MARKET SOLUTIONS

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In This Issue

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Crypto ETFs: Suitability and Supervision

By Christopher Vaughan and Sean Coughlin
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Three weeks ago, the SEC shocked the financial world by approving eight spot Ether ETFs simultaneously.[1] These approvals marked a drastic policy shift from what investors have come to expect from the regulator, as industry experts predicted that the Ether ETFs would likely face at least a delay, if not a wholesale rejection.[2]

With twelve spot Bitcoin ETFs already available to the investing public, and eight more Ether ETFs on the way, Financial Advisors will undoubtedly face questions from some of their more crypto-curious clients about the economic upsides, and inherent risks, of adding these ETFs to their portfolios. These new opportunities for investors will also create new potential headaches for both investment advisors and broker-dealers offering these products on their platforms. This article outlines the requirements to which advisors must adhere when recommending these new products, as well as the steps financial firms should take to properly offer, manage, and supervise Cryptocurrency ETFs.

A. Suitability

Perhaps the first question a financial professional must ask before considering recommending cryptocurrency ETFs for their retail clients is the extent to which these products are appropriate for those customers. This concern is reflected by FINRA Rule 2111, also known as the Suitability rule. The Suitability rule requires a financial professional to have a reasonable basis to believe a transaction or investment strategy is suitable for their customers. The financial professional must believe that the investment is suitable through reasonable diligence on both the investment product (Crypto ETF) and the client's investment profile.

The share price for Bitcoin ETFs now, and Ether ETFs in the future, reflect the current spot market price of Bitcoin and Ether themselves. While Bitcoin has recently become less volatile than many stocks in the S&P 500[3], all cryptocurrencies are susceptible to black swan events and market pivots that simply do not exist in the traditional stock market. Additionally, the price of Ether, which is inherently far more volatile than Bitcoin and traditional equities, is further exposed to fluctuations related to blockchain upgrades, large sales by the Ethereum foundation to fund developer work, and other factors that the average investor almost certainly has failed to consider in their decision to add the corresponding ETF to their portfolio.

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Route to: ❑ Audit ❑ Compliance ❑ Legal ❑ Risk Management ❑ Back Office ❑ Training

Legislative/Regulatory Actions

This column was written by lawyers from Morrison Foerster to provide an update on selected key legislative and regulatory developments affecting financial services and capital markets activities. Because of the generality of this column, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

In this issue, we address selected developments from the federal banking regulators, the Financial Crimes Enforcement Network ("FinCEN"), the Office of Foreign Assets Control (OFAC), and the Consumer Financial Protection Bureau (CFPB or "Bureau").

FEDERAL BANKING REGULATORS

Community Bank Third-Party Risk Management Guidance

On May 3, 2024, the Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), and the Office of the Comptroller of the Currency ("OCC") (collectively, the "Agencies") issued a guide intended to aid community banks in developing and implementing their third-party risk-management practices for third-party relationships.

According to the guide, entitled "Third-Party Risk Management: A Guide for Community Banks," third-party relationships can positively benefit community banks by providing them with access to new technologies, risk-management tools, human capital, delivery channels, products, services, and markets. However, reliance by a community bank on third parties reduces the community bank's direct operational control over activities and may introduce new risks or increase existing risks, including, but not limited to, operational, compliance, financial, and strategic risks.

The Agencies emphasized that community banks are expected to appropriately identify, assess, monitor, and control these risks to ensure that activities are performed in a safe and sound manner and in compliance with applicable laws and regulations, including those designed to protect consumers and those intended to prevent financial crimes, as if the bank were performing the activity itself.

The guide provides potential considerations, resources, and examples through each stage of the third-party relationship life cycle. According to the Agencies, the guide illustrates the principles discussed in the third-party risk management guidance issued by the Agencies in June of 2023, "Interagency Guidance on Third-Party Relationships: Risk Management," but the new guide is not a substitute for the 2023 guidance.

Proposal on Incentive-Based Compensation

On May 6, 2024, the FDIC, the OCC, and the Federal Housing Finance Agency ("FHFA") (collectively, the "Agencies") announced adoption of a Notice of Proposed Rulemaking ("NPRM") to address incentive-based compensation arrangements, as required by Section 956 of the Dodd-Frank Act ("Section 956"). The NPRM re-proposes regulatory text that was proposed in 2016 and proposes certain alternatives and questions.

Section 956, entitled "Enhanced Compensation Structure Reporting" (12 U.S.C. § 5641), requires that action also be taken by the Federal Reserve Board, the National Credit Union Administration ("NCUA"), and the Securities and Exchange Commission ("SEC"), in addition to the FDIC, the OCC, and the FHFA. Specifically, Section 956 requires regulations or guidelines to require each covered financial institution to disclose to their appropriate federal regulator the structures of all incentive-based compensation arrangements offered by such covered financial institutions sufficient for the regulator to determine whether the compensation structure (i) provides an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or (ii) could lead to material financial loss to the covered financial institution. The law provides an exemption for financial institutions with assets of less than $1 billion.

The proposed rule would make incentive-based compensation arrangements more sensitive to risk, such as by prohibiting incentive-based compensation arrangements that do not include risk adjustment of awards, deferral of payments, and forfeiture and clawback provisions.

The NCUA said that it expects to take action on the NPRM "in the near future." The SEC has a rulemaking proceeding to implement Section 956 on its rulemaking agenda. The Federal Reserve Board has yet to act on this topic, and the topic does not appear on the Board's rulemaking agenda. Subject to approval by all six agencies, the NPRM would be published jointly in the *Federal Register* with a 60-day comment period.

Testimony by the FDIC Chair before the Senate Committee on Banking, Housing, and Urban Affairs

On May 16, 2024, FDIC Chair Martin Gruenberg testified before the Senate Committee on Banking, Housing, and Urban Affairs at a hearing entitled "Oversight of U.S. Financial Regulators: Accountability and Financial Stability."

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Crypto ETFs…

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While there is no requirement that financial professionals become experts in the stock or investment vehicles they recommend, the cryptocurrency markets introduce an entirely new set of downside risks to which even the most veteran of Wall Street brokers are unaccustomed. Therefore, financial professionals will need to do their due diligence on the causes of crypto volatility before they can make an adequate assessment as to the suitability of Bitcoin and Ether ETFs for their client's portfolios. Otherwise, they may find themselves under cross-examination from Claimant's counsel in front of a FINRA Arbitration panel, attempting to explain a client's investment they recommended without fully understanding.

B. Supervision Requirements for Broker-Dealers

Cryptocurrency ETFs also cause new supervision concerns for the financial firms recommending the purchase of Crypto ETFs. Under FINRA Rule 3110, firms are required to establish and maintain a system to supervise the activities of their associates that is reasonably designed to achieve compliance with applicable securities laws and regulations. These systems typically include automated software which flag unusual trading patterns or potential conflicts of interests for advisors who may be recommending these ETFs. However, given that the vast majority of cryptocurrency trading takes place via anonymous (or at least pseudonymous) wallets, Broker-Dealers will likely need to be on high alert for any advisors they suspect may attempt to exploit that aspect of crypto custody to use their clients for their own financial gain.

Further, while it may be the financial professional's responsibility to perform their own due diligence prior to recommending a Cryptocurrency ETF to clients, it is equally the firms' responsibility to ensure that their Advisors are properly trained. Under FINRA Rule 1250, Broker-Dealers are required to provide continuing education for their registered personnel so that their advisors may remain knowledgeable about the products they handle, which in this case extends to Cryptocurrency ETFs. For this requirement, it may be prudent for Broker-Dealers to consider hiring cryptocurrency experts to offer these trainings, due to the highly specialized nature of the crypto markets.

Finally, under SEC Rule 206(4)-7 of the Investment Advisers Act of 1940, Broker-Dealers are required to establish written policies and procedures designed to prevent violations of securities laws. Given the new volatility and liquidity issues introduced by cryptocurrency ETFs, all Broker-Dealers offering these products will likely need to draft new policies specifically addressing the offering and solicitation of these vehicles. Further, given that cryptocurrency trading can sometimes lend itself to quick decisions and short holding periods, financial firms must put forth their best efforts to ensure that these new policies actually align and comport with the realities of crypto trading practices. It is likely that these policies will need to be adapted to the cryptocurrency markets as they evolve, but an immediate baseline must be put in place if financial firms hope to avoid SEC and FINRA scrutiny in their offering of Cryptocurrency ETFs to retail investors.

C. Conclusion

Undoubtedly, the prospect of Cryptocurrency ETFs, and the potential returns they offer retail investors, are exciting and novel. However, while the assets underlying these new products may be a departure from the norm in securities markets, the rules surrounding them remain the same. Investment Advisors and the Broker-Dealers who employ them, therefore, must plan and act accordingly in their offering and solicitation of Crypto ETFs. ■

[1] Spot crypto ETFs buy cryptocurrencies and securitize them. On the retail side, Investors buy and sell shares of the ETFs as needed, as they would for any other ETF. A spot bitcoin ETF tracks the current price of bitcoin and is backed by actual bitcoin holdings, while a spot ether ETF does the same thing for ether.

[2] Ethereum ETFs see declining interest: What does it mean for the future? (msn.com)

[3] https://www.fidelitydigitalassets.com/research-and-insights/closer-look-bitcoins-volatility#:~:text=Bitcoin%20is%20volatile%2C%20but%20less,stocks%20more%20volatile%20than%20bitcoin.

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2024 OCC Bank Supervision Operating Plan – *https://www.occ.gov/news-issuances/news-releases/2023/nr-occ-2023-109a.pdf*

2024 SEC Examination Priorities – *https://www.sec.gov/files/2024-exam-priorities.pdf*

2024 FINRA Regulatory Oversight Report (formerly known as the Examination and Risk Monitoring Program Report) – *2024 FINRA Annual Regulatory Oversight Report | FINRA.org*

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In his prepared remarks, Chair Gruenberg provided an overview of the FDIC's recent work. In particular, he provided an update on FDIC resolution activities and discussed the release of an FDIC paper on the agency's preparedness to apply the Dodd-Frank Act Title II framework in the resolution of a global systemically important bank. In addition, he discussed improvements in regulation and bank supervision that could help prevent bank failures like those that occurred in the spring of 2023 or mitigate their impact in the future, such as initiatives to improve banks' management of liquidity and funding risks and a rulemaking to strengthen corporate governance at larger banks.

Chair Gruenberg also discussed the FDIC workplace culture issues that have made recent news. In response, the FDIC initiated an independent, third-party review, which found that the FDIC has failed to provide a workplace free from sexual harassment, discrimination, and other personal misconduct. Chair Gruenberg said the FDIC has already begun implementing several of the report's recommendations. For example, the report recommends changes to the agency's structure and procedures for receiving and investigating complaints and taking disciplinary action against misconduct due to the failures of the existing offices with those duties.

At the hearing, testimony also was heard from Federal Reserve Board Vice-Chair for Supervision Michael Barr and Acting Comptroller of the Currency Michael Hsu.

OCC: Acting Comptroller Discusses Artificial Intelligence and Financial Stability

On June 6, 2024, Acting Comptroller of the Currency Michael Hsu delivered remarks at a Financial Stability Oversight Council ("FSOC") / Brookings Institution conference on AI and financial stability. His remarks addressed the systemic risk implications of AI in banking and finance, both from AI's use as a tool and as a weapon.

Acting Comptroller Hsu noted that AI's ability to learn leads to "greatly diffused accountability." He said that AI providers and end-users, such as banks, should develop a framework of shared responsibility for bad outcomes resulting from adoption of AI models, noting that "[w]ith AI, it is easier to disclaim responsibility for bad outcomes than with any other technology in recent memory." He added that AI has implications on public trust, which is fundamental in banking, and is likely limiting AI adoption and use more generally.

Acting Comptroller Hsu suggested that the shared responsibility model that is utilized in the cloud computing context, which allocates operations, maintenance, and security responsibilities to customers and cloud service providers depending on the service a customer selects, could be used as an approach for a similar framework for AI. He added that the new Artificial Intelligence Safety Institute within the National Institute of Standards and Technology may be well positioned to determine the details of such a shared responsibility framework and said FSOC could contribute because of its ability to coordinate among agencies, organize research, seek industry feedback, and make recommendations to Congress.

BSA / AML

FinCEN's June Beneficial Ownership FAQ's

On June 10, 2024, FinCEN provided updated guidance on reporting requirements under the Corporate Transparency Act (CTA). Among other updates, the new FAQs address questions related to entities formed under tribal law, homeowners associations, telecommunications, and the large operating company exemption.

Entities formed under tribal law are required to report beneficial ownership information if they meet the definition of a reporting company and are not otherwise exempt. The FAQs clarify that a legal entity is a reporting company only if registered, "under the laws of a State or Indian Tribe" and through the filing of a document with an office or entity similar to a secretary of state.

Homeowners associations will also be reporting companies if they fall within the reporting company definition and are not otherwise exempt. FinCEN further clarified that a corporation engaged in the sale of telephone or telegraph services will be included in the public utility exemptions if the rates for the sale meet the public utility requirements under the applicable law.

Regarding the large operating company exemption, if a company has not yet filed its tax return for the previous year, FinCEN advised that it could rely on the return filed in the previous year for the purposes of determining whether it qualifies for the exemption. However, if the company's subsequent tax return shows gross sales or receipt below the $5 million threshold, it will disqualify for the exemption and will need to file a beneficial ownership information report within 30 days from the date of that tax return.

FinCEN Advisory on Iran-Backed Terror Groups

On May 8, 2024, FinCEN released an "Advisory to Financial Institutions to Counter the Financing of Iran-Backed Terrorist Organizations." The advisory addresses heightened concerns

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regarding intensified terrorist activity and the financing of terrorist organizations backed by Iran, including Hamas, the Houthis, Hizballah, Palestinian Islamic Jihad (PIJ), and various militia groups in Iraq and Syria. The advisory emphasizes the role of the U.S. Department of Treasury in dismantling these organizations and the role of financial institutions in detecting and reporting activities potentially linked to these groups.

The advisory details the mechanisms of each terrorist organization's funding and support, including through direct financial support from Iran, sham and fraudulent charities, taxing and extorting local populations, front companies, cryptocurrencies, smuggling networks, and crowdfunding.

FinCEN provides financial institutions with a non-exclusive list of sample red flags indicating suspicious activity connected to the financing of Iran-backed terrorist organizations. These include, for example, when a customer purporting to be a charity openly supports terrorist activity on social media and does not appear to be providing any charitable services. Another red flag would be if a customer makes payments to high-risk jurisdictions for terrorist activity, which payment is inconsistent with their stated occupation and which has vague purposes, such as "charity" or "aid."

FinCEN reminds financial institutions of their requirement to file a SAR if they know, suspect, or have reason to suspect that the transaction involves funds from an illegal activity, or if the transaction is intended to disguise such illegal activities.

FinCEN RFI on Social Security Numbers

On March 28, 2024, FinCEN published a Request for Information, requesting comment on the existing requirement for banks to collect a taxpayer identification number from a customer prior to opening an account (RFI). This RFI was issued in consultation with staff at the OCC, the FDIC, the NCUA, and the Federal Reserve Board.

Under the Customer Identification Program Rule (CIP Rule), covered financial institutions must collect a customer's social security number (SSN) prior to account opening. The RFI suggests modifying this requirement to allow banks to collect only part of the SSN and obtain the remainder from third-party sources.

In issuing the RFI, FinCEN Director Andrea Gacki noted that the rule reflects FinCEN's appreciation of "significant changes in technology and financial services that have taken place since the promulgation of the CIP Rule[.]" The RFI also represents part of FinCEN's efforts to modernize and streamline regulations and guidance, as mandated by the Anti-Money Laundering Act of 2020.

FinCEN poses several detailed questions to the public to gather insights and data that could inform potential regulatory adjustments. These questions cover the risks and benefits of allowing partial SSN collection; the impact of such a change on banks' policies and anti-money laundering programs; the procedures for verifying SSNs obtained from third parties; and the overall effectiveness of current practices in protecting against fraud and ensuring compliance. The agency encourages feedback on these topics from all interested parties.

FinCEN on Environmental Crimes

On Earth Day, April 22, 2024, FinCEN reminded financial institutions to identify and report suspicious activity relating to environmental crimes, such as wildlife trafficking, illegal mining, and waste and hazardous substance trafficking. FinCEN referred financial institutions to the agency's 2021 notice on environmental crimes (the "Notice") and its 2021 FinCEN Financial Threat Analysis (FTA), both of which addressed these environmental issues.

The Notice reminded financial institutions that wildlife trafficking is often tied to corruption and transnational criminal organizations (TCOs), both of which are FinCEN priorities with respect to anti-money laundering and the counter-financing of terrorism. The Notice provided financial institutions with descriptions of environmental crimes, including illegal logging, i.e., harvesting and selling timber illegally, illegal fishing, illegal mining, and waste and hazardous substances trafficking, including the intentional disposal of waste in an illegal manner. FinCEN notes that global environmental crimes generate hundreds of billions in illicit funds annually. They are the third largest illicit activity in the world, following drug trafficking and counterfeit goods.

The FTA highlighted the risks of wildlife trafficking and its negative impact on health, biodiversity, and ecosystems. Per the agency, funds transfers between depository institutions were the most common wildlife trafficking-related payment mechanism. Financial institutions were referred to the Financial Action Task Force's financial indicators related to wildlife trafficking and FinCEN also provided their own—including, for example, where international trade companies, zoos, or safaris were involved or where payments were made with precious metals or stones.

FinCEN Warns about Elder Abuse

On World Elder Abuse Awareness Day, June 14, 2024, FinCEN reminded financial institutions to detect and report suspicious activity relating to elder financial abuse (EFE). FinCEN re-

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shared a Financial Trend Analysis (FTA-II) from April 2023 and June 2022 advisory (the "Advisory") relating to EFE.

The Advisory noted a sharp increase in suspicious activity reports identifying EFE. Per the advisory, the abuse generally involves theft or scams. Theft may be perpetrated by family members or caregivers of the elder through a variety of means, including the exploitation of legal guardianships, power of attorney arrangements, or Ponzi schemes.

Per the Advisory, elder scams are typically orchestrated by individuals outside the U.S. who contact adults within the U.S. online or over the phone. They tend to impersonate government officials, customer support or lottery representatives, or trusted family or friends. FinCEN provided financial institutions with sample red flags indicating EFE, such as an older customer's account showing sudden and unusual changes in contact information or new overseas connections or an older customer is agitated or frenzied about the need to send money immediately to a loved one in an emergency.

The FTA-II noted that elder scams were far more prevalent than elder theft, and that scam funds were most frequently transmitted by check or wire, domestically.

OFAC

The United States Imposes New Sanctions and Export Controls Targeting Russia's Growing War Machine

On June 12, 2024, the United States took several hard-hitting sanctions- and export control-related actions intended to intensify pressure on the Russian government and hamper Russia's ability to continue to support its war in Ukraine. OFAC and the U.S. Department of State designated over 300 individuals and entities ("persons") deemed to be contributing to the Russian war effort, including financial infrastructure players critical to the Russian economy such as the Moscow Exchange and the National Clearing Center, as well as supply chain and evasion networks in Russia and third countries. In addition, OFAC increased the so-called "secondary sanctions" risk for foreign financial institutions ("FFIs") that conduct or facilitate significant transactions, or provide any service, involving a newly broadened category of persons linked to Russia's military-industrial base. Specifically, OFAC broadened the term "Russia's military-industrial base" to include any person designated pursuant to Executive Order ("E.O.") 14024—the core legal authority for sanctions imposed after Russia's invasion of Ukraine in February 2022—and updated its guidance to FFIs seeking to mitigate the risk of being targeted with these secondary sanctions. OFAC also issued a determination pursuant to E.O. 14071 prohibiting, effective September 12, 2024, the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, whereover located, of (i) IT consultancy and design services, and (ii) IT support and cloud-based services for enterprise management software and design and manufacturing software. Finally, the U.S. Department of Commerce's Bureau of Industry and Security made additions to the Entity List and imposed new export controls designed to limit the items that can be transferred to Russia and Belarus without a license.

The actions described above are yet another step in the United States's escalating response to Russia's war on Ukraine. The June 12 actions illustrate that the U.S. government remains able and willing to identify new ways of targeting Russia, cutting off its access to necessary funds and resources, and identifying and targeting those who help Russia to evade or circumvent sanctions imposed by the United States and its allies. We expect the United States to continue to identify additional targets (both in and outside of Russia) and to continually evaluate ways in which the U.S. government and its allies can increase its pressure on Russia and those who enable and support its activities in Ukraine.

For more information please read our client alert.

OFAC Makes Humanitarian-Related Amendments to the Cuban Assets Control Regulations

On May 28, 2024, in connection with policy statements made by the Biden-Harris Administration in 2022, OFAC amended the Cuban Assets Control Regulations ("CACR") to bolster support for the Cuban people in several different respects. Specifically, OFAC revised and clarified the scope of authorized internet-based services and software, including those related to the exchange of communications over the internet. OFAC also changed the defined term "self-employed individual" to "independent private sector entrepreneur" to broaden the scope of individuals and entities covered under certain authorizations. Cuban nationals who are independent private sector entrepreneurs are now authorized to open and use U.S. bank accounts to conduct authorized or exempt transactions, regardless of where the independent private sector entrepreneur is located. The new authorizations also include a revived "U-turn" license that allows U.S. banking institutions to process transactions involving Cuban parties originating and terminating outside the United States where both the originator and beneficiary to the transaction, as well as their respective banks, are not persons subject to U.S. jurisdiction under the CACR. As before, U.S. banking institutions are now authorized to process these "U-turn" transactions as intermediary banks.

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OFAC also published informal guidance in the form of "Frequently Asked Questions" that clarify the scope of the CACR amendments, including OFAC's due diligence expectations for U.S. banking institutions processing "U-turn" transactions. Financial institutions should carefully review these updates and implement enhancements to its sanctions compliance procedures as needed, including by training relevant personnel on the implications of these amendments in a timely fashion.

OFAC Amends its Reporting, Procedures and Penalties Regulations

On May 8, 2024, OFAC issued an interim final rule (the "Rule") to amend several sections of its Reporting, Procedures and Penalties Regulations (31 C.F.R. Part 501) (the "RPPR"), which include, among other requirements, the standard recordkeeping and reporting requirements for OFAC sanctions programs. Written comments on the Rule were due earlier in June, and the Rule will go into effect on August 8, 2024.

Key takeaways include the Rule's requirement for initial reports of blocked property, Annual Reports of Blocked Property, and reports of rejected transactions to be filed via the electronic OFAC Reporting System ("ORS"), which is already available to filers on a voluntary basis. OFAC will now require electronic submission (i.e., via email or ORS) and eliminating the mail and facsimile submission options in other sections of the RPPR as well. To promote OFAC's awareness of the current status of blocked property, OFAC is also requiring electronically submitted reports within 10 business days of when property is unblocked or transferred. Further, the Rule clarifies that the definition of "transaction" in the reporting requirement for rejected transactions (§ 501.604) includes "transactions related to securities, checks, or foreign exchange, as well as sales or purchases of goods or services," but that securities, checks, foreign exchange, and goods and services are not, by themselves, transactions when not included as part of a transaction. Additionally, OFAC is updating the procedures related to requests for the release of property blocked due to "mistaken identity" and the rules related to the information available under the Freedom of Information Act.

These RPPR amendments demonstrate OFAC's efforts to streamline and clarify its expectations regarding who is required to file what with the agency and when. The amendments also highlight the importance of monitoring changes to the RPPR and updating compliance processes accordingly.

CFPB Update

CFPB Issues Report on Risks Posed by Video Game Marketplaces

On April 4, 2024, the Consumer Financial Protection Bureau ("CFPB") issued a report on "*Banking in Video Games and Virtual Worlds*" ("Report"). The Report focuses on the movement of money in virtual worlds and how gamer data is collected, used, and shared. In tandem with the Report, the CFPB issued a press release and a statement noting that it is monitoring financial transactions in video games and virtual worlds for fraud and scams, and emphasizing its position that in-game currencies increasingly resemble the traditional banking and payment system, particularly where they can be converted back to fiat currency. The Report highlights three main areas of risk: (1) the resemblance of gaming products and services to conventional financial products, as gaming products increasingly enable players to store and transfer assets; (2) the failure of gaming companies to provide customer support when consumers experience financial harm, especially given the rise of recent phishing attempts; and (3) the collection and use of personal and behavioral data. Based on this, the CFPB has emphasized that it will be monitoring for compliance with federal consumer financial protection laws.

For more information, please see our client alert.

CFPB Focus on Credit Card Rewards Programs

On May 9, 2024, the CFPB released an issue spotlight on credit card rewards ("Spotlight"). The Spotlight focuses on identified issues with rewards programs, including vague terms and conditions, devaluing of rewards, revocation of rewards, and redemption issues with earned benefits. In the Spotlight, the CFPB points to federal consumer protection laws under their jurisdiction that apply to credit card rewards programs, particularly the Consumer Financial Protection Act's prohibition of unfair, deceptive, or abusive acts or practices. Also on May 9, the CFPB and the Department of Transportation held a joint hearing on airlines, frequent flyer programs, and credit card rewards. In his opening remarks, Director Chopra laid out his goals moving forward with respect to these programs, including protecting points from massive devaluation, stopping "bait-and-switch," examining exclusive deals on credit card benefits, and promoting competition on interest rates with high-rewards cards.

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U.S. Supreme Court Holds CFPB Funding Structure Constitutional

On May 16, 2024, the U.S. Supreme Court held in a 7-2 decision that the funding structure of the CFPB complies with the Appropriations Clause of the United States Constitution. Justice Thomas wrote the majority opinion with separate concurrences written by Justices Kagan and Jackson. Justice Alito, joined by Justice Gorsuch, dissented.

The decision puts to rest longstanding litigation over the Bureau's funding structure, which had cast doubt over the Bureau's ability to exercise its rulemaking, enforcement, and other powers. The litigation began in 2018 when two trade associations challenged the CFPB's Payday Lending Rule in a U.S. District Court in Texas. The lawsuit challenged the CFPB's "self-funding" mechanism, which permits the CFPB to receive its funding from the Federal Reserve System rather than through the typical annual Congressional appropriations process. The Plaintiffs argued that the CFPB's funding structure was too open-ended in duration and amount to satisfy the constitutional requirement for "Appropriations made by Law."

The Court held that "an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes[,]" and concluded that the mechanism for funding the CFPB satisfies those requirements. Given the skepticism a number of Justices expressed toward Plaintiffs' position at oral argument, the Court's reversal of the Fifth Circuit's holding was unsurprising.

For more information, please see our client alert.

CFPB Subjects Certain BNPL Products to Credit Card Requirements

On May 31, 2024, the CFPB published an interpretive rule indicating that some Buy Now, Pay Later ("BNPL") products are subject to certain provisions of Regulation Z applicable to credit card providers. Many BNPL providers have historically taken the view that certain of their products are not subject to the provisions of Regulation Z because they are limited to four payments (pay-in-four) with no associated finance charge. In contrast, Regulation Z generally applies to credit subject to a finance charge or payable in more than four installments.

In the interpretive rule, the CFPB takes the position that BNPL products that use digital user accounts "mimic conventional credit cards" and, thus, are subject to Regulation Z. The CFPB acknowledges that, although BNPL products are not open-end credit, many provisions of subpart B apply more broadly to include close-end credit, and Congress gave the CFPB authority to apply open-end credit regulations in these circumstances.

Against that backdrop, the interpretive rule requires BNPL lenders to provide cost-of-credit disclosures, investigate disputes, refund returned products or cancelled services, and provide billing statements. The CFPB touted this guidance as leveling the playing field by imposing on BNPL providers the consumer protections that already exist for credit card purchases. The interpretive rule is applicable July 30, 2024, and comments are due August 1, 2024.

For more information, please see our client alert.

CFPB Proposes Rule Banning Medical Bills from Credit Reports

On June 11, 2024, the CFPB issued a proposed rule banning certain medical bills or debt from appearing on credit reports. The CFPB is proposing to eliminate Regulation V's current exception to Congress's general prohibition on obtaining and using medical information, which allows for the use of medical debts in credit reports and credit decisioning. The proposed rule would eliminate this exception, prevent credit reporting companies from using medical debt on credit reports, and prohibit lenders from taking medical devices as collateral. In his remarks introducing the rule, Director Chopra highlighted CFPB findings of inaccurate medical bills, predatory actors, and other legal violations in medical billing to justify the rule. In particular, the CFPB has taken the view that "medical debts provide less predictive value to lenders than other debts on credit reports." Comments are due on August 12, 2024. ■

** Olivia S. Chap, Jordan Hare, Nate Kurcab, and Malka Levitin contributed to this column.*

Watch For

CFTC

CFTC Press Release 8918-24 (June 4, 2024) – The CFTC's Global Markets Advisory Committee advanced two recommendations to examine the impacts of proposed U.S. bank capital requirements and to improve collateral and liquidity management for non-centrally cleared derivatives.

CFTC Press Release 8913-24 (May 23, 2024) – The CFTC's Division of Data published updated post-initial appropriate minimum block sizes and post-initial cap sizes as determined under CFTC regulations. The Division of Market Oversight also issued a letter further extending the no-action position originally taken in CFTC Letter No. 22-03 regarding the compliance dates for certain amendments, adopted in November 2020, to the CFTC's swap data reporting rules concerning block trades and post-initial cap sizes. The updated post-initial appropriate minimum block and cap sizes will be effective October 7. The updated post-initial appropriate minimum block and post-initial cap sizes, as well as other swap reporting rules, forms, and requirements, are at Real-Time Reporting | CFTC.

CFTC Press Release 8907-24 (May 10, 2024) – The CFTC issued a Notice of Proposed Rulemaking to further specify types of event contracts that fall within the scope of Commodity Exchange Act section 5c(c)(5)(C) and are contrary to the public interest. The Commission has recently observed an increase in the number and variety of event contracts listed for trading by CFTC-registered exchanges. In addition, the Commission has recently received applications for exchange registration, and expressions of interest regarding registration, from entities indicating that they are interested in listing event contracts for trading. In light of these developments, the Commission proposes to amend CFTC regulation 40.11 to further specify types of event contracts that fall within the scope of CEA section 5c(c)(5)(C) and are contrary to the public interest. The proposal includes a determination that event contracts involving each of the activities enumerated in CEA section 5c(c)(5)(C) (gaming, war, terrorism, assassination, and activity that is unlawful under any Federal or State law) are, as a category, contrary to the public interest and therefore may not be listed for trading or accepted for clearing on or through a CFTC-registered entity. Further, the proposal defines "gaming" in detail, and the proposal lists illustrative examples of gaming that include staking or risking something of value on the outcome of a political contest, an awards contest, or a game in which one or more athletes compete, or an occurrence or non-occurrence in connection with such a contest or game. Thus, event contracts involving these illustrative examples of gaming could not be listed for trading or accepted for clearing under the proposal. Comments must be received on or before July 9, 2024 and will be published on CFTC.gov.

CFTC Press Release 8905-24 (May 2, 2024) – The CFTC's Technology Advisory Committee released a Report on Responsible AI in Financial Markets. The TAC, which has as its members many well-respected experts in AI, issued a Report that facilitates an understanding of the impact and implications of the evolution of AI on financial markets. The Committee made five recommendations to the Commission as to how the CFTC should approach this AI evolution in order to safeguard financial markets.

CFTC Press Release 8902-24 (April 30, 2024) – The CFTC announced approval of final rules to amend its large trading reporting regulations for futures and options. These regulations require futures commission merchants, clearing members, foreign brokers, and certain reporting markets (reporting firms) to report to the Commission position information for the largest futures and options traders. The final rules are effective 60 days after publication in the *Federal Register*. Reporting firms must comply with the final rules two years after publication in the *Federal Register*.

CFTC Press Release 8901-24 (April 30, 2024) – The CFTC announced it has approved a final rule that amends the capital and financial reporting requirements of Swap Dealers and Major Swap Participants. The amendments make changes consistent with CFTC Staff Letter No. 21-15 regarding the tangible net worth capital approach for calculating capital under CFTC Regulation 23.101, as well as CFTC Staff Letter No. 21-18, as further extended by CFTC Staff Letter No. 23-11, regarding the alternate financial reporting requirements for SDs subject to the capital requirements of a prudential regulator. The amendments also revise certain Part 23 regulations regarding the financial reporting requirements of SDs, including the required timing of certain notifications, the process for approval of subordinated debt for capital, and the information requested on financial reporting forms to conform to the rules. The amendments are intended to make it easier for SDs and MSPs to comply with the CFTC's financial reporting obligations and demonstrate compliance with minimum capital requirements. The effective date of the final rule is 30 days from the date of publication in the *Federal Register*. To allow for sufficient time to effectuate the reporting and notification amendments, the final rule has a compliance date of September 30, 2024, and will apply to all financial reports with an "as of" reporting date of September 30, 2024, or later. For more information on the final rule, see the Fact Sheet.

CFTC Press Release 8896-24 (April 23, 2024) – The CFTC approved final rules to amend its swap execution facility regulations related to uncleared swap confirmations to address issues which have been addressed in CFTC staff no-action letters as well as associated conforming and technical changes. In particular, the final rules amend CFTC Regulation 37.6(b) to enable SEFs to incorporate terms of underlying, previously negotiated agreements between the counterparties by reference

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in an uncleared swap confirmation without being required to obtain such underlying, previously negotiated agreements. Further, the final rules amend CFTC Regulation 37.6(b) to require such confirmation to take place "as soon as technologically practicable" after the execution of the swap transaction on the SEF for both cleared and uncleared swap transactions. The final rules also amend CFTC Regulation 37.6(b) to make clear the SEF-provided confirmation under CFTC Regulation 37.6(b) shall legally supersede any conflicting terms in a previous agreement, rather than the entire agreement. In addition, the final rules make conforming amendments to CFTC Regulation 23.501(a)(4)(i) to correspond with the amendments to CFTC Regulation 37.6(b). Finally, the final rules make certain non-substantive amendments to CFTC Regulation 37.6(a)-(b) to enhance clarity. The final rules are effective 30 days after publication in the *Federal Register*. Upon the effective date of the final rules, CFTC No Action Letter No. 17-17 will expire.

CFTC Press Release 8894-24 (April 22, 2024) – The CFTC announced it is extending the deadline for the public comment period on a proposed rule that makes certain modifications to rules for SEFs and DCMs in Part 37 and 38 that would establish governance requirements regarding market regulation functions, as well as related conflicts of interest standards. The deadline is being extended to May 13, 2024. The proposed rule was published in the *Federal Register* on March 19, 2024, with a 60-day comment period scheduled to close on April 22, 2024. [See CFTC Press Release No. 8866-24]

FDIC

FDIC Press Release 48-2024 (June 20, 2024) – The FDIC Board of Directors approved a final rule to strengthen resolution planning for insured depository institutions (IDIs) with at least $50 billion in total assets. The final rule incorporates several changes from the agency's proposed rule published in September of 2023. Under the rule announced today, the FDIC will require large banks with total assets of at least $100 billion to submit comprehensive resolution plans that meet enhanced standards to support the FDIC's ability to undertake an efficient and effective resolution under the Federal Deposit Insurance Act should such an institution fail. The FDIC's final rule will require IDIs with total assets of at least $50 billion but less than $100 billion to submit more limited 'informational filings' to assist in their potential resolution. The agency will not require these institutions to develop a resolution strategy and related valuation information as part of their submissions. These institutions are also exempt from submitting certain strategy-related content requirements regarding the institution's franchise components. The final rule also bolsters engagement between the FDIC and covered IDIs on resolution matters and requires periodic testing to validate key capabilities and processes needed in a resolution, such as continuation of critical banking services and potential marketing of the institution's franchise or its components. Additionally, the final rule enhances the criteria to assess the credibility of IDIs' resolution submissions and the FDIC's approach to providing feedback. The final rule will take effect on October 1, 2024, and the first submissions are expected next year.

Federal Reserve Board

Federal Reserve Press Release (May 17, 2024) – The Federal Reserve Board announced its denial of two rulemaking petitions due to legal and policy considerations. The first petition asked the Board to develop a framework requiring Board-supervised firms to disclose promised financial commitments to certain corporate initiatives, and the second asked for revisions to the Uniform Financial Institution Rating System framework and adjustments to the framework for financial holding company eligibility.

Federal Reserve Press Release (May 9, 2024) – The Federal Reserve Board released a summary of the exploratory pilot Climate Scenario Analysis exercise that it conducted with six of the nation's largest banks. The summary describes how these banks are using climate scenario analysis to explore the resiliency of their business models to climate-related financial risks. Participating banks took a wide range of approaches in this exercise to consider the possible implications of different physical and transition risk scenarios. The exercise highlighted data gaps and modeling challenges that arise when estimating the financial impacts of highly complex and uncertain risks over various time horizons. The banks that participated in the exercise were Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and Wells Fargo. The exercise was exploratory in nature and does not have capital consequences.

FinCEN

FinCEN News Release (May 13, 2024) – The SEC and FinCEN jointly proposed a new rule that would require SEC-registered investment advisers and exempt reporting advisers to establish, document, and maintain written customer identification programs. The proposal is designed to prevent illicit finance activity involving the customers of investment advisers by strengthening the anti-money laundering and countering the financing of terrorism framework for the investment adviser sector. Under this proposal, RIAs and ERAs would be required

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to implement reasonable procedures to identify and verify the identity of their customers, among other requirements, in order to form a reasonable belief that RIAs and ERAs know the true identity of their customers. The proposed rule would make it more difficult for criminal, corrupt, or illicit actors to establish customer relationships—including by using false identities—with investment advisers for the purposes of laundering money, financing terrorism, or engaging in other illicit finance activity. This proposed rulemaking complements a separate FinCEN proposal in February 2024 to designate RIAs and ERAs as "financial institutions" under the Bank Secrecy Act and subject them to AML/CFT program requirements and suspicious activity report filing obligations, among other requirements. That proposal cites a Treasury risk assessment that identified that the investment adviser industry has served as an entry point into the U.S. market for illicit proceeds associated with foreign corruption, fraud, tax evasion, and other criminal activities. The rule, if adopted, would require RIAs and ERAs to, among other things, implement a CIP that includes procedures for verifying the identity of each customer to the extent reasonable and practicable and maintaining records of the information used to verify a customer's identity, among other requirements. The proposal will be published on SEC.gov and in the *Federal Register*. The public comment period will remain open for 60 days after publication of the proposing release in the *Federal Register*.

FinCEN News Release (April 18, 2024) – FinCEN issued a Financial Trend Analysis focusing on patterns and trends identified in Bank Secrecy Act data linked to Elder Financial Exploitation, or the illegal or improper use of an older adult's funds, property, or assets. FinCEN examined BSA reports filed between June 15, 2022 and June 15, 2023 that either used the key term referenced in FinCEN's June 2022 EFE Advisory or checked "Elder Financial Exploitation" as a suspicious activity type. Financial institutions began filing BSA reports featuring the advisory's key term on the same day that FinCEN published its 2022 advisory. EFE typically consists of two subcategories: elder scams and elder theft.

FinCEN News Release (March 28, 2024) – FinCEN is issuing a request for information related to existing requirements for banks under the Customer Identification Program Rule to collect a taxpayer identification number from a customer prior to opening an account. Generally, for a customer who is an individual and a U.S. person, banks are required to collect a full Social Security number from a customer. The RFI is being issued in consultation with staff at the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Board of Governors of the Federal Reserve System. In addition, this RFI supports FinCEN's ongoing efforts to implement section 6216 of the Anti-Money Laundering Act of 2020, which requires FinCEN to, among other things, identify regulations and guidance that may be outdated, redundant, or otherwise do not promote a risk-based AML/CFT regime. Comments to the RFI will be accepted for 60 days following publication in the *Federal Register*.

FINRA

FINRA News Release (May 22, 2024) – FINRA's new rules for evolving work models — hybrid and remote —provide member firms greater flexibility for their registered persons to work from home. Their new Residential Supervisory Location (RSL) Rule and Remote Inspections Pilot Program Rule are intended to provide member firms greater flexibility — not less — to allow eligible registered persons to work from home, following the expiration of temporary COVID-19 relief from existing requirements. The new rules provide a practical and balanced way for firms to meet their regulatory obligations, while protecting investors, and acknowledging the need for greater workplace flexibility. FINRA has provided guidance — including a Regulatory Notice, FAQs, webinars and direct communications from our staff — to enable them to use the new RSL designation and Remote Inspections Pilot Program should they wish to do so. Firms are encouraged to review these new rules and reach out to their Risk Monitoring Analysts with questions about how these rules might impact their business or workforce planning.

FINRA News Release (March 28, 2024) – FINRA has begun disseminating individual transactions in active U.S. Treasury securities at the end of the day, raising the level of transparency in the market for these benchmark securities. The information is available on a same-day basis for FINRA members and other professionals who subscribe to the new data product. It is also publicly available and free of charge on FINRA's website for non-professionals' personal, non-commercial use on a next-day basis. Starting April 1, FINRA will also begin offering historical data on a six-month delay.

FINRA Trade Reporting Notice (March 22, 2024) – FINRA is providing advance notice of future updates to its equity trade reporting guidance in connection with upcoming enhancements to the FINRA equity trade reporting facilities to support reporting of fractional share quantities. Under the updated guidance, members engaged in fractional share trading will be required to report fractional share quantities up to six digits after the decimal. The effective date of the updated trade reporting guidance will be no earlier than the first calendar quarter of 2025. FINRA will announce the specific effective date of the updated guidance in a future *Notice*.

FINRA Regulatory Notice 24-08 (March 19, 2024) – FINRA has amended FINRA Rule 4210 (Margin Requirements) to establish a specified exception under the margin rules with

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respect to certain short option or warrant positions on indexes that are written against products that track the same underlying index. Referred to as "protected" option or warrant positions, the new exception conforms with similar provisions Cboe recently adopted. The amendments are effective as of the date of issuance of this *Notice*.

Joint Press Release

FDIC Press Release 34-2024 (May 6, 2024) – The FDIC, OCC and FHFA have adopted a Notice of Proposed Rulemaking to address incentive-based compensation arrangements, as required under section 956 of the Dodd-Frank Act (section 956). The NCUA is expected to take action on the NPR in the near future. The SEC has included a rulemaking to implement section 956 on its rulemaking agenda. This NPR is intended to advance stakeholder engagement needed to develop a final incentive-based compensation rule. The NPR re-proposes the regulatory text previously proposed in June 2016, and seeks public comment in the preamble on certain alternatives and questions. Section 956 requires the appropriate Federal regulators—the FDIC, FRB, OCC, NCUA, FHFA & SEC—to jointly prescribe regulations or guidelines with respect to incentive-based compensation practices at certain financial institutions that have $1 billion or more in assets. Once the NPR is adopted by all six agencies, it will be published in the *Federal Register* with a comment period of 60 days following publication. Until then, each agency acting on the NPR will make it available on their respective website, and will accept comments. The proposed rule includes prohibitions intended to make incentive-based compensation arrangements more sensitive to risk. These include a prohibition on incentive-based compensation arrangements that do not include risk adjustment of awards, deferral of payments, and forfeiture and clawback provisions. The prohibitions also emphasize the important role of sound governance and risk management control mechanisms. These prohibitions would help safeguard covered institutions from the types and features of incentive-based compensation arrangements that encourage inappropriate risks. The recordkeeping and disclosure requirements in the proposed regulatory text would assist the appropriate Federal regulator in monitoring and identifying areas of potential concern at covered institutions. Comments received on this NPR and those previously submitted on the 2016 NPR, will further inform efforts to address incentive-based compensation arrangements, as required under section 956.

MSRB

MSRB Press Release (June 17, 2024) – The MSRB expanded the availability of yield curves and indices on its free Electronic Municipal Market Access (EMMA®) website with the addition of the Tradeweb AAA Municipal Curve. This new enhancement to EMMA offers further market transparency by providing another source of hourly municipal yield information, which helps investors, issuers and market participants make more informed and timely market decisions.

June 5, 2024 – The MSRB issued a Request for Comment to solicit input on draft amendments to MSRB Rule A-12, on registration, and Form A-12, which would create new reporting requirements for bank dealers. These new reporting requirements include reporting information about the municipal securities registration and municipal securities-related examination qualification status of bank dealer associated persons. The RFC is intended to elicit views and input on the burdens and benefits of gathering this information about associated persons of bank dealers using MSRB Form A-12 and potentially making this information publicly available on the MSRB's website at a later date. The MSRB also seeks comment on a draft technical amendment to Rule A-12 to add an additional notification requirement for FINRA-member municipal advisor-only firms that subsequently add a new business line for municipal securities activities. This parallels an existing requirement for brokers, dealers and municipal securities dealers that subsequently add municipal advisory activities as a new business line. Comments may be submitted no later than August 5, 2024.

MSRB Notice 2024-08 (May 31, 2024) – On May 30, 2024, the MSRB filed with the SEC a proposed rule change to amend MSRB Rule G-27, on supervision, to permit certain brokers, dealers, and municipal securities dealers that are members of FINRA to fulfill their internal inspection obligations under Rule G-27(d) remotely for a specified period. The amendment is designed to conform the MSRB's supervision rule to FINRA's recently approved supervisory requirements under FINRA Rule 3110 Supplementary Material .18 creating a remote inspections pilot program (the "FINRA Pilot Program"). The MSRB's proposed rule change was filed for immediate effectiveness with an operative date of July 1, 2024, to coincide with the operative date of the FINRA Pilot Program.

May 30, 2024 – The MSRB reminds dealers that the amendment to MSRB Rule G-27 on dealer supervision, filed with the SEC on May 10, 2024, becomes operative on June 1, 2024. The rule change will allow FINRA-member dealers to designate an associated person's private residence where supervisory activities are conducted as a residential supervisory location, which harmonizes Rule G-27 with recently adopted amendments by FINRA.

May 24, 2024 – The MSRB reminds municipal market participants that the municipal bond market, and many other markets, will be moving from a regular-way settlement date of

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T+2 to T+1 on Tuesday, May 28. This means that regular-way settlement for Friday, May 24 (T+2) and Tuesday, May 28 (T+1) is Wednesday, May 29. Any municipal bond trades executed with an extended settlement date, such as for a recently issued security with a long first settlement date (known as a "when, as and if issued" transaction), will not be impacted by the change to T+1. The MSRB's new same-day allocation rule similarly will apply to regular-way municipal bond trades beginning Tuesday, May 28, but will not impact "when, as and if issued" municipal bond transactions.

MSRB Notice 2024-07 (May 22, 2024) – Largely pertaining to Rule G-12(c), a provision that specifies the confirmation disclosure requirements for inter-dealer municipal securities transactions that are ineligible for automated comparison in a system operated by a registered clearing agency, the MSRB is retiring nine pieces of interpretive guidance that, at their respective times of publication, were designed to address a novel or frequently asked question but are now believed to have limited utility in the present market, are considered outdated due to current market practices or are otherwise superfluous.

MSRB Press Release (May 10, 2024) – The MSRB filed with the SEC a proposed rule change to MSRB Rule G-27 on dealer supervision. The proposed rule change will allow FINRA-member dealers to designate an associated person's private residence where supervisory activities are conducted as a residential supervisory location, which will harmonize Rule G-27 with recently adopted amendments by FINRA. The rule change was filed for immediate effectiveness and becomes operative on June 1, 2024. The RSL classification allows FINRA-member broker-dealers the option to treat a private residence at which an associated person engages in specified supervisory activities, subject to certain safeguards and limitations, as a non-branch location. As a non-branch location, the newly defined RSL will be subject to inspections on a regular periodic schedule instead of the annual inspection currently required for offices of municipal supervisory jurisdiction and supervisory branch offices. To utilize the optional RSL classification, a dealer and the associated person assigned to each location must meet specified conditions and eligibility requirements, pursuant to Rule G-27. Additionally, the dealer must develop a reasonable risk-based approach to designating an office or location as an RSL and conduct and document a risk assessment for the associated person assigned to each office or location. Dealers must also provide a list of designated RSLs to FINRA, with the first list due to FINRA by October 15, 2024, covering all locations designated between June 1, 2024, and September 30, 2024. In the coming weeks, MSRB expects to file an additional amendment to Rule G-27 with the SEC, allowing certain dealers to fulfill their office inspection obligations remotely for a pilot period through participation in FINRA's Remote Inspections Pilot Program.

April 2, 2024 – Next week, the MSRB will launch a survey asking municipal advisor professionals for their input on what content should appear on the Municipal Advisor Representative Qualification Examination (Series 50 exam). The purpose of the Series 50 exam is to identify basic competencies for acting in the capacity of a municipal advisor representative and this survey aims to validate the baseline knowledge as represented on the Series 50 exam content outline.

MSRB Notice 2024-05 (March 21, 2024) – The MSRB submitted a proposed rule change to the SEC to make a technical amendment, for immediate effectiveness, to Supplementary Material .01 to MSRB Rule A-11, on assessments for municipal advisor professionals. This technical amendment clarifies that the calculation of the annual fee on municipal advisors for covered professionals2 under Rule A-11(b) (the "Municipal Advisor Professional Fee") is based on the number of covered professionals as of January 31, 2024, rather than January 31, 2023, for the fees to be assessed in 2024, and as of January 31 of each subsequent year thereafter. The amendment does not change the rate of the Municipal Advisor Professional Fee, which is $1,060 for each covered professional. Rather, it changes the fixed date of January 31, 2023, previously included in the rule text to January 31 of the applicable year, beginning in 2024, in connection with the calculation each year of the Municipal Advisor Professional Fee based on the number of covered professionals for whom a municipal advisor has on file with the Commission an active Form MA-I. As a result of this technical amendment, the Municipal Advisor Professional Fee that will become due by April 30, 2024 pursuant to Rule A-11(b) will be based on the number of covered professionals as of January 31, 2024.

OCC

OCC Bulletin 2024-12 (May 6, 2024) – The OCC approved a notice of proposed rulemaking to implement section 956 of the Dodd–Frank Ac. The proposal would establish new requirements for incentive-based compensation at certain covered institutions. OCC-supervised institutions that would be subject to the proposed rule include national banks, federal savings associations, and federal branches and agencies, as well as these institutions' subsidiaries (other than brokers, dealers, insurance providers, investment companies, and investment advisers), that offer incentive-based compensation and have average total consolidated assets of at least $1 billion. The proposed rule would prohibit incentive-based compensation arrangements that encourage inappropriate risks by a covered institution (1) by providing an executive officer, employee, director, or principal shareholder of the covered institution with excessive compen-

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sation, fees, or benefits; or (2) that could lead to material financial loss to the covered financial institution. The proposed rule includes requirements for recordkeeping, policies and procedures, risk management, and governance. The close of the comment period will be calculated based on the date the notice is published in the *Federal Register*.

SEC

SEC Press Release 2024-58 (May 16, 2023) – The SEC announced the adoption of amendments to Regulation S-P to modernize and enhance the rules that govern the treatment of consumers' nonpublic personal information by certain financial institutions. The amendments update the rules' requirements for broker-dealers (including funding portals), investment companies, registered investment advisers, and transfer agents (collectively, "covered institutions") to address the expanded use of technology and corresponding risks that have emerged since the Commission originally adopted Regulation S-P in 2000. The amendments require covered institutions to develop, implement, and maintain written policies and procedures for an incident response program that is reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information. The amendments also require that the response program includes procedures for, with certain limited exceptions, covered institutions to provide notice to individuals whose sensitive customer information was or is reasonably likely to have been accessed or used without authorization. The amendments require a covered institution to provide notice as soon as practicable, but not later than 30 days, after becoming aware that an incident involving unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred. The notice must include details about the incident, the breached data, and how affected individuals can respond to the breach to protect themselves. The amendments will become effective 60 days after publication in the *Federal Register*. Larger entities will have 18 months after the date of publication in the *Federal Register* to comply with the amendments, and smaller entities will have 24 months after the date of publication in the *Federal Register* to comply.

SEC Press Release 2024-54 (May 13, 2023) – The SEC and FinCEN jointly proposed a new rule that would require SEC registered investment advisers and exempt reporting advisers to establish, document, and maintain written customer identification programs. The proposal is designed to prevent illicit finance activity involving the customers of investment advisers by strengthening the anti-money laundering and countering the financing of terrorism framework for the investment adviser sector. Under this proposal, RIAs and ERAs would be required to implement reasonable procedures to identify and verify the identity of their customers, among other requirements, in order to form a reasonable belief that RIAs and ERAs know the true identity of their customers. The proposed rule would make it more difficult for criminal, corrupt, or illicit actors to establish customer relationships — including by using false identities — with investment advisers for the purposes of laundering money, financing terrorism, or engaging in other illicit finance activity. This proposed rulemaking complements a separate FinCEN proposal in February 2024 to designate RIAs and ERAs as "financial institutions" under the Bank Secrecy Act and subject them to AML/CFT program requirements and suspicious activity report (SAR) filing obligations, among other requirements. That proposal cites a Treasury risk assessment that identified that the investment adviser industry has served as an entry point into the U.S. market for illicit proceeds associated with foreign corruption, fraud, tax evasion, and other criminal activities. The rule, if adopted, would require RIAs and ERAs to, among other things, implement a CIP that includes procedures for verifying the identity of each customer to the extent reasonable and practicable and maintaining records of the information used to verify a customer's identity, among other requirements. The proposal is generally consistent with the CIP requirements for other financial institutions, such as brokers or dealers in securities and mutual funds. The proposal is published on SEC.gov and will be published in the *Federal Register*. The public comment period will remain open for 60 days after publication of the proposing release in the *Federal Register*. A fact sheet on the Notice of Proposed Rulemaking is available.

SEC Press Release 2024-42 (March 27, 2023) – The SEC adopted amendments to the rule permitting certain internet investment advisers to register with the Commission (the "internet adviser exemption"). The amendments will require an investment adviser relying on the internet adviser exemption to have at all times an operational interactive website through which the adviser provides digital investment advisory services on an ongoing basis to more than one client. The amendments will also eliminate the current rule's *de minimis* exception by requiring an internet investment adviser to provide advice to all of its clients exclusively through an operational interactive website and to make certain corresponding changes to Form ADV. The amendments will become effective 90 days after publication in the *Federal Register*. An adviser relying on the internet adviser exemption must comply with the rule, including the requirement to amend their Form ADV to include a representation that the adviser is eligible to register with the Commission under the internet adviser exemption, by March 31, 2025. Most investment advisers will have filed their annual updating amendments to Form ADV by this date i.e., 90 days

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after the Dec. 31, 2024, fiscal year end). An adviser that is no longer eligible to rely on the amended exemption and does not otherwise have a basis for registration with the Commission must register in one or more states and withdraw its registration with the Commission by filing a Form ADV-W by June 29, 2025.

Treasury

Treasury Press Release (April 26, 2024) – The U.S. Department of the Treasury released a request for information on the Uses, Opportunities, and Risks of Artificial Intelligence (AI) in the Financial Services Sector. Building on Treasury's recent work on cybersecurity and fraud in AI and recent initiatives by other federal agencies, Treasury is seeking public comment on the uses of AI in the financial services sector and the opportunities and risks presented by developments and applications of AI within the sector. Treasury also wants to increase its understanding of how AI is being used within the financial services sector and the opportunities and risks presented by developments and applications of AI within the sector, including potential obstacles for facilitating responsible use of AI within financial institutions, the extent of impact on consumers, investors, financial institutions, businesses, regulators, end-users, and any other entity impacted by financial institutions' use of AI, and recommendations for enhancements to legislative, regulatory, and supervisory frameworks applicable to AI in financial services. Members of the public are encouraged to submit comments within 60 days.

Treasury Press Release (April 26, 2024) – The U.S. Department of the Treasury's Federal Insurance Office announced a partnership with the National Science Foundation to establish a new Industry-University Cooperative Research Center to provide research, analysis, and thought leadership to improve the insurance sector's modeling and underwriting of terrorism and catastrophic cyber risks. An IUCRC is a vehicle, developed by the NSF, where university faculty and students work with an industry consortium to carry out cutting-edge research focused on the collective needs of a sector of the U.S. economy. This new IUCRC will bring together the insurance sector, academic teams, the federal government, and other stakeholders to strengthen the resilience of the U.S. financial system.

Treasury Press Release (April 11, 2024) – The U.S. Department of the Treasury, as Chair of the Committee on Foreign Investment in the United States (CFIUS), issued a Notice of Proposed Rulemaking to enhance certain CFIUS procedures and sharpen its penalty and enforcement authorities. The proposed rule reflects CFIUS's evolution and increased focus on monitoring, compliance, and enforcement. The proposed rule hones CFIUS's ability to accomplish its national security mission consistent with the United States' open investment policy. CFIUS is authorized to review certain transactions involving foreign investment into businesses in the United States and certain transactions by foreign persons involving real estate in the United States in order to determine the effect of such transactions on the national security of the United States. CFIUS enforces transaction parties' compliance with its statute and regulations, as well as agreements entered into and conditions and orders imposed under such authorities, through its authority to impose civil monetary penalties and seek other remedies. Comments will be accepted for 30 days following publication in the *Federal Register*.

Treasury Press Release (March 27, 2024) – The U.S. Department of the Treasury released a report on Managing Artificial Intelligence-Specific Cybersecurity Risks in the Financial Services Sector. Treasury's Office of Cybersecurity and Critical Infrastructure Protection led the development of the report. In the report, Treasury identifies significant opportunities and challenges that AI presents to the security and resiliency of the financial services sector. The report outlines a series of next steps to address immediate AI-related operational risk, cybersecurity, and fraud challenges. In addition, Treasury will continue to examine a range of AI-related matters, including the impact of AI on consumers and marginalized communities.

Available Publications

OCC News Release 2024-64 (June 18, 2024) – The OCC reported the key issues facing the federal banking system in its *Semiannual Risk Perspective for Spring 2024*. The OCC reported that, while the overall condition of the federal banking system remains sound, the maturing economic cycle may cause consumer headwinds. The OCC highlighted credit, market, operational, and compliance risks, as the key risk themes in the report.

FINRA Information Notice (June 18, 2024) – FINRA is advising member firms that the Options Clearing Corporation has issued the June 2024 Options Disclosure Document. The ODD contains general disclosures on the characteristics and risks of trading standardized options. The June 2024 ODD contains new language to update (i) the list of options markets to include MEMX, LLC and (ii) settlement information to reflect T+1 settlement. Rule 9b-1 under the Securities Exchange Act requires broker-dealers to deliver the ODD and supplements to customers. FINRA has similar requirements in FINRA Rule 2360(b)(11)(A)(1), which, among other things,

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requires firms to deliver the current ODD to each customer at or before the time the customer is approved to trade options. To comply with the requirements of FINRA Rule 2360(b)(11)(A)(1), firms may distribute the June 2024 ODD in various ways. Unique to prior versions of the ODD, this version may be distributed by firms as a one-page supplement (June 2024 Supplement) to only those customers who previously received the March 2023 ODD or as the full June 2024 ODD to all other individuals. The availability of the June 2024 Supplement is intended to be a one-time-event because of the limited number of changes made to the March 2023 ODD and the expectation that the June 2024 ODD will require update within one year. Firms should consult with their compliance and legal teams to determine the appropriate distribution to customers.

FINRA News Release (June 4 22, 2024) – The FINRA Investor Education Foundation has released a new report, "The machines are coming (with personal finance information). Do we trust them?" Despite the growing popularity of artificial intelligence, very few consumers knowingly turn to AI for information on personal finances, according to the report.

May 29, 2024 – The MSRB published an update to a 2017 study on the timing of annual financial disclosures by municipal securities issuers. The updated study revealed that the average length of time audited financial statements were submitted to the MSRB following the end of the issuer's fiscal year increased. Meanwhile, the average length of time annual financial/operating data were submitted to the MSRB decreased.

FDIC Press Release 39-2024 (May 22, 2024) – The FDIC published its *2024 Risk Review*, which summarizes conditions in the U.S. economy, financial markets, and the banking industry. An annual publication based on year-end banking data from the prior year, the 2024 Risk Review provides an overview of banking risks in 2023 in five broad categories: market risks that include funding and liquidity risks; credit risks in various portfolios including commercial real estate and consumer lending; operational risks; crypto-asset risks; and climate-related financial risks. Economic conditions remained strong in 2023, and financial market conditions improved toward the end of the year. The banking industry demonstrated resilience after a period of stress in early 2023 as full-year net income remained high, overall asset quality metrics were favorable, and liquidity stabilized.

SEC Press Release 2024-57 (May 15, 2023) – The staff of the SEC published a new report of Investment Adviser Statistics, which is based on aggregated data filed by investment advisers on Form ADV. The new report, which will be updated on an annual basis, is designed to give the public a view into the investment advisory industry, with insights into areas such as business activities, client composition, and the types of funds advised. The report shows trends over time. The report is available on the SEC's website here.

FDIC Press Release 24-2024 (April 10, 2024) – The FDIC released a comprehensive report on how the FDIC would manage the orderly resolution of a large, complex financial company under Title II of the Dodd-Frank. The *Overview of Resolution Under Title II of the Dodd-Frank Act* is the most detailed description to date of the FDIC's preparedness to use its Title II resolution authority in a manner that promotes financial stability and prevents taxpayer bailouts. The *Overview* explains how the FDIC would use authorities under Title II of the Dodd-Frank Act, with a particular focus on how it expects to resolve U.S.-headquartered Global Systemically Important Banking Organizations. In addition, the paper: Provides background of resolution-related authorities in the Dodd-Frank Act; Highlights key measures that facilitate preparation and implementation of resolution under Title II authority; Reviews strategic decision-making for the use of Title II authority; and Explains how the FDIC expects to carry out a Title II resolution of a U.S. GSIB using a Single Point of Entry resolution strategy.■

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Who's News

Robert Bartl, formerly a Senior Fiduciary Risk Specialist, has retired from the Federal Reserve and is now working as an independent fiduciary consultant as well as doing estate planning for a Chicago area law firm.

Cory Claussen has been promoted to Vice President, Federal Government Affairs, Office of Government Affairs at FINRA.

Tina Diamantopoulos has been named Director of the SEC's Chicago Regional Office, the Commission's second-largest regional office.

Mark Douce has joined Key Investment Services as Chief Compliance Officer. Previously, he was CCO at Capital One Securities.

Linda Filardi, Esq., has been promoted to Senior Vice President and Associate General Counsel, Head of Lending, Commercial and Private Bank at Flagstar Bank.

Cynthia Foresta has joined Huntington Financial Advisors as CCO, SVP. Previously, Cynthia was CCO, SVP at Key Investment Services LLC.

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Program Update

2024 Securities Compliance Seminar

April 17-19 in Chicago

FMA's 33rd Securities Compliance Seminar took place in person **April 17 - 19** at the **InterContinental Chicago Magnificent Mile Hotel**. The annual spring event is a three-day educational and networking experience for securities compliance professionals, risk managers, internal auditors, attorneys, service providers and regulators.

Congratulations to the planning committee for developing varied agenda topics and securing noted industry leaders and regulators as speakers. Members included: **Carlos Arias** (U.S. Bancorp Investments); **Mark Lasswell** (Ameriprise Financial Services / RiverSource); **Diane Novak** (HomeStreet Bank); **Mark Carberry** (J.P. Morgan); and **Melissa Loner** (formerly at Avantax, Inc.).

The agenda featured these sessions and confirmed speakers:

Key 2024 (and Beyond) Legislative and Regulatory Initiatives

Moderator: **Kimberly Prior | Winston & Strawn LLP**

- **Basil Godellas** — **Winston & Strawn LLC**
- **Daniel Konar** — **Stellar Development Foundation**
- **Elizabeth Sheridan** — **National Futures Association**
- **Ed Wegener** — **Oyster Consulting, LLC**
- **Daniel Yukilevich** — **BMO Capital Markets**

Fiduciary Requirements in BDs: Reg BI—Where Is It Going?

Moderator & Speaker: **David Porteous | Faegre Drinker Biddle & Reath**

- **Bradford Campbell** — **Faegre Drinker Biddle & Reath**
- **James Martignon** — **BMO Financial Group**

Compliance Challenges in the Sales of Complex Products

Moderator: **Mark Carberry | J.P. Morgan**

- **Chris Burky** — **FINRA**
- **Nicholas Laughlin** — **J.P. Morgan**
- **Donald Littlefield** — **Bressler, Amery & Ross, P.C.**

Regulatory Changes Driving Market Structure

Moderator: **Zachary Zweihorn | Davis Polk & Wardwell LLP**

- **Thomas Merritt** — **Virtu Financial**
- **John Roeser** — **Charles Schwab**
- **Racquel Russell** — **FINRA**
- **David Shillman** — **SEC**

2-for-1, first-timer & govt/regulator registration discounts, plus an additional 3-for-1 special offer for locals (Illinois only), were available.

Courtesy of Choose Chicago

Regulatory Forum

Moderator & Speaker: **Shawn O'Neill | FINRA**

- **Joseph Brady** — **NASAA**
- **Tina Diamantopoulos** — **SEC**
- **William Otto** — **MSRB**
- **Kathryn Pyszka** — **SEC**

Artificial Intelligence in the Financial Services Market

Moderator: **Matt White | Baker Donelson**

- **Mark Bruns** — **FirstBank**
- **Alex Koskey** — **Baker Donelson**
- **Saveen Mundarath** — **Ankur**
- **Frank Sensenbrenner** — **SEC**

Best Practices: Supervision & the Risk Controls Framework

Moderator: **Carlos Arias | U.S. Bancorp Investments**

- **Dawn Corbin** — **U.S. Bancorp Investments**
- **Shawn O'Neill** — **FINRA**
- **Stephen Strombelline** — **J.S. Held LLC**

Continuing Challenges with Off-Channel Communications

Moderator: **Mark Lasswell | Ameriprise Financial Services / RiverSource**

- **Mark Carberry** — **J.P. Morgan**
- **Christopher Riper** — **Bates Group**
- **Alexander Schneble** — **Robert W. Baird & Co.**
- **Jeffrey Ziesman** — **Bryan Cave Leighton Paisner LLP**

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Program Update

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Workforce Engagement Strategies

Moderator: **Melissa Loner | formerly at Avantax, Inc.**

- **James Clements — Carson Group**
- **Heather Lyon — Strategic Investment Advisors, LLC**
- **Jennifer Selliers — Renaissance Regulatory Services**

Internal Audit: The Changing Landscape Within the Financial Industry

Moderator: **James Connors | Wells Fargo Audit**

- **James Enstrom — Cboe Global Markets**
- **Kathy Sheng — Freddie Mac**
- **Jay Simmons — Wells Fargo Audit**

Navigating the Currents: Dive into AML Enforcement Trends and Regulatory Responses

Moderator & Speaker: **Deborah Connor | Morrison & Foerster LLP**

- **Matthew Browne — FinCEN**
- **Michael Buffardi — FTI Consulting**
- **Anatoly Trofimchuk — DNB North America**

Elder and Vulnerable Adult Financial Exploitation

Moderator: **Louis Dempsey | Renaissance Regulatory Services**

- **Joshua Jones — Bressler, Amery & Ross, P.C.**
- **Michael Paskin — FINRA**
- **Deborah Royster — Consumer Financial Protection Bureau**

What You Need to Know About Cybersecurity

Moderator: **Diane Novak | HomeStreet Bank**

- **Timothy Howard — Freshfields Bruckhaus Deringer US LLP**
- **Michael Phillips — vSEC, LLC**
- **Frank Visser — Charles River Associates**
- **Michael Wheatley — Paul Hastings, LLP**

Informal group dinners took place Wednesday and Thursday evenings. They provided a great opportunity for attendees to unwind, casually network and discuss/compare notes on sessions and speakers from earlier in the day.

And, **CLE accreditation (among others) was available and all known requesters to date have received their approval notifications, certificates, etc**. If you requested CLE and have NOT been contacted nor received these materials, please contact Dorcas Pearce right away at ***dp-fma@starpower.net*** or 919/494-7479.

Courtesy of Choose Chicago

Thanks to everyone who participated and contributed to the success of this annual spring program…committee members, moderators, speakers, attendees and sponsors.

Courtesy of Choose Chicago

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Program Update

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FMA gratefully acknowledges these sponsors of FMA's 2024 Securities Compliance Seminar

WINSTON & STRAWN LLP

RRS Renaissance Regulatory Services

MORRISON FOERSTER

Davis Polk

OYSTER® CONSULTING, LLC

SS&C

Bressler AMERY & ROSS

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Program Update

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2025 Securities Compliance Seminar

Fort Lauderdale…Dallas…Milwaukee or ???

Dates and locations are currently being explored for FMA's **2025 Securities Compliance Seminar** next spring. This annual program is traditionally a three-day educational and networking experience for securities compliance professionals, internal auditors, risk managers, attorneys, consultants and regulators.

The Planning Committee will begin work in the fall on program development. Contact Dorcas Pearce ***(dp-fma@starpower.net*** or 919/494-7479 to volunteer as a committee member or general session panelist…or to share topical and/or speaker suggestions. Please note…speakers receive a complimentary registration and are encouraged to attend as much of the seminar as possible.

FMA needs your input! A survey will be emailed in the fall asking for hot topic/best practice ideas and speaker recommendations…you may even choose to volunteer! Please email your thoughts to Dorcas Pearce within 72 hours of receipt.

CLE accreditation will be available, so be sure to budget for, and plan to attend, the 2025 Securities Compliance Seminar next spring.

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Who's News

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Daniel Halstad has joined Danske Bank as Principal Business Risk Officer, Asset Management. Previously, Dan was a Senior Manager at Deloitte.

Robert Jamieson has joined Raymond James as Senior Assistant General Counsel – PCG. Previously, Rob was a Shareholder at Guerra & Partners, P.A.

Nancy Johnson Jones has joined Strategic Compliance Concepts as a Senior Consultant. Previously, Nancy was a Senior Principal Consultant at the ACA Group.

Dr. Ted Kaouk has been named the first Chief Artificial Intelligence Officer at the CFTC. He currently serves as the CFTC's Chief Data Officer and Director of the Division of Data. In his newly expanded role, Dr. Kaouk will be responsible for leading the development of the CFTC's enterprise data and artificial intelligence strategy to further integrate CFTC's ongoing efforts to advance its data-driven capabilities.

Steven Lofchie has joined Norton Rose Fulbright US LLP as a Partner in their Financial Services group. Previously, Steven was a Partner at Fried Frank LLP.

Patrick McGovern has joined Robinhood as Brokerage Control Program Manager. Previously, Patrick was Director, Broker-Dealer Regulatory Oversight at Stash.

Andrea O'Toole has joined Charles Schwab as Managing Director & Deputy Chief Counsel, Treasury Capital Markets. Previously, Andrea was Managing Counsel and Head of Equities Legal at Wells Fargo.

Judith Pinto has joined Accenture as Managing Director, U.S. South Market Unit Financial Services Security Lead. Previously, Judith was a Managing Director at Promontory Financial Group, an IBM Company.

John Proskoczilo has joined Confluence as an Enterprise Sales Director, Compliance Services. Previously, he was Vice President, Business Development at Red Oak Compliance Solutions.

Tom Rosenkoetter has joined the American Bankers Association as the Executive Director of the Card Policy Council and SVP for Payments Policy. Previously, Tom was MD, Head of Government Affairs at BNP Paribas.

Ignacio Sandoval has joined Orrick, Herrington & Sutcliffe LLP as a Partner. Previously, Ignacio was a Partner at Morgan Lewis & Bockius LLP.

Alexander Sixbey has joined Compliance Risk Concepts as an Associate Director. Previously, he was the Deputy Ethics & Compliance Officer at Lincoln Financial Group.

Michael Solomon has been promoted to EVP of FINRA's Examinations and Membership Application Program.

Bala Subramaniam has joined U.S. Bank in Minneapolis as Senior Vice President in their Internal Audit Group. Previously, Bala was Chief Auditor at NatWest Group.

Vaughn Swartz has been named Global Head of Financial Economic Crime W&R at Rabobank.

Jeb White will launch CollegeAdmissions.com over the Labor Day weekend, an online platform to level the college admissions playing field. Previously, Jeb was President and CEO at The Anti-Fraud Coalition.

Jeff Ziesman has joined Norton Rose Fulbright as a Partner in their Regulatory, Investigations, Securities & Compliance practice. Previously, Jeff was a Partner at Bryan Cave Leighton Paisner LLP.