

## BROKER-DEALER

### 2016 Examination Priorities Announced By SEC

On January 11, the Securities and Exchange Commission released the Office of Compliance Inspections and Examinations' (OCIE) 2016 examination priorities, which seek to address: (1) the protection of retail investors, particularly those saving for retirement; (2) the monitoring and assessment of market-wide risks; and (3) the use of data to detect potentially illegal activity.

Many examination priorities represent areas of ongoing focus by OCIE, such as fee arrangements, cybersecurity and market manipulation. However, OCIE has added several new priorities pertaining to public pension advisers, liquidity controls, and suitability and disclosure issues pertaining to certain investment products. More specifically, OCIE has indicated that its focus on public pension advisers will center on issues such as pay-to-play and undisclosed gifts and entertainment. OCIE also will seek to examine advisers with exposure to, and broker-dealers that deal in, potentially illiquid fixed income securities. Finally, OCIE will review the suitability of recommendations and disclosures made to investors with regard to exchange-traded funds, variable annuities and "new, complex and high risk" products.

The examination priorities can be found [here](#). The announcement of such priorities can be found [here](#).

See also "SEC 2016 Examination Priorities Focus on ETFs, Cybersecurity and Liquidity Controls for Fixed-Income Funds" in the *Investment Companies and Investment Advisors* section.

## DERIVATIVES

See "CFTC Issues No-Action Relief From the Swap Clearing Requirements for Small Bank Holding Companies, Small Savings and Loan Holding Companies, and Certain Community Development Financial Institutions" and "CFTC Technology Advisory Committee To Meet on January 26" in the *CFTC* section.

## CFTC

### CFTC Issues No-Action Relief From the Swap Clearing Requirements for Small Bank Holding Companies, Small Savings and Loan Holding Companies, and Certain Community Development Financial Institutions

On January 8, the Division of Clearing and Risk (Division) of the Commodity Futures Trading Commission issued no-action relief from the swap clearing requirements of Section 2(h)(1)(A) of the Commodity Exchange Act to certain bank holding companies (BCHs), savings and loan holding companies (SLHCs), and Community Development Financial Institutions (CDFIs).

Pursuant to CFTC Letter No. 16-01, the Division will not recommend that the CFTC take enforcement action against a BHC or SLHC for failure to comply with the clearing requirements if: (1) the aggregate value of the assets of all of the BHC's or SLHC's subsidiaries on the last day of each subsidiary's most recent fiscal year does

not exceed \$10 billion; and (2) such BHC or SLHC complies with the same conditions with which a bank or savings association must comply under CFTC Regulation 50.50 in order to elect not to clear a swap subject to the CFTC's clearing requirement.

Pursuant to CFTC Letter No. 16-02, the Division will not recommend that the CFTC take enforcement action against a CDFI for failure to comply with the clearing requirements with respect to certain products if: (1) such CDFI maintains certification from the US Department of Treasury as a CDFI; (2) such products are limited to interest rate swaps in the fixed-to-floating swap class and forward rate agreement class denominated in US dollars that are subject to the clearing mandate according to CFTC Regulation 50.4(a); (3) interest rate swaps and forward rate agreements exempted from the clearing requirements do not exceed \$200 million of total aggregate notional value per year; (4) such CDFI does not elect not to clear more than 10 such swap transactions per year; and (5) such CDFI satisfies the other conditions and requirements of CFTC Regulation 50.50 (including filing a notice of election and additional information, as described in CFTC Regulation 50.50(b)).

CFTC Letter No. 16-01 is available [here](#). CFTC Letter No. 16-02 is available [here](#).

### **CFTC Technology Advisory Committee To Meet on January 26**

The Technology Advisory Committee of the Commodity Futures Trading Commission will hold a public meeting on January 26 to discuss (1) the CFTC's proposed Regulation Automated Trading, (2) swap data standardization and harmonization and (3) blockchain and the potential application of distributed ledger technology to the derivatives market.

The public will have access to a live webcast on the CFTC's website or can listen through conference call by calling 1.866.844.9416. The meeting will begin at 9:45 a.m.(ET).

More information is available [here](#).

## **INVESTMENT COMPANIES AND INVESTMENT ADVISERS**

### **SEC 2016 Examination Priorities Focus on ETFs, Cybersecurity and Liquidity Controls for Fixed-Income Funds**

On January 11, the Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) released its 2016 examination priorities for investment companies, investment advisers, broker-dealers and transfer agents. The examination priorities highlight new and continuing areas of interest. Among the priorities listed are the following items:

#### *Retail and Retirement Investor Protection – ETFs*

OCIE will be examining exchange-traded funds (ETFs) for compliance with applicable exemptive relief granted under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 and with other regulatory requirements. In addition, OCIE also will be focused on ETF sales strategies, trading practices and disclosures, including excessive portfolio concentration, primary and secondary market trading risks, adequacy of risk disclosure, and suitability, particularly in niche or leveraged/inverse ETFs.

#### *Assessing Market-Wide Risks – Cybersecurity*

OCIE's market-wide risk assessment will focus on advancing its September 2015 Cyber Security Examination Initiative through 2016. OCIE's examination of broker-dealers and investment advisers will include testing and assessments of firms' implementation of cybersecurity procedures and controls.

#### *Assessing Market-Wide Risks – Liquidity Controls for Fixed-Income Funds*

OCIE will examine advisers to mutual funds, ETFs and private funds that have exposure to potentially illiquid fixed income securities. Broker-dealers who are a source of liquidity in fixed income securities also will be examined. These examinations will include a review of various controls, such as controls over market risk management, valuation, liquidity management, trading activity and regulatory capital.

Other 2016 examination areas include, among other things, a focus on branch office supervision of representatives, suitability of variable annuities, public pension advisors, newly registered municipal advisors, private placements under Regulation D and the Immigrant Investor Program (EB-5 Program), never before examined advisors and investment companies, and private advisors for fees and expenses and evaluating, among other things, the controls and disclosure associated with side-by-side management of performance-based and purely asset-based fee accounts.

Click [here](#) to read the 2016 SEC Examination Priorities.

Click [here](#) to read OCIE's 2015 Cybersecurity Examinations Initiative.

## UK DEVELOPMENTS

### **FCA Trade Association Roundtable on MiFID II Implementation**

On January 6, the Financial Conduct Authority (FCA) held a roundtable (Roundtable) with trade associations to discuss the implementation of the revised and recast Markets in Financial Instruments Directive and the associated Markets in Financial Instruments Regulation (jointly referred to as MiFID II). The FCA confirmed at the Roundtable:

- Application date and transposition deadline: The FCA expects further clarity from the European Commission during January as to whether or not the application date of MiFID II will be delayed. However, the FCA also confirmed that it does not have clarity if the transposition deadline of July 3 will be delayed (the EU directive elements of MiFID II have to be brought into effect in the national law of each EU country; the Markets in Financial Instruments Regulation is binding law in each EU country).
- Implementing measures: The adoption of the delegated acts and technical standards under MiFID II is an ongoing process that is “expected to progress in the next month or so.”
- Consultation on implementation: The FCA described its MiFID II Implementation – Consultation Paper I (CP 15/43) (CP1) as “largely legal carpentry” with limited discretion for domestic interpretation. CP1 covers secondary trading of financial instruments and closes for consultation on March 8.

The FCA confirmed at the Roundtable that it intends for the European Securities and Markets Authority's transaction reporting guidelines (published for consultation in December 2015) to replace the existing FCA transaction reporting guidance.

However, while the FCA noted it expects to publish a further Consultation Paper in the first half of 2016, it cautioned that the timing of publications depends on further clarity in relation to the EU legislation. Depending on when the FCA publishes a second Consultation Paper, firms impacted by MiFID II may not have clarity on the MiFID II implementation rules until mid-2016 at the earliest. This leaves a limited amount of time for firms impacted to make all necessary changes to comply with MiFID II by the current deadline of January 3, 2017, making the deferral of the much-debated implementation very welcome.

The FCA's MiFID II Implementation Roundtable minutes can be found [here](#).

The CP1 can be found [here](#).

## EU DEVELOPMENTS

### **EU Bonus Cap: EBA Publishes Guidelines on Sound Remuneration Policies and Separate Opinion on Proportionality**

The EU Capital Requirements Directive (CRD) went into effect on January 1, 2014. The CRD introduced what is commonly referred to in the European Union as a “bonus cap” on individual variable remuneration when paid to employees by EU banks and investment firms. Under the CRD, variable remuneration for such individuals is required to be capped at 100 percent of the relevant individual's fixed remuneration (i.e., a ratio of 1:1 for salary to bonus), or at 200 percent if shareholder approval is obtained (i.e., a ratio of salary to bonus at 1:2).

On December 21, 2015, the European Banking Authority (EBA) published final guidelines in relation to sound remuneration policies (Guidelines) under the CRD. The Guidelines set out the requirements for remuneration policies, the corresponding governance arrangements and the processes that should be applied when remuneration policies are implemented.

The EBA also separately published a formal opinion on proportionality requirements (Opinion), in which it proposes to amend the CRD to exempt smaller and less complex firms, and employees who receive only a small amount of variable remuneration, from stricter requirements in relation deferral arrangements and pay-out requirements. However, it should be noted that the EBA clarified in the Opinion that it does not propose *any* exemptions to the CRD bonus cap.

The UK financial media is widely reporting that HM Treasury does not have the desire to comply with the EBA Guidelines, which are indeed merely guidelines for EU national regulators. It would seem that the view of HM Treasury is that the cap on bonuses for bankers and employees of investment firms is potentially a step too far, making the United Kingdom an un-competitive place to do business because of the potential risk of talented employees being drawn to employment in Asia or the United States. Guidelines issued by EU regulatory supervisory authorities such as the EBA, European Securities and Markets Authority, and European Insurance and Occupational Pensions Authority, are not strictly binding on any EU country—though there is an established practice of “comply or explain”—and it seems that there may be appetite at HM Treasury (and by extension, in the UK Government and at the Financial Conduct Authority) for the United Kingdom not to comply and to explain that these bonus cap rules are excessively punitive on the UK financial services sector. It remains to be seen what action will actually be taken. The EBA intends for the Guidelines to apply from January 1, 2017.

The CRD is available online [here](#).

The EBA press release can be found [here](#).

The Guidelines can be found [here](#).

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UK DEVELOPMENTS

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\* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

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