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SEC Launches Retirement Targeted Exam Initiative

The SEC Office of Compliance Inspections and Examinations (OCIE) recently issued a Risk Alert regarding the Targeted Industry Reviews and Examinations Initiative related to retirement accounts. The Risk Alert noted that the 2015 Examination Priorities issued earlier this year by OCIE announced that the examination of broker-dealers and investment advisers would include a focus on “examining matters of importance to retail investors and investors saving for retirement.” Consistent with that priority, OCIE launched a multi-year Retirement-Targeted Industry Reviews and Examinations Initiative (ReTIRE). The examinations of SEC registered investment advisers and broker-dealers under the ReTIRE Initiative will focus on certain higher-risk areas of sales, investment, and oversight processes, with particular emphasis on select areas where retail investors saving for retirement may be harmed.

The SEC staff intends to use data analytics, information from prior examinations, and examiner-driven due diligence to identify registrants to examine under this Initiative. As part of the examinations or the selection of examination candidates, the staff may focus on the activities of investment advisory representatives and/or broker-dealer registered representatives.

The risk-based examinations conducted under the ReTIRE Initiative will focus on the services offered to investors with retirement accounts and include reasonable basis for recommendations, conflicts of interest, supervision and compliance controls, and marketing and disclosure.

- **Reasonable Basis for Recommendations.** The SEC intends to assess the actions of broker-dealers and their representatives for consistency with these obligations when: (i) selecting the type of account; (ii) performing due diligence on investment options; (iii) making initial investment recommendations; and (iv) providing on-going account management.
- **Conflicts of Interest.** Broker-dealers and investment advisers have inherent conflicts of interest that exist as a result of, among other things, their business structure, compensation structure, personal issues or relationships, or relationships with service providers. The SEC intends to review sales and account selection practices in light of the fees charged, the services provided to investors, and the expenses of such services to evaluate, to the extent applicable and required, whether: (i) compliance programs identify and address risks associated with the conflicts of interest and (ii) material conflicts of interest, such as compensation structures that may incentivize representatives to make certain recommendations, are disclosed or otherwise addressed.

- **Supervision and Compliance Controls.** The SEC intends to review controls, oversight, and supervisory policies and procedures, as appropriate, for compliance with any applicable regulatory issues specific to retirement accounts. In addition to those review areas, the staff may additionally focus on: (i) broker-dealers and investment advisers with operations in multiple and/or distant branch offices and (ii) representatives with outside business activities.
- **Marketing and Disclosure.** The SEC intends to review registrants' brochures, sales and marketing materials, and disclosures to retail investors to, among other things, validate, to the extent applicable and required, that: (i) the content of the materials and representations of representatives are true and accurate and do not omit material information where there is a duty to disclose; (ii) disclosures regarding the fees are complete and accurate; and (iii) credentials or other endorsements are valid and meet any stipulated standards.

While the SEC believes that these are the primary focus areas for the ReTIRE Initiative, they also alluded to the fact that examiners may select additional topics based on operational and other risks identified during the examinations.

The key takeaway for firms providing financial services to investors and or their advisory clients in retirement accounts, is that those retirement accounts represent a substantial regulatory risk in 2015. With that said, now would be a good time for financial services firms to make a preliminary assessment of how they will be viewed by the SEC as to the focus areas of the examinations and to the extent necessary, make adjustments to their supervisory and compliance programs. Whether your firm is targeted for a ReTIRE Initiative exam or not, it is clear that as OCIE obtains and processes information gathered from the initiative, that knowledge will be integrated into the ongoing examination program of the SEC, and ultimately FINRA. In a major shift in policy with respect to the processing of customer checks by broker-dealers in subscription-way securities, the United States Securities and Exchange Commission ("SEC") issued a No Action Letter on March 12, 2015 to NYLIFE Securities, Inc. stating that the Staff in the SEC's Division of Trading and Markets would not recommend enforcement action if a broker-dealer holds customer checks payable to issuers if the purpose for holding the customers' funds is to complete a principal suitability review of each sale of a recommended subscription-way security.

We hope that this information has been helpful to you. Should you have any additional questions or concerns, please feel free to contact Daniel E. LeGaye or Michael Schaps by e-mail or phone, at 281-367-2454, or consult with your legal counsel or compliance consultant. This legal update has been provided to you courtesy of The LeGaye Law Firm, P.C., 2002 Timberloch Drive, Suite 200, The Woodlands, Texas 77380. Visit our web site at www.legayelaw.com.

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