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SEC EXAMS Risk Alert Regarding Electronic Investment Advice: Implications of Evolving Policies and Practices

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The Staff of the Securities and Exchange Commission's (SEC) Division of Examinations (Division or EXAMS) released a risk alert on November 9, 2021 (Risk Alert) discussing the Staff's observations and findings from the Division's recent electronic investment advice initiative (eIA Initiative), a series of examinations of investment advisers that provide "automated digital investment advisory services to their clients" (often referred to as robo-advisory services).[1] The eIA Initiative focused on helping the SEC obtain a better understanding of the operations of, and services provided by, these firms, as well as on how firms providing electronic investment advice are satisfying their regulatory obligations and fulfilling the fiduciary duties that advisers owe to their clients. The eIA Initiative examined a selection of advisers that provide: (1) robo-advisory services to employee-sponsored retirement plans and/or retail investors; (2) advisory or sub-advisory services to a digital investment platform; and/or (3) digital investment platform access to third-party advisers, broker-dealers, and banks through the sale or licensing of such platform. The eIA Initiative also focused on discretionary robo-advisory services that may implicate Rule 3a-4 under the Investment Company Act of 1940, which provides a non-exclusive safe harbor from being classified as an investment company for certain advisory programs.

While the eIA Initiative and Risk Alert each focus on the practices of advisers offering robo-advisory services, the Risk Alert also draws attention more generally to the "significant increase" in advisers providing electronic investment advice to retail investors through other business models, from more traditional advisory services supplemented by proprietary or third-party software to robo-advisory services offered online or through mobile applications. The Risk Alert also builds on themes that the SEC articulated in its recent request for information relating to digital engagement practices (RFI), which includes a discussion of, and requested comments on, the use of information technology in formulating investment advice and interacting with clients.[2] In the RFI, the SEC discussed issues that it believes could arise if a robo-adviser (1) offers limited or no direct human interaction, (2) places "too much importance" on clients' responses to automated client evaluations (for example, through use of online questionnaires), or (3) does not effectively understand and oversee algorithms and artificial intelligence used to construct client portfolios. For these reasons, the Risk Alert might be of interest to any adviser using or offering electronic investment advice or other information technology in connection with its advisory services.

In this article, we summarize the Staff's observations and assertions in the Risk Alert, provide legal context and analyze their potential implications.

Risk Alert

eIA Initiative Intent and Focus

In the Risk Alert, the Division expressed its intention that the eIA Initiative would provide the Division with a "broad understanding" of advisers providing electronic advice through its examination of a diverse set of advisers (for example, varying bases for registration, business models, investment practices, client types, assets under management) that offer robo-advisory services, sell, license or otherwise grant access to interactive digital platforms (Platforms) to third-party advisers, broker-dealers, and banks and/or that provide advisory or sub-advisory services to such Platforms.

Application of Fiduciary and Other Duties to Electronic Investment Advice

The SEC takes the position that investment advisers are subject to federal fiduciary duties that consist of a duty of care and a duty of loyalty, which, taken together, require an adviser to act in the best interest of its client at all times; the SEC put forward this position in an interpretive release in 2019 (Fiduciary Interpretation).[3] As stated in the Fiduciary Interpretation, the duty of care includes three components: the duty to provide advice that is in the client's best interest (which includes suitability obligations); the duty to seek best execution; and the duty to provide suitable advice and monitoring over the course of the adviser/client relationship. The duty of loyalty requires an adviser to eliminate, or to fully and fairly disclose, conflicts of interest for the purpose of obtaining informed consent.

According to the SEC, in order to provide advice that is in a client's best interest, the adviser must have a reasonable understanding of the client's "investment profile"—the client's financial situation, level of financial sophistication, investment experience, and financial goals. The Fiduciary Interpretation explains how in the SEC's view an adviser can form a reasonable understanding of a client's investment profile by making a reasonable inquiry when advising retail clients. In forming a reasonable belief that advice is in a retail client's best interest, an adviser must consider, in connection with the retail client's investment profile, whether the retail client is willing to tolerate the risks associated with the investments or overall strategy and whether the potential benefits justify the associated risks.

In the Fiduciary Interpretation, the SEC expressly stated that these obligations apply to robo-advisers.[4] However, the Fiduciary Interpretation does not provide specific or actionable guidance to robo-advisers seeking to apply these fiduciary principles to their circumstances. Rather, the SEC cited Staff guidance provided in 2017, which provided suggestions from the Staff of the Division of Investment Management that robo-advisers could consider in: (1) meeting their disclosure obligations; (2) assessing the suitability of their investment advice; and (3) adopting and implementing effective compliance programs (IM Staff Guidance).[5]

The IM Staff Guidance observed that many robo-advisers manage client accounts based primarily, if not solely, on client responses to an online questionnaire. The IM Staff Guidance stated that some questionnaires were "not designed to provide a client with the opportunity to give additional information or context." The Staff also indicated that some robo-advisers may not: (1) follow-up with clients about their responses; (2) address inconsistencies in client responses; or (3) provide assistance to a client filling out a questionnaire. Although the IM Staff Guidance does not take the position that any particular practices would be required to address these issues for a robo-adviser to adequately discharge its fiduciary duties, the IM Staff Guidance suggested that robo-advisers "may wish to consider" whether their questionnaires and practices provide sufficient support for the adviser's suitability determination. The IM Staff Guidance takes the position that in developing

a compliance program that is "reasonably designed to prevent violations" of the Advisers Act, as required by Rule 206(4)-7 under the Advisers Act, a robo-adviser should consider its "reliance on algorithms, the limited, if any, human interaction with clients, and the provision of advisory services over the internet" as sources of risks that should be addressed in the RIA's compliance policies and procedures.

The eIA Initiative examinations followed these themes and included a broad review of the selected firms' adherence to their fiduciary duties to their clients and other compliance matters, with specific consideration of:

- The reasonableness of the adviser's compliance programs;
- Annual testing of the compliance program;
- How advisers formulate investment advice (including whether sufficient information was gathered to form a reasonable belief that the advice was in a client's best interest);
- The adequacy and accuracy of disclosures as to conflicts of interest and "customization;"
- Whether marketing (including performance advertising) complied with Advisers Act Rule 206(4)-1 (Advertising Rule) and, where relevant, whether "securities selection and portfolio management techniques were used when managing client accounts;"
- Advisers' data protection and cybersecurity practices for compliance with Regulation S-P and Regulation S-ID; and
- The respective adviser's eligibility for SEC registration.

Use of Discretionary Investment Advisory Programs

The Risk Alert observes that advisers providing electronic investment advice also can sponsor or operate wrap fee programs, mutual fund or ETF asset allocation programs, and other investment advisory programs designed to provide the "same or substantially similar" portfolio management services to a "large number of" retail clients; as a result, the eIA Initiative included a review of such programs at "more than two dozen advisers." The SEC takes the position that a program where clients' accounts (1) are managed on a discretionary basis in accordance with pre-selected investment objectives, (2) receive the same investment advice, and (3) may hold the same or substantially the same securities in their accounts, could meet the general definition of an investment company under the Investment Company Act of 1940 (1940 Act).[6] In light of this position, many sponsors of and advisers to such programs seek to rely on the safe harbor provided by Rule 3a-4 to avoid their programs potentially being deemed an improperly unregistered investment company.

Rule 3a-4 provides a non-exclusive safe harbor from the definition of "investment company" under the 1940 Act and the registration requirements under Section 5 of the Securities Act of 1933 for programs meeting its terms. Among other provisions, to remain within the safe harbor: (1) each client's account must be managed on the basis of the client's financial situation and investment objectives; (2) the client must receive "individualized investment advice;" (3) clients must have the ability to impose reasonable restrictions on their accounts; (4) clients must be provided with a quarterly account statement; and (5) clients must retain certain "indicia of ownership" of all securities and funds in their respective accounts.[7]

The eIA Initiative reviewed the status of discretionary investment advisory programs recommended by examined firms for compliance with Rule 3a-4 conditions, and "specifically … inquired as to whether the advisers were aware of how these programs were organized and whether they were being operated in accordance with the nonexclusive safe harbor provided by Rule 3a-4."

Staff Observations

The Risk Alert states that "[n]early all of the examined advisers received a deficiency letter" and

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that the most common findings related to: compliance programs; portfolio management; and marketing and performance advertising. The Staff also observed that certain advisers relied on, but were "not acting in accordance with, the Internet [A]dviser exemption and ... Rule 3a-4." In the Risk Alert, the Staff provided further discussion and commentary on the concerns it identified in the eIA Initiative.

Electronic Investment Advice

The Risk Alert focuses on the most common findings from the eIA Initiative, which involve (1) compliance programs (for example, policies, procedures, testing); (2) portfolio management (for example, an adviser's fiduciary duty to provide advice that is in each client's best interest); and (3) marketing/performance advertising (for example, misleading statements, missing or inadequate disclosure).

Compliance programs. The Staff observed that "most advisers" that were examined had what the Risk Alert describes as "inadequate compliance programs" due to insufficiently tailored, unimplemented or untested policies and procedures or a "lack" of written policies and procedures altogether. Most notably, the Staff observed policies and procedures that were not "specific" to an adviser's use of a Platform and/or other digital tools to provide investment advice, including policies and procedures considering (1) whether "algorithms were performing as intended;" (2) whether "asset allocation and/or rebalancing services were occurring as disclosed;" or (3) whether the adviser had direct or indirect access to clients' credentials (for example, pins and passwords) in connection with "data aggregation service(s) [that] allow a client to view third-party financial information" on the adviser's Platform, which could "impair the safety of clients' assets." The Staff also observed that advisers that use business-to-business or "white-label" Platforms did not have policies and procedures to assess the Platform providers' practices in respect of these matters. Additionally, the Risk Alert notes that some advisers did not properly review their policies and procedures annually to assess adequacy and/or effectiveness of implementation. In particular, the Staff found shortcomings here with respect to marketing, performance advertising and custody. Further deficiencies cited related to the Code of Ethics Rule (including failures to obtain required reports or acknowledgements, and codes that did not include all required provisions).

Portfolio management—oversight. The Staff stated that "many" advisers did not test their Platform's investment advice for alignment with the "clients' stated or Platform-determined investment objectives or otherwise satisfying their duty of care." Specifically, the Staff observed advisers that did not have written policies and procedures or whose policies and procedures were insufficient for the adviser to (1) develop a reasonable belief that the investment advice was in each client's best interest based on their objectives and suitable based on their circumstances (for example, questionnaires that relied on only a "few data points to formulate investment advice") and to periodically inquire about changes to the client's circumstances (for example, retaking questionnaires); (2) ensure adequate oversight and supervision of their automated Platforms, which increased the risk of "algorithms producing unintended and inconsistent results" (for example, coding errors, rebalancing errors, trade errors, "coding insufficient to address unforeseen or unusual market conditions"); or (3) meet its duty to seek best execution.

Portfolio management—disclosures and conflicts. The Staff observed that "many" advisers' Forms ADV included what the Risk Alert describes as inaccurate or incomplete (or omitted altogether) disclosures regarding conflicts of interest, advisory fees, investment and trading practices and ownership structure. Specific examples of omitted, inaccurate or incomplete disclosures included occasions where advisers did not disclose (1) an affiliation with or compensation from (for example, for referrals, trade execution) third parties that recommended the adviser or provided execution services for advisory clients; (2) the adviser's collection and use of client information

to formulate a recommended portfolio, or how and when such portfolio is rebalanced; or (3) the adviser's treatment of trade error profits and losses. The Staff also observed advisers that provided what they described as inconsistent disclosure across documents regarding advisory fee calculations. Further, the Risk Alert asserts that "more than half" of examined advisers' advisory agreements, terms and conditions or other documents included hedge clauses or other exculpatory language that could be inconsistent with advisers' fiduciary duties.

Performance advertising and marketing. The Staff identified what it described as advertising-related deficiencies at "more than one-half" of the advisers examined. According to the Risk Alert, these included (1) making misleading or prohibited statements on the adviser's website (for example, "vague or unsubstantiated claims" regarding advisory services provided, investment options available, performance expectations and potential costs); (2) suggesting Securities Investor Protection Corporation (SIPC) protection of client accounts from market declines; (3) using press logos without links or explanations of their relevance; (4) making references to positive third-party commentary without an explanation of its relevance or potential conflicts of interest; (5) using materially misleading performance advertisements (for example, with hypothetical performance of a model not paired with relevant disclosures to make the performance not misleading); and (6) having insufficient disclosure regarding "human" services, rather than electronic investment advice (for example, whether a human was "available, mandatory, or restricted," whether a human financial professional was assigned, relative costs of such advice).

Cybersecurity and protection of client information. The Risk Alert states that "while all of the advisers had business continuity plans, and the vast majority had written policies regarding identifying and recovery from cybersecurity events, fewer … addressed protecting the firm's systems and responding to such events." The Staff also observed advisers that did not fully comply with Regulation S-ID or S-P, because those advisers (1) had "covered accounts" but no written policies and procedures to detect, prevent and mitigate identity theft; (2) did not have policies and procedures that addressed all of the elements of Regulation S-P; and/or (3) did not deliver initial and/or annual privacy notices to all clients as and when required.

Registration matters. The Staff stated that "nearly half" of advisers that relied on the "Internet Adviser" exemption from registration[8] did not satisfy its requirements or were not otherwise eligible for SEC registration because they did not have an interactive website or because they provide advisory personnel who could provide advice to clients.[9]

Discretionary Investment Advisory Programs

The Staff assessed compliance with Rule 3a-4 and, where compliance with this rule was not claimed or observed, whether alternative measures were employed to address the status of the relevant discretionary advisory programs under the 1940 Act. The Staff also assessed whether adequate disclosures were provided and policies and procedures were implemented to satisfy Rule 3a-4 (or any such alternate means of addressing any 1940 Act status questions).

Reliance on the nonexclusive safe harbor provisions of Rule 3a-4. The Staff observed that advisers often were unaware that a discretionary investment program could be an unregistered investment company. The Risk Alert notes that some advisers that recognized the issues claimed reliance on Rule 3a-4, while others did not claim reliance on Rule 3a-4 or employ alternative compliance measures. Additionally, the Staff observed that some advisers claiming reliance on Rule 3a-4 in respect of the programs they operated or sponsored did not comply with all requirements of Rule 3a-4. Noting that many of these advisers had compliance policies and procedures that the Staff viewed as either inadequate or insufficiently implemented (or both), the Risk Alert recommends that advisers sponsoring

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or operating programs relying on Rule 3a-4 should "adopt compliance policies and procedures that are reasonably designed to validate that such programs" operate in a manner consistent with Rule 3a-4's provisions.

Establishing client accounts. The Staff observed that some advisers relied on questionnaires that "included a very limited number of data points, potentially increasing the risk of not providing clients with individualized advice (as is required to rely on Rule 3a-4) or acting in their clients' best interests." The Staff also observed advisers that expressly prohibited clients from imposing what the Staff believed were reasonable investment restrictions or made it difficult to do so. For example, the Staff pointed to cases where clients who sought to impose a restriction were then required to select a different model portfolio or were "warn[ed] of negative consequences" from the restrictions without further explanation; and where advisers did not in the Staff's view adequately disclose that the client could impose reasonable restrictions or provided what Staff believed was inaccurate or insufficient information as to the ability to impose reasonable restrictions. The Staff described these practices as conflicting with Rule 3a-4's requirement to allow clients the ability to impose reasonable restrictions.

Ongoing communications. Advisers relying on Rule 3a-4 are required to conduct certain ongoing communications with program participants. However, the Staff observed that a number of advisers relying on Rule 3a-4 did not: (1) periodically request information to update the client's financial circumstances or investment objectives; (2) determine whether the client wanted to impose new, or modify existing, reasonable restrictions quarterly; or (3) provide clients with sufficient access to advisory personnel with knowledge of the client's account (for example, restricting access to advisory personnel through requiring certain account minimums, failing to offer advisory personnel at all, offering only technical support and general customer service support).

Client rights. The Staff observed advisers that restricted cash or security withdrawals or limited other rights or indicia of ownership with respect to clients' program accounts and assets (for example, to vote or delegate voting of proxies, to proceed directly as a security holder against an issuer without joining any operator or other client of the program, to receive transaction confirmations and other required documents confirming that legal documents were sent to clients), contravening Rule 3a-4's requirement that clients retain these rights and indicia of ownership to the same extent as if the clients held those assets outside of the program.

Staff Recommendations for Improving Compliance

As the Risk Alert acknowledges, the eIA Initiative reviewed a variety of advisers and observed a "wide range of compliance practices;" as such, the Staff noted that "not all of the [noted] practices" are "universally applicable." Nonetheless, the Staff provided some observations that it believes "may assist advisers in developing and maintaining [an] adequate and effective" compliance program, based on practices it observed as being effective, including:

Tailored and effectively implemented compliance programs. The Staff observed that advisers with "adequate and effective" compliance programs, where practices were consistent with their procedures, "were not cited for deficiencies related to: (1) portfolio management; (2) custody; and (3) books and records. Such advisers also rarely had deficiencies related to marketing, performance advertising, or billing practices." In contrast, the Staff observed that when it identified an adviser with deficiencies in its compliance programs, the adviser "often had multiple deficiencies across more than one [of these] categor[ies]."

Routine testing of algorithms to ensure they are operating as intended. The Staff recognized advisers

that performed algorithm-related testing at least quarterly, noting that it had observed certain commonly employed practices, including: testing performed by algorithm designers/software developers that included additional teams (for example, portfolio management, compliance either working independently or relying on other groups, internal audit, information technology); exception reporting or other reporting mechanisms that combined "high-level and account-specific results" that "often" were reviewed by algorithm designers/software developers; and compliance issues where "many" firms also included reviews by portfolio management or information technology.

Safeguarding algorithms. The Staff found that "most" advisers sought to prevent unauthorized algorithm changes by limiting access to relevant code to certain personnel and providing advance notice to compliance Staff of "substantive algorithm changes or overrides." While advisers using "white label" Platforms generally could not modify underlying code, many reported that the Platform providers furnished notice to advisers of any changes.

Implications for Investment Advisers

The Risk Alert and the eIA Initiative are the latest in a series of SEC efforts to better understand, and adapt the Advisers Act regulatory regime to, electronic investment advice. The Risk Alert shows not only that the SEC's focus on certain areas of compliance (for example, performance presentation, disclosure of conflicts of interest, cybersecurity) is broadly based and perennial, but that electronic investment advice presents distinct challenges to the SEC and the regulatory framework. The Staff's response to these challenges demonstrates a preference to apply the same detailed fiduciary guidance commonly applied to more traditional advisory services. However, it is becoming clearer that the SEC is finding what many electronic investment advisers already know: a regulatory framework that focuses on the human characteristic of trustworthiness (which is central to acting as a fiduciary) cannot always be easily and directly applied to algorithm- and machine-learning-based services, such as those offered by robo-advisers. The greatest strengths of automated investment services (mainly their scalability, replicability and consistency in application) have tended to be treated in the existing regulatory scheme as failures to provide sufficiently individualized treatment, which the SEC and its Staff view as contrary to an adviser's fiduciary duty to provide suitable investment advice.

Specifically, the SEC conceptualizes suitability as a duty to provide individually tailored advice to each client, based on the client's investment profile. Robo-advisers generally seek to meet this obligation by gathering investment profile information through the use of online questionnaires. In addition, some robo-advisers use data analytics based on other data gathered relating to the client to form the client's investment profile. However, one observed effect of the IM Staff Guidance, the Risk Alert and the eIA Initiative has been to apply pressure to make these questionnaires longer, more detailed and more interactive, and more generally to implement policies and procedures designed to assure that each client's best interest was being served, with the apparent model being human interaction. However, a rigid application of this framework is in tension with the strengths of automated investment services (that is, scalability, replicability and consistency). There is a balance to be struck regarding the degree of detailed personal information that is necessary to bring the benefits of automation to bear in an individualized context. Each robo-adviser will generally be in the best position to understand this balance in light of the nature of the services it provides. If the EXAMs Staff presses too hard towards a human component (or replication of human interaction), it risks disrupting this balance.

Similarly, the EXAMS Staff appears in many cases to strictly apply Rule 3a-4 and its conditions, without proper consideration of the evolution of the industry. Although the Rule's preamble states that it is a non-exclusive safe harbor, the EXAMS Staff's close and sometimes skeptical scrutiny of accounts

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in effect places practical pressure on robo-advisers to comply strictly with the rule's conditions. This pressure can have counterproductive effects. For example, the reasonable restriction requirement is difficult for many robo-advisers to implement, since it impedes the purpose and strengths of the robo-advisory model, namely scalability, replicability and consistency. The Risk Alert has compounded this difficulty, by implying that it is not a reasonable restriction for a robo-adviser to require a client to select a different model portfolio where the client's requested restriction would impose material additional programming and managerial costs on the model portfolio program or would otherwise impede the scalability of the program.

It should be considered reasonable to treat Rule 3a-4 as the *non-exclusive* safe harbor that the SEC stated it to be: compliance with the conditions of the rule that remain relevant in the context of electronic investment advice, plus compliance in spirit if not in letter with other conditions (in particular, "reasonable restrictions"), should still be sufficient to establish that a robo-adviser's program is not a virtual investment company. More fundamentally, the SEC can and should eliminate the reasonable restriction requirement from Rule 3a-4 for all programs. Requiring an adviser or sponsor to accept restrictions is not necessary to provide sufficiently individualized treatment, and it is unwarranted to apply the full panoply of 1940 Act regulation to separate accounts that are managed similarly when each is suitable for the relevant program participant and each participant retains the indicia of individual ownership of the assets in its account.

It is reasonable for the SEC and its Staff to expect that investment advisers, as fiduciaries, have reasonable processes and practices to avoid errors in investment-related code and systems. But, treating an electronic investment adviser's coding processes, testing and quality controls as compliance procedures, when human advisers' comparable practices are generally considered to be part of the investment process and supervision rather than compliance functions creates an unintended and undesirable double standard. These processes, for advisers who use electronic investment advice to service clients, are better understood, like their human analogs, as governance and supervisory processes, and are better overseen and tested through a separate compliance program. Compounding this issue, in treating these processes as part of, rather than as subject to, the compliance function, the SEC and front-line compliance professionals face the same practical difficulty: how to effectively design, implement, monitor and test highly technical, code-based systems within the scope of a regulatory compliance program adopted under rules that were conceived in the context of traditional, human-based services. Respecting the distinction between coding and compliance will empower compliance professionals by centering their roles on their core areas of technical skill and authority.

The Risk Alert shows many signs that the SEC and its Staff are developing an appreciation for these issues. However, some of the Staff's expectations (for example, assessing whether electronic advisory programs are meeting clients' best interests as part of the compliance function) treat investment functions as compliance matters, and they assume a degree of coordination among compliance, investment management and software development personnel that is not yet practicable, Moreover, they might be too rigid and inflexible to conform to the diversity of the different types of advisers and advisory models.

The Staff's statements in the Risk Alert and IM Staff Guidance are unlikely to be the final words on these topics. Continued development of technology and industry practices, and engagement between the industry and the Staff, necessarily will lead the SEC's and Staff's views to evolve. For now, the Risk Alert is a valuable indication of the SEC's and the Staff's current views and direction in applying the Advisers Act regulatory framework to electronic investment advice. Thus, robo-advisers and other firms that employ electronic investment advisory techniques

may find it useful to study the Risk Alert and future statements from the SEC and Staff, both to learn whether these firms' practices, disclosures and policies and procedures are consistent with the Staff's statements and to get a potential sense of where practices may lead.

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NOTES

1 SEC Division of Examinations, Risk Alert, Observations From Examinations of Advisers that Provide Electronic Investment Advice at *https://www.sec.gov/exams/announcement/risk-alert-electronic-investment-advice* (Nov. 9, 2021). The Division of Examinations was formerly known as the Office of Compliance Inspections and Examinations (OCIE). At times, this article tracks language in the Risk Alert without the use of quotation marks.

2 Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; *Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice* at *https://www.sec.gov/rules/other/2021/34-92766.pdf*, SEC Rel. Nos. 34-92766, IA-5833 (Aug. 27, 2021); SEC Press Release, SEC Requests Information and Comment on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology at *https://www.sec.gov/news/press-release/2021-167* (Aug. 27, 2021). The SEC also explored related issues at a meeting of the Evolution of Investment Adviser subcommittee of the Asset Management Advisory Committee on July 7, 2021. *See* SEC Webcasts, SEC Asset Management Advisory Committee Meeting at *https://www.sec.gov/video/webcast-archive-player.shtml?document_id=070721-amac-meeting-part1*.

3 *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers* at *https://www.sec.gov/rules/interp/2019/ia-5248.pdf*, SEC Rel. No. IA-5248 (June 5, 2019).

4 *Id* at n.27.

5 Division of Investment Management, Robo Advisers at *https://www.sec.gov/investment/im-guidance2017-02.pdf*, IM Guidance Update No. 2017-02 (Feb. 2017).

6 *See, e.g., Status of Investment Advisory Programs Under the Investment Company Act of 1940*, SEC Rel. Nos. IC-22579, IA 1623 (Mar. 24, 1997) at 4-7.

7 Advisers Act Rule 3a-4 (Status of Advisory Programs). For more information on the Rule 3a-4's safe harbor, *see Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice* at *https://www.sec.gov/rules/other/2021/34-92766.pdf*, SEC Rel. Nos. 34-92766; IA-5833 (Aug. 27, 2021).

8 An Internet Adviser is eligible for registration because the entity: provides investment advice to all clients through an interactive website (*i.e.*, "a website in which computer software-based models or applications provide investment advice based on personal information each client submits through the website") and to fewer than 15 clients through other means during the prior 12 months; maintains a record demonstrating that investment advice is provided exclusively through an interactive website in accordance with these limits; and does not control, is not controlled by, and is not under common control with, another investment adviser that is SEC-registered solely in reliance on the adviser registered under this exemption. Advisers Act Rule 203A-2(e).

9 In other cases, the Staff found that an adviser's affiliates were improperly unregistered because the

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affiliate was operationally integrated with the registered adviser, and therefore ineligible to rely on a registration exemption or, in other cases, the affiliate was improperly registered due to its reliance on the Internet Adviser's registration as a basis for its own registration, which is not permissible.

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