

March 27, 2017

The Year Ahead for GCs and Compliance Officers: Reporting from the Annual SIFMA Compliance & Legal Society Seminar

From March 19–22, the Securities Industry and Financial Markets Association (“SIFMA”) hosted its Annual Compliance & Legal Society Seminar in San Diego, California. This seminar is the top conference for financial institutions, compliance officers, and their in-house and outside counsel.

Every year, the seminar panelists and attendees make predictions on the regulatory and litigation developments for the year ahead. Compared to years past, this year’s conference proved to be quite remarkable because of the rapid changes in the industry and the uncertainty of government regulation and enforcement with the new administration in Washington, D.C.

Much of the regulatory landscape remains in flux. In the words of SIFMA President and CEO Kenneth E. Bentsen, Jr., we face a “whole new regulatory apparatus.” President Trump’s nominees to lead the regulatory agencies that oversee the financial industry, including Jay Clayton (nominated to lead the Securities and Exchange Commission (“SEC”)) and J. Christopher Giancarlo (nominated to lead the Commodity Futures Trading Commission (“CFTC”)), have yet to be confirmed. Likewise, lead and deputy regulators and commissioners at the SEC, CFTC, Department of Justice, Federal Deposit Insurance Corporation (“FDIC”), and Federal Reserve have yet to be nominated or approved.

No matter who President Trump nominates for such posts, nearly all participants at the seminar predicted that changes in leadership would lead to changes in policies. To summarize a few predictions from seminar panelists:

- Panelists predicted that some regulatory agencies, such as the SEC, will roll back certain disclosure and compliance requirements that are viewed as burdensome for regulated entities.
- Panelists from the DOJ and SEC predicted the newly appointed leaders of their agencies would look for more opportunities to prosecute individuals in addition to financial institutions. Stephanie Avakian, deputy director at the SEC for the Division of Enforcement, said 70 percent of SEC actions involve prosecuting individuals, and anticipates that percentage will continue to increase.
- Representatives from the DOJ predicted increased efforts to prosecute financial companies under the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”), which has a 10-year statute of limitations, significantly longer than most federal statutes, and gives the government broad authority to bring civil fraud claims against financial institutions.
- Bryan Bennett, SEC associate regional director, Los Angeles, speculated that Chair White’s “broken windows” practice would “go away.” Chair White’s practice was marked by the SEC’s use of small exams and investigations to identify minor violations as a proxy for more systemic compliance failures.
- Panelists from the SEC, Federal Reserve, Financial Industry Regulatory Authority (“FINRA”), and other regulators predicted an increased focus on cyber security

As H. Rodgin Cohen, a panelist and attorney at Sullivan & Cromwell LLP, remarked, “people is policy.” Regardless of whether President Trump’s appointees take a more business-friendly or more populist approach, at a minimum, public companies, their executives, and their counsel will have to adapt.

March 27, 2017

Even if President Trump's appointees take a more relaxed approach to federal regulation, seminar participants predicted that state regulators and plaintiffs' lawyers will fill the vacuum. Recent examples include New York regulators' prosecution of individuals for the equivalent of insider trading in state court under New York's Martin Act. Many participants predict this trend will precipitate preemption debates.

The uncertainty as to what the future holds in the regulatory arena follows increased regulatory activity during the Obama presidency. As reported by Joe Salama, director and associate general counsel at Deutsche Bank AG and a moderator of one seminar breakout session, in 2017, there were over 300 securities actions filed against public companies. This drastically exceeded filings in each of the last five years, which averaged around 220. Average settlement damages also increased to \$72 million in 2016, marking a significant increase from the last two years. Some of this increase can be attributed to increased merger and acquisition-related lawsuits, which increased from 44 to 88 from 2016 to 2017.

Some industry representatives nevertheless expressed that they were optimistic about future developments. They predict the new administration will likely curtail and may even repeal the Department of Labor's new fiduciary rule. By one estimate, the financial impact of the implementation of this rule could be as high as \$4.7 billion to initially comply and over \$1 billion in annual compliance costs.¹

Likewise, DOJ panelists also predicted more business-friendly policies such as the continuation of the Foreign Corrupt Practices Act ("FCPA") cooperation pilot program and similar initiatives.

The year ahead is likely to lead to significant developments on a host of important issues such as the SEC's use of administrative judges, changes to the benefit test in insider trading actions, rulings on the statute of limitations that apply to SEC's disgorgement authority, and changes to the Dodd-Frank Act.

John V. McDermott
Shareholder
jmcdermott@bhfs.com
303.223.1118

Thomas J. Krysa
Shareholder
tkrysa@bhfs.com
303.223.1270

Jeffrey S. Rugg
Shareholder
jrugg@bhfs.com
702.464.7011

Carrie E. Johnson
Shareholder
cjohnson@bhfs.com
303.223.1198

Emily R. Garnett
Associate
egarnett@bhfs.com
303.223.1171

David B. Meschke
Associate
dmeschke@bhfs.com
303.223.1219

March 27, 2017

Joshua A. Weiss

Associate

jweiss@bhfs.com

303-223-1268

Maximilien D. Fetaz

Associate

mfetaz@bhfs.com

702.464.7083

Elizabeth G. Tillotson

Associate

etillotson@bhfs.com

303.223.1173

Jonathan C. Sandler

Shareholder

jsandler@bhfs.com

310.564.8672

Lawrence W. Treece

Shareholder

ltreece@bhfs.com

303.223.1257

¹Patrick Lach, "A Simple Alternative To The Fiduciary Rule," *Wall Street Journal* (Mar. 8, 2017).

This document is intended to provide you with general information regarding the Annual SIFMA Compliance & Legal Society Seminar. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.