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Insights from Winston & Strawn

On September 11, 2018, the federal prudential banking agencies (Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and National Credit Union Administration) and the Bureau of Consumer Financial Protection (the "Bureau") issued an [Interagency Statement Clarifying the Role of Supervisory Guidance](#). The Statement also describes their approach to such guidance.

The context of the Interagency Statement is that the Government Accountability Office ("GAO") last December surprised many by declaring that certain controversial guidance issued by the Bureau actually constituted a rule subject to review by Congress. Since the guidance had not been submitted to Congress for review, the basis existed for considering the guidance invalid. The GAO separately declared that the interagency guidance issued by the prudential banking regulators on leveraged lending also constituted a rule that had not been submitted to Congress, thus raising questions about the validity of the leveraged-lending guidance. The Congressional Review Act ("CRA") provides that a rule must be presented to Congress "[b]efore a rule can take effect." Thus, the GAO, in finding that guidance can constitute a rule within the meaning of the CRA, threw into doubt the validity of all guidance issued by federal government agencies since the 1996 enactment of the CRA. The agencies have historically issued guidance in a number of different forms including interagency statements (such as that issued on September 11), advisories, bulletins, policy statements, questions and answers, and frequently asked questions; they were faced with the choice of (1) submitting previously issued guidance to Congress, risking Congressional disapproval; (2) risking that any particular guidance could someday be deemed invalid; or (3) declaring that the guidance has no binding effect, thus avoiding its characterization as a rule. The banking regulators have adopted the third alternative.

The September 11 Interagency Statement provides that supervisory guidance does not have the effect of law and that the federal banking agencies do not take enforcement actions based on such guidance. Rather, such guidance outlines their "supervisory expectations" or priorities and articulates agency "general views regarding appropriate practices." Guidance, the Interagency Statement says, provides insight to industry as well as to supervisory staff, helping to ensure consistency.

Going forward, the agencies say they will try to limit the use of numerical thresholds or bright lines in guidance. When numerical thresholds are used, it will be indicated that they are exemplary and not required. Examiners will not cite violations of guidance, although examiners may identify deficiencies that do not constitute violations of law and may also cite guidance to provide examples. Even though guidance is not an enforceable rule, the agencies may follow notice-and-comment rulemaking procedures in adopting guidance in order to inform themselves. The agencies also will try to reduce the issuance of multiple guidance on the same topic. Finally, the agencies plan to clarify the role of guidance in communicating with their examiners and supervised firms.

Of course, the regulators' renunciation of the enforceability of guidance is consistent with the current Administration's emphasis on deregulation. Declaring that the guidances, issued in large numbers by the banking regulators, will not serve as the bases for future enforcement actions is a very significant step toward decreasing the number of binding rules to which banks are subject.

However, bank regulators do not consider examination report criticism, such as Matters Requiring Attention or Matters Requiring Immediate Attention, to be enforcement actions. Thus, the prospect remains that guidance may serve as the basis for examination report criticism.

[Jerry Loeser](#)



Feature: SEC Staff's Withdrawal of Two Guidance Letters Could Weaken Influence of Proxy Advisory Firms

On September 13th, the Securities and Exchange Commission's ("SEC") Division of Investment Management ("Division") announced in a [statement](#) that, following a re-examination and in response to developments since 2004, it has decided to withdraw no-action letters that it issued to Egan-Jones Proxy Services on May 27, 2004, and Institutional Shareholder Services, Inc. ("ISS") on September 15, 2004. The letters, which [assured](#) institutional investors that they could straighten out any possible conflicts of interest with public companies by depending upon proxy firm recommendations, had effectively [increased](#) the influence of proxy advisors when they had offered recommendations about items up for a vote at a public company's annual meeting. The Division specified that it has provided its notice of withdrawal of the letters in order to facilitate discussion at its upcoming Roundtable on the Proxy Process, which will focus on the proxy voting process, retail shareholder participation, and the role of proxy advisory firms. The Roundtable is expected to be held in November 2018.

[The Wall Street Journal](#) called the Division's withdrawal of the two no-action letters an "early victory" for U.S. public companies in their perennial fight to limit the effect of these consultants, who influence shareholder votes on highly-charged topics like executive compensation. According to many corporations and Congressional Republicans, the now-withdrawn letters raised the influence of proxy advisory firms, including ISS, which has advocated against large CEO pay packages.

Christopher Lacovella, CEO of the American Securities Association, also [agreed](#) with the Division's move, and cheered SEC Chairman Jay Clayton and the SEC for "acting to put the interests of America's retail investors before the often politically motivated interests of the proxy advisory mega-firms." Lacovella added that the

Division's withdrawal of the letters "will help investors better grow and protect their wealth as funds and institutions can no longer quickly turn to proxy advisors without conducting the necessary due diligence their fiduciary duty requires."

Not everyone approves of the Division's move. SEC Commissioner Robert Jackson Jr. [wondered](#) why the SEC and the Division have "suddenly raised questions about long-resolved issues regarding shareholder voting." He also implored his colleagues and the Division to not to allow "corporate lobbyists' priorities" to create a distraction from the agency's vital work in "fixing the American system for corporate voting." Additionally, Karen Barr, president and CEO of the Investment Adviser Association, [argued](#) that proxy advisory firms "provide critically important services to investment advisors to help them meet their proxy voting obligations, ranging from voting mechanics to research and recommendations."

The full impact of the Division's decision is not yet entirely clear. [According to](#) consultancy Fariant Advisors, while the effect of the Division's withdrawal of the guidance letters will probably not be substantial when it comes to how investors "generally oversee compensation governance," the move "does portend continued push-back on ISS's influence as the SEC prepares for its November roundtable on potential regulation of proxy advisers."



Banking Agency Developments

Joint Agency Releases

Agencies Approve Amendments to Swap Margin Rule

On September 21st, the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Farm Credit Administration, the Federal Deposit Insurance Corporation ("FDIC"), the Federal Housing Finance Agency, and the Office of the Comptroller of the Currency ("OCC") [announced](#) that they have approved [final amendments](#) to swap margin requirements to conform with recent rule changes that impose new restrictions on certain qualified financial contracts of systemically important banking organizations ("QFC Rules"). Under the amendments, legacy swaps entered into before the applicable compliance date will not become subject to the margin requirements if they are amended solely to comply with the requirements of the QFC Rules.

Agencies Propose Rule Regarding the Treatment of High Volatility Commercial Real Estate

On September 18th, the Federal Reserve, the FDIC, and the OCC [invited](#) public comment on a [proposal](#) to modify the agencies' capital rules for high volatility commercial real estate exposures, as required by the Economic Growth, Regulatory Relief, and Consumer Protection Act. The proposal also asks for comment on certain terms contained in the revised definition of high volatility commercial real estate. The changes, when finalized, would apply to all banking organizations subject to the agencies' capital rules. Comments will be accepted for 60 days after publication in the Federal Register.

Federal and State Financial Regulatory Agencies Issue Interagency Statement on Supervisory Practices Regarding Financial Institutions Affected by Hurricane Florence

On September 14th, the OCC, the Federal Reserve, the FDIC, the National Credit Union Administration ("NCUA"), and state regulators [announced](#) that they recognize the serious impact of Hurricane Florence on the customers, members, and operations of many financial institutions and will provide appropriate regulatory assistance to affected institutions subject to their supervision.

OCC

Recovery Planning Guidelines: Notice of Proposed Rulemaking; Revised Guidelines

On September 19th, the OCC [announced](#) that it is proposing to amend its [enforceable guidelines](#) relating to recovery planning standards for insured national banks, insured federal savings associations, and insured federal branches in order to limit the application of the guidelines to the largest, most complex banks and thereby provide regulatory burden relief to smaller, less complex institutions. Comments on the proposal must be received by November 5, 2018.

Covered Savings Associations: Notice of Proposed Rulemaking

On September 18th, the OCC [announced](#) that it has issued a [proposed rule](#) to allow federal savings associations with total consolidated assets of \$20 billion or less as of December 31, 2017, to elect national bank powers and operate as covered savings associations. The proposed rule aims to provide certain federal savings associations with additional flexibility to adapt to new economic conditions and business environments without changing their charters. The deadline for comments on the proposed rule is November 19, 2018.

Federal Reserve

Federal Reserve Seeks Public Comment on Proposal to Amend Regulation H and Regulation K

On September 21st, the Federal Reserve [requested](#) public comment on a [proposal](#) to amend Regulation H and Regulation K to repeal provisions that incorporate the Secure and Fair Enforcement for Mortgage Licensing Act ("S.A.F.E. Act"). Comments on the proposal must be submitted within 60 days from the date of publication in the Federal Register, which is expected shortly.

Trump Set to Nominate Former Fed Economist to Board of Governors

On September 19th, Bloomberg [reported](#) that President Trump is planning to nominate former Federal Reserve economist Nellie Lang to the central bank's Board of Governors. According to the article, Liang believes that the Federal Reserve is not tasked to bailing out losers or providing a safety net for excesses.

CFPB

Free Credit Freezes Are Here

On September 21st, the Consumer Financial Protection Bureau ("CFPB") [announced](#) that, thanks to a new federal law, free credit freezes and year-long fraud alerts are here.

CFPB to Open Southeast Regional Office in Atlanta

On September 21st, the CFPB [announced](#) that it will be relocating its southeast regional office from Washington, D.C. to Atlanta, Georgia.

New Research Report on the Geography of Credit Invisibility

On September 19th, the CFPB [announced](#) that it has released a [new research report](#) on the geographic patterns of credit invisibility. This is the third in a series of CFPB studies on consumers with limited credit histories. The first, [Credit Invisibles](#), estimated the number and demographic characteristics of consumers who were credit invisible or had an unscorable credit record. The second, [Becoming Credit Visible](#), explored the ways in which consumers establish credit records.



Treasury Department Developments

Treasury Department

Secretary Mnuchin Statement on National Cyber Strategy

On September 20th, U.S. Treasury Secretary Steven T. Mnuchin issued a [statement](#) on the release of President Trump's National Cyber Strategy.

Treasury and IRS to launch redesigned W-4 Form in 2020

On September 20th, the Treasury Department [announced](#) that the IRS will implement a redesigned W-4 form for tax year 2020, a timeline that will allow for continued work to refine the new approach for the form.

Treasury International Capital Data for July

On September 18th, the Treasury Department [announced](#) that it has released Treasury International Capital (TIC) data for July 2018. The next release, which will report on data for August 2018, is scheduled for October 16, 2018.

U.S.-UK Financial Regulatory Working Group Joint Statement

On September 18th, the Treasury Department [discussed](#) the inaugural meeting of the U.S.-UK Financial Regulatory Working Group, which was held on September 12, 2018 in London. Among other things, U.S. and UK participants talked about the outlook for financial regulatory reforms and future priorities, the implications of the UK's exit from the EU on financial stability and cross-border financial regulation, and the U.S.-UK financial regulatory issues resulting from the UK's exit from the EU.



Securities and Exchange Commission

Regulatory Actions

SEC Extends Regulatory Relief to Victims of Hurricane Florence

The SEC [announced](#) on September 19th that it is providing regulatory relief to publicly traded companies, investment companies, accountants, transfer agents, municipal advisors and others affected by Hurricane Florence. In an effort to address compliance issues caused by the hurricane, the SEC issued an [exemptive order](#) that exempts affected persons from certain requirements of the federal securities laws following the weather event, subject to certain conditions. The exemptive relief covers the period from September 14, 2018, until October 26, 2018. The SEC also adopted [interim final temporary rules](#) that extend the filing deadlines for specified reports and forms that companies must file pursuant to Regulation Crowdfunding and Regulation A. The rules are effective from September 21, 2018 through October 29, 2018.

Proposed Rules

SEC Proposes Amendment to Single Issuer Exemption for Broker-Dealers

On September 20th, the SEC requested comment on a [proposed rule](#) that would amend the exemption provisions in the broker-dealer annual reporting rule under the Securities Exchange Act to provide that a broker-dealer is not required to engage an independent public accountant to certify the broker-dealer's annual reports if, among other things, the securities business of the broker-dealer has been limited to acting as broker for a single issuer in soliciting subscriptions for securities of that issuer. Comments should be submitted within 30 days of publication in the Federal Register, which is expected shortly.

Guidance

Open-End Management Investment Company Inline XBRL Filing of Tagged Data

The SEC in June 2018 adopted amendments that will require certain open-end management investment companies, including exchange-traded funds ("funds") organized as open-end management investment companies to submit risk/return summary information in the Inline eXtensible Business Reporting Language ("XBRL") format. On September 14th, the SEC [announced](#) that, effective September 17th, the amendments eliminate the requirement for funds to post Interactive Data Files on their websites, and terminate the SEC's voluntary program for the submission of financial statement information interactive data that is currently available only to investment companies and certain other entities.

Operating Company Inline XBRL Filing of Tagged Data

The SEC in June 2018 adopted amendments that will require operating companies to submit financial statement information in the XBRL format. Operating companies are currently required to submit all XBRL data entirely within a separate XBRL exhibit. On September 14th, the SEC [announced](#) that, effective September 17th, the amendments also eliminate the requirement for operating companies to post "Interactive Data Files" on their websites.

Speeches and Statements

Avakian Says that Enforcement Success Should Not Be Measured by Numbers Alone

SEC Division of Enforcement Co-Director Stephanie Avakian delivered a [speech](#) on September 20th in which she assessed the success of the SEC's enforcement program over the last fiscal year. Avakian maintained that numbers and statistics do not provide a full and meaningful picture of the quality, nature, and effectiveness of the Division's efforts, highlighting the SEC's Share Class Disclosure Initiative and approach to initial coin offering ("ICO") and digital asset matters as emblematic of the Division of Enforcement's goal of identifying challenges and risks facing investors and markets; developing a response that addresses those challenges in a thoughtful and effective way; and maximizing the use of resources.

Jackson Urges SEC to Heighten Oversight of Stock Markets

SEC Commissioner Robert J. Jackson Jr. delivered a [speech](#) at George Mason University on September 19th in which he highlighted deficiencies in the SEC's oversight of the stock markets. Jackson maintained that the hidden fees and conflicts of interest imbedded in current practices of the stock markets put ordinary investors at a disadvantage, calling on the SEC to "take a hard look at the structure of our stock markets."

Bricker Discusses Financial Reporting Compliance for Digital Assets

On September 17th, SEC Chief Accountant Wesley Bricker gave a [speech](#) at the AICPA National Conference on Banks & Saving Institutions in which he discussed financial reporting and digital assets. For more on Bricker's remarks, please see the "Disruptive Technology Developments" section of the newsletter.

Peirce Says SEC Should Approach Innovative Products with "Humility."

In [remarks](#) at the Cato Institute's FinTech Unbound Conference on September 12th, SEC Commissioner Hester

M. Peirce called on the SEC to approach the regulation of innovative financial technologies, including cryptocurrencies, with "an appropriate degree of humility," observing that regulators need to "resist the temptation to treat uncertainty as a disqualifier" or risk stifling the development and growth of these innovative products.

Other Developments

SEC Announces Roundtable on Combating Retail Investor Fraud

The SEC's Division of Trading and Markets will hold a roundtable on September 26, 2018, on regulatory approaches to combating retail investor fraud, according to an [announcement](#) by the SEC on September 18th. The SEC invited members of the public to submit comments on the topic prior to the roundtable, which will be open to the public and broadcast via webcast on the SEC's website.

Staff Announcements

The SEC announced on September 20th that [Pamela C. Dyson](#), the SEC's Chief Information Officer ("CIO"), will leave the agency to serve as executive vice president, head of the Technology Group, and CIO at the Federal Reserve Bank of New York. The day before, on September 19th, the SEC announced that [Christopher R. Hetner](#), Senior Advisor to Chairman Jay Clayton for Cybersecurity Policy, also plans to leave the SEC. On September 17th, the SEC announced that [Mark E. Wolfe](#) will serve as Associate Director of the Office of Derivatives Policy and Trading Practices in the Division of Trading and Markets.

SEC Reduces Amount of Award to Whistleblower Who Delayed Reporting Misconduct

The SEC [announced](#) on September 14th that it has awarded more than \$1.5 million to a whistleblower who provided the SEC with important information and ongoing assistance that proved critical to the overall success of an enforcement action. The SEC noted, however, that it reduced the amount of the award because the whistleblower did not promptly report the misconduct and benefited financially during the delay.



Commodity Futures Trading Commission

CFTC to Hold an Open Commission Meeting on September 27, 2018

On September 20th, Commodity Futures Trading Commission ("CFTC") Chairman J. Christopher Giancarlo [announced](#) that the CFTC will hold an open meeting on Thursday, September 27, 2018 at the agency's Washington, D.C. headquarters to consider a proposed rule amending registration and compliance obligations for commodity pool operators and commodity trading advisors; Fintech cooperation arrangement(s); and the Paperwork Reduction Act delegation to the Secretary of the Commission.

CFTC's Technology Advisory Committee to Meet on October 5, 2018

On September 20th, the CFTC [announced](#) that its Technology Advisory Committee ("TAC") will hold a public meeting on Friday, October 5, 2018 at the agency's Washington, D.C. headquarters. At this meeting, the TAC will hear presentations from select TAC subcommittees and discuss how RegTech is opening up the possibility of machine readable and executable regulatory rulebooks, as well as the potential role for regulators to facilitate RegTech.



Disruptive Technology Developments

Hackers Exploit Software Glitch to Target Cryptocurrencies

On September 19th, Bloomberg [reported](#) that hackers are illegally generating Bitcoin and other cryptocurrencies by taking advantage of a software flaw that was leaked from the U.S. government.

AI Will Be Crucial in Helping Stop Cyberattacks

On September 18th, The Wall Street Journal [reported](#) that corporations are looking to artificial intelligence ("AI") in an effort to fight off hackers and data breaches.

Bricker Highlights Financial Reporting Compliance for Digital Assets

In [remarks](#) at the AICPA National Conference on Banks & Saving Institutions on September 17th, SEC Chief Accountant Wesley Bricker discussed several topics of interest to financial institutions, including the implementation of the current expected credit loss standard; digital asset activities; and expanded audit reports. Bricker maintained that distributed ledger technology and digital assets "do not alter [the] fundamental responsibility" of companies to adhere to the requirements of federal securities laws, including requirements related to books and records, internal accounting controls, internal control over financial reporting, and custody.



Federal Rules Effective Dates

September 2018 – November 2018

Commodity Futures Trading Commission

September 26, 2018 Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants. [83 FR 43510](#).

Consumer Financial Protection Bureau

October 12, 2018 Disclosure of Records and Information. [83 FR 46075](#).

September 21, 2018 Summaries of Rights Under the Fair Credit Reporting Act (Regulation V). [83 FR 47027](#).

September 17, 2018 Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P). [83 FR 40945](#).

Federal Deposit Insurance Corporation

October 1, 2018 Securities Transaction Settlement Cycle. [83 FR 26347](#).

Federal Financial Institutions Examination Council

October 1, 2018 Appraisal Subcommittee; Appraiser Regulation. [83 FR 43739](#).

Federal Housing Finance Agency

September 28, 2018 Rules of Practice and Procedure; Civil Money Penalty Inflation Adjustment. [83 FR 43965](#).

September 10, 2018 Repeal of Federal Housing Finance Board Regulations; Technical Amendments to FHFA Regulations. [83 FR 39323](#).

Federal Housing Finance Board

September 10, 2018 Repeal of Federal Housing Finance Board Regulations; Technical Amendments to FHFA Regulations. [83 FR 39323](#).

Federal Reserve System

October 5, 2018 Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations. [83 FR 38460](#).

National Credit Union Administration

October 1, 2018 Bylaws; Voluntary Mergers of Federally Insured Credit Unions. [83 FR 30301](#).

September 1, 2018 Chartering and Field of Membership. [83 FR 30289](#).

Office of the Comptroller of the Currency

October 1, 2018 Securities Transaction Settlement Cycle. [83 FR 26347](#).

Securities and Exchange Commission

October 30, 2018 Amendments to Municipal Securities Disclosure. [83 FR 44700](#).

October 9, 2018 Regulation of NMS Stock Alternative Trading Systems. [83 FR 38768](#).

September 21, 2018 Regulation Crowdfunding and Regulation A Relief and Assistance for Victims of Hurricane Florence. [83 FR 47834](#).

September 17, 2018 Inline XBRL Filing of Tagged Data. [83 FR 40846](#).

September 10, 2018 Investment Company Liquidity Disclosure. [83 FR 31859](#).

Smaller Reporting Company Definition. [83 FR 31992](#).

Treasury Department

October 11, 2018 Removal of Office of Thrift Supervision Regulations. [82 FR 47083](#).

September 19, 2018 Extension of Import Restrictions Imposed on Archaeological Material From Cambodia. [83 FR 47283](#).



Exchanges and Self-Regulatory Organizations

BOX Options Exchange

SEC Institutes Disapproval Proceedings for Proposed Changes to BOX's Connectivity Fees. On September 17th, the SEC suspended a proposed rule change filed by BOX Options Exchange LLC's ("BOX"), which would amend the BOX fee schedule to establish certain connectivity fees and reclassify its high-speed vendor feed connection as a port fee, and instituted proceedings to determine whether to approve or disapprove the proposal. Comments should be submitted on or before October 12, 2018. Rebuttals are due on or before October 26, 2018. [SEC Release No. 34-84168](#).

Cboe Global Markets

SEC Seeks Comments in Disapproval Proceedings for BZX's Bitcoin Fund Proposal. On September 20th, the SEC instituted proceedings to determine whether to approve or disapprove a proposal submitted by Cboe BZX Exchange Inc. ("BZX") to list and trade shares of SolidX Bitcoin Shares issued by the VanEck SolidX Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. Comments should be submitted within 21 days of publication in the Federal Register, which is expected the week of September 24, 2018. Rebuttals are due within 35 days. [SEC Release No. 34-84231](#).

Financial Industry Regulatory Authority

FINRA Alerts Investors to Post-Hurricane Investment Scams

The Financial Industry Regulatory Authority ("FINRA") [published](#) an [investor alert](#) on September 19th that warns the public to beware of potential investment scams touting stocks and other investments promising huge financial gains in the wake of Hurricane Florence. The alert notes that disaster-related investment scams often promote investment opportunities claiming to be associated with clean-up and rebuilding efforts.

FINRA Offers Information on Special Proceedings under Simplified Arbitration

On September 17th, FINRA [published](#) an informational video about the arbitrator's responsibilities during a Special Proceeding under FINRA's new simplified arbitration option.

FINRA Advises Members to Switch with SEC Guidance on Third-Party Recordkeeping Services

In a [Regulatory Notice](#) released on September 14th, FINRA provided firms with information regarding guidance issued by the staff of the SEC's Division of Trading and Markets about the use of recordkeeping services provided by third parties to preserve records pursuant to Securities Exchange Act Section 17(a) and Rule 17a-4. The SEC guidance addresses contractual provisions under which third-party recordkeeping service providers may seek to delete or discard the broker-dealer's records in response to non-payment of fees, which the SEC maintains are inconsistent with retention requirements under Rule 17a-4.

Fixed Income Clearing Corporation

SEC Approves FICC's Proposal to Codify the Processing of Conditional Prepayment Rate Claims in the MBS Rules

On September 20th, the SEC approved a proposed rule change filed by the Fixed Income Clearing Corporation ("FICC") to amend its Mortgage-Backed Securities Division ("MBS") Clearing Rules by adding terms governing MBS's current processing of conditional prepayment rate claims to the MBS Rules and making other clarifications and corrections. [SEC Release No. 34-84236](#).

ICE Clear

SEC Okays Clearing of Additional Credit Default Swaps by ICE

On September 14th, the SEC issued an order approving ICE Clear Credit LLC's ("ICC") proposal to revise the ICC Rulebook to provide for the clearance of an additional Standard Emerging Market Sovereign CDS contract. [SEC Release No. 34-84130](#).

International Swaps and Derivatives Association

ISDA White Paper Proposes Regulatory Safe Harbor for Derivatives

On September 20th, the International Swaps and Derivatives Association ("ISDA") [announced](#) that it has published a [white paper](#) that proposes a regulatory safe harbor mechanism for derivatives that would allow firms to rely on their compliance with one of the two primary U.S. markets regulators' rules to satisfy comparable requirements set by the other regulator. The paper seeks to address the impasse over a comprehensive and consistent regulatory framework for the U.S. derivatives market created by differences in the timing and substance of the rules implemented by the SEC and the CFTC.

ISDA Releases Benchmarks Supplement

On September 19th, ISDA [published](#) the ISDA Benchmarks Supplement, which is designed to help firms improve the contractual robustness of derivatives that reference interest rate, FX, equity and commodities benchmarks. ISDA developed the supplement in response to the European Union Benchmarks Regulation and the International Organization of Securities Commissions' *Statement on Matters to Consider in the Use of Financial Benchmarks*.

ISDA Responds to Canada's Proposed Derivatives Registration Framework

On September 17th, ISDA [responded](#) to the Canadian Securities Administrators' ("CSA") [Proposed National Instrument 93-102 – Derivatives: Registration](#), which would establish a new regime for the registration of dealers and advisers transacting in the over-the-counter ("OTC") derivatives markets in Canada. In its response, ISDA expressed concern that the proposed framework is drawn from the existing securities regulatory regime and should instead be designed specifically for derivatives markets.

Municipal Securities Rulemaking Board

MSRB Requests Comments on Draft Guidance on Application of Content Standards to Advertisements by Municipal Advisors

On September 17th, the Municipal Securities Rulemaking Board ("MSRB") [announced](#) that it is seeking comments on a draft compliance resource regarding the application of the content standards under MSRB Rule G-40, on advertising by municipal advisors. Comments should be submitted on or before October 17, 2018.

MSRB Finalizes FAQs on Use of Municipal Advisory Client Lists and Case Studies under Rule G-40

On September 17th, the MSRB published a set of [frequently-asked questions](#) ("FAQs") on the application of MSRB Rule G-40, on advertising by municipal advisors, to the use of municipal advisory client lists and case studies by municipal advisors. The MSRB issued the guidance to assist municipal advisors in understanding permissible and impermissible uses of municipal advisory client lists and case studies by municipal advisors under the rule, which becomes effective on February 7, 2019.

National Futures Association

NFA Increases Required Minimum Security Deposits for Forex Transactions in Turkish Lira and South African Rand

On September 20th, the National Futures Association ("NFA") [notified](#) members that its Executive Committee has determined to increase the minimum security deposits required to be collected and maintained by forex dealer members ("FDMs") for transactions involving Turkish lira and South African rand. The increases of 12% for Turkish lira and 7% for South African rand will become effective on September 24, 2018, for both new and existing positions, and will remain in effect until further notice.

NYSE

SEC Delays Action on NYSE Arca's Proposed Changes to Listing Standards for Managed Fund Shares

On September 19th, the SEC designated November 5, 2018, as the date by which it will approve, disapprove or institute disapproval proceedings for NYSE Arca Inc.'s ("NYSE Arca") proposal to amend Commentary .01 to NYSE Arca Rule 8.600-E relating to certain generic listing standards for Managed Fund Shares. [SEC Release No. 34-84195](#).

SEC Institutes Disapproval Proceedings for NYSE's Proposal to Make Permanent the Retail Liquidity Program Pilot

On September 18th, the SEC instituted proceedings to determine whether to approve or disapprove the New York Stock Exchange LLC's ("NYSE") proposal to make permanent its Retail Liquidity Program Pilot. Comments should be submitted within 21 days of publication in the Federal Register, which is expected the week of September 24, 2018. Rebuttals are due within 35 days. [SEC Release No. 34-84183](#).

Judicial Developments

Pension Funds Fail to Show That Company Executives Consciously Disregarded That Their 'Tone' Made Employees Engage in Erroneous Accounting

Pension funds brought a putative securities fraud class action against Hertz and current and former executives for making materially false and misleading statements about Hertz's financial results, internal controls, and future earnings projections. On September 20th, the Third Circuit affirmed dismissal, as the funds failed to show defendants knew their actions were improper, that they consciously disregarded that their "tone" was making employees engage in erroneous accounting, or that Hertz's errors were so obvious that only reckless disregard on the individual defendants' part can explain their actions. [In re Hertz Global Holdings Inc.](#)



Industry News

Airbnb Seeks Company Equity for Hosts

On September 21st, Fortune [reported](#) that private travel company Airbnb has requested that the Securities and Exchange Commission ("SEC") allow it to begin issuing equity in its company to its hosts. Private companies are currently only allowed to give shares to investors or employees. According to the [letter](#), Airbnb cited Rule 701 of the Securities Act, which would need to be amended to include a new category of people who would be allowed to own shares in a company called a "gig economy worker."

Financial Services Firms Are Most Affected by Data Breaches

On September 20th, ThinkAdvisor [reported](#) that financial services firms are the most vulnerable to the bad publicity that arises following data breaches. According to a report by eMoney Advisor, financial services firms lack the resources, infrastructure, or experience to protect against cyberattacks.



Winston & Strawn Publications

\$200 Billion in Chinese Imports Subject to Additional Duties

On September 17, 2018, the United States Trade Representative ("USTR") released a list of 5,745 categories of products imported from China that will be subject to additional duties. [Briefing.](#)



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