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(De)regulation in the Investment Management Industry under President Donald Trump

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I. Introduction

President Trump has sent a strong message that he intends to significantly scale back on all federal regulation and promote only regulation that helps American businesses prosper. He recently nominated securities attorney Jay Clayton to the post of chair of the Securities and Exchange Commission (SEC or Commission). As of the date of this writing, Mr. Clayton's confirmation by the Senate is still pending. Once confirmed, Mr. Clayton could play a leading role, as have past chairs, in helping advance the president's broad initiatives and establishing the future priorities of the SEC.

The investment management industry is accustomed to operating in a heavily-regulated environment and adapting as those regulations change, often in response to changes in the political climate and financial markets, as well as evolution within the industry. During former Chair Mary Jo White's tenure, the industry was hit with a number of new rules and proposals following the 2008–2009 financial crisis and has been hoping for some reprieve from the cost and burden of additional, new regulation. Given his areas of experience, many in the investment management industry believe Mr. Clayton will focus more on capital formation and corporate finance than the investment management industry. With heavy scrutiny from the new administration and from Congress on certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), we also may expect to see less of a push at the SEC to adopt rules that attempt to address perceived systemic risks of the industry. Enforcement was also a priority under Chair White, who herself was a former federal prosecutor. With Mr. Clayton's experience more focused on corporate matters, many believe his philosophy towards enforcement will differ from Chair White's and will move away from the "broken windows" approach she had emphasized, where all alleged federal securities law violations, both big and small, were pursued for possible enforcement action.

And yet, let's not forget despite this push from President Trump's administration for deregulation and what is likely to be a different approach toward SEC enforcement actions, Trump's campaign success and election were centered on the idea that he was the candidate who would look out for the disenfranchised, working-class Americans—the "forgotten men and women"—and improve their standard of living and take on Wall Street when necessary to protect them. With this complicated landscape, what are possible areas of focus for the SEC that will advance President Trump's (seemingly conflicting)

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mandates? How can we reconcile the president's populist agenda with a business-friendly, restrained approach to SEC regulation of investment managers that continues to protect the Americans who voted Trump into office?

Led by a new SEC chair, what are likely to be the potential areas of focus of the SEC and the Division of Investment Management? Which proposed or anticipated rulemakings will end up being casualties of this administration? Which current regulations need to be revisited? Are there areas of new regulation or SEC Staff guidance that could help the industry grow, while also serving the SEC's mission to protect investors?

This article discusses several possible themes for consideration. Section II of this article summarizes recent presidential actions that demonstrate a move toward deregulation and a close look at the cost and impact of regulation. Section III explores possible areas of regulatory focus, including a uniform fiduciary standard, mutual fund board governance, the impact of technology on the industry, and investment product innovation. Section IV speculates on the fate of current SEC rule proposals. Apparent throughout the discussion is a recognition that the investment management industry stands to continue to benefit from a strong regulatory regime that focuses on smart regulation that can enhance the industry's future growth, and remains consistent with the SEC's mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. This mission must be informed by the results of the presidential election, and an acknowledgement of the importance of establishing a regulatory and economic environment that will help all Americans improve their financial well-being and save for their children's education and for retirement. Necessarily, this must be buttressed by greater emphasis on financial education and more clarity in the investment advisory services and tools available that can help a wider population of the American public achieve its financial goals.

II. The Political Landscape: Presidential Orders and Executive Actions

The SEC's agenda during Chair White's tenure was influenced by the international Financial Stability Board (FSB) and the US Financial Stability Oversight Counsel (FSOC) and their focus on the systemic risks of the asset management industry following the financial crisis. This influence propelled regulations aimed at minimizing perceived risks, such as money market fund reform and other initiatives conceived under the Dodd-Frank Act, for instance, stress testing for asset managers or designation of certain asset managers as systemically important financial institutions (SIFIs).[1]

Under President Trump's administration, we can expect to see much less control over the SEC by the FSB and FSOC, a shift to deregulation, and more focus on the costs of regulation. The president issued an executive order which requires the secretary of the treasury to consult with the heads of the member agencies of FSOC (which includes the SEC chair) to identify any laws, regulations, guidance, reporting, and recordkeeping requirements that inhibit federal regulation of the US financial system in a manner consistent with the core principles. The order details the core principles, notably one of which is to foster "economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures."[2] While the executive order does not mention the Dodd-Frank Act by name, the order does create a framework pursuant to which Dodd-Frank is expected to be revisited and reformed. The Financial CHOICE Act (CHOICE Act), first proposed in September 2016, similarly calls for revisiting a number of provisions of the Dodd-Frank Act, including the power of FSOC to designate non-bank financial institutions as SIFIs.[3]

President Trump also signed a separate executive order freezing all federal hires and federal rulemaking. While the White House issued a memorandum clarifying that the order does not apply to an

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independent regulatory agency like the SEC, the memorandum encouraged those independent agencies "to identify existing regulations, that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions."[4] In addition, legislation has been proposed in the House, the SEC Accountability Act, that would require more cost-benefit analysis from the SEC to advance new regulation. If passed by Congress, many believe it could stymie, if not prevent, significant new rulemaking.[5] The CHOICE Act also contains a number of provisions that could, if enacted, impact SEC rulemaking, including rules requiring Congress to approve major SEC rules that have a specified, expected impact on the US economy and a requirement for the SEC to analyze the impact of new rules and review existing rules.

While the SEC is an agency independent of the executive and legislative branches, perhaps the greatest area of President Trump's influence over the SEC is his ability to nominate the candidates to fill the two current vacancies on the Commission in addition to nominating the new chair. (President Obama had nominated a candidate for each of the two open seats, but the candidates were never confirmed by the Senate.) With five seats total on the Commission, the new Commissioners will serve along with the two current Commissioners—Republican Michael Piwowar and Democrat Kara Stein, with Commissioner Piwowar serving as acting chair until Jay Clayton is confirmed. The Republican-controlled Congress will also determine the size of the SEC's budget, which can be expected to have a significant impact on the SEC's operations and initiatives.

III. Possible Areas of Regulatory Focus

A. Fiduciary Standard for Brokers and Investment Advisers

1. Department of Labor (DOL) Fiduciary Rule (DOL Rule)

With President Trump in office just a few weeks, it has become clear that the DOL Rule with a compliance date of April 10, 2017, will likely not survive in its current form. The rule, aimed at protecting investors, requires financial advisers that receive compensation for making individualized investment recommendations to a retirement plan participant or Individual Retirement Account (IRA) owner to comply with a fiduciary standard to act in the client's "best interest." Currently, retirement account advisers, who are registered broker-dealers but not registered investment advisers, are held to a lesser "suitability" standard that allows them to recommend products that are suitable based on the investor's financial and other circumstances. The DOL's intention in adopting the DOL Rule was to mitigate the conflicts of interest that incentivize retirement advisers to prefer one product over another in the form of higher commissions or other payments.

On February 3, 2017, President Trump took executive action on the DOL Rule to ask the secretary of labor to consider rescinding or revising the rule. The presidential memorandum directs the secretary to determine whether the DOL Rule may "adversely affect the ability of Americans to gain access to retirement information and financial advice." It directs the DOL to publish for notice and comment a proposed rule rescinding or revising the rule if it determines that the rule is likely to harm investors due to a reduction of access to certain retirement products, result in disruptions within the retirement services industry that may adversely affect investors, or cause an increase in litigation and an increase in the prices that investors must pay to gain access to retirement services.[6] In light of the presidential directive, Acting Secretary of Labor Edward Hugler issued a statement saying the DOL would consider its legal options to delay the rule's applicability date. Because the DOL Rule was already effective, either legislation or further rulemaking sufficient to survive scrutiny under the Administrative Procedures Act is needed to rescind or revise the rule. On February 9, 2017, the DOL sent a proposal to delay the DOL Rule to the Office of Management and Budget. On March 2, the proposal was publicly

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released. It includes a delay of the rule's applicability date for 60 days with a 15-day comment period. The likelihood of the delay has created substantial uncertainty for the industry.

Many have criticized the DOL Rule as being overly complicated and having a number of unintended consequences. Critics have suggested that the DOL Rule would put smaller advisory or brokerage firms out of business due to the costs of compliance. They have also argued that the DOL Rule would limit retirement product choices for investors and result in those Americans who do not have large investment accounts getting priced out of receiving traditional investment advice. Critics also claim the rule would give the plaintiff's bar a private right of action, which would add to the associated, overall costs.

Given the timing of the April 10, 2017 compliance date of the DOL Rule, however, firms have already spent millions of dollars working toward compliance and revisiting their fee and commission structures. In the mutual fund industry, intermediaries that sell mutual funds to retirement plans have worked toward changing their compensation models, platforms, and offerings. Fund complexes have begun to register new share classes and revise fund prospectuses to accommodate the expectations of those intermediaries. The rule has already begun to shape the direction of the fund industry and fee structures (even outside the retirement space) and some believe it has contributed to the flight to passively managed index funds to the detriment of active fund managers. The sharper focus on fees and investment performance by the broker-dealer and advisory platforms should benefit mutual fund investors. It is unlikely these sweeping changes will be dialed back even if the DOL Rule is delayed or rescinded.

2. Possibility of a Coordinated DOL and SEC Fiduciary Rule

A plausible outcome that would allow the industry to capitalize on all the work that has been done and money spent working toward compliance with the DOL standards is a coordinated effort between the SEC and the DOL toward a workable fiduciary standard. It is unclear as of the date of this writing whether the SEC will pursue such an approach. This approach, however, has gained support from the industry, including the Investment Company Institute (ICI). In a statement issued February 3, 2017, ICI President and CEO Paul Schott Stevens said, "(The) ICI supports a delay in implementation of the current DOL fiduciary rule. The Administration should use this time to address flaws in the rule and pursue a harmonized standard across the retail and retirement marketplace, coordinating with the Securities and Exchange Commission to ensure investors' best interests are paramount." This coordinated approach would protect American investors by ensuring that both brokers and advisers are required to act in their clients' best interests for both retirement and retail accounts and, presumably, require more transparency about the scope of the services provided, and the related fees and any conflicts.

The Dodd-Frank Act required the SEC to conduct a study to evaluate the effectiveness of the standards of care that apply to broker-dealers and investment advisers when providing personalized investment advice to retail customers. The findings and recommendations of the SEC's study were published in January 2011 (2011 Study).[7] In the 2011 Study, the SEC Staff emphasized that advice should be provided in the best interests of retail customers, without regard to the conflicts of interest of the adviser or broker-dealer providing the advice, and that the standard be no less stringent than currently applied to investment advisers under the Investment Advisers Act of 1940 (Advisers Act). In March 2013, the SEC issued a release in which it requested data concerning standards of conduct and the potential harmonization of certain other aspects of broker-dealer and investment adviser regulation. In the release, the SEC clarified that a uniform fiduciary standard would not necessarily require all firms to: (a) provide the lowest cost alternative; (b) stop offering

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proprietary products; (c) charge only asset-based fees (as opposed to charging commissions); and (d) continuously monitor all accounts.[8]

Before leaving office, on November 15, 2016, Chair White testified before the Committee on Financial Services of the House of Representatives and reiterated her support for a uniform fiduciary standard of conduct for broker-dealers and investment advisers. She noted the challenges and complexities of developing a uniform fiduciary standard, including "how to define the standard, how it would affect current business practices, and the nature of the potential effects on investors, particularly retail investors." She explained that the SEC Staff had developed a framework for the rule which had been provided to the Commission for its consideration.[9]

In working toward a solution, it seems important for the SEC and its Staff to remember the goals that support establishing a uniform fiduciary standard. A primary goal is to do away with the investor confusion that many believe exists in the current model. Not all retail customers understand the different standards of care that apply to broker-dealers and investment advisers or that the "financial advisers" or "wealth managers" that they work with are not required to act in their customer's best interests. And, not many investors are likely to understand that if the DOL Rule were to move forward, their broker would be a fiduciary subject to the best interests standard for their retirement account but not for their retail account in the absence of a rule from the SEC. Many industry players now support the uniform, best interest standard, as long as it preserves investor choice in terms of fee structures and provides for a principles-based, consistent approach for client disclosures and mitigating conflicts.[10] This will require some analysis of, and accounting for, the differences in the scope and range of the services provided from one firm to another, such as transaction-based advisory services versus ongoing financial planning advisory services.

3. The Fiduciary Standard and Rule 12b-1 Fees and Sales Loads

The DOL Rule has already had a tremendous impact on mutual fund share classes with Rule 12b-1 fees and sales loads. The traditional share class structure used by most fund groups with front-end loads on Class A shares, as well as sub-transfer agency and Rule 12b-1 fees that often vary by fund family or fund type, raised a number of conflicts under the DOL Rule. The long-term effect of the DOL Rule on Rule 12b-1 remains to be seen, but many have speculated that share classes with Rule 12b-1 fees will not survive in the long term, at least not in the retirement space. This has presented an interesting intersection with what is known in the industry as "distribution in guise," the idea that funds may be paying for distribution outside of a Rule 12b-1 fee, through sub-transfer agency, administrative or other shareholder servicing fees. This movement away from Rule 12b-1 fees may make the issue of distribution in guise more challenging for the industry and for fund boards.[11]

There also has been a move toward either leveling or externalizing sales commissions to comply with the best interests standard. Many fund complexes have begun to register Class T shares, typically with a 0.25 percent Rule 12b-1 fee and a uniform 2.50 percent front-end sales load (although very recently some have indicated that they may not move forward with offering Class T shares as planned due to the uncertainties in the status of the DOL Rule). Some intermediaries have begun to consider offering "clean shares" on their platforms, prompting some fund groups to register new share classes or modify existing ones. This approach has raised questions under Section 22(d) of the Investment Company Act of 1940 (1940 Act), which fixes the prices at which fund shares may be offered, including any applicable sales charges, to the prices described in the prospectus. In an interpretive letter issued to Capital Group in January 2017, the SEC Staff clarified that the Section 22(d) restrictions do not apply to a broker acting as agent on behalf of its customers

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that charges commissions for effecting transactions in clean shares (defined in the letter as a class of shares with no front-end load, deferred sales charge, or other asset-based fee for sales or distribution) or to the principal underwriter of clean shares entering into a selling agreement with such a broker.[12] The letter enables an intermediary to apply its own sales loads without requiring the fund to register a new share class for each intermediary, similar to the proposed but never adopted Rule 6c-10(c) (proposed in connection with the Rule 12b-1 reform), which would have permitted intermediaries selling fund shares to set their own commissions.[13] The letter explicitly states that it does not address whether a broker may receive revenue sharing payments from a fund adviser. Sub-transfer agency fees or service fees paid for non-distribution services should be included in the clean shares definition.

Fund complexes also have been contacted by intermediaries to tailor their sales load variations for fund share classes that impose sales loads. In an IM Guidance Update in January 2017, the Division of Investment Management clarified a fund intermediary's ability to establish its own sales load variations for purposes of Section 22(d), by permitting the required disclosures regarding each intermediary's sales load variations to be included in an appendix to the statutory prospectus that identifies the name of the intermediary and the scheduled variations that apply, which may depend on the type of account held at the intermediary.[14]

4. Harmonization of Regulation

The 2011 Study recommended that the regulations affecting broker-dealers and investment advisers be harmonized "to the extent that such harmonization appears likely to add meaningful investor protection." The study suggested that broker-dealers and investment advisers who perform substantially similar functions should be subject to the same regulation in areas such as advertising, supervision, and recordkeeping. Many have advocated for taking the most effective elements out of each regime in harmonizing the regulations. One area that may be ripe for reconsideration is the prohibition on client testimonials that applies only to advisers. The Advisers Act prohibits the use of testimonials in an adviser's advertisements, while the Financial Industry Regulatory Authority (FINRA) testimonial rule applicable to brokers permits the use, provided certain disclosures are made. In this age of rapidly available information, investors have the freedom to consult multiple available sources to obtain reviews or information about other investors' experiences with an adviser, and disclosures like those required under the FINRA rule alert investors to the potential limitations of the testimonial within an advertisement. Legislation has been proposed that would do away with the testimonial rule for certain private fund advisers to the extent that the materials are distributed solely to sophisticated clients and high net worth individuals and comply with the anti-fraud standards under the Advisers Act.[15]

B. Mutual Fund Board Governance: Sharper Focus on Risk Oversight

The regulations involving board governance practices in the mutual fund industry have allowed the industry to flourish in the face of inherent conflicts and have helped shape strong governance practices in the wider corporate arena in the United States.[16] Requirements such as a majority of independent directors, board self-evaluations, incumbent independent directors nominating new independent directors, and independent directors meeting at least quarterly in executive session have served the fund industry well and left it remarkably free from scandal with limited exception. These requirements have helped protect against the conflicts of interest and industry abuses that prompted Congress to enact the 1940 Act. Under this new administration and a new SEC chair, it is unlikely there will be any pressure to make any significant changes to a governance system that works well, with independent directors acting as the "independent watchdogs" of the $16 trillion

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mutual fund industry where many Americans invest their retirement savings.[17]

Historically, the role of the independent fund director has been focused on areas of conflict of interest, inherent in the mutual fund structure, between the fund and the fund's adviser. Many have observed, however, that fund director responsibilities have continued to evolve, and even multiply, from a focus on areas where there is a clear conflict of interest between the fund and the adviser toward a greater focus on the board's role in overseeing fund operations and board oversight of the fund's risk management, particularly following the 2008–2009 financial crisis.[18] Consistent with this theme, Chair White has referred to fund directors as "critical gatekeepers."[19] Under the new chair and a newly-constituted Commission, what we might see or hope to see is an acknowledgement that the role of the fund director has evolved, and as such, for the Commission to look for avenues to help independent directors do their jobs better, in a way that will allow them to focus on the greatest areas of potential risk to the funds on whose boards they serve. This necessarily must recognize, however, the dividing line between the roles of independent directors and fund management.

1. 1940 Act Exemptive Rules

In the first instance, this could include refining exemptive rules that require directors to pore through sometimes voluminous materials and reports in areas that are already overseen by a fund's chief compliance officer (CCO), such as Rules 10f-3, 17a-7, and 17e-1 under the 1940 Act. Rule 10f-3 addresses a fund's participation in an underwriting in which an affiliate is a participant; Rule 17a-7 addresses cross trades between the fund and another fund or client managed by the same adviser; and Rule 17e-1 addresses portfolio transactions effected by an affiliated party. Each of these rules includes specific director approval requirements intended to address an adviser's conflicts of interest. Each rule requires a fund board to make a specific determination, no less frequently than quarterly, that each transaction made during the prior quarter was effected in compliance with procedures reasonably designed to provide that the transactions comply with the rule's requirements.

In 2010, the SEC Staff issued an interpretive letter to the Independent Directors Council and the Mutual Fund Directors Forum clarifying that it is inappropriate for fund boards to delegate their responsibility to make the determinations required under these rules. The letter states that, contrary to some boards' practice of delegating the responsibility to make the determinations required under these rules to the funds' CCO under Rule 38a-1, the language of each rule requires the board to make such determinations. The letter clarifies, however, that boards may rely on summary reports prepared by the fund's CCO or other third parties where consistent with the prudent discharge of their fiduciary duties. The letter cautions boards to confirm there is a process in place reasonably designed to ensure that transactions are effected in a manner that is consistent with board-approved procedures and the relevant rules.[20] As a result, boards continue to make the required determinations and receive quarterly reports relating to these exemptive rules.

These exemptive rules are highly technical in nature and some argue there is little room for independent fund directors to provide meaningful input or oversight beyond that already provided by the fund's CCO, who reports to the independent directors. Nonetheless, these rules continue to require the attention of fund directors and require time on the agendas for fund board meetings. Oversight of a fund's compliance with these exemptive rules is arguably subsumed by the boards' oversight of the compliance program under Rule 38a-1, the rule that requires funds and their service providers to adopt and maintain compliance programs that are "reasonably designed to prevent violations of the federal securities laws." That rule also requires the fund board to appoint the fund's CCO and for the CCO to provide an annual report to the board on

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the effectiveness of the compliance program and to report to the board any material violations of the program. Reliance on the CCO to review compliance with the exemptive rules would not ignore the conflicts of interest involved, because directors would still have oversight responsibility to confirm the funds have complied with the rules. This approach also would seemingly be consistent with the evolution we have seen in fund director responsibilities toward a greater focus on the board's role in overseeing fund operations and its oversight of the fund's risk management processes.

2. *Focus on Oversight*

Recognizing that there has been movement to greater focus on board oversight of fund operations and risk management, the Commission and its Staff can assist fund boards by making sure the board's role appropriately remains focused on "oversight" (except in areas where the 1940 Act already requires otherwise, such as fair valuation and approval of the advisory agreements).[21] Consistent with the new administration's shift to deregulation, care should be taken to keep the fund board's role narrowly defined and not to needlessly add to the heavy plate of fund directors those functions that are the traditional role of the fund's investment adviser. In the adopting release for the liquidity risk management program, for example, the Commission emphasized that the role of the board in approving a fund's program is one of "general oversight" subject to the exercise of the board's "reasonable business judgment."[22] To the extent that it moves forward with proposed Rule 18f-4 relating to derivatives risk management programs for investment companies or issues a reproposal of the rule,[23] the Commission should take a similar approach to carefully review and clarify the appropriate role of the board. Under the current proposal, the board would effectively be intimately involved in setting derivatives exposure levels and reviewing risk-based segregation procedures, based on complicated risk measures (such as Value at Risk or VaR), which are beyond the understanding and expertise of most fund directors, and should be the responsibility of the adviser who has the requisite expertise.[24]

Within the industry and at the SEC, however, we should expect to see continued focus on the fund board's role in overseeing the fund's risk management process employed by the adviser. This oversight responsibility stems in the first instance from principles of state law fiduciary duties of care and loyalty, under the exercise of the board's informed, reasonable business judgment.[25] The board's oversight of risk management is often cited in reference to areas such as the following: oversight of key service providers, cybersecurity, business continuity planning, and fund investments and use of derivatives.[26] These areas also have implications for director responsibilities under the 1940 Act, including Rule 38a-1, and other federal securities laws. In treading into this complex area of risk management oversight, fund boards may be well-advised to first request that the adviser map out the areas of greatest risk to the funds, including emerging risks, and explain the steps taken by the adviser to identify, manage, and mitigate those risks.

3. *Rule 12b-1 Factors and Quarterly Reports*

While the future or prevalence of Rule 12b-1 fees may be in question under the DOL Rule and the possibility of a SEC rule requiring a uniform fiduciary standard, for the foreseeable future fund boards will still be required to renew and approve Rule 12b-1 plans. Many in the industry, including the SEC itself, have recognized that the factors outlined in the SEC's release adopting Rule 12b-1 in 1980 are outdated and no longer relevant.[27] Fund boards would benefit from updated guidance from the SEC or its Staff as to relevant considerations or at least an affirmative withdrawal of those outdated factors, particularly under this evolving distribution landscape. In its 2007 report, the ICI's Working Group on Rule 12b-1 noted that "[b]oard involvement in fund distribution arrangements should stem from regulatory responsibilities that are consistent with marketplace realities." The report recommended that

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boards fulfill their oversight role "by focusing on the full range of activities financed under a fund's 12b-1 plan and the options and other benefits those activities provide to the fund's shareholders." The report recommended that the SEC no longer specify the factors a board should consider in deciding whether or not to approve or continue a 12b-1 plan and suggested that the SEC eliminate the factors that were listed in the 1980 adopting release.

Rule 12b-1 also requires that fund directors review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made. Given the evolution of Rule 12b-1 payments and their purpose, it would be worthwhile for the Commission to reconsider whether these quarterly reports continue to serve their intended purpose. The ICI's Working Group report recommended that "[q]uarterly board consideration does not provide any meaningful additional protection to investors and should be eliminated." The report suggested instead that "it would be a more productive use of their time, if, similar to their consideration of advisory agreements, fund directors reviewed and considered this type of information as part of the annual renewal process."[28]

C. The Impact of Technology on the Investment Management Industry

The SEC has been criticized in the past for not keeping pace with developments in technology that impact the asset management industry and for allowing outdated rules to sit on its books. Over the last several years, the SEC has devoted significant resources to enhancing its own use of technology. For example, the SEC Enforcement Division Staff has made use of technology to study performance aberrations and gone after bad actors.[29] The Staff of the SEC's Office of Compliance Inspections and Examinations (OCIE) has used more "data-driven and risk-based exams" and used technology to evaluate data provided by the firms they are examining to look for any outlier activity. Within the Division of Investment Management, there is regular coordination between the Risk and Examinations Office (REO) and the Disclosure and Rulemaking Offices. REO works with the Disclosure Office to make sure that the risks REO identifies through its data reviews are appropriately disclosed to investors. REO also uses its review of industry data to coordinate with the Rulemaking Office to inform policy and rulemaking. The new investment company reporting and data modernization requirements will provide the Division with enhanced data on portfolio holdings and use of derivatives, securities lending and borrowings. Because the data will be filed in a structured data format, it will be easier for the Staff to analyze in an automated fashion.[30]

While the SEC seems to have made strides with respect to its own use of technology, there is more work to be done for SEC regulation to keep pace with the enhancements in technology that are directly impacting the investment management industry. In these areas, many advocate for clarification of existing rules or a "principles-based" approach that will not stifle the industry's ability to capitalize on changes in consumer demands for access to technology. The SEC sent a message of its focus on technology in November 2016 when it hosted the Fintech Forum to discuss financial technology innovation in the financial services industry. The purpose of the forum was "to foster greater collaboration and understanding among regulators, entrepreneurs and industry experts into Fintech innovation and evaluate how the current regulatory environment can most effectively address these new technologies."[31] Identified below are possible areas on which the SEC may continue to focus in the near term that involve technology and areas of impact to the industry. Not covered below but also relevant for future consideration are the impact of artificial intelligence, blockchain, and the evolving landscape for mutual fund distribution to make greater use of mobile accessibility.

1. Social Media

Social media provides an important tool to enhance financial literacy in the United States, to

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reach a younger demographic of future investors, and to communicate with a wider population due to its ready accessibility. It also provides a cost-efficient way for firms to market their services to clients and prospective clients and grow their businesses. While the number of broker-dealer and investment advisory firms with a social media presence continues to grow, many firms still struggle with how to apply existing SEC and FINRA rules, such as those relating to advertising and recordkeeping, to their use of social media. Many of the applicable regulations were written before social media was even contemplated. Despite the social media guidance that has been issued to date from the SEC Staff and FINRA, many firms continue to struggle with how to minimize compliance and regulatory risk in establishing and maintaining a social media presence. As a result, many firms have not capitalized on all that social media has to offer as a means to market and grow their businesses, reach existing and prospective clients, and educate the investing public. There is a real opportunity here for the SEC and its Staff to assist firms in this endeavor by revisiting outdated rules (such as the recordkeeping rules or testimonial rule for advisers) and to clarify through nonprescriptive guidance how current standards apply to the use of social media. This could tie in with an initiative to harmonize broker-dealer and investment adviser regulation in establishing a uniform fiduciary standard. Possible areas to further clarify may include: what constitutes a business communication on social media and what does not; who is deemed to be speaking for the firm and how to narrow that universe; and when a firm will be deemed to "adopt" content by posting it on social media, keeping in mind the benefits of pushing content out quickly. This analysis necessarily must consider that overarching all such social media communications is the protection of the anti-fraud rules.

2. Robo-Advisers

Recognizing the consumer demand for online automated investment advice, assets under management invested through robo-advisers is expected to hit at least $2 trillion by 2020. Consistent with President Trump's stated goal of improving the standard of living for all Americans, robo-advisers provide a unique opportunity to make investment advice more affordable and accessible for all investors regardless of account size. Focusing on the unique challenges presented by robo-advisers, many of which have limited human interaction with their clients, in March 2016, Chair White stated that the key questions relating to robo-advisers "are focused on whether and how a firm meets its Advisers Act obligations, as well as its fiduciary duties, when it provides only or primarily automated advice."[32]

In February 2017, the Division of Investment Management issued an IM Guidance Update on robo-advisers addressing regulatory issues unique to the digital platforms.[33] It focused on three main areas: the substance of the disclosure to clients regarding the robo-adviser's services; the obligation to obtain information from the client so that the robo-adviser can provide suitable investment advice; and the adoption and implementation of compliance programs reasonably designed to address particular concerns relevant to robo-advice. Interestingly, the IM Guidance Update seems to concede that robo-advisers can meet their fiduciary obligations, provided appropriate steps are taken. The IM Guidance Update offers suggestions as to how robo-advisers can comply with existing Advisers Act requirements, recognizing that there may be a variety of means to do so.

OCIE included examination of robo-advisers in its 2017 exam priorities, stating that "[e]xaminations will likely focus on registrants' compliance programs, marketing, formulation of investment recommendations, data protection, and disclosures relating to conflicts of interest. We will also review firms' compliance practices for overseeing algorithms that generate recommendations."[34] We should expect additional focus on this growing segment of the investment management industry and

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perhaps more from OCIE following its additional examinations of robo-advisers.

3. Cybersecurity

Cybersecurity has been an area of focus of the Commission since at least March 2014, when it hosted a Cybersecurity Roundtable. In 2015, OCIE conducted examinations of registrants' cybersecurity protocols and later that same year issued a National Exam Program Risk Alert on cybersecurity.[35] Also in 2015, the SEC's Division of Investment Management issued guidance for funds and advisers on the subject.[36] That guidance highlighted the need for fund and adviser compliance programs to address disruptions in service that could affect a fund's ability to process shareholder transactions, including the fund's ability to process and redeem shares under Section 22(e) of the 1940 Act (which prohibits an open-end fund from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after tender of a security for redemption) and Rule 22c-1 under the 1940 Act (which requires an open-end fund to sell or redeem shares only at a price based on its net asset value next computed after receipt of a purchase order or redemption request). Citing the difficulties encountered in 2015 by clients of BNY Mellon in calculating the funds' net asset values and timely meeting redemptions, Chair White reinforced in a speech in May 2016 the importance of a fund being adequately prepared to respond to risks posed by service providers and implementing alternative systems to meet the fund's regulatory obligations.[37]

Cybersecurity will continue to be an area of focus for the foreseeable future due to the wide-ranging risks it presents to the investment management industry. OCIE recently announced that cybersecurity would continue to be among its 2017 examination priorities. Cybersecurity was also mentioned in the SEC's proposal on business continuity planning.[38] Mr. Clayton has reflected a focus throughout his career on the importance of cybersecurity protocols for financial services firms and we can expect this to be an area of continued focus and attention under his Chairmanship.[39] This should extend to the SEC's own cybersecurity protections, particularly given the large amounts of proprietary data requested by OCIE during exams and the new data reporting under the investment company modernization requirements.

4. Transmission of Shareholder Documents by Web Posting

The proposal relating to investment company reporting modernization included, as one component, Rule 30e-3 under the 1940 Act regarding an optional method for investment companies to transmit shareholder reports by web posting. While the rest of the regulation on reporting was adopted in October 2016, electronic delivery did not survive, largely on the grounds that paper copies were important to reach older Americans or others who do not have ready internet access. Commissioner Piwowar was vocal about this omission in his vote against the reporting modernization proposal, citing the "reduction in costs for fund shareholders" and "the hope that more investors would read and make greater use of fund disclosures."[40] The ICI likewise has been very vocal about the projected savings to the industry from this option. Aside from opposition from the paper industries, this could be a relatively controversy-free undertaking by the Commission in terms of new regulation that has the added benefits of cost savings and recognition of the evolution of technology and how shareholders receive and review information. Much of the work in terms of the cost-benefit analysis has already been completed and the benefits in terms of cost savings to the industry are significant and tangible. As the ICI noted in its March 14, 2016 comment letter relating to the proposal, one point to be reviewed is whether the cost of processing fees imposed by the New York Stock Exchange (NYSE) rules require funds to pay more for ***not*** delivering paper shareholder reports than they currently pay to deliver paper reports. The ICI recommended that the SEC clarify how the

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NYSE fees would apply to the Rule 30e-3 delivery mechanism.

5. Disclosure Initiatives

We can expect the SEC and its Staff to continue to focus on how to improve investor disclosures and leverage technology to do so. For example, the SEC Staff has expressed continued interest in building upon the layered approach to mutual fund disclosure that has worked effectively with the use of the summary prospectus. Funds are permitted to deliver to investors a summary prospectus as long as they make the longer form statutory prospectus available on the fund's website. This has the benefit of saving the industry money in printing costs and perhaps more importantly, focusing on the most pertinent information for fund shareholders—the fund's principal investment strategies and risks and the fund's expenses. Possible future initiatives the SEC Staff has indicated are in development or under consideration include: a shorter form shareholder report and summary prospectuses for variable insurance products.

On March 10, 2017, the SEC's Office of the Investor Advocate hosted an Evidence Summit to discuss how to simplify disclosures to investors, including possible strategies for raising retail investors' understanding of key investment characteristics such as fees, risks, returns, and conflicts of interest. The Evidence Summit discussed the use of data and analysis to design new tools and methods to improve investor disclosures, including how to modernize the disclosures through the use of technology. Other recent initiatives from the Commission include a proposed rule that, if adopted, would require funds to use inline XBRL to file mutual fund risk/return summary information, eliminating the need to tag a copy of the information in a separate XBRL exhibit, as currently required. The original purpose of the current XBRL filing requirements was to make this summary information easier for investors to analyze through automated means and compare among funds. The proposed rule is intended to improve the accessibility and quality of disclosures for investors and lower compliance costs for fund companies.[41]

D. Investment Product Innovation

Certainly, investment product innovation will be driven largely by the impact of the Trump presidency on the markets, including expected rising interest rates, higher inflation, investment in infrastructure, and any challenges placed on globalization and the resulting impact on foreign and emerging markets. Overall, the market volatility that is likely to follow an anti-establishment president could benefit hedge fund strategies and alternative asset classes. Commodity strategies may also benefit due to President Trump's push for more manufacturing and construction, and the increase in precious metal prices as a result of the political uncertainty. Against this background, we will look to the SEC to continue to be flexible when it comes to product innovation and to continue to work with the industry to develop working solutions that allow for this innovation and result in industry growth. We likely can expect continued review and development of the following: exchange-traded funds (including actively-managed nontransparent exchange-traded funds (ETFs) or those that use tax harvesting techniques); registered private equity funds; and liquid alternative funds that use hedge fund-like strategies and/or make use of derivatives as part of their principal strategies.

With a Republican-controlled Commission, we may see a greater willingness to grant no-action or exemptive relief that will help facilitate this product innovation, particularly given the possibility that advancing SEC rulemaking may become more difficult in the future as a result of the presidential order, and the possibility of legislation being enacted such as the CHOICE Act or the SEC Accountability Act. There may be an opportunity, however, given the focus on adopting regulations that will help registrants achieve cost savings to revisit codifying certain areas of exemptive relief for certain types of funds and fund structures, such as passively managed

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ETFs, multi-manager funds, and fund-of-funds. Not having the expense and delay of needing exemptive relief could advance the proliferation of ETFs and other fund structures.

IV. Possible Casualties of Proposed Rulemakings

What are the likely casualties of proposed or anticipated SEC rulemaking in the investment management space under a less regulation-friendly administration? Possible casualties include anticipated or proposed rules on: stress testing, third-party exams, business continuity plans and transition planning for advisers; registered investment companies' use of derivatives and enhanced risk management measures; and a rule to promote board diversity which may apply to fund boards.

Anticipated rules on stress testing and third-party exams may be unlikely to move forward, largely because they have the taint of the Dodd-Frank Act and in part because of the challenge of figuring out an approach in each case that would work for the industry. In the case of stress testing, the industry argued that it does not make sense to require stress testing for advisers because they manage client accounts on an agency basis. Third-party exams have the benefit of supplementing (although they are not intended to replace) SEC exams, which could be important if the SEC's budget is not sufficient to cover the needed examiners and resources, although many believe it would be costly for the industry. Board diversity is unlikely to be a priority under this administration, but would be a welcome surprise for some. The business continuity plan rule was widely-criticized for being part of an anti-fraud rule rather than guidance under the existing compliance rule, with many concerned that firms would be charged for fraud for imperfections judged in hindsight. Many also believed the topic was better addressed through guidance than a rule and that guidance would inherently provide more flexibility to tailor the plans to a firm's operations and risks. Commenters also expressed concern that the proposal established an unprecedented level of accountability for functions carried out by third-party service providers.

With respect to the derivatives proposal, many in the industry support having some guidance from the SEC relating to fund use of derivatives that will provide more clarity than currently exists. Many believe that if the derivatives rule moves forward we can expect to see a less prescriptive approach than originally proposed. One possibility is the approach supported by Commissioner Piwowar which focused on limiting risk through asset segregation, rather than setting limits on notional derivatives exposure. In his dissenting statement to the rule proposal, Commissioner Piwowar explained that the "proposed asset segregation requirements should function as a leverage limit on funds and ensure that funds have the ability to meet their obligations arising from derivatives." He aptly suggested that the Commission wait to adopt the derivatives rule until it has had an opportunity to review the data obtained on fund derivatives use under the new investment company reporting modernization rules to determine whether there is any need to further limit funds' use of derivatives.[42]

There has also been some speculation about whether some of the recently-adopted rules on liquidity risk management, swing pricing, and investment company reporting modernization would be revisited or delayed, particularly given how costly they will be for the industry to implement. As of the date of this writing, there have been no statements from the SEC or its Staff reflecting any intention to do so.

V. Closing Thoughts

While there has already been a strong push to cut back on federal regulation across the board from the Trump administration, the investment management industry stands to continue to benefit from a strong regulatory regime that focuses on smart regulation that can enhance the industry's future growth while serving the SEC's mission to protect investors. Much of that will almost certainly depend on the Commission's

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ability to be forward-thinking in terms of the direction of the industry and the tremendous impact technology will continue to have in the years to come. Perhaps more importantly and appropriately under our populist president, the industry's future growth may hinge in part on the Commission's ability to listen to the constituency of investors and the demands they are making on the industry for more product innovation and access to technology—as well as the Commission's success in managing and addressing the associated risks, which stand to hamper investor confidence in the industry and detract from American wealth accumulation and retirement savings.

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NOTES

1 *See Money Market Fund Reform; Amendments to Form PF*, Release No. IC-31166 (July 23, 2014), available at *https://www.sec.gov/rules/final/2014/33-9616.pdf*. *See also* Chair Mary Jo White, "Enhancing Risk Monitoring and Regulatory Safeguards for the Asset Management Industry" (Dec. 11, 2014), available at *https://www.sec.gov/News/Speech/Detail/Speech/1370543677722*; FSOC, "Notice Seeking Comment on Asset Management Products and Activities," FSOC-2014-0001 (Dec. 24, 2014), available at *https://www.gpo.gov/fdsys/pkg/FR-2014-12-24/pdf/2014-30255.pdf*; FSOC, "Update on Review of Asset Management Products and Activities" (Apr. 18, 2016), available at *https://www.treasury.gov/initiatives/fsoc/news/Documents/FSOC%20Update%20on%20Review%20of%20Asset%20Management%20Products%20and%20Activities.pdf*.

2 Presidential Executive Order on Core Principles for Regulating the United States Financial System, (Feb. 3, 2017), available at *https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states*.

3 The CHOICE Act contains a number of other provisions, which, if enacted, could have a direct and indirect impact on the asset management industry. These include: an Advisers Act amendment that would exempt certain private equity fund advisers from registration; amendments to the 1940 Act that would provide more investment flexibility for business development companies; changes to the SEC's burden of proof in administrative proceedings; and repeal of the Volcker Rule. The CHOICE Act is available at *http://financialservices.house.gov/choice/*. As of the date of this writing, it is expected that a revised version of the CHOICE Act will be forthcoming and will reflect the new political realities. The president's economic policy team has yet to weigh in but they may be expected to follow course under the CHOICE Act.

4 Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, Jan. 30, 2017, available at *https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling*; Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," Feb. 2, 2017, available at *https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-*

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30-2017. *See also,* Presidential Executive Order on Enforcing the Regulatory Reform Agenda, Feb. 24, 2017, available at *https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda*.

5 H.R. 78, available at *https://www.congress.gov/bill/115th-congress/house-bill/78*.

6 Presidential Memorandum on Fiduciary Duty Rule, Feb. 3, 2017, available at *https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule*. The president's directive is believed to be intended to coordinate with possible legislation, such as the Wagner bill, H.R. 1090, the Retail Investor Protection Act, which passed the House in 2015 and called for a delay in DOL regulation and for the SEC to issue a fiduciary rule governing all investment accounts.

7 *See Study on Investment Advisers and Broker-Dealers* (Jan. 2011), available at *https://www.sec.gov/news/studies/2011/913studyfinal.pdf*.

8 *See Duties of Brokers, Dealers, and Investment Advisers,* Release No. IA-3558, (Mar. 1, 2013), available at *https://www.sec.gov/rules/other/2013/34-69013.pdf*.

9 Testimony on "Examining the SEC's Agenda, Operations, and FY 2018 Budget Request," Chair Mary Jo White, Before the Committee on Financial Services United States House of Representatives Washington, DC, Nov. 15, 2016, available at *https://www.sec.gov/news/testimony/white-testimony-sec-agenda-fy2018-budget-request.html#_ftn99*.

10 *See, e.g.*, Michael Wursthorn, "Amid Threat to Fiduciary Rule, an Opening for a Uniform Standard?", *Wall Street Journal* (Feb. 9, 2017); Mark Schoeff Jr., "FSI renews efforts to scrap DOL rule and push for universal standard by SEC," *Investment News* (Jan. 24, 2017); John Taft, "Voices Taft: What a fiduciary standard could look like under Trump," *On Wall Street* (Nov. 30, 2016).

11 *See* SEC, Division of Investment Management, IM Guidance Update, "Mutual Fund Distribution and Sub-Accounting Fees," No. 2016-01 (Jan. 2016), available at *https://www.sec.gov/investment/im-guidance-2016-01.pdf*.

12 Capital Group, SEC Interpretive Letter (Jan. 11, 2017), available at *http://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm*.

13 *Mutual Fund Distribution Fees; Confirmations,* Release No. IC-29367 (July 21, 2010), available at *https://www.sec.gov/rules/proposed/2010/33-9128.pdf*.

14 IM Guidance Update, Mutual Fund Fee Structures, No. 2016-06 (Dec. 15, 2016), available at *http://www.sec.gov/investment/im-guidance-2016-06.pdf*.

15 Investment Advisers Modernization Act of 2016 (H.R. 5424).

16 *See, e.g.,* Richard M. Phillips, "Mutual Fund Independent Directors: A Model for Corporate America?", Investment Company Institute Perspective, Aug. 2003, at 3, available at *http://www.ici.org/pdf/per09-04.pdf*.

17 Jones v. Harris Associates L.P., 130 S. Ct. 1418 (2010) (*Citing* Burks v. Lasker, 441 US 471 (1979) "The [1940] Act interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser.").

18 SEC, Report of the Division of Investment Management, "Protecting Investors: A Half Century of Investment Company Regulation" (May 1992), available at *https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf*; Matthew P. Fink and Jacqueline Edwards, "The Changing Role of Independent Directors of Mutual Funds," *The Investment Lawyer*, Vol. 23, No. 4 (Apr. 2016).

19 *See* Remarks by Chair Mary Jo White at the Securities Enforcement Forum, Oct. 9, 2013 (stating "It has been suggested that our focus on gatekeepers may drive away those who would otherwise serve in these roles, for fear of being second-guessed or blamed for every issue that arises… [But] being a director or in any similar role where you owe a fiduciary duty is not for the uninitiated or the faint of heart."), available at *https://www.sec.gov/News/Speech/Detail/Speech/1370539872100*.

20 Staff Letter to the Independent Directors Council and the Mutual Fund Directors Forum (Nov. 2, 2010),

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http://www.sec.gov/divisions/investment/noaction/2010/idc-mfdf110210.pdf.

21 *Investment Company Liquidity Risk Management Programs,* Release No. IC-32315 (Oct. 13, 2016), available at *https://www.sec.gov/rules/final/2016/33-10233.pdf*.

22 *Id.* at p.249 (stating that "We believe the role of the board under the rule is one of general oversight, and consistent with that obligation we expect that directors will exercise their reasonable business judgment in overseeing the program on behalf of the fund's investors."). *See* American Bar Association Business Law Section Comment Letter, Feb. 11, 2016, available at *https://www.sec.gov/comments/s7-16-15/s71615-96.pdf* (stating that "The Committee recommends that the Commission make explicit that fund boards serve in an oversight role and can satisfy their obligations by being informed and exercising their business judgment.").

23 *Use of Derivatives by Registered Investment Companies and Business Development Companies,* Release No. IC-31933 (Dec. 11, 2015), available at *https://www.sec.gov/rules/proposed/2015/ic-31933.pdf*.

24 American Bar Association Business Law Section Comment Letter, Apr. 8, 2016, available at *https://www.sec.gov/comments/s7-24-15/s72415-191.pdf* (stating that "…we are concerned that imposing specific, new responsibilities on Boards of the type required by proposed Rule 18f-4 may go a step beyond the traditional Board role into areas that are properly the province of the investment adviser. For example, absent clarifying guidance to directors in the adopting release for the final rule, directors may be concerned that they are required to develop an in-depth understanding of the technicalities of value-at-risk models or the computation of the risk-based-coverage amount for complex derivatives before approving a Program recommended by a fund's adviser, which would be inconsistent with their oversight role, and a practical impossibility for many independent fund directors. The Committee believes that the Commission should clarify that the Board's role related to derivatives risk management generally is consistent with its general oversight role.… Consistent with our prior comments on proposed Rule 22e-2, the Committee urges the Commission to confirm in any adopting release for Rule 18f-4 that nothing in the final rule or the adopting release changes the relevant legal standard in respect of Board oversight of Funds and their investment advisers."). *See also* Amy B. R. Lancellotta, "It's Time: SEC Proposals Show the Need to Reexamine the Role of Fund Boards," *ICI Viewpoints,* July 7, 2016, available at *https://www.iciglobal.org/viewpoints/view_16_ Board_Responsibilities*.

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26 *See, e.g.,* "ABA Fund Director's Guidebook" (4th Ed.)(2015) at pp.72-76, 92-93, 118-119; Arthur C. Delibert, Marguerite W. Laurent and Lori L. Schneider, "Cybersecurity: Could Investment Company Directors Be Liable for a Breach?" *The Investment Lawyer*, Vol. 22 No. 2 (Feb. 2015); Gene Gohlke, associate director, Office of Compliance and Inspection, "If I Were a Director of a Fund Investing in Derivatives—Key Areas of Risk on Which I Would Focus," SEC, Nov. 8, 2007, available at *https://www.sec.gov/news/speech/2007/spch110807gg.htm*.

27 *See* Investment Company Act Release No. 10862 (Sept. 7, 1979) and No. 11414 (Oct. 28, 1980); see Release No. IC-29367, *supra* n.13.

28 Report of the Working Group on Rule 12b-1, Submitted to Investment Company Institute Board of Governors (May 2007), at 7, available at *https://www.ici.org/pdf/rpt_07_12b-1.pdf*.

29 *See, e.g.*, *In the Matter of Ambassador Capital Management, LLC, et. al.* (Nov. 26, 2013), available at *https://www.sec.gov/litigation/admin/2013/ia-3725.pdf*.

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30 *Investment Company Reporting Modernization,* Release No. IC-32314 (Oct. 13, 2016), available at *https://www.sec.gov/rules/final/2016/33-10231.pdf*.

31 Press Release, 2016-195, Sept. 27, 2016, available at *https://www.sec.gov/news/pressrelease/2016-195.html*.

32 Chair Mary Jo White, "Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative," Mar. 31, 2016, available at *https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html*.

33 IM Guidance Update, Robo-Advisers, No. 2017-02 (Feb. 2017), available at *https://www.sec.gov/investment/im-guidance-2017-02.pdf*.

34 National Exam Program, OCIE, Examination Priorities for 2017, available at *https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf*.

35 *See* National Exam Program, Risk Alert: Vol. IV, Issue 8, *OCIE's 2015 Cybersecurity Examination Initiative* (Sep. 15, 2015), available at *https://www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf*.

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37 Chair Mary Jo White, Keynote Address Investment Company Institute 2016 General Meeting, "The Future of Investment Company Regulation," Washington, DC, (May 20, 2016), available at *https://www.sec.gov/news/speech/white-speech-keynote-address-ici-052016.html*; *See* BNY Mellon, "Transcript of the BNY Mellon Teleconference Hosted By Gerald Hassell on the Sungard Issue" (Aug. 30, 2015), available at *https://www.bnymellon.com/_global-assets/pdf/events/transcript-of-bny-mellon-teleconference-on-sungard-issue.pdf*.

38 *See Adviser Business Continuity and Transition Plans,* Release No. IA-4439 (June 28, 2016), available at *https://www.sec.gov/rules/proposed/2016/ia-4439.pdf*; IM Guidance Update, Business Continuity Planning for Registered Investment Companies, No. 2016-04 (June 2016), available at *https://www.sec.gov/investment/im-guidance-2016-04.pdf*.

39 Jay Clayton, co-author "We Don't Need a Crisis to Act Unitedly Against Cyber Threats," Knowledge@Wharton (June 2015), available at *http://knowledge.wharton.upenn.edu/article/we-dont-need-a-crisis-to-act-unitedly-against-cyber-threats/*.

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41 *Inline XBRL Filing of Tagged Data,* Release No. IC-32518 (Mar. 1, 2017), available at *https://www.sec.gov/rules/proposed/2017/33-10323.pdf*. XBRL is a machine-readable format using eXtensible Business Reporting Language. Since 2009, mutual funds have been required to provide risk/return summary information from their prospectuses in XBRL format by submitting it to the Commission in exhibits and posting it on their websites, if any.

42 Commissioner Michael S. Piwowar, "Dissenting Statement at Open Meeting on Use of Derivatives by Registered Investment Companies and Business Development Companies" (Dec. 11, 2015), available at *https://www.sec.gov/news/statement/piwowar-dissenting-statement-use-of-derivatives-funds.html*.

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