



# SEWARD & KISSEL LLP

## COMPLIANCE FLASH

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### A Publication of the Investment Management Group

#### Adviser Charged with Cherry-Picking Trades

The Securities and Exchange Commission (“SEC”) initiated [administrative proceedings](#) against an investment adviser for cherry-picking profitable trades and misleading clients. After trades were executed in an omnibus account, the adviser allocated profitable trades to his own accounts and unprofitable trades to client accounts. In addition, contrary to representations to clients, the adviser’s separate account clients who invested in a mutual fund managed by the adviser were charged both account advisory fees and fund management fees.

#### Failure to Conduct Annual Compliance Reviews

The SEC settled an [enforcement action](#) with an investment adviser who failed to conduct annual compliance reviews for the first four years of registration. The adviser appointed its administrative assistant as its chief compliance officer even though she had no prior experience in compliance. After being appointed chief compliance officer, the employee’s administrative duties continued to take up a significant portion of her time. Moreover, neither the adviser nor the chief compliance officer was aware of the obligation to conduct annual compliance reviews.

#### Failure to Supervise Activities of Research Analyst

The SEC settled an [enforcement action](#) against a hedge fund adviser and one of its senior research analysts (the “Supervisor”) for failing to supervise a research analyst (the “Analyst”) whose securities recommendations were based on material nonpublic information. Unlike a typical research analyst, the Analyst did not construct analytical models on the companies he covered or provide reports supporting his recommendations. Instead, the Analyst, who previously worked at a technology company, made securities recommendations based on inside information learned from contacts at various technology companies. Unlike the adviser’s other analysts, the Analyst did not work in the adviser’s offices but rather worked out of his home. Despite the risks, the adviser did not investigate whether the Analyst had access to inside information or increase its oversight of the Analyst’s information gathering activities.

#### Adviser Sanctioned for Improper Bond Valuations

The SEC [censured](#) a registered investment adviser for improperly fair valuing certain bonds held by several mutual funds managed by the adviser. The inaccurate valuations resulted in wrong net asset values and inflated advisory fees. In valuing the bonds, the adviser failed to consider certain pertinent valuation related data.

#### SEC Announces Enforcement Results for Fiscal Year 2016

The SEC announced its [enforcement results](#) for the fiscal year that ended September 30, 2016. The year saw record enforcement activity, with 868 enforcement actions filed and more than \$4 billion in disgorgement and penalties. SEC fiscal year 2016 featured the most ever enforcement actions involving investment advisers and companies (160). The SEC whistleblower program awarded \$57 million to 13 whistleblowers in the year, which is more than all prior years combined. Notable enforcement actions included eight enforcement actions related to private equity advisers, sanctions against 13 investment advisory firms that repeated false performance claims made by an investment management firm and sanctions against investment advisers for steering mutual fund clients toward more expensive share classes to collect more fees.

#### OCIE Issues Risk Alert on Whistleblower Rule Compliance

The SEC’s Office of Compliance Inspections and Examinations (“OCIE”) issued a [risk alert](#) regarding its examination of compliance with whistleblower rules under the Dodd-Frank Act. At issue are confidentiality agreements, employment agreements, severance agreements, compliance manuals and codes of ethics that impede employees and former employees from communicating with the SEC concerning possible securities law violations. Employers should review these documents to ensure that they do not violate the whistleblower rules. Seward & Kissel’s memorandum regarding the risk alert is available [here](#).

#### Department of Labor Issues Fiduciary Rule FAQ

The Department of Labor published an [FAQ](#) relating to its final regulations (the “fiduciary rule”) which provided a significantly broader definition of a fiduciary under ERISA. The fiduciary rule, which goes into effect on April 10, 2017, will have a significant impact on, among others, investment managers that offer private fund interests to IRAs, small plans or plan participants. This initial FAQ, which is expected to be the first of three, responds to questions about fiduciary rule exemptions such as the “best interest contract” exemption and the “principal transactions” exemption. Seward & Kissel’s memorandum describing the fiduciary rule and its implications is available [here](#).

#### Key Upcoming Compliance Dates

- TIC Form SLT for November (December 23)
- NFA Bylaw 1101 annual confirmation (December 31)
- Form 13H quarterly amendment (promptly after December 31)
- Quarterly Transaction Reports required by Rule 204A-1(b)(2) of the Investment Advisers Act of 1940 (January 30)

Seward & Kissel LLP offers [Compliance Support Services](#) as well as an [Online Compliance Subscription Service](#).

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