

# Office of the Investor Advocate



*The Office of the Investor Advocate was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, as codified under Section 4(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 78d(g).*

OFFICE OF THE INVESTOR ADVOCATE

# REPORT ON ACTIVITIES

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FISCAL YEAR 2015

The Office of the Investor Advocate was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), as codified under Section 4(g) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78d(g). Exchange Act Section 4(g)(2)(A)(ii) provides that the Investor Advocate be appointed by the Chair of the U.S. Securities and Exchange Commission (the “Commission” or the “SEC”) in consultation with the other Commissioners and that the Investor Advocate report directly to the Chair.<sup>1</sup> On February 24, 2014, SEC Chair Mary Jo White appointed Rick A. Fleming as the Commission’s first Investor Advocate.

Exchange Act Section 4(g)(6) requires the Investor Advocate to file two reports per year with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.<sup>2</sup> A Report on Objectives is due not later than June 30 of each year, and its purpose is to set forth the objectives of the Investor Advocate for the following fiscal year.<sup>3</sup> On June 30, 2014, the Office of the Investor Advocate (“the Office”) filed a Report on Objectives for Fiscal Year 2015, which identified six policy areas that the Office would focus upon during the year.<sup>4</sup> Similarly, the Office filed a Report on Objectives for Fiscal Year 2016 on June 30, 2015.

In addition to the Report on Objectives, a Report on Activities is due no later than December 31 of each year.<sup>5</sup> The Report on Activities shall describe the activities of the Investor Advocate during the immediately preceding fiscal year. Among other things, the report must include information on steps the Investor Advocate has taken to improve the responsiveness of the Commission and self-regulatory organizations (“SROs”) to investor concerns, a summary of the most serious problems encountered by investors during the reporting period, identification of Commission or SRO action taken to address those problems, and recommendations for administrative and legislative actions to resolve problems encountered by investors.<sup>6</sup>

This Report on Activities for Fiscal Year 2015 is organized primarily around our six areas of policy focus that were announced in our Report on Objectives for Fiscal Year 2015. In each of those areas, we have striven to understand the needs of American investors and the implications of policy choices. In a variety of ways, as more fully described below, we have identified proposed policy decisions that are likely to harm investors, have begun to make recommendations for regulatory changes that will ease or resolve the problems encountered by investors, and have taken steps to improve the responsiveness of the Commission and SROs to investor concerns. The reporting period for this Report on Activities runs from October 1, 2014 to September 30, 2015 (the “Reporting Period”).

Functions of the Investor Advocate	Reporting Obligation
<p>According to Exchange Act Section 4(g)(4), 15 U.S.C. § 78d(g)(4), the Investor Advocate shall:</p> <ul style="list-style-type: none"> <li>(A) assist retail investors in resolving significant problems such investors may have with the Commission or with SROs;</li> <li>(B) identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of SROs;</li> <li>(C) identify problems that investors have with financial service providers and investment products;</li> <li>(D) analyze the potential impact on investors of proposed regulations of the Commission and rules of SROs; and</li> <li>(E) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified and to promote the interests of investors.</li> </ul>	<p>According to Exchange Act Section 4(g)(6)(B), 15 U.S.C. § 78d(g)(6)(B), the Investor Advocate shall submit to Congress, not later than December 31 of each year, a report on the activities of the Investor Advocate during the immediately preceding fiscal year. This “Report on Activities” must include the following:</p> <ul style="list-style-type: none"> <li>(I) appropriate statistical information and full and substantive analysis;</li> <li>(II) information on steps that the Investor Advocate has taken during the reporting period to improve investor services and the responsiveness of the Commission and SROs to investor concerns;</li> <li>(III) a summary of the most serious problems encountered by investors during the reporting period;</li> <li>(IV) an inventory of the items described in subclause (III) that includes— <ul style="list-style-type: none"> <li>(aa) identification of any action taken by the Commission or the SRO and the result of such action;</li> <li>(bb) the length of time that each item has remained on such inventory; and</li> <li>(cc) for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action;</li> </ul> </li> <li>(V) recommendations for such administrative and legislative actions as may be appropriate to resolve problems encountered by investors; and</li> <li>(VI) any other information, as determined appropriate by the Investor Advocate.</li> </ul>

**DISCLAIMER: Pursuant to Section 4(g)(6)(B)(iii) of the Exchange Act, 15 U.S.C. § 78d(g)(6)(B)(iii), this Report is provided directly to Congress without any prior review or comment from the Commission, any Commissioner, any other officer or employee of the Commission, or the Office of Management and Budget. Accordingly, the Report expresses solely the views of the Investor Advocate. It does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for the Report and all analyses, findings, and conclusions contained herein.**

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*In addition to our Ombudsman function, our Office exists to provide a voice for investors in the policymaking process at the Commission, at SROs, and even in Congress.*

# MESSAGE FROM THE INVESTOR ADVOCATE

**A**t the beginning of Fiscal Year 2015, the Office of the Investor Advocate had been in existence for approximately seven months. We started the year with five staff members and an ambitious agenda. I am extremely proud of the work they have done and the foundation we have laid for the future.

The SEC Ombudsman, Tracey L. McNeil, began her duties just days before the fiscal year began. For most of the year, she worked alone, building a framework to resolve the concerns that investors may have with the actions or inactions of the Commission and the self-regulatory organizations under the Commission's oversight. This Report on Activities includes a report of the Ombudsman's impressive work during the year, and with the addition late in the year of two persons to assist those efforts, we look forward to providing an even greater level of direct service to investors in the year ahead.

In addition to our Ombudsman function, our Office exists to provide a voice for investors in the policymaking process at the Commission, at SROs, and even in Congress. As a new office, we focused our efforts in six primary areas of policy during Fiscal Year 2015: equity market structure, investor flight, municipal market reform, cybersecurity, effective disclosure, and elder abuse. Our activities and recommendations within each of those policy areas are described in detail in this Report.

Our level of engagement in these policy areas has varied. I spoke early and often about the problem of elder abuse, in formal speeches and

informal conversations, and was vocal in support of efforts to give financial professionals greater ability to stop financial exploitation of customers. I also advocated publicly for several reforms in the municipal securities markets and engaged frequently with the Municipal Securities Rulemaking Board and others on matters of great concern to the investors in those markets, most of whom are retail investors. Furthermore, I articulated the need for modernizing not just the content of disclosures, but also the methods by which disclosures are presented to investors, and I expressed support, both in public speeches and behind the scenes, for greater utilization of structured data.

Our engagement in policy debates involving equity market structure and our evaluation of investor participation in that market were greatly enhanced in the summer of 2015 with the addition of key staff who brought the expertise to provide counsel on those matters. We recently have begun the process of reviewing the many rulemakings of the national securities exchanges, as well as Commission rulemakings that will impact investors in the equity markets.

As the year progressed, and repeated data breaches plagued not only the financial services industry but also retailers, health care providers, government



agencies, and seemingly every type of entity, it became clear that appropriate responses and solutions must be broad-based and cross multiple sectors of industry and government. Solutions of this nature are beyond the scope of the Office of the Investor Advocate, so we have focused instead on the efforts of the Commission and the Financial Industry Regulatory Authority to encourage financial services providers and market participants to bolster their defenses. We have not made any formal recommendations for new rules or policies to address these issues, but we continue to monitor developments in this area.

Late in the fiscal year, the Office achieved another milestone with the addition of an economist, Dr. Brian Scholl. With the support of SEC Chair Mary Jo White and many others at the Commission, including the Division of Economic and Risk Analysis and the Office of Investor Education and Advocacy, Dr. Scholl has begun developing plans for conducting more regular data collection from

individual investors. Of course, most individual investors do not follow the activities of the Commission or SROs, much less submit comments in response to proposed rules, so we hope to use investor surveys and focus group testing to provide greater insights into the needs of investors. We believe this will become an important source of information for policymakers and will help them make better informed policy decisions.

On behalf of the Office of the Investor Advocate, I am pleased to present this report to Congress, and I would be happy to answer any questions about our activities.


Sincerely,

A handwritten signature in black ink, appearing to read "Rick Fleming", written in a cursive style.

Rick A. Fleming  
Investor Advocate



# REPORT ON ACTIVITIES AND RECOMMENDATIONS RELATING TO THE FISCAL YEAR 2015 POLICY AGENDA

 In June 30, 2014, the Office of the Investor Advocate filed a Report on Objectives for Fiscal Year 2015.<sup>7</sup> The Report identified six key policy areas that would be the primary focus of the Office during its first full year of existence: equity market structure, investor flight, municipal market reform, cybersecurity, effective disclosure, and elder abuse. This Report on Activities describes our activities and recommendations within each of those policy areas during Fiscal Year 2015 (“FY 2015”).

## EQUITY MARKET STRUCTURE

In FY 2015, the Office of the Investor Advocate worked with Commission staff and relevant SROs to encourage equity market structure reforms designed to enhance market resilience, efficiency, transparency, and fairness. We analyzed proposed rules to examine their potential impact on investors and advocated for improvements that would benefit and protect investors. In addition, we spent significant time and effort advocating for investors behind the scenes on initiatives that are not yet public.

During the Reporting Period, the Commission and SROs have taken certain steps to bolster risk management and resilience in the equity markets. In November 2014, the Commission adopted Regulation Systems Compliance and Integrity (“Reg SCI”), designed to strengthen the technology infrastructure of the U.S. securities markets.<sup>8</sup> In March 2015, as part of its equity trading initiatives, the Financial Industry Regulatory Authority (“FINRA”) issued guidance to its members on

effective supervision and control practices for firms engaging in algorithmic trading strategies.<sup>9</sup> Then, in July 2015, following an hours-long trading outage on the New York Stock Exchange (“NYSE”) on July 8, 2015, both NYSE and Nasdaq Stock Market LLC (“Nasdaq”) announced an agreement to back up each other’s closing auctions in the event of trading outages.<sup>10</sup>

Several efforts are under way to improve Regulation National Market System (“NMS”).<sup>11</sup> In May 2015, the Commission’s Equity Market Structure Advisory Committee (the “EMSAC”) met for the first time to discuss and debate the structure and operations of the U.S. equities market.<sup>12</sup> The EMSAC currently is considering the implications of Regulation NMS, including Rule 611 (also known as the “Order Protection Rule”),<sup>13</sup> and publicly has indicated an interest in evaluating the complex interaction between Rule 611 and other parts of Regulation NMS. This could include order execution and routing information under Rules 605 and 606, access fees under Rule 610, and one-cent minimum pricing under Rule 612.<sup>14</sup>

Several SROs also have proposed reforms to Regulation NMS that could provide benefits to investors. In December 2014, Intercontinental Exchange, Inc., as parent company of three exchanges, proposed to reduce the maximum exchange access fees under Rule 610 in return for a “trade at” rule that would give more precedence to exchanges displaying the best orders under Rule 611.<sup>15</sup> In January 2015, BATS Global Markets, Inc. (“BATS”), as parent company of

four exchanges, filed a Petition for Rulemaking (“Petition”) with the Commission to amend Regulation NMS to reduce access fees, enhance transparency by requiring brokers to disclose their execution quality more effectively, and reduce fragmentation by denying small trading centers certain advantages currently afforded by Regulation NMS.<sup>16</sup> In February 2015, Nasdaq implemented an experimental pricing schedule to lower access fees for a small number of securities trading on its market.<sup>17</sup>

As noted in BATS’s Petition, enhancements to Regulation ATS<sup>18</sup> are also under discussion. Currently, around 35 percent of market volume in NYSE and Nasdaq-listed stocks is executed in dark alternative trading systems (“ATSs”) and broker-dealer platforms, rather than on lit venues like exchanges.<sup>19</sup> In November 2014, FINRA issued Regulatory Notice 14-48, expanding its ATS transparency initiative through a proposal to publish the remaining equity volume executed over-the-counter, including non-ATS electronic trading systems and internalized trades.<sup>20</sup> The Commission subsequently approved the FINRA proposal in October 2015, noting the enhancement was intended to make the OTC market more transparent, to help prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.<sup>21</sup>

The Office of the Investor Advocate is responsible for, among other things, analyzing the potential impact on investors of proposed rules of SROs.<sup>22</sup> In furtherance of this objective, the Office has analyzed the potential impact of various other SRO proposals related to equity market structure. For example, in August 2015, the BATS Exchange proposed to adopt a new rule to prevent layering and spoofing on the exchange by creating a process for expedited suspension proceedings.<sup>23</sup> The Office has been monitoring the public comment process and evaluating the proposal’s potential impact on investors.

In addition, the Office continues to monitor SRO activity to address concerns about trading speeds through flexible, competitive solutions. In June 2015, the Chicago Stock Exchange proposed an intra-day and on-demand auction service that deemphasizes speed as a hallmark of its functionality.<sup>24</sup> In its subsequent October 2015 approval of the SRO filing, the Commission noted the proposal was intended to deemphasize speed advantages and concluded it was reasonably designed to help promote just and equitable principles of trade, remove impediments, and perfect the mechanisms of a free and open market.<sup>25</sup> In September 2015, the Commission published notice of a registration application for Investors’ Exchange, LLC (“IEX”) and began considering whether to grant the registration to an exchange that provides access to participants with a hardwired 350 microseconds of latency to the primary trading platform.<sup>26</sup>

The Office also has monitored the developments in the upcoming Tick Size Pilot by the various SROs. In May 2015, the Commission approved a proposal by the national securities exchanges and FINRA for a two year pilot program widening the minimum quoting and trading increments—or “tick sizes”—for stocks of some smaller companies.<sup>27</sup> The Commission intends to use the pilot, which is scheduled to begin in October 2016, to assess whether wider tick sizes enhance the market quality of these stocks for the benefit of issuers and investors.

Other market participants, including asset managers, believe the market could be adjusted to serve investors better, and they have voiced corresponding opinions and suggestions.<sup>28</sup> In April 2014, Blackrock, Inc. published a white paper which discussed fragmentation, high frequency trading, off-exchange trading, and other matters and offered recommendations to improve market quality and stability.<sup>29</sup> In October 2014, the Investment Company Institute (“ICI”), Managed Funds Association (“MFA”), and the Securities

Industry and Financial Markets Association (“SIFMA”) submitted to the Commission a template for the disclosure of order routing and execution quality information, and they encouraged the Commission to consider the template for any potential rulemaking related to Rules 605 and 606 of Regulation NMS.<sup>30</sup> Our Office continues to analyze these and other proposals, with an eye toward championing ideas and concepts that appear most likely to enhance equity market structure for the benefit of investors.

Our efforts to engage policymakers in these important issues were greatly enhanced in June 2015 by the addition of a staff attorney with experience in issues related to trading and markets, as well as support staff to assist with monitoring all SRO rule filings. With these enhanced capabilities, the Investor Advocate made his first formal recommendation to the Commission on October 16, 2015, shortly after the close of the Reporting Period. The Investor Advocate recommended disapproval of a proposed rule by NYSE that would exempt certain early stage companies from having to obtain shareholder approval before selling additional shares to insiders and other related parties.<sup>31</sup> We will continue to engage in robust advocacy for investors in rules proposed by the national securities exchanges and other SROs.

Although regulatory reforms moved forward in FY 2015 as noted above, some have observed that progress has been slow.<sup>32</sup> Nevertheless, our concern about the pace of regulatory reform is ameliorated to some degree by two factors. First, significant work has been done behind the scenes on certain reforms, and we expect those efforts to result in rulemakings in the relatively near term.<sup>33</sup> Second, we believe the Commission has been effective in using its enforcement powers to address a variety of market abuses while regulatory reforms have been in the developmental stage.

During FY 2015, the Commission charged and settled actions against a national securities

exchange and two ATs, focusing attention on the need for transparency and fair dealings across all trading venues.<sup>34</sup> For example, in August 2015, the Commission settled with ITG Inc. and its affiliate, AlterNet Securities, for operating a secret trading desk and misusing the confidential trading information of dark pool subscribers for the firms’ benefit.<sup>35</sup> The Commission also charged and settled actions against a number of market intermediaries for Market Access Rule violations and inaccurate regulatory trade reporting, thereby focusing attention on the role of gatekeepers in maintaining fair and orderly markets.<sup>36</sup> In one such case, the Commission settled an action against Credit Suisse Securities in September 2015 for submitting deficient blue sheet data to the Commission that omitted reportable trades.<sup>37</sup> As noted in the order, accurate reporting of blue sheet data helps the Commission detect unlawful conduct.

The Commission also charged a variety of individuals and entities with market manipulation during the Reporting Period, including for layering, marking-the-close, and wash trades.<sup>38</sup> For example, in October 2014, the Commission settled an action against Athena Capital Research (“Athena”), charging that the firm had placed a large number of aggressive, rapid fire trades in the final two seconds of almost every trading day.<sup>39</sup> By marking-the-close, Athena overwhelmed the market’s *bona fide* liquidity and pushed the market price in Athena’s favor to the detriment of legitimate investors. Similarly, in January 2015, the Commission charged an individual with layering, alleging that he orchestrated an order placement scheme to trick investors into buying or selling stock at artificially inflated or depressed prices.<sup>40</sup> These and similar enforcement actions should serve as deterrents to other bad actors.

## INVESTOR FLIGHT

In the wake of losses suffered during the financial crisis of 2008–2010, and in the face of greater market complexity and speed, some have questioned whether individual investors perceive

the markets to be fair. Thus, concurrent with our evaluation of equity market structure, the Office began to explore whether individual investors have abandoned the equity markets in recent years.

The issue of investor flight, particularly in relation to equity investment, is important for the financial services industry, household and institutional investors, policymakers, and others. If the average person is reluctant to invest in financial assets, it could reduce the demand for financial services, in addition to several other ramifications. For example, it could limit wealth accumulation by households, which might ultimately render individuals unprepared for some of the challenges inherent in the later stages of life. More generally, the lack of household participation in the equity market seems to suggest that the significant financial gains of recent years have not flowed broadly across the population, which could contribute to or exacerbate wealth inequality. Ultimately, this phenomenon, if borne out by the data, could potentially limit population-wide support for pro-capital institutional systems and structures that are so vital to the process of capital formation and a stable investment environment.

Our efforts to study these matters could not begin in earnest until late in the Reporting Period, with the addition of staff possessing the expertise required to engage in substantive analysis of available data. Based on the Office's initial research, which will be developed further and scrutinized in the coming months, we make the following preliminary observations, some of which are corroborated by the findings of other research in this area:

- Direct stock ownership is not prevalent among households, creating a well-known puzzle for economists. Direct stock ownership is significantly below optimal levels, according to benchmark economic theories. These low ownership rates predate the financial crisis and are not a new phenomenon. Even in high income and wealth categories, direct stock ownership is far from universal.<sup>41</sup>
- Not surprisingly, households in lower income and wealth quantiles of the distribution are far less likely to own stock, and far less likely to own stock in any significant amount, than those in higher income and wealth quantiles. Direct stock ownership becomes somewhat more prevalent only at the very highest wealth quantiles, representing a small fraction of the population.
- In the wake of the financial crisis, direct ownership rates for publicly traded stock are lower than they were prior to the crisis. This holds true for the population as a whole, and across almost every income and wealth category. In fact, for many income quantiles we examined, ownership rates appear to be even lower than they were in the late 1980s and early 1990s.
- The likelihood of owning stock conditional on a variety of observed household characteristics appears to have been lower in 2013 than it was in 2007. This preliminary result suggests that even if the financial situation of a particular family did not change in real terms over the intervening years, that same family would have been less likely to directly own publicly traded stock in 2013 than in 2007. However, declines in ownership rates also predated the financial crisis, suggesting that the financial crisis may not be the sole event affecting the likelihood of stock ownership.
- Trust in financial institutions has rebounded slightly after plummeting during the depths of the financial crisis and recession, but still remains at historical lows. Some measures suggest that such confidence over the past several years has been at or below any other point in the prior 40 years. This lack of confidence may weigh on investor participation.

The study of investor flight is somewhat complicated by underlying demographic and economic developments, a rapid succession of shocks to financial and labor markets, continued deleveraging, and other factors. Moreover, the limits to currently available data provide an impediment to studying this topic. Despite these challenges, we will continue our efforts to understand investor flight and contribute to research concerning this issue.

## MUNICIPAL MARKET REFORM

During the Reporting Period, the Office of the Investor Advocate worked with Commission staff and relevant SROs to encourage municipal market reforms. This year, the Office has focused its efforts primarily on post-trade price transparency in the fixed income markets and on analyzing proposed rules and rule amendments of SROs.

On October 31, 2014, the Office filed a comment letter with the Municipal Securities Rulemaking Board (“MSRB”) suggesting that the MSRB assign a higher ranking to price transparency in its long-term Strategic Priorities.<sup>42</sup> Then, on January 20, 2015, the Office filed two comment letters—one with the MSRB and one with FINRA—regarding their proposed rules requiring dealers to include pricing reference information on customer confirmations for fixed income securities transactions.<sup>43</sup> The Office generally supported these proposals, seeing them as coordinated steps toward improving the availability of pricing information for retail investors.<sup>44</sup> After consideration of these and other comment letters, the MSRB and FINRA issued revised proposals on September 24, 2015, and October 12, 2015, respectively.<sup>45</sup> The Office will continue its review and analysis of these proposals and take appropriate action, as necessary, in Fiscal Year 2016.

On July 13, 2015, the Office filed a public comment in response to the MSRB’s draft amendment to MSRB Rule A-3 regarding membership on the MSRB Board of Directors

(“MSRB Board”). In the comment letter, the Investor Advocate opposed the proposed modifications to the standard of independence as applied to the public investor representative seat on the MSRB Board.<sup>46</sup> In place of the proposed amendment, the Investor Advocate encouraged the MSRB to consider two potential alternatives—changing the length of Board members’ service and allowing confidential treatment of applicants for the public investor representative seat—to address the MSRB’s concern about attracting qualified applicants for the public investor representative seat.<sup>47</sup>

In a September 17, 2015 press release, the MSRB Board indicated it would not pursue the proposed changes to MSRB Rule A-3 and announced that the MSRB will establish an investor advisory group to provide the MSRB Board with expertise on municipal market practices, transparency, and investor protection issues.<sup>48</sup> Also, on October 5, 2015, the MSRB published Regulatory Notice 2015-18 requesting comments on amendments to Rule A-3 to lengthen the term of MSRB Board service from three years to four years.<sup>49</sup> The Office filed a comment letter in support of the MSRB’s proposed amendments outside of the Reporting Period.<sup>50</sup>

## DATA PROTECTION AND CYBERSECURITY

FY 2015 was riddled with data breaches and cyber-attacks at a wide variety of companies and government agencies.<sup>51</sup> In one such instance, the breach of a financial services company’s data impacted 76 million households and seven million small businesses.<sup>52</sup> Additionally, the average total organizational cost of a data breach in the United States is estimated to be \$6.5 million in 2015, and it continues to increase.<sup>53</sup>

Investors, in particular, could experience significant harm from cybersecurity weaknesses. For example, investors could suffer from trading disruptions in targeted financial markets, breaches of investors’ personal information, or conversion of

funds. Consequently, the Office of the Investor Advocate has monitored the cybersecurity and data protection efforts of the SEC, SROs, Congress, and key market participants.

The SEC and SROs began addressing cybersecurity before the Reporting Period.<sup>54</sup> In January 2014, for example, FINRA announced plans to conduct a targeted examination to assess firms' approaches to managing cybersecurity threats.<sup>55</sup> On March 26, 2014, the SEC hosted a public Cybersecurity Roundtable to review the challenges facing public companies and market participants. The Roundtable included discussion of the cybersecurity landscape and its impact on public company disclosure, market systems, broker-dealers, investment advisers, and transfer agents.<sup>56</sup> Then, in April 2014, the SEC's Office of Compliance, Inspections, and Examinations ("OCIE") announced plans for examinations of registered broker-dealers and registered investment advisers "to assess cybersecurity preparedness in the securities industry and to obtain information about the industry's recent experiences with certain types of cyber threats."<sup>57</sup>

The cybersecurity initiatives of FINRA and OCIE have continued into FY 2015.<sup>58</sup> After completing its cybersecurity assessment, FINRA issued a corresponding Report on Cybersecurity Practices outlining "principles and effective practices" to assist firms in addressing cyber threats.<sup>59</sup> Likewise, OCIE completed and published a Cybersecurity Examination Sweep Summary in which it revealed that 88 percent of broker-dealers and 74 percent of advisers reported "that they have experienced cyber-attacks directly or through one or more of their vendors."<sup>60</sup> Drawing from these findings, the SEC and FINRA issued several alerts and bulletins to raise awareness of cybersecurity risks and promote best practices.<sup>61</sup> Moreover, the SEC settled a cybersecurity enforcement action against an investment adviser for the adviser's alleged failure to adopt written policies and procedures

reasonably designed to protect customer records and information.<sup>62</sup>

In addition, Chair White directed SEC Staff in summer 2014 to form a cybersecurity working group.<sup>63</sup> Throughout FY 2015, this cybersecurity working group assisted the SEC's divisions and offices by facilitating communications within the agency about cybersecurity, keeping abreast of cybersecurity trends in the securities markets, providing a forum for sharing information and coordinating activities relating to cybersecurity, and serving as a resource for identifying, assessing, and addressing cybersecurity risks affecting securities markets.<sup>64</sup>

In November 2014, the SEC finalized Reg SCI,<sup>65</sup> which requires certain self-regulatory organizations, ATs, and other entities to implement comprehensive policies and procedures for their technological systems.<sup>66</sup> Reg SCI is "designed to reduce the occurrence of systems issues, improve resiliency when systems problems do occur, and enhance the Commission's oversight and enforcement of securities market technology infrastructure."<sup>67</sup> Reg SCI became effective February 3, 2015, and the compliance date for entities subject to Reg SCI was November 3, 2015.<sup>68</sup> On September 2, 2015, the SEC's Division of Trading and Markets published Responses to Frequently Asked Questions Concerning Reg SCI.<sup>69</sup>

During FY 2015, key market participants aside from the SEC and SROs also have undertaken initiatives relating to data protection and cybersecurity. For example, SIFMA issued 10 principles to facilitate the partnership between firms and regulators in order to "achieve their shared goals of protecting critical infrastructure and the assets and data of the public."<sup>70</sup>

## EFFECTIVE DISCLOSURE

During the Reporting Period, the Office advocated for modernization of various types of disclosure

to make disclosure more effective for the 21<sup>st</sup> Century investor. We encouraged the use of layered disclosure, structured data, and, more generally, the harnessing of technology to enhance the delivery of information. During the Reporting Period, the Investor Advocate delivered two speeches to publicize his views regarding these issues.<sup>71</sup>

To be effective, we believe disclosure requirements need to take into account the varying needs of different types of users. Whenever possible, disclosures should be layered to make the most important information readily accessible and allow an individual investor to dig deeper for more information in a way that is user-friendly. At the same time, data should be structured in a way that facilitates the use of cutting-edge tools by highly sophisticated analysts, investment advisers, and other market participants. Users should be able to search data dynamically, establish trends through multiple reporting periods, and draw comparisons between different filers.

While the average investor may not utilize structured data directly, millions of investors in pension plans and other pooled investment vehicles could benefit from enhanced analytical tools that may be utilized by asset managers. Moreover, all investors benefit indirectly when data is used by sophisticated intermediaries to expose anomalies, detect superior performance, or contribute to more efficient price discovery in the markets.

The Commission has begun to consider the use of structured data in every rulemaking that includes a filing requirement. We have expressed our support for structured data in a variety of contexts, and we will continue to support similar initiatives. During the Reporting Period, the Commission's movement toward structured data was borne out in several significant rulemakings.

- On March 25, 2015, the Commission adopted final rules to update and expand Regulation A, an exemption for smaller issuers from the

securities registration requirements.<sup>72</sup> The Regulation now requires that issuers file certain key information in an online fillable form that is collected in a structured format.<sup>73</sup>

- On April 29, 2015, the Commission voted to propose rules requiring companies to disclose the relationship between executive compensation and the financial performance of a company.<sup>74</sup> Companies would be required to tag the disclosures in an interactive data format.<sup>75</sup>
- On July 1, 2015, the Commission proposed rules directing national securities exchanges and associations to establish listing standards requiring companies to “claw back” incentive-based compensation that was awarded erroneously.<sup>76</sup> The proposal would require issuers to disclose information related to clawbacks in an interactive data format.<sup>77</sup>
- On August 5, 2015, the Commission adopted new rules to provide a comprehensive process for security-based swap dealers and major security-based swap participants to register with the SEC.<sup>78</sup> The registration and other forms are being implemented with a graphical user interface that will allow users to complete a fillable online form, and the data will be collected in a structured format.<sup>79</sup>
- On September 22, 2015, the Commission proposed a new rule and amendments to promote effective liquidity risk management throughout the mutual fund industry.<sup>80</sup> The proposed approach would provide the framework for detailed reporting and disclosure about the liquidity of funds' portfolio assets in a structured data format.<sup>81</sup> This builds upon an earlier proposal, released on May 20, 2015, that would modernize the investment company reporting requirements and utilize structured data.<sup>82</sup>

During the Reporting Period, the Office also considered the effectiveness of new methods for delivering disclosures to investors. In particular, this issue was presented in the proposal to modernize

the investment company reporting requirements. Under current requirements, investment companies deliver lengthy semiannual reports to shareholders on paper unless shareholders specifically indicate they would prefer electronic delivery. The proposed rule would flip the default, allowing investment companies to provide the information electronically unless investors opt out by requesting paper documents.<sup>83</sup>

This is an important and challenging policy choice because different investors have different preferences. As an initial matter, the Investor Advocate has voiced support for a default to electronic delivery, believing the Commission should generally be forward-looking in its rulemakings. However, we will review the comments that are filed in response to the proposed rule and continue to explore research involving consumer or investor behaviors to determine what type of delivery would be the most effective in conveying important, lengthy, and complex information.

## ELDER ABUSE

Elder financial abuse is expected to grow dramatically for at least three reasons. First, our population is aging. About 10,000 Americans will celebrate their 65<sup>th</sup> birthday every day from now until 2030,<sup>84</sup> and by 2040, more than one in five Americans will be 65 or older.<sup>85</sup> Second, as the population ages, greater numbers of seniors are expected to suffer from diminished capacity. The Alzheimer's Association estimates that the number of people age 65 and older with Alzheimer's disease will reach 7.1 million by 2025, a 40 percent increase from the current number.<sup>86</sup> Third, as reliance on defined benefit retirement plans decreases and dependence on defined contribution retirement plans increases,<sup>87</sup> seniors will be left with greater control over the savings they accumulate over a lifetime of hard work. According to some estimates, persons 65 years and older control a total of \$18.1 trillion in assets, including \$10 trillion in financial assets.<sup>88</sup> These assets will be

very tempting targets for wrongdoers of all stripes, from unethical caregivers and family members to fraudsters and scam artists.

When the unscrupulous carry out acts of exploitation, financial professionals often find themselves on the front lines. Many broker-dealers and investment advisers have known their clients for years and may be among the first to recognize signs of diminished capacity or financial exploitation. But financial professionals may feel limited in their ability to protect their clients. For example, financial professionals are expected to comply with their clients' requests to withdraw or transfer assets, and rigid compliance with this basic rule would prevent a financial professional from blocking transactions that appear to be exploitative or outright scams. Financial professionals are also subject to privacy laws that limit their ability to contact a client's family members to discuss their concerns.

During the Reporting Period, the Office made it a priority to identify methods to help protect elderly investors from financial exploitation. In particular, we have looked for ways to give financial service professionals more effective tools to protect vulnerable clients. Potential solutions raise a host of policy questions, and the Investor Advocate sought to articulate a number of them in a speech in February 2015 at a conference on senior issues held at Commission headquarters.<sup>89</sup>

Any law or regulation in this area must balance two potentially conflicting goals: to respect every individual's right to self-determination, and also to prevent his or her unwitting financial self-destruction. We should remove undue restraints that keep financial professionals from acting to protect their clients. Yet, if we confer new authority on broker-dealers and investment advisers to intervene in clients' accounts when they suspect elder exploitation, we must place appropriate limits on that authority.



The challenge is to strike the right balance. In grappling with these policy issues, the Office conferred with a number of experts in the field. In October 2014, the Investor Advocate and staff participated in the 5<sup>th</sup> Annual Summit on Elder Financial Exploitation, convened by the National Adult Protective Services Association (“NAPSA”). The following month, we participated in an Elder Investor Protection Roundtable organized by the Fort Worth Regional Office of the SEC. The roundtable was noteworthy for bringing together the full panoply of organizations that must work together to prevent elder abuse: federal, state and local officials representing regulators, prosecutors, and the Department of Health and Human Services; broker-dealers and other financial professionals; and leaders of local not-for-profit organizations.

On June 15, 2015, the Investor Advocate and staff attended the First Global Summit on the 10<sup>th</sup> Anniversary of World Elder Abuse Awareness Day, held at Commission headquarters. The following month, we met with NAPSA officials to learn about the challenges adult protective services (“APS”) workers face while investigating and resolving reports of elder financial exploitation.<sup>90</sup> In addition, we have conferred regularly with colleagues in other SEC divisions and offices to encourage a coordinated approach to the challenges of elder exploitation.

At the end of the Reporting Period, two significant developments took place: FINRA and the North American Securities Administrators Association (“NASAA”) separately announced new proposals to combat elder financial exploitation. The proposals come against a backdrop in which a few states have adopted laws allowing financial firms to delay disbursements when elder exploitation is suspected.<sup>91</sup>

On September 17, 2015, FINRA announced that its Board of Governors had approved a rulemaking item to help firms better protect seniors and other vulnerable adults from financial exploitation.<sup>92</sup> The

proposal would allow a firm to place a temporary hold on a disbursement of funds or securities and notify a customer’s trusted contact when the firm has a reasonable belief that financial exploitation is occurring. Shortly after this Reporting Period ended, FINRA released the proposal for public comment.<sup>93</sup>

On September 29, 2015, NASAA announced that its Board of Directors had approved for public comment a proposed Model Act to address issues faced by broker-dealer and investment adviser firms and their employees when confronted with suspected financial exploitation of seniors and other vulnerable adults.<sup>94</sup> The proposed Model Act would provide broker-dealers and investment advisers with the authority to delay disbursement of funds from an eligible adult’s account if the broker-dealer or investment adviser reasonably believes that such disbursement will result in the financial exploitation of the eligible adult.

Mandatory reporting constitutes a key element of the proposed Model Act. If a broker-dealer or investment adviser delays a disbursement, it must notify persons authorized to transact business on the account (unless such persons are suspected of the financial exploitation), notify the state securities commissioner and APS, and undertake an internal review of the suspected exploitation.<sup>95</sup> The model legislation also would provide immunity from administrative or civil liability for broker-dealers and investment advisers for engaging in protective actions permitted under the act.<sup>96</sup>

During the next reporting period, the Office will follow the progress of the NASAA and FINRA proposals closely and comment as appropriate. In addition, we will examine what else remains to be done at the federal level to protect seniors and other vulnerable adults from financial exploitation.

As an initial observation, we would underscore the importance of reporting suspected exploitation to APS. This is a local agency that shoulders respon-

sibility for investigating reports of suspected elder abuse of all kinds, including financial exploitation, and taking swift and effective actions to protect seniors from abuse. The Investor Advocate believes that financial firms should have the ability to pause disbursements of funds, contrary to the explicit instructions of a customer, if there is a reasonable belief that financial exploitation is occurring. However, if the suspicion is strong enough to warrant a pause on a disbursement, it also should trigger an obligation to report the suspicious activity to APS.

For this reporting mechanism to be effective, it is necessary for APS to have adequate resources to do the job. Sadly, those resources appear to be lacking,<sup>97</sup> but this is an area in which Congress can make a real impact in the lives of vulnerable seniors. Although Congress authorized \$125 million for this purpose when it passed the Elder Justice Act in 2010, the first actual appropriation came in 2015 and amounted to \$4 million.<sup>98</sup> Additional funding would go a long way toward helping APS address the financial exploitation of seniors, a problem that likely will grow in the coming years.



# MOST PROBLEMATIC INVESTMENT PRODUCTS AND PRACTICES

**A**mong the statutory duties of the Investor Advocate enumerated in Exchange Act Section 4(g)(4), the Investor Advocate is required to identify “problems” that investors have with financial service providers and investment products. Exchange Act Section 4(g)(6) (B) mandates that the Investor Advocate, within the annual Report on Activities, shall provide a summary of the most serious problems encountered by investors during the preceding fiscal year. The statute also requires the Investor Advocate to make recommendations for such administrative and legislative actions as may be appropriate to resolve those problems.<sup>99</sup>

To determine the most serious problems related to financial service providers and investment products,

staff of the Office of the Investor Advocate reviewed information from the following sources:

- Investor Alerts and Bulletins issued by the SEC, NASAA, and FINRA during FY 2015;
- SEC enforcement actions and FINRA disciplinary actions during the Reporting Period;
- The 2015 NASAA Enforcement Report;<sup>100</sup>
- An October 30, 2015, letter from Lynnette Kelly, Executive Director, MSRB, highlighting municipal market practices that may have an adverse impact on retail investors;<sup>101</sup> and
- SEC and SRO staff reports providing guidance and interpretations relating to investment products.

The table below lists certain problematic products or practices during FY 2015 as reported by the

SEC <sup>102</sup>	NASAA <sup>103</sup>	FINRA <sup>104</sup>	MSRB <sup>105</sup>
<ul style="list-style-type: none"> <li>▪ Penny Stocks of Dormant Companies</li> <li>▪ Internet Fraud, Including Social Media Investment Schemes &amp; Fantasy Trading Websites</li> <li>▪ Automated Investment Tools</li> <li>▪ Broker-Dealer Controls Regarding Customer Sales of Microcaps &amp; Structured Securities</li> <li>▪ Miscellaneous Broker Fees</li> <li>▪ Pump and Dump Schemes</li> <li>▪ Non-traded REITs</li> <li>▪ Options</li> <li>▪ Cybersecurity</li> </ul>	<ul style="list-style-type: none"> <li>▪ Pyramid and other Ponzi Schemes</li> <li>▪ Regulation D/Rule 506 Private Offerings</li> <li>▪ Real Estate Schemes, Including Those Using Promissory Notes</li> <li>▪ Internet Fraud, Including Social Media and Crowdfunding</li> <li>▪ Oil &amp; Gas Investments in the Fracking Era</li> <li>▪ Affinity Fraud</li> <li>▪ Marijuana Industry Investments</li> <li>▪ Stream of Income Investments</li> <li>▪ Binary Options</li> <li>▪ Digital Currency and Cybersecurity</li> </ul>	<ul style="list-style-type: none"> <li>▪ Penny Stocks of Dormant Companies</li> <li>▪ Messaging Applications &amp; Pump and Dump Scams</li> <li>▪ Automated Investment Tools</li> <li>▪ Advance Fee Scams</li> <li>▪ Brokerage Account Asset Transfers at Death</li> <li>▪ Bond Liquidity</li> <li>▪ High Pressure Sales Tactics and Aggressive Promotions in Physical Precious Metal, E-Cigarette, and Vaporizer Markets</li> <li>▪ Cybersecurity</li> </ul>	<ul style="list-style-type: none"> <li>▪ Timeliness of Continuing Disclosures</li> <li>▪ Lack of Bank Loan Disclosures</li> <li>▪ Trades Below Minimum Denomination</li> <li>▪ Time of Trade Disclosures</li> <li>▪ Price Transparency</li> </ul>

SEC, NASAA, FINRA, and the MSRB. Although not exhaustive, the lists reflect some of the concerns of these organizations. Details regarding these products and practices are available on these organizations' websites.

Each of the products and practices listed above presented problems for investors during the Reporting Period. Based on our review of the resources described above and consultations with knowledgeable professionals, however, this Report on Activities identifies three products or practices that we wish to highlight: (1) exchange traded products (including related structural concerns); (2) municipal market disclosure practices; and (3) master limited partnerships.

## EXCHANGE TRADED PRODUCTS

Exchange-traded products ("ETPs") constitute a diverse class of financial products that seek to provide investors with exposure to financial instruments, financial benchmarks, or investment strategies across a wide range of asset classes. ETP trading occurs on national securities exchanges and other secondary markets,<sup>106</sup> making ETPs widely available to individual investors as well as institutional investors such as hedge funds and pension funds.<sup>107</sup>

The Commission approved the listing and trading of shares of the first ETP—the SPDR S&P 500 ETF ("SPY" or "Spider")—in 1992.<sup>108</sup> Since then, there has been enormous growth in this market. From 2006 to 2013, the total number of ETPs listed and traded rose by an average of 160 per year.<sup>109</sup> The total market capitalization of ETPs also has grown substantially, nearly doubling since the end of 2009. Much of this growth has been in index-based ETPs.<sup>110</sup> As of December 31, 2014, there were 1,664 U.S.-listed ETPs with a market capitalization of over \$2 trillion.<sup>111</sup>

There also has been significant growth in the range of investment strategies that ETPs pursue.

These strategies have expanded from exchange-traded funds ("ETFs") that track equity indices (such as the original SPY) to include, among other things: (i) ETPs that track other types of indices (such as those based on fixed-income securities or on derivatives contracts on commodities and currencies); (ii) actively managed ETPs that hold portfolios of equities, fixed-income instruments, foreign securities, commodities, currencies, futures, options, or other over-the-counter or exchange-traded derivatives; (iii) leveraged, inverse, and inverse leveraged ETPs; and (iv) ETPs employing market volatility, hedging, or options-based strategies.<sup>112</sup>

Although ETPs constitute a diverse class of financial products, they are often classified into three broad categories.

*Exchange-Traded Funds.* The first, and largest, category comprises ETFs, which are funds or trusts registered as investment companies under the Investment Company Act of 1940 ("1940 Act").<sup>113</sup> Like a mutual fund, an ETF pools the assets of multiple investors and invests according to its stated investment objective, and each share of an ETF represents an undivided interest in the underlying assets. However, unlike mutual funds whose shares are bought or sold at the fund's current net asset value calculated typically only at the end of the day, ETF shares may be bought or sold throughout the day through a broker-dealer at a fluctuating price.<sup>114</sup>

*Non-1940 Act Pooled Investment Vehicles.* The second category comprises ETPs that, generally, are trusts or partnerships that are not registered under the 1940 Act because they do not invest primarily in securities.<sup>115</sup> Examples include those that physically hold a precious metal or that hold a portfolio of futures contracts on commodities. Offerings of securities issued by these ETPs are registered only under the Securities Act of 1933 ("Securities Act").

*Exchange-Traded Notes (“ETNs”).* The third category, ETNs, are senior debt instruments issued by banks, and they pay a return based on the performance of a “reference asset” such as a market benchmark like the return on the S&P 500 Index.<sup>116</sup> Unlike the other two categories of ETPs, ETNs are not pooled at all like mutual funds, and they do not hold an underlying portfolio of securities or other assets. ETNs are registered under the Securities Act, and the performance of the referenced asset generally determines what the issuer of the ETN must pay to the investor at maturity of the note.

Certain ETPs can be relatively easy to understand. Other ETPs may have unusual investment objectives or use complex investment strategies that may be more difficult to understand and fit into an investor’s investment portfolio.<sup>117</sup> For example, leveraged ETFs seek to achieve performance equal to a multiple of an index after fees and expenses. These ETFs seek to achieve their investment objective on a daily basis only, potentially making them unsuitable for long-term investors. In addition, the Commission has observed that the secondary market price of an ETN can substantially deviate from its reference assets when the issuer of that ETN suspends issuances, which has occurred on occasion.<sup>118</sup>

In June 2015, the Commission issued a release seeking public comment to help inform its review of the listing and trading of new, novel and complex ETPs.<sup>119</sup> The Commission also solicited comment regarding the ways in which broker-dealers market these products, especially to retail investors.<sup>120</sup> Finally, the Commission sought comment on investor understanding of the nature and uses of ETPs, particularly by retail investors. To date, the Commission has received over 35 comments on ETPs from individuals, industry trade groups, academics, and other interested parties.<sup>121</sup>

On the morning of August 24, 2015, the price of dozens of equity ETFs dropped below the values of the indices they were designed to track, and the ETFs experienced a number of trading halts.<sup>122</sup> Chair White has noted that the Division of Economic and Risk Analysis (“DERA”) and the Division of Trading and Markets are evaluating a great deal of information from that day’s trading activity.<sup>123</sup> From its initial analysis, DERA has observed 1,278 trading halts on August 24<sup>th</sup> (as compared to 40 on an average day) and found that more than 80 percent of the halts involved ETPs, with many of those ETPs trading well below their presumed value at the time.<sup>124</sup> Preliminarily, the data suggests there was a large pull-back in liquidity for ETPs as the markets opened for trading. Furthermore, the problems were not restricted to small ETFs, as the typically larger and liquid ETFs were more likely to be halted.<sup>125</sup>

In a recent speech, SEC Commissioner Luis Aguilar noted that the apparent fragility of ETFs during the opening of trading raises questions and suggests it may be time to reexamine the entire ETF ecosystem.<sup>126</sup> For example, it may be appropriate to consider whether liquidity providers for ETFs need more effective incentives to participate during periods of extreme volatility, and whether the growth of ETFs and their proliferation into less liquid asset classes has challenged the effectiveness of the existing ETF arbitrage and pricing mechanisms.<sup>127</sup> Chair White has encouraged Commission staff to examine whether the behavior of ETPs on that day can be explained by uncertainty in pricing, by the demand and supply for ETPs, or by the low trading volume.<sup>128</sup>

It is too early to offer meaningful recommendations to address the problems that were exposed on August 24<sup>th</sup>. Our Office will continue to evaluate the underlying causes for the market disruption, monitor developments, and offer our recommendations at the appropriate time.

## MUNICIPAL MARKET DISCLOSURE PRACTICES

As of the end of the second quarter of 2015, individual investors held directly approximately 42 percent of municipal securities. Another 28 percent were owned indirectly by retail investors through mutual funds, money market funds, or closed end funds and exchange-traded funds.<sup>129</sup> The prevalence of municipal securities in the portfolios of individual investors makes investor protection in municipal securities markets imperative. Recently, the MSRB highlighted “three areas of particular concern given their potential adverse effect on retail investors” and identified two additional areas that continue to be monitored for potential risks to retail investors.<sup>130</sup> Each of these areas is briefly discussed below.

*Timeliness of Continuing Disclosures.* Municipal securities issuers are falling short in providing investors with timely disclosures of valuable information.<sup>131</sup> According to the MSRB’s May 2015 report, *Timing of Annual Financial Disclosures by Issuers of Municipal Securities*, between 2010 and 2014 audited financial statements were submitted to the Electronic Municipal Market Access (“EMMA”) system,<sup>132</sup> on average, between 199 and 203 days after the end of the applicable fiscal year.<sup>133</sup> Other financial information was submitted on average between 186 and 189 days after the end of the applicable fiscal year.<sup>134</sup> This lag between the end of a fiscal year and the disclosure of annual financial information by issuers likely diminishes the information’s usefulness and relevance to retail investors trying to assess the current financial position and health of a municipal issuer.<sup>135</sup>

*Lack of Bank Loan Disclosures.* Bank loans, direct-purchase debt, and privately placed debt are increasing in popularity as an alternative financing option to a public debt offering.<sup>136</sup> According to data published by the Federal Deposit Insurance Corporation, the issuance of bank loans to state and local government increased by approximately \$95.6 billion from fourth quarter 2012 to fourth

quarter 2014.<sup>137</sup> For an investor in municipal securities, the level of a municipality’s debt-like obligations can be an important factor in an investment decision because the loans can impact the issuer’s credit profile or distort valuation of the issuer’s bonds. However, these debt-like obligations are rarely disclosed<sup>138</sup> because they may not trigger disclosure obligations under existing rules.<sup>139</sup>

*Trades Below the Minimum Denomination.* During a municipal bond offering, issuers prescribe the minimum denomination, which is the lowest dollar amount of bonds to be sold by a dealer to an investor in a single transaction. Typically, the minimum denomination is \$5,000, but some issuers may impose a higher minimum, most commonly in the amount of \$100,000.<sup>140</sup> An issuer may set high minimum denominations because it perceives that the municipal bond may be inappropriate—due to risk of default, lack of publicly disseminated disclosure, or other concerns—for retail investors who are likely to purchase in dollar amounts below the minimum denomination.<sup>141</sup> By setting a higher minimum denomination, issuers may help ensure that high risk bonds are sold only to investors able to make larger investments and bear the associated risk.<sup>142</sup> Toward that end, the MSRB implemented MSRB Rule G-15, which prohibits municipal bond dealers from effecting customer transactions in a dollar amount below the minimum denomination, subject to certain exceptions.<sup>143</sup> However, the MSRB has grown concerned that certain dealers have inappropriately transacted below the minimum denomination.<sup>144</sup>

*Time of Trade Disclosures.* Under MSRB Rule G-47, dealers cannot sell municipal securities to a customer or purchase municipal securities from a customer without disclosing to the customer, at or prior to the time-of-trade, all material information known about the transaction and material information about the security that is reasonably accessible to the market.<sup>145</sup> The failure of a dealer to disclose all material information poses a significant risk because retail investors may act on incomplete



information, execute unsuitable transactions, or pay unreasonable prices for transactions.<sup>146</sup> According to the MSRB, the magnitude of this type of dealer misconduct is difficult to measure, but inadequate disclosure is an area of increasing concern.<sup>147</sup>

*Price Transparency.* Currently, customer confirmations are not required to include information about the cost of a security to the firm. For individual investors to determine that cost and compare it to the price they paid for the security, they must navigate through publicly available information on EMMA and identify prices in corresponding transactions.<sup>148</sup> Thus, to help ensure fair and reasonable pricing, there is a need for increased price transparency. With better price transparency, retail investors will be better equipped to evaluate transaction costs and the quality of service provided to them by brokers.<sup>149</sup>

Some steps have been taken to address each of the areas identified above. The MSRB has made efforts to promote more timely disclosure and to improve disclosure practices through market outreach and the development of tools and resources that promote more timely disclosure, such as a free automated email reminder service alerting issuers to

periodic financial disclosure requirements.<sup>150</sup> The MSRB also has repeatedly called upon municipal market participants to urge issuers to disclose bank loans and other debt-like obligations on EMMA.<sup>151</sup> Through its rulemaking process, the MSRB has sought to ensure suitability and fair pricing obligations are met.<sup>152</sup> Its price transparency initiatives, including its recent best execution requirement and additions to post-trade data on EMMA, seek to ensure fair pricing and transparency in municipal securities markets.<sup>153</sup>

As discussed in greater detail in the section above entitled Municipal Market Reform, the Office of the Investor Advocate has spent considerable time in FY 2015 advocating for the protection of investors in municipal securities markets. In Fiscal Year 2016, the Office will continue to monitor developments and encourage reforms that benefit investors.

## **MASTER LIMITED PARTNERSHIPS**

Master limited partnerships (“MLPs”) have attracted media coverage recently, partly as a result of their steep price declines after years of prosperity.<sup>154</sup> Media reports typically point to the large drop in crude oil prices as a significant reason for the selloff in MLP shares.<sup>155</sup> Although once the

most popular energy-related investments of the past decade, MLPs have become a scorned investment vehicle in a matter of months. Indeed, as their prices have fallen even further than the crude oil on which many MLPs depend, the popularity of MLPs has plummeted.<sup>156</sup> Because the typical MLP investor tends to be an individual who holds securities for the long-term,<sup>157</sup> the recent volatility in MLP prices directly impacts the individual investor. According to the MLP Association, most MLP investors are individuals who invest in MLPs either directly or through MLP funds, and a large proportion of those investors are seniors who rely on MLPs to help fund their retirement.<sup>158</sup>

Generally, MLPs have been a popular investment choice because of their high yields, unique structure, and tax advantages.<sup>159</sup> An MLP is a limited partnership whose limited partnership interests are publicly traded—in other words, an MLP is a publicly traded limited partnership.<sup>160</sup> The limited partnership interests, usually referred to as “common units,” are analogous to the common stock of an issuer.<sup>161</sup> Despite being publicly traded, however, MLPs are classified as partnerships for federal income tax purposes.<sup>162</sup>

As a result, an MLP captures the tax advantages of a partnership at the federal and state levels while maintaining the liquidity of a publicly traded stock.<sup>163</sup> This confers significant tax advantages on MLPs as compared to companies organized as publicly traded corporations.<sup>164</sup> Because MLPs are “pass-through” entities—meaning that income passes through to the owners of the MLP—they are not subject to corporate income taxes.<sup>165</sup> Rather, the owners of the MLP are personally responsible for the payment of income taxes on their individual portion of the MLP’s income, gains, losses, and deductions.<sup>166</sup>

The unique structure of MLPs is due mainly to the Revenue Act of 1987, which exempted from entity-level taxation any publicly traded partnership in

which at least 90 percent of its gross income is classified as “qualifying income.”<sup>167</sup> Generally, qualifying income includes, among other things, income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource (including fertilizer, geothermal energy, and timber).<sup>168</sup> Real property rents, income, and gains also can be considered qualifying income under certain circumstances.<sup>169</sup> Nonetheless, most MLPs are clustered in the energy sector, particularly in the pipeline or energy storage industries, which provide a stable source of income derived from the transport and storage of oil, gasoline, and natural gas.<sup>170</sup> According to the MLP Association, total MLP market capital is approximately \$481 billion, of which 82 percent (approximately \$393 billion) is attributable to energy and natural resource MLPs.<sup>171</sup>

A significant disadvantage of the concentration of MLPs in the energy sector is that they can be acutely sensitive to shifts in oil prices—even those MLPs unrelated to the oil and gas industry.<sup>172</sup> MLP investors reportedly have lost approximately \$20 billion in publicly traded drilling partnerships alone in the past year.<sup>173</sup> The Alerian MLP Index, a benchmark gauge of energy MLPs (whose 50 constituents represent approximately 75 percent of total market capitalization), had declined by over 30 percent year-to-date as of September 30, 2015, and was down nearly 40 percent in the one-year period ending on that date.<sup>174</sup> Investors who hold MLPs indirectly in the form of ETPs may be impacted by the uncertainty of interest rate movements and commodity prices as well.<sup>175</sup> In addition, the MLP space has consolidated over the past couple of years, resulting in the removal of certain MLPs from MLP indexes.<sup>176</sup> In other words, MLP prices can be extremely volatile, and many investors have experienced the downside of this volatility in the past year.



Other potential risks of investing in MLPs include, among other things, partnership tax consequences, governance and standards of care that may be more favorable to the MLP sponsor than to the investor, and conflicts of interest.<sup>177</sup> For example, each owner—or limited partner—of an MLP receives an annual Schedule K-1 which itemizes the limited partner's share of the MLP's income, gains, losses, and deductions.<sup>178</sup> An MLP investor is responsible for paying all applicable federal, state, and local income taxes even if the MLP does not make any cash distributions to the investor.<sup>179</sup> In addition, the sponsor who set up the MLP (usually a public company that contributes assets to the MLP) typically controls the MLP through its general partner and board of directors and can opt to exercise a lower standard of care than the fiduciary standard corporations generally owe to their shareholders under state law.<sup>180</sup> Moreover, the sponsor's relationship with the MLP and its general partner can create conflicts of interest that can be disadvantageous to investors who are only limited partners in the MLP.<sup>181</sup>

Depending on the circumstances, MLPs might have a place in the overall asset mix of a broadly diversified investment portfolio, and the Office of the

Investor Advocate does not recommend changes to the rules or regulations that govern these products at this time. We note, however, that an investor's reach for yield can have negative consequences, as evidenced by the steep declines in MLP prices and corresponding heavy losses for MLP investors over the past year. The recent performance of these products underscores the types of risks that investors are increasingly assuming in a marketplace rife with more and more complex products. We believe that it is incumbent upon providers of these products to ensure that investors understand those risks.

For their part, investors should conduct thorough research and strive to understand the nature of MLPs and their risks before deciding to invest in them. This is particularly important in the case of MLPs because so many of them have concentrated exposure to a single industry or commodity, in addition to other risks. As with any investment, investors should not invest in something that they do not understand. Investors might also consider seeking the advice of registered investment professionals who understand their investment objectives and tolerance for risk before making investment decisions involving MLPs.



# OMBUDSMAN'S REPORT

## ESTABLISHING A FOUNDATION FOR MEANINGFUL SERVICE

**U**nder Section 919D of the Dodd-Frank Act, as codified in Exchange Act Section 4(g)(8), 15 U.S.C. § 78d(g)(8), the Ombudsman shall: (i) act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations (“SROs”); (ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and (iii) establish safeguards to maintain the confidentiality of communications between investors and the Ombudsman.<sup>182</sup> On August 26, 2014, the Investor Advocate, in consultation with Chair White, appointed Tracey L. McNeil as Ombudsman. She formally began her duties on September 22, 2014.

Exchange Act Section 4(g)(8)(D) requires the Ombudsman to submit a semi-annual report to the Investor Advocate that describes the activities and evaluates the effectiveness of the Ombudsman during the preceding year.<sup>183</sup> In turn, these reports must be included in the semi-annual reports that are submitted by the Investor Advocate to Congress.<sup>184</sup> Accordingly, we submit this report describing the Ombudsman’s activities from October 1, 2014 to September 30, 2015 (“FY 2015”).

During FY 2015, the Ombudsman<sup>185</sup> focused largely on establishing processes to handle inquiries from retail investors. In addition to the founda-

tional activities listed in the previous semi-annual Ombudsman’s Report included in the Report on Objectives for Fiscal Year 2016,<sup>186</sup> the Ombudsman continued the operational process of establishing the foundational systems necessary to support the ombudsman function, including:

- Hiring a full-time attorney with experience addressing investor inquiries to increase response capacity and facilitate effective outcomes;
- Engaging a contract attorney with significant financial regulatory experience to support more comprehensive analysis of SRO regulatory policies and procedures;
- Establishing confidential email, telephone, facsimile, and file storage with appropriate protections to secure data and limit access;
- Refining internal policies and procedures, and establishing internal protocols for handling inquiries in a confidential manner; and
- Working directly with the SEC’s Office of Information Technology (“OIT”) and a technology contractor to create an integrated electronic platform for inquiry management, data collection, reporting, and recordkeeping available only to the Ombudsman and authorized staff.



The Ombudsman is required to review and make recommendations for policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws. The establishment of the role, the Ombudsman's ability to handle inquiries on a confidential basis, and the Ombudsman's access to appropriate SEC staff across the agency should encourage persons to present questions to both the Ombudsman and the Investor Advocate. To achieve this objective, the Ombudsman has adopted a two-pronged approach using personal outreach and electronic media to raise awareness of this service and encourage public engagement.

With the addition of new staff and increased Ombudsman personnel resources, the Ombudsman has connected with the greater ombudsman community, including ombudsmen in other government agencies and the financial services industry, by participating in various industry-specific and practice-focused trainings and conferences during FY 2015. Through these events, the Ombudsman's presence and participation has forged relationships with other financial industry neutrals positioned to guide investors and others to the services of the SEC's Ombudsman when appropriate.

The Ombudsman also launched the new Ombudsman webpage accessible through the Commission's public website at [www.sec.gov](http://www.sec.gov). The new webpage is designed to be user-friendly, explain the nature of the Ombudsman's liaison function, clarify the types of assistance the Ombudsman can provide, encourage individuals to bring concerns for the Investor Advocate's consideration, and highlight the safeguards protecting confidentiality of communications with the Ombudsman.

## **STANDARDS OF PRACTICE**

Any retail investor with an issue or concern related to the SEC or to a self-regulatory organization subject to SEC oversight may contact the

Ombudsman. The Ombudsman is available to identify existing SEC options and resources to address issues or concerns, and to explore informal, objective steps to address issues or concerns that may fall outside of the agency's existing inquiry and complaint processes. Similar to ombudsmen at other federal agencies, the Ombudsman follows three core standards of practice:

### **Confidentiality**

The Ombudsman has established safeguards to protect confidentiality, including a separate email address, dedicated telephone and fax lines, and secure file storage. The Ombudsman will not disclose information provided by a person in confidence, including identity, unless expressly authorized by the person to do so, or if required by law or other exigent circumstances, such as a threat of imminent risk or serious harm. At times, the Ombudsman may need to disclose information on a limited basis to other SEC staff to address inquiries and related issues. In these instances, information is only shared to the extent necessary to route and review the matter.

### **Impartiality**

The Ombudsman does not represent or act as an advocate for any individual or entity, and does not take sides on any issues brought to her attention. The Ombudsman maintains a neutral position, considers the interests and concerns of all involved parties, and works to promote a fair process.

### **Independence**

By statute, the Ombudsman reports directly to the Investor Advocate, who reports directly to the Chair of the SEC. However, the Office of the Investor Advocate and the Ombudsman are designed to remain somewhat independent from the rest of the SEC. Through the Congressional reports filed every six months by the Investor Advocate, the Ombudsman reports directly to Congress without any prior review or comment by the Commission.

## **OMBUDSMAN MATTER MANAGEMENT SYSTEM**

The Ombudsman continued working closely with OIT throughout FY 2015 to develop the Ombudsman Matter Management System (“OMMS”), a platform for collecting, recording, and tracking matters received by the Ombudsman—including inquiries, complaints, requests, and recommendations—while ensuring necessary data management, confidentiality, and reporting requirements are met. The development acquisition process began during the second quarter of FY 2015, and a technology contractor was selected and engaged during the third quarter of FY 2015.

With the assistance of OIT, the Ombudsman continues to meet with the contractor to refine the data parameters and functionality requirements for the completed system. To ensure successful operation and full compliance with SEC and OIT development, security, and privacy guidelines and standards, the Ombudsman and approved staff will engage in software testing throughout the first and second quarters of FY 2016. The Ombudsman plans to begin phasing out the existing manual data collection system during FY 2016 and anticipates full reliance on the new, customer-facing, data management platform no later than FY 2017.

When OMMS is fully operational, the Ombudsman and approved staff will have the ability to review investor inquiries and complaints, including communication, handling, and resolution histories, within a fully secure, confidential electronic system. Over time, OMMS should enhance operational efficiency on multiple levels. It will provide appropriate staff with the ability to input and access all correspondence and related supplemental documents relevant to a particular individual or entity through an automated, unified system indexed for complex research capacity. With these features, OMMS will increase the depth and breadth of resources available for staff

review, reduce corresponding staff research and response time, and increase the security of personal information related to the individual inquiries, complaints, and concerns the Ombudsman handles. The OMMS data collection, analysis, and reporting features also will allow for more comprehensive data analysis, thereby supporting the Ombudsman’s recommendations to the Investor Advocate with fuller, data-driven metrics.

Further, the OMMS external interface will include a secure communication system permitting the submission of electronic inquiries and complaints directly to the Ombudsman through a web portal system accessible via the [www.sec.gov](http://www.sec.gov) webpage. As with the dedicated Ombudsman telephone number and email address already in place, this web-based communication platform will ensure the confidentiality of communications between the Ombudsman and the public. This OMMS feature will encourage further public inquiry simply because such technology has become a commonly used, well-recognized, online tool for communicating inquiries and complaints.

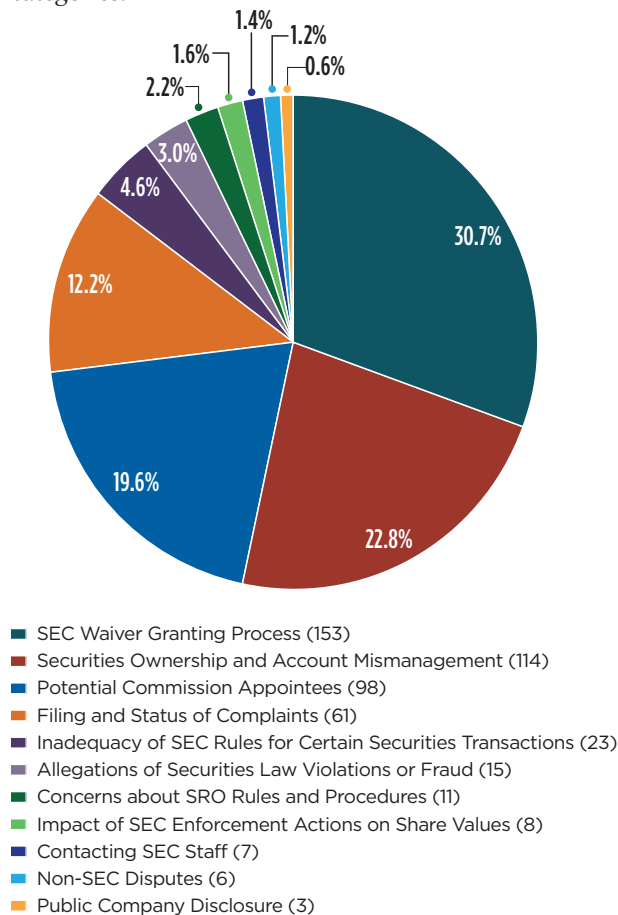
## **OMBUDSMAN SERVICE BY THE NUMBERS — FY 2015**

The Ombudsman assists retail investors and other individuals in a variety of ways, including, but not limited to:

- Helping persons explore available SEC options and resources;
- Listening to inquiries, concerns, complaints, and related issues;
- Clarifying certain SEC decisions, policies, and practices;
- Taking objective measures to resolve informally matters that fall outside of the established resolution channels and procedures at the SEC; and
- Acting as an alternate channel of communication between retail investors and the SEC.

During FY 2015, the Ombudsman fielded 727 contacts from retail investors, attorneys, industry professionals, students, prospective government service contractors, SEC staff, and other individuals. Every contact—including phone calls, emails, voicemails, and other correspondence—was individually reviewed by the Ombudsman in an impartial and confidential manner, as discussed under the Standards of Practice. Of these 727 contacts, 499 represent initial matters where the Ombudsman was contacted to address a discrete question or concern. Of these initial matters, 228 generated follow-on contacts which required additional resources and information—including research, meetings, and correspondence between the Ombudsman, SEC staff, SRO staff, and/or investors and individuals—to address subsequent requests, questions, or concerns.

The 499 initial matters fell into 11 primary categories:



## OMBUDSMAN SERVICE BEHIND THE NUMBERS—RESTORING INVESTOR CONFIDENCE, RETHINKING PROCEDURES, AND CREATING A FORUM FOR DISCUSSION AND RECOMMENDATIONS

Although instructive, the numbers alone are insufficient to reflect an accurate picture of the Ombudsman’s activities. The numbers provide information about the range of investor concerns we addressed, but they do not offer a meaningful picture of the obstacles faced by investors who came to us or how the Ombudsman’s role provided alternative solutions to those obstacles. For a more valuable understanding of the Ombudsman’s undertakings, the following sections describe a few of the matters the Ombudsman received, how they were addressed, and the basis for the resolution method employed. These sections also highlight the scope of considerations influencing the Ombudsman’s responses based on the particular investor and the specific context involved.

### Restoring Investor Confidence

The Ombudsman received a substantial number of calls generated by two strategic, scripted call campaigns during the fourth quarter of FY 2015. The Ombudsman received 98 calls from individuals expressing opposition to certain potential nominees for Commission vacancies, and 153 calls from individuals objecting to Commission waivers granted to entities otherwise disqualified from submitting SEC filings as “well-known seasoned issuers,” or WKSIs.<sup>187</sup> Each call campaign was conducted during a very short window of time, and resulted in a high volume of calls received over a period of a few days. In addition to each caller using similar, seemingly scripted language, a number of callers individually requested to speak with a member of the Commission staff about their concerns. Several callers also expressed significant frustration, identified the Commission as non-responsive to investors’ concerns, and asserted

that this perception was justified when the call was answered by voicemail rather than a live person.

The Ombudsman reviewed each of the 251 voicemail messages, noted each caller's name and contact information when provided, and informed the Investor Advocate and staff in the Chair's Office of the nature and volume of calls. In determining a procedure to handle the call campaigns, the Ombudsman considered both the callers' stated and implied concerns. Ultimately, every caller who requested a return call received a personal call from the Ombudsman, and the Ombudsman took the time to listen to the concerns of each person she reached. When helpful or requested, the Ombudsman provided the caller with additional information on how Commission vacancies are filled and how waiver requests are granted. The decision by the Ombudsman to engage directly with these individual callers addressed their stated concerns while also correcting mistaken public assumptions about the priority the Commission places on individual investors.

This theme—restoring investor confidence through personal interaction with the Ombudsman—has been a recurring one for which there is no one-size-fits-all solution. For example, an elderly investor contacted the Ombudsman for assistance with the SEC complaint process to address a disputed brokerage account transaction. The investor was particularly daunted by technology and found it difficult to navigate the SEC website. The investor also was intimidated by his perceived lack of power in a dispute with a large, international brokerage. The Ombudsman assisted the investor and explained the SEC complaint process; however, the investor routinely called the Ombudsman to discuss his complaint, and also to request the same information provided to him previously. Realizing that the investor's ill health was complicating efforts to provide assistance, the Ombudsman crafted a personalized, multi-step strategy to address the investor's concerns and get his complaint filed.

When last contacted to follow up, the investor expressed his gratitude to the Ombudsman and the SEC for providing the guidance, resources, and support necessary to file a complaint to help him protect his life savings.

In another particularly challenging and compelling matter, a caller contacted the Ombudsman complaining that an SEC staff member spoke impolitely to his elderly father who was hospitalized and unable to appear for scheduled testimony that same afternoon. The caller lived in a different state from his father, did not know the name of SEC staff with whom his father spoke, and had no information about the nature of the testimony, the entity, or the security that might be involved. With the limited information provided, the Ombudsman conducted research and contacted the appropriate SEC senior staff directly to discuss the matter, facilitating a rapid resolution to the caller's concerns. Acting as a liaison and leveraging the ability to address investor concerns through informal channels, the Ombudsman was able to demonstrate the Commission's commitment to the protection of individual investors and support the agency's enforcement efforts.

### **Rethinking Procedures**

While the number of retail investor complaints specifically addressing conflicts with SROs has been relatively small, the Ombudsman's treatment of those complaints reflects their significance and demonstrates the Ombudsman's unique role in raising issues for the consideration of the Investor Advocate and in contributing to the protection of investors. Several investors raised concerns about their experiences with the FINRA arbitration process, and the Ombudsman noted the intent to focus on these concerns in the Ombudsman's Report included in the Report on Objectives for FY 2016.<sup>188</sup> The discussion that follows highlights broad areas of concern raised by investors that relate to the fairness and effectiveness of securities arbitration: noncompliance with discovery rules,

unprofessional and unethical conduct, arbitrator neutrality, and mandatory pre-dispute arbitration.

During FY 2015, several investors complained to the Ombudsman that firms withheld material documents subject to automatic disclosure, introduced fabricated documents into the record, and misrepresented facts and substantive securities law to FINRA arbitrators. Moreover, these investors complained about delays during the expedited arbitration process, failure to follow procedural rules, and otherwise unprofessional and unethical conduct during arbitration hearings. Concerns about noncompliance with securities arbitration discovery rules have existed for some time. In 2003, for example, the National Association of Securities Dealers (“NASD”), which consolidated member firm regulatory functions with NYSE to form FINRA in 2007,<sup>189</sup> issued a notice to remind members of their duty to cooperate during the arbitration discovery process.<sup>190</sup> Furthermore, this notice highlighted sanctions that may be imposed against parties who violated this duty, and mentioned the responsibility of claimants and their representatives to follow discovery rules and procedures as well.<sup>191</sup> Unprofessional and unethical conduct may be best addressed through training<sup>192</sup> and other corrective measures; however, efforts to address the broad scope of investor complaints about noncompliance with discovery rules and unprofessional and unethical conduct may extend into other aspects of the FINRA arbitration process.

In addition, investors expressed concerns relating to arbitrator neutrality and raised complaints about arbitrators with undisclosed conflicts of interest and pro-industry biases. A FINRA arbitrator, whether classified as a public arbitrator (one with no securities industry experience) or a non-public arbitrator (one with securities industry experience),<sup>193</sup> has a continuous duty to disclose conflicts of interest fully.<sup>194</sup> This conflict disclosure encompasses interests, relationships, and circumstances that may affect, or appear to affect, an arbitrator’s ability to render an objective

and impartial decision.<sup>195</sup> Investors asserted that prior employment in the securities industry affected arbitrator neutrality, and that despite FINRA’s requirements, arbitrators with conflicts and pro-industry biases were adjudicating arbitration hearings.

Investors also voiced their concerns and overall dissatisfaction with mandatory pre-dispute arbitration. The Ombudsman explored these concerns in depth during one-on-one discussions with individual investors on numerous occasions. Investors often asserted that they would have more rights and fare better financially if their disputes were adjudicated in court rather than in arbitration. In support of one complaint, an investor discussed with the Ombudsman a detailed timeline of events that ultimately led to an arbitration award amount that was a meager portion of the damages claimed. Furthermore, the investor’s attorney and expert fees far exceeded the award amount.

The Ombudsman reviewed voluminous records, studies, legislative histories, policy discussions, and commentaries on how retail investors fare in arbitration proceedings. The Ombudsman also discussed the issue informally with other ombudsmen, industry professionals, and Commission staff. Long-held perspectives on the benefits and drawbacks of mandatory pre-dispute arbitration remain in conflict.<sup>196</sup> Backers of mandatory pre-dispute arbitration maintain that it is an efficient and cost-effective alternative to litigation and may provide the greatest benefits to investors with small claims.<sup>197</sup> Opponents assert that mandatory pre-dispute arbitration forces investors to waive their right to choose the judicial process over arbitration at the outset,<sup>198</sup> results in awards that are often a fraction of the actual losses,<sup>199</sup> and contributes to the perception held by many investors that the overall process is unfair.<sup>200</sup>

The consideration of, and resources dedicated to, these investors and their complaints demonstrate the Ombudsman’s unique ability to bring important



issues to the attention of the Investor Advocate on behalf of retail investors. The Ombudsman continues to field complaints and examine investors' concerns about the arbitration process, and further analysis is necessary to determine what formal recommendations the Ombudsman may present to the Investor Advocate.

### **Creating a Forum for Discussion and Recommendations**

Two additional examples highlight the Ombudsman's service behind the numbers. In the first instance, a solo practitioner contacted the Ombudsman with specific complaints about the process required to submit a certain filing via the SEC's Electronic Data Gathering and Retrieval ("EDGAR") system. The practitioner felt that her difficulties could also affect other small filers and hinder, rather than facilitate, capital formation. She also provided a summary of her difficulties with the EDGAR filing process and suggestions for improvement. By creating a genuine forum for discussion, the Ombudsman resolved the practitioner's immediate request that her complaint and recommendations for improvement be considered by SEC staff. The Ombudsman continues to examine the specific complaints and recommendations in detail and, as appropriate, will work with agency staff to address the matter.

On a separate occasion, a retired financial industry professional contacted the Ombudsman to discuss concerns about corporate bond transaction practices adversely affecting certain retail investors. It became apparent that he identified the concerns based on his significant industry experience and familiarity with corporate bond transactions. At the encouragement of the Ombudsman, the retired

professional offered a detailed written analysis of his concerns for the Ombudsman's review, which the Ombudsman shared with staff in the Office of the Investor Advocate for reference. The Ombudsman is reviewing the analysis with the support of other SEC staff and, if appropriate, will make a formal recommendation to the Investor Advocate for his consideration. In this way, the Ombudsman's standard of service, individual attention, and responsiveness support the mandate to review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws.

### **OUTLOOK**

Based on the continued flow of inquiries and complaints, the Ombudsman will consider appropriate recommendations to address concerns raised by retail investors relating to SROs, and in particular, the mandatory pre-dispute arbitration process. Likewise, the Ombudsman will engage with other SEC divisions and offices to gain greater familiarity with their inquiry and complaint procedures and, if appropriate, may offer recommendations for improvements to better serve retail investors. Finally, the Ombudsman looks to the coming year as an opportunity to establish deeper relationships with staff across the agency to facilitate dialogue and further develop an ongoing forum for recommendations benefitting retail investors.

Tracey L. McNeil



Ombudsman



# SUMMARY OF INVESTOR ADVISORY COMMITTEE RECOMMENDATIONS AND SEC RESPONSES

Congress established the Investor Advisory Committee (“IAC”) to advise and consult with the Commission on regulatory priorities, initiatives to protect investor interests, initiatives to promote investor confidence and the integrity of the securities marketplace, and other issues.<sup>201</sup> The Committee is composed of the Investor Advocate, a representative of state securities commissions, a representative of the interests of senior citizens, and not fewer than 10 or more than 20 members appointed by the Commission to represent the interests of various types of individual and institutional investors.<sup>202</sup>

Exchange Act Section 39 authorizes the Committee to submit findings and recommendations for review and consideration by the Commission.<sup>203</sup> The statute also requires the SEC “promptly” to issue a public statement assessing each finding or recommendation of the Committee and disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.<sup>204</sup> While the Commission must respond to the IAC’s recommendations, it is under no obligation to agree with or act upon the recommendations.<sup>205</sup>

In its reports to Congress, including this one, the Office of the Investor Advocate summarizes the IAC recommendations and the SEC’s responses to them.<sup>206</sup> This Report covers all recommendations the IAC has made since its inception because either there are continuing developments with respect to each recommendation or the response of the Commission is pending.<sup>207</sup> SEC responses to IAC recommendations may take various forms. If an IAC recommendation pertains to a current

rulemaking, the Commission’s proposing release or the adopting release may constitute the Commission’s response. If an IAC recommendation involves no current rulemaking, Chair White has indicated that the Commission will respond with a written statement.<sup>208</sup>

The Commission may be pursuing initiatives that are responsive to IAC recommendations but have not yet been made public. Commission staff—including staff of the Office of the Investor Advocate—is prohibited from disclosing nonpublic information.<sup>209</sup> Therefore, any such initiatives are not reflected in this Report.

## **Empowering Elders and Other Investors: Background Checks in the Financial Markets**

This recommendation, adopted on July 16, 2015, asks the SEC to:

- Develop a disciplinary database for violations of the securities laws that will allow elders and other investors to conduct searches of any person or firm sanctioned for these violations easily;
- Begin to reduce the complexity of background searches by taking steps to simplify the search process, including steps to ensure comparable quality between BrokerCheck and the Investor Advisor Public Disclosure (“IAPD”) system and the development of an appropriately named site that will permit a single search through which elders and other investors can access information in all databases supervised by the SEC in whole or in part; and

- Seek to obtain the agreement from other federal regulators, self-regulatory organizations, and state regulators for the development of a single site that will permit a search of all relevant databases that provide background information on financial market professionals.

Within the Reporting Period, the Commission had not yet responded to this recommendation.

### **Shortening the Trade Settlement Cycle in U.S. Financial Markets**

This recommendation, adopted on February 12, 2015, calls for shortening the security settlement period in the U.S. financial markets from a three-day settlement cycle (referred to as “T+3”) to a one-day settlement cycle (“T+1”) for “at least” transactions in U.S. equities, corporate and municipal bonds, and unit investment trusts.<sup>210</sup>

The IAC acknowledged a proposal of the Depository Trust & Clearing Corporation (“DTCC”) to shorten the settlement cycle to a two-day period (“T+2”), but favored a move to T+1 in the near term. To the extent that T+2 was pursued nevertheless, the IAC recommended that the Commission work with industry participants to create a clear plan for moving to T+1 in an expedited fashion rather than pausing at T+2 for an indeterminate period of time.

COMMISSION RESPONSE. In a letter to two industry association leaders on September 16, 2015, Chair White expressed her strong support for efforts to shorten the settlement cycle from T+3 to T+2.<sup>211</sup> She urged the Industry Steering Committee (“ISC”) “to continue to pursue the necessary steps towards achieving this important goal as promptly as possible.” As its name suggests, the ISC is a committee composed of members from across the securities industry. Under a plan outlined in an ISC White Paper, the settlement cycle would be shortened by no later than the third quarter of 2017.<sup>212</sup>

According to the Chair’s letter, the most significant regulatory changes needed to move to T+2 would be amendments to the various rules of the SROs that specifically mandate a three-day settlement cycle or that are keyed to the settlement date and require pre-settlement actions. Therefore, the Chair has directed the Commission staff to work closely with the SROs to develop detailed schedules to consider the necessary SRO rule amendments. According to her letter, she requested that the SROs finalize these schedules by October 31, 2015. In addition, she has instructed the Commission staff to develop a proposal to amend Exchange Act Rule 15c6-1(a) to require settlement no later than T+2. She cautioned that the initiative should not be seen as a precondition for nor an impediment to the execution of the plan described in the White Paper, nor to any future efforts to shorten the settlement cycle even further.

SEC Commissioners Michael S. Piwowar and Kara M. Stein issued a joint statement on June 29, 2015,<sup>213</sup> expressing their willingness to work with fellow Commissioners and staff, as well as partnering with market participants, to shorten the settlement cycle as soon as possible. Their statement referred specifically to the IAC recommendation.

### **Impartiality in the Disclosure of Preliminary Voting Results**

Exchange Act Rule 14a-2(a)(1) provides an exemption from the proxy rules for brokers that forward proxy materials to shareholders who own shares in “street name.”<sup>214</sup> On October 9, 2014, the IAC adopted a recommendation that the staff of the Commission take the steps necessary to ensure that the exemption is conditioned upon the broker (and any intermediary designated by the broker) acting in an impartial and ministerial fashion throughout the proxy process, and that any broker who uses an intermediary take reasonable steps to verify that the intermediary will act in an impartial manner and is not subject to impermissible conflicts of interest. In adopting these recom-

mendations, the IAC noted several concerns about current industry practices, including the disclosure of preliminary voting results to issuers while the results are withheld from exempt solicitors, as well as possible conflicts of interest between the issuer and the broker's designated intermediary.

COMMISSION RESPONSE. Chair White focused on this issue in a speech to a national conference of the Society of Corporate Secretaries and Governance Professionals in June 2015, in which she specifically referred to the concerns of the IAC.<sup>215</sup> Chair White said that staff in the Division of Corporation Finance, after reviewing the various rules that govern proxy solicitations, has acknowledged that the current rules do not address directly whether a broker (or its agent) is required or permitted to share such preliminary vote tallies with other parties. The Chair observed that, if the Commission were to advance a rulemaking in this area, it could take several forms, and she described two of those forms. However, the Chair also urged companies to engage constructively with shareholders to resolve the issue on their own. "In this context," she told her audience, "since companies have direct access to the voting results, they should themselves consider leveling the field by agreeing or consenting to a mechanism that provides the interim vote tallies to shareholder proponents."

### **The Accredited Investor Definition**

On October 9, 2014, the IAC adopted a set of recommendations related to the Commission's review of the accredited investor definition as required by the Dodd-Frank Act.<sup>216</sup> The IAC first recommended that the Commission seek to determine whether the current definition achieves the goal of identifying a class of individuals who do not need the protections afforded by the Securities Act of 1933 because they are sufficiently able to protect their own interests. If, as the IAC expects, the analysis reveals a failure to meet that goal, then the Committee recommended prompt rulemaking to revise the definition.

The IAC also recommended that the Commission revise the definition to enable individuals to qualify as accredited investors based on their financial sophistication. However, should the Commission choose to continue with an approach that relies exclusively or mainly on financial thresholds, the Committee recommended the consideration of alternative approaches to setting those thresholds, such as limiting investments in private offerings to a percentage of assets or income.

In addition to any changes to the accredited investor standard, the IAC recommended that the Commission take concrete steps to encourage development of an alternative means of verifying accredited investor status that shifts the burden away from issuers. The IAC also recommended that the Commission strengthen the protections that apply when non-accredited individuals, who do not otherwise meet the sophistication test for such investors, qualify to invest solely by virtue of relying on advice from a purchaser representative.

COMMISSION RESPONSE. At the IAC meeting on April 9, 2015, Chair White stated that the staff was working to complete its internal review of the definition of accredited investor.<sup>217</sup> The report was pending as of the end of this Reporting Period.

### **Crowdfunding**

At its meeting on April 10, 2014, the IAC adopted a package of six recommendations for the SEC to strengthen its proposed rules to implement the crowdfunding provisions of the JOBS Act.<sup>218</sup> The Committee stated that its recommendations would better ensure that investors understand the risks of crowdfunding and avoid unaffordable financial losses. Among other things, the Committee recommended that the SEC:

- Adopt tighter limits on the amount of money that investors could invest in crowdfunding;
- Strengthen the mechanisms for the enforcement of the investment limits to better prevent errors and evasion;

- Clarify and strengthen the obligations of crowdfunding intermediaries to ensure that issuers comply with their legal obligations; clarify the requirements for background checks; clearly affirm the right of portals to “curate” offerings; and consider a tiered regulatory structure based upon factors such as the size of offering, investment limits, and participation by individuals with a record of securities law violations;
- Enhance the effectiveness of educational materials for investors;
- Replace the proposed definition of electronic delivery with a stronger definition that, at a minimum, requires disclosure of a specific URL where required disclosures can be found; and
- Replace the proposal to eliminate application of the integration doctrine with a narrower approach.

COMMISSION RESPONSE. On October 30, 2015, after this reporting period ended, the Commission adopted final rules to permit companies to offer and sell securities through crowdfunding.<sup>219</sup> Our next report to Congress will provide details on the final rules and how they relate to the IAC recommendations.

### Decimalization and Tick Sizes

On January 31, 2014, the IAC adopted a resolution opposing any test or pilot programs to increase the minimum quoting and trading increments (“tick sizes”) in the securities markets.<sup>220</sup> The resolution argued that larger tick sizes would disproportionately harm retail investors by raising prices without achieving the goals of improved research coverage or liquidity of small-cap companies.

If, however, the SEC were to decide to pursue a pilot program of increasing tick sizes, the IAC made three more recommendations: to limit the pilot program’s duration, with a short “sunset” on the pilot unless benefits prove to outweigh the costs; to conduct a careful evaluation of costs and

benefits to investors, with a particular focus on retail investors; and to pilot other competition-based measures designed to encourage trading and capital formation.

COMMISSION RESPONSE. On June 24, 2014, the Commission directed the national securities exchanges and FINRA (collectively, “SROs”) to submit a plan for a pilot program to test a tick size of five cents per share in three groups of securities. Within the Order to the SROs, the Commission specifically discussed the IAC recommendations.<sup>221</sup>

On May 6, 2015, the Commission approved the SROs’ proposal, with modifications, for a pilot program to widen tick sizes for stocks of some smaller companies.<sup>222</sup> Among other modifications, the Commission increased the duration of the pilot program (from one year to two years) while reducing the size of companies in it (lowering the market capitalization threshold from \$5 billion to \$3 billion). Implementation is scheduled to begin on October 3, 2016. To establish a baseline, data will be collected starting six months prior to the Pilot Period.

In the footnotes to the SEC release dated May 6, 2015, several references are made to the IAC recommendations. In particular, footnote 269 states the IAC’s “concern that a pilot would disproportionately harm retail investors because their trading costs would rise.” It goes on to note, “[t]he Commission has carefully considered the IAC Recommendations from January 2014. After careful deliberation and considering the IAC Recommendations, the Commission is approving the NMS plan, as modified.”

### Legislation to Fund Investment Adviser Examinations

On November 22, 2013, the IAC recommended that the SEC request legislation from Congress that would authorize the Commission to impose user fees on SEC-registered investment advisers to provide a scalable source of funding for more

The IAC asserted that the examination cycle for SEC-registered investment advisers, was “simply inadequate to detect or credibly deter fraud.”

COMMISSION RESPONSE. While refraining from taking a position on user fees, the Commission’s FY 2015 budget request made it a top priority to increase examinations of investment advisers. The Commission’s request called for an increase of 316 new positions to the examination program in the SEC’s Office of Compliance Inspections and Examinations (OCIE).<sup>224</sup> Congress appropriated \$1.5 billion for the SEC in FY 2015, which was less than the SEC’s request of \$1.722 billion but 11 percent more than the previous year’s overall budget. With the increased funding, the Commission has used a portion to increase its examination staff by 91 full-time equivalents or FTEs. In addition, the SEC budget request for FY 2016 calls for funding to hire an additional 225 OCIE examiners, primarily to conduct additional examinations of investment advisers.<sup>225</sup>

In a related development, Chair White has asked staff to develop recommendations for a program of third-party compliance reviews for investment advisers. The reviews would supplement, but not replace, the examinations conducted by OCIE staff.<sup>226</sup>

### **Broker-Dealer Fiduciary Duty**

On November 22, 2013, the IAC adopted a set of recommendations encouraging the SEC to establish a fiduciary duty for broker-dealers when they provide personalized investment advice to retail investors.<sup>227</sup> The Committee preferred to accomplish this objective by narrowing the exclusion for broker-dealers within the definition of an “investment adviser” under the Investment Advisers Act of 1940. As an alternative, the Committee recommended the adoption of a rule under Section 913 of the Dodd-Frank Act to require broker-dealers to act in the best interests of their retail customers when providing personalized investment advice, with sufficient

flexibility to permit certain sale-related conflicts of interest that are fully disclosed and appropriately managed. In addition, the Committee recommended the adoption of a uniform, plain English disclosure document to be provided to customers and potential customers of broker-dealers and investment advisers. The document would disclose information about the nature of services offered, fees and compensation, conflicts of interest, and the disciplinary record of the broker-dealer or investment adviser.

COMMISSION RESPONSE. In March 2015, Chair White announced her belief that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct when providing personalized securities advice to retail investors. In Congressional testimony, she said that she would soon begin discussing the issue with fellow Commissioners, and that she had asked Commission staff to develop rulemaking recommendations for Commission consideration.<sup>228</sup>

The following month, she told the IAC:

As most of you know from the remarks I made last month on my own behalf, I expect we will be discussing advancing rulemakings to impose a uniform fiduciary duty on broker-dealers and investment advisers under Section 913 of the Dodd-Frank Act and to require a program of third party examinations of investment advisers to increase our exam coverage.

Further Commission action is pending.

### **Universal Proxy Ballots**

On July 25, 2013, the IAC adopted a recommendation urging the SEC to explore the relaxation of the “bona fide nominee rule” (Rule 14a-4(d)(1)) to provide proxy contestants with the option, but not the obligation, to use Universal Ballots in connection with short slate director nominations.<sup>229</sup> The IAC also encouraged the Commission to hold one or more roundtable discussions on the topic.

COMMISSION RESPONSE. In a speech in June 2015, Chair White stated that she had asked Commission staff to bring appropriate rulemaking recommendations before the Commission on universal proxy ballots.<sup>230</sup> In the same speech, she appealed to corporations to “[g]ive meaningful consideration to using some form of a universal proxy ballot even though the proxy rules currently do not require it.” Previously, on February 19, 2015, the Commission hosted a Proxy Voting Roundtable to explore issues related to proxy voting, including the use of a universal ballot.<sup>231</sup>

### Data Tagging

At its meeting on July 25, 2013, the IAC adopted a recommendation for the SEC to promote the collection, standardization, and retrieval of data filed with the SEC using machine-readable data tagging formats.<sup>232</sup> The Committee urged the SEC to take steps to reduce the costs of providing tagged data, particularly for smaller issuers and investors, by developing applications that allow users to enter information on forms that can be converted to machine-readable formats by the SEC. In addition, the IAC recommended that the SEC give priority to the data tagging of disclosures on corporate governance, including information about executive compensation and shareholder voting.

COMMISSION RESPONSE. Since the IAC recommendation was adopted, the Commission has incorporated the collection of structured data into several final and proposed rules:

*Liquidity Risk of Mutual Funds.* On September 22, 2015, the Commission proposed a new rule and amendments to promote effective liquidity risk management throughout the open-end fund industry.<sup>233</sup> The proposed approach would provide the framework for detailed reporting and disclosure about the liquidity of funds’ portfolio assets in a structured data format on proposed Form N-PORT. The proposing release described these advantages of such disclosure:

“[T]he structured data format would increase the ability of Commission staff, investors, and other potential users to aggregate and analyze the data in a much less labor-intensive manner. This data, in turn, would assist Commission staff in monitoring risks and trends with respect to funds’ portfolio liquidity (for example, observing whether portfolio liquidity increases or decreases in response to market events), and would also permit investors to better evaluate the liquidity profile of funds’ portfolios and better assess the potential for returns and risks of a particular fund.”<sup>234</sup>

*Registration of Security-Based Swap Dealers.* On August 5, 2015, the Commission adopted new rules to provide a comprehensive process for security-based swap dealers and major security-based swap participants to register with the SEC.<sup>235</sup> The rules will require applications and any additional documents to be filed electronically with the Commission through the Commission’s EDGAR system. The registration and other forms are being developed with a graphical user interface that will allow users to complete a fillable form on the EDGAR website. This data will be collected in a structured format, obviating the need for the Commission to require SBS Entities to submit the information in a “tagged” format.

*Clawbacks.* On July 1, 2015, the Commission proposed rules directing national securities exchanges and associations to establish listing standards requiring companies to adopt policies that require executive officers to pay back incentive-based compensation that they were awarded erroneously.<sup>236</sup> The proposal would require listed issuers to disclose how they have applied their recovery policies in an interactive data format using XBRL with block-text tagging.<sup>237</sup> The interactive data would have to be provided as an exhibit to the definitive proxy or information statement filed with the Commission and as an exhibit to the annual report on Form 10-K. Issuers



would be required to prepare their interactive data using the list of tags the Commission specifies.<sup>238</sup>

The Commission affirmed its belief that tagged data “would lower the cost to investors of collecting this information, and would permit data to be analyzed more quickly by shareholders, exchanges and other end-users than if the data was provided in a non-machine readable format.”<sup>239</sup>

Furthermore, the Commission observed that the interactive data format in XBRL “may facilitate the extraction and analysis of the information contained in the disclosure across a large number of issuers or, eventually, over several years.”<sup>240</sup>

*Earlier rulemakings.* As detailed in our Report on Activities filed on June 30, 2015, the Commission has incorporated structured data requirements in previous rulemakings, including proposals related to investment company reporting modernization,<sup>241</sup> executive pay versus performance,<sup>242</sup> Regulation A,<sup>243</sup> asset-backed securities disclosure and registration,<sup>244</sup> and money market funds.<sup>245</sup>

### Target Date Mutual Funds

On April 11, 2013, the IAC adopted recommendations for the Commission to revise its proposed rule regarding target date retirement fund names and marketing.<sup>246</sup> The package of five IAC recommendations pertained to a 2010 SEC proposal that would, among other things, require marketing materials for target date retirement funds to include a table, chart, or graph depicting the fund’s asset allocation over time (i.e., an “asset allocation glide path”).<sup>247</sup>

As either a replacement for or supplement to the SEC’s proposed asset allocation glide path illustration, the IAC recommended that the Commission develop a glide path illustration that would be based on a measure of fund risk. To promote comparability between funds, the

IAC recommended the adoption of standard methodologies to be used in glide path illustrations. In addition, the IAC urged the Commission to require clearer disclosure about the risk of loss, the cumulative impact of fees, and the assumptions used to design and manage the funds.

COMMISSION RESPONSE. On April 3, 2014, the Commission reopened the comment period on the proposed rule to seek public comment on the IAC’s recommendations to adopt a risk-based glide path illustration and the methodology to be used for measuring risk.<sup>248</sup> The comment period closed on June 9, 2014, and a final rule has not yet been adopted.

### General Solicitation and Advertising

On October 12, 2012, the IAC adopted a set of seven recommendations concerning rulemaking to lift the ban on general solicitation and advertising in offerings conducted under Rule 506.<sup>249</sup> The IAC asserted that the recommendations would strengthen investor protections and enhance regulators’ ability to police the private placement market.

COMMISSION RESPONSE. On July 10, 2013, the Commission adopted final rules permitting general solicitation and advertising in Rule 506 offerings<sup>250</sup> and disqualifying offerings involving felons and other bad actors.<sup>251</sup> In addition, the Commission proposed a rule to enhance the Commission’s ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise because the ban on general solicitation was lifted.<sup>252</sup> The majority of the IAC recommendations relate to the proposed rule, which has not yet been adopted. The Commission placed the rulemaking on its Regulatory Flexibility Agenda—Spring 2015,<sup>253</sup> indicating that the Commission expects to consider a final rule by the end of the first quarter of 2016.

## ENDNOTES

- 1 Exchange Act § 4(g)(2)(A)(ii), 15 U.S.C. § 78d(g)(2)(A)(ii) (2012).
- 2 Exchange Act § 4(g)(6), 15 U.S.C. § 78d(g)(6).
- 3 Exchange Act § 4(g)(6)(A)(i), 15 U.S.C. § 78d(g)(6)(A)(i).
- 4 See SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2015* (June 30, 2014), <http://www.sec.gov/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2015.pdf>.
- 5 Exchange Act § 4(g)(6)(B)(i), 15 U.S.C. § 78d(g)(6)(B)(i).
- 6 *Id.* Exchange Act Section 4(g)(6)(B) requires the Report on Activities to include an “inventory” of the most serious problems encountered by investors during the Reporting Period. The inventory must identify any action taken by the Commission or an SRO to resolve each problem, the length of time that each item has remained on our inventory and, for items on which no action has been taken, the reasons for inaction and an identification of any official who is responsible for such action. We do not set forth a separate inventory of pre-existing items.
- 7 Report on Objectives, Fiscal Year 2015, *supra* note 4.
- 8 See Regulation Systems Compliance and Integrity, Exchange Act Release No. 34-73639 (Nov. 19, 2014) [79 FR 72252 (Dec. 5, 2014)] [hereinafter “Reg SCI”].
- 9 See FINRA, Regulatory Notice 15-09, Guidance on Effective Supervision and Control Practices for Firms Engaging in Algorithmic Trading Strategies (Mar. 2015), <http://www.finra.org/industry/notices/15-09>. The guidance focused on five general areas: General Risk Assessment and Response; Software/Code Development and Implementation; Software Testing and System Validation; Trading Systems; and Compliance.
- 10 See Bradley Hope & Dan Strumpf, *NYSE, Nasdaq, Planning Pact to Back Up Each Other’s Closing Auctions*, WALL ST. J. (July 22, 2015), <http://www.wsj.com/articles/nyse-nasdaq-planning-pact-to-back-up-each-others-closing-auctions-1437603718>.
- 11 Regulation NMS: Final Rules and Amendments to Joint Industry Plans, Exchange Act Release No. 34-51808 (June 9, 2005) [70 FR 37496 (June 29, 2005)] [hereinafter “Regulation NMS”].
- 12 See SEC, Press Release, SEC Announces Members of New Equity Market Structure Advisory Committee, 2015-5 (Jan. 13, 2015), <http://www.sec.gov/news/pressrelease/2015-5.html>.
- 13 See Mary Jo White, Chair, SEC, Speech at Sandler O’Neill & Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370542004312>; Concept Release on Equity Market Structure, Exchange Act Release No. 34-61358 (Jan. 14, 2010) [75 FR 3594, 3596 (Jan. 21, 2010)].
- 14 See SEC, Equity Market Structure Advisory Committee Meeting (May 13, 2015), <https://www.sec.gov/news/otherwebcasts/2015/equity-market-structure-advisory-committee-051315.shtml> (last visited Nov. 12, 2015).
- 15 See Bradley Hope & Scott Patterson, *NYSE Plan Would Revamp Trading*, WALL ST. J. (Dec. 17, 2014), <http://www.wsj.com/articles/intercontinental-exchange-proposing-major-stock-market-overhaul-1418844900>. (Intercontinental Exchange Inc. controls the NYSE, NYSE Arca and NYSE MKT exchanges).
- 16 See Letter from Joe Ratterman, CEO, BATS Global Markets, Inc. to Brent Fields, Sec’y, SEC, File No. 4-680 (Jan. 21, 2015), <https://www.sec.gov/rules/petitions/2015/petn4-680.pdf>. (BATS Global Markets controls the BATS, BATS Y, EDGA and EDGX exchanges).
- 17 See generally NasdaqTrader, *Nasdaq Equity Trader Alert #2015-18, Amended Liquidity Codes for Select Symbols* (Feb. 5, 2015), <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2015-18>.
- 18 Regulation of Exchanges and Alternative Trading System: Final Rule, Exchange Act Release No. 34-40760 (Dec. 8, 1998) [63 FR 70844 (Dec. 22, 1998)].
- 19 See White Speech, *supra* note 13.
- 20 See FINRA, Regulatory Notice 14-48, FINRA Requests Comment on a Proposal to Publish OTC Equity Volume Executed Outside Alternative Trading Systems (Nov. 2014), <http://www.finra.org/industry/notices/14-48>.
- 21 See Order Approving a Proposed Rule Change, as Amended by Amendment No. 1, To Expand FINRA’s Alternative Trading System Transparency Initiative by Publishing OTC Equity Volume Executed Outside ATSS, Exchange Act Release No. 34-76078 (Oct. 5, 2015) [80 FR 61246 (Oct. 9, 2015)].
- 22 See Exchange Act § 4(g)(4), 15 U.S.C. § 78d(g)(4).
- 23 See Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Adopt New Rule 8.17 To Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 To Prohibit Layering and Spoofing on BATS Exchange, Inc., Exchange Act Release No. 34-75693 (Aug. 13, 2015) [80 FR 50370 (Aug. 19, 2015)]; see also Letter from Anders Franzon, VP, Assoc. Gen. Counsel, BATS Global Markets, Inc. to Brent Fields, Sec’y, SEC, File No. SR-BATS-2015-57 (Nov. 6, 2015), <http://www.sec.gov/comments/sr-bats-2015-57/bats201557-6.pdf> (stating BATS’ intention to amend in response to public comment and refile as File No. SR-BATS-2015-101).
- 24 See Notice of Filing of Proposed Rule Change To Implement CHX SNAP, an Intra-Day and On-Demand Auction Service, Exchange Act Release No. 34-75346 (July 1, 2015) [80 FR 39172 (July 8, 2015)].

- 25 See Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt and Implement CHX SNAP, an Intra-day and On-Demand Auction Service, Exchange Act Release No. 34-76087 (Oct. 6, 2015) [80 FR 61540 (Oct. 13, 2015)].
- 26 See Notice of Filing of Application, as Amended, for Registration as a National Securities Exchange under Section 6 of the Securities Exchange Act of 1934, Exchange Act Release No. 34-75925 (Sept. 15, 2015) [80 FR 57261 (Sept. 22, 2015)]; see also SEC, IEX Form 1 Application, Exhibit E, <http://www.sec.gov/rules/other/2015/investors-exchange-form-1-exhibits-a-e.pdf#page=571> (last visited Nov. 12, 2015).
- 27 See Order Approving the National Market System Plan to Implement a Tick Size Pilot Program, Exchange Act Release No. 34-74892 (May 6, 2015) [80 FR 27514 (May 13, 2015)]; see also Order Granting Exemption From Compliance With the National Market System Plan To Implement a Tick Size Pilot Program, Securities Exchange Act Release No. 76382 (Nov. 6, 2015) [80 FR 70284 (Nov. 13, 2015)].
- 28 See, e.g., Letter from Managed Funds Association, Equity Market Structure Policy Recommendations (Sept. 30, 2014), <https://www.managedfunds.org/wp-content/uploads/2014/09/MFA-Equity-Mkt-Structure-Recommendations-final-9-30-14.pdf>.
- 29 See BLACKROCK VIEWPOINT, U.S. Equity Market Structure: An Investor Perspective (Apr. 2014), <https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf> (last visited Nov. 12, 2015).
- 30 See, e.g., Letter from ICI, MFA and SIFMA to Mary Jo White, Chair, SEC, Customer-Specific Order Routing Disclosures for Institutional Investors (Oct. 23, 2014), <https://www.managedfunds.org/wp-content/uploads/2014/10/Cover-Letter-for-Execution-Venue-Template1.pdf>; see also Standardized Disclosure Template, [http://www.sifma.org/uploadedfiles/correspondence/comment\\_letters/2014/standardized%20broker%20routing%20venue%20analysis.pdf](http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2014/standardized%20broker%20routing%20venue%20analysis.pdf) (last visited Nov. 12, 2015).
- 31 See Rick A. Fleming, Investor Advocate, SEC, Recommendation of the Investor Advocate, File No. SR-NYSE-2015-02 (Oct. 16, 2015), <http://www.sec.gov/about/offices/investorad/comment-letter-sec-investor-advocate-101615.pdf>; see also Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change Amending Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual to Exempt Early Stage Companies from having to Obtain Shareholder Approval Before Issuing Shares for Cash to Related Parties, Affiliates of Related Parties or Entities in which a Related Party has a Substantial Interest, Exchange Act Release No. 34-75599 (Aug. 4, 2015) [80 FR 47978 (Aug. 10, 2015)].
- 32 See Michael S. Piwowar, Comm’r, SEC, Remarks at the SEC Equity Market Structure Advisory Committee Meeting (Oct. 27, 2014), <http://www.sec.gov/news/statement/remarks-emsac-102715-piwowar.html> (“Although the Commission may have good intentions with respect to an equity market structure review, we have been slow out of the starting blocks.”); see also Stephanie Russell-Kraft, *SEC’s Gallagher Rues Slow Market Structure Reform*, LAW 360 (June 3, 2015), <http://www.law360.com/articles/663528/sec-s-gallagher-rues-slow-market-structure-reform> (“Each one of those issues will be a shiny object to the SEC that it will chase down some hole for two years, and that’s sort of the inclination of the place. To beat one issue to the ground, maybe address it, maybe do a rule change.”).
- 33 See, e.g., 5 C.F.R. § 2635.703 (2014). Commission staff, including the Investor Advocate, are prohibited from disclosing non-public information, including information about internal agency deliberations that have not been made public. See also *infra* note 209. On November 18, 2015, outside of the Reporting Period, the Commission proposed amending Regulation ATS to enhance the operational transparency of those venues that trade listed equity securities. See Regulation of NMS Stock Alternative Trading Systems, Securities Act Release No. 76474 (Nov. 18, 2015) (File No. S7-23-15). The Office will monitor the public comment process and evaluate the proposal’s potential impact on investors.
- 34 See, e.g., SEC, Press Release, SEC Charges Direct Edge Exchanges With Failing to Properly Describe Order Types, 2015-2 (Jan. 12, 2015), <http://www.sec.gov/news/pressrelease/2015-2.html> (settled without admission). See, e.g., SEC, Press Release, SEC Charges UBS Subsidiary With Disclosure Violations and Other Regulatory Failures in Operating Dark Pool, 2015-7 (Jan. 15, 2015), <http://www.sec.gov/news/pressrelease/2015-7.html> (settled without admission).
- 35 See SEC, Press Release, SEC Charges ITG with Operating Secret Trading Desk and Misusing Dark Pool Subscriber Trading Information, 2015-164 (Aug. 12, 2015), <http://www.sec.gov/news/pressrelease/2015-164.html> (settled with admission).
- 36 See, e.g., SEC, Press Release, SEC Penalizes Morgan Stanley for Violating Market Access Rule, 2014-274 (Dec. 10, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543668817> (penalized without admission); see, e.g., SEC, Press Release, SEC Charges Goldman Sachs with Violating Market Access Rule, 2015-133 (June 30, 2015), <http://www.sec.gov/news/pressrelease/2015-133.html> (settled without admission); see, e.g., SEC, Press Release, OZ Management LP Admits Providing Inaccurate Data, Impacting Brokers’ Records and “Blue Sheets”, 2015-145 (July 14, 2015), <http://www.sec.gov/news/pressrelease/2015-145.html> (settled with admission).

- 37 See SEC, Press Release, Credit Suisse to Pay \$4.25 Million and Admits to Providing Deficient “Blue Sheet” Trading Data, 2015-214 (Sept. 28, 2015), <http://www.sec.gov/news/pressrelease/2015-214.html> (settled with admission).
- 38 See, e.g., SEC, Litig. Release, SEC v. Donald L. Koch and Koch Asset Management, LLC, No. 23308 (D.C. Cir. July 20, 2015), <http://www.sec.gov/litigation/litreleases/2015/lr23308.htm> (*aff’d* SEC order); see, e.g., SEC, Litig. Release, SEC v. Gary S. Williky, No. 23211 (Mar. 2, 2015), <https://www.sec.gov/litigation/litreleases/2015/lr23211.htm> (charges filed).
- 39 See SEC, Press Release, SEC Charges New York-Based High Frequency Trading Firm With Fraudulent Trading to Manipulate Closing Prices, 2014-229 (Oct. 16, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184457> (settled without admission).
- 40 See SEC, Press Release, SEC Charges Canadian Man With Conducting Fraudulent Trading Scheme, 2015-4 (Jan. 13, 2015), <http://www.sec.gov/news/pressrelease/2015-4.html> (charges filed).
- 41 See generally, Luigi Guiso & Paolo Sodini, *Household Finance: An Emerging Field*, in 2 HANDBOOK OF THE ECONOMICS OF FINANCE 1397 (Elsevier B.V. ed., 2013), [http://www.eief.it/files/2014/01/guiso\\_sodini-household-finance-an-emerging-field.pdf](http://www.eief.it/files/2014/01/guiso_sodini-household-finance-an-emerging-field.pdf). Includes an excellent survey of the state of literature on household stockholding behavior and other issues of household finance.
- 42 See Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: Regulatory Notice 2014-16, Request for Comment Regarding MSRB Strategic Priorities*, at 2 (Oct. 31, 2014), [http://www.msrb.org/RFC/2014-16/Rick\\_Fleming.pdf](http://www.msrb.org/RFC/2014-16/Rick_Fleming.pdf).
- 43 Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Regulatory Notice 2014-20, Request for Comment on Draft Rule Amendments to Require Dealers to Provide Pricing Reference Information on Retail Customer Confirmations* (Jan. 20, 2015), <http://www.msrb.org/RFC/2014-20/USSEC.pdf>; Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: FINRA Regulatory Notice 14-52, Request for Comment on Pricing Disclosure in the Fixed Income Markets* (Jan. 20, 2015), [http://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/SEC.pdf](http://www.finra.org/sites/default/files/notice_comment_file_ref/SEC.pdf).
- 44 *Id.*
- 45 MSRB, Regulatory Notice 2015-15, Request for Comment on Draft Rule Amendments to Require Confirmation Disclosure of Mark-ups for Specified Principal Transactions with Retail Customers (Sept. 24, 2015), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2015-16.ashx>. In essence, the MSRB’s proposed changes “would require dealers acting as principal to disclose to retail customers their mark-up from the prevailing market price of a municipal security if the dealer makes a corresponding trade within two hours of the customer trade. To assist investors in learning more about the market for their traded security, the draft amendments also would require all retail customer confirmations to include a link to the main page for the security on the MSRB’s Electronic Municipal Market Access (EMMA) website.” MSRB, Press Release, MSRB Requests Comment on Requiring Disclosure of Mark-Ups (Sept. 24, 2015), <http://www.msrb.org/News-and-Events/Press-Releases/2015/MSRB-Requests-Comment-on-Requiring-Disclosure-of-Mark-Ups.aspx>; FINRA, Regulatory Notice 15-36, Pricing Disclosure in the Fixed Income Markets, FINRA Requests Comment on a Revised Proposal Requiring Confirmation Disclosure of Pricing Information in Corporate and Agency Debt Securities Transactions (Oct. 12, 2015), [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-15-36.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-36.pdf). In essence, FINRA’s revised proposal would require member firms to disclose additional information on customer confirmations for transactions in corporate and agency debt securities. *Id.* The revised proposal changed the proposal in Regulatory Notice 14-52 by “replacing the size-based disclosure threshold with a retail customer standard, permitting firms to use alternate methodologies for calculating the reference price for more complex trade scenarios; requiring firms to add a link to TRACE on the confirmation; and proposing additional exceptions from the requirements.” *Id.*
- 46 Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Regulatory Notice 2015-08, Request for Comment on Draft Amendments and Other Issues Related to MSRB Rule A-3 on Membership on the Board*, at 2 (July 13, 2015), <http://www.msrb.org/RFC/2015-08/OIAD.pdf>.
- 47 *Id.*
- 48 MSRB, Press Release, MSRB to Create Investor Advisory Group (Sept. 17, 2015), <http://www.msrb.org/News-and-Events/Press-Releases/2015/MSRB-to-Creat-Inv-Adv-Grp.aspx>.
- 49 MSRB, Regulatory Notice 2015-18, Request for Comment on Draft Rule Amendments to MSRB Rule A-3 to Lengthen the Term of Board Member Service (Oct. 5, 2015), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2015-18.ashx?la=en>. Comments were due by Nov. 19, 2015. *Id.*
- 50 See Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Regulatory Notice 2015-18, Request for Comment on Draft Amendments to MSRB Rule A-3 to Lengthen the Term of Board Member Service* (Oct. 29, 2015), <http://www.msrb.org/RFC/2015-18/Fleming.pdf>.
- 51 Ponemon Institute, LLC, *2014: A Year of Mega Breaches*, at 1 (Jan. 2015), [http://www.ponemon.org/local/upload/file/2014%20The%20Year%20of%20the%20Mega%20Breach%20FINAL\\_3.pdf](http://www.ponemon.org/local/upload/file/2014%20The%20Year%20of%20the%20Mega%20Breach%20FINAL_3.pdf); Office

- of Personnel Management, News Release, OPM Announces Steps to Protect Federal Workers and Others from Cyber Threats (July 9, 2015), <https://www.opm.gov/news/releases/2015/07/opm-announces-steps-to-protect-federal-workers-and-others-from-cyber-threats/>.
- 52 Elizabeth Weiss, *JP Morgan Reveals Data Breach Affected 76 million Households*, USA TODAY, (Oct. 3, 2014), <http://www.usatoday.com/story/tech/2014/10/02/jp-morgan-security-breach/16590689/>.
- 53 Ponemon Institute, LLC, *2015 Cost of Data Breach Study: Global Analysis*, at 7 (May 2015), <http://nhlearningsolutions.com/Portals/0/Documents/2015-Cost-of-Data-Breach-Study.PDF>. The average total organizational cost of a data breach in 2013 was nearly \$5.5 million.
- 54 See SEC, *SEC Staff Report to Committees on Appropriations of the U.S. Senate and House of Representatives Public Company Disclosures under the Federal Securities Laws*, at 5 (2015) [hereinafter “SEC Staff Report”]; Rich Steeves, *Regulatory Priority: Former White House Counsel Michael Gottlieb Helps Untangle the Web of Cybersecurity Regulations*, INSIDE COUNSEL, (Oct. 1, 2015), <http://www.insidecounsel.com/2015/10/01/regulatory-priority>.
- 55 FINRA, Targeted Exam Letter, *Sweeps Letter-Cybersecurity* (Jan. 2014), <http://www.finra.org/industry/cybersecurity-targeted-exam-letter>.
- 56 SEC, *SEC Roundtable on Cybersecurity* (Mar. 26, 2014), <https://www.sec.gov/spotlight/cybersecurity-roundtable/cybersecurity-roundtable-transcript.txt>. SEC Chair Mary Jo White delivered the opening statement for the roundtable, highlighting the importance of partnerships between government and private sectors in cybersecurity education and prevention and Commissioner Aguilar stressed the importance of increasing dialogue on the subject of cybersecurity through the creation of a SEC cybersecurity task force. Mary Jo White, Chair, SEC, Opening Statement at SEC Roundtable on Cybersecurity (Mar. 26, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541286468>; Luis A. Aguilar, Comm’r, SEC, The Commission’s Role in Addressing the Growing Cyber-Threat at SEC Cybersecurity Roundtable (Mar. 26, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541287184>. The roundtable reviewed the cybersecurity landscape, and its impact on public company disclosure, market systems, broker-dealers, investment advisers, and transfer agents. See *id.*
- 57 SEC, Nat’l Exam Program Risk Alert, *OCIE Cybersecurity Initiative*, at 1 (Apr. 15, 2014), <http://www.sec.gov/ocie/announcement/Cybersecurity-Risk-Alert--Appendix---4.15.14.pdf>. OCIE staff published this announcement along with “a sample request for information and documents used in the examination initiative.” *Id.* at 2.
- 58 See *id.* at 1; Targeted Exam Letter, *supra* note 55 (detailing the goals of the sweeps and the assessment criteria for FINRA member firms).
- 59 FINRA, *Report on Cybersecurity Practices*, at 1 (Feb. 2015), [http://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices\\_0.pdf](http://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf). The report includes critical considerations for firms related to cybersecurity, such as governance framework, risk assessment, technical controls, incident response planning, vendor management, staff training, intelligence, information sharing, and cyber insurance.
- 60 SEC, Nat’l Exam Program Risk Alert, *Cybersecurity Examination Sweep Summary*, at 2–3 (Feb. 3, 2015), <http://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf>. FINRA’s review period for broker-dealers covered calendar year 2013; adviser examinations, which began a few months after the broker-dealer examinations, reviewed firm practices in 2013 through Apr. 2014. In addition, OCIE determined that 93 percent of broker-dealers and 83 percent of investment advisers have adopted written information security policies. *Id.* at n.3.
- 61 See FINRA, Investor Alerts, *Cybersecurity and Your Brokerage Firm* (Feb. 3, 2015), <https://www.finra.org/investors/alerts/cybersecurity-and-your-brokerage-firm>; SEC, Investor Bulletin, *Protecting Your Online Brokerage Accounts from Fraud* (Feb. 3, 2015), <http://investor.gov/news-alerts/investor-bulletins/investor-bulletin-protecting-your-online-brokerage-accounts-fraud>; SEC, Investor Alert: *Identity Theft, Data Breaches and Your Investment Accounts* (Sept. 22, 2015), [http://www.sec.gov/oiea/investor-alerts-bulletins/ia\\_databreaches.html](http://www.sec.gov/oiea/investor-alerts-bulletins/ia_databreaches.html). One alert includes a “sample list of information that [the SEC] may review in conducting examinations of registered entities regarding cybersecurity matters.” *OCIE Cybersecurity Initiative*, *supra* note 57, at app.
- 62 The Administrative Proceeding resulted in a settlement between the SEC and Respondent without Respondent admitting or denying the allegations and findings therein. *In re R.T. Jones Capital Equities Mgmt., Inc.*, Advisers Act Release No. 4204 (Sept. 22, 2015), <https://www.sec.gov/litigation/admin/2015/ia-4204.pdf>. More than 100,000 individuals were vulnerable as a result of the adviser’s conduct, which triggered a violation of Rule 30(a) under Regulation S-P. See also 17 C.F.R. § 248.30(a) (2015). Regulation S-P (the “Safeguards Rule”) “requires that every investment adviser registered with the Commission adopt policies and procedures reasonably related to: (1) insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3) protect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer.” *Id.*

- 63 *SEC Staff Report*, *supra* note 54, at 6.
- 64 *Id.*
- 65 *See* Reg SCI, *supra* note 8.
- 66 SEC, Press Release, SEC Announces Outreach Programs to Help Firms Comply with Regulation Systems Compliance and Integrity, 2015-80 (May 5, 2015), <http://www.sec.gov/news/pressrelease/2015-80.html>.
- 67 SEC, Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Regulation SCI, <http://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml> (last visited Nov. 12, 2015).
- 68 Reg SCI, *supra* note 8, at 440–48; *see also* SEC, Press Release, SEC Adopts Rules to Improve Systems Compliance and Integrity, 2014-260 (Nov. 19, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543496356>; Luis A. Aguilar, Comm’r, SEC, Speech at SEC Cybersecurity Roundtable: The Commission’s Role in Addressing the Growing Cyber-Threat (Mar. 26, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541287184>.
- 69 *See also* Responses to Frequently Asked Questions Concerning Regulation SCI, *supra* note 67.
- 70 SIFMA, Principles for Effective Cybersecurity Regulatory Guidance, <http://www.sifma.org/issues/item.aspx?id=8589951691> (last visited Oct. 20, 2014).
- 71 Rick A. Fleming, Investor Advocate, SEC, Effective Disclosure for the 21st Century Investor (Feb. 20, 2015), <http://www.sec.gov/news/speech/022015-spchraf.html>; Rick A. Fleming, Investor Advocate, SEC, Address Before the Financial Regulation Summit: Data Transparency Transformation: The Benefits of Structured Data for Investors (Mar. 24, 2015), <http://www.sec.gov/news/speech/032415-spch-rf.html>.
- 72 Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Securities Act Release No. 33-9741 (March 25, 2015) [80 FR 21805 (April 20, 2015)].
- 73 *Id.* at 21822.
- 74 SEC, Press Release, SEC Proposes Rules to Require Companies to Disclose the Relationship Between Executive Pay and a Company’s Financial Performance: Rules Would Provide Greater Transparency and Better Inform Shareholders, 2015-78 (Apr. 29, 2015), <http://www.sec.gov/news/pressrelease/2015-78.html>.
- 75 *Id.*
- 76 Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 33-9861 (July 1, 2015) [80 FR 41143 (July 14, 2015)] (“Erroneously Awarded Compensation”).
- 77 *Id.* at 87.
- 78 Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 34-75611 (Aug. 5, 2015) [80 FR 48963 (Aug. 14, 2015)] [hereinafter “Security-Based Swap”].
- 79 *Id.* at 48971.
- 80 Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Securities Act Release No. 33-9922 (Sept. 22, 2015) [80 FR 62274 (Oct. 15, 2015)].
- 81 *Id.* at 62293.
- 82 Investment Company Reporting Modernization, Securities Act Release No. 33-9776 (May 20, 2015) [80 FR 33590 (June 12, 2015)].
- 83 *Id.* at 33666.
- 84 Kathy Greenlee, Assistant Sec’y for Aging, U.S. Department of Health and Human Services, Remarks to the SEC Investor Advisory Committee (July 10, 2014), <http://www.sec.gov/news/otherwebcasts/2014/iac071014.shtml>; *see also* Dep’t of Justice, Press Release, Health and Human Services Call for Action to Address Abuse of Older Americans (July 9, 2014), <http://www.justice.gov/opa/pr/justice-department-health-and-human-services-call-action-address-abuse-older-americans>.
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- 86 ALZHEIMER’S ASSOCIATION, Alzheimer’s Facts and Figures, [http://www.alz.org/alzheimers\\_disease\\_facts\\_and\\_figures.asp](http://www.alz.org/alzheimers_disease_facts_and_figures.asp) (last visited Oct. 28, 2015).
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- 88 *See, e.g.*, David Laibson, *The Age of Reason* (June 2011), [http://scholar.harvard.edu/files/laibson/files/ageofreason\\_pdf.pdf?m=1360043079](http://scholar.harvard.edu/files/laibson/files/ageofreason_pdf.pdf?m=1360043079) (last visited Nov. 12, 2015); Jason Stipp & Esther Pak, *Why Age Matters for Financial Decision-Makers*, MORNINGSTAR: MORNINGSTAR CONFERENCE 2011 (June 20, 2011), <http://www.morningstar.com.au/funds/article/age-matters/3576?q=printme>; John Sullivan, *Challenges, Opportunities of Aging Population Gauged as Morningstar Conference End*, THINKADVISOR (June 11, 2011), <http://www.thinkadvisor.com/2011/06/11/challenges-opportunities-of-aging-population-gauge?page=2>.

- 89 Rick A. Fleming, Investor Advocate, SEC, Speech at The American Retirement Initiative Winter Summit: Protecting Elderly Investors from Financial Exploitation: Questions to Consider (Feb. 5, 2015), <http://www.sec.gov/news/speech/protecting-elderly-investors-from-financial-exploitation.html>; *see also* The American Retirement Initiative Winter 2014 Summit—Retirement: It’s About People! (Feb. 4, 2014), <http://www.americanretirementinitiative.org/2014-02-04-winter-summit/>.
- 90 APS workers need to marshal the right mix of training, skills and capabilities to do their job. Therefore, we commend NAPSA for its initiative, in partnership with San Diego State University School of Social Work, to produce a body of APS core competency training modules on financial exploitation and other topics. Furthermore, NAPSA is developing training materials for a national certificate program based on the modules. ACADEMY FOR PROFESSIONAL EXCELLENCE, <http://theacademy.sdsu.edu/programs/master/core-curriculum/> (last visited Nov. 15, 2015).
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- 92 FINRA, News Release, FINRA Board Approves Rulemaking Item to Protect Seniors and Other Vulnerable Adults from Financial Exploitation (Sept. 17, 2015), <http://www.finra.org/newsroom/2015/finra-board-approves-rule-protecting-seniors-financial-exploitation>.
- 93 FINRA, Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults (Oct. 2015), [http://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-15-37.pdf](http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-37.pdf).
- 94 NASAA, Notice of Request for Comments Regarding NASAA’s Proposed Model Legislation or Regulation to Protect Vulnerable Adults from Financial Exploitation (Sept. 29, 2015), <http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2015/09/Request-for-Comments-Model-Seniors-Legislation-Final-2.pdf>.
- 95 *Id.* at § 7.
- 96 *Id.* at §§ 6, 8.
- 97 *See* Kathleen M. Quinn, Exec. Dir., Nat’l Adult Protective Servs. Ass’n, Testimony before the Senate Special Committee on Aging Hearing: Broken Trust: Combating Financial Exploitation of Vulnerable Seniors (Feb. 4, 2015), [http://www.aging.senate.gov/imo/media/doc/SCA\\_Quinn\\_2\\_4\\_15.pdf](http://www.aging.senate.gov/imo/media/doc/SCA_Quinn_2_4_15.pdf) (“Federal support to state APS programs is desperately needed for them to be able to provide their life-saving, and asset-saving, services.”).
- 98 *See id.*
- 99 Exchange Act §4(g)(6)(B)(ii)(V), 15 U.S.C. § 78d(g)(6)(B)(ii)(V).
- 100 NASAA, *NASAA Enforcement Report: 2015 Report on 2014 Data* (Sept. 2015), [http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data\\_FINAL.pdf](http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/08/2015-Enforcement-Report-on-2014-Data_FINAL.pdf); *see also* NASAA, *Top Investor Threats*, <http://www.nasaa.org/3752/top-investor-threats/> (last visited Nov 3, 2015).
- 101 Letter from Lynnette Kelly, Exec. Dir., MSRB, to Rick A. Fleming, Investor Advocate, SEC, *Response to SEC Request Highlighting Municipal Market Practices* (Oct. 30, 2015) (on file with the Office of the Investor Advocate, SEC).
- 102 This list of problematic products identified by the SEC is based on staff analysis of the alerts and bulletins issued by the SEC’s Office of Investor Education and Advocacy and the SEC’s Office of Compliance Inspections and Examinations during FY 2015.
- 103 *See Top Investor Threats, supra* note 100.
- 104 This list of problematic products is based on staff analysis of the alerts and bulletins issued by FINRA for investors during FY 2015.
- 105 Kelly, *supra* note 101.
- 106 Exchange Act § 6(a), 15 U.S.C. § 78f (2014). Once listed on a national securities exchange, ETP shares also can be traded on Alternative Trading Systems (as defined in Regulation ATS, 17 CFR § 242.300 (2015)) or in other over-the-counter transactions.
- 107 Request for Comment on Exchange Traded Products, Exchange Act Release No. 34-75165, at 3 (June 12, 2015) [80 FR 34729 (June 17, 2015)] [hereinafter “ETF Request for Comment”].
- 108 *See* Exchange Act Release No. 34-31591 (Dec. 11, 1992) [57 FR 60253 (Dec. 18, 1992)] (order approving Amex rules to provide for the listing and trading of PDRs, and specifically PDRs based on the Standard and Poors Corporation (“S&P”) 500 Index known as SPDRs).
- 109 ETF Request for Comment, *supra* note 107.
- 110 *Id.*
- 111 *Id.* These figures reflect an analysis by Commission staff of market data obtained through subscriptions to Morningstar Direct and Bloomberg Professional services.
- 112 *Id.*
- 113 *Id.* ETFs can be either open-end fund vehicles or unit investment trusts.
- 114 *See* SEC, Office of Investor Education and Advocacy, Investor Bulletin, Exchange-Traded Funds (ETFs) (Aug. 2012), <http://www.sec.gov/investor/alerts/etfs.pdf>.

- 115 ETF Request for Comment, *supra* note 107.
- 116 *Id.*
- 117 See SEC, Office of Investor Education and Advocacy, *supra* note 114.
- 118 ETF Request for Comment, *supra* note 107; see also Kevin Dugan, *How a 56-Year-Old Engineer's \$45,000 Loss Spurred SEC Probe*, BLOOMBERG (Apr. 17, 2014), <http://www.bloomberg.com/news/articles/2014-04-16/how-a-56-year-old-engineer-s-45-000-note-loss-spurred-sec-probe>.
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- 120 See *id.*
- 121 See Comment File for ETF Request for Comment, <http://www.sec.gov/comments/s7-11-15/s71115.shtml>.
- 122 See, e.g., Chris Dieterich, *Many ETFs Saw Wacky Trading In Monday's Selloff*, Barron's Blog (Aug. 25, 2015, 1:42 PM), <http://blogs.barrons.com/focusonfunds/2015/08/25/many-etfs-saw-wacky-trading-in-mondays-selloff/>.
- 123 Mary Jo White, Chair, SEC, Opening Remarks to the Investor Advisory Committee (Oct. 15, 2015), <http://www.sec.gov/news/statement/white-investor-advisory-committee-10-15-2105.html>.
- 124 See Mark Flannery, Chief Economist, SEC, Remarks at Equity Market Structure Advisory Committee Meeting (Oct. 27, 2015), <https://www.sec.gov/news/otherwebcasts/2015/equity-market-structure-advisory-committee-102715.shtml>.
- 125 See *id.*
- 126 Luis A. Aguilar, Comm'r, SEC, How Can the Markets Best Adapt to the Rapid Growth of ETFs? (Oct. 15, 2015), <http://www.sec.gov/news/statement/how-can-markets-adapt-to-rapid-growth-etfs.html>.
- 127 *Id.*
- 128 White, Opening Remarks, *supra* note 123.
- 129 Federal Reserve Board, Statistical Release, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Second Quarter 2015*, 117 tbl. L.212 (Nov. 2, 2015, 08:41 AM), <http://www.federalreserve.gov/releases/z1/current/z1.pdf>.
- 130 Kelly, *supra* note 101.
- 131 *Id.*
- 132 EMMA is a service of the MSRB. It is the official repository of information on virtually all municipal securities. EMMA provides free public access to official disclosure, trade data, credit ratings, and other information about the municipal securities market. The EMMA website was established to increase transparency and provide access to vital disclosure and information in the municipal securities market. MSRB, *Timing of Annual Financial Disclosures by Issuers of Municipal Securities*, at 10 (May 2015), <http://www.msrb.org/msrb1/pdfs/MSRB-CD-Timing-of-Annual-Financial-Disclosures-2015.pdf>.
- 133 *Id.* at figs 3a, 4a.
- 134 *Id.* Other financial information includes annual financial information and operating data submissions. *Id.* at 1, n.1.
- 135 SEC, *Report on the Municipal Securities Market*, at 74 (July 31, 2012) [hereinafter "*Report on the Municipal Securities Market*"], <https://www.sec.gov/news/studies/2012/munireport073112.pdf>.
- 136 See MSRB, Regulatory Notice 2015-13, Bank Loan Disclosure Market Advisory (Jan. 29, 2015), <http://www.msrb.org/~media/Files/Regulatory-Notices/Announcements/2015-03.ashx>; Kelly, *supra* note 101.
- 137 See Federal Deposit Insurance Corporation, *Call Report and Thrift Financial Report Data* (Nov. 3, 2015), [https://www5.fdic.gov/Call\\_TFR\\_Rpts/](https://www5.fdic.gov/Call_TFR_Rpts/); Kelly, *supra* note 101. The issuance of bank loans increased from \$96.7 billion outstanding in fourth quarter 2012 to \$192.3 billion in fourth quarter 2014. *Id.*
- 138 Only 130 bank loan disclosures have been submitted to the EMMA system since 2012. See MSRB, Regulatory Notice 2015-13, *supra* note 136.
- 139 With bank loan executions increasing, bank loan disclosures are becoming more of a concern because certain disclosure obligations may not be triggered by bank loans, direct-purchase debt, or privately placed debt unless determined to be a municipal security. Despite the efforts of market participants to encourage disclosure and develop best practices and guidance, the number of bank loan executions continues to exceed bank loan disclosures. See MSRB, Regulatory Notice 2015-13, *supra* note 136. "Delayed or undisclosed debt-like obligations could result in an investor's inability to assess in a timely manner the loan's impact on an issuer's credit profile and could inadvertently distort valuation of an issuer's bonds in the primary and secondary markets." *Id.* MSRB, Regulatory Notice 2011-52, Potential Applicability of MSRB Rules to Certain "Direct Purchases" and "Bank Loans" (Sept. 12, 2011), <http://www.msrb.org/en/Rules-and-Interpretations/Regulatory-Notices/2011/2011-52.aspx?n=1>; MSRB, Regulatory Notice 2011-37, Financial Advisors, Private Placements, and Bank Loans (Aug. 3, 2011), <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-37.aspx?n=1>; Kelly, *supra* note 101.
- 140 MSRB, Glossary of Municipal Securities Terms, *Minimum Denomination*, <http://www.msrb.org/glossary/definition/minimum-denomination.aspx> (last visited Nov. 15, 2015).



- 141 MSRB, *Request for Comments: Minimum Denomination*, 21 MSRB Reports 1 (May 2001), <http://www.msrb.org/msrb1/reports/0501v211/MinDenomNotice.htm>.
- 142 See SEC, Press Release, SEC Sanctions 13 Firms for Improper Sales of Puerto Rico Junk Bonds, 2014-246 (Nov. 3, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543350368>.
- 143 MSRB Rule G-15, *Confirmation, Clearance, Settlement and Other Uniform Practice Requirements with Respect to Transactions with Customers*, <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules-General/Rule-G-15.aspx>; Kelly, *supra* note 101.
- 144 See e.g., SEC Sanctions, *supra* note 142. SEC Enforcement Division's Municipal Securities and Public Pensions Unit detected improper sales below a \$100,000 minimum denomination set in a \$3.5 billion offering of junk bonds by the Commonwealth of Puerto Rico earlier this year. The SEC's subsequent investigation identified a total of 66 occasions when dealer firms sold the Puerto Rico bonds to investors in amounts below \$100,000. The agency instituted administrative proceedings against the firms behind those improper sales. *Id.*
- 145 MSRB, Rule G-47, *Time of Trade Disclosure*, <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules-General/Rule-G-47.aspx>; see also MSRB, Regulatory Notice 2014-07, SEC Approves MSRB Rule G-47 on Time-of-Trade Disclosure Obligations, MSRB Rules D-15 and G-48 on Sophisticated Municipal Market Professionals, and Revisions to MSRB Rule G-19 on Suitability of Recommendations and Transactions (Mar. 12, 2014), <http://www.msrb.org/~media/Files/Regulatory-Notices/Announcements/2014-07.ashx?n=1>; Proposed Rule Change Consisting of Proposed MSRB Rule G-47, Exchange Act Release No. 34-70593 (Oct. 1, 2013) [78 FR (Oct. 22, 2013)].
- 146 Kelly, *supra* note 101.
- 147 *Id.*
- 148 Comment Letter, Rick A. Fleming, Investor Advocate, SEC, RE: MSRB Regulatory Notice 2014-20, *Request for Comment on Draft Rule Amendments to Require Dealers to Provide Pricing Reference Information on Retail Customer Confirmations*, at 2 (Jan. 20, 2015), <http://www.msrb.org/RFC/2014-20/USSEC.pdf>.
- 149 *Id.*
- 150 See, e.g., Kelly, *supra* note 101. In 2013, the MSRB engaged in a multi-year outreach effort, published a *Market Transparency Advisory – Suggested Practices in Submitting of Financial Disclosures to EMMA*, and created a free automated email reminder service of which approximately 7,500 municipal entities use. *Id.*; see also MSRB Notice 2013-18, *Market Transparency Advisory – Suggested Practices in Submitting of Financial Disclosures to EMMA* (Aug. 12, 2013), <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-18.aspx>; Report on the Municipal Securities Market, *supra* note 135, at 74–83.
- 151 In a Jan. 20, 2015 letter to the SEC, the MSRB encouraged the SEC to conduct a wholesale re-examination of Exchange Act Rule 15c2-12 and consider the issuance of interpretive guidance. Comment Letter, Kym Arnone, Chair, MSRB, RE: *Request for Comment on Collection of Information Provided for in Rule 15c2-12 under the Securities Exchange Act of 1934*, at 5 (Jan 20, 2015), <http://www.msrb.org/msrb1/pdfs/MSRB-Comment-Letter-on-SEC-Rule-15c2-12-January-2015.pdf>.
- 152 E.g., MSRB Rule G-19, on suitability, and MSRB Rule G-30, on fair pricing, disclosures to investors include continuing disclosures consisting of information about the municipal security that arise after the initial issuance and reflect the issuer's changing financial condition. MSRB Rule G-47, on time of trade disclosure, requires municipal securities dealers to disclose to customers in a primary offering and secondary transaction, at or prior to the time of trade, all material information about the security known by the issuer and material information reasonably accessible to the market. MSRB, Rule G-19, *Suitability of Recommendations and Transactions*, <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules-General/Rule-G-19.aspx> (last visited Nov. 12, 2015); MSRB, Rule G-30, *Prices and Commissions*, <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules-General/Rule-G-30.aspx> (last visited Nov. 12, 2015); MSRB, Regulatory Notice 2014-07, *supra* note 145; Kelly, *supra* note 101.
- 153 Kelly, *supra* note 101.
- 154 See, e.g., Dan Strumpf & Corrie Driebusch, *Once Hot, Master Limited Partnerships Reel from Sharp Selloff*, WALL ST. J., (Oct. 18, 2015), <http://www.wsj.com/articles/once-hot-master-limited-partnerships-reel-from-sharp-selloff-1445190859> (observing that the “sharp selloff” in MLPs has exceeded the fall in oil prices); Christine Buurma, *Even the Dead Aren't Spared as Oil Price Rout Clobbers MLPs*, BLOOMBERG (Sept. 21, 2015) (stating that energy companies have been impacted by crude oil's 50 percent price decline over the past year), <http://www.bloomberg.com/news/articles/2015-09-21/even-the-dead-aren-t-spared-as-oil-price-rout-clobbers-mlps>; Paul J. Lim, *Surviving the Perils of the Quest for Higher Yield*, N.Y. TIMES, Feb. 14, 2015, <http://nyti.ms/1CsdWfX> (discussing, in part, the risks inherent in high-yielding securities such as MLPs).
- 155 See, e.g., *id.*
- 156 See, e.g., *id.*
- 157 See John Goodgame, *Master Limited Partnership Governance*, 60 Bus. L.J. 471, 474 (Feb. 2005).

- 158 See MASTER LTD. P'SHIP ASS'N, <http://www.mlpassociation.org/> (last visited Nov. 6, 2015).
- 159 See, e.g., Bernard Condon, *New Way to Bet on Oil Wipes Out Billions in Investor Savings*, ASSOCIATED PRESS (Oct. 26, 2015), <http://bigstory.ap.org/article/8ad383f069304229bf1f00da5984826a/new-way-bet-oil-wipes-out-billions-investor-savings>; Strumpf et al, *supra* note 154.
- 160 See Goodgame, *supra* note 157, at 471; Master Limited Partnerships, Pers. Fin. Plan Handbook ¶ 7.10 (2015).
- 161 See *id.*; Phillip R. Clark & Peter O. Hansen, Understanding Master Limited Partnerships: What Every Oil and Gas Lawyer Needs to Know, 54 ROCKY MOUNTAIN MINERAL L. INST. 22 (2008).
- 162 See Certain Publicly Traded Partnerships Treated as Corporations, I.R.C. § 7704, 26 U.S.C. § 7704; Goodgame, *supra* note 157, at 471.
- 163 See Goodgame, *supra* note 157, at 471–72; Pers. Fin. Plan Handbook, *supra* note 160.
- 164 See Clark, *supra* note 161.
- 165 See Pers. Fin. Plan Handbook, *supra* note 161, at ¶ 7.10.
- 166 See *id.*
- 167 See Goodgame, *supra* note 158, at 472.
- 168 See I.R.C. § 7704; Clark, *supra* note 161.
- 169 See *id.*
- 170 See Pers. Fin. Plan Handbook, *supra* note 160; Goodgame, *supra* note 157, at 480.
- 171 See MASTER LTD. P'SHIP ASS'N, Master Limited Partnerships 101: Understanding MLPs, at 28 (Aug. 28, 2015), <http://www.mlpassociation.org/wp-content/uploads/2015/08/MLP-101-MLPA.pdf> (last visited Nov. 12, 2015).
- 172 Lim, *supra* note 154; Buurma, *supra* note 154.
- 173 Condon, *supra* note 159. The \$20 billion figure reportedly does not include losses from MLP bonds or losses from investments in private partnerships.
- 174 See ALERIAN MLP INDEX FACT SHEET, <https://www.alerian.com/wp-content/uploads/2015.09.30-AMZ-Facts.pdf> (last visited Nov. 4, 2015).
- 175 See Robert Goldsborough, *Are MLPs Going Down the Tubes*, MORNINGSTAR (Oct. 21, 2015), <http://news.morningstar.com/articlenet/article.aspx?id=718519>.
- 176 See Allison Sider & Russell Gold, *Kinder Morgan to Consolidate Empire*, WALL ST. J., (Aug. 10, 2014), <http://www.wsj.com/articles/kinder-morgan-to-consolidate-in-70-billion-deal-1407704960> (reporting that Kinder Morgan Inc. has consolidated its energy MLP affiliates into a single, publicly traded corporation); Allison Sider & Angela Chen, *Williams Cos. to Acquire its Partnership*, WALL ST. J. (May 13, 2015), <http://www.wsj.com/articles/williams-to-buy-its-infrastructure-partner-1431519255> (reporting that Williams Companies, a natural gas pipeline company, announced that it would acquire its MLP, Williams Partners LP); Goldsborough, *supra* note 175.
- 177 See generally Goodgame, *supra* note 157, at 494–95.
- 178 Goodgame, *supra* note 157, at n.11.
- 179 Based on consultations with Commission staff.
- 180 Goodgame, *supra* note 157, at 491, 494.
- 181 *Id.*
- 182 Exchange Act § 4(g)(8)(B), 15 U.S.C. § 78d(g)(8)(B).
- 183 Exchange Act v 4(g)(8)(D), 15 U.S.C. § 78d(g)(8)(D).
- 184 *Id.*
- 185 As used in this report, the term “Ombudsman” may refer to the Ombudsman, or to the Ombudsman and Office of the Investor Advocate staff directly supporting the ombudsman function.
- 186 SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2016* (June 30, 2015), <http://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2016.pdf>.
- 187 WKSI status is available “for the most widely followed issuers representing the most significant amount of capital raised and traded in the United States.” See SEC, Div. of Corp. Fin., Revised Statement on Well-Known Seasoned Issuer Waivers (Apr. 24, 2014), <http://www.sec.gov/divisions/corpfm/guidance/wksi-waivers-interp-031214.htm> (discussing the factors considered when determining whether to grant a waiver of ineligible issuer status to a WKSI).
- 188 Report on Objectives, Fiscal Year 2016, *supra* note 186.
- 189 Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., Exchange Act Release No. 34-56145 (July 26, 2007) [72 FR 42169 (Aug. 1, 2007)].
- 190 See NASD, Notice to Members 03-70, NASD Reminds Members of Their Duty to Cooperate in Arbitration Discovery Process (Nov. 2003), <http://www.finra.org/industry/notices/03-70>.
- 191 *Id.*
- 192 For example, the FINRA basic arbitrator training course material states that “[o]ne careless gesture or offhand remark can lead to an impression of bias—which is one of the few grounds for which arbitration decisions can be overturned. Consequently, arbitrators must always be on guard and project and

- exhibit a high degree of seriousness, professionalism, and competency in all of their verbal and nonverbal communications.” The course material also lists several ethical considerations for arbitrators that are examined in further detail throughout the course. See FINRA, *Dispute Resolution Basic Arbitrator Training*, at 6-8 (Sept. 2015), <http://www.finra.org/sites/default/files/basic-arbitrator-training-sept-2015.pdf>.
- 193 See FINRA Arbitrators, <https://www.finra.org/arbitration-and-mediation/finra-arbitrators> (last visited Nov. 9, 2015).
- 194 Rule 12405 of the FINRA Code of Arbitration Procedure for Customer Disputes requires arbitrators to make a reasonable effort to learn of, and disclose to the Director of FINRA Dispute Resolution any interest, relationship, or circumstance that might preclude them from rendering an objective and impartial determination in the proceeding. This is a continuing duty of the arbitrator throughout all stages of an arbitration proceeding. See FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12405, Disclosures Required of Arbitrators, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4146](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4146) (last visited Nov. 9, 2015).
- 195 See *id.*
- 196 See, e.g., *The Securities Arbitration System, Hearing Before the Subcomm. on Capital Markets, Ins. and Gov't Sponsored Enter., H. Comm. on Fin. Serv.*, 109th Cong. (2005), <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg24398/pdf/CHRG-109hhrg24398.pdf>.
- 197 See *id.* at 74-75 (Testimony of Marc E. Lackritz, President, Securities Industry Association).
- 198 See, e.g., Luis A. Aguilar, Comm’r, SEC, Remarks at the North American Securities Administrators Association, Annual NASAA/SEC 19(d) Conference: Outmanned and Outgunned: Fighting on Behalf of Investors Despite Efforts to Weaken Investor Protections (Apr. 16, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1365171515400> (“Arbitration may be a viable option after a dispute arises and both parties knowingly agree to go into arbitration. However, my main concern with *pre-dispute* mandatory arbitration is the denial of investor choice; investors should not have their option of choosing between arbitration and the traditional judicial process taken away from them at the very beginning of their relationship with their brokers and advisers.”).
- 199 See, e.g., Letter from William Beatty, President and Washington Secs. Dir., NASAA, to FINRA Dispute Resolution Task Force, at 3 (Mar. 30, 2015), <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Letter-to-FINRA-Dispute-Resolution-Task-Force-on-FINRA-Arbitration-FINAL-3-30-2015.pdf>.
- 200 See, e.g., Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors’ Views of the Fairness of Securities Arbitration*, 2008 J. Disp. Resol. 349, 400 (2008) (“[E]ven if the system meets objective standards of fairness, a mandatory system that is not perceived as doing so cannot maintain the confidence of its users and, in the long run, may not be sustainable. As a result, customers’ negative perceptions are changing the realities of the current system of securities arbitration . . .”).
- 201 Exchange Act § 39(a), 15 U.S.C. § 78pp(a).
- 202 Exchange Act § 39(a), 15 U.S.C. § 78pp(b).
- 203 Exchange Act § 39(a)(2)(B), 15 U.S.C. § 78pp(a)(2)(B).
- 204 Exchange Act § 39(g), 15 U.S.C. § 78pp(g).
- 205 Exchange Act § 39(h), 15 U.S.C. § 78pp(h).
- 206 Exchange Act § 4(g)(6)(B)(ii), 15 U.S.C. § 78d(g)(6)(B)(ii). A Report on Activities must include several enumerated items, and it may include “any other information, as determined appropriate by the Investor Advocate.” *Id.*
- 207 See SEC, <http://www.sec.gov/spotlight/investor-advisory-committee-2012.shtml> (last visited Nov. 12, 2015) (listing all of the recommendations of the SEC Investor Advisory Committee).
- 208 Mary Jo White, Chair, SEC, Remarks at the Meeting of the Investor Advisory Committee (July 25, 2013), <http://www.sec.gov/news/otherwebcasts/2013/iac072513.shtml>.
- 209 17 CFR §§ 200.735-3(b)(2)(i), 230.122 (2014); Exchange Act § 24(b), 15 U.S.C. § 78x; 5 U.S.C. § 552a(i)(1); Sec. Exch. Comm’n Admin. Regulation 18-2, Section B.5 (Nonpublic Information) (July 31, 2005).
- 210 SEC, *Recommendation of the Investor Advisory Committee: Shortening the Trade Settlement Cycle in U.S. Financial Markets* (Feb. 12, 2015), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf>.
- 211 Letter from Mary Jo White, Chair, SEC, to Kenneth E. Bentsen, Jr., President & CEO, SIFMA, & Paul Schott Stevens, President & CEO, ICI (Sept. 16, 2015), <https://www.sec.gov/divisions/marketreg/chair-white-letter-to-sifma-ici-t2.pdf>.
- 212 The Shortened Settlement Cycle Indus. Steering Comm., *Shortening the Settlement Cycle: The Move to T+2* (June 18, 2015), <http://www.ust2.com/pdfs/ssc.pdf>.
- 213 Michael S. Piwowar & Kara M. Stein, Comm’rs, SEC, Statement Regarding Proposals to Shorten the Trade Settlement Cycle (June 29, 2015), <http://www.sec.gov/news/statement/statement-on-proposals-to-shorten-the-trade-settlement-cycle.html>.

- 214 Exchange Act Rule § 14a-2(a)(1), 17 CFR § 240.14a-2(a)(1) (2014).
- 215 Mary Jo White, Chair, SEC, Address at the Society of Corporate Secretaries and Governance Professionals 69th National Conference: Building Meaningful Communication and Engagement with Shareholders (June 25, 2015) [hereinafter “White Address”], <http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholders.html>.
- 216 SEC, *Recommendation of the Investor Advisory Committee: Impartiality in the Disclosure of Preliminary Voting Results* (Oct. 9, 2014), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/impartiality-disclosure-prelim-voting-results.pdf>.
- 217 Mary Jo White, Chair, SEC, Opening Remarks to the Investor Advisory Committee (Apr. 9, 2015), <http://www.sec.gov/news/statement/opening-remarks-to-the-investor-advisory-committee.html>.
- 218 SEC, *Recommendation of the Investor Advisory Committee: Crowdfunding Regulations* (Apr. 10, 2014), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-crowdfunding-recommendation.pdf>.
- 219 Crowdfunding, Securities Act Release No. 33-9974 (Oct. 30, 2015).
- 220 SEC, *Recommendation of the Investor Advisory Committee: Decimalization and Tick Sizes* (Jan. 31, 2014), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-decimalization-recommendation.pdf>.
- 221 Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a Tick Size Pilot Plan, Exchange Act Release No. 34-72460 (June 24, 2014) [79 FR 36840 (June 30, 2014)].
- 222 Regulation NMS, *supra* note 11; Tick Size Pilot Program, *supra* note 27.
- 223 SEC, *Recommendation of the Investor Advisory Committee: Legislation to Fund Investment Adviser Examinations* (Nov. 22, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-examinations-recommendation-2013.pdf>.
- 224 Testifying in support of the budget request, Chair White stated, “There is an immediate and pressing need for significant additional resources to permit the SEC to increase its examination coverage of registered investment advisers so as to better protect investors and our markets.” Mary Jo White, Chair, SEC, Budget Hearing before H. Subcomm. on Fin. Service & Gen. Gov’t of the H. Comm. on Appropriations, 113th Cong. (Apr. 1, 2014), <http://docs.house.gov/meetings/AP/AP23/20140401/102004/HHRG-113-AP23-Wstate-WhiteM-20140401.pdf>.
- 225 SEC, FY 2016 Budget Request Tables, <http://www.sec.gov/about/reports/sec-fy2016-budget-request-tables.pdf> (last visited Nov. 10, 2015); SEC, FY 2016 Budget Request by Program, at 68, <http://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf> (last visited Nov. 10, 2015). Chair White has reiterated these numbers in Congressional testimony. *See, e.g.*, Mary Jo White, Chair, SEC, Testimony before the Subcomm. on Fin. Serv. and Gen. Gov’t Comm. on Appropriations: Fiscal Year 2016 Budget Request of the U.S. Securities and Exchange Commission, 113th Cong. (May 5, 2015), <http://www.sec.gov/news/testimony/testimony-fy-2016-sec-budget-request.html>.
- 226 Mary Jo White, Chair, SEC, Testimony before the H. Subcomm. on Fin. Services: Examining the SEC’s Agenda, Operations and FY 2016 Budget Request, 113th Cong. (Mar. 24, 2015) [hereinafter “White Testimony”], <http://www.sec.gov/news/testimony/2015-ts032415mjw.html>.
- 227 SEC, *Recommendation of the Investor Advisory Committee: Broker-Dealer Fiduciary Duty* (Nov. 22, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf>.
- 228 White Testimony, *supra* note 226.
- 229 SEC, *Recommendation of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots* (July 25, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf>.
- 230 White Address, *supra* note 215.
- 231 *See* SEC, <https://www.sec.gov/spotlight/proxy-voting-roundtable.shtml> (last visited Nov. 10, 2015).
- 232 SEC, *Recommendation of the Investor Advisory Committee Regarding the SEC and the Need for the Cost Effective Retrieval of Information by Investors* (July 25, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf>.
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- 234 *Id.* at 66.
- 235 Security-Based Swap, *supra* note 78.
- 236 Erroneously Awarded Compensation, *supra* note 76.
- 237 *Id.* at 87.
- 238 *Id.*
- 239 *Id.*
- 240 *Id.* at 133.
- 241 Investment Company Reporting Modernization, *supra* note 82.

- 242 Pay Versus Performance, Exchange Act Release No. 34-74835 (Apr. 29, 2015) [80 FR 26329 (May 7, 2015)].
- 243 Regulation A, *supra* note 72.
- 244 Asset-Backed Securities Disclosure and Registration, Securities Act Release No. 33-9638 (Sept. 4, 2014) [79 FR 57184 (Sept. 24, 2014)].
- 245 Money Market Fund Reform; Amendments to Form PF, Securities Act Release No. 33-9616 (July 23, 2014) [79 FR 47736, 47944 (Aug. 14, 2014)].
- 246 SEC, *Recommendation of the Investor Advisory Committee: Target Date Mutual Funds* (Apr. 11, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-target-date-fund.pdf>.
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