

COMPLIANCE FLASH

JANUARY 2019

A Publication of Seward & Kissel Regulatory Compliance

SEC Charges Adviser with Failing to Adhere to Representations to Clients

The SEC [settled](#) charges against an investment adviser for negligently failing to perform adequate due diligence and monitoring of a counterparty in connection with certain fraudulent investments that it recommended to clients contrary to representations in the adviser's Form ADV Part 2A and client marketing materials. The SEC found that the adviser failed to escalate multiple red flags uncovered in the adviser's initial due diligence of the counterparty to its investment committee and did not adequately inform clients of ongoing due diligence and monitoring, although it represented that it would. The SEC also found that the adviser failed to address its CCO's repeated concerns regarding the adviser's compliance program and requests for additional compliance resources.

SEC Settles Multiple Enforcement Actions Related to the Allocation of Expenses and Fees

The SEC settled multiple enforcement actions related to investment advisers' misallocation of expenses and fees. In these actions, advisers were found to have inappropriately charged clients for (i) [business development services](#); (ii) [rent, overhead and employee compensation expenses](#); (iii) [the cost of certain employees and third party consultancy fees](#); and (iv) [expenses allocable to employee funds and co-investors \(and to have failed to offset management fees with certain portfolio company advisory fees\)](#). The advisers in these actions were ordered to pay disgorgement and civil money penalties ranging from \$400,000 to \$3.9 million.

SEC Brings Action Related to Adviser's Undisclosed Brokerage Compensation

The SEC [settled](#) charges against an investment adviser and broker-dealer firm for failing to disclose the receipt of a portion of a \$20 mark-up included in a clearing broker's confirmation fee. The SEC found that the firm also failed to disclose that this compensation created conflicts of interest by giving the firm a greater incentive to enter into more client transactions and to use the clearing broker. Additionally, the SEC concluded that the marked-up confirmation fee caused the firm to violate its fiduciary duty to seek best execution for its advisory clients.

SEC Charges Two Robo-Advisers with False Disclosures

The SEC [settled](#) charges against two registered investment advisers operating as "robo-advisers." The SEC [found](#) one adviser to have falsely represented to clients that its proprietary tax loss harvesting program would monitor all client accounts to avoid wash sales, when in fact it did not. The adviser also retweeted certain tweets from its clients that constituted impermissible testimonials. The SEC [concluded](#) that a second adviser made misleading statements on its website and social media regarding a "Robo-Index" of the performance of two other robo-advisers and a

performance composite of the adviser's own clients. The SEC found that the Robo-Index was calculated based on estimates rather than actual performance and the performance composite included only a small subset (less than 4%) of the adviser's clients.

OCIE Issues Risk Alert on Electronic Communications

The SEC's Office of Compliance Inspections and Examinations (OCIE) issued a [Risk Alert](#) sharing examination observations of practices regarding electronic messaging that may assist advisers in meeting their obligations under the Investment Advisers Act of 1940. These practices included implementing policies and procedures that limit the forms of electronic communication that can be used for business purposes; training employees on the adviser's policies and procedures relating to the use of electronic messaging; monitoring employees' use of social media, personal email, and personal websites for business purposes; and taking certain security precautions with regard to employees' personally owned devices that are used for business purposes. Seward & Kissel's memorandum on the Risk Alert is available [here](#).

OCIE Releases its 2019 Examination Priorities

OCIE released its [2019 Examination Priorities](#). This year's priorities, which are nearly identical to last year's, focus on six topics: (1) matters of importance to retail investors, including seniors and those saving for retirement; (2) compliance and risk in registrants responsible for critical market infrastructure; (3) FINRA and MSRB; (4) digital assets; (5) cybersecurity; and (6) anti-money laundering programs. Seward and Kissel's memorandum on the Examination Priorities is available [here](#).

Key Upcoming Compliance Dates

- Code of Ethics Quarterly Transaction Reports (1/30)
- Periodic Report for CPOs (1/30)
- NFA Bylaw 1101 Confirmation (2/1)
- Form 13F (2/14)
- Annual Form 13H (2/14)
- Schedule 13G and amendments (2/14)
- Annual Form CTA-PR (2/14)
- TIC Form S (2/15)
- TIC Form SLT (2/25)
- Annual Exemption Affirmations for CFTC Rules 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) and/or 4.14(a)(8) (3/1)

Online Compliance Subscription Service

SKRC's 2019 Compliance Calendar and other compliance tools and resources are available on our [Online Compliance Subscription Service](#), which is free to our active investment adviser clients.

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