-month period, will not have a material adverse effect on the financial condition of the SIPC member or its customers.

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SPECIAL ANNOUNCEMENT

Goodwin Procter partner Sean O'Malley, whose practice focuses on broker-dealer, investment adviser and hedge fund regulation, will be a speaker at the *Introduction to European Regulation* course presented by FINRA on March 16 in New York. The other speakers include Dr. Markus Escher who heads the banking team at GSK Stockmann & Kollegen a leading German law firm and Rob Moulton who heads up the Nabarro Financial Services Regulation Group.
This course covers European regulation relevant to US securities firms operating into the European Union (E.U.) or interacting with counterparties in the E.U., and serves as an interactive forum to better understand legal and regulatory applications. The course looks at the fundamental issues of conducting business on a cross-border basis in Europe, and uses clear, practical examples of how today's firms manage the interaction between rules and principles applicable to US parent firms, and those rules governing securities business in the U.K. and Europe.

FOR MORE INFORMATION, PLEASE CLICK HERE. IF YOU WISH TO ATTEND, PLEASE EITHER CALL 202-728-8849 OR USE THE FAX REGISTRATION FORM ON THE WEBPAGE. PLEASE BE SURE TO IDENTIFY YOURSELF AS A CLIENT OR FRIEND OF GOODWIN PROCTER AND YOU WILL BE OFFERED THE FINRA MEMBER RATE FOR THE PROGRAM.

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