Robinson+Cole

2021 Investment Adviser Update

Into The Flood Again, Same Old Trip It Was Back Then

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The rules and regulations governing private equity and hedge fund advisers continue to develop in response to changes in technology. As a result, advisers are subject to an ever-increasing degree of supervision by the Securities and Exchange Commission (SEC) and self-regulatory organizations. Investment advisers registered with the SEC (each an RIA) are subject to certain annual requirements under the Investment Advisers Act of 1940 (Advisers Act). Some of these requirements also either apply to exempt reporting advisers (each an ERA) or may warrant consideration as best practices for ERAs.

This update summarizes some of the most important developments of the past year. We focus on SEC examination priorities, look at some significant recent regulatory developments, and finally, review certain recent SEC enforcement actions. A careful read of this update against last year's will show that a lot of the same ground is being covered, which demonstrates a certain level of consistency from the SEC and can help manage expectations going forward.

SEC Division Of Examinations - New Name of OCIE

On December 17, 2020, the SEC announced that after 25 years since the creation of the Office of Compliance Inspections and Examinations (OCIE), it would be renaming the office the Division of Examinations (the Division). The announcement reinforced the SEC's commitment to the Division's centralized National Examination Program, with staff located across its Washington, D.C. headquarters and 11 SEC regional offices. Risk-based examinations of entities registered with the SEC, including investment advisers, mutual funds and exchange-traded funds (ETFs), broker-dealers, transfer agents, and clearing agencies as well as national securities exchanges and municipal advisors, will continue to be the Division's priority and focus. The SEC noted that Division program areas will continue to be a primary focus, including the Investment Adviser/Investment Company Examination Program; the Broker-Dealer and Exchange Examination Program; the Financial Industry Regulatory Authority (FINRA) and Securities Industry Oversight Examination Program; the Technology Controls Program; and the newly-created Event and Emerging Risks Examination Team. In the announcement, the SEC noted that the Division's new name reflects the important role its expert staff plays in support of the SEC's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[1]

Exam Priorities 2021

On March 3, 2021, the Division published its examination priorities for 2021 (Exam Priorities) for various regulated entities, including investment advisers. The Division has announced its exam priorities annually for the past nine years to provide insights into the areas it believes present potentially heightened risk to investors or the integrity of the U.S. capital markets. The Division opened this year's Exam Priorities summary with an acknowledgement of the impact the global pandemic has had on everyone, a

reminder of firms' obligations under Regulation Best Interest (Reg BI) and reporting under Form CRS, and the continued importance of firms' compliance programs. The Exam Priorities can serve as a roadmap to assist advisers in assessing their policies, procedures and compliance programs; testing for and remediating any deficiencies related to the Exam Priorities; and preparing for exams by the Division. Advisers are encouraged to review their current policies, procedures and client disclosures with these priorities in mind. ERAs, as well as RIAs, are subject to SEC examination, although the SEC has indicated that it does not expect to examine ERAs on a routine basis.

The Division noted that it examined 2,952 advisers, about 15 percent of the RIA population, in (FY) 2020. The number of exams conducted was down only slightly from (FY) 2019, and since March of 2020 they were administered under pandemic protocols. Investment company complexes were also prioritized for examinations in 2020, with the Division noting that its staff completed more than 100 examinations of investment company complexes. In the Exam Priorities discussion, the Division also highlighted the results of examinations, including more than 2,000 deficiency letters and over 130 referrals to the Division of Enforcement. The Division's priorities for 2021 reflect a continued focus on risk areas that have been emphasized in recent years, but with attention paid to emerging risks and risks associated with developing products and services. Specific emerging risks the Division identified include ESG topics, cybersecurity (compromised network management software), supervision of remote employees, LIBOR transition preparedness, and "meme stock" issues.

The priorities reviewed under the stated examination priorities for the Division are organized around nine themes: (1) retail investors, including seniors and individuals saving for retirement; (2) information security and operational resiliency; (3) FINTECH and innovations including digital assets; (4) anti-money laundering; (5) LIBOR transition; (6) focus areas for RIAs and investment companies (i.e., compliance programs, registered fund [mutual funds and ETFs], and private fund risks); (7) financial responsibility and trading practices for broker-dealers and fiduciary and disclosure obligations for municipal advisors; (8) market infrastructure issues, including clearing agencies, transfer agents and national securities exchanges; and (9) select areas and programs of FINRA and Municipal Securities Rulemaking Board (MSRB).

Exams are Risk-Based and Data-Driven

The Division notes in the 2021 Exam Priorities that its priorities provide a preview of key elements of adviser examinations; however, they are not exhaustive and will not be the only topics addressed during an examination. RIAs received a cautionary statement from the Division that "while the priorities drive many of the Division's examinations, we select firms for examination and the areas of focus covered during examinations according to a risk-based analysis, which varies depending on the type of firm and its business activities."

Continued Focus on Retail Investors

For both broker-dealers and investment advisers, the Division continues to emphasize the protection of retail investors. Examinations will have a particular focus on services targeted to retail investors, particularly seniors and individuals saving for retirement and the related investments and services for retail investors, such as mutual funds and ETFs, municipal securities, other fixed-income securities and microcap securities. Among other focus areas, examiners will review a firm's approach and compliance with Regulation Best Interest RIA fiduciary duties and disclosures in firm's Form CRS relationship summary.

Information Security and Operational Resiliency

The Division is focused on reviewing firms' programs to identify and address information security (including cyber-related) risks. Calling attention to the increase in remote operations over the past year in response to the pandemic, the Division is looking to identify and address concerns regarding endpoint security, data loss, remote access, use of third-party communication systems, and vendor management. In this context, the Division plans to review steps firms have taken to: (1) safeguard customer accounts and prevent account intrusions, including verifying an investor's identity to prevent unauthorized account access; (2) oversee vendors and service providers; (3) address malicious email activities, such as phishing or account intrusions; (4) respond to incidents, including those related to ransomware attacks; and (5) manage operational risk as a result of dispersed employees in a work-from-home environment. Related electronic records safeguarding and protection practices also will be a focus for the Division. In the Exam Priorities, the Division notes that it intends to review controls surrounding online and mobile application access to investor account information and access to electronically stored books and records with personally identifiable information maintained with third-party cloud service providers. The Division also plans to review business continuity and disaster recovery plans in light of the substantial disruptions to normal business operations many firms experienced during the past year.

While not included in the Exam Priorities summary, the Division likely will continue to focus questions and information gathering during exams on assessing information safeguarding procedures and protection of clients' personal financial information. Examination questions and information requests emanate from the SEC's "cyber-six" and should still be the foundation for advisers' compliance efforts. The six focus areas generally include: (1) governance and risk management; (2) access controls; (3) data loss prevention; (4) vendor management (including oversight practices related to network solutions and cloud-based storage); (5) training; and (6) incident response and resiliency.

FINTECH and Innovation, including Digital Assets

The Division notes the rapid pace of innovation in financial technology and capital formation. In turn, the Division highlights its commitment to staying informed about the risks and impact of these developments. RegTech, the use of technology to facilitate compliance, will be a focus of the Division as it assesses how firms have implemented and integrated RegTech into the firm's compliance program.

Aware of registered firms' increased use of new sources of data ("alternative data") to inform investment decision-making, the Division remains focused on assessing the evolving risks of alternative data use. The Division will focus on firms' use of alternative data sets and technologies to interact with and provide services to investors, firms, and other service providers and will assess the effectiveness of related compliance and control functions, particularly as they relate to material non-public information (MNPI) and insider trading controls. For RIAs that invest in digital assets, examinations will include an assessment of firm policies for: (1) portfolio management; (2) maintenance of books and records; (3) custody; (4) disclosures to clients; (5) pricing and digital asset valuation; and (6) calculation methods of digital assets for purposes of calculating regulatory assets under management.

LIBOR Transition

Echoing the concerns detailed in its 2020 LIBOR Exam Initiative Risk Alert[2], the Division again identified LIBOR transition preparedness as an examination program priority in 2021. The Division has noted it would review, among other things, firms' activities to understand any exposure to LIBOR, how registrants have evaluated the effect of the LIBOR transition on business activities, operations, services, and investors, and what steps registrants have taken to transition documentation affected by the LIBOR transition, including amending

existing contracts and incorporating appropriate fallback language into new contracts.

Focus Areas Relevant to Investment Advisers and Investment Companies

RIA Compliance Programs. Areas of focus will include whether firms maintain effective compliance programs to address custody and safekeeping of client assets, best execution, fees and expenses, business continuity plans, and valuation of client assets for consistency and appropriateness of methodology. The Division will prioritize examinations of RIAs that have never been examined or have not been examined in a number of years. Also a priority for the Division will be advisers offering investment strategies with a focus on sustainability, or labeled socially-responsible, impact, or ESG. The stated specific focus of the Division will be to review disclosures, consistency of policies and procedures, marketing materials, and proxy voting practices.

Registered Funds, Including Mutual Funds and ETFs. The focus of the Division for registered funds includes reviews of funds' compliance programs and governance practices, disclosures to investors, valuation practices, filings with the SEC, personal trading activities, and contracts and agreements. The Division also plans to review securities lending practices for funds and advisers. As with RIAs, the Division will prioritize examinations of mutual funds or Exchange Traded Funds (ETFs) that have not previously been examined or have not been examined in a number of years.

Private Fund Advisers and Higher Risk Products. The Division will continue with its focus on RIAs that manage private funds with a specific focus on firms that manage what the Division considers to be higher risk products, such as structured products (i.e., collateralized loan obligations and mortgage backed securities) or private funds with portfolio companies that may have experienced material impacts due to recent economic conditions (e.g., real estate-related investments). In the Exam Priorities for private fund managers, the Division notes that it will be reviewing specifically for preferential liquidity treatment for funds that experienced liquidity issues in 2020 (including imposing gates or suspending fund withdrawals). The Division also will be reviewing portfolio valuation practices and the impact to management fees, cross trades, principal investments, or distressed sales, as well as for conflicts around liquidity, such as adviser-led fund restructurings.

Additional Focus Areas Relevant to Investment Advisers

Disclosure, Conflicts of Interest, Fiduciary Duty. The focus of examinations through the end of 2020 and the beginning of 2021 suggests that the Division will continue to examine advisers to evaluate whether, as fiduciaries, they have fulfilled their duties of care and loyalty. The focus of Division reviews continues its assessment of whether advisers have provided advice in the best interests of their clients and have eliminated, or at least exposed through full and fair disclosure, all of the identified conflicts of interest that might incline an adviser, consciously or unconsciously, to render advice that is not disinterested.

Fees/Expenses. Fees and expenses of private fund products continue to be a high priority for the Division's staff. During 2020, the Division reported its findings and observations regarding advisers to private and registered funds that misallocated expenses to the funds. For example, staff observed advisers that allocated distribution and marketing expenses, regulatory filing fees, and travel expenses to clients instead of the adviser, in contravention of the applicable advisory agreements, operating agreements, or other disclosures.[3]

*MNPI/Code of Ethics Complianc*e. Insider trading and the potential misuse of material nonpublic information (MNPI) have long been areas of intense focus

of the SEC examination and enforcement programs. Recent SEC investment adviser examinations and enforcement actions against private fund managers reflect a trend toward increased scrutiny of the potential for advisers to receive, and possibly to misuse, MNPI as a result of the adviser's frequent interactions with the issuers in their investment portfolios, even where there is no evidence of misuse. Even in instances in which the SEC does not allege insider trading actually occurred, these actions reflect that investment advisers may face challenging regulatory examinations, enforcement actions, and civil money penalties if the SEC alleges that an investment adviser's policies and procedures were not adequately and effectively designed, implemented, and enforced to address the potential for such misconduct.

Allocation of Investment Opportunities. Private fund advisers have had allocation of investment opportunities near the top of the compliance priority list for a number of years. Through its recent examination activity, the Division continues to review advisers' policies and actions to confirm that advisers are not giving preferential treatment to some clients or systematically excluding eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the firm's allocation policies. Specific scenarios private fund managers should review for potential deficiencies include inadequately disclosing the allocation process, failing to execute the allocation process disclosed to investors (causing investors to bear undisclosed unintended fees), or not receiving equitable investment allocations.

Focused Examination Activity. Based on recent examinations and comments by members of the Division, focused examinations may develop in 2021 for managers of environmental, social and corporate governance (ESG) strategies and Qualified Opportunity Zone Funds. Focused examination activity typically scrutinizes an adviser's risk identification, mitigation controls, policies, and procedures; marketing practices; adherence to fiduciary duty, including adequacy of disclosures; and overall effectiveness of compliance programs in areas of specific risks related to the focus topic.

Recent Regulatory Developments and Guidance that May Affect an Adviser's Compliance Program

The following regulatory developments may affect the compliance programs of certain advisers. Advisers should review these and other changes in applicable laws, rules, regulations, and/or SEC staff guidance to determine whether compliance policies and procedures need to be added or revised.
Observations on the Division's Risk Alert on Investment Adviser Compliance Programs

A Risk Alert issued by the Division on November 19, 2020, provides an overview of the Division's observations of RIA examinations, with a focus on compliance issues related to the Compliance Rule under the Advisers Act.[4] The Risk Alert, together with remarks from the Division's director, Peter Driscoll, provides a reminder of how the Division evaluates written policies and procedures, while emphasizing the importance of appointing a knowledgeable Chief Compliance Officer (CCO).

The Compliance Rule — one of the most common sources of deficiencies cited by the Division[5] — requires RIAs to: (i) adopt written policies and procedures tailored to the nature of their firm's operations; (ii) review those policies and procedures on at least an annual basis; and (iii) appoint a competent and knowledgeable CCO with requisite power, responsibility, and authority to develop, administer, and enforce those policies and procedures. The Risk Alert enumerates the following six categories of notable deficiencies:

1. *Inadequate compliance resources*. The staff observed deficiencies originating from inadequately resourced compliance departments, including CCOs who were stretched too thin over multiple roles and

responsibilities to develop or maintain the requisite compliance with the Advisers Act; inadequately or insufficiently trained staff, which resulted in deficiencies related to conducting annual reviews, timely filings, and timely responses to Division requests; and outdated compliance infrastructures.

2. *Insufficient authority of CCOs*. The staff cited a number of cases in which a CCO had insufficient authority (and in some cases, insufficient knowledge of strategy, transactions, or business operations) to develop and enforce compliance policies and procedures effectively.
3. *Annual review deficiencies*. The staff observed a number of RIAs who were not able to either demonstrate their performance of annual reviews or identify significant compliance issues in conducting their annual reviews. Other RIAs failed to perform comprehensive reviews that reflected key areas of risk (e.g., cybersecurity, fee calculation) for their advisory businesses.
4. *Failure to implement written policies and procedures*. The staff observed RIAs' failure to implement their written policies and procedures relating to personnel training, the review of advertising materials, back-testing fee calculations, testing business continuity plans, and more.
5. *Failures to maintain complete and accurate written policies and procedures*. In a recurring observation, the staff noted that some firms adopt compliance policies and procedures that are outdated, inaccurate, and incomplete and/or in some cases contain irrelevant information.
6. *Failure to establish or maintain reasonably-designed written policies and procedures*. The SEC observed that some RIAs had adopted written policies and procedures that were not appropriately tailored to their advisory businesses, were not implemented, or failed to address essential categories of compliance, such as portfolio management, marketing, trading practices, and disclosures. In other cases, the staff observed RIAs who had no written policies or procedures in place.

Provided the overview above, the Division encourages RIAs to review their written policies and procedures (including implementation thereof) to ensure that they are tailored to each RIA's business and adequately reviewed and administered.

Observations on the Division's Risk Alert on Examinations of Investment Advisers: Supervision, Compliance, and Multiple Branch Offices

The Division issued a Risk Alert on November 9, 2020, providing an overview of its observations during RIA examinations with a focus on RIAs that operate multiple branch offices that are geographically dispersed from the RIAs' principal offices (Multibranch Advisers).[6]

Among other things, the Risk Alert focused on the assessment of the compliance and supervisory practices of Multibranch Advisers relating to advisory personnel working at such branch offices. The Division emphasizes two broad areas of focus: (i) the adequacy of compliance programs under the Compliance Rule, the Custody Rule, Rule 204A-1 (Code of Ethics Rule), Rule 206(4)-1 (Advertising Rule), and fiduciary obligations with respect to fees and expenses billing practices; and (ii) the supervision of investment advisory activities across all of a Multibranch Adviser's offices.

Common Deficiencies in Compliance Programs

The Compliance Rule. The staff observed that more than half of the Multibranch Advisers examined had compliance policies and procedures that were inaccurate because they contained outdated information, inconsistently applied across branch offices, inadequately implemented or simply not enforced.

Custody Rule. The staff observed noncompliance with the Custody Rule by certain Multibranch Advisers because of policies and procedures that failed to

adequately limit the ability of advisory personnel to process withdrawals and deposits in client accounts and/or to alter clients' addresses of record.

Code of Ethics Rule. The staff cited a number of Multibranch Advisers for Code of Ethics Rule deficiencies, including failure to comply with reporting requirements, review transactions and holdings reports, properly identify access persons, or include all required provisions in their codes of ethics (e.g., provisions requiring a review and approval process prior to supervised persons investing in limited or private offerings, initial and annual holdings report submissions, and/or quarterly transaction report submissions).

Advertising Rule. The staff observed a number of problem areas in advertising materials, including performance presentations that omitted material disclosures, utilized superlatives, advanced unsupported claims, falsely stated experience or credentials of supervised persons or the advisory firm, and highlighted third-party rankings or awards that omitted material facts regarding the accolades.

Fees and expenses. The SEC found that some RIAs either did not have policies and procedures that addressed identifying and remediating instances in which undisclosed fees were charged to clients or did not enforce such policies. The staff found that most fee billing issues were related to a lack of oversight of billing processes.

Supervision of Investment Advisory Activities
The SEC noted deficiencies in the oversight of investment recommendations and the failure to disclose related conflicts of interests. Additionally, the SEC cited Multibranch Advisers for failures to adequately disclose conflicts of interest and material information regarding the disciplinary history of certain branch office advisory personnel. The SEC also observed deficiencies pertaining to the trading and investment practices of certain Multibranch Advisers, including a lack of documentation demonstrating analyses regarding obtaining best execution for clients; effectuation of principal transactions involving inventory securities without obtaining prior client consent; and inadequate monitoring of trading by advisory personnel.

Observations on the Division's Risk Alert for COVID-19 Compliance Risks and Considerations

On August 12, 2020, the Division released a Risk Alert related to COVID-19-related issues and risks relevant to SEC-registered investment RIAs and broker-dealers.[7] The Alert focuses on (1) protection of investors' assets; (2) supervision of personnel; (3) practices relating to fees, expenses, and financial transactions; (4) investment fraud; (5) business continuity; and (6) the protection of investor and other sensitive information. The SEC's concerns focus on the issues related to market volatility and the risks associated with policies, disclosures, and security related to working remotely.

Protection of Investors' Assets. Investors' assets may be compromised when investor requests by mail cannot be retrieved on a daily basis. Firms may wish to consider reviewing and adjusting their procedures related to collecting and processing investor checks and transfer requests and also consider implementing additional steps to validate investor identity and disbursement instructions. Firms may also wish to consider recommending that their investors, especially senior and other vulnerable investors, identify a trusted contact person.

Establishing an internal plan to retrieve mail on a periodic basis could alleviate many of these risks. Firms may wish to consider further notifing investors that mailed-in assets may experience delays and reminding them of alternative methods to deposit assets.

Supervision of Personnel. Working remotely creates additional risks when coupled with market volatility. The Division encourages firms to closely review and modify their supervisory and compliance policies with specific regard to (i) supervisors not having the same level of oversight when working from home; (ii) supervised persons making securities recommendations in market sectors with heightened risks for fraud or greater volatility; (iii) restraints associated with due diligence and reviewing third-party managers, investments, and portfolio companies while working remotely; (iv) any communications or transactions occurring outside the firm's systems due to personnel using personal devices; (v) remote oversight of trading and reviewing affiliated, cross, aberrational, and high-volume trading; (vi) difficulties in performing diligence on background checks when performing onboarding and having the personnel take necessary exams.

Firms may alleviate risk by (i) educating employees on the appropriate methods of business communication and use of firm software; (ii) considering whether communications, specifically those not used prior to COVID-19, are being appropriately monitored, and running additional testing to confirm adherence to trade policies; (iii) adjusting due diligence practices to address practical limits of remote reviews (such as adjusting the type or frequency of reporting); and (iv) having broker-dealers continue to monitor FINRA guidance regarding requirements to update Form BRs and Form U4s used to conduct inspections of office locations.

Practices Relating to Fees, Expenses, and Financial Transactions. The Division expressed concern that recent market volatility could increase the risk of conflicts of interest and improper fee generation due to increased pressure to generate revenue.

Firms may alleviate risks associated with improper fee generation and conflicts of interest by (i) assessing conflicts of interest continually; (ii) reviewing valuation practices for consistency and confirming that valuation issues have not resulted in overbilling, higher asset-based advisory fees, or inflated portfolio performance returns; (iii) validating the accuracy of disclosures and fee-and-expense calculations; (iv) considering adjustments to policies or procedures related to the suitability of investments; (v) identifying and monitoring transactions that resulted in high fees and expenses to investors in order to evaluate whether such transactions were in the best interest of clients; (vi) determining whether investment RIAs or broker-dealers borrowed or took loans from investors or clients, and evaluating the risks and potential conflicts associated with such financial help and how those risks can be ameliorated or disclosed; and (vii) ensuring that when an RIA received financial assistance, from the government or otherwise, the adviser is aware that it might be required to update its Form ADV Part 2A and/or Part 1, Item 18.[8]

Investment Fraud. The Division noted that times of financial uncertainty can lead to a higher risk of fraud and/or fraudulent offerings. The Division reminded RIAs and broker-dealers that they should be mindful of these risks, especially when conducting due diligence on investments.

Business Continuity. Advisers and broker-dealers are required to have business continuity plans for periods of disruption. The Division encourages firms to review and update such plans to address compliance and technological issues that could affect protracted remote operations, including (i) risk operations with supervised persons taking new or expanded roles to maintain business operations, and (ii) technological and infrastructure issues, such as securing servers and systems, relocating infrastructure and support for remote personnel, and protecting data stored or created remotely.

Protection of Investor and Other Sensitive Information. The Division highlighted the risks associated with cybersecurity and data protection when working remotely. The Division encourages firms to review and modify any

compliance policies and procedures designed to protect personally identifiable information.

Firms should consider (i) whether current policies or procedures should be modified due to personnel working in shared or less-secured environments, and (ii) providing personnel with additional cybersecurity training and tools, including enhanced system access security, such as by using multifactor authentication and validated encryption technologies to protect communications and data stored on all devices, especially personally owned devices.

Observations from Private Fund Adviser Examinations: Practical Tips and Best Practices

On June 23, 2020, the Division released a Risk Alert intended to assist RIAs to private funds in reviewing and enhancing their compliance programs and to provide investors with information regarding private fund adviser deficiencies. The three general areas covered include (1) conflicts of interest, (2) fees and expenses, and (3) MNPI and related code of ethics procedures and controls.[9]

Conflicts of Interest

The Alert identifies several situations in which disclosure is insufficient. Full and fair disclosure should "be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent."[10] Issues concerning conflicts of interest may need to be addressed on a case-by-case basis. RIAs should assess the adequacy of disclosures and ensure that disclosures contain details sufficient for the RIA's unique situation, such as avoiding overusing "may" language to describe actual practices or present conflicts. RIAs also should review procedures relating to identifying, interpreting, and disclosing conflicts and governance procedures for addressing identified conflicts, as well as verify and document the execution of existing procedures.
Allocation of Investments. Conflict-of-interest issues were often found when RIAs inadequately disclosed the allocation process or failed to execute the process disclosed to investors. Advisers should provide appropriate disclosures to clients when providing preferential treatment or excluding eligible clients from participating in specific opportunities. This is particularly important in regard to new clients, higher-fee-paying clients, and proprietary accounts or proprietary-controlled clients.

Specific Portfolio Transactions. Conflicts also arise when investments by multiple clients are made in the same portfolio company (such as one client owning debt and another owning equity in a single portfolio company) and during purchases and sales between clients (such as disclosures of transaction details such as pricing methods and anticipated limitations among clients participating in such cross-transactions).[11] The SEC's active engagement on these issues and its concerns are outlined in a number of enforcement proceedings.[12]

Fund Structures and Investment Rights. Conflicts are also found with regard to fund structure and access to investment opportunities and investor rights. The Division focused on particular instances in which private-fund RIAs failed to completely or adequately disclose preferential liquidity rights for funds or side-by-side vehicles; adequately disclose investment allocation practices; follow disclosed processes; or provide sufficiently detailed disclosure of pricing terms, valuation practices, or investor options for restructurings. These same issues were found in prior enforcement proceedings.[13]

Advisers' Economic Interests. The Division noted deficiencies when RIAs (i) failed to disclose pre-existing ownership interests or other financial interests held by principals or employees; (ii) inadequately disclosed economic

relationships between the adviser or fund and select investors or clients; (iii) failed to disclose financial incentives for the adviser or conflicts in which portfolio companies controlled by private funds entered into service agreements with the RIA, its affiliates, or other portfolio companies; and (iv) failed to follow disclosed practices regarding these types of conflicts or adopting procedures reasonably designed to address conflicts arising from interest in client investments.

To avoid issues with conflicts regarding an adviser's economic interests, RIAs may wish to consider (i) reviewing financial relationships with private funds and portfolio companies as well as policies to identify new relationships or arrangements that require new or amended disclosure; (ii) assessing ownership and economic interests in fund portfolio companies to ensure that those interests are consistent with the adviser's fiduciary duties to the fund; (iii) reviewing and memorializing any analysis with respect to the use of affiliated service providers to ensure that the nature and quality of the services are at least as good as, and costs are comparable to or less than, services available from third parties; and (iv) raising awareness among employees of the need for timely reporting and identification of financial conflicts through reminders and training reviews.

Fees and Expenses

The Division identified four types of deficiencies related to fees and expenses, such as (i) failing to sufficiently disclose practices for different types of fees and expenses; (ii) failing to adhere to disclosed practices; (iii) lacking appropriately-tailored policies based on the types of fees and expenses or the adviser's specific combination of clients; and (iv) failing to follow and/or document existing policies.

Allocation for Fees and Expenses. Deficiencies regarding RIAs' handling of fee and expense allocations may occur when RIAs fail to (i) sufficiently disclose specific allocations; (ii) properly review specific allocations to confirm appropriate allocations and policy compliance; (iii) review allocation methodologies used to allocate fees and expenses among private fund clients; (iv) properly allocate expenses that were permitted by the relevant fund operating agreements (such as salaries of adviser personnel, compliance expenses, regulatory filing fees, and office expenses); (v) follow contractual limits on expenses that could be charged to investors; and (vi) follow their own travel and entertainment expense policies. Advisers should be aware that over the past several years the Division continues to conduct a particular focus on allocations of fees and expenses.[14]

Advisers may alleviate deficiencies by (i) reviewing expense practices, including adviser expenses shared with clients and on what basis; (ii) confirming authorization for all shared expenses under organizational documents and the specific disclosure of both the expenses and the allocation practices; (iii) confirming the details and execution of procedures used to identify and monitor contractual obligations for expenses limitations or policy-based exclusions; and (iv) confirming the details and execution of controls to identify new types or categories of expenses and procedures for identifying the proper allocation.

Operating Partners. Division staff noted that many private fund RIAs used "operating partners," often an employee or affiliate of the adviser, for services used by the private funds or their portfolio companies. In such arrangements, RIAs often failed to present sufficiently specific disclosure with regard to their relationship with the operating partner, the operating partner's role, or the operating partner's compensation.[15] To avoid such conflicts, it is recommended that RIAs review arrangements and related disclosures regarding support services to portfolio companies or funds and sufficiently disclose the services provided, and compensation or other benefits received, by the adviser and expenses borne by the client.

Valuation. Division staff frequently included valuation among examination priorities for private fund managers, and the SEC has brought multiple enforcement actions addressing these issues.[16] Advisers can address deficiencies in this area by (i) reviewing disclosures regarding valuation procedures and the use of fair value practices; (ii) confirming the accuracy and sufficiency of prior disclosures regarding valuation and fair value practices; (iii) confirming that policies and procedures address valuation issues in sufficient detail; (iv) confirming consistent execution and documentation of disclosed valuation procedures and standards; and(v) monitoring and tracking changes to valuation practices and reviewing and updating policies, procedures, and disclosures accordingly.

Monitoring/Board/Deal Fees and Fee Offsets. Division staff noticed that some private fund RIAs (i) failed to apply or calculate management fee offsets; (ii) allocated portfolio company fees across clients incorrectly; (iii) made payments to affiliates without applying the adviser's policy to offset such fees against management fees; (iv) did not have adequate policies and procedures to detect payments that required disclosure, allocation, or offsets; and (v) failed to adequately disclose long-term monitoring agreements with portfolio companies and related fees received by the adviser that were accelerated upon the sale of the portfolio company. Some of the SEC's suggestions include having RIAs review disclosures regarding additional revenues received by the adviser through arrangements between the adviser or its affiliates and portfolio companies as well as confirming the adequacy of the firm's disclosures and policies addressing such arrangements.

MNPI

The Division observed that some private fund RIAs lacked policies reasonably designed to deal with risks or to prevent misuse of potential MNPI exposure from interactions with (i) insiders of publicly traded companies; (ii) outside consultants arranged by "expert network firms;" or (iii) value-added investors. Advisers were also found to lack controls to address risks posed by employees obtaining MNPI through access to office space or systems or though transaction-based access to information about public issuers (such as through pursuing private investments in public equity).

The Division suggests that an RIA should (i) confirm that the implementation and enforcement of policies are tailored to address MNPI risks specific to its business; (ii) ensure substantive and consistent documentation of steps taken to confirm that it is not in possession of MNPI; (iii) review the sufficiency-of-information barriers in light of the nature and structure of the adviser's business; and (iv) independently review the status of information received and not rely exclusively on assurances from an issuer that the adviser has not received MNPI.

The Division also noted deficiencies in RIAs implementing their own code of ethics, such as the failure to (i) establish, maintain, or enforce provisions of their code of ethics intended to prevent the misuse of MNPI; (ii) enforce trading restrictions on securities placed on their restricted lists; (iii) address procedural weaknesses for adding to or removing securities from their restricted lists; (iv) enforce requirements in their code of ethics relating to employees' receipt of gifts and entertainment; and (v) administer timely transactions and holdings reporting requirements or pre-clearance requirements under their policies or the code of ethics rule.

The Division Announces Plans to Assess Compliance with Reg BI and Form CRS as Scheduled

As of June 30, 2020, the Division began evaluating whether firms have made reasonable progress in implementing Regulation Best Interest (Reg BI) policies and procedures and have made a "good-faith effort" to establish policies that are reasonably designed to comply with Reg BI and the rules

related to Form CRS. Reg BI exclusively applies to broker-dealers, while Form CRS applies to both broker-dealers and RIAs.

Reg BI establishes “best interest” standards of conduct for broker-dealers when making recommendations to retail investors involving securities transactions, investment strategies, and types of accounts. The Risk Alert provides a summary of how the Division may assess a firm’s compliance with its obligations, including what documents and information the Division may request.[17]

The Division may further focus on the following key areas of compliance for Reg BI:

- *The Disclosure Obligation*: requiring broker-dealers, prior to or at the time of the recommendation, to provide full and fair disclosure of all material facts relating to the scope and terms of the relationship with the retail customer and all material facts relating to conflicts of interest associated with the recommendation.
- *The Care Obligation*: requiring broker-dealers to exercise reasonable diligence, care, and skill when making recommendations to retail customers.
- *The Conflict of Interest Obligation*: requiring broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to address conflicts of interest associated with its recommendations to retail customers.
- *The Compliance Obligation*: requiring broker-dealers to establish, maintain, and enforce written policies and procedures designed to achieve compliance with Reg BI.

Additionally, Form CRS requires broker-dealers and RIAs to deliver to new and existing retail customers a summary of the relationship between the customer and the firm. Firms were required to deliver Form CRS to existing customers by July 30, 2020. Detailed information regarding examinations related to Form CRS may be found in the accompanying Risk Alert.[18]

SEC Rule Developments

SEC Adopts New Investment Adviser Marketing Rule

On December 22, 2020, the SEC unanimously adopted certain amendments to the Advisers Act relating to RIA advertisements and compensation to solicitors (the Marketing Rule).[19] According to the SEC, the amendments are meant to modernize the rules of the Advisers Act and reflect changes in technology, investor expectations, and the evolution of industry practices. The Marketing Rule applies to all RIAs, but does not apply to the marketing of registered investment companies or business development companies, which is, and continues to be, regulated separately.

The amendments create a single rule, Rule 206(4), which supersedes an array of SEC staff guidance and applies to both direct and indirect communications. Among other things, the Marketing Rule expands the definition of an “advertisement” to encompass advertisement to investors in a private fund advised by the RIA. The Marketing Rule formally excludes from the definition of an advertisement certain activities, for example, information contained in a statutory or regulatory notice or filing and any communication that includes hypothetical performance provided in response either to an unsolicited request or to a prospective or current investor in a private fund in a one-on-one communication. The adopting release also establishes de facto exclusions, such as account statements, statements about an advisory firm’s culture or community activity, and certain information included in a fund’s private placement memorandum.

The Marketing Rule sets forth prohibited statements, such as untrue material statements and omissions, unsubstantiated material statements of fact, untrue

or misleading implications or inferences, advertisements that are otherwise materially misleading, and “cherry-picking” in connection with (i) references to specific investment advice where such investment advice is not presented in a fair and balanced manner, or (ii) the inclusion or exclusion of performance results, or presentation of performance time periods, in a manner that is not fair and balanced. Unlike the existing rule, the Marketing Rule permits the use of testimonials, endorsements, and third-party ratings under certain conditions. Replacing the current cash solicitation rule, the new rule covers solicitation activity under the definitions of testimonials and endorsements and expands its application to cover private fund investors and non-cash compensation as well. The Marketing Rule also enumerates certain disclosure requirements for advisers and prohibits an adviser from compensating disqualified persons for testimonials or endorsements (subject to specified partial exemptions, including for de minimis payments, for example).

Other provisions of the Marketing Rule provide for amendments to the Form ADV and the books-and-records rule (Rule 204-2) and rescission of certain SEC staff no-action letters.

The Marketing Rule was published in the Federal Register on March 5, 2021, and became effective on May 4, 2021; the compliance date for RIAs is November 4, 2022.

SEC Broadens “Accredited Investor” and “Qualified Institutional Buyer” Definitions

On August 26, 2020, the SEC adopted amendments that took effect on December 8, 2020, expanding the definitions of “accredited investor” and “qualified institutional buyer.”[20] [21]

“*Qualified Institutional Buyer*” *Amendments*. The amendments to the definition of “qualified institutional buyer” broaden the definition (as defined in Rule 144A under the Securities Act) to include (i) limited liability companies and Rural Business Investment Companies (RBICs) if they meet the “$100 million in securities owned and invested” threshold in the definition, and (ii) any institutional investors included in the “accredited investor” definition that are not otherwise covered under the definition of “qualified institutional buyer,” provided they meet the $100 million threshold.

“*Accredited Investor” Amendments*. The amendments allow investors to qualify as “accredited investors” based on “defined measures of professional knowledge, experience or certifications in addition to the existing tests for income or net worth” as well as setting forth an investments test for entities. In particular, the amendments to the “accredited investor” definition in Rule 501(a) under the Securities Act add the following categories of persons or entities:

- natural persons with certain professional certifications, designations, or credentials or other credentials issued by an accredited educational institution, which the SEC may designate from time to time by order (including holders in good standing of the Series 7, Series 65, and Series 82 licenses)
- natural persons who are “knowledgeable employees” of private funds (i.e., hedge funds, venture capital funds, and private equity funds excluded from the definition of “investment company” in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act)
- limited liability companies with $5 million in assets
- SEC- and state-registered investment advisers, ERAs, and RBICs
- any entity, including American Indian tribes, governmental bodies, funds, and entities organized under the laws of foreign countries, that owns “investments,” as defined in Rule 2a51-1(b) under the Investment Company Act, in excess of $5 million and which was not formed for the specific purpose of investing in the securities offered

- “family offices” with at least $5 million in assets under management and their “family clients,” as each term is defined under the Advisers Act, as long as such family office’s investments are directed by someone with “such knowledge and experience in financial and business matters that such family office is capable of evaluating the merits and risks of the prospective investment,” and such family office was not formed for the specific purpose of acquiring the securities offered
- for the purposes of calculating joint income or determining net worth under Rules 501(a)(5) and (6) under the Securities Act, “spousal equivalents” — cohabitants occupying a relationship generally equivalent to that of a spouse

SEC Amends Exemptions From Investment Adviser Registration for Advisers to Rural Business Investment Companies

On March 2, 2020, the SEC adopted amendments, effective March 10, 2020, to two rules to implement congressionally-mandated exemptions from registration for RIAs who advise RBICs.[22] These exemptions were enacted as part of the RBIC Advisers Relief Act of 2018, which amended the Advisers Act.[23]

The Commission adopted amendments to rules 203(l)-1 and 203(m)-1. These rules implement exemptions from SEC registration for RIAs to venture capital funds and private funds.[24]

Under rule 203(l), RIAs who solely advise venture capital funds are exempt from investment adviser registration. The amendment adds RBICs to the definition of the term “venture capital fund.”[25]

Under Rule 203(m), RIAs who solely advise private funds and have assets under management in the United States totaling less than $150 million are exempt from investment adviser registration. The amendment excludes the assets of RBICs from the definition of the term “assets under management” for purposes of the private fund adviser exemption, such that assets of RBICs do not count toward the $150 million threshold.[26]

Advisers to RBICs relying on either amendment are required to submit Form ADV reports as ERAs and must include on their reports certain information about the private funds they advise, consistent with current Form ADV filing requirements for ERAs.[27]

The amendments do not exempt advisers from state regulatory requirements. Advisers must evaluate the need for state registration, and those still required to register with a state regulatory authority must also complete all of Form ADV.[28]

SEC Adopts Rule Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate, and Complete Information

On July 22, 2020, the SEC adopted amendments to a number of its rules governing proxy solicitations, with the objective of ensuring that clients of proxy-voting-advice businesses receive more transparent, accurate, and complete information on which to make voting decisions, without imposing undue costs or delays that could adversely affect the timely provision of proxy voting advice:

- **Rule 14a-1(1)(1)(iii)**, as amended, contains a new paragraph stipulating that, under certain conditions, the terms “solicit” and “solicitation” include solicited proxy-voting advice to a shareholder regarding that shareholder’s vote, consent, or authorization on matters requiring or requesting a shareholder’s vote, consent, or authorization. The rule excludes from the revised definitions proxy-

voting advice provided in response to unprompted client requests.[29],[30]

- **Rule 14a-2(b)(9)(i)** will require proxy advisers to include the following disclosures prominently in their proxy-voting advice (or electronic medium used to deliver the advice):
- o any information regarding an interest, transaction, or relationship of the proxy adviser (or its affiliate) that is material to assessing the objectivity of the proxy-voting advice in light of the circumstances of the particular interest, transaction, or relationship
- o any policies and procedures used to identify, as well as the steps taken to address, any such material conflicts of interest arising from such interest, transaction, or relationship[31]
- **Rule 14a-2(b)(9)(ii)(A)** will require a proxy adviser to adopt and publicly disclose written policies and procedures reasonably designed to ensure that companies that are the subject of proxy-voting advice have access to such advice at or before the time the advice is disseminated to the proxy advisers' clients.[32]
- **Rule 14a-2(b)(9)(ii)(B)** requires a proxy adviser to adopt and publicly disclose written policies and procedures reasonably designed to ensure that the proxy adviser provides its clients with a mechanism by which they can reasonably be expected to become aware of any written statements regarding proxy-voting advice by companies that are the subject of such advice, in a timely manner before the shareholder meeting (or, if there is no meeting, before the votes, consents, or authorizations may be used to effect the proposed action). The "timely manner" requirement will be met if the proxy adviser's client has sufficient time to consider the company's response in connection with a vote. The new rules do not condition the availability of the proxy rule exemptions on proxy advisers disabling or suspending pre-populated and automatic submission of votes in instances in which a company indicates it intends to file or has filed a response to the voting advice as additional soliciting materials.[33]

A proxy adviser will be deemed to satisfy this requirement if it has written policies and procedures reasonably designed to inform clients when a company that is the subject of proxy-voting advice notifies the proxy adviser that it intends to file or has filed with the SEC additional soliciting materials setting forth the company's statement regarding the advice, by notifying clients:

- on its electronic platform that the company intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on the EDGAR database when available, or
- through email or other electronic means that the company intends to file or has filed such additional soliciting materials and including an active hyperlink to those materials on the EDGAR database when available.[34]

The SEC has provided supplemental guidance to aid RIAs in complying with the above amendments when exercising their proxy voting responsibilities. The guidance takes the form of frequently asked questions about the amendments and the SEC's responses to them.[35] Included in the supplemental guidance are disclosures proxy advisory firms can make and steps to take to ensure that they are making voting determinations in a client's best interest, particularly when using electronic vote management systems.[36]

These amendments took effect on September 3, 2020, but the final rules provide for a one-year transition period after the publication of the final rules to give proxy advisers sufficient time to develop processes and systems to comply with certain aspects of the new rules.[37] Proxy advisers will not be required to comply with the amendments to Exchange Act Rule 14a-2(b)(9) until December 1, 2021.[38]

Recent Enforcement Initiatives and Proceedings

The following is a summary of several recent enforcement actions and trends of relevance to RIAs.

Failure to Promptly Amend Schedule 13D

The SEC settled charges with an RIA for alleged failure to promptly amend its Schedule 13D with respect to its beneficial ownership of common stock shares in a prosthetics care company.[39] The SEC cited the RIA's failure to disclose in a timely manner that it (i) changed its intent with respect to its interest in potentially acquiring the company and (ii) subsequently liquidated its position in the company.

The RIA managed five private funds that purchased more than 5 percent of the company's stock and reported the transactions on a Schedule 13D. The funds disclosed that the transactions were for "investment purposes" and that "based on [the funds'] review and/or discussions with management, the [funds] may explore a possible acquisition or restructuring of the Issuer."[40] When the RIA sold over 4 percent of the company's shares, it did not file an amendment to its Schedule 13D reporting the sales. One of the RIA's compliance employees discovered the error, and outside counsel eventually reported the sales more than two months late. According to the SEC, the RIA failed to promptly file two Schedule 13D amendments: the first to report the "material change" with respect to its acquisition intent, and the second to report the actual sales. As a result of the RIA's failure to timely amend, it was ordered to pay $100,000.[41]

Failure to Disclose Expenses

The SEC settled charges with an RIA relating to alleged misrepresentations regarding expenses.[42] According to the SEC, the RIA neglected to disclose all annual operating expenses in the prospectuses of four money market funds that it managed. Instead, it required the funds to reimburse certain expenses it had previously waived, causing them to incur roughly $5.2 million in additional expenses. The SEC found that these expense omissions were materially misleading under Section 34(b) of the Investment Company Act.

As a result of the RIA self-reporting the conduct, taking prompt steps to remediate the violations, and reimbursing the expenses with interest, the SEC did not impose a civil penalty.

Misrepresenting Payment for Order Flow Arrangements

The SEC settled charges against two affiliated RIAs relating to alleged material misrepresentations made to institutional clients about compensation arrangements with several broker-dealers.[43] The RIAs served as RIAs to a series of mutual funds and a series of ETFs. According to the SEC, one RIA would route the other RIA's client orders for execution to certain broker-dealers who agreed to pay specific amounts per share to that RIA as "payments for order flow." In addition, the RIAs agreed that the broker-dealers would execute the client orders on a "net basis," (e.g., buying a security in the market for one price and then selling it to the RIA at a higher price). The difference between the two prices was retained by the broker-dealer as compensation for carrying out the trade. These adjusted execution prices allowed the broker-dealers to recoup their payments for order flow and generate profits.

The SEC found that the RIAs, on several occasions, provided false assurances to the boards of the mutual funds and the ETFs that these compensation arrangements with the broker-dealers did not adversely affect the prices at which the funds' orders were executed. The SEC also found that

these assurances were materially misleading because the arrangements involved adjusting execution prices to account for the payment for order flow.

Misleading Investors

A publicly traded financial services corporation settled charges brought by the SEC that it misled investors regarding its business success.[44] The allegations cover the period 2012 to 2016, during which the corporation opened fake accounts for customers without their knowledge and sold unnecessary, unused products. During the time in question, the corporation publicly highlighted its successful community bank “cross-sell” strategy. It claimed the strategy - selling additional products to current customers - was key to its success. The SEC found that the corporation intended investors to rely on the success of the cross-sell strategy, even though the data were inflated by unused, unneeded, and unauthorized accounts and products. Beginning in 2002, the corporation created millions of unauthorized or fraudulent financial product accounts. These practices did not align with the corporation’s investor disclosures.

The SEC concluded that the corporation “misled investors, including through a misleading performance metric, about what it claimed to be the cornerstone of its Community Bank business model and its ability to grow revenue and earnings.”[45] To settle the charges, the corporation agreed to pay $500 million to be returned to investors. It reached a $3 billion settlement with the SEC and the Department of Justice, of which the $500 million is a component.

Failure to Supervise Investment Advisers; Absence of Compliance Procedures

The SEC settled charges with an RIA and its affiliate RIA for inadequate supervision of RIAs and registered representatives.[46] The settlement also involved charges that the RIAs did not have sufficient compliance policies. According to the SEC, the RIAs did not supervise financial professionals in a manner that prevented them from providing unsuitable recommendations of single-inverse ETF investments to retail investors. Single-inverse ETFs held for more than one day can lead to large losses and involve substantial risk. The SEC found that the RIAs did not sufficiently supervise employees’ recommendations or train them about these ETF products. According to the SEC, employees did not comprehend the risk of loss presented by these products, and therefore, provided inappropriate guidance to clients to buy or hold single-inverse ETFs for long periods of time. Many of these clients were senior citizens and retirees with limited means and risk tolerances inconsistent with the risk inherent in these products.

The SEC found that the RIAs did not have adequate compliance policies regarding these product recommendations. Between April 2012 and September 2019, the policies were not sufficiently designed to prevent or detect inappropriate single-inverse ETF guidance. The SEC also found that the RIAs did not adopt policies and procedures, or implement existing policies and procedures, to prevent this guidance. The RIAs settled with the SEC for a $35 million penalty that is to be distributed to clients who suffered losses from long single-inverse ETF holding periods. The SEC also censured the RIAs and ordered them to cease and desist from additional violations.

Enforcement Action Trends

Last year, the Division saw fewer enforcement actions than in 2019, an increase in monetary relief ordered, a shift in the subject matter most common to enforcement actions, and payments of more money in whistleblower awards. Additionally, the Division adjusted to operating remotely in the wake of COVID-19.

The SEC brought 715 enforcement actions during the fiscal year ending September 30, 2020, a 17 percent decrease from 2019.[47] The SEC ordered a record $4.680 billion in monetary remedies, including $3.589 billion in disgorgement. More than 80 percent of these remedies were derived from only 5 percent of the largest SEC actions. The SEC paid a record amount - $175 million - in whistleblower awards as part of the SEC Whistleblower Program. Like many offices, the SEC was forced to adopt a remote work environment as a result of COVID-19, but still brought 492 enforcement actions after the transition to remote work. Securities-offering frauds were the biggest category of enforcement activities, followed by investment advisory and investment company issues. RIAs and investment companies, issuer reporting/auditing and accounting cases, and Foreign Corrupt Practices Act enforcements all decreased from 2019 to 2020. The Division continued efforts to shorten the time it takes to complete enforcement investigations and recommend enforcement action, with a median timeline of 21.6 months.
A new administration, SEC Chair, and enforcement staff may seek more aggressive enforcement, which could shift Division enforcement priorities in 2021.

Please refer to our 2018 annual investment adviser alert,[48] which discusses who is required to file Form PF, the various filing categories for advisers, and the frequency of reporting and filing deadlines.

Finally, please also refer to our newsletter for annual calendar-related filing dates, ongoing and compliance requirements, and additional annual considerations[49] that private fund advisers may wish to consider.

This update does not purport to be a comprehensive summary of all of the compliance obligations to which advisers are subject; If you have any questions, please contact the author, **Shant Chalian**, or another member of Robinson+Cole's **Investment Management Group**.

For insights on legal issues affecting various industries, please visit our page and subscribe to any of our newsletters or blogs.

[1] Regular readers of this annual newsletter have probably figured out the recurring theme of using song lyrics (2018 -*The Who* and 2020 – *Foo Fighters*) and titles (2019 - *Led Zeppelin*) from the author's favorite groups in the title to the newsletter. 2021 is no exception.

[2] See SEC Public Statement of the Commissioners, Statement on the Renaming of the Office of Compliance Inspections and Examinations to the Division of Examinations, December 17, 2020, https://www.sec.gov/news/public-statement/joint-statement-division-examinations.

[3] OCIE, Examination Initiative: LIBOR Transition Preparedness (June 18, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20OCIE%20LIBOR%20Initiative_1.pdf.

[4] See Division of Examinations, Observations from Examinations of Investment Advisers Managing Private Funds, June 23, 2020, https://www.sec.gov/ocie/announcement/risk-alert-private-funds.

[5]SEC OCIE Risk Alert, "OCIE Observations: Investment Adviser Compliance Programs" (November 19, 2020), https://www.sec.gov/files/Risk%20Alert%20IA%20Compliance%20Programs_0.pdf.

[6] OCIE, "The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers" (February 7, 2017) (The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.

[7] SEC OCIE Risk Alert, "Observations from OCIE's Examinations of Investment Advisers: Supervision, Compliance and Multiple Branch Offices'" (November 9, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Multi-Branch%20Risk%20Alert.pdf.

[8] SEC OCIE Risk Alert: Select COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers (August 12, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20COVID-19%20Compliance.pdf.

[9] Division of Investment Management Coronavirus (COVID-19) Response FAQs https://www.sec.gov/investment/covid-19-response-faq.

[10] See Division of Examinations, Observations from Examinations of Investment Advisers Managing Private Funds, June 23, 2020, https://www.sec.gov/ocie/announcement/risk-alert-private-funds.

[11] SEC, Commission Interpretation Regarding Standard of Conduct for Investment Advisers (June 5, 2019), https://www.sec.gov/rules/interp/2019/ia-5248.pdf.

[12] SEC OCIE, Investment Adviser Principal and Agency Cross-Trading Compliance Issues, https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Principal%20and%20Agency%20Cross%20Trading.pdf.

[13] Inv. Adv. Act Rel. No. 5448 (February 24, 2020), https://www.sec.gov/litigation/admin/2020/ia-5448.pdf; Inv. Adv. Act Rel. No. 4983 (August 10, 2018), https://www.sec.gov/litigation/admin/2018/ia-4983.pdf; Inv. Adv. Act Rel. No. 5050 (September 27, 2018), https://www.sec.gov/litigation/admin/2018/ia-4983.pdf.

[14] Inv. Adv. Act Rel. No. 5001 (Sept. 7, 2018), https://www.sec.gov/litigation/admin/2018/ia-5001.pdf.

[15] See, e.g., OCIE Priorities 2020, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf; OCIE Priorities 2017, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf; OCIE Priorities 2016, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf.

[16] See, e.g., Inv. Adv. Act Rel. No. 5485 (April 22, 2020), https://www.sec.gov/litigation/admin/2020/ia-5485.pdf; Inv. Adv. Act Rel. No. 5074 (December 13, 2018), https://www.sec.gov/litigation/admin/2018/ia-5074.pdf.

[17] OCIE Priorities 2020, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf; Inv. Adv. Act Rel. No. 5373 (September 27, 2019), https://www.sec.gov/litigation/admin/2020/ia-5485.pdf; Inv. Adv. Act Rel. No. 5070 (December 3, 2018), https://www.sec.gov/litigation/admin/2018/ia-5074.pdf.

[18] SEC OCIE, Examinations that Focus on Compliance with Regulation Best Interest (April 7, 2020), https://www.sec.gov/files/Risk%20Alert-%20Regulation%20Best%20Interest%20Exams.pdf.

[19] SEC OCIE, Examinations that Focus on Compliance with Form CRS (April 7, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Form%20CRS%20Exams.pdf.

[20] See “Investment Adviser Marketing,” Investment Advisers Act Release No. 5653 (Dec. 22, 2020), available at https://www.sec.gov/rules/final/2020/ia-5653.pdf (adopting release).

[21] SEC, Final Rule: “Accredited Investor Definition,” Securities Act Release No. 33-10824 (August 26, 2020), https://www.sec.gov/rules/final/2020/33-10824.pdf.

[22] SEC, Press Release 2020-191: “SEC Modernizes the Accredited Investor Definition” (August 26, 2020), https://www.sec.gov/news/press-release/2020-191.

[23] https://www.sec.gov/news/press-release/2020-51.

[24] Id.

[25] Id.

[26] SEC, Final Rule: “Exemptions From Investment Adviser Registration for Advisers to Certain Rural Business Investment Companies,” Securities Act Release No. IA-5454 (March 10, 2020), https://www.sec.gov/rules/final/2020/ia-5454.pdf.

[26] Id.

[27] Id.

[29] Id.

[30] SEC, Press Release: "SEC Adopts Rule Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate and Complete Information" (July 22, 2020), https://www.sec.gov/news/press-release/2020-161.

[31] SEC, Final Rule: "Exemptions From the Proxy Rules for Proxy Voting Advice," Securities Act Release No. 34-89372 (November 2, 2020), https://www.sec.gov/rules/final/2020/34-89372.pdf.

[32] Id.

[33] Supra notes 12 and 13.

[34] Id.

[35] Id.

[36] SEC, "Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers," Securities Act Release No. IA-5547 (September 3, 2020), https://www.sec.gov/rules/policy/2020/ia-5547.pdf.

[37] Id.

[38] Supra note 12.

[39] Id.

[40] SEC Administration Proceeding File No. 3-20020 (September 17, 2020), https://www.sec.gov/litigation/admin/2020/34-89914.pdf.

[41] Id.

[42] Id.

[43] SEC Administration Proceeding File No. 3-20105 (September 30, 2020) https://www.sec.gov/litigation/admin/2020/ia-5599.pdf.

[44] SEC Administration Proceeding File No. 3-19904 (August 5, 2020), https://www.sec.gov/litigation/admin/2020/34-89481.pdf.

[45] SEC Administrative Proceeding File No. 3-19704 (February 21, 2020), https://www.sec.gov/litigation/admin/2020/34-88257.pdf.

[46] SEC Press Release 2020-38, "Wells Fargo to Pay $500 Million for Misleading Investors About the Success of Its Largest Business Unit" (February 21, 2020), https://www.sec.gov/news/press-release/2020-38.

[47] SEC Administrative Proceeding File No. 3-19714 (February 27, 2020), https://www.sec.gov/litigation/admin/2020/34-88295.pdf.

[48] SEC Division of Enforcement, 2020 Annual Report (November 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

[49] http://www.rc.com/publications/upload/2018-Investment-Adviser-Update.pdf.

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