



Office of the Investor Advocate

This Report on Activities for Fiscal Year 2016 is organized primarily around eight areas of policy focus. In each of those areas, we have strived to understand the needs of American investors and the implications of policy choices.

OFFICE OF THE INVESTOR ADVOCATE

REPORT ON ACTIVITIES

FISCAL YEAR 2016

Section 4(g)(6) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78d(g)(6), requires the Investor Advocate to file two reports per year with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.¹ A Report on Objectives is due not later than June 30 of each year, and its purpose is to set forth the objectives of the Investor Advocate for the following fiscal year.² On June 30, 2015, the Office of the Investor Advocate (Office) filed a Report on Objectives for Fiscal Year 2016, which identified eight policy areas that the Office would focus upon during the year.³ Similarly, the Office filed a Report on Objectives for Fiscal Year 2017 on June 30, 2016.⁴

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

This Report on Activities for Fiscal Year 2016 is organized primarily around our eight areas of policy focus that were announced in our Report on Objectives for Fiscal Year 2016. In each of those areas, we have strived to understand the needs of American investors and the implications of policy choices. In a variety of ways, as more fully described below, we have identified proposed policy decisions that are likely to harm investors, have made recommendations for regulatory changes that will ease or resolve the problems encountered by investors, and have taken steps to improve the responsiveness of the Commission and SROs to investor concerns. The reporting period for this Report on Activities runs from October 1, 2015 to September 30, 2016 (Reporting Period).

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

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

CONTENTS

MESSAGE FROM THE INVESTOR ADVOCATE	1
REPORT ON ACTIVITIES AND RECOMMENDATIONS RELATING TO THE FISCAL YEAR 2016 POLICY AGENDA	3
Equity Market Structure	3
Municipal Market Reform	6
Effective Disclosure.	8
Shareholder Rights and Corporate Governance	11
Financial Reporting and Auditing	14
Fiduciary Duty.	15
Retirement Readiness	16
Millennials	18
PROBLEMATIC INVESTMENT PRODUCTS AND PRACTICES.	19
Simple Agreement for Future Equity in Crowdfunding Investments	20
Business Development Companies	21
INVENTORY OF INVESTOR ADVOCATE RECOMMENDATIONS AND SEC OR SRO RESPONSES	25
OMBUDSMAN'S REPORT	29
SUMMARY OF IAC RECOMMENDATIONS AND SEC RESPONSES.	47
END NOTES	56

Our new testing program will help the Commission understand the needs of investors. . . . It will help the Commission be more data-driven, not only when it comes to calculating the costs or burdens of proposed regulations upon regulated entities, but also in determining the quantitative or qualitative benefits to investors.



MESSAGE FROM THE INVESTOR ADVOCATE

As Fiscal Year 2016 draws to a close, the Office of the Investor Advocate takes pride in our accomplishments during the second full year of our existence, and we are eager to implement new strategic initiatives that will help the U.S. Securities and Exchange Commission (SEC) serve investors more effectively. We celebrate the work of our policy team, which is now fully staffed, and we look forward to the implementation of new technology that will create efficiencies and help the Ombudsman team provide an even higher level of customer service. We have also laid a foundation for the Commission to conduct regular investor testing, and we are excited about the possibilities that lie ahead through the use of new tools to determine the best interests of investors.

Our policy team reached a milestone in May 2016, when we were able to hire an attorney with experience in the SEC's Division of Corporation Finance. This attorney, Alexandra Ledbetter, became our primary liaison with that Division, and we now have staff attorneys who serve as liaisons with each of the Commission's rulemaking divisions and track the developments in their respective policy areas. Policy staff also achieved significant professional milestones, with Stephen Deane earning a Chartered Financial Analyst designation, Marc Sharma being selected as an Excellence in Government Fellow, and Ashlee Connett completing the SEC's Aspiring Leader Program.

A primary function of the policy team is to meet our statutory mandate to analyze the impact on investors of proposed rules and regulations, not only in connection with Commission rulemakings, but also with respect to the rulemakings of the self-regulatory organizations (SRO) like the Financial Industry Regulatory Authority (FINRA), the Municipal Securities Rulemaking Board (MSRB), and the 20 national securities exchanges. During Fiscal Year 2016, we analyzed 22 of the Commission's proposed regulations and concept releases, many of which were hundreds of pages in length. We also analyzed the impact on investors of a significant exchange registration application, an interpretation of a key part of Regulation National Market System, and several proposed NMS Plans and amendments, including the creation of the Consolidated Audit Trail.

In addition to Commission rulemakings, our team of four staff attorneys and one financial analyst reviewed numerous SRO proposals, including 64 by FINRA, 24 by the MSRB, and 225 by the national securities exchanges. As these statistics suggest, the volume of rule changes by the exchanges is quite large, and in fact, they totaled more than 1,300 in calendar year 2015. Thus, while we conduct a



substantive analysis of most FINRA and MSRB proposals, we have developed a system to triage and prioritize the filings by the exchanges,⁷ leading to a more efficient use of our limited resources.

As part of our statutory duties, we are expected to identify areas in which investors would benefit from changes in Commission regulations, SRO rules, or statutes. We engage in this activity primarily within the context of our analysis of proposed amendments, when we suggest ways that the proposals could be modified to benefit investors. Often, this type of work is performed behind the scenes in informal communications with rulemaking teams and Commission or SRO leadership. However, we also submit written suggestions to the Commission or SROs in the form of comment letters or formal recommendations. During FY 2016, we submitted our first two formal recommendations to the Commission, which require a response within three months, and we filed six comment letters. We also made two recommendations to Congress concerning legislation that would impact investors. These activities are described in greater detail in this Report.

Another important part of our work involves assisting retail investors to resolve any concerns they may have with the Commission or an SRO. The SEC Ombudsman, Tracey McNeil, and her team provide important customer service to investors who may be frustrated or overwhelmed in the midst of difficult circumstances. During FY 2016, they have provided service to hundreds of individual investors, as described in the Ombudsman's Report beginning on page 29. They are also on the cusp of launching an important new technological solution that will enhance their capabilities.

Finally, I would like to highlight a new initiative at the SEC that is being led by the Office of the Investor Advocate and our economist, Brian Scholl, Ph.D. Working with the SEC's Office of Acquisitions, and in consultation with numerous offices and divisions,

Dr. Scholl has designed a program to facilitate greater use of investor testing by the Commission. This will include a range of testing modalities, including surveys, focus group testing, and A-B testing, among other things.

In my view, investor testing provides an opportunity to alleviate a significant shortcoming of the rulemaking process. In that process, proposed rules are published for public comment, but members of the general public who stand to benefit from the rules are underrepresented in the comment letters that are submitted. This should come as no surprise, given that the average person has little to no awareness of SEC rulemaking and may find it challenging to submit substantive comments on complex rulemakings that may be hundreds of pages in length.

Our new testing program will help the Commission understand the needs of investors, even in the absence of formal public comments by investors. It also will be a tool for determining which of the many competing policy choices would serve the needs of investors most effectively. Ultimately, it will help the Commission be more data-driven, not only when it comes to calculating the costs or burdens of proposed regulations upon regulated entities, but also in determining the quantitative or qualitative benefits to investors.


It is a great honor to lead the Office of the Investor Advocate. I am very proud of the accomplishments of my team, and I would be pleased to answer any questions about our activities.

Sincerely,



Rick A. Fleming
Investor Advocate

REPORT ON ACTIVITIES AND RECOMMENDATIONS RELATING TO THE FISCAL YEAR 2016 POLICY AGENDA

 In June 30, 2015, the Office of the Investor Advocate filed a Report on Objectives for Fiscal Year (FY) 2016.⁸

The Report identified eight key policy areas that would be the primary focus of the Office during its second full year of existence:⁹ equity market structure, municipal market reform, effective disclosure, shareholder rights and corporate governance, financial reporting and auditing, fiduciary duty, retirement readiness, and Millennials. This Report on Activities describes our activities and recommendations within each of those policy areas during FY 2016.

EQUITY MARKET STRUCTURE

In FY 2016, the Office worked with Commission staff and relevant SROs to encourage equity market structure reforms designed to enhance market resilience, efficiency, transparency, and fairness. We analyzed proposed rules, including significant Commission proposals concerning alternative trading venue regulation and the disclosure of broker order handling activity, to examine their potential impact on investors. In some cases, we advocated publicly in the form of comment letters and formal recommendations, but we also spent considerable time and effort advocating in less formal ways for improvements that would benefit and protect investors.

Currently, around 35 percent of market volume in New York Stock Exchange (NYSE) and Nasdaq Stock Market LLC (Nasdaq)-listed stocks is

executed in dark alternative trading systems (ATS) and broker-dealer platforms, rather than on lit venues like the NYSE.¹⁰ Investors and other market participants have expressed concern that the current regulatory requirements relating to operational transparency for ATSs, particularly those that execute trades in National Market System (NMS) stocks, may no longer fully meet the goal of furthering the public interest and protecting investors. Unlike registered national securities exchanges, there is limited public information available to market participants about the operations of ATSs, including how orders interact, match, and execute on ATSs. There is also limited information about the potential conflicts of interest that arise from the activity of the broker-dealer operator of the ATS.¹¹ The lack of operational transparency limits market participants' ability to adequately assess the relative merits of many trading centers, and recent enforcement actions against certain alternative trading systems have highlighted these concerns.¹²

In November 2015, the Commission proposed significant amendments to Regulation ATS to enhance the operational transparency of venues that trade listed equity securities.¹³ Our Office monitored the public comment process and evaluated the proposal's potential impact on investors. It appeared that greater information about the operation of these venues could allow sophisticated investors to better compare the trading venues and order routing products.

Consequently, in September 2016, our Office submitted a comment letter to the Commission in support of the proposed amendments.¹⁴ In our letter, we suggested a modest expansion of certain aspects of the proposal in order to enhance the operational transparency of venues that trade fixed income securities, including those that solely trade government securities.¹⁵ We will continue to advocate for greater transparency in FY 2017 and encourage the Commission to adopt a final rule in the near future.

Several efforts are also under way to improve Regulation NMS.¹⁶ In July 2016, the Commission proposed rules that, for the first time, would require broker-dealers to disclose the handling of institutional orders to customers under existing Rule 606 of Regulation NMS.¹⁷ This would provide customers with better information to evaluate the quality of execution for the orders they place.¹⁸ We have evaluated the proposal, including questions surrounding the proposed definition of institutional order and its impact on the ability of institutional customers to obtain information about all their orders, and we anticipate submitting a comment letter on the proposal after the Reporting Period.

In addition to reviewing Commission rulemakings, the Office of the Investor Advocate is responsible for analyzing the potential impact on investors of proposed rules of SROs.¹⁹ In furtherance of this objective, the Office has analyzed the potential impact of various SRO proposals related to equity market structure. For example, in November 2015, the BATS Exchange, since renamed Bats BZX Exchange, proposed to adopt a new rule to prevent layering and spoofing on the exchange by creating a process for expedited suspension proceedings.²⁰ On December 15, 2015, acting under our Office's statutory authority, we recommended that the Commission approve the proposed rule amendment and encouraged other SROs to make similar efforts to expedite their regulatory processes when clear

evidence of manipulative trading is identified.²¹ In February 2016, the Commission granted approval of the proposed rule change, discussing the merits of our recommendation in the formal order.²² Since that time, many other exchanges have adopted such rules, including the sister exchanges of Bats BZX Exchange,²³ two Nasdaq-affiliated equity exchanges,²⁴ and three Nasdaq-affiliated options markets.²⁵ Recently, FINRA submitted a similar rule amendment to the Commission.²⁶

During the Reporting Period, there were numerous other initiatives that we monitored closely. Often, we chose not to formally comment upon them if we considered the proposals to be favorable for investors. For example, in the wake of two troubling market events during the summer of 2015, the Commission and SROs have taken certain steps to bolster risk management and resilience in the equity markets. Following an hours-long trading outage on the NYSE on July 8, 2015, both NYSE and Nasdaq submitted and received Commission approval to establish contingency procedures to back up each other's closing auctions in the event of such future trading outages.²⁷ Then, following the unusual market volatility experienced on August 24, 2015, particularly in the ETF market, the Commission²⁸ and SROs have adjusted several exchange rules that may have contributed to the volatility, including the widening of opening and re-opening auction collars and enhancements to the limit-up/limit-down pilot program.²⁹ Our Office has monitored the progress made in understanding and addressing the causes of these troubling market events.

The Commission and SROs have also taken important final steps to improve regulatory oversight of the equity markets. In April 2016, FINRA received approval to require the registration of persons responsible for the design, development, and modification of algorithmic trading strategies and for the day-to-day supervision of such activities.³⁰ The Commission noted that this

would require a minimum standard of knowledge regarding the securities rules and regulations applicable to the broker-dealer employing the algorithm, potentially reducing problematic market conduct and manipulative trading activities.³¹ Also in April, FINRA received approval to reduce the synchronization tolerance for computer clocks used to record events in equity markets.³² In approving the proposal, the Commission noted it would improve transparency and enhance surveillance and enforcement capabilities, thereby permitting FINRA to compile more accurate audit trail data and conduct more precise surveillance.³³ In May 2016, the Commission approved a third FINRA proposal requiring ATSs to report additional specific order information, such as re-pricing events and order display information, which will be used to more fully reconstruct an ATS's order book and perform order-based surveillance.³⁴

On November 15, 2016, after years of consideration, the Commission approved an SRO plan to govern a Consolidated Audit Trail designed to enhance, centralize, and generally update the regulatory data infrastructure available to market regulators.³⁵ In our view, this is a development of monumental importance because, once implemented, regulators will have ready access to all trade and order data, facilitating more prompt and complete analysis of market events such as the May 6, 2010 “Flash Crash” that saw U.S. equity and futures markets experience a sudden breakdown of orderly trading. With this data, the Commission will be able to more readily determine what happened, who was affected and how, whether any regulatory responses might be required, and what shape such responses should take.

In addition, the Office continues to monitor SRO activity to address concerns about trading speeds. In October 2015, the Commission approved the Chicago Stock Exchange's (CHX) proposed intra-

day and on-demand auction service, noting that it was intended to deemphasize speed advantages in the market.³⁶ CHX's “SNAP” auctions ultimately launched on the exchange in June 2016,³⁷ although the initial public data from the exchange suggests only a handful of successful auctions in the first few months after the launch.³⁸

Another important event occurred in June 2016, when the Commission granted the registration application for Investors' Exchange, LLC (IEX), determining that an exchange can, consistent with the public interest and the protection of investors, provide access to participants with a hardwired 350 microseconds of latency to the primary trading platform.³⁹ Since the IEX approval, other exchanges have begun to consider ways to address concerns about trading speed. In September, CHX proposed to adopt a “liquidity taking access delay” and thereby require that all new incoming marketable orders, as well as certain related cancel messages, be intentionally delayed for 350 microseconds.⁴⁰ We have also seen other exchanges publicly discussing other potential solutions, such as providing priority to orders that commit to not changing or canceling for at least one second.⁴¹ As we did with the IEX application, we intend to monitor the comment process and evaluate the newer proposals to ensure that any such proposed devices and order types will truly benefit investors and serve the public interest.

The Office also has monitored the developments in the Tick Size Pilot, a two-year pilot program by the national securities exchanges and FINRA for widening the minimum quoting and trading increments—or “tick sizes”—for stocks of some smaller companies.⁴² The Commission intends to use the pilot, which began its rollout in October 2016, to assess whether wider tick sizes enhance the market quality of these stocks for the benefit of issuers and investors.⁴³

In addition to analyzing active SEC and SRO rulemakings, we also monitor the work of the Commission's Equity Market Structure Advisory Committee (EMSAC),⁴⁴ with an eye toward championing ideas and concepts that appear most likely to enhance equity market structure for the benefit of investors. For example, on July 8, 2016, the EMSAC recommended that the Commission propose a pilot program to adjust the existing access fee cap under Regulation NMS Rule 610. This would give the Commission the ability to evaluate the impact of so-called "maker-taker" access fees on equity exchanges.⁴⁵ During FY 2016, our Office has reviewed the EMSAC recommendation, and we will likely support the Commission in implementing a pilot program in FY 2017.

Finally, we note that, in our view, the Commission has been effective in using its enforcement powers to address a variety of market abuses while regulatory reforms have been in the developmental stage. During FY 2016, the Commission charged and settled actions against two ATS operators, focusing attention on the need for transparency and fair dealings across all trading venues.⁴⁶ For example, in January 2016, the Commission settled with Barclays, alleging that Barclays failed to police one of its dark pools for predatory trading as promised and did not adequately disclose how it classified subscribers or how it used market data feeds.⁴⁷ The Commission also charged and settled actions against market intermediaries. One such case alleged numerous Market Access violations by a broker-dealer, thereby focusing attention on the role of gatekeepers in maintaining fair and orderly markets.⁴⁸ In another case, the Commission settled an action against Citigroup in July 2016 for submitting deficient blue sheet data to the Commission for 15 years.⁴⁹ As noted in the order, accurate and complete reporting of blue sheet data helps the Commission detect unlawful conduct.⁵⁰ In addition, the Commission charged a variety of individuals with market manipulation during the

Reporting Period, including for spoofing.⁵¹ These and similar enforcement actions should serve as deterrents to other bad actors.

MUNICIPAL MARKET REFORM

Throughout FY 2016, the Commission and relevant SROs took significant strides to enhance fixed income markets for investors and other market participants. For example, the MSRB adopted a rule requiring municipal bond dealers to seek 'best execution' of customer orders for municipal securities.⁵² The MSRB and FINRA have also continued their efforts to enhance the Electronic Municipal Market Access system (EMMA) and the Trade Reporting and Compliance Engine (TRACE), respectively, so investors will have better access to pricing and other important market information, including new information about bank loans by municipal issuers.⁵³

During the Reporting Period, the Office of the Investor Advocate made it a priority to review the MSRB's and FINRA's proposed rules relating to the regulation of the fixed income markets and, in particular, the municipal market. In total, we reviewed 32 such proposals covering a wide range of issues.⁵⁴ During our review, we considered the impact on investors of each proposed rule, and we engaged in numerous discussions with relevant SRO staff, Commission staff, and interested industry participants.

In four instances during the Reporting Period, the Office issued public recommendations related to the fixed income and municipal markets. One of these comment letters responded to a proposal to lengthen the term of service on the Board of the MSRB, and the remaining three comment letters related to post-trade price transparency.⁵⁵

MSRB Board Member Term

During the preceding fiscal year, we opposed a MSRB proposal to modify the standard of independence for the Public Investor Representative

Board member on the MSRB.⁵⁶ In a comment letter filed in Fiscal Year 2015, the Investor Advocate objected to the change but encouraged the MSRB to consider two potential alternatives—one of which was changing the length of MSRB Board members' service in order to allow Board members to develop the institutional knowledge and experience required for fully engaged and effective oversight of the MSRB.⁵⁷

As we suggested, on October 5, 2015, the MSRB announced that it would not pursue changes to the standard for independence of Public Members.⁵⁸ Instead, the MSRB proposed amendments to Rule A-3 to lengthen the term of MSRB Board service from three years to four years.⁵⁹ In response, we filed a comment letter supporting the MSRB's new proposal on October 29, 2015.⁶⁰ After the comment period closed, the MSRB filed the proposed rule change with the Commission, and it was approved on March 17, 2016.⁶¹

Post-Trade Price Transparency

For several years, the MSRB and FINRA have explored ways to increase price transparency for retail investors who engage in the purchase or sale of fixed income securities. In 2014, the MSRB and FINRA released for comment companion proposals to require the disclosure of pricing reference information on customer confirmations.⁶² Then, after receiving public comments, the MSRB and FINRA issued new proposals on September 24, 2015, and October 12, 2015, respectively.⁶³ The new MSRB proposal changed both the methodology for calculating the pricing information to be disclosed on the customer confirmation and limited the disclosure requirement to transactions occurring in a shortened two-hour window.⁶⁴ The new FINRA proposal made certain changes but retained the original basic approach. It proposed requiring pricing disclosure based upon a reference transaction, and it retained the full trading day threshold for disclosure.⁶⁵

The Office of the Investor Advocate supported aspects of each of these contrasting proposals.⁶⁶ In a comment letter dated December 11, 2015, that was jointly addressed to the MSRB and FINRA, the Office strongly supported the MSRB's proposed mark-up disclosure using the prevailing market price (PMP) and expressed a clear preference for FINRA's same trading day threshold.⁶⁷ We also urged the MSRB and FINRA to adopt consistent rules in order to avert investor confusion that could be caused by different pricing disclosures for different parts of the fixed income markets.⁶⁸

On February 18, 2016, the MSRB requested comment on proposed guidance for determining the PMP for purposes of mark-up disclosure.⁶⁹ In a comment letter dated March 31, 2016, we generally supported the guidance, and we noted the apparent harmony between the MSRB's proposed PMP guidance and FINRA's existing guidance for calculating the PMP of other fixed income securities.⁷⁰ However, we highlighted a significant concern with how the PMP may be determined in circumstances involving non-arm's-length affiliate transactions, and we offered potential solutions for the MSRB to consider prior to filing the proposed rule changes with the Commission.⁷¹

On August 15, 2016, and September 7, 2016, respectively, FINRA and the MSRB filed proposed rule changes with the Commission to require disclosure of mark-ups and mark-downs to retail customers for certain transactions in fixed income markets.⁷² These proposed rule changes incorporated many suggestions made by the Office of the Investor Advocate and generally followed our recommended course of action. Notably, the proposed rule changes addressed the four key issues identified by the Office in earlier comment letters—consistency of approach by the MSRB and FINRA, incorporating a full trading day disclosure threshold, utilizing PMP-based disclosure, and requiring fixed income dealers to look through

non-arm's-length transactions with affiliates when calculating PMP.

The Office of the Investor Advocate believes the MSRB's and FINRA's proposed rule changes will enhance post-trade pricing disclosure in fixed income markets and will greatly benefit retail investors. Accordingly, after the Reporting Period, the Office submitted a formal recommendation to the Commission, encouraging them to approve the proposed changes to MSRB and FINRA rules.⁷³

In addition to advocacy through comment letters, the Investor Advocate and staff attend and participate in conferences and events related to the fixed income markets. During FY 2016, for example, the Investor Advocate and staff attended the MSRB Municipal Securities Regulator Summit on August 25, 2016. At the Summit, the Investor Advocate participated on a panel highlighting investor protection issues in fixed income markets for seniors and vulnerable adults. The Investor Advocate also provided the closing remarks of the summit, during which he pointed out a troubling trend toward greater concentration of municipal securities ownership.⁷⁴

EFFECTIVE DISCLOSURE

As mentioned in our prior reports, the Commission has undertaken a comprehensive Disclosure Effectiveness Initiative to review and modernize public company reporting requirements in Regulation S-K and Regulation S-X. The disclosure requirements pertain to information found in periodic and current reports, including Forms 10-K, 10-Q, and 8-K, as well as proxy statements. The initiative is, at least in part, responsive to congressional mandates found in the Jumpstart Our Business Startups (JOBS) Act of 2012⁷⁵ and the Fixing America's Surface Transportation (FAST) Act of 2015.⁷⁶ The JOBS Act introduced a suite of exemptions from disclosure and capital-raising requirements for smaller companies, and the Commission has completed all of its mandatory

rulemaking under the JOBS Act. The more recent FAST Act requires the Commission to revise Regulation S-K "to further scale or eliminate requirements of regulation S-K, in order to reduce the burden on emerging growth companies, accelerated filers, smaller reporting companies, and other smaller issuers, while still providing all material information to investors," and to eliminate provisions that are "duplicative, overlapping, outdated, or unnecessary."⁷⁷ The requirement to make revisions would not apply to provisions for which the Commission determines that further study is necessary to determine their efficacy.⁷⁸

In some respects, the Disclosure Effectiveness Initiative is broader in its objectives and scope than is mandated by the JOBS Act or the FAST Act. These broader objectives are reflected in a concept release that was published on April 15, 2016, on modernizing business and financial disclosure requirements in Regulation S-K (S-K Concept Release).⁷⁹ In the S-K Concept Release, the Commission outlined the statutory framework of its disclosure regime and described materiality, as formulated in seminal Supreme Court decisions, as the linchpin of that framework. The Commission went on to discuss and request public comment on the informational needs of investors in multiple areas.

The S-K Concept Release could be considered the cornerstone of the Disclosure Effectiveness Initiative. However, during the Reporting Period, there have been several other rulemakings that concern various aspects of public company reporting requirements.

- On January 13, 2016, the Commission adopted rules revising registration statement forms for emerging growth companies and smaller reporting companies. These congressionally mandated rules⁸⁰ revised Forms S-1 and F-1 to provide that as long as emerging growth companies' registration statements

include all required financial information at the time of the offering, they will be allowed to omit certain historical period financial information prior to the offering. In addition, the rules revised Form S-1 to allow smaller reporting companies to use incorporation by reference for future filings the companies make under the federal securities laws after the registration statement becomes effective.⁸¹

- On May 3, 2016, the Commission adopted rules related to the thresholds for registration, termination of registration, and suspension of reporting under Exchange Act Section 12(g).⁸² The Commission adopted the amendments in order to conform to statutory changes made in Title V and Title VI of the JOBS Act and Title LXXXV of the FAST Act.⁸³
- On June 1, 2016, the Commission adopted a congressionally mandated rule⁸⁴ that allows Form 10-K filers to provide a summary of business and financial information contained in the annual report. The rule provides filers with flexibility in preparing the summary, although those opting to provide it must include hyperlinks to the related, more detailed disclosure in the Form 10-K.⁸⁵
- On June 16, 2016, the Commission proposed rules to update the disclosure requirements for mining companies currently found in Item 102 of Regulation S-K and related guidance in Industry Guide 7.⁸⁶
- On June 27, 2016, the Commission proposed amendments that would increase the financial thresholds in the “smaller reporting company” definition. The proposal would expand the number of companies that qualify as smaller reporting companies, which are subject to scaled back disclosure requirements in Regulation S-K and Regulation S-X.⁸⁷

- On July 13, 2016, the Commission proposed amendments to eliminate provisions thought to be redundant, overlapping, outdated, or superseded in light of other changes to Commission disclosure requirements, U.S. Generally Accepted Accounting Principles, International Financial Reporting Standards, or technology developments. The provisions impacted are mainly in Regulation S-X.⁸⁸
- On August 25, 2016, the Commission published a request for public comment on disclosure requirements in Subpart 400 of Regulation S-K, including those relating to management, certain security holders, executive compensation, and corporate governance matters.⁸⁹
- On August 31, 2016, the Commission proposed rule and form amendments that would require registrants to include hyperlinks to exhibits in their filings, so as to make it easier to locate exhibit documents.⁹⁰

The Commission also worked to satisfy another mandate of the FAST Act, which required the Commission to deliver a report to Congress by November 28, 2016. The report was required to contain “specific and detailed recommendations on modernizing and simplifying the requirements in Regulation S-K in a manner that reduces the costs and burdens on companies while still providing all material information.”⁹¹ Furthermore, the FAST Act requires recommendations on ways to improve the “readability and navigability” of disclosure documents and to “discourage repetition and the disclosure of immaterial information.”⁹² These recommendations will carry unusual importance because the FAST Act further requires that the Commission propose rules to implement the report’s recommendations no later than 360 days following the report’s submission to Congress.⁹³

As described above, in addition to finalizing previous rulemakings, the Commission released for public comment six new proposals between April 15 and August 31, 2016. These are important and substantive proposals that could significantly revise the disclosure requirements of public companies and, in turn, impact investors and the markets. Fortunately, our Office was able to add a staff attorney in May 2016 to focus on matters involving public company disclosure and corporation finance, and we are working hard to analyze the proposals and provide feedback to the Commission and Division rulemaking staff. However, we are concerned that the sheer volume of proposals—totaling 1,084 pages and 577 questions—has made it difficult for investors to provide meaningful input in the public comment process.

To address the inadequacies of the public comment process, which tends to elicit comment from parties who may bear the costs or burdens of regulation but underrepresent the views of those who benefit from regulation, we have encouraged the Commission to be more proactive in determining the needs of investors. For our part, we have begun conducting investor outreach to determine

how a variety of investors make decisions to buy and sell securities or exercise their voting rights. Among other things, we are attempting to learn the information sources they rely upon and the data points that are most useful to them. These discussions will help to inform our thinking, and ultimately our advocacy, regarding the proposed changes to the disclosure requirements. In addition, we have laid the groundwork for the Commission to conduct more investor testing in this area, utilizing focus groups and other methods to determine what is actually in the best interests of investors.

In addition to this outreach, we have worked to facilitate informed investor comment on proposed changes that are important yet dauntingly technical. For example, the release dated July 13, 2016, proved to be especially challenging, so we held a number of conversations, individually and jointly, with a group of interested investors, professors of accounting, other accounting experts, and members of the SEC Investor Advisory Committee. Then, on September 21, 2016, our Office facilitated a conference call among these individuals and relevant Commission staff.



This afforded the group an opportunity to ask questions about the release and express their concerns. Among other things, they expressed concern that the comment period was too short for a proposal of this size and complexity. Shortly thereafter, the Commission approved a 30-day extension of the comment period, and we anticipate that several of these individuals may follow up with comment letters to the Commission after the Reporting Period.

Many of the proposals before the Commission appear to pit the informational needs of investors against the costs and burdens to the companies who provide the disclosure. However, we believe that technology, particularly the use of structured data, presents an opportunity to improve the delivery of information to investors while decreasing burdens on the companies that must provide the disclosure.⁹⁴ Chair Mary Jo White has created a working group to explore enhancements to disclosure delivery, and the working group includes staff members from our Office.⁹⁵

SHAREHOLDER RIGHTS AND CORPORATE GOVERNANCE

Director Elections

Shareholders have the right to participate in the election of directors and vote on certain matters affecting the corporation. However, given the impracticality of attending annual meetings, the primary way for shareholders to learn about matters to be decided on at a meeting and to vote on the election of directors is through the proxy process. While shareholder rights stem primarily from state corporate law,⁹⁶ it is federal law that governs the solicitation of any proxy or consent or authorization with respect to any security registered pursuant to Exchange Act Section 12.⁹⁷

Under the current proxy rules, if a shareholder wishes to nominate a candidate to a company's board of directors without the acquiescence

of the existing board members and executive management, the shareholder may prepare and file a registered proxy statement under Exchange Act Section 14 and disseminate its own proxy material to its fellow shareholders. There is no rule permitting a dissident shareholder to include a nominee and supporting material in the company's proxy statement that is sent at the company's expense. In 2011, the U.S. Court of Appeals for the D.C. Circuit vacated precisely such a rule on the grounds that the Commission had failed to conduct an adequate cost-benefit analysis.⁹⁸

Since that defeat, shareholders have sought to institute proxy access on a company-by-company basis through bylaw amendment proposals. In 2014, a consortium of pension funds and other institutional investors started the Boardroom Accountability Project, a corporate governance initiative centered on the submission of proxy access bylaw proposals at annual meetings pursuant to Exchange Act Rule 14a-8.⁹⁹ These resolutions typically request a proxy access bylaw permitting shareholders that have collectively held three percent of the company for at least three years to nominate up to 25 percent of the board using the company's proxy statement and card.

Previously, we reported on an attempt by Whole Foods, Inc. to exclude from its company proxy statement a proposed proxy access bylaw amendment on the grounds that the shareholder proposal directly conflicted with the company's own proposal.¹⁰⁰ That dispute led to a review of the proper scope and application of Exchange Act Rule 14a-8(i)(9) by the Division of Corporation Finance, which culminated in a publication of the Division's informal views on October 22, 2015.¹⁰¹ Notably, the Division revised its interpretation of the "directly conflicts" basis for exclusion in a way that would have been favorable to the shareholder proponent in the Whole Foods dispute. According to the Division, for Rule 14a-8(i)(9) "a direct

conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal.”¹⁰² That would not be the case for proposals that generally seek a similar objective but propose different means of accomplishing the objective.¹⁰³

By the end of the Reporting Period, more than 250 companies had adopted some form of proxy access since the launch of this corporate governance initiative.¹⁰⁴ According to a *Wall Street Journal* report, 40 percent of S&P 500 companies had adopted proxy-access provisions as of August 31, 2016, up from just five percent in 2015.¹⁰⁵ It remains to be seen how these provisions will be used.

Now that many companies have adopted some form of proxy access, shareholders in the most recent proxy season proposed modifications to make the access provisions less restrictive by, for example, removing the limit on the number of shareholders that may aggregate shares to reach the ownership threshold. Between January 1, 2016 and September 14, 2016, 54 companies submitted no-action requests seeking to exclude the proposed modifications on the grounds that the companies had substantially implemented proxy access, referring to the basis for exclusion provided in Exchange Act Rule 14a-8(i)(10).¹⁰⁶ SEC staff granted the majority of those requests.¹⁰⁷ For a company seeking to exclude a shareholder proposal, “substantial implementation” entails a less exacting comparison than “directly conflicts.”

On October 26, 2016, following this Reporting Period, the Commission proposed amendments to the proxy rules that would require the use of universal ballots in contested director elections.¹⁰⁸ Briefly, universal ballots would enable shareholders to vote for their preferred combination of management and shareholder nominees, just as they could if they attended the meeting and voted

in person. This differs from proxy access in that it would allow a dissident shareholder to have its competing nominee(s) listed on the company’s proxy card (and vice versa), but the dissident shareholder would not be allowed to include information about its nominee(s) in the company’s proxy statement. This means that the shareholder would have to prepare and disseminate a separate proxy statement and solicit other shareholders at its own expense. Our next Report on Activities will provide more details on this rulemaking proposal.

Exchange Listing Standards

During the Reporting Period, we have also monitored proposals by national securities exchanges that deal with shareholder rights and corporate governance. We believe that an exchange’s qualitative listing standards, such as the standards relating to audit committees, independent director oversight of executive compensation, a mandatory code of conduct, shareholder meetings (including proxy solicitation and quorum), review of related party transactions, shareholder approval (including voting rights), and disclosure policies, should be designed to help ensure that companies trading on a national securities exchange will adequately protect the interests of public shareholders.

At the beginning of the Reporting Period, the Investor Advocate made his first formal recommendation to the Commission on this very issue. On October 16, 2015, the Investor Advocate recommended disapproval of a proposed rule by NYSE that would exempt certain early stage companies from having to obtain shareholder approval before selling additional shares to insiders and other related parties.¹⁰⁹ As more fully described in the recommendation, we believed that the NYSE’s proposed rule change was inconsistent with investor protection because it deprived existing shareholders of an important right without significant benefit. However, the Commission ultimately approved the proposed rule change,

finding that the proposal was consistent with the Exchange Act despite the potential for harmful dilution, reasoning that the potential benefits to small issuers and fair competition between exchanges offset the harm to investors.¹¹⁰

In November 2015, our Office began reviewing a Solicitation of Comments by Nasdaq’s Listing and Hearing Review Council concerning shareholder approval rules.¹¹¹ Nasdaq was broadly asking whether various provisions of its current rules—which generally require companies to obtain approval from shareholders prior to issuing securities in connection with certain acquisitions, equity-based compensation plans, changes of control and certain private placements—continue to serve their original shareholder protection purpose and otherwise still ‘make sense’ given the evolution in the capital markets and securities laws. In January, representatives from Nasdaq discussed the request for comment at the SEC’s Investor Advisory Committee meeting.¹¹² After our review and consideration of concerns expressed at the meeting, we submitted a comment letter to Nasdaq on February 12, 2016, to express our belief that shareholder approval constitutes an important element in the corporate governance framework that helps protect investors and builds trust in markets.¹¹³ In our letter, we expressed concern that board or independent committee approval may not be an effective substitute for approval by shareholders, whose interests are directly impacted by economic and ownership dilution, and that lowering Nasdaq’s qualitative listing standards could exacerbate a troubling “race to the bottom” among listing exchanges, whereby the exchanges lower their listing standards in order to attract more companies to list with them.

Motivated by those concerns, our Office began researching the history of exchange listing standards, and the Investor Advocate gave a public speech on February 19, 2016, to bring more attention to the Office’s findings.¹¹⁴ As

noted in the speech, it appeared that over the last decade, exchange listing standards, especially their quantitative standards, have tended to drift downward, pulled by the exchange’s pursuit of profits over investor protection. The speech concluded by encouraging Commission staff to consider this broader context in its review of future rule filings and encouraging the exchanges to resist the temptation to engage in this race to the bottom, as it would otherwise raise questions about whether for-profit exchanges ought to be involved in self-regulation. Going forward, we will continue to monitor and evaluate SRO proposals concerning exchange listing standards with an eye towards preserving and enhancing the protections such standards afford investors.

In April 2016, NYSE proposed to adopt generic listing standards to permit the exchange to list “equity investment tracking stocks” that would seek to track the performance of another listed company, but with limited voting rights. In effect, shareholders of the tracking stock will have no voice in the corporate governance of the underlying operating company and no direct claim on the assets if the company should become distressed.¹¹⁵ We understand that this structure became popular in the late 1990s, but fell out of favor, in part because it can create potential conflicts of interest between holders of the two separate stocks.¹¹⁶ We analyzed the proposal prior to Commission action to ensure that investors would be properly advised of the risks, and we were pleased to see the NYSE submit several amendments committing to: (1) distribute information to brokers concerning the special characteristics and risks of tracking stocks in connection with a suitability determination; (2) monitor activity in such stocks to identify and deter any potential improper trading activity; and (3) enhance its surveillance procedures around trading in such stocks.¹¹⁷ In addition, the NYSE committed to conduct a compliance review over the initial two-year period of listing such a tracking stock and will provide the Commission with two

reports in order to address the relationship between the equity investment tracking stock and the underlying operating company and potentially identify any enhancements to the listing standards.¹¹⁸ We intend to continue monitoring the listing of tracking stocks on the NYSE and other exchanges.

FINANCIAL REPORTING AND AUDITING

High-quality financial reporting is critically important to the efficient functioning of our capital markets, and it is one of the reasons that our markets are often called the gold standard or the envy of the world. In order to deliver this level of financial reporting, we rely upon a system of sound accounting and auditing practices, ethical gatekeepers, and appropriate checks and balances.

Over the past fiscal year, our Office has monitored and, on occasion, made recommendations on critical matters related to financial reporting. These range from a Public Company Accounting Oversight Board (PCAOB) proposal to enhance the independent auditor's report, which we supported, to a Congressional bill to scale back requirements of auditor attestation concerning the effectiveness of internal control over financial reporting (ICFR), which we opposed.

On May 11, 2016, the PCAOB requested comment on proposed changes to the report that auditors are required to prepare when conducting an audit of a public company. During the comment period, we submitted a letter to the PCAOB in support of its re-proposed standard.¹¹⁹ In particular, we expressed strong support for a proposed requirement that the audit report include communication of critical audit matters that required especially challenging, subjective, or complex auditor judgment, and a description of how the auditor responded to those matters. In addition, we supported disclosure of auditor's tenure and measures to improve the form and enhance the usability of audit reports.

Effective internal control over financial reporting—and attestation by an independent accountant as to the effectiveness of such controls—promotes reliable financial reporting, strengthens public confidence, and encourages investment in our capital markets. As James V. Schnurr, then the SEC Chief Accountant, explained late last year, “Management’s ability to fulfill its financial reporting responsibilities depends, in large part, on the design and effectiveness of internal control over financial reporting.”¹²⁰ In our view, ICFR and auditor attestation provide investors with a critical window into the competence of a company’s management, the integrity of its financial reporting, and the quality and sustainability of its earnings. Moreover, the importance of ICFR will only grow as a result of new accounting standards.¹²¹

Given the importance of ICFR and auditor attestation, we have been particularly sensitive to any efforts to reduce the scope of either. Therefore, on May 23, 2016, we sent a letter to Congress expressing our opposition to H.R. 4139, a bill that would allow smaller public companies to avoid the auditor attestation requirement of the Sarbanes-Oxley Act for up to 10 years following an initial public offering.¹²² We continue to believe that having an independent auditor attest to the effectiveness of ICFR promotes reliable financial reporting, strengthens investor confidence, and ultimately reduces the cost of capital for businesses.

During the Reporting Period, our Office also has continued to monitor developments involving two proposals that the Financial Accounting Standards Board (FASB) made in September 2015. These proposals relate to how to determine the “materiality” of certain matters, which would trigger a disclosure requirement. The first proposal would affect the conceptual framework that FASB uses as a guide in its own decision-making process.¹²³ This proposal, according to FASB, would clarify that the concept of materiality was not intended to conflict with the legal definition.¹²⁴

The second proposal was an Accounting Standards Update that was intended to clarify how companies and not-for-profit entities consider materiality in notes to the financial statements.¹²⁵

According to FASB, the amendments were not intended to alter any specific disclosure requirements, but would help entities omit non-material disclosures and focus instead on relevant, material information.¹²⁶ Despite these assurances, however, several investors and interested parties, including the SEC Investor Advisory Committee, expressed concerns that the changes would allow issuers to reduce their level of financial reporting and their transparency to investors.¹²⁷

We understand that FASB intends to hold a public roundtable in the coming months to discuss this topic. During the Reporting Period, we actively engaged with FASB Board members and Financial Accounting Foundation (FAF) officials to discuss the issue, and we expect to continue the dialogue on behalf of investors.

FIDUCIARY DUTY

Many individual investors rely on broker-dealers and investment advisers to help them manage their investments and meet their financial goals.¹²⁸ Generally, these investors expect that the investment advice they receive is provided in their best interest.¹²⁹ Some investors may not be aware, however, that broker-dealers and investment advisers are subject to different standards under federal law when providing advice about securities.¹³⁰ Indeed, many investors are confused about the different standards of care that apply to investment advisers and broker-dealers with respect to the investment advice they provide.¹³¹

Under the Investment Advisers Act of 1940, an investment adviser is considered a fiduciary of its clients.¹³² The fiduciary standard encompasses the duties of loyalty and care.¹³³ The duty of loyalty requires an investment adviser to serve the best

interests of its clients, which includes an obligation not to subordinate a client's interests to its own.¹³⁴ The duty of care requires an investment adviser to "make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or misleading information."¹³⁵ In practical terms, the fiduciary standard requires an adviser with a material conflict of interest to either eliminate that conflict or fully disclose to its clients all material facts relating to the conflict.¹³⁶

Broker-dealers operate under a different regulatory regime from that of investment advisers. Broker-dealers are subject to statutory, Commission, and SRO requirements designed to promote business conduct that protects customers from abusive practices. One such requirement is an obligation of "suitability," which generally requires a broker-dealer to make recommendations that are suitable for a customer in light of the customer's risk tolerance, liquidity needs, investment horizon, and other factors that are specific to the individual customer.¹³⁷ Broker-dealers also are required, under certain circumstances, to disclose material conflicts of interest to their customers—in some cases, at the time the transaction is completed¹³⁸—and the federal securities laws and FINRA rules prohibit broker-dealers from participating in certain transactions involving particularly acute potential conflicts of interest.¹³⁹

As described more fully in our Report on Objectives for Fiscal Year 2016, the Commission has been considering whether to apply a fiduciary standard to broker-dealers.¹⁴⁰ For instance, Section 913 of the Dodd-Frank Act required the Commission to conduct a study analyzing the obligations of brokers, dealers, and investment advisers,¹⁴¹ and SEC staff issued the resulting study on January 21, 2011.¹⁴² That study recommended, among other things, that the Commission implement a uniform fiduciary standard for broker-dealers and investment advisers.

On March 1, 2013, the Commission issued a request for data and other information, in particular quantitative data and economic analysis, relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of broker-dealers and investment advisers.¹⁴³ The Commission sought this information to inform its consideration of alternative standards of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers, as well as to inform its consideration of “potential harmonization” of certain other aspects of the regulation of broker-dealers and investment advisers.¹⁴⁴

On April 6, 2016, the U.S. Department of Labor issued a final regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 as a result of providing investment advice to such a plan or its participants or beneficiaries.¹⁴⁵ The final rule also applies to the definition of “fiduciary” of a plan (including an individual retirement account (IRA)) under the Internal Revenue Code of 1986.¹⁴⁶ In addition, the final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of an employee benefit plan or IRA as fiduciaries in a wider array of advice relationships.¹⁴⁷ We continue to monitor developments associated with the implementation of these regulations.

On September 12, 2016, SEC Chair White announced that she and her fellow Commissioners were reviewing a staff report regarding a potential fiduciary duty rulemaking proposal.¹⁴⁸ She stated that, although she strongly supported a fiduciary duty rule, such a proposal was not imminent.¹⁴⁹ Earlier, while endorsing a uniform fiduciary standard for broker-dealers and investment advisers, Chair White stated that such a rule-making should be a principles-based standard rooted in the current fiduciary standard for



investment advisers.¹⁵⁰ At the same time, Chair White acknowledged that there were complexities and challenges that accompany such a rulemaking.¹⁵¹

We have reviewed the internal staff report regarding a potential fiduciary duty rulemaking and have discussed it with staff and Commissioners. During the Reporting Period, we did not submit any formal written recommendations related to this issue.

RETIREMENT READINESS

According to the Census Bureau, the age 65-and-older demographic in the United States is likely to increase by more than 50 percent—to approximately 74 million—between 2015 and 2030.¹⁵² Based on current trends, this age group will likely represent more than 20 percent of the total U.S. population by 2030.¹⁵³ This development promises to have a significant and wide-ranging impact on a number of policy areas in the years ahead.

For many Americans, the prospect of a comfortable retirement remains an elusive goal. For example, a recent Gallup survey found that “Americans continue to be most worried about not having enough money for retirement, with 64 percent saying they are ‘very worried’ or ‘moderately worried’ about this.”¹⁵⁴ According to Gallup, since it began polling Americans in 2001 regarding their financial concerns, “a majority have continually

been worried about not being able to afford retirement—the top overall concern in each of those sixteen years.”¹⁵⁵ Another recent Gallup survey concluded that “many working Americans simply can’t afford to retire.”¹⁵⁶

A recent study by the U.S. Government Accountability Office (the “GAO Retirement Study”) found, among other things, that Social Security furnishes most of the retirement income for approximately half of households age 65-and-older.¹⁵⁷ This trend may continue, as the same study found that 52 percent of households age 55-and-older have no retirement savings in a defined contribution plan or individual retirement account, and nearly 30 percent of households age 55-and-older have no retirement savings and no defined benefit (*e.g.*, pension) plan.¹⁵⁸ Findings like these prompt some to warn of a “retirement crisis” and to caution that “millions of Americans may be

forced to muddle through their final years partially dependent on others for financial support and to accept a standard of living significantly below that which they had envisioned.”¹⁵⁹

In our Report on Objectives for Fiscal Year 2016, we announced our intention to study the issue of Americans’ readiness for retirement. During the Reporting Period, we reviewed multiple studies and met with a cadre of researchers to explore the question of whether, or to what extent, Americans will be able to maintain their accustomed standard of living during their retirement years. We have also considered several policy recommendations that have been advanced by researchers and other advocates. The following chart summarizes some of the factors that, in their view, have contributed to the lack of retirement readiness, as well as their proposed policy recommendations.

SAMPLING OF EXPERTS	ISSUE(S) IDENTIFIED	SELECTED POLICY RECOMMENDATIONS
Brookings Institution ¹⁶⁰	<ul style="list-style-type: none"> • Savings rates have not kept up with increases in longevity 	<ul style="list-style-type: none"> • Expand Social Security through tax increases • Implement auto-enrollment in retirement plans • Require all businesses to offer workplace savings plans
Bipartisan Policy Center ¹⁶¹	<ul style="list-style-type: none"> • Lack of access to workplace retirement plans • Insufficient savings for short-term needs • Risk of outliving retirement savings • Failure to build and use home equity • Lack of personal finance knowledge • Problems with Social Security 	<ul style="list-style-type: none"> • Improve access to workplace retirement plans, especially for small businesses • Implement auto-enrollment in multiple accounts • Integrate lifetime income features in plans • Facilitate the use of home equity for retirement consumption • Improve financial education • Strengthen Social Security’s finances and modernize the program

SAMPLING OF EXPERTS	ISSUE(S) IDENTIFIED	SELECTED POLICY RECOMMENDATIONS
Center for Retirement Research at Boston College ¹⁶²	<ul style="list-style-type: none"> • Increased life expectancy • Declining Social Security replacement rates • Shift from defined benefit to defined contribution retirement plans • Increased out-of-pocket health care costs for retirees • Decline of real interest rates 	<ul style="list-style-type: none"> • Encourage workers to work longer to increase Social Security benefits and grow assets • Permit workers to contribute to retirement plans for a longer period • Implement auto-enrollment for all workers • Use home equity by downsizing or taking out a reverse mortgage
Ghilarducci and James ¹⁶³	<ul style="list-style-type: none"> • Insufficient savings by those with access to workplace defined contribution plans • Long-term retirement savings used to cover short-term needs (leakage) • Existing system offers no cost-effective means to convert savings to life-long income • Defined contribution participants experience sub-optimal returns on investments • Investments in 401(k)s and IRAs have a short-term focus rather than a long-term outlook • Current system favors the wealthy through higher tax subsidies 	<ul style="list-style-type: none"> • All employers with more than five employees must provide a pension or Guaranteed Retirement Account (GRA) • Shift all uncovered workers, and roll workers with retirement plans, into GRAs • Annuitize benefits • Offer incentives to workers to remain in the work force

These issues are discussed at length in a white paper authored by staff of our Office.¹⁶⁴ While we have no immediate plans to recommend specific action by the SEC, our research will inform our thinking on rulemakings or other initiatives that may impact senior investors.

MILLENNIALS

In addition to the topic of retirement readiness, we also conducted research concerning the Millennial generation. Our intention was to examine economic issues germane to Millennials, including their financial literacy, the manner and extent in which they participate in financial markets, and

the differences between Millennials and preceding generations. Our work in this area will be ongoing, as we believe it is important to consider whether proposed changes to laws, policies, and regulations are forward-looking and anticipate the needs of a new generation of investors.

The Investor Advocate included a discussion of Millennial investors and their unique needs in a speech delivered November 19, 2016.¹⁶⁵ The research we conducted during the Reporting Period will provide a foundation for our continuing advocacy efforts.

PROBLEMATIC INVESTMENT PRODUCTS AND PRACTICES

Among the statutory duties of the Investor Advocate enumerated in Exchange Act Section 4(g)(4), the Investor Advocate is required to identify problems that investors have with financial service providers and investment products. Exchange Act Section 4(g)(6)(B) mandates that the Investor Advocate, within the annual Report on Activities, shall provide a summary of the most serious problems encountered by investors during the preceding fiscal year. The statute also requires the Investor Advocate to make recommendations for such administrative and legislative actions as may be appropriate to resolve those problems.¹⁶⁶

To determine the most serious problems related to financial service providers and investment products, staff of the Office of the Investor Advocate reviewed information from the following sources:

- Investor Alerts and Bulletins issued by the SEC, FINRA, and the North American Securities Administrators Association, Inc. (NASAA) during FY 2016;
- Discussions and correspondence with SRO staff;
- SEC enforcement actions and FINRA disciplinary actions during the Reporting Period;
- The 2016 NASAA Enforcement Report;¹⁶⁷ and

- SEC and SRO staff reports providing guidance and interpretations relating to investment products.

The majority of municipal securities are owned by retail investors, so we pay close attention to developments in that market and the activities of the MSRB. In a letter dated November 3, 2016, the MSRB identified four areas of particular concern “given their potential adverse effect on retail investors:” (1) Disclosure practices; (2) Price fairness and transparency; (3) Types of ownership; and (4) Senior investor protection. They also indicated the steps they are taking to address these concerns.¹⁶⁸



SEC ¹⁶⁹	NASAA ¹⁷⁰	FINRA ¹⁷¹
<ul style="list-style-type: none"> • Internet Fraud, Including Social Media Investment Schemes • Investment Scams & Schemes Including Government Impersonator Schemes, Zika Virus Investment Scams, and Natural Disaster Investment Scams • Short Sales • Investment Fees & Expenses • Variable Annuities • Exchange Traded Notes (ETN) • Securities-Backed Lines of Credit (SBLOC) • Fraudulent Stock Promotions Leading to Pump-and-Dump Schemes • Presentation and Reliability of Investment Performance Claims • Stop and Stop-Limit Orders • Master Limited Partnerships • Microcap Stocks • Investment Adviser Disclosure Practices • Public Non-Traded REITs • Crowdfunding • Affinity Fraud 	<ul style="list-style-type: none"> • Ponzi Schemes • Internet Fraud, including Internet Bulletin Boards • Intermediary or Gatekeeper Fraud • Senior Fraud • Real Estate Related Investment Fraud • Oil and Gas Investment Fraud • Unregistered Products/Unlicensed Salesmen • Promissory Notes • Affinity Fraud • Escheatment • Employment-Based, Fifth Preference (EB-5) Visa Fraud • Pension Advances 	<ul style="list-style-type: none"> • Advance Fee Scams • Binary Options • Investment Scams & Schemes Including IRS Impersonation Scams, Telephone Scams, Fake Check Scams, Lottery Scams, and Recovery Service Scams • Securities-Backed Lines of Credit (SBLOC) • Range Accrual Notes • Alternative Mutual Funds • Non-Traded Business Development Companies • Unit Investment Trusts • Proliferation of Share Classes • Identity Theft • High-Yield CD Marketing Ploys • Stock-Based Loan Concerns • Risks Related to Order Types • Market/Systemic Risk • Public Non-Traded REITs • Crowdfunding Risk

The table above lists certain problematic products or practices during FY 2016 as reported by the SEC, NASAA, and FINRA. Although not exhaustive, the lists reflect some of the concerns of these organizations. Details regarding these products and practices are available on these organizations' websites.

Each of the products and practices listed above presented problems for investors during the Reporting Period. Based on our review of the resources described above and consultations with knowledgeable professionals, however, we will highlight two areas of concern: the Simple

Agreement for Future Equity in crowdfunding investments and business development companies.

SIMPLE AGREEMENT FOR FUTURE EQUITY IN CROWDFUNDING INVESTMENTS

A relatively new investment instrument has been developed for use in crowdfunding offerings, in which a large number of investors may invest relatively small amounts of money in a business. The instrument, called a Simple Agreement for Future Equity (SAFE), contains certain features that differ from the rights and potential returns that an average equity investor may expect.¹⁷²

A SAFE instrument contains a set of basic funding terms for a start-up seeking capital from investors who, in turn, receive the promise of future equity. A SAFE is structured to allocate equity to investors when there is a future valuation event, such as an acquisition or an initial public offering. If there never is such a valuation event, investors receive nothing.¹⁷³ Moreover, not all valuation events trigger an equity issuance. For instance, a recent *Crowdfund Insider* article pointed out that the SAFE offered by a major Regulation Crowdfunding portal provided that a financing conversion occurred under the contract only when the issuer closed a future sale of preferred stock.¹⁷⁴ The article's authors observed that "a company could theoretically raise unlimited amounts of private capital selling common stock and distributing profits to those investors and the founders via dividends without ever triggering a conversion of the SAFEs or allowing the SAFE holders to participate in those dividend payments."¹⁷⁵

SAFES are used primarily by early-stage companies that tend to be difficult to value because they may lack observable or measurable metrics of performance. SAFES defer decisions about valuation, liquidation preferences and participation rights until later-stage rounds of financing. From the company's perspective, the terms are uncomplicated—there are no covenants, veto rights, board seats, rights of first refusal or co-sale, or other provisions typically negotiated by purchasers of preferred or common stock. There are no maturity dates or interest payments, as might be found in convertible debt. Investors are unable to declare default and they are not entitled to any of the company's assets in the event of liquidation. In essence, SAFE investors have no rights until a valuation event (as defined) or sale takes place.¹⁷⁶

In our view, the acronym SAFE seems misleading. In addition, unless the features of the product are explained very clearly, crowdfunding investors may not understand the amount of risk they are assuming, and particularly the possibility that they may not readily reap the benefits from investing in a successful business venture. Ultimately, crowdfunding may become an unattractive alternative for investors if their upside potential is severely restricted while they take on the heightened risk of start-up investing.

We have not yet made any recommendations to the Commission concerning this product. However, in consultation with the Division of Corporation Finance's Office of Small Business Policy, our Office will continue to monitor the development and usage of SAFES.

BUSINESS DEVELOPMENT COMPANIES

The Investment Company Act of 1940 defines a Business Development Company (BDC) as any domestic, closed-end company operating for the purpose of making investments in small and mid-sized companies.¹⁷⁷ This category of closed-end investment company was created by Congress in 1980 and was designed to foster the growth of small companies by enabling managerial assistance from the adviser and loosening some of the more restrictive Investment Company Act provisions.¹⁷⁸

A BDC is generally required to invest at least seventy percent of its total assets in securities of certain types of companies, including eligible portfolio companies (EPC).¹⁷⁹ Generally, EPCs are small, developing companies in need of capital financing but are locked out of the conventional capital markets.¹⁸⁰ Additionally, BDCs are required to make available significant managerial assistance to the EPCs.¹⁸¹



Typically, BDCs are structured as regulated investment companies or limited partnerships for tax purposes.¹⁸² If a BDC distributes at least ninety percent of its taxable income annually to its shareholders and meets other source-of-income and asset diversification tests, the BDC is exempt from federal corporate taxes.¹⁸³

Most BDCs are publicly traded.¹⁸⁴ BDCs use the proceeds from selling their stock, in addition to the proceeds from bank loans and bond issuances, to make loans to EPCs.¹⁸⁵ In contrast, there are also non-traded BDCs. Non-traded BDCs are registered as investment companies with the SEC, and therefore their shares can be sold to retail investors.¹⁸⁶ However, non-traded BDC shares are not listed on any public exchange.¹⁸⁷

Generally, BDCs attract individual investors seeking high yields, steady dividends, or non-investment-grade debt.¹⁸⁸ BDCs provide the opportunity for individuals to invest in private companies, an area that had once been limited to large institutional investors through private equity and venture capital funds.¹⁸⁹ Additionally, BDCs provide the

opportunity to diversify investors' portfolios.¹⁹⁰ Non-traded BDCs may be attractive to investors who are seeking even higher yields than public BDCs as well as the promise of protection from market volatility.¹⁹¹

Of course, investing in BDCs is not without risk.¹⁹² Analysts indicate that potential risks include lending to venture-capital-backed companies, buying equity stakes in private companies, and focusing on loans to specific sectors such as automotive or real estate.¹⁹³ Analysts further indicate that due to the nature of BDCs, which invest in small and mid-sized companies, BDCs often lend to companies with "junk" status or that carry low credit ratings, if rated at all.¹⁹⁴ In January 2013, FINRA highlighted investors' exposure to significant market, credit, and liquidity risks, and the risk of over-leveraging their relatively illiquid portfolios.¹⁹⁵

Non-traded BDCs can carry a higher degree of risk than public BDCs.¹⁹⁶ Among other things, they may fail to provide accurate mark-to-market values, be subject to very low liquidity, impose

high upfront fees, and present numerous conflicts of interest.¹⁹⁷ In August 2016, FINRA indicated it would make non-traded BDCs an area of focus and would seek to better understand how non-traded BDCs are marketed and sold, given their increasing popularity.¹⁹⁸ In particular, FINRA identified the following areas of potential concern: increased availability to retail investors, exposure to high commissions and fees, illiquidity risks, and uncertainty regarding the time-period BDCs will hold funds before they are invested.¹⁹⁹

In sum, both nontraded and traded BDCs may be considered highly volatile.²⁰⁰ Nonetheless, depending on the circumstances, BDCs might have a place in the overall asset mix of a broadly diversified investment portfolio, and the Office

of the Investor Advocate does not recommend changes to the rules or regulations that govern these products at this time. We note, though, that an investor's reach for yield can have negative consequences, and we believe that it is incumbent upon providers of these products to ensure that investors understand those risks.

For their part, investors should conduct thorough research and strive to understand the nature of BDCs and their risks before deciding to invest in them. Investors might also consider seeking the advice of registered investment professionals who understand their investment objectives and tolerance for risk before making investment decisions involving BDCs.



INVENTORY OF INVESTOR ADVOCATE RECOMMENDATIONS AND SEC OR SRO RESPONSES

Pursuant to Exchange Act Section 4(g)(4), the Office of the Investor Advocate is required to identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations. To the extent practicable, we are also expected to propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified and to promote the interests of investors.²⁰¹

We engage in advocacy for investors in various ways. Most often, our written advocacy is in the form of a comment letter that is included in the public comment file. Our expectation is that our comments will be given due weight and that our recommendations will be addressed in a substantive way within the order or release in which a proposed amendment is approved or disapproved. However, we also have the authority to submit more formal recommendations directly to the Commission.

Exchange Act Section 4(g)(7) requires the Commission to establish procedures requiring a formal response to all such recommendations

not later than three months after the date of such submission.²⁰² Of course, while the Commission must respond to the Investor Advocate's recommendations, it is under no obligation to agree with or act upon the recommendations.

Exchange Act Section 4(g)(6) requires us to provide, within our Reports on Activities, an inventory of the most serious problems encountered by investors during the report period. The inventory must identify: any action taken by the Commission or SRO and the result of such action; the length of time that each item has remained on the inventory; and for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action.

To satisfy Section 4(g)(6), we provide the following inventory of comment letters and formal recommendations in which we call for action by the Commission or an SRO.²⁰³ We are very selective in choosing the issues to address in comments or recommendations and, accordingly, we believe these issues are among the most serious potential problems for investors. These matters are discussed in greater detail in the preceding sections of this Report.

Nature and Date of Submission	Recommendation of Investor Advocate	Action Taken by Commission or SRO	Reason for Inaction, If Applicable, and Responsible Official
Formal Recommendation, dated October 16, 2015, to Commission ²⁰⁴	Opposed application of NYSE to amend its Listed Company Manual to exempt early stage companies from the existing NYSE requirement to obtain shareholder approval before selling shares for cash to related parties, affiliates of related parties, or entities in which a related party has a substantial interest.	On December 31, 2015, the Commission approved the proposed rule change over our objection and provided a substantive response to our recommendation within the approval order.	Action complete
Comment Letter, dated October 29, 2015, to MSRB ²⁰⁵	Supported proposal to lengthen the term of MSRB board member service to 4 years (following earlier objection to related proposal).	On January 26, 2016, the MSRB submitted the proposed amendment to the SEC, which approved it on March 17, 2016.	Action complete
Comment Letter, dated December 11, 2015, to MSRB and FINRA ²⁰⁶	Encouraged adoption of consistent markup disclosure rules that would utilize a full trading day timeframe and be calculated using the “prevailing market price.”	On August 15, 2016, and September 7, 2016, respectively, FINRA and the MSRB submitted proposed amendments, which largely followed our recommendations, to the SEC. The proposals were approved by the SEC after the end of the Reporting Period.	Action complete
Formal Recommendation, dated December 15, 2015, to Commission ²⁰⁷	Supported application of BATS Exchange, Inc. to give itself the authority to initiate an expedited suspension proceeding in order to stop certain cases of disruptive and manipulative trading behavior.	On February 18, 2016, the Commission approved the proposed rule change.	Action complete

Nature and Date of Submission	Recommendation of Investor Advocate	Action Taken by Commission or SRO	Reason for Inaction, If Applicable, and Responsible Official
Comment Letter, dated March 31, 2016, to MSRB ²⁰⁸	Supported proposed guidance for the determination of “prevailing market price,” with suggestions to address transactions with affiliated parties.	On September 7, 2016, the MSRB submitted the proposed guidance, which largely followed our recommendations, to the SEC. The proposal was approved by the SEC after the end of the Reporting Period.	Action complete
Comment Letter, dated August 15, 2016, to PCAOB ²⁰⁹	Supported proposal for the auditor’s report to include discussion of critical audit matters, auditor tenure, and additional improvements.	Pending at end of Reporting Period.	
Comment Letter, dated September 9, 2016, to Commission ²¹⁰	Supported proposal to require greater disclosure by ATs that transact in NMS stocks, and encouraged Commission to make current Form ATS public for ATs that transact in fixed income securities, including government securities.	Pending at end of Reporting Period.	



OMBUDSMAN'S REPORT

ESTABLISHING A FOUNDATION FOR MEANINGFUL SERVICE

Under Section 919D of the Dodd-Frank Act, as codified in Exchange Act Section 4(g)(8), 15 U.S.C. § 78d(g)(8), the Ombudsman shall: (i) act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations; (ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and (iii) establish safeguards to maintain the confidentiality of communications between investors and the Ombudsman.²¹¹

The Ombudsman is also required to “submit a semi-annual report to the Investor Advocate that describes the activities and evaluates the effectiveness of the Ombudsman during the preceding year” (Ombudsman’s Report).²¹² The Ombudsman’s Report must be included in the semi-annual reports submitted by the Investor Advocate to Congress. To maintain reporting continuity going forward, the Ombudsman’s Report included in the Investor Advocate’s June 30 Report on Objectives will provide a look back on the Ombudsman’s activities during the first half of the fiscal year and discuss the objectives of the Ombudsman for the following fiscal year. The Ombudsman’s Report included in the Investor

Advocate’s December 31 Report on Activities will provide a look back on the Ombudsman’s activities during the full preceding fiscal year. Accordingly, this report describes the Ombudsman’s activities from October 1, 2015 through September 30, 2016 (Reporting Period) and provides a brief discussion of the Ombudsman’s primary objectives and outlook for Fiscal Year (FY) 2017.



During the Reporting Period, the Ombudsman²¹³ continued to develop infrastructure and procedures necessary to support the ombudsman function by:

- Refining administrative practices and procedures for responding to initial matters and subsequent investor contacts and correspondence;
- Standardizing primary issue tracking categories, based on a comprehensive review of matters received during FY 2015 and FY 2016 to establish reporting continuity;
- Working directly with the SEC’s Office of Information Technology and a technology contractor to complete the first phase of development for the electronic platform for matter management, data collection, reporting,

and recordkeeping and to develop the corresponding web form for use by the public;

- Amending policies and procedures to reflect the transition from a primarily manual matter management system to an electronic matter management system; and
- Identifying specialized training opportunities for staff members to enhance their ombudsman and dispute resolution knowledge and expertise.

OMBUDSMAN SERVICE BY THE NUMBERS

The Ombudsman assists retail investors and other individuals with concerns or complaints about the SEC or an SRO the SEC oversees in a variety of ways, including, but not limited to:

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

In practice, individuals often seek the Ombudsman's assistance as an initial point of contact to identify resources and options available to resolve their questions or complaints, or as a subsequent point of contact when they are dissatisfied with the rate of progress or resolution

of their matters. To respond to inquiries effectively, efficiently, and with consistently high quality service, the Ombudsman uses workflow data to monitor the volume of inquiries and the staff resources devoted to addressing the particular concerns raised. To do so, we track:

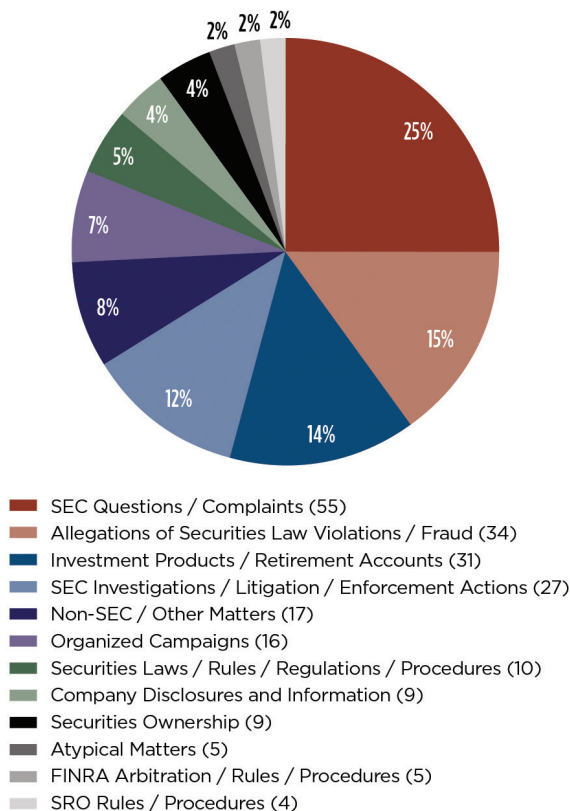
- initial inquiries received by or referred to the Ombudsman;
- all related correspondence submitted to, prepared by, or exchanged with Ombudsman staff;
- actions and resources required to identify and respond to inquiries; and
- inquiry status from inception to closure or resolution.

Workflow volume is measured in terms of matters and contacts. Each matter represents a discrete inquiry raised to the Ombudsman and the facts and circumstances pertinent to it. Each contact indicates a separate communication to or from the Ombudsman staff relating to a particular matter. Individual matters often generate numerous contacts that require separate and additional staff attention, research, and responses. These matters usually involve related concerns raised by investors, ongoing explanations and resolution attempts provided by the Ombudsman, or recurring instances of challenging or persistent communications.

The Ombudsman tracks matters and contacts to maintain a comprehensive view of the time and resources spent on each aspect of matter resolution. More importantly, the Ombudsman uses this information to identify those matters and circumstances that significantly alter workflow volumes, call for reallocation of resources, or require other techniques to manage effectively.

Quantifying What We Do

During FY 2016, retail investors, industry professionals, concerned citizens, and other interested persons sought the Ombudsman's assistance on 222 matters covering 12 primary issue categories. Of these 222 matters, 207 were new matters initiated during FY 2016 and 15 were carry-over matters initiated prior to October 1, 2016. When a matter is initiated, the Ombudsman conducts an initial assessment to examine the unique facts, circumstances, and concerns raised, and to determine the research, staff engagement, and resolution methods that may be required. As a matter of practice, the Ombudsman generally conducts this initial assessment within five business days of receipt of a matter to ensure prompt disposition, handling, and referral to other offices or divisions as appropriate. During the Reporting



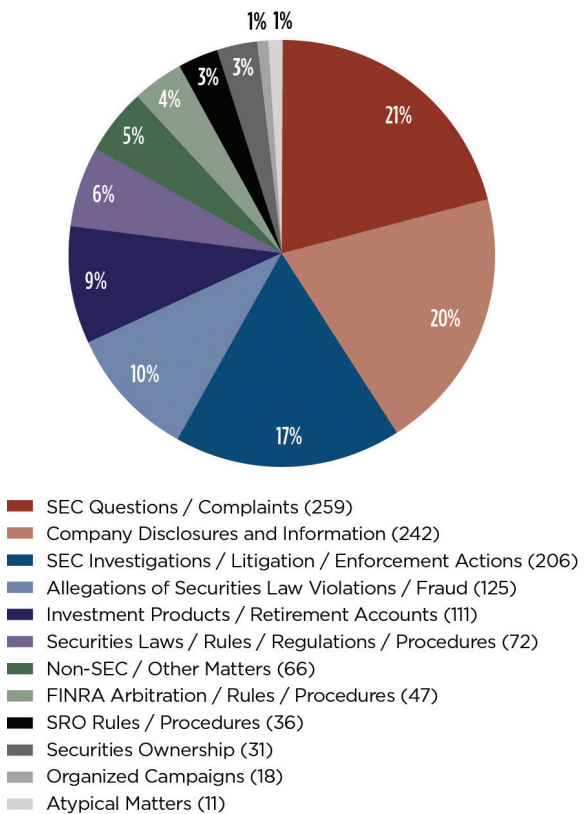
Period, 99 percent of all new matters were assessed within two business days of receipt and 84 percent of all new matters were assessed on the date of receipt. The chart on the left shows the distribution of matters handled during FY 2016 by primary category.

Upon a detailed analysis of the facts and circumstances behind the 222 matters addressed during FY 2016, the Ombudsman identified certain noteworthy themes:

- Ten individuals asked the Ombudsman to compel FINRA to reverse an unfavorable arbitration decision or to deny arbitration;
- Nine investors raised concerns about recovering losses in the context of Fair Funds, claim funds, or other circumstances involving court-appointed receivers; two of the nine specifically complained about the inefficiency of existing claim funds and their inability to make injured investors whole;
- Ten individuals complained about inadequacy of investor protections in bankruptcy proceedings and/or the role of the SEC in corporate bankruptcy restructuring plans; and
- Eighteen investors complained about interactions with SEC staff relating to the staff's ability or obligation to advocate for their individual concerns, or the staff's obligation to provide access to non-public information.

During FY 2016, the 222 matters discussed above resulted in 1,224 contacts. Of these contacts, 90 percent resulted from 207 new matters. The remaining 118 contacts resulted from 15 ongoing matters carried over from the prior fiscal year.

The chart below illustrates the distribution of the 1,224 contacts across the 12 primary categories:



The Ombudsman’s web presence also expanded during the Reporting Period, as the Ombudsman’s external web page, accessible through the Commission’s public website at www.sec.gov/ombudsman, became publicly available days before the beginning of FY 2016. The web page offers straightforward explanations about the Ombudsman’s role and the assistance the Ombudsman provides, and describes how individuals may contact the Ombudsman and raise concerns for the Investor Advocate’s consideration. The web page was viewed 961 times during this Reporting Period, with an average time spent on each view of 2 minutes and 19 seconds.

The Ombudsman continues to work with SEC staff to track these analytics on a continuing basis and will use the related information to inform and enhance the public’s interest in and

understanding of information presented on the Ombudsman’s webpage. Likewise, as the Ombudsman’s use of social media increases, we will consult these analytics for new and creative ways to generate productive engagement with investors and to increase the public’s understanding of the Ombudsman’s role. In anticipation of the Ombudsman Matter Management System (OMMS)²¹⁴ web form becoming available to the public, the Ombudsman also is soliciting feedback from and working with other ombudsmen and key SEC staff to explore the viability of various social media platforms as additional avenues for investor outreach efforts.

How We Use the Numbers

The Ombudsman uses matter and contact quantitative data for both administrative and substantive purposes. Administratively, matter and contact data helps the Ombudsman evaluate the resources required to reach closure or resolution and make strategic decisions to ensure that persons seeking the Ombudsman’s assistance receive an appropriate level of personalized service and staff resources. For example, when an individual asks the Ombudsman to resolve a concern by taking measures that fall outside of the Ombudsman’s statutory authority, it may be appropriate to dedicate additional time and resources to exploring feasible alternatives. However, if the individual is unwilling to consider other options and signals this through voluminous or repetitive communications to the staff, the workflow data may indicate that continued resolution efforts are not an appropriate use of staff or agency resources. In such instances, the Ombudsman may inform the staff or individual that, barring any new or pertinent information that impacts the staff’s analysis, subsequent incoming correspondence will be reviewed but the matter itself may be closed.

The quantitative data also informs resource allocation considerations related to our program development efforts. For example, we anticipate that changes in our workflow data before and after

the OMMS Form release may provide insight on how the introduction of a public-facing electronic platform for accessing the Ombudsman (i) affects public awareness of the Ombudsman's services; (ii) encourages individuals who have not previously contacted the Ombudsman to do so; (iii) enhances public input on the issues the Ombudsman identifies and regulatory recommendations the Ombudsman may present for the Investor Advocate's consideration; and (iv) affects the staff's ability to resolve certain types of inquiries more efficiently than telephone calls or other forms of correspondence may allow. In this way, quantitative data may identify procedural changes to expedite the resolution of concerns without decreasing the individualized, high-quality response each investor receives. In addition to tracking quantitative data, the Ombudsman also evaluates matters and contacts based on the primary issues involved. By tracking the distribution of investor matters and contacts across categories that appropriately represent the range of concerns the Ombudsman receives, the data helps the Ombudsman identify potential areas of impact or concern.

During this Reporting Period, the Ombudsman refined these issue categories further to incorporate the most useful category structure into the design of OMMS data management configuration and to build in flexible data tracking and reporting functionality. The staff also revised the existing manual record-keeping systems, adjusted the corresponding category data for FY 2016, and maintained matter and contact data in OMMS compatible categories and formats. This allowed for a seamless migration of matter and contact data to the OMMS platform. Through these efforts, the staff maintained the utility of existing workflow data and used that data to enhance the services the Ombudsman provides.

OMBUDSMAN SERVICE BEHIND THE NUMBERS

As indicated in prior reports, the numbers are helpful for understanding some aspects of the Ombudsman's day-to-day operations. However, even when Ombudsman staff deliverables are easy to quantify—such as the number of matters and contacts fielded during the fiscal year—narrative descriptions provide essential information to interpret what those numbers represent from a time, resource, and customer service perspective. The 1,224 contacts fielded during FY 2016 represent a 68.4 percent increase over the 727 contacts fielded during FY 2015.²¹⁵ This comparison takes on more meaning in the context of key details. By adding a few descriptive facts, the 68.4 percent increase reveals the complex nature of the service and assistance provided to investors.

Throughout FY 2016, the Ombudsman function was supported by three persons—the Ombudsman and two attorneys. Every matter and contact involved at least one Ombudsman staff member's active participation as a listener, reviewer, securities law resource, and solution provider. Every item of correspondence was reviewed for any potential substantive value it might add to the process of reaching an effective resolution to the unique concerns that brought the individual to the Ombudsman for help. Numerous matters and ensuing contacts required the staff to review additional information, perform research, assess related matters or concerns handled by other SEC offices and divisions, and consult other SEC staff on a regular basis.

The relationship between our numbers, our accomplishments, and our investor service approach is not always readily apparent. For that reason, we routinely provide vignettes to

demonstrate the staff time, effort, and commitment that transform the numbers into a full picture of the earnest efforts of the Ombudsman to provide meaningful, personalized service that creates unique value for retail investors. The examples below highlight representative themes the Ombudsman identified through assistance provided to the investors during FY 2016.

Share Value Losses and Concerns

During the Reporting Period, the Ombudsman received inquiries from 10 retail investors as shareholders of publicly traded companies, asking the SEC to intervene in U.S. Bankruptcy Court proceedings, with the expectation that the SEC's investor protection role obligated the agency to do so. These investors were somewhat frustrated to discover the SEC has neither the obligation nor the authority to represent retail investors in bankruptcy cases. Some investors perceived the Ombudsman's response as proof that the protection of retail investors is a superficial policy meant to conceal a conspiratorial connection between the SEC and Wall Street corporate insiders. Investors who took this perspective posed unique challenges for Ombudsman staff engagement and required varying degrees of nuanced diplomacy to assist effectively and resolve the complaints.

The Ombudsman also observed that investors who suffered losses from conduct reported in SEC enforcement actions complained somewhat differently and tended to be less receptive to Ombudsman assistance overall. Several investors contacted the Ombudsman because SEC staff in a particular office or division declined the investor's requests for non-public information relating to SEC investigations, including questions about the status of investigations, the SEC's legal strategy, the financial solvency of an individual or entity associated with the conduct, or other petitions. Some investors spoke in terms of their right to non-public information, while others felt that it was

the SEC's duty to mitigate the harm by providing the requested information. One particularly zealous investor complained that the SEC staff did not follow this individual's specific investigative instructions or carry out their duties in the way the investor expected advocates to behave.

Successful SEC enforcement actions—particularly those involving large financial judgments—reinforce these investor perceptions and sometimes encourage investors to present their complaints to the Ombudsman in more adversarial or antagonistic ways. For example, two investors contacted the Ombudsman to complain about the administration of different investor claim funds. In one instance, an investor left a phone message characterizing the relevant issue as “an SEC screw-up of unbelievable proportions” for which the Ombudsman owed the investor a satisfactory response. The Ombudsman effectively allayed the investor's concerns by establishing respectful rapport, addressing each point of the investor's assumptions through extensive dialogue, and realigning the investor's expectations properly. In another situation, an individual claimed that the administration of a particular Fair Fund proved the SEC did not actually intend to protect investors because the distributions did not cover the full amount of the investors' losses. Again, the investor's complaint with the SEC flowed from particular assumptions about the meaning of investor protection in the context of the federal securities laws and the SEC's legal authority.

In analyzing the common aspects of these scenarios and investor reactions, it became apparent that investor expectations were affected by beliefs that a causal connection existed between a regulatory event or enforcement action and the subsequent depreciation in the value of their investments. Investors who articulated this connection also tended to see themselves in a personal SEC-investor relationship defined and governed by the investor's

beliefs about fairness. Through a diplomatic and thoughtful approach to each investor, the Ombudsman consistently identified barriers to effective communication, realigned each investor's expectations when needed, and explained key aspects of the securities laws and the role of the SEC in the context of each investor's assumptions and complaints.

Investor Protection and Advocacy Expectations

During the Reporting Period, the Ombudsman received multiple inquiries from investors presenting a range of beliefs about what protecting investors means in the context of the SEC's stated mission, along with a similar range of expectations about how protecting investors should apply to their particular concerns or complaints. Perhaps nowhere were these concepts more evident than in staff interactions with a small number of investors and individuals who engaged the staff intensely and persistently. These individuals presented unique challenges for the Ombudsman because of their demands for a particular resolution, outcome, or SEC action, their presentation of ongoing hypothetical scenarios, their resistance to engage in beneficial communications, and often, the sheer volume of their communications and the disproportionate staff effort required to address those communications.

Several tenacious investors contacted the Ombudsman throughout the Reporting Period with complaints that SEC staff members routinely ignored their communications, refused to initiate investigations or provide investigation details and updates, and failed to obtain the results the investors asked for in their individual complaints. Typically, these investors presented complaints that spanned periods of years and involved contract law and consumer rights issues, allegations of conspiracies and fraudulent schemes involving specific SEC staff, and other disparate accusations and complaints outside of the scope of the SEC's

mandate. These investors often insisted that the only fair outcome of their particular complaint was the outcome they identified. These outcomes usually included demands that the SEC make exceptions to the securities laws, ignore and act outside of the bounds of its statutory authority and limitations, and take unprecedented action against persons and entities.

After conducting research to understand the nature of the underlying conflicts and issues involved, and after the detailed review of the years of voluminous correspondence, records, and related complaints these investors filed with the SEC and other entities, the Ombudsman devoted significant time and resources explaining what the SEC could and could not do to assist the investors, and offering other resources and options. What is often not accepted or acknowledged by these investors is the Ombudsman staff's earnest attempts to address their wide-ranging concerns. Although investors are often disappointed to learn that the SEC cannot provide the assistance they expect, most are able to readjust their expectations accordingly. Some investors, however, are not. Rather, these investors endeavor to force a different result by engaging in ongoing communications, escalating allegations and accusations, and refuting the information, resolution options, and resources presented by the Ombudsman staff and others at SEC. These investors respond with the full force of their convictions—they assume an intractable position with seemingly no regard to the scope or limits of the SEC's authority.

Many investors raise the SEC's mission statement—to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation—to support their positions and complaints. In particular, many insist that the protection of investors noted in the SEC's mission statement, coupled with the name of our Office—the Office of the Investor Advocate—proves that SEC staff should advocate for laws and statutes to be

expanded, creatively interpreted, or disregarded altogether to reach the particular outcome the investor demands. For these investors, the Ombudsman explains the mission statement and the name of the Office, and distinguishes the general understanding of an advocate from the particular meaning in the context of the work of the Office—namely, to advocate and provide a voice for retail investors in the policymaking processes of the Commission, SROs, and Congress.

Ongoing discourse with these investors can be challenging and costly from a resource point of view, and often results in a standstill, where investors' expectations and demands cannot be met and no satisfactory resolution can be reached. The benefit of these interactions is that they provide opportunities for the Ombudsman to consider and examine investors' understandings of certain terms and concepts closely associated with the mission and work of the SEC and how those understandings should inform not only the responses we provide to investors, but also the practical aspects of Ombudsman operations.

Input from Industry Professionals

During FY 2015, a retired financial industry professional identified certain corporate bond transaction practices that create disparities in the flow of information available to retail and institutional investors. The professional submitted a detailed report offering a thorough analysis of the circumstances and practices involved. Upon review of the report, the Ombudsman staff consulted with SEC subject matter experts and shared the report with key staff. Although the investor did not submit the report in response to an SEC rulemaking or policy initiative open for public comment, the staff appreciated the well-presented and thorough analysis, noting the benefit both the public and the staff could gain from feedback offered in response to requests for public comment on other similar issues in the future.

Another investor offered observations and recommendations relating to disclosure requirements in Regulation S-K and the manner in which Regulation S-K disclosure information is available to investors. The Ombudsman engaged SEC staff in key offices and divisions to review the investor's detailed examples and recommendations. The Ombudsman further encouraged the investor to submit formal comments to the Commission in response to a specific concept release and the larger disclosure issues his observations raised. We informed the investor that input from the public often influences policy determinations and rulemaking recommendations considered by our Office and the Commission, and his perspectives and comments were valued and welcomed.

FINRA DISPUTE RESOLUTION PROCESS

The Ombudsman is empowered to act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with an SRO such as FINRA.²¹⁶ As noted in the Ombudsman's prior reports,²¹⁷ retail investors continue to raise concerns about the FINRA dispute resolution process. During FY 2016, the Ombudsman continued the regular practice of monitoring policy, news, and other activity relating to the FINRA dispute resolution forum. The Ombudsman specifically focused on FINRA activities impacting retail investors. A few of these issues raised by investors are discussed below.

Explained Decisions

The FINRA Dispute Resolution Task Force (Task Force) was formed in July 2014 to provide recommendations to FINRA's National Arbitration and Mediation Committee (NAMC) to improve the arbitration forum.²¹⁸ The Task Force issued its final report in December 2015,²¹⁹ which spanned 51 recommendations over 11 thematic areas, including explained decisions and expungement. The Task Force made three recommendations to the NAMC

with respect to explained decisions: (i) FINRA should require an explained decision unless a party to the arbitration notifies FINRA that it does not want an explained decision; (ii) the existing fact-based format of the explanation should be retained, but the decision should include a summary explanation of the damages calculation; and (iii) before expanding explained decisions, FINRA should develop and administer a training program on how to write them.²²⁰

During the Reporting Period, a retail investor raised concerns to the Ombudsman about the FINRA arbitration process, stating that he was unaware that he would not receive an explained decision in his simplified arbitration. The investor raised concerns about the fairness of FINRA arbitration, particularly because awards are routinely issued without providing explanations for the decisions. The investor also questioned the partiality of the award because, in his view, his opponent was a broker-dealer whose fees help fund FINRA's operations. This retail investor's perception of fairness is consistent with the Task Force's views on expanding the use of explained decisions. The Task Force observed that expanding the use of explained decisions may improve the transparency of the FINRA arbitration system and increase investor confidence in arbitration outcomes.²²¹

This retail investor's complaint also provides insight into the value of explained decisions in simplified arbitrations. Under FINRA rules, simplified arbitrations are disputes involving \$50,000 or less, with one arbitrator assigned rather than a panel of three arbitrators, and where the assigned arbitrator is selected from the chairperson roster unless the parties agree otherwise.²²² No arbitration hearing is held unless the investor requests one, and if there is no hearing, the arbitrator will render an award based on the pleadings and discovery provided by the parties.²²³ Notably, a simplified arbitration is not eligible for an explained decision unless the

investor requests a hearing.²²⁴ Even if the investor makes this request, the arbitrator need only provide an explained decision upon the joint request by both parties before the first arbitration hearing.²²⁵

FINRA notes that explained decisions are not appropriate in simplified arbitrations due to the "abbreviated nature of the proceedings."²²⁶ This view is echoed by some legal scholars who otherwise support explained decisions, on the basis that the parties to a simplified arbitration seek an expedited, inexpensive resolution.²²⁷ Scholars also opine that the parties would benefit from a brief statement of factual findings and an explanation of why the findings justify the result.²²⁸

Expungement Requests and Hearings

The Task Force made six recommendations to the NAMC with respect to expungement: (i) FINRA should create a pool of specially-trained arbitrators from the chairperson roster to conduct expungement hearings in settled cases and in all cases where claimants did not name the broker as a respondent; (ii) the arbitration panel that conducts the arbitration should also conduct the expungement hearing in cases decided on the merits, provided the chairperson attends special expungement training; (iii) FINRA should review procedures for notifying state regulators of expungement requests, but the Task Force took no position on NASAA's recommendation for a regulatory approach to expungement; (iv) FINRA should review its expungement training with a consultant; (v) FINRA should review the second Rule 2080 ground for expungement (the broker was not involved in the "alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds"); and (vi) FINRA should require greater expungement training for arbitrators, with additional training required to qualify for the special arbitration panel.²²⁹

During the Reporting Period, there was an important expungement-related development that may impact retail investors in the future. In *Royal Alliance v. Liebhaber*, a financial advisor encouraged a retail investor to select “illiquid, high-risk investments” that were “inappropriate and unsuitable” for her individual retirement account, and which allegedly resulted in a \$325,000 loss.²³⁰ The investor filed an arbitration claim with FINRA against the advisor and firm, and settled with the firm for \$30,000.²³¹ Once the case was settled, the firm requested a hearing to expunge the complaint from the financial advisor’s record. Despite objections by the investor’s counsel that the investor was not given a full and fair opportunity to participate in the expungement hearing, the arbitrators took the position that the proper process had been followed and that additional information from the investor was unnecessary. The arbitration panel ultimately recommended expungement. The investor’s counsel then wrote a letter to FINRA Dispute Resolution requesting that arbitrators be informed that investors are allowed to tell their side of the facts in expungement hearings, and that FINRA oppose the particular request for expungement.²³²

Two days later, FINRA emailed arbitrators and posted updated guidance on its website emphasizing the importance of allowing investors and their counsel to introduce evidence at expungement hearings, cross-examine the broker and witnesses for the party seeking expungement, and to present opening and closing arguments if the arbitrators allow the parties to do so.²³³ FINRA also provided updated guidance to arbitrators related to the rights of retail investors in FINRA expungement hearings.²³⁴

The firm subsequently filed a petition with a California state court to obtain an order confirming an arbitration award of expungement and named the investor and FINRA as respondents to the petition.²³⁵ Both the investor and FINRA requested

that the expungement order be vacated.²³⁶ The investor argued that she had an interest in the expungement proceedings because by awarding expungement, the arbitrators were making the determination that the investor’s viewpoints were false or erroneous.²³⁷ The investor also argued that she represented a greater good for regulators and the investing public by ensuring that the adviser’s Central Registration Depository (CRD) and BrokerCheck²³⁸ records were accurate.²³⁹ FINRA also stated that it had an interest in protecting the integrity of the CRD system.²⁴⁰

On August 30, 2016, a California appellate court ruled that retail investors have a right, as a matter of fairness, to challenge a broker’s efforts to seek expungement. The appellate court ultimately determined that the expungement hearing was not fair because the arbitrators permitted the firm the opportunity to bolster its written record with oral testimony, but did not permit the investor to do the same.²⁴¹

Although the ruling is based on California law, it offered some important lessons that may be useful to retail investors with disputes in FINRA arbitration:

- If an investor is aware that an opposing party is seeking expungement and the investor believes that expungement is not warranted, the investor should consider participating in the expungement hearing to challenge the expungement request. In addition, the investor may request from FINRA, or the from the appropriate state securities regulator, to be informed when the broker files a petition for expungement.²⁴²
- If an investor participates in a FINRA expungement hearing, the investor should consider participating as vigorously as possible. In most circumstances, the investor has a right to submit written evidence, provide testimony,

and cross-examine the individual seeking the expungement. If allowed by the arbitrators, the investor may provide an opening statement or a closing statement, or both.²⁴³ FINRA also permits investors and their attorneys to participate in expungement hearings in person or by phone.

- If a broker is awarded expungement by the arbitration panel, the broker still must have a court approve the award granting expungement. This presents an additional opportunity for the investor to participate in the expungement process and to present factual information to a judge.

FINRA Dispute Resolution Party Portal

During Fiscal Year 2015, the Ombudsman received a complaint from a retail investor concerned that FINRA did not follow its own arbitration hearing policies and procedures or communicate to arbitration participants that it received pleadings. The investor also complained that the opposing party did not provide timely discovery. Another investor informed the Ombudsman that the opposing party did not timely produce documents, and that it produced documents of questionable authenticity during the arbitration, which the arbitrators accepted.

During the Reporting Period, FINRA proposed a rule change that addressed some of these concerns by requiring all arbitration parties other than *pro se* customers to file and serve statements of claim and pleadings through the FINRA Office of Dispute Resolution's Party Portal (Party Portal), requiring all customers to file discovery correspondence through the Party Portal, and permitting mediation parties to use the Party Portal.²⁴⁴ Comments to the proposed rule were largely supportive, although organizations representing retail investors in dispute resolution proceedings sought modifications to the proposed rule.²⁴⁵

The Party Portal allows arbitration parties to electronically file complaints, pleadings, discovery requests, correspondence, and other documents to opposing parties. Arbitrators and mediators have the option to use the Party Portal on a voluntary basis, but they are not required to use it.²⁴⁶ As a result, all documents uploaded to the Party Portal must be provided to arbitrators and mediators separately. The Party Portal is an important step to ensure that arbitration participants follow FINRA discovery requirements, although it may provide greater piece of mind to retail investors if arbitrators are deemed to have received the documents once the documents are uploaded to the Party Portal.

For retail investors, below are important points to consider regarding the use of the Party Portal:

- Although *pro se* parties are not required to use the Party Portal to file initial statements of claim or to file and serve pleadings, a *pro se* party must use the Party Portal to file discovery correspondence.²⁴⁷
- Investors, other than *pro se* investors who opt-out of using the Party Portal, may only pay arbitration fees online by check or credit card. For investors paying by check, the Party Portal User Guide contains detailed instructions on how to make payments via the Party Portal using bank routing and checking account numbers.²⁴⁸
- Arbitrators and mediators are not obligated to use the Party Portal. Hence, all documents uploaded to the Party Portal should be sent to the arbitrators separately.
- The Party Portal is used for filing complaints, pleadings, motions, discovery requests, and correspondence, but it is not used for responsive document production. When

producing documents to the opposing party, provide those documents by a means other than the Party Portal.

FORM U5 DISCLOSURE

Under FINRA rules, when a broker leaves a brokerage firm, the firm must file a Uniform Termination Notice for Securities Industry Registration (Form U5) with FINRA within 30 days, and provide the broker a copy of the Form U5.²⁴⁹ The Form U5 provides the date the broker terminated employment with the firm and the reason for the broker's departure.²⁵⁰ If the firm becomes aware of facts or circumstances that render the information in the Form U5 inaccurate or incomplete, the firm must file an amendment to the Form U5 with FINRA within 30 days, and the firm must provide the broker with a copy of the amendment.²⁵¹

The Ombudsman received several complaints from brokers asserting that their former employers entered false information on the brokers' Form U5s in retaliation against the brokers for resigning. One broker argued that his former employer entered false information on his Form U5 and that FINRA refused to investigate, even though false statements on a Form U5 violate FINRA's rules.²⁵²

The Ombudsman has a strong interest in proposed rule changes involving information contained in CRD.²⁵³ Form U5 disclosure, in particular, is valuable to regulators, firms, and investors. State regulators review this information when making licensing decisions, FINRA reviews Form U5s in order to identify and initiate investigations of firms and brokers that may pose a risk, firms utilize this information when making hiring decisions,²⁵⁴ and Form U5 information in BrokerCheck alerts investors about potential red flags in a broker's employment history.²⁵⁵ The timely availability

and accuracy of information in BrokerCheck may significantly impact investor decisions and investor protection.

Form U5 Reporting Time Frames

During the Reporting Period, NYSE Arca and NYSE MKT (Exchanges) proposed rules extending their Form U5 reporting periods from 10 days after the employment termination date to promptly but not later than 30 days after the termination date.²⁵⁶ The rationale for the change was to harmonize their existing 10-day reporting time frame with the 30-day reporting time frame of the other exchanges and SROs.²⁵⁷ The Exchanges argued that the requirement that the firms file "promptly" might lead firms to file Form U5s sooner than the current 10-day requirement.²⁵⁸ The Exchanges also suggested that their 10-day requirement imposed a burden on competition for them compared to other SROs that require longer Form U5 reporting time frames.²⁵⁹

On October 3, 2016, the Investor Advocate and Ombudsman provided comments to the Commission in objection to the Exchanges' proposed rules,²⁶⁰ noting that the move to a 30-day time frame was not in the public interest and may contribute to, rather than prevent, fraudulent and manipulative acts and practices in the markets. For example, extending the 10-day reporting period to a 30-day reporting period presents a gap of time in which a bad broker fired for misconduct could race to a new firm before any negative disclosures came to light in the Form U5 filing by the prior firm.²⁶¹ While noting our support for a harmonized approach among all the various SROs, the Investor Advocate and Ombudsman suggested that the appropriate route to harmonization would be to shorten the filing time frames of the other SROs rather than lengthening the time frames for these Exchanges.

Although the 30-day filing standard may have been consistent with the Exchange Act in 1996 when FINRA's predecessor obtained Commission approval for the electronic filing of Form U5s, the 30-day time frame may no longer be necessary given the significant advances in technology since the 1990s. On October 5, 2016, the Commission published an order to institute proceedings pursuant to Exchange Act Section 19(b)(2)(B) to determine whether to approve or disapprove the Exchanges' proposed rules changes.²⁶²

For retail investors, the takeaway from this discussion is that BrokerCheck and the Investment Adviser Public Disclosure (IAPD) website are critical tools for assessing the credibility and trustworthiness of brokers, investment advisers, and financial services firms.²⁶³ When determining whether to hand over money to a broker, adviser, or firm, retail investors are encouraged to check BrokerCheck and IAPD first.

Broker and Adviser Misconduct

A companion issue to Form U5 reporting is the prevalence of broker and adviser misconduct in the financial services industry, as misconduct is believed to have a strong correlation with job separation at the firm level.²⁶⁴ Misconduct in the industry affects all market stakeholders including firms who seek to develop their reputations to attract customers, retail investors who put their trust in financial services firms and the individuals employed by those firms,

and regulators who license industry professionals and ensure that those who violate securities laws and regulations are held accountable. In the last two years, several studies have been published that provide insight to the prevalence and patterns of misconduct within the industry, which can be useful information to retail investors when deciding whether to hand over their investments to advisers, brokers, and firms.²⁶⁵

Generally, retail investors should be wary of brokers and advisers with misconduct on their records, or who work for firms with significant numbers of employees with misconduct on their records. Suggested steps that investors can take to research a broker, adviser, or firm include the following:

- Review BrokerCheck and IAPD for disclosure events, employment history, and other potential red flags before deciding whether to invest;
- Go to the FINRA Disciplinary Actions Online web page²⁶⁶ to review documents related to FINRA's disciplinary enforcement against brokers and firms; and
- Contact their state securities regulator for information related to a specific broker, adviser, firm, or branch office of a firm.²⁶⁷

OMBUDSMAN STANDARDS OF PRACTICE

Any retail investor with an issue or concern related to the SEC or an SRO subject to SEC oversight may contact the Ombudsman. The Ombudsman is available to identify existing SEC options and

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

CONFIDENTIALITY	IMPARTIALITY	INDEPENDENCE
<p>The Ombudsman has established safeguards to protect confidentiality, including a separate email address, dedicated telephone and fax lines, and secure file storage. The Ombudsman will not disclose information provided by a person in confidence, including identity, unless expressly authorized by the person to do so, or if required by law or other exigent circumstances, such as a threat of imminent risk or serious harm. At times, the Ombudsman may need to disclose information on a limited basis to other SEC staff to address inquiries and related issues. In these instances, information is only shared to the extent necessary to route and review the matter.</p>	<p>The Ombudsman does not represent or act as an advocate for any individual or entity, and does not take sides on any issues brought to her attention. The Ombudsman maintains a neutral position, considers the interests and concerns of all involved parties, and works to resolve questions and complaints by clarifying issues and procedures, facilitating discussions, and identifying options and resources.</p>	<p>By statute, the Ombudsman reports directly to the Investor Advocate, who reports directly to the Chair of the SEC. However, the Office of the Investor Advocate and the Ombudsman are designed to remain somewhat independent from the rest of the SEC. Through the Congressional reports filed every six months by the Investor Advocate, the Ombudsman reports directly to Congress without any prior review or comment by the Commission or other Commission staff.</p>

OMBUDSMAN MATTER MANAGEMENT SYSTEM

The Ombudsman maintains records of inquiries and concerns to: (i) identify and respond to problems retail investors have with the Commission or with SROs; (ii) track and analyze inquiry volume, response, and resolution times; (iii) categorize and report corresponding trends and concerns; and (iv) provide data-driven support for recommendations presented by the Ombudsman to the Investor Advocate for review and consideration.

During the Reporting Period, the Ombudsman continued to use manual recordkeeping systems to collect, document, track, and respond to all forms

of correspondence received from retail investors and other persons. This included the manual review of all correspondence to ascertain issue trends and determine areas of interest or concern to investors. In addition, the Ombudsman continued to work extensively with the SEC’s Office of Information Technology (OIT) and a technology contractor to complete the functionality and test environment phase for the Ombudsman Matter Management System (OMMS), a platform for collecting, recording, and tracking matters while ensuring necessary data management, confidentiality, and reporting requirements are met. In addition, the Ombudsman and approved staff will have the ability to review investor inquiries and complaints,

access handling and resolution histories, and run reports within OMMS.

We coordinated with key SEC staff to timely and successfully complete the Paperwork Reduction Act and U.S. Office of Management and Budget (OMB) Clearance Procedure process during Fiscal Year 2016. We received the OMB Control Number during September 2016, and are preparing to provide the public with the option of using the web-based OMMS Form to submit their complaints and questions. Persons will still have the ability to communicate with the Ombudsman by traditional methods; however, we anticipate OMMS becoming the primary method used by retail investors to initially contact the Ombudsman for assistance with problems they encounter with the Commission or with SROs. The OMMS Form will be accessible from the <http://www.sec.gov/ombudsman> webpage, and will guide the user through a series of questions tailored to elicit specific information relating to problems retail investors encounter with the Commission or SROs. The OMMS Form will also provide an easy method to electronically upload and submit related documents for Ombudsman staff review. We are on track to transition to the OMMS platform in FY 2017, and to begin phase two of OMMS development, where we will work with OIT and the consultants to develop additional functionality.

OUTREACH AND ENGAGEMENT

The Ombudsman is required to review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws. To achieve this objective, the Ombudsman must be known, approachable, and accessible to key stakeholders—SEC staff at all levels, retail investors, financial service industry participants and regulators—and other interested persons. In this context, sharing information about the role within and outside of the SEC is central to the Ombudsman's effectiveness.

During FY 2016, the day-to-day focus remained primarily on establishing policies, procedures, and systems required to meet the needs of investors and others seeking assistance from the Ombudsman to resolve problems with the Commission itself or with SROs. In addition, we identified unique opportunities to engage key stakeholders, share information, and develop the relationships essential to the Ombudsman's effectiveness.

Law School Clinic Outreach Program

Several law schools across the country run securities law and investor-focused clinics that provide legal representation to retail investors who are unable to hire legal counsel to handle their claims.²⁶⁸ Many of these clinics also conduct outreach to inform their local communities about financial products, saving and investing wisely, and avoiding scams—particularly those aimed at specific communities such as immigrants, veterans, and senior investors.

In recent semesters, the Office of the Investor Advocate has benefitted from SEC law student externs assigned to our office who have participated in investor protection, securities law, and arbitration clinics at their respective law schools. As introduced in the Ombudsman's Report dated June 30, 2016, the Ombudsman, working directly with the Investor Advocate and a senior counsel, developed a framework for an outreach program to inform law schools with investor protection, securities law and investor-focused clinics of the work of the Office. The outreach program is designed to align with our Office's statutory mandate and core functions, and to benefit law student clinic participants and the investing public. The primary goal of the outreach program is to create a dynamic forum for law students and clinic classes to provide the Investor Advocate and Ombudsman their perspectives, direct feedback, and formal comments on SEC rulemakings and policy and retail investor concerns.

During the fourth quarter of FY 2016, the Ombudsman confirmed participation from three law schools to participate in the pilot phase of the outreach program. We began our visits to the law school clinics in October 2016. Our visits have been extremely beneficial and the students and professors are eager to continue the exchange of ideas with our Office. The students are particularly eager to review SEC regulations and SRO rules to identify areas in which retail investors could potentially benefit from changes, and to offer feedback and recommendations on policies directly impacting retail investors. We look forward to sharing the progress of the outreach program in future reports.

We also recognized that the outreach program offers a unique opportunity to inform these students—who are already demonstrating an interest in securities law and public service through their clinic participation—about internships, externships, and careers at the SEC. We feel that our outreach program augments the SEC’s diversity and inclusion efforts in several ways as the agency develops additional paths to attract a diverse pool of potential applicants drawn from all segments of society. We plan to use our interactions with the clinic classes as an opportunity to support the SEC’s initiatives to expand the diversity of our applicant pool and sustain a workplace culture that welcomes and values innovative thoughts, ideas, and approaches.

Additional Outreach and Industry Activities

During the Reporting Period, the Ombudsman continued to seek out opportunities to increase awareness and elevate the visibility of the position through participation in securities industry events, conferences, and leadership opportunities. During FY 2016, these outreach efforts and related activities included the following:

- Administrative Conference of the United States—The Ombudsman in Federal Agencies report: Ombudsman working group participation, report review, and feedback;
- American Bar Association Section of Dispute Resolution—Ombuds Subcommittee;
- Coalition of Federal Ombudsmen Annual Conference;
- Corporate Counsel Women of Color—Featured Speaker at 2016 Annual Conference;
- *Fordham Lawyer* magazine, Fall 2015 Issue—Featured in “Beltway Access” article spotlighting government service careers;
- International Ombudsman Association Annual Conference;
- Securities Industry and Financial Markets Association Compliance and Legal Society Annual Conference;
- Toigo Foundation—Groundbreakers Women in Leadership Summit; and
- U.S. Ombudsman Association—New Ombudsman Training and Annual Conference.

OUTLOOK FOR FISCAL YEAR 2017

More than 3,000 matters and contacts—representing personalized information and service provided to investors and other persons to address their complaints and concerns—have been handled by the Ombudsman since the role was established in September 2014. The shift from manual recordkeeping systems to the OMMS platform in FY 2017 will add an important channel of communication for retail investors and will allow the Ombudsman to resourcefully track and analyze

matter and contact data to better inform the work of our Office. In addition, OMMS will create better efficiencies to allow the Ombudsman and staff to continue the high level of personalized, thoughtful service to retail investors that has become a hallmark of our approach.

The Ombudsman also plans to restructure staff resources and responsibilities to accommodate additional investor outreach efforts. These efforts include investor-focused speaking engagements, expanded use of social and traditional media to share information with the investing public and interested persons, and more involvement in ombudsmen, securities industry, and dispute resolution conferences and events. In addition, the Ombudsman will continue to examine the various

ways the SEC communicates with retail investors and the public to identify areas for improvement in both perception and practice. This is an ongoing issue that will involve a close examination of what the SEC communicates to investors, how those communications are structured and delivered, and what improvements can be made to best serve the needs of investors and the mission and work of the agency. I look forward to reporting on our progress in all of these areas in our next report.



Tracey L. McNeil
Ombudsman



SUMMARY OF IAC RECOMMENDATIONS AND SEC RESPONSES

Congress established the Investor Advisory Committee to advise and consult with the Commission on regulatory priorities, initiatives to protect investor interests, initiatives to promote investor confidence and the integrity of the securities marketplace, and other issues.²⁶⁹ The Committee is composed of the Investor Advocate, a representative of state securities commissions, a representative of the interests of senior citizens, and not fewer than 10 or more than 20 members appointed by the Commission to represent the interests of various types of individual and institutional investors.²⁷⁰

Exchange Act Section 39 authorizes the Committee to submit findings and recommendations for review and consideration by the Commission.²⁷¹ The statute also requires the SEC to promptly issue a public statement assessing each finding or recommendation of the Committee and disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation.²⁷² While the Commission must respond to the IAC's recommendations, it is under no obligation to agree with or act upon the recommendations.²⁷³

In each of its reports to Congress, including this one, the Office of the Investor Advocate summarizes the IAC recommendations and the SEC's responses to them.²⁷⁴ This report covers all recommendations the IAC has made since its inception.²⁷⁵ However, the Commission may be pursuing initiatives that are responsive to IAC

recommendations but have not yet been made public. Commission staff—including the staff of this Office—are prohibited from disclosing nonpublic information.²⁷⁶ Therefore, any such initiatives are not reflected in this Report.

Enhance Information for Bond Market Investors

This recommendation, adopted on June 7, 2016, calls for SRO and Commission action to provide post- and pre-trade price transparency in municipal, corporate and agency bonds.²⁷⁷

Specifically, the IAC recommended that the Commission “actively engage with the Municipal Securities Rulemaking Board (MSRB) and the Financial Industry Regulatory Authority (FINRA) to finalize their proposals to require dealers to provide more information to retail investors so that they can see the full transaction costs of purchasing or selling a bond, not only commissions or fees when a dealer acts as agent, but also markups or markdowns when a dealer is acting as a principal.”

Over the longer term, the Committee suggested that the Commission work with brokers, FINRA, and the MSRB “to get full transaction cost information to investors before they purchase or sell a bond.” The Committee also encouraged the Commission to work with the MSRB and FINRA “to continue to improve easy access to price transparency in bond markets for retail investors.”

COMMISSION RESPONSE. On August 15, 2016, and September 7, 2016, FINRA and the MSRB, respectively, filed harmonized rule proposals with the Commission.²⁷⁸ The proposed rules would require disclosure of mark-ups and mark-downs based on prevailing market price to retail customers for certain transactions in fixed income markets. The deadline for Commission action on the proposals is after the Reporting Period.

In addition to these steps to address post-trade price transparency, SEC and MSRB officials have been considering the issue of pre-trade price transparency. In October 2015, for example, Chair White indicated that work on pre-trade price transparency is “ongoing.”²⁷⁹ Then, on September 7, 2016, Commissioner Piwowar made the following remarks:

*I have heard serious concerns that the lack of pre-trade transparency is resulting in sub-optimal executions for a variety of market participants. For example, some market participants have complained that, despite posting competitive bids on alternative trading systems that they believe should execute, often no trade occurs. Then, later, these participants see trades in the same bonds printed on TRACE at inferior prices. Similarly, academic research suggests that the lack of pre-trade transparency may be a factor in trade-throughs occurring in the fixed income markets.*²⁸⁰

The Chair of the MSRB, Colleen Woodell, has indicated that she intends to start the conversation on pre-trade price transparency in the coming year.²⁸¹ Lynnette Kelly, the MSRB’s Executive Director, stated that MSRB’s goal would be to determine what types of pre-trade information would be the most valuable.²⁸²

Mutual Fund Cost Disclosure

On April 14, 2016, the Committee recommended that the Commission explore ways to improve mutual fund cost disclosures, with the goal of enhancing investors’ understanding of actual costs and the impact of those costs on total accumulations over time.²⁸³ This should include a short-term objective of standardizing the disclosure of actual dollar amount costs on customer account statements, and a longer term goal of providing context for cost information to improve investor understanding of the impact of those costs. The Committee encouraged the Commission to test various disclosure enhancements to determine which would be most effective.

COMMISSION RESPONSE. The Commission has not yet responded to this recommendation with respect to disclosure of mutual fund costs. However, in September 2016, the Commission entered into a contract with a vendor to conduct a variety of investor testing, including a project to examine ways to improve mutual fund fee disclosure. In addition, the Commission adopted new rules on October 13, 2016, to modernize and enhance the reporting and disclosure of other information by mutual funds, ETFs and other registered investment companies. Among other things, registered funds will be required to file a new monthly portfolio reporting form.²⁸⁴

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

On July 16, 2015, the Committee recommended that the Commission develop a disciplinary database that will allow elders and other investors to conduct easy searches to determine whether a person or firm has been sanctioned for securities law violations.²⁸⁵ More specifically, they

recommended that the Commission take steps to simplify the search process, including steps to ensure comparable quality between BrokerCheck and the Investor Advisor Public Disclosure (IAPD) system. They also encouraged the Commission to seek agreement from other federal regulators, self-regulatory organizations, and state regulators for the development of a single site that will permit a search of all relevant databases that provide background information on financial market professionals.

COMMISSION RESPONSE. While the Commission has not yet given an official response to this recommendation, our Office is aware that Commission staff has been working actively across several divisions and with other stakeholders to address the recommendation.

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

This recommendation, adopted February 12, 2015, calls for shortening the security settlement period in U.S. financial markets from three days after the trade date (referred to as T+3) to one day (T+1) for at least transactions in U.S. equities, corporate and municipal bonds, unit investment trusts, and security-based swaps.²⁸⁶ A shorter settlement cycle, the Committee maintained, would reduce the overall level of systemic risk in the financial system and would directly benefit retail investors, among others.²⁸⁷ The Committee acknowledged that a move from T+3 to T+2, as proposed by the Depository Trust & Clearing Corporation (DTCC), was a step in the right direction, but the Committee urged the Commission “to work with industry participants to create a clear plan for moving to T+1 in an expedited fashion rather than pausing at T+2 for an indeterminate period of time.”²⁸⁸

COMMISSION RESPONSE. On September 28, 2016, the Commission voted to release for public

comment a proposed rule to shorten the standard settlement cycle for most broker-dealer securities transactions from T+3 to T+2 (Proposing Release). Comments were due on December 5, 2016.²⁸⁹

The Proposing Release and the statements made by the Commissioners during the public meeting reflected consideration of the IAC recommendation. Chair White and both Commissioners raised the possibility of further shortening the settlement cycle in their remarks at the open meeting.²⁹⁰

The Proposing Release, however, cited several reasons for the Commission’s preliminary belief that T+2 was the appropriate step to take at this time. For example, a move to an even shorter cycle would require larger investments, lead time, and coordination by market participants, which would delay the realization of the expected risk-reducing benefits. Furthermore, a cycle shorter than T+2 would increase funding costs for those seeking to fund a cross-border securities transaction with the proceeds of a foreign currency transaction, because such transactions are settled on T+2 basis.²⁹¹

The Proposing Release did not address municipal securities, corporate bonds, or unit investment trusts. However, on April 29, 2016, the Commission issued an order approving an MSRB proposal to require T+2 settlement for municipal securities.²⁹² In addition, FINRA has proposed rule changes that would amend the definition of “regular way” settlement as occurring on T+2, and this proposal would apply to U.S. secondary market transactions in equities, corporate and municipal bonds, unit investment trusts, and financial instruments composed of these products.²⁹³ FINRA held a comment period that ended April 4, 2016, but as of the end of this Reporting Period, FINRA had not yet filed that proposal with the Commission.

With respect to security-based swaps, the Commission's Proposing Release noted that they currently enjoy temporary exemptive relief from compliance with Rule 15c6-1, but that exemption is set to expire on February 5, 2017. The Release asks whether the exemption should be extended.²⁹⁴

Impartiality in the Disclosure of Preliminary Voting Results

Exchange Act Rule 14a-2(a)(1) provides an exemption from the proxy rules for brokers that forward proxy materials to shareholders who own shares in "street name."²⁹⁵ On October 9, 2014, the IAC adopted a recommendation that the staff of the Commission take the steps necessary to ensure that the exemption is conditioned upon the broker (and any intermediary designated by the broker) acting in an impartial and ministerial fashion throughout the proxy process, and that any broker who uses an intermediary take reasonable steps to verify that the intermediary is not subject to impermissible conflicts of interest.²⁹⁶ In adopting these recommendations, the IAC noted several concerns about current industry practices, including the disclosure of preliminary voting results to issuers while the results are withheld from exempt solicitors, as well as possible conflicts of interest between the issuer and the broker's designated intermediary.

COMMISSION RESPONSE. The Commission has not yet responded to this recommendation.

The Accredited Investor Definition

On October 9, 2014, the IAC adopted a set of recommendations related to the Commission's review of the accredited investor definition as required by the Dodd-Frank Act.²⁹⁷ The Committee encouraged the Commission to determine whether the current definition achieves the goal of identifying a class of individuals who do not need the protections afforded by the Securities

Act of 1933 because they are sufficiently able to protect their own interests. If, as the IAC expected, the analysis were to reveal a failure to meet that goal, then the Committee recommended prompt rulemaking to revise the definition. In doing so, the Commission should revise the definition to enable individuals to qualify as accredited investors based on their financial sophistication. However, if the Commission chooses to continue relying on financial thresholds, it should consider limiting investments in private offerings to a percentage of assets or income.

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

COMMISSION RESPONSE. On December 18, 2015, the Commission issued a staff report (Report) analyzing various approaches for modifying the definition of an accredited investor.²⁹⁸ The Report considered comments received from the Investor Advisory Committee, as well as from the Advisory Committee on Small and Emerging Companies and others. The Report remains open for comment from the public, with no set deadline for comments.

The Report recommended that the Commission consider one or more of several ways to revise the financial thresholds requirements for natural persons to qualify as accredited investors. The first approach was in accord with the IAC's recommendation to limit investments in private



offerings to a percentage of assets or income. The Report recommended that the Commission consider limiting investments for individuals who qualify as accredited investors solely based on those thresholds to a percentage of their income or net worth (e.g., 10 percent of prior year income or 10 percent of net worth, as applicable, per issuer, in any 12-month period).²⁹⁹ This approach would leave the current income and net worth thresholds in the accredited investor definition in place.

The Report proposed that the Commission consider two further changes to financial thresholds: first, to adjust the income and net worth thresholds for inflation (such as \$500,000 for individual income, \$750,000 for joint income, and \$2.5 million for net worth);³⁰⁰ and, second, to index financial thresholds going forward.³⁰¹

The Report also recommended that the Commission consider revising the Accredited Investor Definition to allow individuals to qualify as accredited investors based on measures of sophistication other than financial measures. The Report offered a menu of options by which individuals would qualify as accredited investors, including by having certain investment experience or professional credentials.³⁰²

Crowdfunding

At its meeting on April 10, 2014, the IAC adopted a package of six recommendations, which were intended to strengthen the Commission's proposed rules to implement the crowdfunding provisions of the JOBS Act.³⁰³ The Committee stated that its recommendations would better ensure that investors understand the risks of crowdfunding and avoid unaffordable financial losses.

On October 30, 2015, the Commission adopted final rules to permit companies to offer and sell securities through crowdfunding.³⁰⁴ Therefore, the Commission's response to the IAC recommendations is complete. Please see our Report on Objectives for Fiscal Year 2017 for an analysis of how the final rules correspond with the IAC recommendations.³⁰⁵

Decimalization and Tick Sizes

On January 31, 2014, the IAC adopted a resolution opposing any test or pilot programs to increase the minimum quoting and trading increments (tick sizes) in the securities markets.³⁰⁶ The resolution argued that larger tick sizes would disproportionately harm retail investors by raising prices without achieving the goals of improved research coverage or liquidity of small-cap companies.

If, however, the SEC were to decide to pursue a pilot program of increasing tick sizes, the IAC made three more recommendations: to limit the pilot program's duration, with a short "sunset" on the pilot unless benefits were proven to outweigh the costs; to conduct a careful evaluation of costs and benefits to investors, with a particular focus on retail investors; and to pilot other competition-based measures designed to encourage trading and capital formation.

COMMISSION RESPONSE. Implementation of a two-year pilot program began on October 3, 2016.³⁰⁷ The start of the pilot program follows Commission action on June 24, 2014, when it directed the national securities exchanges and FINRA (collectively, SROs) to submit a plan for a pilot program to test a tick size of 5 cents per share in three groups of securities.³⁰⁸ That plan was submitted in August 2014, and in May 2015 it was approved by the Commission with certain modifications, including an increase in the duration of the pilot program (from one year to two) and a reduction in the size of companies (lowering the market capitalization threshold from \$5 billion to \$3 billion).³⁰⁹

The Commission's order in May 2015 specifically referenced the IAC recommendations. Though it did not adopt the IAC's recommendations, the Commission stated that it had carefully considered them. The Commission also took note of the IAC's "concern that a pilot would disproportionately harm retail investors because their trading costs would rise."³¹⁰

Legislation to Fund Investment Adviser Examinations

On November 22, 2013, the IAC recommended that the SEC request legislation from Congress that would authorize the Commission to impose user fees on SEC-registered investment advisers

to provide a scalable source of funding for more frequent compliance examinations of advisers.³¹¹ The IAC asserted that the examination cycle for SEC-registered investment advisers was "simply inadequate to detect or credibly deter fraud."³¹²

COMMISSION RESPONSE. Though it has never made a statement requesting user fees, the Commission has made funding for increased coverage of investment adviser exams a top priority every year since FY 2015. Each year, the Commission has requested funding to hire additional examiners in the SEC Office of Compliance Inspections and Examinations (OCIE): the FY 2015 Budget Request called for funding to support an increase of 316 OCIE examiner positions;³¹³ the FY 2016 Budget Request, an increase of 225 OCIE examiners;³¹⁴ and the FY 2017 Budget Request, an increase of 127 OCIE examiners.³¹⁵

In addition to adding new examiners when new resources become available, OCIE is in the process of converting some staff from its broker-dealer examination program to the investment adviser/investment company program, with the goal of increasing staff for the latter by roughly 20 percent.³¹⁶

At its April 14, 2016, meeting, the IAC received an update from OCIE Director Marc Wyatt and Peter Driscoll, OCIE Chief Risk and Strategy Officer. Wyatt argued that it would be a mistake to assume that the 10 percent coverage rate in the Investor Adviser/Investment Company program means that the other 90 percent go untouched.³¹⁷

Chair White, speaking at the same meeting, reminded the IAC that she had directed Commission staff to develop a recommendation to establish a program of independent, third-party compliance assessments for registered investment

advisers. She said that the reviews would not be in lieu of exams by OCIE staff, but rather would be designed to enhance investment adviser compliance through an independent review.³¹⁸

Broker-Dealer Fiduciary Duty

On November 22, 2013, the IAC adopted a set of recommendations encouraging the SEC to establish a fiduciary duty for broker-dealers when they provide personalized investment advice to retail investors.³¹⁹ The Committee preferred to accomplish this objective by narrowing the exclusion for broker-dealers within the definition of an “investment adviser” under the Investment Advisers Act of 1940. As an alternative, the Committee recommended the adoption of a rule under Section 913 of the Dodd-Frank Act to require broker-dealers to act in the best interests of their retail customers when providing personalized investment advice, with sufficient flexibility to permit certain sale-related conflicts of interest that are fully disclosed and appropriately managed. In addition, the Committee recommended the adoption of a uniform, plain English disclosure document to be provided to customers and potential customers of broker-dealers and investment advisers. The document would disclose information about the nature of services offered, fees and compensation, conflicts of interest, and the disciplinary record of the broker-dealer or investment adviser.

COMMISSION RESPONSE. In March 2015, Chair White announced her belief that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct when providing personalized securities advice to retail investors. In Congressional testimony, she stated that she would soon begin discussing the issue with fellow Commissioners, and that she had asked Commission staff to develop rulemaking recommendations for Commission consideration.³²⁰ She made similar remarks at a subsequent meeting of the IAC.³²¹

In September 2016, Chair White indicated that SEC staff had completed a detailed outline proposing a fiduciary duty rule, which had been circulated to the SEC commissioners. She cautioned, however, that a vote was not imminent.³²²

Universal Proxy Ballots

On July 25, 2013, the IAC adopted a recommendation urging the SEC to explore the relaxation of the “*bona fide* nominee rule” (Rule 14a-4(d)(1)) to provide proxy contestants with the option, but not the obligation, to use Universal Ballots in connection with short slate director nominations.³²³ The IAC also encouraged the Commission to hold one or more roundtable discussions on the topic.

COMMISSION RESPONSE. On October 26, 2016, following this Reporting Period, the Commission proposed amendments to the proxy rules to require parties in a contested election to use universal proxy cards that would include the names of all board of director nominees.³²⁴ The proposal would give shareholders the ability to vote by proxy for their preferred combination of board candidates, similar to voting in person. Our next report to Congress will provide details on this proposal and how it relates to the IAC recommendation. Previously, on February 19, 2015, the Commission held a Proxy Voting Roundtable to explore issues related to proxy voting, including the use of universal proxies.³²⁵

Data Tagging

At its meeting on July 25, 2013, the IAC adopted a recommendation for the SEC to promote the collection, standardization, and retrieval of data filed with the SEC using machine-readable data tagging formats.³²⁶ The Committee urged the SEC to take steps to reduce the costs of providing tagged data, particularly for smaller issuers and investors, by developing applications that allow users to enter information on forms that can be converted to machine-readable formats by the SEC. In addition,

the IAC recommended that the SEC give priority to the data tagging of disclosures on corporate governance, including information about executive compensation and shareholder voting.

COMMISSION RESPONSE. Since the IAC recommendation was adopted, the Commission has addressed data tagging in a number of final and proposed rules.

Availability of the Inline XBRL Format. On June 13, 2016, the Commission issued an order allowing companies to voluntarily file structured financial statement data in a format known as Inline XBRL, which is both human-readable and machine-readable.³²⁷ The order asserts that the format should decrease filing preparation costs, improve the quality of structured data, and, by improving data quality, increase the use of XBRL data by investors and other market participants.

Pay Ratio Disclosure. The Commission passed on the opportunity to incorporate data tagging in the final rule on pay ratio disclosure, noting: “We did not propose to require that the pay ratio disclosure be provided in interactive data format, and are not adopting such a requirement for this disclosure. To the extent that we consider more generally the tagging of disclosures in XBRL format in our rules, we may consider revisiting the format in which the pay ratio disclosure is provided.”³²⁸

Regulation S-K Concept Release. On April 15, 2016, the Commission published a concept release on modernizing business and financial disclosure.³²⁹ The release features a lengthy discussion concerning whether our disclosure requirements continue to provide investors with the information needed to make informed investment and voting decisions. Notably, in a section on “Presentation and Delivery of Important Information,” the Commission requested public input on the use of structured data and other available standards and technologies that could enhance the quality of disclosure to investors while reducing burdens on registrants.

Disclosure of Payments by Resource Extraction Issuers. On June 27, 2016, the Commission adopted rules to require resource extraction issuers to disclose payments made to governments for the commercial development of oil, natural gas or minerals.³³⁰ The rules require the payment disclosure to be provided in a structured data format.

Property Disclosures for Mining Companies. On June 16, 2016, the Commission proposed rules to update the disclosure requirements for mining companies currently found in Item 102 of Regulation S-K and related guidance in Industry Guide 7.³³¹ Although data tagging is not a feature of the proposed rules, the Commission posed questions for public comment on whether it should in the future require certain disclosures to be made available in a structured data format.

Investment Company Reporting Modernization. On October 13, 2016, the Commission adopted rules to modernize and enhance the reporting and disclosure of information by registered investment companies and to enhance liquidity risk management by open-end funds, including mutual funds and ETFs.³³² The new rules require registered funds to report portfolio and census information in a structured data format.

Disclosure of Order Handling Information. On July 13, 2016, the Commission proposed to amend Rules 600 and 606 of Regulation NMS to require a broker-dealer to make publicly available aggregated information with respect to its handling of customers’ institutional orders for each calendar quarter.³³³ The proposed amendments would require that the report be made available using an XML schema and associated PDF renderer to be published on the Commission’s Web site. Requiring the report to be provided in XML should result in the data in the report being provided in a consistent, structured format that would facilitate search capabilities and statistical and comparative analyses across broker-dealers and date ranges.

Earlier rulemakings. As detailed in our previous Reports to Congress,³³⁴ the Commission has incorporated structured data requirements in previous rulemakings, including ones related to security-based swap data repositories,³³⁵ registration of security-based swap dealers,³³⁶ alternative trading systems,³³⁷ the use of derivatives by registered investment companies,³³⁸ clawbacks of erroneously awarded executive compensation,³³⁹ Regulation A,³⁴⁰ crowdfunding,³⁴¹ asset-backed securities disclosure and registration,³⁴² liquidity risk of mutual funds,³⁴³ and money market funds.³⁴⁴

Target Date Mutual Funds

On April 11, 2013, the IAC adopted recommendations for the Commission to revise its proposed rule regarding target date retirement fund names and marketing.³⁴⁵ The package of five IAC recommendations pertained to a 2010 SEC proposal that would, among other things, require marketing materials for target date retirement funds to include a table, chart, or graph depicting the fund's asset allocation over time (i.e., an asset allocation glide path).³⁴⁶

As either a replacement for or supplement to the SEC's proposed asset allocation glide path illustration, the IAC recommended that the Commission develop a glide path illustration that would be based on a measure of fund risk. To promote comparability between funds, the IAC recommended the adoption of standard methodologies to be used in glide path illustrations. In addition, the IAC urged the Commission to require clearer disclosure about the risk of loss, the

cumulative impact of fees, and the assumptions used to design and manage the funds.

COMMISSION RESPONSE. On April 3, 2014, the Commission reopened the comment period on the proposed rule in order to seek public comment on the IAC's recommendations to adopt a risk-based glide path illustration and the methodology to be used for measuring risk.³⁴⁷ The comment period closed on June 9, 2014, and a final rule has not yet been adopted.

General Solicitation and Advertising

On October 12, 2012, the IAC adopted a set of seven recommendations concerning rulemaking to lift the ban on general solicitation and advertising in offerings conducted under Rule 506.³⁴⁸ The IAC asserted that the recommendations would strengthen investor protections and enhance regulators' ability to police the private placement market.

COMMISSION RESPONSE. On July 10, 2013, the Commission adopted final rules permitting general solicitation and advertising in Rule 506 offerings³⁴⁹ and disqualifying offerings involving felons and other bad actors.³⁵⁰ In addition, the Commission proposed a rule to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise because the ban on general solicitation was lifted.³⁵¹ The majority of the IAC recommendations relate to the proposed rule, which has not yet been adopted.

END NOTES

- 1 Exchange Act § 4(g)(6), 15 U.S.C. § 78d(g)(6).
- 2 Exchange Act § 4(g)(6)(A)(i), 15 U.S.C. § 78d(g)(6)(A)(i).
- 3 See SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2016* (June 30, 2015) [hereinafter Report on Objectives, Fiscal Year 2016], <http://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2016.pdf>.
- 4 See SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2017* (June 30, 2016) [hereinafter Report on Objectives, Fiscal Year 2017], <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2017.pdf>.
- 5 Exchange Act § 4(g)(6)(B)(i), 15 U.S.C. § 78d(g)(6)(B)(i).
- 6 *Id.* Exchange Act Section 4(g)(6)(B) requires the Report on Activities to include an “inventory” of the most serious problems encountered by investors during the Reporting Period. The inventory must identify any action taken by the Commission or an SRO to resolve each problem, the length of time that each item has remained on our inventory and, for items on which no action has been taken, the reasons for inaction and an identification of any official who is responsible for such action. Because the Office of the Investor Advocate is new, this Report on Activities is the first to describe problems, recommendations, and resulting actions. Therefore, we do not set forth a separate inventory of pre-existing items.
- 7 These SRO rule proposals mostly fall into two categories. The larger category includes what are known as B3A filings, a shorthand reference to Section 19(b)(3)(A) of the Exchange Act. 15 U.S.C. § 78s(b)(3)(A) (2016). Generally speaking, these are more technical in nature and expected to be non-controversial. They may change fees or extend the length of a pilot program. These rule changes become effective upon filing with the Commission and are subsequently published for comment. The second category is known as B2 filings, referencing Section 19(b)(2) of the Exchange Act. 15 U.S.C. § 78s(b)(2) (2016). These include the more substantive rule proposals, such as changes to the listing standards of an exchange, the priority of bids and offers on the exchange, and new order types and instructions. These proposals are published for public comment prior to their approval or disapproval by the Commission. During FY2016, our Office focused its resources on analyzing the latter category’s potential impact on investors, but remained vigilant for significant filings outside of the B2 filing context.
- 8 Report on Objectives, Fiscal Year 2016, *supra* note 3.
- 9 The Office of the Investor Advocate was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). On February 24, 2014, SEC Chair Mary Jo White appointed Rick A. Fleming as the Commission’s first Investor Advocate.
- 10 See Mary Jo White, Chair, SEC, Speech at Sandler O’Neill & Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370542004312>.
- 11 See Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 76,474, 80 Fed. Reg. 80,997, 81,001 (proposed Dec. 28, 2015) [hereinafter “NMS Stock ATS Proposing Release”].
- 12 See NMS Stock ATS Proposing Release, *supra* note 11, at 81,042 n.374.
- 13 See NMS Stock ATS Proposing Release, *supra* note 11.
- 14 See Comment Letter, Rick A. Fleming, Investor Advocate, SEC, RE: File No. S7-23-15, Regulation of NMS Stock Alternative Trading Systems (Sept. 9, 2016), <https://www.sec.gov/about/offices/investorad/investor-advocate-comment-letter-regulation-ats.pdf>.
- 15 See *id.*
- 16 Regulation NMS, Exchange Act Release No. 51,808, 70 Fed. Reg. 37,495 (adopted June 29, 2005) [hereinafter “Regulation NMS”].
- 17 See Disclosure of Order Handling Information, Exchange Act Release No. 78,309, 81 Fed. Reg. 49,431 (proposed July 27, 2016).
- 18 See *id.*
- 19 See Exchange Act § 4(g)(4), 15 U.S.C. § 78d(g)(4).
- 20 See BATS Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt New Rule 8.17 to Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing on BATS Exchange, Inc., Exchange Act Release No. 76,470, 80 Fed. Reg. 73,247 (published Nov. 24, 2015).
- 21 See Comment Letter, Rick A. Fleming, Investor Advocate, SEC, RE: File No. SR-BATS-2015-101, (Dec. 15, 2015), <https://www.sec.gov/about/offices/investorad/comment-letter-bats-investor-advocate-121515.pdf>.
- 22 See BATS Exchange, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt New Rule 8.17 to Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing on BATS Exchange, Inc., Exchange Act Release No. 77,171, 81 Fed. Reg. 9,017 (published Feb. 23, 2016).
- 23 See Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Rule 8.17 to Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing, Exchange Act Release No. 77,589, 81 Fed. Reg. 22,691 (published Apr. 18,

- 2016); Bats BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Rule 8.17 to Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing, Exchange Act Release No. 77,602, 81 Fed. Reg. 23,046 (published Apr. 19, 2016); and Bats EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Rule 8.17 to Provide a Process for an Expedited Suspension Proceeding and Rule 12.15 to Prohibit Layering and Spoofing, Exchange Act Release No. 77,606, 81 Fed. Reg. 23,026 (published Apr. 19, 2016).
- 24 See The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide a Process for an Expedited Suspension Proceeding and Adopt a Rule to Prohibit Disruptive Quoting and Trading Activity, Exchange Act Release No. 77,913, 81 Fed. Reg. 35,081 (published June 1, 2016); and NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide a Process for an Expedited Suspension Proceeding and Adopt a Rule to Prohibit Disruptive Quoting and Trading Activity, Exchange Act Release No. 77,914, 81 Fed. Reg. 35,106 (published June 1, 2016).
- 25 See NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide a Process for an Expedited Suspension Proceeding and Adopt a Rule to Prohibit Disruptive Options Quoting and Trading Activity, Exchange Act Release No. 78,107, 81 Fed. Reg. 41,619 (published June 27, 2016); The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide a Process for an Expedited Suspension Proceeding and Adopt a Rule to Prohibit Disruptive Quoting and Trading Activity, Exchange Act Release No. 78,208, 81 Fed. Reg. 44,366 (published July 7, 2016); and International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a Rule to Prohibit Disruptive Quoting and Trading Activity and Allow the Exchange to Take Prompt Action, Exchange Act Release No. 78,920, 81 Fed. Reg. 67,038 (published Sept. 29, 2016).
- 26 See FINRA, Process for an Expedited Proceeding and Adopt a Rule to Prohibit Disruptive Quoting and Trading Activity, Exchange Act Release No. 79,361 (Nov. 21, 2016).
- 27 See New York Stock Exchange LLC; NYSE MKT LLC; Notice of Filings of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1, to Provide for How the Exchanges Would Determine an Official Closing Price if the Exchanges Are Unable to Conduct a Closing Transaction, Exchange Act Release No. 78,014, 81 Fed. Reg. 38,755 (published June 14, 2016), and New York Stock Exchange LLC; NYSE MKT LLC; Notice of Filings of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1, to Provide for How the Exchanges Would Determine an Official Closing Price if the Exchanges Are Unable to Conduct a Closing Transaction, Exchange Act Release No. 78,015, 81 Fed. Reg. 38,747 (published June 14, 2016).
- 28 In December 2015, Commission staff published a research note concerning the price volatility during the period surrounding the start of regular trading hours for the equity markets, thereby allowing market participants and the public to better understand what had occurred. See SEC, Staff of the Office of Analytics and Research, Division of Trading and Markets, *Research Note: Equity Market Volatility on August 24, 2015* (December 2015), https://www.sec.gov/marketstructure/research/equity_market_volatility.pdf.
- 29 The NYSE Arca exchange widened its opening and re-opening auction collars that had previously limited the extent to which those auctions arrived at market clearing prices. See Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change to Provide for Price Collar Thresholds for Trading Halt Auctions, Exchange Act Release No. 76,994, 81 Fed. Reg. 5,809 (published Feb. 3, 2016). NYSE extended the time period for the dissemination of pre-opening imbalance information, reduced the delays associated with these indications, and gave its market makers more flexibility to conduct automated openings during broad market volatility and to electronically re-open trading after a pause. See Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Partial Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 2 and 3, Relating to Pre-Opening Indications and Opening Procedures, Exchange Act Release No. 78,228, 81 Fed. Reg. 44,907 (published July 11, 2016). FINRA and the exchanges have also taken steps to enhance the existing limit-up/limit-down pilot program. See Joint Industry Plan; Order Approving the Tenth Amendment to the National Market System Plan to Address Extraordinary Market Volatility by Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Chicago Stock Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ BX, Inc., NASDAQ PHLX LLC, The Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., Exchange Act Release No. 77,679, 81 Fed. Reg. 24,908 (published Apr. 27, 2016) (modifying the definition of opening price in cases where the primary listing exchange opens with quotations rather than a transaction, and extending the pilot for another year to continue to consider the data). See also Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Clarify the Operation of the Regulation NMS Plan to

- Address Extraordinary Market Volatility, Exchange Act Release No. 78,435, 81 Fed. Reg. 51,239 (published Aug. 3, 2016), and Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Effective Date of SR-FINRA-2016-028, Exchange Act Release No. 78,660, 81 Fed. Reg. 59,676 (published Aug. 30, 2016) (FINRA amendment providing that following a trading pause triggered by limit-up/limit-down, the exchanges will either wait for the SIP to disseminate the new price bands or calculate the new price bands themselves before commencing trading). Chair Mary Jo White has asked that the SROs continue to consider additional enhancements. *See, e.g.,* Mary Jo White, Chair, SEC, Keynote Address at the Securities Traders Association 83rd Annual Market Structure Conference: Equity Market Structure in 2016 and for the Future (Sept. 14, 2016), <https://www.sec.gov/news/speech/white-equity-market-structure-2016-09-14.html>.
- 30 *See* Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Require Registration as Securities Traders of Associated Persons Primarily Responsible for the Design, Development, Significant Modification of Algorithmic Trading Strategies or Responsible for the Day-to-Day Supervision of Such Activities, Exchange Act Release No. 77,551, 81 Fed. Reg. 21,914 (published Apr. 13, 2016).
- 31 *See id.*
- 32 *See* Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Reduce the Synchronization Tolerance for Computer Clocks That Are Used to Record Events in NMS Securities and OTC Equity Securities, Exchange Act Release No. 77,565, 81 Fed. Reg. 22,136 (published Apr. 14, 2016).
- 33 *See id.*
- 34 *See* Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Adopt FINRA Rule 4554, Alternative Trading Systems-Recording and Reporting Requirements of Order and Execution Information for NMS Stocks, Exchange Act Release No. 77,798, 81 Fed. Reg. 30,395 (published May 16, 2016).
- 35 *See* Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail, Exchange Act Release No. 79,318 (Nov. 15, 2016), <https://www.sec.gov/rules/sro/nms/2016/34-79318.pdf>.
- 36 *See* Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt and Implement CHX SNAP, an Intra-day and On-Demand Auction Service, Exchange Act Release No. 76,087, 80 Fed. Reg. 61,540 (published Oct. 13, 2015).
- 37 *See* Chicago Stock Exchange, Customer Service Notification, <http://www.chx.com/customer-service-notifications/snap-auctions-to-begin-friday-june-3-2016> (last visited Oct. 1, 2016).
- 38 *See* Chicago Stock Exchange, SNAP Auction Results, <http://www.chx.com/snap/market-activity/> (last visited Oct. 1, 2016).
- 39 *See* In the Matter of the Application of Investors' Exchange, LLC for Registration as a National Exchange, Exchange Act Release No. 78,101, 81 Fed. Reg. 41,142 (published June 23, 2016); *see also* Commission Interpretation Regarding Automated Quotations Under Regulation NMS, Exchange Act Release No. 78,102, 81 Fed. Reg. 40,785 (published June 23, 2016).
- 40 *See* Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change to Adopt the CHX Liquidity Taking Access Delay, Exchange Act Release No. 78,860, 81 Fed. Reg. 65,442 (published Sept. 22, 2016).
- 41 *See* Annie Massa, *Simplicity Is the Goal of Nasdaq's New Order Type*, CEO Says, BLOOMBERG (Aug. 15, 2016), <https://www.bloomberg.com/news/articles/2016-08-15/simplicity-is-the-goal-of-nasdaq-s-new-order-type-ceo-says>.
- 42 *See* Joint Industry Plans; Order Approving the National Market System Plan to Implement a Tick Size Pilot Program by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., as Modified by the Commission, for a Two-Year Period, Exchange Act Release No. 74,892, 80 Fed. Reg. 27,513 (published May 13, 2015).
- 43 *See* Exemption Under Rule 608(e) of Regulation NMS from a Certain Provision of the Plan to Implement a Tick Size Pilot Program (Sep. 13, 2016), <https://www.sec.gov/divisions/marketreg/mr-noaction/2016/exemption-608e-tick-size-pilot-091316.pdf>.
- 44 *See* SEC, Press Release, SEC Announces Members of New Equity Market Structure Advisory Committee, 2015-5 (Jan. 13, 2015), <http://www.sec.gov/news/pressrelease/2015-5.html>; *see also* Equity Market Structure Advisory Committee website, <https://www.sec.gov/spotlight/equity-market-structure-advisory-committee.shtml> (last visited Oct. 1, 2016).
- 45 *See* SEC, EMSAC, Recommendation for an Access Fee Pilot (July 8, 2016), <https://www.sec.gov/spotlight/emsac/recommendation-access-fee-pilot.pdf>.
- 46 *See* SEC, Press Release, Barclays, Credit Suisse Charged With Dark Pool Violations, 2016-16 (Jan. 31, 2016), <https://www.sec.gov/news/pressrelease/2016-16.html> (Credit Suisse settled without admission, Barclays settled with admission).

- 47 *See id.*
- 48 *See* SEC, Press Release, Merrill Lynch Charged with Trading Controls Failures That Led to Mini-Flash Crashes, 2016-192 (Sept. 26, 2016), <https://www.sec.gov/news/pressrelease/2016-192.html> (settled without admission).
- 49 *See* SEC, Press Release, Citigroup Provided Incomplete Blue Sheet Data for 15 Years, 2016-138 (July 12, 2016), <https://www.sec.gov/news/pressrelease/2016-138.html> (penalized with admission).
- 50 *See* Exchange Act Release No. 78291 (July 12, 2016), <https://www.sec.gov/litigation/admin/2016/34-78291.pdf>.
- 51 *See, e.g.,* SEC, Press Release, SEC Charges Firm and Owner With Manipulative Trading, 2015-236 (Oct. 8, 2015), <https://www.sec.gov/news/pressrelease/2015-236.html> (settled without admission against a proprietary trading firm for, over the course of more than a year, placing sham orders to manipulate the price of stocks and take advantage of the price movements). *See also* SEC, Press Release, SEC Announces Charges for Spoofing and Order Mismarking, 2015-273 (Dec. 3, 2015), <https://www.sec.gov/news/pressrelease/2015-273.html> (charging and instituting proceedings); and Exchange Act Release No. 78043 (Jun. 13, 2016), <https://www.sec.gov/litigation/admin/2016/33-10094.pdf> (settled an action without admission with two brothers that had, as part of their alleged spoofing scheme, exploited the maker-taker pricing model on an exchange, thereby collecting inappropriate rebates).
- 52 On August 6, 2013, the MSRB issued a concept release seeking comments on this recommendation, and the MSRB subsequently proposed a best execution rule. On December 5, 2014, the SEC issued an order approving the proposed amendments, and the rule changes are set to become effective on December 7, 2015. On November 20, 2015, the MSRB published implementation guidance to assist bond dealers in complying with the MSRB's best execution rule. The MSRB subsequently announced it would provide additional guidance about the new best execution rule and delayed the effectiveness of the rule until 120 days after publication of the interpretive guidance. The MSRB's best execution rule requires municipal securities dealers to use "reasonable diligence" in seeking to obtain for their retail customers the most favorable terms reasonably available under prevailing market conditions. *See* MSRB, Comment Letters, Request for Comment on Whether to Require Dealers to Adopt a "Best Execution" Standard for Municipal Securities Transactions, <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-16.aspx?c=1>; MSRB, Regulatory Notice 2014-22, SEC Approves MSRB Rule G-18 on Best Execution of Transactions in Municipal Securities and Related Amendments to Exempt Transactions with Sophisticated Municipal Market Professionals (Dec. 8, 2014), <http://www.msrb.org/~media/Files/Regulatory-Notices/Announcements/2014-22.ashx?n=1>; and Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Rule G-18, on Best Execution of Transactions in Municipal Securities, and Amendments to Rule G-48, on Transactions With Sophisticated Municipal Market Professionals ("SMMP"), and Rule D-15, on the Definition of SMMP, Exchange Act Release No. 72,956, 79 Fed. Reg. 53,236 (published Sept. 8, 2014); MSRB, Press Release, MSRB Provides Implementation Guidance on Best-Execution Rule (Nov. 20, 2015), <http://www.msrb.org/News-and-Events/Press-Releases/2015/MSRB-Provides-Implementation-Guidance-on-Best-Execution-Rule.aspx>.
- 53 *See, e.g.,* Lynnette Kelly, Executive Director, MSRB, Testimony Before the Capital Markets and Government Sponsored Enterprises Subcommittee of the House Financial Services Committee, Hearing on "Examining the Agenda of Regulators, Self-Regulatory Organizations and Standards-Setters for Accounting, Auditing, and Municipal Securities," at 6, (Sept. 22, 2016), <http://www.msrb.org/msrb1/pdfs/Testimony-on-Capital-Markets-and-Government-Sponsored-Enterprises.pdf>. In her testimony, Ms. Kelly highlights several enhancements to EMMA including, "adding analytical tools and resources to improve retail investor access to market information, such as a price discovery tool to help investors find and compare prices of securities with similar characteristics; graphical displays to explore trade data, prices and trends; initial offering price and yield information; expanded access to credit ratings; advanced search functionality; an economic calendar with descriptions of upcoming macroeconomic developments that could have an impact on the trading and issuance of municipal securities; and the ability to receive EMMA alerts to stay current on newly available information about securities." *Id.* Jennifer A. Galloway, Chief Communications Officer, MSRB, Press Release, MSRB Improves Bank Loan Disclosure on EMMA Website (Sept. 26, 2016), <http://msrb.org/News-and-Events/Press-Releases/2016/MSRB-Improves-Bank-Loan-Disclosure-on-EMMA-Website>; Jennifer A. Galloway, Chief Communications Officer, MSRB, Press Release, MSRB Improves Bank Loan Disclosure on EMMA Website (Sept. 26, 2016), <http://msrb.org/News-and-Events/Press-Releases/2016/MSRB-Improves-Bank-Loan-Disclosure-on-EMMA-Website>.
- 54 The Office of the Investor Advocate considers a proposed rule or rule amendment with comment periods expiring between October 1, 2015 and September 30, 2016, to be included in its FY 2016 rulemaking review. For purposes of this Report, we also include as part of our FY 2016 review the MSRB's Notice of Filing of a Proposed Rule Change to MSRB Rules G-15 and G-30 to Require Disclosure of Mark-Ups and Mark-Downs to Retail Customers in Certain Principal Transactions and to Provide Guidance on Prevailing Market Price, which had a comment period ending October 4, 2016. *See* Proposed Rule, Notice of Filing of a Proposed Rule Change to

- MSRB Rules G-15 and G-30 to Require Disclosure of Mark-Ups and Mark-Downs to Retail Customers in Certain Principal Transactions and to Provide Guidance on Prevailing Market Price, Exchange Act Release No. 78,777, 81 Fed. Reg. 62,947 (published Sept. 13, 2016). We have also included as part of our FY 2016 review the MSRB's second request for comment on draft provisions relating to minimum denominations, which was published on September 27, 2016, and had a comment period ending October 18, 2016. *See* MSRB, Regulatory Notice 2016-23, Second Request for Comment on Draft Provisions on Minimum Denominations (Sept. 27, 2016), <http://msrb.org/~media/Files/Regulatory-Notices/RFCs/2016-23.ashx?la=en>.
- 55 *See* Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Regulatory Notice 2015-18, Request for Comment on Draft Amendments to MSRB Rule A-3 to Lengthen the Term of Board Member Service* (Oct. 29, 2015), <http://www.msrb.org/RFC/2015-18/Flemming.pdf>; Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Notice 2015-16, RE: FINRA Notice 15-36* (Dec. 11, 2015), <https://www.sec.gov/about/offices/investorad/comment-letter-msrb-finra-investor-advocate-121115.pdf>; Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Notice 2014-20* (Jan. 20, 2015), <http://www.msrb.org/RFC/2014-20/USSEC.pdf>; Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *FINRA Notice 14-52* (Jan. 20, 2015), http://www.finra.org/sites/default/files/notice_comment_file_ref/SEC.pdf.
- 56 Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Regulatory Notice 2015-08, Request for Comment on Draft Amendments and Other Issues Related to MSRB Rule A-3 on Membership on the Board* (July 13, 2015), <http://www.msrb.org/RFC/2015-08/OIAD.pdf>.
- 57 *Id.* at 2.
- 58 *See* MSRB, Regulatory Notice 2015-18, Request for Comment on Draft Amendments to MSRB Rule A-3 to Lengthen the Term of Board Member Service (Oct. 5, 2015), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2015-18.ashx?n=1>.
- 59 *Id.*
- 60 Comment Letter, Rick A. Fleming, *Regulatory Notice 2015-18*, *supra* note 55.
- 61 Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to Rule A-3, on Membership on the Board, Exchange Act Release No. 76,999, 81 Fed. Reg. 6,088 (published Feb. 4, 2016); Order Granting Approval of a Proposed Rule Change Consisting of Proposed Amendments to Rule A-3, on Membership on the Board, Exchange Act Release No. 77,390, 81 Fed. Reg. 15,582 (Mar. 23, 2016).
- 62 *See* MSRB, Regulatory Notice 2014-20, Request for Comment on Draft Rule Amendments to Require Dealers to Provide Pricing Reference Information on Retail Customer Confirmations, at 1 (Nov. 17, 2014), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2014-20.ashx?n=1>; FINRA, Regulatory Notice 14-52, Pricing Disclosure in the Fixed Income Markets, at 3 (Nov. 17, 2014), http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_14-52.pdf [hereinafter *FINRA Notice 14-52*]. The Office of the Investor Advocate believed that retail investors would benefit from the disclosure of the additional pricing information and filed a supportive comment letter with both the MSRB and FINRA. *See also* Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Notice 2014-20* (Jan. 20, 2015), <http://www.msrb.org/RFC/2014-20/USSEC.pdf>; Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *FINRA Notice 14-52* (Jan. 20, 2015), http://www.finra.org/sites/default/files/notice_comment_file_ref/SEC.pdf.
- 63 *See* MSRB, Regulatory Notice 2015-16, Request for Comment on Draft Rule Amendments to Require Confirmation Disclosure of Mark-ups for Specified Principal Transactions with Retail Customers (Sept. 24, 2015), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2015-16.ashx?la=en> [hereinafter *MSRB Notice 2015-16*]; *see also* FINRA, Regulatory Notice 15-36, Pricing Disclosure in the Fixed Income Markets (Oct. 12, 2015), <http://www.finra.org/industry/all-requests-for-comments> [hereinafter *FINRA Notice 15-36*].
- 64 MSRB Notice 2015-16, *supra* note 63 at 7.
- 65 FINRA Notice 15-36 differs from FINRA Notice 14-52 in that it reclassifies the types of trades that would trigger the disclosure requirement; allows for alternative calculation methods for more complex trade scenarios; allows firms to choose whether or not to disclose the reference price, or disclose the reference price with clarifying information for situations in which there is a material change to the price of a security; and requires firms to include TRACE data on the customer confirmation. FINRA Notice 15-36, *supra* note 63 63; FINRA Notice 14-52, *supra* note 62. The new FINRA proposal would require a firm to disclose on the customer confirmation the price to the customer, the price to the firm of the same-day trade (reference price), and the differential between the two if “a firm sells to a customer as principal and on the same day buys the same security as principal from another party.” FINRA Notice 15-36, *supra* note 63, at 2.
- 66 *See* Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: MSRB Notice 2015-16, RE: FINRA Notice 15-36* (Dec. 11, 2015), <https://www.sec.gov/about/offices/investorad/comment-letter-msrb-finra-investor-advocate-121115.pdf>.

- 67 *See id.*
- 68 *See id.*
- 69 MSRB, Regulatory Notice 2016-07, Request for Comment on Draft Amendments to MSRB Rule G-30 to Provide Guidance on Prevailing Market Price (Feb. 18, 2016), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2016-07.ashx?n=1> [hereinafter MSRB Notice 2016-07].
- 70 Comment Letter, Rick A. Fleming, Investor Advocate, SEC, *RE: Regulatory Notice 2016-07*, (Mar. 31, 2016), <http://www.msrb.org/RFC/2016-07/Fleming.pdf>.
- 71 *Id.* at 2.
- 72 Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to FINRA Rule 2232 (Customer Confirmations) to Require Members to Disclose Additional Pricing Information on Retail Customer Confirmations Relating to Transactions in Fixed Income Securities, Exchange Act Release No. 78,573, 81 Fed. Reg. 55,500 (published Aug. 19, 2016) [hereinafter FINRA Proposing Release]; Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to MSRB Rules G-15 and G-30 to Require Disclosure of Mark-Ups and Mark-Downs to Retail Customers on Certain Principal Transactions and to Provide Guidance on Prevailing Market Price, Exchange Act Release No. 78,777 (published Sept. 7, 2016), 81 Fed. Reg. 62,947 (published Sept. 13, 2016) [hereinafter MSRB Proposing Release].
- 73 *See* Rick A. Fleming, Investor Advocate, SEC, Recommendation of the Investor Advocate, File No. SR-FINRA-2016-032; SR-MSRB-2016-12 (Nov. 7, 2016), <https://www.sec.gov/comments/sr-finra-2016-032/finra2016032-10.pdf>. On November 17, 2016, after the close of the Reporting Period, the Commission approved both proposals.
- 74 Rick A. Fleming, Investor Advocate, SEC, Speech at MSRB Municipal Securities Regulator Summit, *Investor Protection in the Municipal Securities Market*, Washington, D.C. (Aug. 25, 2016), <https://www.sec.gov/news/speech/investor-protection-in-the-municipal-securities-markets.html>.
- 75 Pub. L. No. 112-106, 126 Stat. 306 (2012).
- 76 Pub. L. No. 114-94, 129 Stat. 1312 (2015).
- 77 Pub. L. No. 114-94, § 72002, 129 Stat. 1312 (2015).
- 78 *See id.*
- 79 Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 77,599, 81 Fed. Reg. 23,915 (published Apr. 22, 2016).
- 80 *See* Pub. L. No. 114-94, § 71003 and § 84001, 129 Stat. 1312 (2015).
- 81 Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies, Securities Act Release No. 10,003, 81 Fed. Reg. 2,743 (published Jan. 19, 2016).
- 82 Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Securities Act Release No. 10,075, Exchange Act Release No. 77,757, 81 Fed. Reg. 28,689 (adopted May 10, 2016).
- 83 *See id.*
- 84 *See* Pub. L. No. 114-94, § 71001, 129 Stat. 1312 (2015).
- 85 Form 10-K Summary, Exchange Act Release No. 77,969, 81 Fed. Reg. 37,132 (published June 9, 2016).
- 86 Modernization of Property Disclosures for Mining Registrants, Securities Act Release No. 10,098, Exchange Act Release No. 78,086, 81 Fed. Reg. 41,651 (proposed June 27, 2016).
- 87 Amendments to Smaller Reporting Company Definition, Securities Act Release No. 10,107, Exchange Act Release No. 78,168, 81 Fed. Reg. 43,130 (proposed July 1, 2016).
- 88 Disclosure Update and Simplification, Securities Act Release No. 10,101, Exchange Act Release No. 78,310, Investment Company Act Release No. 32,175, 81 Fed. Reg. 51,607 (proposed Aug. 4, 2016).
- 89 Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters, Securities Act Release No. 10,198, Exchange Act Release No. 78,687, 81 Fed. Reg. 59,927 (published Aug. 31, 2016).
- 90 Exhibit Hyperlinks and HTML Format, Securities Act Release No. 10,201, Exchange Act Release No. 78,737, 81 Fed. Reg. 62,689 (proposed Sept. 12, 2016).
- 91 Pub. L. No. 114-94, § 72003(c), 129 Stat. 1312 (2015).
- 92 *Id.* at § 72003(c).
- 93 *Id.* at § 72003(d).
- 94 *See* Rick A. Fleming, Investor Advocate, SEC, *Improving Disclosure with Smart Data* (Oct. 24, 2016), <https://www.sec.gov/news/speech/improving-disclosure-with-smart-data.html>.
- 95 Mary Jo White, Chair, SEC, *Statement at an Open Meeting on Regulation S-K Concept Release* (Apr. 13, 2016), <https://www.sec.gov/news/statement/white-statement-1-041316.html>.
- 96 *See Preston v. Allison*, 650 A.2d 646, 649 (Del. 1994); *see also Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (“The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.”).

- 97 15 U.S.C. § 78n(a).
- 98 *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).
- 99 N.Y.C. COMPTROLLER SCOTT M. STRINGER, *Overview of Boardroom Accountability Project*, <http://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/> (last visited Oct. 13, 2016).
- 100 See Report on Objectives, Fiscal Year 2016, *supra* note 3, at 21-22.
- 101 See Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015), <https://www.sec.gov/interps/legal/cfslb14h.htm>.
- 102 *Id.* at Section B.3.
- 103 See *id.*
- 104 Michael Greene, *Proxy Access Remains in Spotlight for 2017 Season*, BLOOMBERG BNA (Sept. 19, 2016), <http://www.bna.com/proxy-access-remains-n57982077182/>.
- 105 Vipal Monga, *The Big Number*, WALL ST. J. (Oct. 10, 2016), (citing a survey by the law firm Shearman & Sterling LLP), <http://www.wsj.com/articles/the-big-number-1476140737>.
- 106 See Michael Greene, *Proxy Access Remains in Spotlight for 2017 Season*, BLOOMBERG BNA (Sept. 19, 2016), <http://www.bna.com/proxy-access-remains-n57982077182/>.
- 107 *Id.*
- 108 See Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122 (proposed Nov. 10, 2016).
- 109 See Rick A. Fleming, Investor Advocate, SEC, Recommendation of the Investor Advocate, File No. SR-NYSE-2015-02 (Oct. 16, 2015), <http://www.sec.gov/about/offices/investorad/comment-letter-sec-investor-advocate-101615.pdf>; see also Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change Amending Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual to Exempt Early Stage Companies from Having to Obtain Shareholder Approval Before Issuing Shares for Cash to Related Parties, Affiliates of Related Parties or Entities in Which a Related Party Has a Substantial Interest, Exchange Act Release No. 75,599, 80 Fed. Reg. 47,978 (published Aug. 10, 2015).
- 110 See Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Amending Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual to Exempt Early Stage Companies From Having to Obtain Shareholder Approval Before Issuing Shares for Cash to Related Parties, Affiliates of Related Parties or Entities in Which a Related Party Has a Substantial Interest, Exchange Act Release No. 76,814, 81 Fed. Reg. 820 (published Jan. 7, 2016).
- 111 See Nasdaq, Solicitation of Comments by the NASDAQ Listing and Hearing Review Council about Shareholder Approval Rules (Nov. 18, 2015), <https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation.pdf>.
- 112 See SEC Investor Advisory Committee Meeting (Jan. 21, 2016), https://www.sec.gov/video/webcast-archive-player.shtml?document_id=investor-advisory-committee-012116 (03:29:30-04:27:46).
- 113 See Letter from Rick A. Fleming, Investor Advocate, SEC, to Stanley Higgins, Senior Director, Listing Qualifications, Nasdaq (Feb. 12, 2016), <https://www.sec.gov/about/offices/investorad/comment-letter-investor-advocate-nasdaq-021216.pdf>.
- 114 See Rick A. Fleming, Investor Advocate, SEC, Speech at the SEC Speaks in 2016: The Falling Leaves of the Buttonwood Tree (Feb. 19, 2016), <https://www.sec.gov/news/speech/falling-leaves-buttonwood-tree.html>.
- 115 See Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Adopting Initial and Continued Listing Standards for the Listing of Equity Investment Tracking Stocks and Adopting Listing Fees Specific to Equity Investment Tracking Stocks, Exchange Act Release No. 77,674, 81 Fed. Reg. 24,919 (published Apr. 27, 2016).
- 116 See, e.g., Jesse Drucker, *Sprint Highlights the Pitfalls Of Tracking-Stock Structure*, WALL ST. J. (Mar 7, 2003) <http://www.wsj.com/articles/SB104699971768830900>.
- 117 See Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 5 and 6, to Adopt Initial and Continued Listing Standards for the Listing of Equity Investment Tracking Stocks and Adopt Listing Fees Specific to Equity Investment Tracking Stocks, Exchange Act Release No. 78,153, 81 Fed. Reg. 42,762 (published June 30, 2016).
- 118 See *id.*
- 119 Rick A. Fleming, Investor Advocate, SEC, Comment Letter on PCAOB Rulemaking Docket Matter No. 034, The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, (Aug. 15, 2016), <https://www.sec.gov/about/offices/investorad/comment-investor-advocate-pcaob-auditor-reports-8-15-2016.pdf>.
- 120 Schnurr went on to explain what IFCR is: "In simple terms, a company's ICFR consists of the controls that are designed to provide reasonable assurance that the company's financial statements are reliable and prepared in accordance with GAAP. While controls cannot replace the need for judgment or eliminate the variations in reporting inherent in situations in which a range of acceptable judgments is possible, well-designed controls

- support the process by which those accounting judgments are made and the resulting quality of the financial reporting.” [Footnotes omitted.] James V. Schnurr, Chief Accountant, Office of the Chief Accountant, Remarks Before the 2015 AICPA National Conference on Current SEC and PCAOB Developments, (Dec. 9, 2015), <https://www.sec.gov/news/speech/schnurr-remarks-aicpa-2015-conference-sec-pcaob-developments.html>.
- 121 “Management’s ability to successfully transition to new accounting standards will depend, to a large degree, on the effective design and operation of ICFR,” he noted. Brian T. Croteau, Deputy Chief Accountant, Office of the Chief Accountant, Remarks before the 2015 AICPA National Conference on Current SEC and PCAOB Developments, (Dec. 9, 2015), <https://www.sec.gov/news/speech/croteau-2015-aicpa.html>.
- 122 Rick A. Fleming, Investor Advocate, SEC, Letter on H.R. 4139, Fostering Innovation Act of 2015, (May 23, 2016), <https://www.sec.gov/about/offices/investorad/letter-from-sec-investor-advocate-hr-4139.pdf>.
- 123 FASB, Exposure Draft: Proposed Amendments to Statement of Financial Accounting Concepts, Conceptual Framework for Financial Reporting—Chapter 3, Qualitative Characteristics of Useful Financial Information, http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176166402450&acceptedDisclaimer=true.
- 124 For a FASB member’s explanation of how the materiality proposals fit in with FASB’s overall Disclosure Framework project, see Marc Siegel, For The Investor: Disclosure Effectiveness—How Materiality Fits In, FASB, 2016 Q1, <http://www.fasb.org/cs/ContentServer?c=Page&pagename=FASB%2FPage%2FSectionPage&cid=1176167771326>.
- 125 FASB, Exposure Draft: Proposed Accounting Standards Update (ASU), Notes to Financial Statements (Topic 235): Assessing Whether Disclosures Are Material, http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176166402325&acceptedDisclaimer=true.
- 126 See, e.g., FASB in Focus: FASB Disclosure Framework Exposure Drafts on Materiality, September 2015, http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176166402203.
- 127 SEC, Investor Advisory Committee, Letter to Technical Director, FASB (Jan. 21, 2016), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-letter-fasb-materiality-012116.pdf>. See also, comment letters submitted to FASB by the California Public Employees’ Retirement System (“CalPERS”) (Dec. 8, 2015); the CFA Institute (Jan. 21, 2016); the Council of Institutional Investors (CII), (Dec. 3, 2015); and Jack Ciesielski, R.G. Associates, Inc. (Dec. 7, 2015), http://www.fasb.org/jsp/FASB/CommentLetter_C/CommentLetterPage&cid=1218220137090&project_id=2015-310. For a summary of comment letters submitted to FASB, see FASB, Board Meeting Handout: Disclosure Framework, (Mar. 2, 2016), http://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1176167952679.
- 128 Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, at i (Jan. 21, 2011).
- 129 *Id.*
- 130 *Id.*
- 131 *Id.*
- 132 15 U.S.C. § 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. § 80b of the United States Code, at which the Advisers Act is codified.
- 133 Staff of the U.S. Securities and Exchange Commission, *supra* note 128 at iii.
- 134 *Id.* at 22.
- 135 *Id.* (quoting Concept Release on the U.S. Proxy System, Exchange Act Release No. 62,495, Investment Advisers Act Release No. 3,052, Investment Company Act Release No. 29,340, 75 Fed. Reg. 42,982 (published July 22, 2010)).
- 136 Staff of the U.S. Securities and Exchange Commission, *supra* note 128 at iii.
- 137 *Id.*
- 138 *Id.*
- 139 *Id.*
- 140 See Report on Objectives, Fiscal Year 2016, *supra* note 3, at 13.
- 141 Dodd-Frank Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376 (2010).
- 142 Staff of the U.S. Securities and Exchange Commission, *supra* note 128.
- 143 See Duties of Brokers, Dealers, and Investment Advisers, Exchange Act Release No. 69,013, Investment Advisers Act Release No. 3,558, 78 Fed. Reg. 14,848 (published Mar. 7, 2013).
- 144 See *id.*
- 145 See Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (adopted Apr. 8, 2016).
- 146 *Id.*
- 147 *Id.*
- 148 See Mark Schoeff Jr., *SEC Chairwoman Mary Jo White Says Agency Mulling Fiduciary Duty*, INVESTMENTNEWS (Sept. 12, 2016), <http://www.investmentnews.com/article/20160912/FREE/160919991/sec-chairwoman-mary-jo-white-says-agency-mulling-fiduciary-duty>.

- 149 *See id.* Chair White’s reiteration of support for a fiduciary duty rule can be traced back to her remarks on March 17, 2015, when she called for the implementation of a uniform fiduciary standard for broker-dealers and investment advisers under Section 913 of Dodd-Frank. *See, e.g.,* Justin Baer & Andrew Ackerman, *SEC Head Backs Fiduciary Standards for Brokers, Advisers*, WALL ST. J. (Mar. 17, 2015), <http://www.wsj.com/articles/sec-head-seeks-uniformity-in-fiduciary-duties-among-brokers-advisers-1426607955>; Michael J. de la Merced, S.E.C. *Chief Voices Support for Higher Advice Standard for Brokers*, N.Y. TIMES: DEALBOOK (Mar. 17, 2015), http://www.nytimes.com/2015/03/18/business/dealbook/sec-chief-voices-support-for-higher-advice-standard-for-brokers.html?_r=0.
- 150 Justin Baer & Andrew Ackerman, *SEC Head Backs Fiduciary Standards for Brokers, Advisers*, WALL ST. J. (Mar. 17, 2015), <http://www.wsj.com/articles/sec-head-seeks-uniformity-in-fiduciary-duties-among-brokers-advisers-1426607955>; Michael J. de la Merced, S.E.C. *Chief Voices Support for Higher Advice Standard for Brokers*, N.Y. TIMES: DEALBOOK (Mar. 17, 2015), http://www.nytimes.com/2015/03/18/business/dealbook/sec-chief-voices-support-for-higher-advice-standard-for-brokers.html?_r=0.
- 151 *See* Baer & Ackerman, *supra* note 150.
- 152 U.S. Census Bureau, *Projections of the Population by Sex and Selected Age Groups for the United States: 2015 to 2060* (December 2014).
- 153 *Id.*
- 154 *See* Justin McCarthy, *Americans’ Financial Worries Edge Up in 2016*, GALLUP (Apr. 28, 2016), <http://www.gallup.com/poll/191174/americans-financial-worries-edge-2016.aspx?version=>.
- 155 *See id.*
- 156 *See* Lydia Saad, *Three in 10 U.S. Workers Foresee Working Past Retirement Age*, GALLUP (May 13, 2016), <http://www.gallup.com/poll/191477/three-workers-foresee-working-past-retirement-ags-as.aspx?version=>.
- 157 *See* U.S. Gov’t Accountability Office, *Retirement Security—Most Households Approaching Retirement Have Low Savings* (May 12, 2015) at 7.
- 158 *See id.*
- 159 Keith Miller *et al.*, *The Reality of the Retirement Crisis*, Center for American Progress (Jan. 26, 2015) at 1.
- 160 *See* Joshua Gotbaum, *Losing Ground: Little Reason to Celebrate 10th Anniversary of the Pension Protection Act*, BROOKINGS (Aug. 26, 2016), <https://www.brookings.edu/opinions/losing-ground-little-reason-to-celebrate-10th-anniversary-of-the-pension-protection-act/>.
- 161 BIPARTISAN POLICY CTR., *SECURING OUR FINANCIAL FUTURE: REPORT OF THE COMMISSION ON RETIREMENT SECURITY AND PERSONAL SAVINGS* (June 2016), <http://cdn.bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Retirement-Security-Report.pdf>.
- 162 Alicia H. Munnell, *Falling Short: The Coming Retirement Crisis and What to Do about It*, (Ctr. for Ret. Research at Boston College Issue in Brief No.15-7, Apr. 2015), http://crr.bc.edu/wp-content/uploads/2015/04/IB_15-7_508.pdf.
- 163 Teresa Ghilarducci and Hamilton “Tony” James, *A Comprehensive Plan to Confront the Retirement Savings Crisis*, THE NEW SCHOOL RETIREMENT EQUITY LAB (2016).
- 164 *See* Office of the Investor Advocate, SEC, *Perspectives on Retirement Readiness in the United States: A White Paper* (Nov. 2016), available at <https://www.sec.gov/advocate/staff-papers/white-papers/retirement-readiness-white-paper.pdf>.
- 165 Rick A. Fleming, Investor Advocate, SEC, *Speech at NASAA Corporation Finance Training, Moving Forward with the Commission’s Disclosure Effectiveness Initiative*, Houston, TX (Nov. 19, 2016), <https://www.sec.gov/news/speech/moving-forward-with-the-disclosure-effectiveness-initiative.html>.
- 166 Exchange Act § 4(g)(6)(B)(ii)(V), 15 U.S.C. § 78d(g)(6)(B)(ii)(V).
- 167 NASAA, *NASAA Enforcement Report: 2016 Report on 2015 Data* (Sept. 2016), http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2016/09/2016-Enforcement-Report-Based-on-2015-Data_online.pdf; *see also* NASAA, *Top Investor Threats*, <http://www.nasaa.org/3752/top-investor-threats/> (last visited Sept. 19, 2016).
- 168 Letter from MSRB to Rick Fleming, Investor Advocate, SEC (Nov. 3, 2016), <http://www.msrb.org/msrb1/pdfs/MSRB-Response-to%20Investor-Advocate-November-2016.pdf>.
- 169 This list of problematic products identified by the SEC is based on staff analysis of the alerts and bulletins issued by the SEC’s Office of Investor Education and Advocacy and the SEC’s Office of Compliance Inspections and Examinations during FY 2016.
- 170 *See* NASAA Enforcement Report, *supra* note 167; *see also* *Top Investor Threats*, *supra* note 167.
- 171 This list of problematic products is based on discussion with FINRA staff and our analysis of the alerts and bulletins issued by FINRA for investors during FY 2016.
- 172 Adam Janofsky & Angus Loten, *Startups Offer Unusual Reward for Investing*, WALL ST. J. (Apr. 1, 2015), <http://www.wsj.com/articles/startups-offer-unusual-reward-for-investing-1427944095>.
- 173 *Id.*
- 174 *See* Joe Green & John Coyle, *Is the SAFE Not So Safe for Investment Crowdfunding?*, CROWDFUND INSIDER (Sept. 22, 2016), <http://www.crowdfundinsider.com/2016/09/90470-safe-not-safe-investment-crowdfunding/>.
- 175 *Id.*

- 176 See Stephanie L. Zeppa & Andrew S. Kreider, *SAFEs and KISSes Poised to Be the Next Generation of Startup Financing*, THE NAT'L LAW REVIEW (May 6, 2015), <http://www.natlawreview.com/article/safes-and-kisses-poised-to-be-next-generation-startup-financing>.
- 177 15 U.S.C. § 80a-2(a)(48); see 1 Clifford E. Kirsch, MUTUAL FUND AND EXCHANGE TRADED FUNDS, § 33:4 (3d ed. 2014) (“A business development company is defined in section 2(a)(48) of the Investment Company Act as any closed-end company which is organized under the laws of, and has its principal place of business in, any state, is operated for the purpose of making investments in certain securities and generally makes available significant managerial assistance with respect to the issuers of such securities, and has elected to be regulated as a business development company in accordance with the requirements of sections 55 to 65 of the Investment Company Act.”); see also Richard G. Tashjian, *The Small Business Investment Incentive Act of 1980 and Venture Capital Financing*, 9 FORDHAM URB. L.J. 865, 883 (1981) (“A business development company is defined in section 2(a)(48) as any closed-end domestic company that is operated for the purpose of investing in securities of the companies indicated in section 55 and that makes available to these companies significant managerial assistance.”).
- 178 H. R. REP. NO. 96-1341 at 20-22 (1980), reprinted in 1980 U.S.C.C.A.N. 4800, 4804 (recognizing that BDCs exhibit substantial differences from investment companies and therefore stating that the Small Business Investment Incentive Act seeks to remove burdens on venture capital activities that might create unnecessary disincentives to the legitimate provision of capital to small businesses); Kirsch, *supra* note 177 at § 1A:2.2.
- 179 15 U.S.C. § 80a-54(a); see H. R. REP. NO. 96-1341, *supra* note 178 at 23 (“The restrictions are designed to assure that companies electing special treatment as [BDCs] are in fact those that [Small Business Investment Incentive Act] is intended to aid – companies providing capital and assistance to small, developing or financially troubled businesses that are seeking to expand, not passive investors in large, well-established businesses.”); see also Tashjian, *supra* note 177 at 930 (“The 1980 Amendments to the [Investment Advisers Act of 1940] distinguish between an investment adviser to a business development company that has elected to be regulated under section 54 of the Amended Act and an investment adviser to a nonregulated business development company.”); SEC, Press Release, SEC Adopts New Rules for Business Development Companies and Reproposes New Category of Eligible Portfolio Company, 2006-181 (Oct. 26, 2006), <https://www.sec.gov/news/press/2006/2006-181.htm>.
- 180 See 15 U.S.C. § 80a-2(a)(46) (statutory definition of eligible portfolio company); Tashjian, *supra* note 177 at 884-85.
- 181 15 U.S.C. § 80a-2(a)(48).
- 182 2 Robert J. Haft, Arthur F. Haft & Michele Haft Hudson, VENTURE CAP. & BUS. FIN., § 5:3 (Aug. 2016).
- 183 *Id.*
- 184 *See id.*
- 185 Christine Idzelis & Craig Torres, *Banks Are Booming in Wall Street’s Shadow*, BLOOMBERG (May 22, 2015), <http://www.bloomberg.com/news/articles/2015-05-22/wall-street-flouts-fed-standards-to-fund-high-risk-loans>; Randall Smith, *Obscure Corner of Wall St. Draws Skepticism From Investors*, N.Y. TIMES: DEALBOOK (Dec. 24, 2015), http://www.nytimes.com/2015/12/25/business/dealbook/obscure-corner-of-wall-st-draws-skepticism-from-investors.html?_r=0.
- 186 *See, e.g.*, Haft, *supra* note 182 (Unlisted BDCs are required to follow the same regulatory structure as listed BDCs).
- 187 *See, e.g., id.* (stating that historically, BDCs are listed on a national stock exchange but that recently, some BDCs have declined listing on an exchange).
- 188 *See, e.g.*, Kirsten Grind & Jean Eaglesham, *These High-Fee, Unlisted, Junk-Based Funds Aren’t Working Out*, WALL ST. J. (Mar. 19, 2016), <http://www.wsj.com/articles/these-high-fee-unlisted-junk-based-funds-arent-working-out-1458379803> (noting that non-traded BDCs in particular were part of a fast-growing class of investments sold to individual investors seeking steady dividends, yields as high as 8 percent and a haven from volatile markets) [hereinafter, Grind, High-Fee, Unlisted]; Amey Stone, *BDCs to Rise With Interest Rates*, BARRON’S (Oct. 3, 2016), <http://www.barrons.com/articles/high-yielding-bdcs-could-rise-with-interest-rates-1475297891> (stating that BDC yields average about 9 percent and that many are trading at discounts to book value); Gillian Tan, *A Yield Play That Could Bite Back*, WALL ST. J. (Feb. 21, 2014), <http://www.wsj.com/articles/SB10001424052702303636404579393453645776782> (observing that investors might consider tapping BDCs “as a small part of a broader allocation to high-yield, or noninvestment-grade, debt” and noting that in 2014 average annual BDC yields was 9.1 percent according to Wells Fargo Securities).
- 189 *See, e.g.*, Michael Kelly, *Investors Thinking About Retirement Should Understand BDCs*, INVESTMENTNEWS: OUTSIDE/IN (Sept. 1, 2015), <http://www.investmentnews.com/article/20150901/BLOG09/150909994/investors-thinking-about-retirement-should-understand-bdcs>.
- 190 Mark Schoeff Jr., *Finra Launches Exam Sweep of Business Development Companies*, INVESTMENTNEWS (Aug. 4, 2016), <http://www.investmentnews.com/article/20160804/FREE/160809952/finra-launches-exam-sweep-of-business-development-companies>.
- 191 Kirsten Grind & Jean Eaglesham, *A \$2.5 Billion Business-Development-Corporation Fund Hits*

- Redemption Limit*, WALL ST. J. (Apr. 10, 2016), <http://www.wsj.com/articles/a-2-5-billion-bdc-halts-redemptions-after-limit-reached-1460280602> [hereinafter Grind, Fund Hits Redemption Limit]; Bruce Kelly, *Illiquid BDCs demand scrutiny*, INVESTMENTNEWS (Apr. 21, 2013, 12:01 AM), <http://www.investmentnews.com/article/20130421/REG/304219999/illiquid-bdcs-demand-scrutiny> (analysts indicate nontraded BDCs' merits compared with traded BDCs include less fluctuation in the BDC's value and that ability to raise capital in a steady manner) [hereinafter Kelly, Illiquid BDCs].
- 192 See Kelly, Illiquid BDCs, *supra* note 191 (discussing, in part, that BDCs yields are attractive due to exposure to high credit risks that are amplified by leverage); Tan, *supra* note 188 (noting that potential defaults pose a risk to BDCs and that BDCs are less diversified than banks and more exposed to market downturns).
- 193 Tan, *supra* note 188 (observing that investors might consider tapping BDCs “as a small part of a broader allocation to high-yield, or noninvestment-grade, debt” and noting that in 2014 average annual BDC yields was 9.1 percent according to Wells Fargo Securities).
- 194 Kelly, Illiquid BDCs, *supra* note 191 (discussing risks associated with BDCs such as potential default rates on the loans, risk of defaults and whether the loans would be repaid to the lender in cash or by issuing more securities); Smith, *supra* note 185 (observing that the BDC category has grown tenfold over the last decade, to \$64 billion in assets partly because BDCs offer higher yields in exchange for the high-risk nature of their assets); John Waski, *Column: Business Development Companies - High Yield, High Risk*, REUTERS (May 17, 2013 8:07AM), <http://www.reuters.com/article/us-column-wasik-bdcs-idUSBRE94G0CL20130517>.
- 195 FINRA, *2013 Regulatory and Examination Priorities Letter* (Jan. 11, 2013), <http://www.finra.org/industry/2013-exam-priorities-letter>.
- 196 See, e.g., Grind, High-Fee, Unlisted, *supra* note 188 (observing that the number of unusual risks, including loans to small and medium-size companies with less than stellar credit, less transparency, upfront fees of at least 10 percent and limited withdrawal requests, has not deterred investors seeking high yields and low interest rates).
- 197 Tim Dulaney, Tim Husson & Craig McCann, *The Priority Senior Secured Income Fund*, 20 PIABA B.J. 191-192 (2013); see also, Grind, Fund Hits Redemption Limit, *supra* note 191 (discussing, among other things, the illiquidity of nontraded business development companies and how typically investors are only allowed to cash out every three months); Grind, High-Fee, Unlisted, *supra* note 188 (discussing, in part, that regulators are concerned about nontraded BDCs that are sold using many of the same networks of brokerage firms and that charge the same high upfront commissions as nontraded real-estate investment trusts); Kelly, Illiquid BDCs, *supra* note 191 (stating that illiquid or non-traded BDCs have high expenses that could limit investor returns).
- 198 Schoeff, *supra* note 190 (stating that given the complexity and high-risk nature of the product, there is concern retail customer may not fully understand the risks and potential impact BDCs may have on their portfolios).
- 199 FINRA, *2016 Regulatory and Examination Priorities Letter*, (Jan. 5, 2016), <http://www.finra.org/industry/2016-regulatory-and-examination-priorities-letter>.
- 200 Waski, *supra* note 194.
- 201 Exchange Act § 4(g)(4), 15 U.S.C. § 78d(g)(4).
- 202 Exchange Act § 4(g)(7), 15 U.S.C. § 78d(g)(7).
- 203 Some of our comment letters respond to Concept Releases and set forth our views on certain matters, but a specific call for action may be premature. Comment letters of this nature are not included in this inventory. See, e.g., Rick A. Fleming, Investor Advocate, SEC, Comment Letter RE: Solicitation of Comments by the NASDAQ Listing and Hearing Review Council about Shareholder Approval Rules, (Feb. 12, 2016). Moreover, we are required to provide an inventory outlining actions of the SEC or SROs. Letters to Congress or other organizations such as NASAA are not included in this inventory, but are available at <https://www.sec.gov/advocate/investor-advocate-comment-letters.html>.
- 204 See *supra* note 109 and accompanying text.
- 205 See *supra* note 60 and accompanying text.
- 206 See *supra* note 66 and accompanying text.
- 207 See *supra* note 21 and accompanying text.
- 208 See *supra* note 70 and accompanying text.
- 209 See *supra* note 119 and accompanying text.
- 210 See *supra* note 14 and accompanying text.
- 211 Exchange Act § 4(g)(8)(B), 15 U.S.C. § 78d(g)(8)(B).
- 212 Exchange Act § 4(g)(8)(D), 15 U.S.C. § 78d(g)(8)(D).
- 213 As used in this report, the term “Ombudsman” may refer to the Ombudsman, or to the Ombudsman and Office of the Investor Advocate staff directly supporting the ombudsman function.
- 214 The Ombudsman Matter Management System (“OMMS”) is an electronic platform for collecting, recording, tracking, and analyzing matters and contacts. Persons will have the option of completing a web form—the OMMS Form—to submit their inquiries to the Ombudsman. A detailed discussion of OMMS begins on page 42 of this Report.
- 215 See SEC, Office of the Investor Advocate, *Report on Activities, Fiscal Year 2015*, at 24 (Dec. 23, 2015) [hereinafter Report on Activities, Fiscal Year 2015], <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2015.pdf>.
- 216 Exchange Act § 4(g)(8)(B)(i), 15 U.S.C. § 78d(g)(8)(B)(i).

- 217 Report on Objectives for Fiscal Year 2016, Report on Activities for Fiscal Year 2015, and the Report on Objectives for Fiscal Year 2017. *See* Report on Objectives, Fiscal Year 2016, *supra* note 3; Report on Activities, Fiscal Year 2015, *supra* note 215; Report on Objectives, Fiscal Year 2017, *supra* note 4.
- 218 *See* Report on Objectives, Fiscal Year 2017, *supra* note 4, at 31.
- 219 *See* FINRA, FINAL REP. AND RECOMMENDATIONS OF THE FINRA DISP. RESOL. TASK FORCE (Dec. 16, 2015) [hereinafter Final Report], <https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>.
- 220 *Id.* at 55.
- 221 *See* Final Report, *supra* note 219, at 21.
- 222 *See* FINRA RULE 12800(a), (b).
- 223 FINRA RULE 12800(c).
- 224 *See* FINRA RULE 12904(g) and FINRA RULE 12800(c).
- 225 FINRA RULE 12904(g).
- 226 FINRA, Regulatory Notice 09-16, Explained Arbitration Decisions (Mar. 2009), <https://www.finra.org/sites/default/files/NoticeDocument/p118141.pdf>.
- 227 *See, e.g.*, Comment Letter, Barbara Black, Jill I. Gross & Deborah Summers, RE: Release No. 34-58862, File No. SR-FINRA-2008-051, *Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Require Arbitrators to Provide an Explained Decision upon the Joint Request of the Parties* (Nov. 20, 2008), at 5, <http://www.sec.gov/comments/sr-finra-2008-051/finra2008051-1.pdf>.
- 228 Seth E. Lipner, *Ideas Whose Time Has Come: The Single Arbitrator and Reasoned Awards*, in *SECURITIES ARBITRATION 2000* (David E. Robbins ed., Practising Law Institute, 2000).
- 229 Report on Objectives, Fiscal Year 2017, *supra* note 4, at 33-34.
- 230 *Royal Alliance Associates v. Liebhaber*, 206 Cal. Rptr. 3d 805, 808 (Cal. Ct. App. 2016).
- 231 *Id.* When the investor filed the claim, FINRA documented the complaint in the CRD records of the firm and adviser. Certain information from CRD records is also reflected in BrokerCheck.
- 232 Susan Antilla, *A Murky Process Yields Cleaner Professional Records for Stockbrokers*, N.Y. TIMES: DEALBOOK (Sept. 25, 2014, 8:40 PM), <http://dealbook.nytimes.com/2014/09/25/a-murky-process-yields-cleaner-professional-records-for-stockbrokers>.
- 233 *Id.*; *see also*, FINRA, *Understanding the Arbitration and Expungement Process* (May 28, 2015), at 9, http://www.finra.org/sites/default/files/2015_AC_Understanding_the_Arbitration_and_Expungement_Process.pdf.
- 234 Arbitrators should: (1) allow the investor and their counsel to appear at the expungement hearing; (2) allow the investor to testify at the expungement hearing; (3) allow a pro se investor, or counsel to an investor, to introduce documents and evidence at the expungement hearing; (4) allow a pro se investor, or counsel to an investor, to cross-examine the broker and other witnesses called by the party seeking expungement; and (5) allow a pro se investor, or counsel to an investor, to present opening and closing arguments, if the panel permits any party to make these arguments. FINRA, Notice to Arbitrators and Parties on Expanded Expungement Guidance (last update Sept. 2015) [hereinafter Expanded Expungement Guidance], <https://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>. FINRA also instructs arbitrators to affirmatively inform retail investors of expungement hearings, and allow retail investors to fully participate in those hearings, when an associated person (broker) files an arbitration claim against a firm for the purpose of seeking expungement without naming the customer in the underlying dispute as a respondent. FINRA clarifies that “without this directive from the arbitrators, the customer(s) may not even be aware that an expungement claim is pending regarding their prior dispute.” *Id.*
- 235 *Liebhaber*, 206 Cal. Rptr. 3d at 812.
- 236 *Id.* at 812-13.
- 237 *See id.* at 814.
- 238 BrokerCheck, a free research tool available on FINRA’s website at <http://brokercheck.finra.org/>, provides information about brokerage firms, brokers, investment adviser firms, advisers, and formerly registered brokers, including information about employment histories, certifications, licenses, regulatory actions, violations, and complaints.
- 239 *Liebhaber*, 206 Cal. Rptr. 3d at 814.
- 240 *Id.*
- 241 *Id.* at 819.
- 242 Under FINRA Rule 2080(b), FINRA is the only party who is required to be listed as a respondent in a judicial petition from a court for expungement relief. If a broker or firm seeks a waiver from FINRA to list FINRA as a party to the judicial petition for expungement, FINRA shares the waiver request with the relevant state(s) the broker or firm are registered. *See* FINRA, FINRA Rule 2080 Frequently Asked Questions, <http://www.finra.org/industry/crd/rule-2080-frequently-asked-questions> (question nos. 7-8).
- 243 *See* Expanded Expungement Guidance, *supra* note 234.
- 244 Notice of Filing of a Proposed Rule Change Amending the Code of Arbitration Procedure, Exchange Act Release No. 78,549, 81 Fed. Reg. 54,858 (published Aug. 17, 2016) [hereinafter Party Portal Proposal]; *see also*, Response from Margo Hassan, Associate Chief Couns., FINRA, to Brent J. Fields, Sec’y, SEC (Oct. 28, 2016) [hereinafter FINRA Response], RE: File No. SR-FINRA-2016-029, http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2016-029-response-

- to-comments.pdf. On November 14, 2016, the SEC approved the Party Portal rule. Order Approving Rule Change Amending the Code of Arbitration Procedure, Exchange Act Release No. 79,296, 81 Fed. Reg. 81,844 (Nov. 18, 2016).
- 245 See Letter from Hugh Berkson, Pres., PIABA, to Brent Fields, Sec’y, SEC (Sept. 7, 2016), RE: *SR FINRA 2016 029*, <https://www.sec.gov/comments/sr-finra-2016-029/finra2016029-5.pdf>; see Letter from Michael F. Williford, Student Intern, and Nicole Iannarone, Assistant Clinical Professor, Geor. St. U. C. of Law, to Margo Hassan, Associate Chief Couns., FINRA (Sept. 7, 2016), RE: *SR-FINRA-2016-029*, <https://www.sec.gov/comments/sr-finra-2016-029/finra2016029-4.pdf>.
- 246 Party Portal Proposal, *supra* note 244, at 54,859.
- 247 FINRA Response, *supra* note 244, at 3.
- 248 FINRA explains, “[t]he Party Portal user enters the [bank routing and account numbers] that appear on a personal check into the Party Portal. . . . A party can provide the numbers to a representative over the phone, or a voided check with the numbers, for entry into the Party Portal.” FINRA Response, *supra* note 244, at 2.
- 249 FINRA, BY-LAWS, ARTICLE V, SECTION 3(a), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4620.
- 250 FINRA, REGISTERED REPRESENTATIVES BROCHURE (2016), at 20, <http://www.finra.org/sites/default/files/registered-representatives-brochure.pdf>.
- 251 FINRA, BY-LAWS, ARTICLE V, SECTION 3(b), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4620.
- 252 See, e.g., FINRA RULE 2010 (“[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”).
- 253 See Report on Objectives, Fiscal Year 2017, *supra* note 4, at 32-33.
- 254 See, e.g., Letter from Judith Shaw, Pres., NASAA to Brent J. Fields, Sec’y, SEC (Aug. 3, 2016), at 1, <https://www.sec.gov/comments/sr-nysemkt-2016-52/nysemkt201652-1.pdf>; see also, FINRA, Regulatory Notice 11-06, Reporting Requirements (Feb. 2011), at 2, <http://www.finra.org/sites/default/files/NoticeDocument/p122888.pdf>.
- 255 Comment Letter, Tracey L. McNeil, Ombudsman, and Rick A. Fleming, Investor Advocate, SEC, RE: *File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103* (Oct. 3, 2016), at 4, <https://www.sec.gov/about/offices/investorad/investor-advocate-comment-letter-sr-nysemkt-2016-52-sr-aysearca-2016-103.pdf>.
- 256 See Notice of Filing of Proposed Rule Change Amending Rules 2.17(c) and 2.23(i) to Harmonize the Requirement of When OTP Holders and OTP Firms Must File a Uniform Termination Notice for Securities Industry Registration With the Rules of Other Exchanges and FINRA, Exchange Act Release No. 78,381, 81 Fed. Reg. 49,286 (published July 27, 2016) [hereinafter *Arca Rule*]; Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rules 340, 341, and 359 to Extend the Time Within Which a Member or Member Organization or an ATP Holder Must File a Uniform Termination Notice for Securities Industry Registration, Exchange Act Release No. 78,198, 81 Fed. Reg. 44,363 (published July 7, 2016) [hereinafter *MKT Rule*].
- 257 See *Arca Rule*, *supra* note 256, at 49,287; see *MKT Rule*, *supra* note 256, at 44,364.
- 258 *Id.*
- 259 Letter from Elizabeth King, Gen. Couns. and Corp. Sec’y, NYSE MKT LLC, to Brent J. Fields, Sec’y, SEC (Aug. 12, 2016), at 2, <https://www.sec.gov/comments/sr-nysemkt-2016-52/nysemkt201652-2.pdf> (“ . . . unless FINRA moves to shorter filing time frame, it would be a burden on competition for the Exchange to maintain a different filing requirement for Form U5s.”).
- 260 Comment Letter, Tracey L. McNeil, Ombudsman, and Rick A. Fleming, Investor Advocate, SEC, RE: *File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103* (Oct. 3, 2016), <https://www.sec.gov/about/offices/investorad/investor-advocate-comment-letter-sr-nysemkt-2016-52-sr-aysearca-2016-103.pdf>.
- 261 This is not a theoretical concern. Consider, for example, recent allegations by FINRA against a trader and his sales assistant. FINRA has charged them with, from at least May 2011 through March 2012, engaging in a scheme to circumvent their former employer’s compliance and anti-money laundering policies in order to trade certain foreign bonds. See Complaint, *FINRA Dept. of Enft v. Bocchino, et al.*, No. 2012032019101 (Sept. 1, 2016), <http://disciplinaryactions.finra.org/Search/ViewDocument/66538>. As alleged in the Complaint, the trader’s brokerage firm ultimately filed the required Form U5 on Friday, March 30, 2012. However, a review of BrokerCheck indicates that the trader was discharged by the firm on March 1, 2012 – a gap of 29 days. See BrokerCheck Report for John B. Bocchino, <http://brokercheck.finra.org/Report/Download/52819180>. During this gap period permitted by existing FINRA rules, the terminated trader was able to quickly obtain employment at another firm and start his new employment on April 3, 2012. The Complaint does not address whether the trader sought to continue the illegal scheme at the new firm.
- 262 Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Extend the Time Within Which a Member, Member Organization, an ATP Holder, an OTP Holder, or an OTP Firm Must File a Uniform Termination Notice for Securities Industry Registration (“Form U5”), Exchange Act Release No. 79,055, 81 Fed. Reg. 70,460 (published Oct. 12, 2016). By entering an order instituting proceedings, the Commission is requesting that

- interested persons provide written submissions of their views, data, and arguments with respect to the issues raised by the proposed rules changes and, in particular, whether the proposed rules changes are inconsistent with any provision of the Exchange Act, or the rules and regulations thereunder. *Id.* at 70,462.
- 263 BrokerCheck may be accessed at <http://brokercheck.finra.org>. IAPD, a website sponsored by the SEC, provides important information disclosed by investment advisers and investment advisory firms disclosed in their Form ADVs. IAPD may be accessed at <https://adviserinfo.sec.gov/IAPD/Default.aspx>.
- 264 See NBER Paper, *infra* note 265, at 14.
- 265 See, e.g., Mark Egan, Gregor Matvos, and Amit Seru, *The Market for Financial Adviser Misconduct* (NBER Working Paper No. 22050, Feb. 2016) [hereinafter NBER Paper], <http://www.nber.org/papers/w22050.pdf>; Stephen G. Dimmock, William C. Gerken, and Nathaniel P. Graham, *Is Fraud Contagious? Career Networks and Fraud by Financial Advisors* (Oct. 14, 2016), <http://ssrn.com/abstract=2577311>; Craig J. McCann, Chuan Qin, and Mike Yan, *How Widespread and Predictable is Stock Broker Misconduct?* (Apr. 22, 2016), <http://ssrn.com/abstract=2768942>.
- 266 FINRA Disciplinary Actions Online, <http://disciplinaryactions.finra.org>.
- 267 NASAA maintains a web page that lists the contact information for the securities regulators for each state in the United States. See NASAA, Contact Your Regulator, <http://www.nasaa.org/about-us/contact-us/contact-your-regulator>.
- 268 A list of these law school clinics is available at <https://www.sec.gov/answers/arbclin.htm>.
- 269 Exchange Act § 39(a), 15 U.S.C. § 78pp(a).
- 270 *Id.*
- 271 Exchange Act § 39(a)(2)(B), 15 U.S.C. § 78pp(a)(2)(B).
- 272 Exchange Act § 39(g), 15 U.S.C. § 78pp(g).
- 273 Exchange Act § 39(h), 15 U.S.C. § 78pp(h).
- 274 According to Exchange Act Section 4(g)(6)(B)(ii), 15 U.S.C. § 78d(g)(6)(B)(ii), a Report on Activities must include several enumerated items, and it may include “any other information, as determined appropriate by the Investor Advocate.”
- 275 For the full versions of the recommendations, see SEC, <http://www.sec.gov/spotlight/investor-advisory-committee-2012.shtml> (last visited May 12, 2016).
- 276 17 C.F.R. §§ 200.735-3(b)(2)(i), 230.122 (2014); Exchange Act § 24(b), 15 U.S.C. § 78x; 5 U.S.C. § 552a(i)(1); SECR18-2, Section 8.5 (Nonpublic Information) (July 31, 2005).
- 277 See SEC, *Recommendation of the Investor Advisory Committee to Enhance Information for Bond Market Investors* (June 7, 2016), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-enhance-information-bond-market-investors-060716.pdf>.
- 278 See Notice of Filing of a Proposed Rule Change Relating to FINRA Rule 2232 (Customer Confirmations) to Require Members to Disclose Additional Pricing Information on Retail Customer Confirmations Relating to Transactions in Fixed Income Securities, Exchange Act Release No. 78,573, 81 Fed. Reg. 55,500 (published Aug. 19, 2016); Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to MSRB Rules G-15 and G-30 to Require Disclosure of Mark-Ups and Mark-Downs to Retail Customers on Certain Principal Transactions and to Provide Guidance on Prevailing Market Price, Exchange Act Release No. 78,777, 81 Fed. Reg. 62,947 (published Sept. 13, 2016).
- 279 “Another core feature of the U.S. regulatory regime for equities is public price transparency on both a pre- and post-trade basis,” Chair White stated in a speech in October 2015. “Over the last decade, public post-trade transparency has also been extended to the corporate bond and municipal securities markets. Further work on pre-trade price transparency is also ongoing in both.” Mary Jo White, Chair, SEC, Keynote Address at the Evolving Structure of the U.S. Treasury Market Conference, Federal Reserve Bank of New York: *Taking Stock of Treasury Market Regulation* (Oct. 20, 2015), <https://www.sec.gov/news/speech/taking-stock-of-treasury-market-regulation.html>.
- 280 Michael S. Piwowar, Comm’r, SEC, Remarks at FINRA’s 2016 Fixed Income Conference (Sept. 7, 2016), <https://www.sec.gov/news/speech/piwowar-remarks-finra-2016-fixed-income-conference.html>.
- 281 Jack Casey, *Woodell Hopes to Start New Initiatives During Tenure as MSRB Chair*, THE BOND BUYER (Sept. 30, 2016), <http://www.bondbuyer.com/news/markets-people/woodell-hopes-to-start-new-initiatives-during-tenure-as-msrb-chair-1114829-1.html>.
- 282 *Id.*
- 283 See SEC, *Recommendation of the Investor Advisory Committee Regarding Mutual Fund Cost Disclosure* (Apr. 14, 2016), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-mf-fee-disclosure-041916.pdf>.
- 284 SEC, Press Release, SEC Adopts Rules to Modernize Information Reported by Funds, Require Liquidity Risk Management Programs, and Permit Swing Pricing 2016-215, (Oct. 13, 2016), <https://www.sec.gov/news/pressrelease/2016-215.html>.
- 285 SEC, *Recommendation of the Investor Advisory Committee: Empowering Elders and Other Investors Re: Background Checks in the Financial Markets* (July 16, 2015), https://www.sec.gov/spotlight/investor-advisory-committee-2012/final_iac_backgroundcheck_recommendation_071615.pdf.

- 286 SEC, *Recommendation of the Investor Advisory Committee: Shortening the Trade Settlement Cycle in U.S. Financial Markets* (Feb. 12, 2015), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf>.
- 287 *Id.*
- 288 *Id.*
- 289 See Amendment to Securities Transaction Settlement Cycle, Exchange Act Release No. 78,962, 81 Fed. Reg. 69,240 (proposed Oct. 5, 2016). For a summary and Fact Sheet, see SEC, Press Release: SEC Proposes Rule Amendment to Expedite Process for Settling Securities Transactions, 2016-200, (Sept. 28, 2016), <https://www.sec.gov/news/pressrelease/2016-200.html>.
- 290 Mary Jo White, Chair, SEC, Statement at Open Meeting: Covered Clearing Agencies and Shortening the Settlement Cycle (Sept. 28, 2016) (“I believe that today’s Commission can best fulfill its commitment to serving investors and the markets by pursuing today’s proposal to move to T+2. However, I would expect that future Commissions, like ours is today, will review whether further reductions would be appropriate, in light of the technology, investor needs, and all other relevant circumstances at the time.”), <https://www.sec.gov/news/statement/white-statement-open-meeting-092816.html>; Michael S. Piwowar, Comm’r, SEC, Statement of Commissioner Piwowar at Open Meeting Regarding Proposal to Shorten the Trade Settlement Cycle, Sept. 28, 2016, (“[T]o the extent the Commission adopts a rule for T+2, what, if anything, should we do with respect to further shortening the settlement cycle in the future?”), <https://www.sec.gov/news/statement/piwowar-statement-open-meeting-092816.html>. Kara M. Stein, Comm’r, SEC, Statement on the Proposed Rule Amendment to Shorten the Transaction Settlement Cycle (Sept. 28, 2016) (the move to T+2 “should lay the groundwork for an even shorter settlement cycle.”), <https://www.sec.gov/news/statement/stein-second-statement-open-meeting-092816.html>.
- 291 Both the Discussion and Economic Analysis sections of the Release discuss the question of moving of a settlement cycle shorter than T+2. See Amendment to Securities Transaction Settlement Cycle, Exchange Act Release No. 78,962, 81 Fed. Reg. 69,240, 69,259, 69,276-69,277 (proposed Oct. 5, 2016).
- 292 The MSRB filed with the Commission a proposal to amend two rules to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle (i.e., T+2) rather than the current three-day cycle. See Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change Consisting of Proposed Amendments to Rules G-12 and G-15 to Define Regular-Way Settlement for Municipal Securities Transactions as Occurring on a Two-Day Settlement Cycle and Technical Conforming Amendments, Exchange Act Release No. 77,744, 81 Fed. Reg. 26,851 (published May 4, 2016).
- 293 FINRA, Regulatory Notice 16-09, Shortening the Settlement Cycle for Securities to T+2 (Mar. 2016), https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-16-09.pdf.
- 294 See Question 5, p. 79, SEC, *Recommendation of the Investor Advisory Committee: Shortening the Trade Settlement Cycle in U.S. Financial Markets* (Feb. 12, 2015), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf>.
- 295 Exchange Act Rule 14a-2(a)(1), 17 C.F.R. § 240.14a-2(a)(1) (2015).
- 296 SEC, *Recommendations of the Investor Advisory Committee: Impartiality in the Disclosure of Preliminary Voting Results* (Oct. 9, 2014), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/impartiality-disclosure-prelim-voting-results.pdf>.
- 297 SEC, *Recommendation of the Investor Advisory Committee: Accredited Investor Definition* (Oct. 9, 2014), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/accredited-investor-definition-recommendation.pdf>.
- 298 Staff of the SEC, *Report on the Review of the Definition of “Accredited Investor”* (Dec. 18, 2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.
- 299 *Id.* at 90.
- 300 *Id.* at 90-91.
- 301 *Id.* at 91.
- 302 *Id.* at 94-96.
- 303 SEC, *Recommendation of the Investor Advisory Committee: Crowdfunding Regulations* (Apr. 10, 2014), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-crowdfunding-recommendation.pdf>.
- 304 Crowdfunding, Securities Act Release No. 9,974, Exchange Act Release No. 76,324, 80 Fed. Reg. 71,387 (adopted Nov. 16, 2015) (hereinafter “Crowdfunding Final Rule”).
- 305 Report on Objectives, Fiscal Year 2017, *supra* note 4.
- 306 SEC, *Recommendation of Investor Advisory Committee: Decimalization and Tick Sizes* (Jan. 31, 2014), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-decimalization-recommendation.pdf>.
- 307 See SEC, Letter Granting Exemption Under Rule 608(e) of Regulation NMS, (Sept. 13, 2016) <https://www.sec.gov/divisions/marketreg/mr-noaction/2016/exemption-608e-tick-size-pilot-091316.pdf>.
- 308 Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a Tick Size Pilot Plan, Exchange Act Release No. 72,460, 79 Fed. Reg. 36,840 (published June 30, 2014).

- 309 Joint Industry Plans; Order Approving the National Market System Plan to Implement a Tick Size Pilot Program by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., as Modified by the Commission, for a Two-Year Period, Exchange Act Release No. 74,892, 80 Fed. Reg. 27,513 (published May 13, 2015).
- 310 *Id.* at 68 n.269.
- 311 SEC, *Recommendation of the Investor Advisory Committee: Legislation to Fund Investment Adviser Examinations* (Nov. 22, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-adviser-examinations-recommendation-2013.pdf>.
- 312 *Id.*
- 313 SEC, Budget Reports, FY 2015 Congressional Budget Justification, FY 2015 Annual Performance Plan and FY 2013 Annual Performance Report (Mar. 7, 2014), at 5, <https://www.sec.gov/about/reports/secfy15congbudjust.pdf> (last visited May 12, 2016).
- 314 SEC, FY 2016 Budget Request Tables, <http://www.sec.gov/about/reports/sec-fy2016-budget-request-tables.pdf>; SEC, FY 2016 Budget Request by Program, at 66 and 68, <http://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf>.
- 315 SEC, Budget Reports, FY 2017 Congressional Budget Justification, FY 2017 Annual Performance Plan and FY 2015 Annual Performance Report: The FY 2017 (Feb. 9, 2016), at 5, <http://www.sec.gov/about/reports/secfy17congbudjust.pdf>.
- 316 Mark Wyatt, OCIE Director, SEC, Remarks before the IAC (Apr. 14, 2016), video replay available at http://www.sec.gov/video/webcast-archive-player.shtml?document_id=041416iac.
- 317 Wyatt argued that this mistake was akin to assuming that a portfolio manager holding a hundred stocks had only looked at those one hundred companies: “The portfolio manager took the entire investable universe, she then applied filters to highlight a subset, and then she and her team conducted extensive due diligence to come up with an even more refined list of opportunities and ultimately she invested in those companies that she thought had the highest chance of her providing the performance she wants to give to her investors,” Wyatt remarked. “We do the same, except we’re looking for risks, not upside... [W]e arrive a list of firms we ultimately examine because they represent a heightened risk to investors.” Mark Wyatt, OCIE Director, SEC, Remarks before the IAC (Apr. 14, 2016), video replay available at http://www.sec.gov/video/webcast-archive-player.shtml?document_id=041416iac.
- 318 Mary Jo White, Chair, SEC, Remarks to the Investor Advisory Committee (Apr. 14, 2016), <https://www.sec.gov/news/statement/white-statement-041416.html>.
- 319 SEC, *Recommendation of the Investor Advisory Committee: Broker-Dealer Fiduciary Duty* (Nov. 22, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf>.
- 320 Mary Jo White, Chair, SEC, Testimony before the H. Subcomm. on Fin. Services: Examining the SEC’s Agenda, Operations and FY 2016 Budget Request, 113th Cong. (Mar. 24, 2015), <http://www.sec.gov/news/testimony/2015-ts032415mjw.html>.
- 321 Mary Jo White, Chair, SEC, Opening Remarks to the Investor Advisory Committee (Apr. 9, 2015), <https://www.sec.gov/news/statement/opening-remarks-to-the-investor-advisory-committee.html>.
- 322 See Mark Schoeff Jr., *SEC Chairwoman Mary Jo White Says Agency Mulling Fiduciary Duty*, INVESTMENT NEWS (Sept. 12, 2016), <http://www.investmentnews.com/article/20160912/FREE/160919991/sec-chairwoman-mary-jo-white-says-agency-mulling-fiduciary-duty>.
- 323 SEC, *Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots* (July 25, 2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf>.
- 324 See Universal Proxy, Exchange Act Release No. 79,164, Investment Company Act Release No. 32,339, 81 Fed. Reg. 79,122 (proposed Nov. 10, 2016).
- 325 See SEC, <https://www.sec.gov/spotlight/proxy-voting-roundtable.shtml> (last visited Oct. 17, 2016).
- 326 SEC, *Recommendations of the Investor Advisory Committee Regarding the SEC and the Need for the Cost Effective Retrieval of Information by Investors* (July 25, 2013), <http://www.sec.gov/spotlight/investor-advisory-committee-2012/data-tagging-resolution-72513.pdf>.
- 327 Order Granting Limited and Conditional Exemption Under Section 36(a) of the Securities Exchange Act of 1934 from Compliance with Interactive Data File Exhibit Requirement in Forms 6-K, 8-K, 10-Q, 10-K, 20-F and 40-F to Facilitate Inline Filing of Tagged Financial Data, Exchange Act Release No. 78,041, 81 Fed. Reg. 39,741 (published June 17, 2016).
- 328 Pay Versus Performance, Exchange Act Release No. 74,835, 80 Fed. Reg. 26,329 (proposed May 7, 2015).
- 329 Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 77,599, 81 Fed. Reg. 23,915 (published Apr. 22, 2016).
- 330 Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 78,167, 81 Fed. Reg. 49,359 (adopted July 27, 2016).

- 331 Modernization of Property Disclosures for Mining Registrants, Securities Act Release No. 10,098, Exchange Act Release No. 78,086, 81 Fed. Reg. 41,651 (proposed June 27, 2016).
- 332 Investment Company Reporting Modernization, Securities Act Release No. 10,231, Exchange Act Release No. 79,095, Investment Company Act Release No. 32,314, 80 Fed. Reg. 81,870 (adopted Nov. 18, 2016).
- 333 Disclosure of Order Handling Information, Exchange Act Release No. 78,309, 81 Fed. Reg. 49,341 (proposed July 27, 2016).
- 334 See SEC, Office of the Investor Advocate, Report on Activities, Fiscal Year 2015, *supra* note 215; Report on Objectives, Fiscal Year 2016, *supra* note 3.
- 335 Establishing the Form and Manner with which Security-Based Swap Data Repositories Must Make Security-Based Swap Data Available to the Commission, Exchange Act Release No. 76,624, 80 Fed. Reg. 79,757 (proposed Dec. 23, 2015).
- 336 Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 75,611, 80 Fed. Reg. 48,963 (adopted Aug. 14, 2015).
- 337 Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 76,474, 80 Fed. Reg. 80,997 (proposed Dec. 28, 2015).
- 338 Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 31,933, 80 Fed. Reg. 80,883 (proposed Dec. 28, 2015).
- 339 Listing Standards for Recovery of Erroneously Awarded Compensation, Securities Act Release No. 9,861, Exchange Act Release No. 75,342, Investment Company Act Release No. 31,702, 80 Fed. Reg. 41,143 (proposed July 14, 2015).
- 340 Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Securities Act Release No. 9,741, Exchange Act Release No. 74,578, Trust Indenture Act Release No. 2,501, 80 Fed. Reg. 21,805 (adopted Apr. 20, 2015).
- 341 Crowdfunding Final Rule, *supra* note 304.
- 342 Asset-Backed Securities Disclosure and Registration, Securities Act Release No. 9,638, Exchange Act Release No. 72,982, 79 Fed. Reg. 57,183 (adopted Sept. 24, 2014).
- 343 Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Securities Act Release No. 9,922, Investment Company Act Release No. 31,835, 80 Fed. Reg. 62,273 (proposed Oct. 15, 2015).
- 344 Money Market Fund Reform; Amendments to Form PF, Securities Act Release No. 9,616, Investment Advisers Act Release No. 3,879, Investment Company Act Release No. 31,166, 79 Fed. Reg. 47,735, 47944 (adopted Aug. 14, 2014).
- 345 SEC, *Recommendation of the Investor Advisory Committee: Target Date Mutual Funds* (Apr. 11, 2013), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-target-date-fund.pdf>.
- 346 Investment Company Advertising: Target Date Retirement Fund Names and Marketing, Securities Act Release No. 9,126, Exchange Act Release No. 62,300, Investment Company Act Release No. 29,301, 75 Fed. Reg. 35,920 (proposed June 23, 2010).
- 347 Investment Company Advertising: Target Date Retirement Fund Names and Marketing, Securities Act Release No. 9,570, Exchange Act Release No. 71,861, Investment Company Act Release No. 31,004, 79 Fed. Reg. 19,564 (proposed Apr. 9, 2014).
- 348 SEC, *Recommendation of the Investor Advisory Committee Regarding SEC Rulemaking to Lift the Ban on General Solicitation and Advertising in Rule 506 Offerings: Efficiently Balancing Investor Protection, Capital Formation and Market Integrity* (Oct. 12, 2012), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-general-solicitation-advertising-recommendations.pdf>. Title II of the JOBS Act requires the SEC to lift the ban on general solicitation and advertising in Rule 506 securities offerings. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (2012).
- 349 Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 9,415, Exchange Act Release No. 69,959, Investment Advisers Act Release No. 3,624, 78 Fed. Reg. 44,771 (adopted July 24, 2013).
- 350 Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings, Securities Act Release No. 9,414, 78 Fed. Reg. 44,729 (adopted July 24, 2013).
- 351 Amendments to Regulation D, Form D and Rule 156, Securities Act Release No. 9,416, Exchange Act Release No. 69,960, Investment Company Act Release No. 30,595, 78 Fed. Reg. 44,806 (proposed July 24, 2013).



OFFICE OF THE
INVESTOR ADVOCATE

U.S. Securities and
Exchange Commission
100 F Street NE
Washington, DC 20549
202.551.3302

