

# **INVESTMENT ADVISER COMPLIANCE INDEX**

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**MORRISON  
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# INTRODUCTION

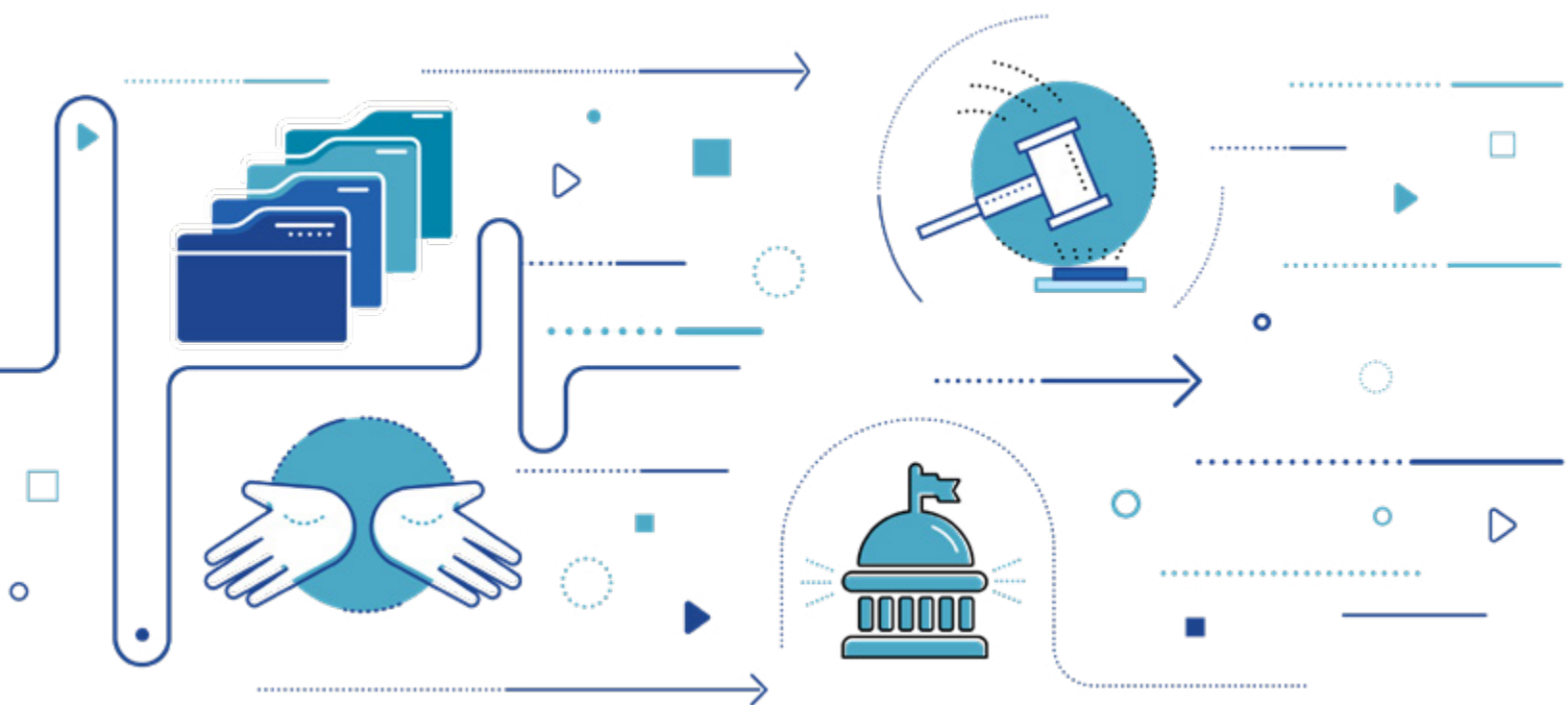


The Investment Advisers Act of 1940 (the “Advisers Act”) is the shortest of the federal securities laws enacted after the Great Depression, and the SEC has adopted relatively few related regulations. As any compliance officer knows, however, the Advisers Act and its related regulations are only part of the “rules” upon which an investment adviser should be basing its compliance decisions. For example, the SEC’s Office of Compliance Inspections and Examinations (OCIE) has an active examination program that has resulted in periodic risk alerts that often include best practices. The Division of Investment Management also periodically provides IM Guidance Updates relevant to advisers and has conducted active outreach to the compliance community on a variety of compliance topics and best practices. Releases proposing or adopting new regulations under the Advisers Act can include information about how the SEC and its staff interpret a rule, as can enforcement proceedings. In short, compliance with the Advisers Act is subject to the periodic interpretation of the SEC and its staff and can be complex.

Given the variety of sources of interpretation and guidance on the Advisers Act and its related rules, it is sometimes challenging to put your finger on the statutory, regulatory, or interpretive guidance that provides the basis for a particular compliance policy or procedure when you need it most. With that in mind, this compliance index is designed to provide a simple reference guide that includes the basis for certain key “rules” applicable to an investment adviser’s business—even if they aren’t really rules. It is not an exhaustive compendium of regulatory guidance, but rather a handbook of sorts designed for the compliance practitioner. Compliance personnel should keep in mind, however, that changing facts make changing law! Please consult competent counsel for specific guidance.

Investment Management Practice Group  
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This summary provides general information related to compliance matters and should not be relied upon for legal advice. The information herein is set forth as of the date above, and Morrison & Foerster LLP has no duty to update the content of this document.



# COMPLIANCE INDEX



COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
<b>Advertising and Marketing*</b>	General	<ul style="list-style-type: none"> <li>• Rule 206(4)-1 under the Advisers Act</li> <li>• <i>The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers</i>, OCIE Risk Alert (Sept. 14, 2017)</li> <li>• <i>Filing Requirements for Certain Electronic Communications</i>, IM Guidance Update (March 2013)</li> <li>• <i>Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles</i>, SEC Rel. No. IA-2628 (Aug. 3, 2007).</li> <li>• <i>Compliance Alert</i>, June 2007 (including performance advertising deficiencies observed in a risk-based examination of advisers)</li> <li>• <i>Investment Counsel Association of America, Inc.</i> (March 1, 2004) (definition of advertisement)</li> <li>• <i>Munder Capital Management</i> (May 17, 1996) (advertisement generally includes materials designed to maintain existing clients or solicit new clients)</li> </ul>
	Use of Hypothetical or Model Performance	<ul style="list-style-type: none"> <li>• <i>Clover Capital Management, Inc.</i> (Oct. 28, 1986)</li> </ul>
	Use of Gross Versus Net Performance	<ul style="list-style-type: none"> <li>• <i>Assoc. for Investment Mgmt. and Research</i> (Dec. 18, 1996) (use of both gross and net performance with equal prominence)</li> <li>• <i>J.P. Morgan Investment Mgmt., Inc.</i> (May 7, 1996) (allowing calculation of composite performance using a model fee equal to the highest fee charged to any account employing the composite strategy)</li> <li>• <i>Investment Company Institute</i> (Sept. 23, 1988) (allowing gross performance in one-on-one presentations to certain HNW and institutional clients)</li> <li>• <i>Clover Capital Management, Inc.</i> (Oct. 28, 1986) (generally requiring performance to be net of fees)</li> </ul>

COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
<b>Advertising and Marketing (continued)*</b>	Use of Predecessor Performance	<ul style="list-style-type: none"> <li>• <i>South State Bank</i> (May 8, 2018) (allowing the continued use of performance track record following a corporate restructuring)</li> <li>• <i>Horizon Asset Mgmt., LLC</i> (Sept. 3, 1996) (circumstances under which performance of a predecessor adviser may be used)</li> <li>• <i>Bramwell Growth Fund</i> (Aug. 7, 1996) (circumstances under which an individual may use performance achieved at a prior employer)</li> </ul>
	Use of Past Specific Recommendations	<ul style="list-style-type: none"> <li>• <i>The TCW Group, Inc.</i> (Nov. 11, 2008) (limiting recommendations to the top-five and bottom-five holdings)</li> <li>• <i>Franklin Management, Inc.</i>, (Dec. 10, 1998) (use of objective, non-performance based criteria to select past specific recommendations)</li> </ul>
	Use of Testimonials	<ul style="list-style-type: none"> <li>• <i>Guidance on the Testimonial Rule and Social Media</i>, IM Guidance Update (March 2014)</li> <li>• <i>Investment Advisers Association</i> (Dec. 2, 2005) (use of third-party ratings)</li> <li>• <i>DALBAR Inc.</i> (March 24, 1998) (use of third-party ratings)</li> <li>• <i>Cambiar Investors, Inc.</i> (Aug. 28, 1997) (use of partial client lists)</li> </ul>
<b>Advisory Contracts</b>	Required Contractual Provisions	<ul style="list-style-type: none"> <li>• Section 205 of the Advisers Act</li> <li>• <i>The Ayco Company, L.P.</i> (Dec. 14, 1995) (no requirement to disclose changes in limited partners)</li> </ul>
	Assignment of Advisory Contracts	<ul style="list-style-type: none"> <li>• Section 205(2) of the Advisers Act</li> <li>• Rule 202(a)(1)-1 under the Advisers Act</li> </ul>
	Hedge Clauses	<ul style="list-style-type: none"> <li>• Section 215(a) of the Advisers Act</li> <li>• <i>Commission Interpretation Regarding Standard of Conduct for Investment Advisers</i>, SEC Rel. No. IA-5248 (June 5, 2019) (addressing when use of hedge clauses would be consistent with the antifraud provisions of the Advisers Act)</li> <li>• Opinion of the General Counsel, SEC Rel. No. IA-58 (Apr. 10, 1951)</li> </ul>
	Sub-Advisory Agreements	<ul style="list-style-type: none"> <li>• <i>The BNY Mellon Family of Funds, et al.</i> (July 9, 2019) (allowing a manager-of-managers to disclose fees paid to sub-advisers on an aggregate basis and to enter into sub-advisory agreements with affiliates without seeking shareholder approval)</li> </ul>

COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
Agency Cross-Transactions	General	<ul style="list-style-type: none"> <li>• Section 206(3) of the Advisers Act</li> <li>• Rule 206(3)-2 under the Advisers Act</li> <li>• <i>Investment Advisers Principal and Agency Cross Trading Compliance Issues</i>, OCIE Risk Alert (Sept. 4, 2019)</li> </ul>
Best Execution	General	<ul style="list-style-type: none"> <li>• <i>Most Frequent Best Execution Issues Cited in Adviser Exams</i>, OCIE Risk Alert (July 11, 2018)</li> <li>• <i>Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934</i>, SEC Rel. No. 34-54165 (July 18, 2006)</li> <li>• <i>SEC Interpretation: Commission Guidance on the Scope of Section 28(e) of the Exchange Act</i>, SEC Rel. No. 34-45194 (Dec. 27, 2001)</li> <li>• <i>Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters</i>, SEC Rel. No. 34-23170 (Apr. 28, 1986)</li> </ul>
Business Continuity Plans	General	<ul style="list-style-type: none"> <li>• <i>Adviser Business Continuity and Transition Plans</i>, SEC Rel. No. IA-4439 (June 28, 2016) (Proposed Rule; not adopted)</li> <li>• <i>Compliance Programs of Investment Companies and Investment Advisers</i>, SEC Rel. No. IA-2204 (Dec. 17, 2003) (at footnote 22 and related text).</li> </ul>
Cash Solicitation*	General	<ul style="list-style-type: none"> <li>• Rule 206(4)-3 under the Advisers Act</li> <li>• <i>Investment Adviser Compliance Issues Related to the Cash Solicitation Rule</i>, OCIE Risk Alert (Oct. 31, 2018)</li> <li>• <i>Compliance Alert</i>, June 2007 (identifying effective provisions of disaster recovery plans)</li> </ul>
	Solicitation of Private Fund Investors	<ul style="list-style-type: none"> <li>• <i>Mayer Brown, LLP</i> (July 15, 2008)</li> </ul>
Compliance	General	<ul style="list-style-type: none"> <li>• Section 206 of the Advisers Act (anti-fraud provisions)</li> <li>• Rule 206(4)-7 under the Advisers Act (requiring a registered investment adviser to adopt and implement a written compliance program reasonably designed to ensure no violation of the Advisers Act by the adviser and its supervised persons and to appoint a Chief Compliance Officer)</li> <li>• <i>The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers</i>, OCIE Risk Alert (Feb. 7, 2017)</li> <li>• <i>Observations from Examinations of Investment Advisers: Compliance, Supervision, and Disclosure of Conflicts of Interest</i>, OCIE Risk Alert (July 23, 2019)</li> <li>• <i>Questions Advisers Should Ask While Establishing or Reviewing Their Compliance Programs</i>, 2009 CCO Outreach Regional Seminar (Apr. 2009)</li> </ul>

COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
<b>Compliance (continued)</b>	Supervision of Personnel with Disciplinary History	<ul style="list-style-type: none"> <li>• <i>Examination of Supervision Practices at Registered Investment Advisers</i>, OCIE Risk Alert (Sept. 12, 2016)</li> </ul>
	Inventory of Compliance Risks	<ul style="list-style-type: none"> <li>• <i>The Evolving Compliance Environment: Examination Focus Areas</i>, 2009 CCO Outreach Regional Seminar (Apr. 2009)</li> <li>• <i>Investment Adviser Scenario Analysis / Risk Matrix</i>, 2009 CCO Outreach Regional Seminar (Apr. 2009)</li> </ul>
	Oversight of Third-Party Service Providers	<ul style="list-style-type: none"> <li>• <i>The Evolving Compliance Environment: Examination Focus Areas</i>, 2009 CCO Outreach Regional Seminar (Apr. 2009)</li> </ul>
	Code of Ethics/ Personal Securities Transactions/Insider Trading Policies	<ul style="list-style-type: none"> <li>• Section 204A of the Advisers Act</li> <li>• Rule 204A-1 under the Advisers Act</li> <li>• <i>Personal Securities Transactions Reports by Registered Investment Advisers: Securities Held in Accounts over Which Reporting Persons Had No Influence or Control</i>, IM Guidance Update (June 26, 2015)</li> </ul>
<b>Custody</b>	General Requirements	<ul style="list-style-type: none"> <li>• Rule 206(4)-2 under the Advisers Act</li> <li>• <i>Investment Adviser Association</i> (Feb 21, 2017) (criteria under which an adviser would not need to obtain a surprise examination of assets subject to a standing letter of instruction)</li> <li>• <i>Inadvertent Custody: Advisory Contract Versus Custodial Contract Authority</i>, IM Guidance Update (Feb. 21, 2017)</li> <li>• <i>Investment Adviser Association</i>, (April 25, 2016) (circumstances under which a sub-adviser in an investment advisory program for which a related person qualified custodian is the primary adviser does not need to obtain a surprise examination of assets)</li> <li>• <i>Significant Deficiencies Involving Adviser Custody and Safety of Client Assets</i>, OCIE Risk Alert (March 4, 2013)</li> <li>• <i>Staff Responses to Questions About the Custody Rule</i></li> </ul>
	Custody of Private Funds Private Securities	<ul style="list-style-type: none"> <li>• <i>Private Funds and the Application of the Custody Rule to Special Purpose Vehicles and Escrows</i>, IM Guidance Update (June 26, 2014)</li> <li>• <i>Privately Offered Securities Under the Investment Advisers Act Custody Rule</i>, (Aug. 1, 2013)</li> </ul>
<b>Cybersecurity<sup>+</sup></b>	General	<ul style="list-style-type: none"> <li>• <i>Safeguarding Customer Records and Information in Network Storage – Use of Third-Party Security Features</i>, OCIE Risk Alert (May 23, 2019)</li> <li>• <i>Observations from Cybersecurity Examinations</i>, OCIE Risk Alert (Aug. 7, 2017)</li> <li>• <i>Cybersecurity Guidance</i>, IM Guidance Update (April 28, 2015).</li> </ul>

COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
<b>Cybersecurity (continued)<sup>+</sup></b>	General	<ul style="list-style-type: none"> <li>• <i>Cybersecurity Examination Sweep Summary</i>, OCIE Risk Alert (Feb. 3, 2015)</li> <li>• <i>Questions Advisers Should Ask While Establishing or Reviewing Compliance Programs</i>, SEC Staff Report</li> </ul>
<b>Fees</b>	General	<ul style="list-style-type: none"> <li>• <i>Overview of the Most Frequent Advisory Fee and Expense Compliance Issues Identified in Examinations of Investment Advisers</i>, OCIE Risk Alert (April 12, 2018)</li> </ul>
	Fulcrum Performance Fees – Registered Funds	<ul style="list-style-type: none"> <li>• Section 205(b)(2) of the Advisers Act</li> </ul>
	Performance Fees – Business Development Companies	<ul style="list-style-type: none"> <li>• Section 205(b)(3) of the Advisers Act</li> </ul>
	Performance Fees – Accounts of Foreign Persons	<ul style="list-style-type: none"> <li>• Section 205(b)(5) of the Advisers Act</li> </ul>
	Performance Fees – Accounts of Qualified Clients	<ul style="list-style-type: none"> <li>• Rule 205-3 under the Advisers Act</li> </ul>
	Contingent Fees and Fee Rebates	<ul style="list-style-type: none"> <li>• <i>Amerivest Investment Management, LLC</i> (Aug. 19, 2014)</li> <li>• <i>George Colman</i> (July 18, 1995)</li> <li>• <i>Contingent Advisory Compensation Arrangements</i>, SEC Rel. No. IA-721 (May 16, 1980)</li> </ul>
<b>Fiduciary Duty</b>	General	<ul style="list-style-type: none"> <li>• <i>Commission Interpretation Regarding Standard of Conduct for Investment Advisers</i>, SEC Rel. No. IA-5248 (June 5, 2019)</li> <li>• <i>SEC v. Capital Gains Research Bureau</i>, 375 U.S. 18 (1963)</li> </ul>
<b>Foreign Advisers</b>	U.S. Jurisdictional Reach and Participating Affiliates	<ul style="list-style-type: none"> <li>• <i>Information Update for Advisers Relying on the Unibanco No-Action Letters</i>, IM Information Update (March 2017) (listing the Unibanco no-action letters)</li> <li>• <i>Uniao de Bancos de Brasileiros S.A. (“Unibanco”)</i> (July 28, 1992)</li> <li>• <i>The Reach of the Investment Advisers Act of 1940, Protecting Investors: A Half-Century of Investment Company Regulation</i> (Division of Investment Management, May 1992)</li> </ul>
<b>Pay-to-Play</b>	General	<ul style="list-style-type: none"> <li>• Rule 206(4)-5 under the Advisers Act</li> <li>• <i>Staff Responses to Questions About the Pay to Play Rule</i></li> <li>• <i>Political Contributions by Certain Investment Advisers</i>, SEC Rel. No. IA-3043 (July 1, 2010)</li> </ul>

COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
Principal Transactions	General	<ul style="list-style-type: none"> <li>Section 206(3)</li> </ul>
	Pooled Investment Vehicles	<ul style="list-style-type: none"> <li><u>Investment Advisers Principal and Agency Cross Trading Compliance Issues</u>, OCIE Risk Alert (Sept. 4, 2019)</li> <li><u>Gardner Russo &amp; Gardner</u> (June 7, 2006)</li> </ul>
Privacy	Regulation S-P	<ul style="list-style-type: none"> <li><u>Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information</u></li> <li><u>Investment Adviser and Broker-Dealer Compliance Issues Related to Regulation S-P – Privacy Notices and Safeguard Policies</u>, National Exam Program Risk Alert (April 16, 2019)</li> <li><u>Staff Responses to Questions About Regulation S-P</u></li> </ul>
	Regulation S-ID	<ul style="list-style-type: none"> <li><u>Regulation S-ID: Identity Theft Red Flags</u></li> </ul>
Proxy Voting	General	<ul style="list-style-type: none"> <li>Rule 206(4)-6 under the Advisers Act</li> <li><u>Proxy Voting by Investment Advisers</u>, SEC Rel. No. IA-2106 (Jan. 31, 2003)</li> </ul>
Recordkeeping	General	<ul style="list-style-type: none"> <li>Rule 204-2</li> <li><u>Filing Requirements for Certain Electronic Communications</u>, IM Guidance Update (March 2013)</li> <li><u>Observations from Investment Adviser Examinations Relating to Electronic Messaging</u>, OCIE Risk Alert (Dec. 14, 2018)</li> </ul>
Registration and Disclosure	Form CRS	<ul style="list-style-type: none"> <li><u>Form CRS Relationship Summary: Amendments to Form ADV</u>, SEC Rel. No. IA-5247 (June 5, 2019)</li> <li><u>Frequently Asked Questions on Form CRS</u> (Feb. 11, 2020)</li> </ul>
	Eligibility for SEC or State Registration	<ul style="list-style-type: none"> <li>Section 203A of the Advisers Act</li> <li><u>Rules Implementing Amendments to the Investment Advisers Act of 1940</u>, SEC Rel. No. IA-3221 (June 22, 2011)</li> </ul>
	Exemptions from SEC Registration	<ul style="list-style-type: none"> <li>Foreign Private Advisers – Section 203(b)(3) of the Advisers Act</li> <li>Venture Capital Fund Advisers – Section 203(l) of the Advisers Act and Rule 203(l)-1 under the Advisers Act</li> <li>Private Fund Advisers – Section 203(m) of the Advisers Act and Rule 203(m)-1 under the Advisers Act</li> <li><u>Guidance on the Exemption for Advisers to Venture Capital Funds</u>, IM Guidance Update (Dec. 2, 2013)</li> <li><u>Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers</u>, SEC Rel. No. IA-3222 (June 22, 2011)</li> </ul>



COMPLIANCE CATEGORY	SUBCATEGORY	CITATIONS
Registration and Disclosure (continued)	Brochure Content and Delivery Requirements	<ul style="list-style-type: none"> <li>• Rule 204-3 under the Advisers Act</li> </ul>
	Form ADV	<ul style="list-style-type: none"> <li>• <i>Form ADV and Investment Advisers Act Rules</i>, SEC Rel. No. IA-4509 (Aug. 25, 2016)</li> <li>• <i>Form ADV Instructions and Glossary</i></li> <li>• <i>Frequently Asked Questions on Form ADV and IARD</i></li> </ul>
	Private Funds	<ul style="list-style-type: none"> <li>• <i>Form PF—Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors</i></li> <li>• <i>Form PF Frequently Asked Questions</i></li> <li>• <i>Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF</i>, SEC Rel. No. IA-3308 (Oct. 31, 2011)</li> </ul>
Soft Dollars	General	<ul style="list-style-type: none"> <li>• <i>Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934</i>, SEC Rel. No. 34-54165 (July 18, 2006)</li> <li>• <i>Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters</i>, SEC Rel. No. 34-23170 (Apr. 28, 1986)</li> <li>• <i>Investment Company Institute</i> (Oct. 26, 2017), <i>Asset Management Group, Securities Industry and Financial Markets Association</i> (Oct. 26, 2017), and <i>Securities Industry and Financial Markets Association</i> (Oct. 26, 2017) (compliance with the unbundling requirements of MiFID II)</li> </ul>

\* On November 4, 2019, the SEC proposed amendments to Rule 206(4)-1 (*Investment Adviser Advertisements; Compensation for Solicitations*, SEC Rel. No. IA-5407 (Nov. 4, 2019)). The proposing release stated that the Staff is also evaluating if existing no-action letters and other guidance will be rescinded in connection with any new Rule.

+ Investment advisers that are dually registered as broker-dealers should also consult FINRA’s Cybersecurity Topic Page for information about FINRA’s guidance and rules related to cybersecurity.

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