

Hot Topics

- **Kelly Gibson**, Associate Regional Director, for Enforcement Securities & Exchange Commission, Philadelphia
- **James Capezzuto**, CCO, Oppenheimer Asset Management, New York
- **John Grady**, Partner, Practus, LLP, Philadelphia

A photograph of Independence Hall in Philadelphia, Pennsylvania, taken at dusk. The building is illuminated from within, and the sky is a deep blue. The clock tower is prominent, with its clock face glowing. The building is surrounded by trees and a fence in the foreground.

Hot Topics

- **Fiduciary Duty Rules:**
 - **Reg BI**
 - **Form CRS**
 - **IA Interpretation**

HOT TOPICS

State Efforts to Impose a Uniform Standard:

- Nevada –
 - Legislation (SB 383)
https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB383_EN.pdf
 - Proposed Regulations
<https://www.nvsos.gov/sos/home/showdocument?id=6156>
- New Jersey –
 - Proposed Regulations
<https://www.njconsumeraffairs.gov/Proposals/Pages/bos-04152019-proposal.aspx>
- Maryland – Legislative Efforts
- New York –
 - Insurance regulations
<https://www.dfs.ny.gov/system/files/documents/2019/05/rf62a52text.pdf>
 - Proposed single conduct standard legislation (expected January 2020)
- Massachusetts –
 - Proposed regulations
<https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm>



A photograph of Independence Hall in Philadelphia, a large red brick building with a prominent clock tower and a white dome. The building is illuminated at dusk, with warm lights from the windows and the clock tower. The sky is a deep blue, and some trees are visible in the foreground.

Hot Topics

- **Latest OCIE Risk Alert on Principal and Cross Trades:**
 - **Disclosure and Consent Requirements**
 - **Annual/Summary of All Cross Trades**
 - **Common Deficiencies include Obtaining Consent after the Trade; Failing to Recognize Principal Trades; Errant Disclosures; Not Maintaining Documentation Attesting to Having Received Written Consent.**
 - **Follow Your Compliance P&Ps**

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HOT TOPICS

Proxy Voting Issues

- Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice (Exchange Act Release No. 34-86721) (Aug. 21, 2019)
 - <https://www.sec.gov/rules/interp/2019/34-86721.pdf>
 - Interpretation: Proxy voting advice by proxy advisory firms generally constitutes a “solicitation” under proxy rules
 - Proxy voting firm recommendations constitute a “solicitation” because they are “designed to influence the client’s voting decision.”
 - Proxy advisory firms may nonetheless rely on exemptions from the proxy rules’ information and filing requirements (Exchange Act Rule 14a-2(b)(1))
- Guidance: Investment advisers must comply with fiduciary duties owed to each client in exercising their proxy voting responsibilities, including their use of proxy advisory firms
 - Under Rule 206(4)-6, an adviser that assumes proxy voting authority must implement policies and procedures reasonably designed to ensure that it makes voting decisions in the best interest of clients.
 - Release sets forth six examples of “considerations” that advisers should evaluate when discharging their fiduciary duties in connection with proxy voting. Big question: “Should” vs. “shall.”

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Master Emerging Challenges

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Hot Topics

- **Proxy Voting Guidance**

- **SEC reminds advisers must vote “in the client’s best interest,” disclose conflicts and “obtain informed consent from” clients.**
- **Encourages advisers to review proxy voting P&Ps “in advance of next year’s proxy season”**
- **Conduct “a reasonable investigation into matters on which the adviser votes”**

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- **Proxy Voting Guidance**

- **Consider different voting policies given “different funds, vehicles” and clients**
- **Weigh “the potential effect of the vote on the value of a client’s investments”**
- **Sample votes cast in your annual review**
- **Use of a proxy advisory firm: Do “periodic sampling of the proxy advisory firm’s pre-populated votes”**

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Hot Topics

- **Proxy Voting Guidance**

- **Assess the proxy advisory firm’s “capacity and competency,” “staffing, personnel” and technology**
- **The firm’s “third-party information sources”**
- **Review the firm’s P&Ps**
- **Evaluate “a proxy advisory firm’s conflicts of interest that can arise on an ongoing basis”**



Hot Topics

- **IM and the Advertising Rule**
- **Other Potential IM Actions**



Hot Topics

- **Custody and OCIE Exams**
 - **What Should Advisers Do?**

HOT TOPICS

- Custody rule issues – examination findings and FAQs
 - Investment Adviser Ass'n no-action letter (2017):
 - <https://www.sec.gov/divisions/investment/noaction/2017/investment-adviser-association-022117-206-4.htm>
 - Staff Guidance (IM Guidance Update 2017-01 (2/2017):
 - <https://www.sec.gov/investment/im-guidance-2017-01.pdf>
 - Staff FAQs (Through June 2018):
 - https://www.sec.gov/divisions/investment/custody_faq_030510.htm
 - Focus on Digital Assets - SEC/FINRA Joint Staff Statement on Custody of Digital Asset Securities:
 - <https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities>

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Hot Topics

- **How about in Working with their aging Clients?**
Senior Investors and Retirement Accounts and Products

“OCIE will conduct examinations that review how broker-dealers oversee their interactions with senior investors, including their ability to identify financial exploitation of seniors. In examinations of investment advisers, OCIE will continue to review the services and products offered to seniors and those saving for retirement. These examinations will focus on, among other things, compliance programs of investment advisers, the appropriateness of certain investment recommendations to seniors, and the supervision by firms of their employees and independent representatives.”

Source: 2019 EXAMINATION PRIORITIES (U.S. Securities and Exchange Commission’s Office of Compliance Inspections and Examinations)



HOT TOPICS

The Robare Group Decision (Robare Group, Ltd. v. SEC, 922 F. 3d 468 (2019))

- Case was focused on “omissions from an adviser’s ADV. Court focused on “intentional” versus “negligent” omissions -
 - Failure to include sufficient detail about a known conflict of interest was found to support a violation of IAA Section 206(2)
 - Merely “negligent” omission did not, however, support a violation of Section 207, which makes it unlawful to “willfully... make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203 or 204,...” or to “willfully... omit to state in any such application or report any material fact which is required to be stated therein.”
- Case also provides valuable insight as to the level of detail expected in disclosures regarding conflicts of interest.
 - “There may be...” disclosures inadequate where conflicts are known
 - Industry standard disclosure practices not a safe harbor
- The court’s conclusion that the SEC cannot sustain a “willful” violation charge with “merely” negligent conduct may impact charging decisions in the future, and may limit the Commission’s ability to seek remedies in settlements under the IAA and other securities laws.

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Hot Topics

- **Mutual Fund Share Class Issues**
- **Complying with the Pay-to-Play Rule Ahead of the 2020 Elections**
- **What Should CCOs Think about the SEC Registering Jon Corzine's IA Two Years After Being Banned by the CFTC?**

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Hot Topics

- **Challenges with Managing Alternatives**
- **What Should Smaller Mutual Fund Advisers Do to Prepare for December's Deadline for the Liquidity Risk Management Rule?**

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HOT TOPICS

Liquidity Risk Management

- Rule 22e-4 requires each open-end fund, including open-end ETFs (excluding money market funds), to establish a written liquidity risk management program. The rule also requires funds to assess, manage, and periodically review their liquidity risk, considering certain factors as applicable.
- Definition of “liquidity risk” focuses on whether a fund can meet redemption requests without significant dilution of remaining investors’ interests.
- Effective Date: The compliance date for “smaller” funds (i.e., those with net assets of less than \$1 billion), for certain aspects of the rule (requirements regarding classification of portfolio investments, adoption and board approval of liquidity risk management programs, part D of Form N-LIQUID, and the liquidity-related amendments to Form N-PORT), is December 1, 2019.
- Funds must now disclose information about their liquidity risk management program in their reports to shareholders.
- Staff FAQs: <https://www.sec.gov/investment/investment-company-liquidity-risk-management-programs-faq>

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HOT TOPICS

DIGITAL ASSETS

“The digital asset market has grown rapidly and may present risks to retail investors. The number of digital asset market participants, including broker-dealers, trading platforms, and investment advisers, also continues to increase. Given the significant growth and risks presented in this market, OCIE will continue to monitor the offer and sale, trading, and management of digital assets, and where the products are securities, examine for regulatory compliance. In particular, through high level inquiries, OCIE will take steps to identify market participants offering, selling, trading, and managing these products or considering or actively seeking to offer these products and then assess the extent of their activities. For firms actively engaged in the digital asset market, OCIE will conduct examinations focused on, among other things, portfolio management of digital assets, trading, safety of client funds and assets, pricing of client portfolios, compliance, and internal controls.”

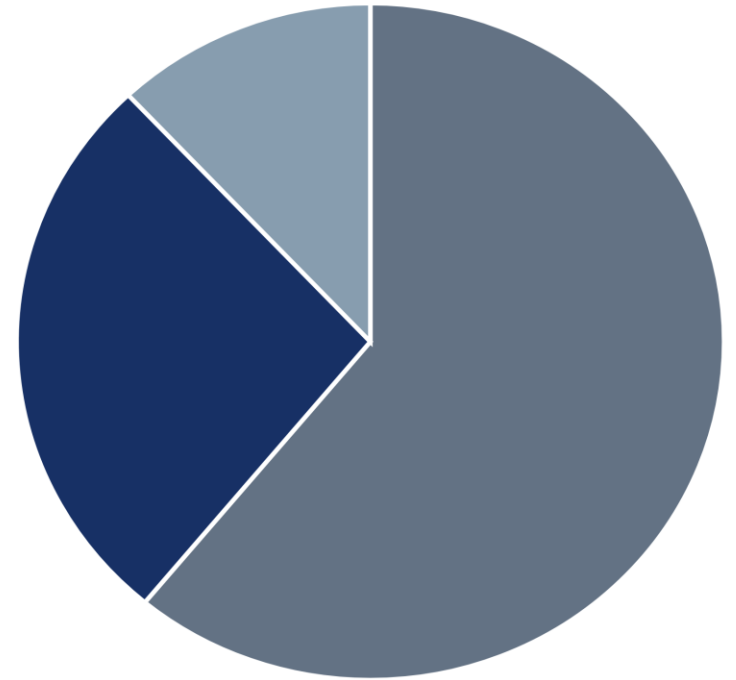
Source: 2019 EXAMINATION PRIORITIES (SEC)



HOT TOPICS

Where advisors are registered by firm type

- Dually registered, 61%
- Broker-dealer only, 27%
- Investment advisor only, 12%



Source: SEC

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