



Office of the Investor Advocate

OFFICE OF THE INVESTOR ADVOCATE

REPORT ON ACTIVITIES

FISCAL YEAR 2020

Section 4(g)(6) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78d(g)(6), requires the Investor Advocate to file two reports per year with the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.¹ A Report on Objectives is due no later than June 30 of each year, and its purpose is to set forth the objectives of the Investor Advocate for the following fiscal year.² On June 27, 2019, the Office of the Investor Advocate (Office) filed a Report on Objectives for Fiscal Year 2020.³

In addition to the Report on Objectives, a Report on Activities is due no later than December 31 of each year.⁴ The Report on Activities describes the activities of the Investor Advocate during the immediately preceding fiscal year. As required, this Report on Activities includes information on steps the Investor Advocate has taken during Fiscal Year 2020 to improve the responsiveness of the Securities and Exchange Commission (Commission or SEC) and self-regulatory organizations (SROs) to investor concerns; a summary of the most serious problems encountered by investors during the reporting period; identification of Commission or SRO action taken to address those problems; and recommendations for administrative and legislative actions to resolve problems encountered by investors.⁵

| Functions of the Investor Advocate | Reporting Obligation |
|---|---|
| <p>According to Exchange Act Section 4(g)(4), 15 U.S.C. § 78d(g)(4), the Investor Advocate shall:</p> <ul style="list-style-type: none"> (A) assist retail investors in resolving significant problems such investors may have with the Commission or with SROs; (B) identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of SROs; (C) identify problems that investors have with financial service providers and investment products; (D) analyze the potential impact on investors of proposed regulations of the Commission and rules of SROs; and (E) to the extent practicable, propose to the Commission changes in the regulations or orders of the Commission and to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified and to promote the interests of investors. | <p>According to Exchange Act Section 4(g)(6)(B), 15 U.S.C. § 78d(g)(6)(B), the Investor Advocate shall submit to Congress, not later than December 31 of each year, a report on the activities of the Investor Advocate during the immediately preceding fiscal year. This “Report on Activities” must include the following:</p> <ul style="list-style-type: none"> (I) appropriate statistical information and full and substantive analysis; (II) information on steps that the Investor Advocate has taken during the reporting period to improve investor services and the responsiveness of the Commission and SROs to investor concerns; (III) a summary of the most serious problems encountered by investors during the reporting period; (IV) an inventory of the items described in subclause (III) that includes: <ul style="list-style-type: none"> (aa) identification of any action taken by the Commission or the SRO and the result of such action; (bb) the length of time that each item has remained on such inventory; and (cc) for items on which no action has been taken, the reasons for inaction, and an identification of any official who is responsible for such action; (V) recommendations for such administrative and legislative actions as may be appropriate to resolve problems encountered by investors; and (VI) any other information, as determined appropriate by the Investor Advocate. |

Disclaimer: Pursuant to Exchange Act Section 4(g)(6)(B)(iii), 15 U.S.C. § 78d(g)(6)(B)(iii), this Report on Activities is provided directly to Congress without any prior review or comment from the Commission, any Commissioner, any other officer or employee of the Commission outside of the Office of the Investor Advocate or the Office of Management and Budget. This Report on Activities expresses solely the views of the Investor Advocate. It does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for this Report on Activities and all analyses, findings, and conclusions contained herein.

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MESSAGE FROM THE INVESTOR ADVOCATE

Fiscal Year 2020 was a challenging time for the Office of the Investor Advocate.

Like the other offices and divisions of the Securities and Exchange Commission, the COVID-19 pandemic necessitated changes to our work environment, with team members working remotely through much of the fiscal year. The pandemic also affected our workload. For example, we organized and hosted two ad hoc virtual meetings of the Investor Advisory Committee (IAC) so that its members could provide timely, on-the-ground feedback to the Commission regarding the impacts of COVID-19 on businesses and financial markets.

We commend the Commission for its response to the challenges of the pandemic. Staff and leadership of the Commission reacted quickly to changing dynamics, and they demonstrated remarkable commitment and flexibility. This alleviated many of the strains in the financial system that could have had devastating consequences for investors.

On the other hand, the rulemaking agenda of the SEC was often disappointing for investor advocates this year. As described in this report, the Commission engaged in numerous rulemakings of a deregulatory nature. While these typically

were characterized as efforts to “modernize” or “streamline” regulations, they often had the effect of diminishing investor protections. Meanwhile, several modernizations sought by investors were not addressed. For example, the Commission did not prioritize repairs to the antiquated infrastructure of the proxy voting system, bypassed opportunities to make disclosures machine-readable, and failed to establish a coherent framework for the disclosure of environmental, social, and governance (ESG) matters that could influence a company’s long-term performance.



Remarkably, the Commission also selectively abandoned its deregulatory posture by erecting higher barriers for shareholders’ exercise of independent oversight over the management of public companies. Individual investors will now find it more difficult, if not impossible, to put forward a proposal for consideration by other shareholders. In addition, institutional investors

such as pension funds will now be subject to potential interference by management regarding the advice those investors pay to receive from proxy advisory firms. While these rulemakings purport to be beneficial for investors, the record reflects that the vast majority of investors opposed them.

In this report, we make recommendations for the reversal of what are, in our view, the most troubling recent actions of the Commission: the shareholder proposal rule, the proxy advisory firm rules, a rulemaking to “harmonize” various Securities Act registration exemptions, and a rulemaking related to inverse and leveraged exchange traded funds. We also identify some near-term priorities that require legislative action or Commission rulemaking, including a framework for ESG disclosure standards, minimum listing standards for stock exchanges, and making disclosures machine-readable. In addition, we recommend legislative actions that would enhance the operational effectiveness of the Office of the Investor Advocate, including important steps to

protect the integrity and independence of our research, and we encourage the implementation of grant programs to provide funding for efforts to protect investors.

In addition to our advocacy on policy matters, this report provides an overview of the important work carried out by SEC Ombudsman Tracey McNeil and her team. It also provides a glimpse into the work of our research team and our vision to serve as a contributor to data-driven policymaking. With very limited resources, these teams continue to manage an ever-increasing workload with passion and commitment to investors.

It has been an honor to lead an office of dedicated investor advocates for another year. I look forward to working with Congress and the leadership of the Commission in the coming days to promote an agenda that benefits investors who continue to save and invest for the future.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rick Fleming". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Rick A. Fleming
Investor Advocate

RECOMMENDATIONS FOR ADMINISTRATIVE AND LEGISLATIVE ACTIONS

Exchange Act Section 4(g)(6)(B)⁶ requires our Reports on Activities to contain “recommendations for such administrative and legislative actions as may be appropriate to resolve problems encountered by investors.” We respectfully present the following recommendations for your consideration, organized into three categories: (1) recent Commission rulemakings that, in our opinion, should be overturned under the Congressional Review Act⁷ or reversed by new leadership of the Commission; (2) new priorities that require legislative action or Commission rulemaking; and (3) legislative actions that would enhance the operations and responsibilities of the Office of the Investor Advocate.

WHAT SHOULD BE OVERTURNED OR REVERSED

Amendments to Exchange Act Rule 14a-8 Concerning Shareholder Proposals

On September 23, 2020, the Commission adopted amendments to Exchange Act Rule 14a-8 to make it easier for public companies to exclude shareholder proposals from corporate proxy statements.⁸ The Commission accomplished this by: (1) raising the ownership thresholds that an investor must meet to submit a proposal for a vote by fellow shareholders; (2) requiring additional documentation to be provided when a proposal is submitted on an investor’s behalf; (3) requiring

investors to identify specific dates and times they can meet with management in person or via teleconference to engage on the proposal; and (4) providing that a person may submit no more than one proposal, directly or indirectly, for the same shareholders’ meeting. Moreover, amendments to the resubmission thresholds raised the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company’s future shareholders’ meetings.

We opposed this rulemaking because the new ownership thresholds significantly diminish the ability of shareholders with smaller investments to submit proposals. The comment file is replete with evidence demonstrating that shareholders with smaller investments have played an important role in the shareholder-proposal process, including by submitting proposals that have garnered broad shareholder support.⁹

Beyond our disagreement with these policy choices of the Commission, we believe the economic analysis in this rulemaking was fundamentally flawed. For example, the Commission sought to raise the ownership thresholds to account for inflation since the thresholds were last adjusted in 1998, even though the number of shareholder proposals had trended downward over the years despite the effects of inflation.¹⁰ The Commission also ascribed little value to shareholder proposals

that failed to receive a majority vote at a shareholder meeting, even though commenters provided numerous examples of shareholder proposals that led to constructive governance reforms before receiving a formal majority vote.¹¹

Most troubling, in our view, is the Commission’s avoidance of the most important and obvious question in the economic analysis of a rulemaking that changed eligibility thresholds: specifically, how many shareholders that were eligible under the prior rules would become ineligible under the amended rules. Astonishingly, instead of answering this question, the Commission limited its analysis to the effect of the amendments on the “pool of shareholders that has demonstrated an interest in submitting shareholder proposals generally,” which included only those individuals and entities that actually submitted shareholder proposals in 2018.¹² This approach ignored the objections of commenters who asserted that the Commission should take into account all shareholders who lose eligibility to submit a shareholder proposal, because a right has value even if not exercised.¹³ Meanwhile, the Commission went in the opposite direction for purposes of counting the number of companies that would benefit from having fewer proposals submitted to them. For this purpose, the Commission counted all companies that could potentially have received a proposal in 2018, as opposed to just the ones that actually received a proposal.¹⁴

The Commission has long possessed data to estimate the full number of investors who would lose eligibility to submit shareholder proposals. According to a staff analysis of the data performed early on in the rulemaking process, economists within the Division of Economic and Risk Analysis (DERA) estimated that somewhere between half to three-quarters of the retail investor accounts that

were eligible under the then-existing thresholds would lose eligibility to submit shareholder proposals under the revised thresholds.¹⁵ However, the staff analysis was withheld from public view until August 14, 2020, a mere 40 days before the Commission voted to adopt the amendments, when the analysis was placed in the public comment file. This was six months after the deadline for public comments had expired, so commenters had little reason to re-examine the public comment file for additional data being relied upon by the Commission. Notably, the SEC—an agency that prides itself on its commitment to transparency—issued no press release, no official statement, nor so much as a tweet to draw the public’s attention to this new information.

For our part, the Office of the Investor Advocate sought access to the staff analysis on October 31, 2019. Our Office is charged with analyzing the potential impact on investors of rulemaking proposals and making recommendations to the Commission regarding those proposals. Exchange Act Section 4(g)(5) directs the Commission to ensure that the Investor Advocate has “full access” to the documents of the Commission as necessary to carry out the functions of the Office. Pursuant to this authority, we repeatedly requested copies of DERA’s written analysis to no avail, until the Commission quietly submitted the analysis into the public comment file more than nine months later.

In sum, we believe this particular rulemaking was adopted in contravention of the Commission’s internal policies for full and objective economic analysis, Exchange Act Section 4(g)(5), and, at the very least, the spirit of the Administrative Procedure Act. In our view, investors should not have to bear the expense of litigation to overturn such a flawed rulemaking.

Amendments to the Exchange Act Rules Concerning Proxy Advisory Firms

On July 22, 2020, the Commission amended the proxy rules in a way that requires proxy advisory firms, which are third-party vendors hired by institutional investors for advice and assistance in voting, to act as a conduit for company management to rebut the advice given.¹⁶ The rulemaking had three principal components. First, the Commission specified in the definition of “solicitation” that proxy voting advice constitutes a solicitation, which means that proxy advisory firms must meet exemptions from the information and filing requirements of the proxy rules in order to continue conducting business. Second, the Commission required proxy advisory firms, as a condition of the exemptions, to (i) provide enhanced disclosures regarding conflicts of interest; (ii) establish a mechanism by which a company that is the subject of advice may view the advice at or prior to the time when the proxy advisory firm disseminates the advice to its client; and (iii) establish a mechanism by which a client can reasonably be expected to become aware of a company’s additional soliciting material responding to the advice, before voting or before it is too late to change votes. Finally, the Commission amended the proxy rules’ antifraud provision to provide that a proxy advisory firm’s failure to disclose material information about its methodology, sources of information, or conflicts of interest, depending upon the particular facts and circumstances, could be considered misleading within the meaning of the rule. The Commission also supplemented prior guidance concerning how investment advisers should exercise voting authority on behalf of clients in light of the proxy voting advice rulemaking.¹⁷

In our view, there are several troublesome aspects of this rulemaking. For example, the Commission’s justification for the feedback mechanism initially was predicated on the corporate registrant community’s purported allegations of widespread factual errors in proxy advisory firms’ work.¹⁸ The Commission retreated from this rationale in the adopting release, seeking instead to reframe findings in terms of system design—the ability to share and respond to information, and the ability of participants to engage with one another.¹⁹ But implicit in this framing, still, was the finding that the existing system lacked “reliability and completeness,” which rested on acceptance at face value of the claims of select market participants that proxy voting advice historically had not been transparent, accurate, and complete.²⁰ The Commission did not evaluate the substance of these claims or distinguish biased opinion from fact, and these claims remain unsupported by empirical evidence.

Corporate governance is at times inherently contentious because shareholders may seek reforms that are opposed by management. Although dialogue and information sharing amongst participants are an important part of corporate governance, those with competing views may never see eye-to-eye. We believe investors should be free to seek the services of a third party to provide independent, objective advice about voting their shares, and investors should not be forced to pay for feedback mechanisms that subject them to further lobbying by corporate management. This is especially important in light of the compressed timeframe for proxy voting during the busy annual meeting season. We worry that the newly mandated feedback mechanism enables undue interference in the voting process and will likely result in the suppression of dissenting views.²¹

As with the Rule 14a-8 rulemaking described above, we believe the proxy advisor rulemaking suffers from an inadequate economic analysis. Earlier this year, the Investor Advisory Committee found that both rulemaking proposals were inconsistent with published staff guidance on economic analyses in SEC rulemakings and recommended that the Commission revise and republish them for further comment.²² The Commission chose not to do so. In the adopting release for the proxy advisor rulemaking, the Commission stated that it “expects the rule to generate benefits compared to the baseline for clients of proxy voting advice businesses and investors, and, albeit to a lesser extent, for proxy voting advice businesses and registrants.”²³ This assertion, however, was at odds with the overwhelming opposition from the first three groups, as reflected in the comment file.

Ironically, the rulemaking subjects the provision of voting advice to greater regulatory scrutiny than the provision of investment advice. Therein lies a paradox. Investment professionals have significant discretion when it comes to making recommendations to buy or sell securities, particularly when the client is an institutional investor. There is no requirement of “completeness” with respect to the information that investment advisers must give to clients when making such a recommendation. Nor is there any requirement that investment advisers give the company issuing a security an opportunity to review the recommendation. We fail to see the justification for such disparate treatment of voting advice.

For these reasons, we recommend that Congress or new leadership of the Commission review this rulemaking and reverse course.

Amendments to the Securities Act Registration Exemptions

On November 2, 2020, the Commission adopted amendments to several Securities Act registration exemptions.²⁴ The amendments included:

- Addressing, in one broadly applicable new rule, the ability of issuers to move from one exemption to another, as well as to a registered offering;
- Raising offering limits for Regulation A, Regulation Crowdfunding, and Regulation D Rule 504 offerings, and raising individual investment limits;
- Relaxing restrictions on general solicitation; and
- Adjusting certain disclosure and eligibility requirements and bad actor disqualification provisions in order to reduce differences between exemptions.

In general, we are concerned with the continued shift of capital-raising from public markets to private markets.²⁵ A central underpinning of the Securities Act of 1933 is the idea that a company must register its shares with the Commission and provide robust disclosures if it wishes to sell its securities to the general public. This concept has contributed to the development of a marketplace in which small investors occupy a more equal footing vis-à-vis large investors in terms of access to information that is important for making investment decisions. However, over the past several decades, this central tenet of securities regulation has eroded as Congress and the Commission created ever-expanding exemptions that allow companies to raise increasing amounts of capital with less and less public disclosure. As a practical matter, a company can now raise as much money as it wants from as many people as it wants for as long as it wants, without ever having to go through the registration process.²⁶

We view the “harmonization” rulemaking, as described above, as a further step toward making registration entirely voluntary. We are particularly concerned about the aspect of the rulemaking that nearly eviscerates the integration doctrine,²⁷ which has traditionally deemed offerings close in time to be a single offering for purposes of eligibility for the offering exemptions. Previously, most offerings had to be separated by at least six months, but that period has been truncated in the new rule to 30 days. As a practical matter, if an issuer uses a combination or series of exempt offerings, it will now be very difficult for investors (or enforcement staff) to determine whether an offering was conducted in compliance with a particular exemption.²⁸

We also believe the Commission failed to provide a balanced analysis of the potential ramifications for investors who are being given greater access to private offerings. To its credit, the Commission acknowledged the heightened potential for fraud when offerings are unregistered. However, the Commission relied heavily upon an assumption that access to a wider range of offerings—including private offerings—will make investors better off.²⁹ In our view, the Commission devoted inadequate consideration to countervailing concerns, particularly with respect to individual investors of limited means. For example, such an investor may have less access to information about the company than other market participants, the investment may be illiquid and difficult to resell at the desired time or price, and the investor may have difficulty diversifying a portfolio in a way that optimizes the investor’s chance of success in the higher-risk exempt markets.

While we generally agree that the registration exemptions are disjointed and ought to be harmonized in some respects, we believe this effort

should reflect a more nuanced understanding of investors who may be offered the opportunity to participate in exempt offerings, as well as the companies that tend to utilize the offering exemptions. Toward that end, we agree with commenters who argue that the Commission lacks important data that it should collect before broadening the exemptions further.³⁰ For instance, the Commission should require issuers and securities intermediaries to provide greater information about their use of transaction exemptions by amending Form D and conditioning the availability of the Regulation D safe harbor on compliance with the Form D notice filing requirement. With the information collected and insight gained, the Commission could make recommendations to Congress on the thresholds for mandatory registration under the Exchange Act and whether those thresholds ought to be revisited in light of the shift in capital-raising to exempt markets.

Amendments to Investment Company Act Rules Concerning the Use of Derivatives

A divided Commission adopted a long-awaited Derivatives Rule on October 28, 2020, with Commissioners Allison Lee and Caroline Crenshaw voicing forceful dissents.³¹ The rule ostensibly is designed to “provide a modernized, comprehensive approach to the regulation of [most registered funds’] derivatives use that addresses investor protection concerns,”³² but critical investor protection provisions contained in the proposed version of the rule were stripped away prior to adoption.

The proposed version of the Derivatives Rule, which advanced after a unanimous (5-0) Commission vote in 2019, generally would have required mutual funds (other than money market funds), exchange-traded funds (ETFs), registered

closed-end funds, and business development companies (collectively, funds) engaging in derivatives transactions to comply with an outer limit on fund leverage based on value at risk (VaR).³³ The Proposed Derivatives Rule fixed that outer limit at 150% of the VaR of a designated unleveraged reference index reflecting the markets or asset classes in which the fund invests.³⁴ The 150% figure was based on a consideration of the extent to which a fund could borrow cash in compliance with existing securities law.³⁵ Moreover, to help prevent a fund's adviser from manipulating a reference index's components, the Proposed Derivatives Rule required that the index not be administered by, nor be created at the request of, a fund or its investment adviser.³⁶

Notably, while exempting leveraged and/or inverse investment vehicles from the 150% VaR test, the Proposed Derivatives Rule would have required broker-dealers and investment advisers to exercise due diligence before approving retail investor accounts to invest in such products.³⁷ Leveraged/inverse investment vehicles are complex financial products that typically seek to provide investment returns corresponding to 200% or 300% of the performance of a market index (or to provide investment returns that have an inverse relationship to the performance of a market index) over a single-day investment horizon.³⁸ The Commission has long acknowledged the unique investor protection concerns that leveraged/inverse investment vehicles present.³⁹ Numerous enforcement cases at the Commission and FINRA have shown that investment professionals themselves often lack a basic understanding of these complex products,⁴⁰ and media outlets have documented the confusion and harm these products cause.⁴¹ We further describe these concerns in the section below entitled "Problematic Investment Products and Practices."

In a reversal from the Proposed Derivatives Rule, the final Derivatives Rule adopted by the Commission increases the VaR test threshold applicable to most funds from 150% to 200%.⁴² The final Derivatives Rule also continues to exempt funds that currently utilize 300% leverage (or 300% inverse leverage) from any VaR test threshold at all.⁴³ In her dissent, Commissioner Lee argued that "[r]isk limits designed to place sensible boundaries around speculative investing have now been converted to outer bounds calibrated specifically to ensure that they will have no impact on funds' existing practices."⁴⁴ Moreover, instead of a designated reference index, the adopted Derivatives Rule now permits a fund to compare its risk to its own securities portfolio for purposes of the VaR test.⁴⁵ Thus, as observed by Commissioner Lee, "a fund can simply change its own derivative risk limits by making changes in its non-derivatives portfolio."⁴⁶ Finally, unlike the Proposed Derivatives Rule, the final Derivatives Rule does not require broker-dealers and investment advisers to exercise due diligence before approving retail investor accounts to invest in leveraged/inverse investment vehicles.⁴⁷

We recognize the hard work the Commission and its staff dedicated to the Derivatives Rule, and we believe that many aspects of the rule help modernize the regulation of funds' use of derivatives. Nonetheless, we are deeply concerned that investor protection measures were significantly weakened—and in certain instances, entirely removed—from the rule as it progressed from proposal to adoption. We respectfully recommend rescinding the Derivatives Rule, which the Commission adopted along strict partisan lines. We also recommend that the unanimously-approved Proposed Derivatives Rule be reconsidered as a framework that modernizes the regulation of derivatives while providing sensible protections for Main Street investors.

NEW PRIORITIES THAT SHOULD BE PURSUED

ESG Disclosure Standards

In making decisions to buy or sell securities, or to vote as a shareholder, many investors take into consideration information regarding what is known as “ESG”—environmental, social, and governance factors that may affect the long-term success of a company. For many years, investors large and small have called upon the Commission to require public companies to disclose more information about these matters. For example, in 2018 the Commission received a rulemaking petition signed by a number of institutional investors and securities law professors.⁴⁸ Earlier this year, the Investor Advisory Committee recommended that the Commission begin in earnest an effort to update public company reporting requirements because investors need ESG-related information. The IAC noted that private-sector voluntary reporting initiatives are inefficient and inadequate, and that the U.S. appears to be falling out of step with capital markets trends in the European Union and elsewhere, where the Commission’s counterparts are setting new disclosure standards in response to investor demand.⁴⁹

Some view the Commission’s principles-based disclosure requirements as adequate to serve investors’ needs because they require the disclosure of “material” information—*i.e.*, information that a reasonable investor would consider important in making an investment or voting decision. But, we agree with the many investors who assert that the principles-based disclosure requirements have failed to deliver important, decision-useful information. The information provided by companies tends to vary in quality, and it is not presented in a standard format that enables comparisons between companies.⁵⁰

We are also concerned with “greenwashing,” the practice of making misleading claims regarding companies’ or funds’ ESG credentials in order to draw the interest of investors who place value in ESG matters. Greenwashing is likely to grow increasingly problematic as companies and funds viewed as ESG-friendly continue to attract assets at an accelerating pace. If not curtailed, the proliferation of greenwashing may cause investors to question the bona fides of the ESG sector as a whole.

In our view, the lack of substantive disclosure standards contributes to the practice of greenwashing because general, principles-based disclosures make it difficult to determine whether a company or fund is following its stated objectives. In the absence of specific and comparable disclosures, even experienced investors and large financial institutions may struggle to discern meaningful differences in the practices of companies and funds.

To address these issues, Commissioners Lee and Crenshaw have proposed the creation of a special ESG advisory committee to make recommendations to the Commission, as well as an internal SEC task force to consider and implement policies in this area. We believe this is a sensible course because the move toward a comprehensive ESG disclosure framework will be a challenging project involving numerous complex issues. While Congressional authorization may not be necessary for this approach, we nonetheless would welcome legislative and budgetary support for the initiative.

Minimum Listing Standards for Exchanges

Exchange listing requirements impose, among other things, threshold standards for the corporate governance structure of issuers that want their shares trading in the U.S. public markets. These

qualitative listing standards seek to ensure that public companies have an adequate corporate governance structure, including a fair proxy voting process, and generally protect the interests of shareholders.

The Commission has an oversight function and reviews whether exchanges' proposed amendments to their listing standards are consistent with the Exchange Act. Courts have noted, however, that corporate governance remains largely the province of state law. While the Commission has statutory authority to further the Exchange Act's underlying disclosure objectives around the proxy voting process, only the exchanges themselves have broader authority to regulate other substantive aspects of corporate governance for their listed issuers. On this point, the D.C. Circuit Court of Appeals once held that the Commission lacks statutory authority to address the use of dual-class shares by publicly listed companies through its own rulemaking, as Congress did not contemplate federal regulation of corporate governance when it passed the Exchange Act in 1934.⁵¹ The court noted, however, that the self-regulating exchanges could adopt rules governing this area of corporate governance for issuers seeking to list on the exchanges.

Market developments since that ruling suggest it is time to revisit this allocation of responsibility. The primary listing exchanges are now for-profit entities that, unlike their prior mutual ownership structure, have an inherent conflict of interest between protecting investors and generating business revenue from listed issuer fees. Our Office has long been concerned about an apparent race-to-the-bottom in this area—with the primary listing exchanges

proposing to voluntarily lower their qualitative corporate governance standards in an effort to attract issuers, but at the expense of the protections the original standards provided investors.

If these for-profit businesses are to be entrusted with regulatory responsibility for corporate governance standards, it would make sense for Congress to set, by statute, certain minimum standards to guarantee investor protections. As an alternative, Congress should give the Commission clear statutory authority to set minimum listing standards that apply to all exchanges.

Congress has just taken an action of this nature with passage of the Holding Foreign Companies Accountable Act, S. 945 (116).⁵² This Act requires the Commission to prohibit the listing of securities for companies whose auditors, or accounting firms engaged to assist the audit, are located in jurisdictions that limit the PCAOB's ability to inspect the auditors. We were pleased with the adoption of this legislation, which addressed a significant risk to U.S. investors, and we encourage Congress to consider other threats to investor protection that have arisen because of weak qualitative listing standards.

In our view, the minimum listing standards should also include the following requirements:

1. If a company chooses to issue multiple classes of stock with differing voting rights, then the dual-class stock must contain a "sunset" provision. While we prefer the principle behind "one share, one vote" for the long-term protection of investors, some companies express reluctance to go public when the founding

management team may still be executing a long-term strategy that may not appear profitable in the short term. As a compromise to allow retail investors access to these companies at an earlier stage, a sunset provision would provide a visionary founder a reasonable length of time to execute his or her initial vision as a public company, while ensuring that a disciplined governance mechanism provides long-term protection to investors.⁵³

2. To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company's current board, as well as its policies designed to promote diversity in board composition going forward. Thus, to be listed on a national exchange, a company should be required to provide more fulsome disclosure regarding the composition of its board of directors, nominees for director positions, and executive officers. The company should also provide greater transparency around its nominating process for director and officer selection, and any initiatives it has in place to increase board diversity. Voluntary disclosures in this regard have been useful, but listing standards could help ensure that more companies make this information publicly available on a basis that enables investors to draw comparisons.⁵⁴ We believe that robust policies of this nature should be a minimum standard for listing on any exchange, and we support efforts in Congress to advance this type of disclosure.⁵⁵

Machine-Readable Disclosures

Notwithstanding the Commission's many recent "modernization" initiatives, one area in which there remains much room for improvement is machine-readability. Investors consume more information now than ever before, and they increasingly utilize technological tools for this purpose.⁵⁶

Consider the challenges related to simple identifiers. If an investor wants to extract data about a company from multiple datasets, the investor must identify the correct company within each dataset. But, this task is often problematic because there are too many different entity identifiers in use. The most common is 'company name,' and there can be numerous variations in the name (e.g., "Inc." or "Incorporated"). Without the adoption of a uniform and specific identifier, linking between datasets must rely on mapping tables, which require significant maintenance and updates that are manual, duplicative, expensive, and error-prone. The Commission participates in international efforts to implement uniform identifiers, such as the Legal Entity Identifier (LEI), but should do more to incorporate these identifiers in its regulations and forms.

The Financial Transparency Act (H.R. 4476) is a bill that was introduced in the U.S. House of Representatives in 2019 that would require the eight financial regulatory member-agencies of the U.S. Financial Stability Oversight Council to adopt and apply uniform data standards for the information collected from regulated entities.⁵⁷ Among other things, the legislation would require regulators to adopt a uniform legal entity identifier,

such as the G-20 backed LEI. We strongly support this type of proposal because it would help investors utilize publicly-available data from multiple sources.

More broadly, we urge the Commission to implement the directives of the Open, Public, Electronic and Necessary Government Data Act (Data Act), which codifies and builds on Federal policies and data infrastructure investments supporting information quality, access, protection, and use.⁵⁸ Signed into law on January 14, 2019, the Data Act provides a sweeping, government-wide mandate for all federal agencies to publish government information in a machine-readable language by default.⁵⁹ This is a timely impetus for updating the manner in which SEC registrants currently report information, much of which is still not machine-readable.

OFFICE OF THE INVESTOR ADVOCATE OPERATIONS AND RESPONSIBILITIES

Investor Testing

We believe that the SEC should reinforce its commitment to evidence-based rulemaking and decision-making throughout the agency. For our Office in particular, this tenet is embodied in our authorizing statute—Section 4(g) of the Exchange Act—which envisions a robust research function within the Office of the Investor Advocate and includes several provisions that support the goal of evidence-based advocacy. For example, Exchange Act Section 4(g)(3) authorizes the Investor Advocate to retain or employ **research staff** as the Investor Advocate deems necessary to carry out the functions, powers, and duties of the Office. Among those responsibilities is the express mandate of Exchange Act Section 4(g)(4)(D), which requires

us to analyze the potential impact on investors of proposed regulations of the Commission and rules of SROs. In addition, Exchange Act Section 4(g)(6) (B) requires us to submit to Congress, within our annual Report on Activities, “appropriate statistical information and full and substantive analysis.”

Historically, the Commission’s analysis of a particular rule’s impact on investors has largely been an exercise in regulatory intuition. Commission attorneys with expertise in very specialized areas of securities law typically draft rule amendments, and while these practitioners are well-intentioned, they may be too far removed from the perspective of the average investors whom they serve. Moreover, the public comment period to which proposed SEC and SRO rules are subject can at times seem like little more than a polite fiction. In reality, the vast majority of “public” comments typically emanate from regulated entities rather than from the investing public. Even when individual investors provide comments to the SEC, those submissions may be the result of a grassroots campaign organized by an interest group and, consequently, those comments may not necessarily reflect the views of the population at large. Unfortunately, the economic analyses conducted in many Commission rulemakings fail to address these shortcomings because they rely so heavily on data provided by self-interested and oftentimes well-funded commenters.

The Office of the Investor Advocate strives to be more proactive in determining the impact on investors of proposed rule changes and to conduct those efforts in accordance with scientific methods. Instead of relying solely upon the public comment process and our own outreach initiatives to inform our policy positions, we have created a

platform with which to conduct investor testing on a routine and ongoing basis. This program, as described more extensively below in the section entitled “Report on Investor Testing,” utilizes tools such as surveys and focus groups to reach actual retail investors. These tools help us gain deeper insights into the demographics and characteristics of the investing public, and we have the capacity to embed experiments into our surveys to examine how changes to the rules will actually affect investors in the real world.

While we believe this program is an important element of our Office’s statutory mission, it also will provide a new stream of valuable data for the Commission. By leveraging this new resource, the Commission will be able to have a much higher degree of confidence regarding the impact of policies on investors. For example, we can conduct research to determine the optimal ways to deliver and present information to investors. In our view, this type of research program is long overdue for a 21st Century financial regulatory agency, and we believe the SEC lags far behind many of its regulatory peers.

Resource Needs

To date, nearly seven years since the creation of the Office of the Investor Advocate, we have been allocated only two full-time permanent positions for research staff. While these two economists have generated the impressive results as described below in this Report, we require additional staff and resources to conduct the type of research necessary to meet our Office’s statutory mission and provide support to the Commission’s broader efforts to engage in data-driven policymaking. In addition to economists, we require researchers with specialized skills such as decision science, marketing, data

analytics, and survey design, as well as staff to support those professionals. We also need a steady commitment of funding so that we can continue to contract with outside vendors who assist us in fielding the surveys and collecting the data.

Independence

It can be tempting for policymakers to conduct research that is designed to provide data that supports a predetermined policy outcome. In the Office of the Investor Advocate, our goal is simple—to determine how policy changes will, in fact, impact investors. In order to achieve this goal, it is important for us to have ultimate control over the research design so that we can safeguard the objectivity and integrity of the work.

This is not a theoretical concern. In a recent rulemaking, the Commission adopted a new disclosure document for retail investors, Form CRS. According to the proposing release, Form CRS was originally intended to help retail investors understand the differences between investment advisers and broker-dealers, understand the fees and costs associated with those services, and understand the potential conflicts of interest that may create incentives for a financial professional to render advice that is not in a client’s best interest. To evaluate the efficacy of Form CRS, we proposed a research plan to determine whether the form actually improved investor comprehension of these matters and to examine potential ways to improve the form to meet its stated goals. Contrary to our proposed research plan, the testing protocol that was approved and that was subsequently implemented by an outside vendor was far too limited in scope to be reliable. For example, investor comprehension of the form was not tested, which, in our estimation, was a significant

omission. Ultimately, our staff determined not to co-author the resulting report because, in our view, the research did not meet our standards for rigor and objectivity.

At least three factors can impede our ability to conduct independent research. First is the funding for our research. Because the Chairman's office controls the budget for our Office, including our research function, we risk disfavor whenever we produce results that run counter to any of the Chairman's preferred policy goals. In order to produce objective research on behalf of the investing public, we respectfully request a specific budgetary authorization for the Office of the Investor Advocate. This type of "ring-fenced" budget is used to protect the independence of other offices, including the Office of the Inspector General.

Another factor that can jeopardize our independence is the ownership of the data we collect. Because such data is deemed to be the property of the SEC, we are required to seek Commission approval to release the data. For example, if we are studying ways to improve the jargon used in a mutual fund summary prospectus, the data we collect from surveys and focus groups is not considered to belong to us. If we want to publish an analysis of that data or our research findings, we must first seek Commission approval to make the underlying data public. Not only is this a labor-intensive and time-consuming process, but in our experience, the Commission is reluctant to approve the release of the underlying

data unless we first show them our analysis of that data. This, of course, provides opportunities for the Commission to withhold approval and effectively block the publication of research that may run counter to the Commission's regulatory preferences. We respectfully request legislation that would grant the Investor Advocate the authority to release publicly the data we collect (excluding personally identifiable information).

Similarly, we request legislation that gives the Investor Advocate the authority to make a finding that investor testing and investor research are in the public interest, for purposes of obtaining an exception from the requirements of the Paperwork Reduction Act (PRA). Sections 19(e) and (f) of the Securities Act of 1933 authorize the Commission to make such a finding and trigger the PRA exemption, but not the Investor Advocate. In effect, this gives the Commission the ability to veto certain research projects at the outset.

We emphasize that our call for enhanced protection of our independence is in no way a reflection upon the incoming administration. Indeed, we are hopeful that new leadership of the Commission will support our efforts to conduct rigorous investor research. Nonetheless, we believe that structural improvements are necessary to safeguard our long-term mission to engage in evidence-based advocacy for the benefit of investors. We trust that the Commission's new leadership will appreciate the importance of preserving the objectivity and integrity of our work.

Administration of Investor Protection Grant Programs

Grant Program for Investor Advocacy Clinics

In 1997, then-SEC Chairman Arthur Levitt established two pilot law school investor advocacy clinics⁶⁰ in response to concerns voiced by retail investors at investor town hall meetings.⁶¹ The pilot clinics, created to provide quality legal representation and information to investors with small claim amounts, proved successful. Over the next fifteen years, twenty-four investor advocacy clinics were established at law schools across the country, funded in part by settlement proceeds from state securities fraud cases,⁶² financial support from state securities commissions,⁶³ and start-up grants from the FINRA Investor Education Foundation.⁶⁴ At the peak, 22 investor advocacy clinics were in active operation in 2012.⁶⁵ However, securing funding to sustain operations has been an ongoing challenge, and as a result, the number of clinics in operation has dwindled to 12.⁶⁶

At the March 2018 SEC Investor Advisory Committee meeting, the IAC voted to approve a recommendation to the Commission entitled “Financial Support for Law School Clinics that Support Investors.” The IAC highlighted the important investor protection services the clinics provide to retail investors with small claim amounts, the declining number of clinics, and their ongoing funding challenges.⁶⁷ The IAC formally recommended that the Commission explore ways to improve external funding sources for the clinics and encouraged the Commission to request legislation from Congress to provide permanent funding for the clinics through a matching grant program.⁶⁸

To date, the Commission has not acted on the IAC’s recommendation. However, the House of Representatives has considered such a grant program. In a report accompanying H.R. 3351—Financial Services and General Government Appropriations Bill, 2020,⁶⁹ the Committee on Appropriations⁷⁰ expressed concern about the lack of access to high-quality legal advice for small-dollar retail investors and directed the Commission to develop recommendations for a grant program to expand the availability of, and access to, high-quality legal assistance to retail investors with small claim amounts.⁷¹

Furthermore, a draft of the proposed “Investor Justice Act of 2020” was provided to the Investor Advocate and Ombudsman for review and comment earlier this year. If passed, the Investor Justice Act would require the Commission, through the Office of the Investor Advocate, to establish and administer a matching grant program to assist in the creation, development, expansion, or continuation of qualified investor advocacy clinics affiliated with law schools or nonprofit organizations to help expand the availability of high-quality legal assistance for investors with small claims.

There are significant parallels in the language of the proposed Investor Justice Act of 2020 and the Internal Revenue Service (IRS) Restructuring and Reform Act, IRC § 7526, that authorized the creation of the Low Income Taxpayer Clinic (LITC) Program at the Internal Revenue Service.⁷² The LITC Program, administered by the IRS Office of the Taxpayer Advocate, is a matching federal grant program that provides up to \$100,000 per year for the development, expansion, or continuation

of low-income taxpayer clinics by qualified organizations that represent low-income taxpayers in disputes with the IRS and provide other related services as required under the program.⁷³ Similar to the LITC Program legislation, the draft Investor Justice Act of 2020 would require the Investor Advocate to administer the proposed program and award grants of up to \$150,000 per year to qualified investor advocacy clinics that provide, or will provide, free representation to investors with claim amounts of less than \$100,000.

The LITC Program has been in operation since 1999. To put the impact of the LITC Program into perspective, there were only 17 clinics available to assist low-income taxpayers in 1990.⁷⁴ In 1999, 34 entities in 18 states and the District of Columbia received matching grants from the LITC Program to establish and fund LITCs. Since that time, the grants awarded by the LITC Program have supported the creation and expansion of LITCs across the country. As of December 2019, 131 LITCs in operation at academic institutions, legal services organizations, and other nonprofits in 46 states and the District of Columbia received funding under the LITC Program.⁷⁵

Again, there were 22 investor advocacy clinics in active operation in 2012, but now there are only 12.⁷⁶ These clinics are often the only option for quality legal representation for retail investors without the means to retain counsel, and those that cannot retain legal counsel due to the small amount in dispute.⁷⁷ When clinics are unable to secure adequate funding, they are forced to reduce the number of cases they take on, and in some circumstances, they must decline investors' cases

altogether. When clinics close, investors with small claim amounts or limited incomes are left without affordable access to quality legal representation. The scope of investor outreach and education the clinics provide to their local communities suffers as well.

The 20-plus year journey of the LITC Program provides a successful model for an investor advocacy clinic grant program to follow. We support legislation that would establish such a grant program to provide funding to qualified investor advocacy clinics affiliated with law schools or nonprofit organizations, and we would welcome the opportunity to administer it within the Office of the Investor Advocate.

Senior Investor Protection Grant Program

Another promising grant program was authorized by Congress a decade ago but has never been implemented. At the request of the North American Securities Administrators Association (NASAA),⁷⁸ our Office has reviewed a statutory provision enacted by Congress in 2010 that directs the establishment of a "Senior Investor Protection Grant Program." The statutory provision in question, which was enacted in Section 989(A) of the Dodd-Frank Act,⁷⁹ establishes a grant program within the Consumer Financial Protection Bureau (CFPB) to provide state regulators with funding for technology, equipment, and training to increase the successful prosecution of salespersons and advisers who target seniors for fraud. The grants also may be used to fund educational materials and training to raise awareness and understanding of misleading or fraudulent marketing practices among seniors.

These are important tools to deter financial exploitation of seniors. As our Office and many others have documented, threats to elderly investors continue to expand, and the consequences of fraud are especially devastating to seniors who have less time to rebuild lost wealth.⁸⁰ A state securities regulator, while testifying this past summer to a House subcommittee about state regulators' work to protect investors from pandemic-related scams, observed as follows:

Financial institutions have reported over 180,000 suspicious activities targeting older Americans since 2013. While the total financial loss is hard to determine, the estimated losses of older adults due to exploitation ranges from \$2.9 billion to \$36.5 billion annually. Moreover, Congress has repeatedly recognized that seniors are especially susceptible to fraud and agreed on a bipartisan basis regarding the importance of supplementing state resources to educate and protect senior investors. Amid the COVID-19 pandemic, Congress should assist state regulators in securing resources to combat financial exploitation against those most vulnerable in this crisis.⁸¹

Unfortunately, the Senior Investor Protection Grant Program has not been established as required by the law, despite considerable bipartisan support from Congress.⁸² Indeed, efforts to implement the program, as presently constituted, appear to have been on hold since at least mid-2014, when the CFPB informed members of the Senate Special Committee on Aging that it would not implement the program because "there has been no appropriation made for these grants to date."⁸³

We are informed that the impasse has proven tricky to resolve. The CFPB's operations are not funded by Congressional appropriation, but by transfer from the Federal Reserve.⁸⁴ Since the CFPB has never sought nor received a Congressional appropriation, Congress has never had the opportunity to vote on legislation appropriating funds necessary for the grants. Unless the CFPB requests an appropriation, that is unlikely to change.

To date, the 116th Congress has held at least two hearings to explore legislative remedies that could fix the grant program.⁸⁵ Unfortunately, a remedy has so far proven elusive. Meanwhile, as recently as January 2020, the CFPB reiterated to Congress that it still has no plans to implement the program.⁸⁶

In our view, the premise of the Senior Investor Protection Grant program had real merit when Congress enacted it in 2010, and we believe this remains the case today. As NASAA President and New Jersey Securities Bureau Chief Christopher Gerold recently explained:


State securities regulators are on the front lines of the fight against elder financial exploitation. We are in every state and every community. But because of a procedural knot, states are not receiving the funds Congress authorized nearly a decade ago to help in this critical battle.⁸⁷

To resolve the funding impasse, we are informed that it might be helpful for the Office of the Investor Advocate to accept responsibility to manage the program. This would require an amendment to Section 989(A) so that our Office,

or the Commission itself, would be charged with the program. An advantage of this approach is that it would reconstitute the program within the primary federal agency charged with investor protection. Moreover, because the SEC is funded by an annual appropriation from Congress, such a change would allow Congress to review the program and fund the grants annually.

To the extent the 117th Congress remains committed to this program, and the CFPB remains unable or unwilling to commit to its implementation, the Office of the Investor Advocate is prepared to work with Congress and the relevant state securities and insurance regulators to implement it.

REPORT ON ACTIVITIES RELATING TO THE FISCAL YEAR 2020 POLICY AGENDA

 In June 27, 2019, the Office of the Investor Advocate filed a Report on Objectives for Fiscal Year 2020.⁸⁸ The Report identified eight key policy areas that would be the primary focus of the Office during Fiscal Year 2020:⁸⁹ corporate disclosure and investor protection in registered and exempt offerings, the proxy process and other proxy issues, equity market structure, fixed income market reform, accounting and auditing, non-transparent exchange-traded funds, protecting senior investors, and broker migration and misconduct. This Report on Activities describes our activities and recommendations within each of those policy areas from October 1, 2019 to September 30, 2020 (the Reporting Period).

CORPORATE DISCLOSURE AND INVESTOR PROTECTION IN REGISTERED AND EXEMPT OFFERINGS

As described in our prior reports, the Commission has undertaken a comprehensive “Disclosure Effectiveness” initiative to review and modernize public company reporting requirements. The disclosure rules govern the information contained in registration statements, routine periodic reports, and proxy statements. Many of these rulemaking projects have been in the nature of streamlining, clarifying, and updating rules where feasible. During the Reporting Period, we generally supported revisions that codified prior

guidance, accounted for changes in related rules or accounting standards, and tightened wording. At the same time, we opposed the elimination of disclosures that investors contended were useful.

On January 30, 2020, the Commission proposed changes to certain financial disclosure requirements in Regulation S-K.⁹⁰ The proposed changes included eliminating Item 301 (selected financial data) and Item 302 (supplementary financial data) and amending Item 303 (management’s discussion and analysis, or “MD&A”) to streamline and refocus the instructions with a more principles-based approach. We advocated retaining a number of the prescriptive disclosure requirements based on feedback from investors that the disclosures elicited were valuable and otherwise difficult to derive. For instance, on May 21, 2020, the Investor Advisory Committee recommended that the Commission reconsider proposed changes permitting registrants to omit fourth-quarter data from annual reports and forgo presenting contractual obligations in the easy-to-follow tabular format.⁹¹ Sometimes registrants have an incentive to be less than forthcoming about unfavorable facts, like revisions to prior-period results or a mismatch between lower-than-projected revenues and near-term cash requirements. Yet these are areas in which investors tend to want detailed factual information, in addition to receiving management’s perspective. Prescriptive disclosure requirements can be more

useful than principles-based requirements in capturing what management might be inclined to gloss over in discussion or otherwise characterize as immaterial. On November 19, 2020, the Commission adopted the changes substantially as proposed, largely ignoring the recommendations of the IAC and other investors.⁹²

In our last Report on Activities, we expressed concern about the practice of reverse factoring, which entails a company working with a third-party intermediary to arrange a trade payables program with the company's suppliers.⁹³ This can be a form of financing that makes balance sheets look better and is often not disclosed. In addition to our report identifying the opacity of reverse-factoring arrangements as one of the most problematic practices for investors, it has been the subject of a number of critical articles in the past year.⁹⁴ Standard-setters are looking at it, which we view as a positive development, and the Commission's Division of Corporation Finance issued comments to a number of companies and published disclosure guidance on supply-chain and other types of short-term financing in light of pandemic-related disruptions.⁹⁵ On May 21, 2020, the IAC recommended that the Commission devote more attention to the issue, including by considering whether any specific line item relating to reverse factoring should be included in the MD&A rulemaking.⁹⁶ Although the Commission did not explicitly consider such a line item in the MD&A adopting release, we believe the Division of Corporation Finance has ample authority to continue pressing for disclosure under the revised principles-based MD&A item requirement.

Also on January 30, 2020, the Commission issued interpretive guidance with MD&A disclosure considerations for key performance indicators and similar metrics.⁹⁷ The guidance

provides that, where registrants disclose metrics, they should consider whether additional disclosures are necessary and be mindful of disclosure controls and procedures.

On August 26, 2020, the Commission adopted amendments to Regulation S-K to modernize the description of business, legal proceedings, and risk-factor disclosures that registrants are required to provide.⁹⁸ Among other features, the amendments revised Items 101(a) (description of the general development of the business), 101(c) (narrative description of the business), and 105 (risk factors) to emphasize a more principles-based approach on the rationale that some aspects of these disclosures may be material to a particular registrant while other aspects may not. As in the MD&A rulemaking, additional rule text revisions were designed to encourage registrants to enhance the salience of information by streamlining and avoiding duplication. Arguably, the most notable substantive development was a broadening of the requirement for a registrant to disclose the number of persons employed. Going forward, registrants must discuss, to the extent material, their human capital resources, including the number of persons employed, and any human capital measures or objectives that management focuses on in managing the business, such as measures or objectives that address the development, attraction, and retention of personnel. Although the Commission's amendments are not as comprehensive as those outlined in a March 28, 2019 Investor Advisory Committee recommendation, we view them as a positive step forward for the disclosure framework.⁹⁹

In another Disclosure Effectiveness work stream, the Commission sought to refresh industry-specific disclosure requirements. On September 11, 2020, the Commission adopted rules updating

the statistical disclosures that bank and savings and loan registrants provide to investors.¹⁰⁰ The rules codify the updated disclosure requirements in new subpart 1400 of Regulation S-K and rescind Industry Guide 3, Statistical Disclosure by Bank Holding Companies, which was not a Commission rule. We advocated primarily for requiring the disclosures to be presented in a machine-readable format.¹⁰¹ The Commission opted not to structure disclosures in this rulemaking, citing cost to issuers.¹⁰²

In yet other work streams, the Commission adopted changes to rules in Regulation S-X related to requirements for financial statements for registered debt offerings¹⁰³ and for acquired and disposed businesses.¹⁰⁴ We did not have significant comments on these rulemakings.

We reviewed other rulemakings that were not part of the Disclosure Effectiveness initiative but were otherwise relevant to capital raising, disclosure, and investor protection. We have previously reported on the Commission undertaking a broad review of the regulatory framework for exempt offerings with the objective of harmonizing and streamlining the rules.¹⁰⁵ During the Reporting Period, the Commission advanced rulemakings stemming from that review.

On December 18, 2019, the Commission proposed amendments to the definition of accredited investor.¹⁰⁶ Among other changes, the Commission sought to allow individuals to qualify as accredited investors if they possessed certain professional credentials or affiliations, even if they did not meet the income or net worth thresholds. The Commission also chose not to modify the definition's income or net worth thresholds, reasoning that the income and net worth thresholds still exceeded the mean and median household

income and household net worth in all regions of the country, information about issuers and other participants in the exempt markets had become more readily available due the rise of the internet, and reducing the pool of accredited investors could make it harder for companies to raise capital in the Regulation D markets.¹⁰⁷ Given the broadly remedial purposes of federal securities legislation, we urged the Commission to demonstrate more convincingly the presumption that the population of investors toward the lower end of the accredited investor range of income and wealth do not need the protections of the Securities Act. We pointed to descriptive statistics from the Federal Reserve Board's Survey of Consumer Finances regarding the financial assets of households toward the lower end of the range and suggested elaborating on the assumptions that could fairly be made about such households in terms of their ability to protect themselves and sustain the risk of loss. We also challenged the Commission's assertion regarding information availability in the exempt markets, as there was no comparison to the kind of information that registration would require an issuer to disclose. On August 26, 2020, the Commission adopted amendments to the definition of accredited investor without addressing these important considerations.¹⁰⁸

On March 4, 2020, the Commission proposed amendments to the Securities Act registration exemptions.¹⁰⁹ The amendments included: addressing, in one broadly applicable new rule, the ability of issuers to move from one exemption to another, as well as to a registered offering; raising offering limits for Regulation A, Regulation Crowdfunding, and Regulation D Rule 504 offerings, and raising individual investment limits; relaxing restrictions on general solicitation; and adjusting certain disclosure and eligibility requirements and bad actor disqualification

provisions in order to reduce differences between exemptions. We agreed with commenters who argued that the Commission first ought to require changes to filing requirements for the existing exemptions in order to collect greater information concerning the exemptions' use.¹¹⁰ This information could be used to inform future policymaking. We also expressed concern that the rulemaking would allow capital formation to shift further from public markets to exempt markets.¹¹¹ With this shift, investors lose an array of protections provided in the public markets, including more robust disclosure, a broader range of remedies for fraud, and more intensive regulatory oversight.¹¹² The Commission was largely dismissive of this concern, contending in a subsequent adopting release that the exemptions in question were for early-stage and smaller issuers for which using the public markets is "not practical."¹¹³ Missing from this rulemaking was any inquiry whatsoever into outcomes for retail investors who had invested in these offerings. Instead, the Commission relied intuitively on the presumption that broadening the exemptions would increase investment opportunities for investors, including non-accredited investors, which in theory could allow for greater wealth accumulation as compared to their investing in a narrower set of opportunities in the public markets.¹¹⁴ On November 2, 2020, the Commission adopted the amendments substantially as proposed.¹¹⁵ We call for the reversal of this rulemaking in the foregoing section entitled "Recommendations for Administrative and Legislative Actions."

THE PROXY PROCESS AND OTHER PROXY ISSUES

During the Reporting Period, the Commission undertook two rulemakings—one on proxy voting advice and one on shareholder proposals—that impact the ability of investors to vote their shares on matters related to corporate governance. The

first, which was proposed on November 5, 2019 and adopted on July 22, 2020, concerns proxy advisory firms.¹¹⁶ The second, which was proposed on November 5, 2019 and adopted on September 23, 2020, concerns the inclusion of shareholder proposals in corporate proxy statements. We describe both of these rulemakings above under the section entitled "Recommendations for Administrative and Legislative Actions."

EQUITY MARKET STRUCTURE

During the Reporting Period, the Commission continued to take action dealing with many aspects of the equity market, both large and small. Concerning mostly smaller capitalization issuers, in October 2019 the Commission published a statement on market structure innovation for thinly traded securities, inviting market participants to submit innovative proposals designed to improve the secondary market for these securities, including, in connection with such proposals, requests to suspend or terminate unlisted trading privileges, known as UTP.¹¹⁷ We have been supportive of this effort and continue to monitor submissions from market participants, including the national securities exchanges, that could enhance the pools of liquidity for these public companies' securities (and inspire other smaller companies to consider going public). We are hopeful that ideas like periodic, intraday batch auctions could optimize the trading process for these smaller issuers and ultimately benefit investors.

Along those lines, the CBOE BYX Exchange, Inc. (BYX) proposed to introduce intra-day, periodic auctions albeit for all securities listed on the exchange, not just thinly-traded ones. In October 2020, the Commission instituted proceedings to determine whether to approve or disapprove the BYX batch auction proposal.¹¹⁸ Given its much broader application, we supported taking

additional time to consider the complexity of implementing the proposal, especially for securities that are already highly liquid and could experience systemic latency in a bifurcated market on BYX. We are reviewing the comments and evaluating whether this broader proposal could lessen costs associated with the speed “arms race” in the equity market.

Also focused on investors in smaller issuers, in September 2020 the Commission adopted amendments to Rule 15c2-11 which addresses “over-the-counter” (OTC) securities not listed on the exchanges.¹¹⁹ While the prior rule required a broker-dealer to review certain issuer information and have a reasonable basis for believing such information is accurate before initiating quotations for OTC securities, it allowed the quotes to continue indefinitely, even after current public information about the issuer became stale. That indefinite exception may have previously permitted unscrupulous market participants to more easily engage in pump-and-dump retail fraud. We supported the Commission’s proposal to add a reasonable time limit to the exception, and we plan to monitor its implementation.

The Commission’s multi-year effort regarding equity market structure continued. In May 2020, the Commission adopted an order directing the exchanges and FINRA to modernize the governance of National Market System (NMS) plans that produce public consolidated equity market data and disseminate trade and quote data from trading venues.¹²⁰ We supported the order and were pleased to see the SROs’ responsive proposal published for public comment in October.¹²¹ In Fiscal Year 2021, we will work to ensure that the improvements to the governance of NMS plans allow for the appropriate representation of retail and institutional investors.

More broadly on market data, in February 2020 the Commission proposed to modernize the overall infrastructure for the collection, consolidation, and dissemination of market data for NMS stocks.¹²² This will provide key upgrades to the content and infrastructure for “core data” that is consolidated and widely distributed by central securities processors (the SIP). Improving the infrastructure around market data could ultimately benefit retail investors, either directly or as participants in mutual funds and pension funds. During the year, we have reviewed the comments, and we were pleased to see the Commission take many of the helpful comments into account when finalizing the proposal on December 9, 2020.

Disappointingly, in June 2020 the U.S. Circuit Court of Appeals for the District of Columbia struck down the Commission’s intended Transaction Fee Pilot regarding NMS stocks, which would have otherwise started collecting experimental data concerning broker-dealer order routing behavior.¹²³ We continue to believe that the potential conflicts of interest created by exchange fees and rebates is worth studying, and we will continue to support the Commission’s efforts to evaluate the issue in light of the Court’s instructive guidance.

In addition to reviewing Commission rulemakings, the Office of the Investor Advocate is responsible for analyzing the potential impact on investors of proposed rules of SROs.¹²⁴ In furtherance of this objective, the Office has analyzed the potential impact of various SRO proposals related to equity market structure, including the periodic auction proposal described above. In September 2019, in another rulemaking related to the speed of trading, the Commission instituted proceedings to determine whether to approve or disapprove a Cboe EDGA Exchange, Inc. (EDGA) proposal

to create a 4-millisecond speedbump for all executable orders submitted to the exchange, except for modification and cancel instructions for existing quotes.¹²⁵ We reviewed the proposal and the comments submitted,¹²⁶ and we recommended that the Commission disapprove the proposed speedbump.¹²⁷ We were pleased when the Commission disapproved the EDGA proposal in February.¹²⁸

There were numerous other SRO rule proposals that we monitored closely during the Reporting Period. As examples, we have reviewed proposed rules that would have changed exchange listing standards for companies based on countries that restrict investor access to accounting documents,¹²⁹ listing standards that would permit a company to conduct a hybrid offering with both an initial public offering (IPO) and a direct listing for some of its shares,¹³⁰ and the application to register a new equity exchange with a novel pricing model, the Members Exchange, LLC (MEMX).¹³¹

We continue to monitor progress on the implementation of the Commission's Consolidated Audit Trail, which is intended to enhance, centralize, and generally update the regulatory data infrastructure available to market regulators.¹³² In August 2020, the Commission proposed amendments to enhance data security for the database.¹³³

FIXED INCOME MARKET REFORM

During the year, our Office has continued to monitor the public meetings of the Commission's Fixed Income Market Structure Advisory Committee (FIMSAC)¹³⁴ and reviewed its recommendations concerning reforms for both the corporate and municipal bond markets. In February 2020, the FIMSAC made several recommendations concerning investor protection

in relation to the timeliness of financial disclosures from municipal bond issuers, including recommending Congress consider granting the Commission additional statutory authority to enforce compliance with continuing disclosure agreements and recommending the Commission evaluate how to make disclosure deadlines for audited financials from municipal issuers more certain and predictable.¹³⁵ In June 2020, the FIMSAC recommended that the Commission revisit the possibility for pre-trade transparency in the municipal securities market, noting it had been almost a decade since the Commission last looked at the issue in a comprehensive manner.¹³⁶ We are supportive of these recommendations.

In August 2020, FINRA requested public comment on the practice of "pennying" in the corporate bond market.¹³⁷ Typically, a bond dealer places a retail client's bid-wanted out to the market and compiles the bids received to determine the winning bid, but a broker engages in pennyning when it nominally exceeds the high bid in order to purchase for its own account rather than execute the trade with the highest external bidder.¹³⁸ As noted in last year's Report on Activities, this follows from a FIMSAC recommendation to curb the pennyning in both corporate and municipal bond auction processes.¹³⁹ The MSRB Board has indicated it is coordinating with FINRA on further analysis of the issue.¹⁴⁰ Our Office will continue to monitor what actions the MSRB and FINRA take to address the practice of pennyning in response to the comments received this year.

In September 2020, the Commission proposed to enhance the operational transparency, system integrity, and regulatory oversight for alternative trading systems (ATSs) that trade government securities.¹⁴¹ The rule would require these ATSs

to file comprehensive public disclosures on new Form ATS-G, informing market participants about potential conflicts of interests arising from trading activity of the ATS's broker-dealer operator or its affiliates, and the ATS's manner of operations, such as order types, use of market data offered and used by the ATS, and fees. The Commission is also proposing to amend Regulation SCI to apply its provisions to ATSs that meet certain trading volume thresholds, which would help address technological vulnerabilities and improve the Commission's oversight of the core technology of key entities in the markets for government securities. We originally recommended the Commission take action in this area in September 2016 when it was finalizing a similar proposal for enhancing its oversight of equity ATSs and are pleased to see this investor friendly proposal come closer to fruition.

At the same time, the Commission issued a broad concept release focused on the regulatory framework for electronic platforms that trade corporate debt and municipal securities, soliciting public comment to obtain information about fixed income electronic trading platforms, including their operations, services, fees, market data, and participants. We expect to review the comments received in the coming months, and will likely encourage the Commission to take further action on this subject.

ACCOUNTING AND AUDITING

Investor confidence in the audited financial statements of public companies listed in the U.S. is a bedrock principle that grounds our capital markets. A commitment to high quality, timely, and independent audits underlies investor confidence and requires unwavering application and regulation.

Hence the critical role of the Public Company Accounting Oversight Board (PCAOB), which was established by the Sarbanes Oxley Act (SOX) to oversee the audits of public companies and SEC-registered brokers and dealers. The PCAOB's mission is to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports. During the Reporting Period, we monitored developments at the PCAOB, and we will continue to do so. As noted in our prior reporting, we again find it troubling that the PCAOB has not convened a meeting of its Investor Advisory Group since November 2018.¹⁴² At this rate, some members may not have the opportunity to attend even a single meeting during the entirety of their three-year term. The lack of meetings of the Investor Advisory Group is perhaps symptomatic of a more significant issue at PCAOB—the failure to consider investor perspectives and interests in all aspects of PCAOB policies and rulemaking. We agree with PCAOB Board Member Jay Brown, who has asserted publicly that investors should be at the forefront of how the PCAOB conducts itself.¹⁴³

In addition, we monitored activity at the Financial Accounting Standards Board (FASB) as well as developments related to auditing and accounting policies at the Commission. Activity involving FASB earlier this year suggests a concerning development—Congressional override. Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the implementation of Accounting Standards Update No. 2016-13, Financial Instruments—Credit Losses, Topic 326, Measurement of Credit Losses on Financial Instruments (CECL) was deemed optional for banking organizations. While Congressional interest and support are encouraged, we believe that overruling the judgment of FASB is fraught with complication. In the long run, even though we do not always agree with the decisions

of FASB, we believe investors are best served by an independent standard setting body whose members possess decades of relevant and diverse experience.

As a follow up item to last year's Report on Activities, the SEC approved expanding the exemption, under Section 404(b) of the Sarbanes-Oxley Act, for issuers to obtain certification from an independent auditor of management's assessment of the effectiveness of internal controls over financial reporting (ICFR).¹⁴⁴ More recently, the SEC also approved loosening the auditor independence rules.¹⁴⁵ Both approved rule amendments appear to fly in the face of continued evidence that ICFR and auditor independence deficiencies remain recurring problems in the accounting and auditing spheres.¹⁴⁶

NON-TRANSPARENT EXCHANGE-TRADED FUNDS

Exchange-traded fund (ETF) sponsors launched the first non-transparent ETFs during the Reporting Period, representing a significant milestone for the ETF industry while triggering potential new investor protection concerns. Unlike traditional ETFs, non-transparent ETFs are not required to disclose their portfolio holdings on a daily basis. This feature enables asset managers to utilize the ETF structure for active portfolio management strategies without exposing their proprietary strategies to the marketplace. The feature also necessitates, however, that a non-transparent ETF find a satisfactory replacement or substitute for the transparency-based arbitrage mechanism that has been at the conceptual core of ETFs for decades.

In our Report on Objectives for Fiscal Year 2020, we noted that the Commission had granted exemptive relief to Precidian ETFs Trust (Precidian) to introduce its model of non-transparent ETFs (ActiveShares) to the market.¹⁴⁷ The first

non-transparent ETFs using Precidian's model began trading on an exchange on April 2, 2020.¹⁴⁸ Typically, a traditional ETF with full daily portfolio transparency can rely on financial institutions to directly identify and act on arbitrage opportunities when the market value of the ETF's shares are over- or under-valued relative to the ETF's portfolio holdings. As a substitute for this traditional arbitrage mechanism, an ActiveShares ETF provides confidential information concerning the securities that the ETF would exchange for its shares to agents working on behalf of such financial institutions. The agents then facilitate the transactions expected to keep the market value of the ETF's shares in line with the value of the ETF's holdings.¹⁴⁹

In our Report on Objectives for Fiscal Year 2021, which we submitted to Congress this past June, we noted that the Commission had granted newer exemptive relief permitting sponsors to utilize a number of alternative non-transparent ETF models.¹⁵⁰ While the details of these models vary slightly amongst each other, each generally provides daily information regarding a "proxy portfolio" in lieu of providing full daily portfolio transparency. The proxy portfolios aim to provide financial institutions enough information to engage in transactions that mimic the traditional ETF arbitrage mechanism. The first of these second-generation non-transparent ETFs launched in June 2020.¹⁵¹

Given the very recent launch of these products, it is too early for us to conclude whether the various arbitrage mechanisms utilized by non-transparent ETFs are as safe and effective as the traditional, transparency-based ETF arbitrage mechanism. In a 2019 joint statement, then Commissioner Robert Jackson and current Commissioner Allison Lee observed that non-transparent ETFs would

“come with real risk that, in moments of limited liquidity, ordinary investors will face wider spreads and hence get prices that do not accurately reflect the value of their shares.”¹⁵² These Commissioners also expressed a variety of other concerns regarding these novel products, stating, “in particular, we wonder whether additional disclosure of the risks, as well as enhanced board oversight of the efficiency of these ETFs, is necessary. . . . [W]e are only in the early stages of determining the information investors need to evaluate the unique risks of non-transparent ETFs, including mechanisms to ensure accuracy and price efficiency.”¹⁵³ We will continue to scrutinize the use of non-transparent ETFs with these concerns in mind, examining whether they are functioning as intended and evaluating the unique risks they may present to investors.

PROTECTING SENIOR INVESTORS

In our Report on Objectives for Fiscal Year 2020, we noted that protecting senior investors has always been a priority for this Office, and stated that protecting senior investors would remain a priority throughout the Reporting Period.¹⁵⁴ We observed then, and continue to believe now, that demographic, financial, and other trends are likely to result in greater challenges associated with elder financial exploitation and diminished capacity in coming years.

Accordingly, we have continued our efforts to raise public awareness and to highlight issues and policy choices that impact these investors. We monitor new legal and regulatory developments with senior investors in mind, and we strive consistently to help protect senior investors when reviewing rulemaking initiatives at the Commission. In addition, we have continued to explore potential investor behavior research projects to fill gaps in existing data regarding the impact of cognitive decline on the financial capability of investors.

We also note that the specific investor protection concerns discussed elsewhere in this report tend to be particularly acute with respect to senior investors. During the Reporting Period, for example, the Commission announced settled charges against Wells Fargo Clearing Services and Wells Fargo Advisors Financial Network relating to unsuitable recommendations of inverse ETFs and stated specifically that a number of these clients were senior citizens and retirees.¹⁵⁵ Awareness of the dangers that leveraged and inverse products pose to senior investors helped shape our advocacy in favor of heightened sales practice requirements for these products when we evaluated the Derivatives Rule that the Commission recently adopted.¹⁵⁶ Advocacy on behalf of particularly vulnerable investors is central to our mission, and we expect this work to continue indefinitely.

Relatedly, in the section of this Report entitled “Recommendations for Administrative and Legislative Actions,” we support the implementation of the Senior Investor Protection Grant Program. The grants, if funded, would provide important resources to state regulators who are on the front lines of efforts to protect seniors from securities fraud and other forms of financial exploitation. If needed, we are willing to take on the responsibility for administering this grant program.

BROKER MIGRATION AND MISCONDUCT

As discussed last year, in May 2019 FINRA published a new request for comment on proposed rules targeting firms with a disproportionate history of broker and other misconduct relative to their similarly-sized peers. The proposed new Rule 4111 (Restricted Firm Obligations)¹⁵⁷ would impose, in certain instances, conditions or restrictions on member operations, including requirements for

deposits of cash or qualified securities that could not be withdrawn without FINRA's prior written consent, if a firm exceeds a certain threshold calculation of broker or other misconduct.¹⁵⁸ We reviewed the comments received, analyzed the data behind the rule, and met with FINRA staff to express our support for the concept and the analysis. In December 2019, FINRA's Board of Governors approved an amended version of the rule to be filed for Commission approval,¹⁵⁹ and on December 4, 2020, the Commission published the proposal for public comment.¹⁶⁰ We will encourage the Commission to give the proposal due consideration in the coming months.

In November 2019, FINRA proposed to expand the options available to customers if a firm or broker becomes inactive. Specifically, if the customer withdraws the claim under these circumstances, the proposal would allow customers to amend pleadings, postpone hearings, request default proceedings and receive a refund of filing fees.¹⁶¹ Given that FINRA has limited disciplinary leverage over inactive members or associated persons that fail to pay arbitration awards, it is important for a customer to have a full set of alternative options before pursuing the claim in

arbitration when collection of an award may be more difficult. We reviewed the public comments and were pleased when the Commission approved the proposal in February 2020.¹⁶²

In April 2020, FINRA proposed to modify its rules to better address risks posed by specific brokers with a significant history of misconduct.¹⁶³ For example, to better address the risks to investors where a broker is still appealing a disciplinary ruling, FINRA proposed allowing its hearing officers to impose conditions or restrictions on the activities of a broker and require their firm to adopt heightened supervisory procedures for the broker when a disciplinary matter is appealed. Having reviewed the comments, we supported this common sense proposal and were pleased to see the Commission approve the proposal on December 10, 2020.

Issues related to broker misconduct are the frequent subject of complaints that investors bring to the attention of SEC Ombudsman Tracey McNeil. Thus, our advocacy in this area was led by Ombudsman McNeil and her staff, who continued to dialogue with FINRA during Fiscal Year 2020.

PROBLEMATIC INVESTMENT PRODUCTS AND PRACTICES

Among other statutory duties, the Investor Advocate is required to identify problems that investors have with financial service providers and investment products. Exchange Act Section 4(g)(6) (B) mandates that the Investor Advocate, within the annual Report on Activities, shall provide a summary of the most serious problems encountered by investors during the preceding fiscal year. The statute also requires the Investor Advocate to make recommendations for such administrative and legislative actions as may be appropriate to resolve those problems.¹⁶⁴

To determine the most serious problems related to financial service providers and investment products, staff of the Office of the Investor Advocate reviewed information from the following sources:

- Investor Alerts, Tips, and Bulletins issued by the SEC, FINRA, and the North American Securities Administrators Association, Inc. (NASAA);
- SEC enforcement actions and FINRA disciplinary actions;

- NASAA's Activity Report,¹⁶⁵ 2020 Enforcement Report,¹⁶⁶ and Top Investor Threats;¹⁶⁷
- The SEC's Office of Compliance Inspections and Examinations' Examination Priorities for 2020;¹⁶⁸
- SEC and SRO staff reports providing guidance and interpretations relating to investment products; and
- Discussions with SRO staff, including a November 20, 2020 call with Mark Kim, Chief Executive Officer, and other leaders of the MSRB, highlighting municipal market practices that may have an adverse impact on retail investors;

The table on page 30 lists certain potentially problematic products or practices during Fiscal Year 2020 as reported by these sources. Although not exhaustive, the lists reflect some of the concerns of these organizations. Details regarding these products and practices are available on the organizations' websites.

| SEC ¹⁶⁹ | NASAA ¹⁷⁰ | FINRA ¹⁷¹ | MSRB |
|---|--|--|--|
| <ul style="list-style-type: none"> • Spoofed Websites Offering Phony CDs • Initial Exchange Offerings • COVID-19 Related Investment Scams • Indexed Annuities • Interval Funds • Publicly Traded Business Development Companies • Publicly Traded Closed-End Funds | <ul style="list-style-type: none"> • Early Withdrawals from Retirement Accounts • Private Placement Offerings • Affinity Fraud • Bond Ratings • Contracts for Difference (speculative derivative contracts) | <ul style="list-style-type: none"> • Stock Fraud in the Wake of Hurricanes • Social Sentiment Investing Tools • Broker Imposter Scams (confirming broker registration) • Fake Check Scams • High-Yield CD Offers as Bait for High-Commission Investments • Fraudulent Binary Options | <ul style="list-style-type: none"> • Timeliness of Issuer Disclosure • Migration to Managed Accounts Without a Supportable Fee Structure • Timeliness and Access to Pricing Data For Purposes of Calculating NAVs |

Each of the products and practices listed above represented an area of concern for investors during the Reporting Period. Based on our review of the resources described above and consultations with knowledgeable professionals, we will highlight two areas of concern: the new-issue process for investment-grade corporate bonds and leveraged and inverse exchange-traded funds. Previous reports have highlighted other issues, including reverse factoring,¹⁷² dual-class share structures,¹⁷³ the LIBOR transition,¹⁷⁴ initial coin offerings,¹⁷⁵ binary options,¹⁷⁶ public non-traded REITS,¹⁷⁷ municipal market disclosure practices,¹⁷⁸ below-minimum denomination positions in municipal securities,¹⁷⁹ and Simple Agreements for Future Equity in crowdfunding investments.¹⁸⁰

THE NEW-ISSUE PROCESS FOR INVESTMENT-GRADE CORPORATE BONDS

Dollar-denominated investment-grade corporate debt issuance amounted to \$1.309 trillion in 2019, and was expected to increase to \$1.995 trillion in 2020.¹⁸¹ Issuance is quadruple what it was in 2010.¹⁸²

The new-issue corporate bond market moves at a rapid pace, enabling issuers to raise capital more efficiently than ever. Yet on closer inspection, the market does not function as seamlessly as might be presumed. In recent years, many institutional investors have raised concerns that the marketing process for new issues does not provide buy-side participants an adequate opportunity to make informed investment decisions.¹⁸³ We outline these concerns below and invite all market participants to provide feedback and help us evaluate them.

Companies that participate in this market are generally well-known and widely followed. From a regulatory perspective, they are eligible to register offerings through a streamlined “shelf” process, forgo prior Commission staff review, and incorporate by reference periodic and current Exchange Act reports.¹⁸⁴ The rationale for allowing eligible issuers to offer securities without filing a new registration statement each time is that these issuers regularly disclose material information to the public that investors can use to evaluate the issuer.¹⁸⁵ This approach works for equities offerings, where the security terms are standardized

and largely determined by state law, and where investors consider mainly an issuer's enterprise value when pricing the securities. In debt markets, however, investors must consider not only the issuer's value, but also risks associated with the unique terms and structure of the particular bond issue. Unlike equities, bonds have terms that are contractual in nature. This means that terms and structures can vary significantly across bond issues. Investors require specific information about a bond issue in order to price it appropriately.

Dealers market an offering through human bilateral negotiations, usually over the telephone or by electronic message.¹⁸⁶ As a result, dealers do not convey information about an offering consistently.¹⁸⁷ They generally seek to get the best terms for the issuer and provide deal certainty, but they have discretion in deciding with which investors they wish to place the bonds.¹⁸⁸

It is typical for an investment-grade bond offering to be announced and priced within the span of a day.¹⁸⁹ Indeed, the amount of time between a deal's announcement and the deadline given for submitting orders is sometimes as short as fifteen minutes.¹⁹⁰ This window of opportunity does not always allow investors time to locate and evaluate relevant disclosure concerning covenants, redemption provisions, and other information about offering terms before placing orders. Although investors are not obligated to purchase bonds after placing their orders, significant market pressures make it difficult to back out once they do. Nearly all of the market participants are repeat-players. Buy-side participants with whom we have spoken worry that if they complain about information availability, or back out of an offering after submitting an order, dealers will retaliate by giving a smaller allocation in a subsequent offering.¹⁹¹

The Credit Roundtable, a trade association of institutional investors organized to protect the interests of bondholders, has sought to reform customary practices in the process for marketing, pricing, and distributing new bonds by promoting what it characterizes as "best practices."¹⁹² These include standardized offering protocols and reference data, which they say would improve their ability to assimilate offering information more quickly. Offering protocols include making a prospectus available immediately upon deal announcement, as opposed to sometime later, and allowing a minimum of 30 minutes between the start of the allocation process and the pricing of the deal.¹⁹³ Reference data include such information as the bonds' maturity date, the intended use of proceeds, and other bond characteristics. Bond covenants and redemption provisions are the most difficult information to assimilate during the compressed offering timeframe, and the Credit Roundtable has sought to enhance information accessibility by promoting standardized model covenants and other indenture terms.¹⁹⁴

Pending developments in trading technology might ameliorate some of the current information-delivery pain points. White papers published by research firm Greenwich Associates describe new trading desk software that promises to combine the functionality that historically has been segregated in legacy applications, automate workflow, and reduce manual data entry.¹⁹⁵ Primary markets for European investment-grade debt have begun utilizing 24 standardized data fields, including a Legal Entity Identifier for the issuing entity.¹⁹⁶ A next step for U.S. market participants could be agreement on a similar set of standardized data fields, which dealers could use to disseminate reference data for bond issues. Many market participants anticipate that a new web-based

platform,¹⁹⁷ developed by a consortium of sell-side banks and set to launch in late 2020, may help to address some of the Credit Roundtable’s concerns inasmuch as it reportedly will disseminate, via structured data, deal announcements and updates for U.S. dollar investment-grade bond offerings.¹⁹⁸ However, the proposed platform is not intended to replace the current relationship-based allocation process, a business that is highly lucrative for sell-side banks.¹⁹⁹

The economic implications of these reported concerns are significant. On the one hand, investment-grade corporate bonds comprise a high-quality asset class, and the institutional asset managers who participate in the primary market tend to be diversified in their respective investment strategies, which would mitigate the risk of mispricing. However, they are purchasing trillions of dollars of bonds on behalf of clients that include pension funds and mutual funds catering to Main Street investors. Main Street investor exposure to the corporate bond market is likely to increase due in part to demographics—the aging of the U.S. population—and the corresponding shift in investments from equity to comparatively more secure fixed-income strategies. We suggest that the Commission host a roundtable to consider these issues and trends in greater detail.

LEVERAGED AND INVERSE EXCHANGE-TRADED FUNDS

As described previously in this Report, the Commission recently approved a rule to regulate the use of derivatives by most registered funds. Unfortunately, the Derivatives Rule, as adopted, stripped away measures set forth in the Proposed

Derivatives Rule that were intended to protect investors from the unique dangers of leveraged and inverse ETFs.²⁰⁰ For example, the final rule removed provisions that would have required broker-dealers and investment advisers to exercise due diligence before approving retail investor accounts to invest in such products.²⁰¹

On the same day the rulemaking was finalized without these investor protections, Chairman Jay Clayton and three SEC division directors issued a joint public statement recognizing the unique dangers presented by leveraged and inverse ETFs.²⁰² Specifically, the joint statement noted that these ETFs and other complex products “may present investor protection issues—particularly for retail investors who may not fully appreciate the particular characteristics or risks of such investments,” expressed concern that “retail investors, and in certain cases financial professionals, may not fully appreciate how these types of products operate,” and stated “investor protection concerns are heightened, moreover, in times of market stress, which typically have a disproportionate impact on complex products, such as leveraged/inverse products and other products that use certain financial instruments that may not perform as expected in such times.”²⁰³ The joint statement noted further that the Commission’s Office of Investor Education and Advocacy received investor complaints indicating the pricing and trading dynamics of these products during the market volatility of Spring 2020 was not consistent with investor expectations.²⁰⁴ Finally, the joint statement indicated that technological advancements have increased investor access to leveraged and inverse ETFs without the aid of a

registered representative or investment adviser, and recognized that these self-directed investors “do not have the required protections that apply when they receive recommendations or advice from a broker or investment adviser.”²⁰⁵

The joint statement noted that Commission staff would review the effectiveness of regulatory requirements in mitigating the special investor protection concerns presented by complex financial products.²⁰⁶ We generally support this planned effort, but with respect to leveraged and inverse ETFs, the relevant investor protection concerns are longstanding and well-documented.²⁰⁷ We find it puzzling, then, that the Commission would deem this review necessary in the context of

leveraged and inverse ETFs. Additionally, we find it disconcerting that, despite its investor protection concerns, the Commission has chosen to entrench in its regulations much of the special exemptive relief granted to leveraged and inverse ETF sponsors over a decade ago.²⁰⁸ Because the investor protection concerns associated with leveraged and inverse ETFs are well-known, because the process of a holistic review of all complex financial products is likely to be lengthy and burdensome, and because investors will be harmed by leveraged and inverse ETFs while such a review is conducted (and while any recommendations stemming from the review are formulated/implemented),²⁰⁹ we urge the Commission to take immediate action to mitigate the dangers associated with these products.



OMBUDSMAN'S REPORT

As set forth in Exchange Act Section 4(g)(8), 15 U.S.C. § 78d(g)(8), the Ombudsman is required to: (i) act as a liaison between the Commission and any retail investor in resolving problems that retail investors may have with the Commission or with self-regulatory organizations; (ii) review and make recommendations regarding policies and procedures to encourage persons to present questions to the Investor Advocate regarding compliance with the securities laws; and (iii) establish safeguards to maintain the confidentiality of communications between investors and the Ombudsman.²¹⁰

The Ombudsman is also required to “submit a semi-annual report to the Investor Advocate that describes the activities and evaluates the effectiveness of the Ombudsman during the preceding year” (Ombudsman’s Report).²¹¹ The Ombudsman’s Report must be included in the semi-annual reports submitted by the Investor Advocate to Congress. To maintain reporting continuity, the Ombudsman’s Report included in the Investor Advocate’s June 30 Report on Objectives describes the Ombudsman’s activities during the first six months of the current fiscal year and provides the Ombudsman’s objectives for the following full fiscal year. The Ombudsman’s Report included in the Investor Advocate’s December 31 Report on Activities describes the activities and discusses the effectiveness of the Ombudsman during the full preceding fiscal year.

Accordingly, this Ombudsman’s Report describes the activities and discusses the effectiveness of the Ombudsman²¹² for the full fiscal year from October 1, 2019 through September 30, 2020 (Reporting Period), and provides a brief outlook for Fiscal Year 2021.

SERVICE BY THE NUMBERS

The Ombudsman assists retail investors—sometimes referred to as individual investors or Main Street investors—and other persons with concerns or complaints about the SEC or SROs the SEC oversees. The assistance the Ombudsman provides includes, but is not limited to:

- listening to inquiries, concerns, complaints, and related issues;
- helping persons explore available SEC options and resources;
- clarifying certain SEC decisions, policies, and practices;
- taking objective measures to informally resolve matters that fall outside of the established resolution channels and procedures at the SEC; and,
- acting as an alternate channel of communication between retail investors and the SEC.



In practice, individuals often seek the Ombudsman’s assistance as an initial point of contact to resolve their inquiries or as a subsequent or ongoing point of contact when they are dissatisfied with the outcome, rate of progress, or resolution. At times, individuals request the Ombudsman’s assistance with things the Ombudsman does not do. For example, individuals may ask us to provide financial or legal advice,

participate in a formal investigation, make binding decisions or legal determinations for the SEC, or overturn decisions of existing dispute resolution or appellate bodies.

The following graphic illustrates the standard lifecycle of what happens when investors or other interested persons contact the Ombudsman for assistance:

Figure 1: What Happens When You Contact the Ombudsman



To respond to inquiries effectively and efficiently, the Ombudsman monitors the volume of inquiries and the staff resources devoted to addressing the particular concerns raised. The Ombudsman tracks all inquiries received by, or referred to, the Ombudsman, as well as all related correspondence and communications to and from Ombudsman staff. We track the status of the inquiry from its receipt to its ultimate resolution or referral, and we monitor the amount of staff engagement and resources that were utilized to respond to the inquiry. We maintain these types of records in order to identify and respond to problems raised, analyze inquiry volume and trends, and provide data-driven support for recommendations presented by the Ombudsman to the Investor Advocate for review and consideration.

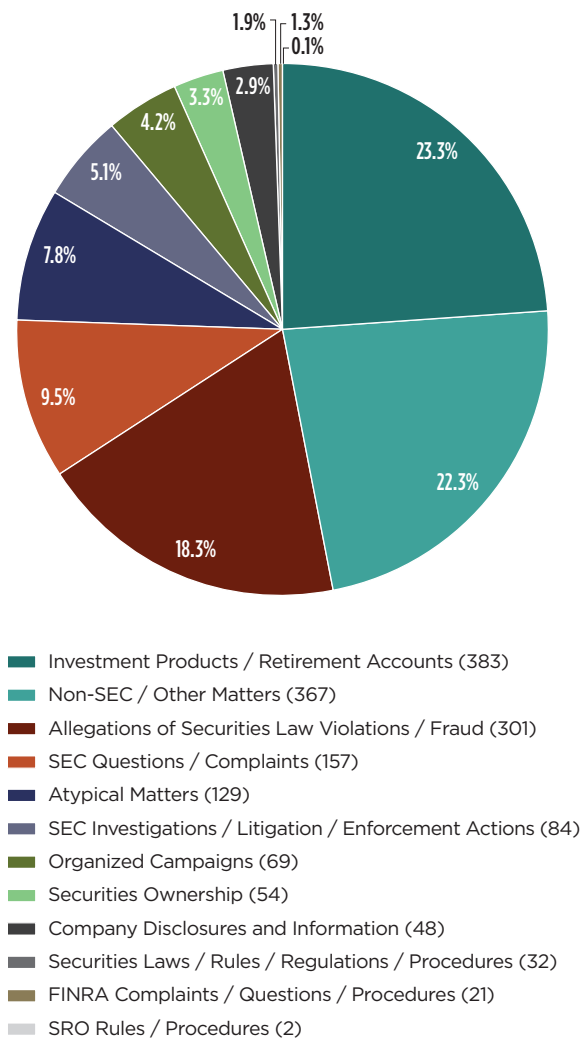
Inquiry volume is counted in terms of matters and contacts. The initial contact—a new, discrete inquiry received by or referred to the Ombudsman—is the contact that creates a matter. When a matter is created, the Ombudsman reviews the facts, circumstances, and concerns, and assesses the staff engagement and resources that may be required to respond to, refer, or resolve the matter.

Once a matter is created, it may generate subsequent contacts—related inquiries and communications to or from the Ombudsman staff deriving from the matter. These contacts often require further attention to answer additional investor questions, explain or clarify proposed resolution options, discuss issues with appropriate SEC or SRO staff, or respond to challenging or persistent communications from an investor. This system of counting matters and contacts helps the Ombudsman quickly assess volume and resource issues related to each matter.

Data Across Primary Issue Categories

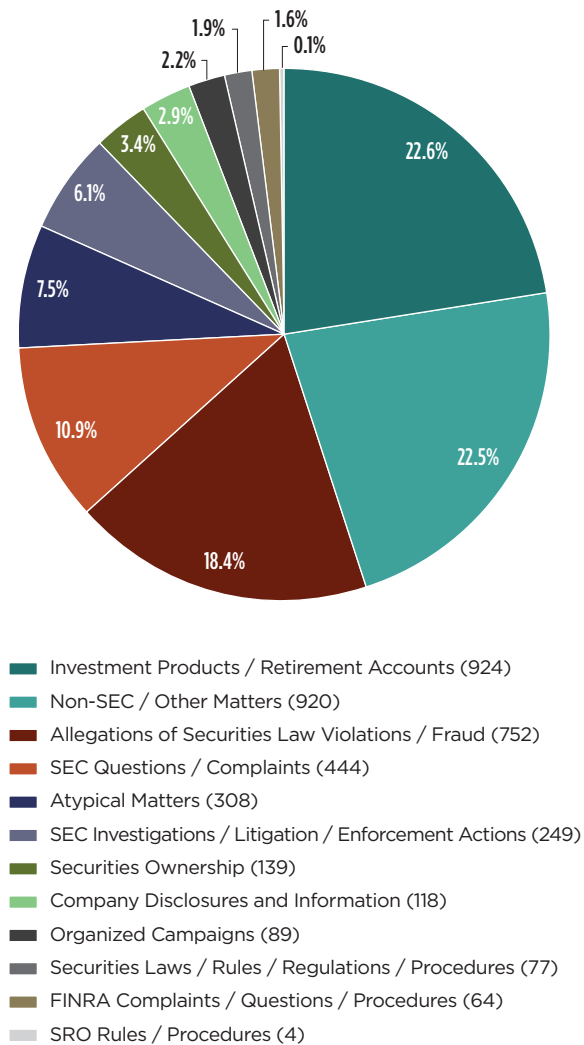
During the Reporting Period, retail investors, industry professionals, concerned citizens, and other interested persons contacted the Ombudsman for assistance on 1,647 matters covering 12 primary issue categories:

Figure 2: **Matters by Primary Issue Category**
October 1, 2019–September 30, 2020



In addition to the 1,647 matters received, we fielded 2,441 contacts covering 12 primary issue categories during the Reporting Period, for a total of 4,088 contacts. The chart that follows displays the distribution of the 4,088 total contacts by primary issue category:

Figure 3: **Contacts by Primary Issue Category**
October 1, 2019–September 30, 2020



How the Numbers Inform Our Efforts

The Ombudsman tracks matter and contact data to maintain a comprehensive view of the allocation of staff resources and to identify matters and contacts that significantly alter workflow volumes, call for the realignment of Ombudsman staff assignments, or require added staff support to manage effectively. The data also informs staff resource allocation considerations related to proposed program development, training, and outreach efforts. By tracking the distribution of matters and contacts across primary issue categories, the data helps the Ombudsman identify potential areas of concern or interest and enables the Ombudsman to act as an early warning system, as necessary, to alert agency leaders about the number and potential impact of particular issues and concerns raised by retail investors and others.

From the first full fiscal year of Ombudsman operations in Fiscal Year 2015 through the end of Fiscal Year 2020, at peak staffing levels, the Ombudsman team was comprised of the Ombudsman, one full-time attorney-adviser, one contract attorney, and one contract paralegal—and these staffing levels have fluctuated from time to time over the years due to turnover. The activities and initiatives covered in this Ombudsman’s Report, including the review, responses, and recordkeeping for the 4,088 contacts fielded during this Reporting Period, were led and completed by the Ombudsman and one attorney-adviser with significant support from one contract law clerk and one contract paralegal. While staffing levels remained flat, the total number of matters and contacts received and responded to by the Ombudsman increased from 727 matters and contacts in Fiscal Year 2015 to 4,088 matters and contacts in Fiscal Year 2020—an increase of 462 percent.

SERVICE BEHIND THE NUMBERS

While the matter and contact data quantify the volume and categories of inquiries the Ombudsman receives, the data does not capture the full value of the service the Ombudsman provides to the investing public. Among the most common problems and concerns brought to the Ombudsman are those where investors are unfamiliar with the existing channels established to resolve the particular concerns they raise, unsure which resolution channel to use, or unable to get the specific outcome they want through the resolution channels available. Typically, investors who are unfamiliar with or unsure of the available resolution channels will thoughtfully consider the advantages and disadvantages of the resolution options the Ombudsman presents, and establish their expectations based upon the potential outcome each option offers. For these investors, the Ombudsman serves a valuable resource function, but the investor retains responsibility for choosing how to proceed based on the resources the Ombudsman presents.

Investors who want a particular outcome or believe that the Ombudsman is permitted to do whatever they request can be more challenging to assist. The Ombudsman routinely receives requests from investors who want the Ombudsman to, for example, automatically grant them SEC whistleblower status and provide monetary awards, reveal confidential information relating to SEC investigations, stop a publicly traded company from taking certain corporate actions, prosecute a particular broker or investment adviser, overturn an arbitration decision, or terminate specific SEC or SRO personnel. At times, they resist the Ombudsman's efforts to engage in a productive dialogue and conclude that the only acceptable outcome is the particular outcome they want.

The vignettes that follow give a sense of the variety of issues addressed by the Ombudsman during the Reporting Period. Collectively, they offer a closer look at how the Ombudsman's time, effort, and commitment provide a meaningful service to investors and other interested persons, and demonstrate the value and effectiveness of these interactions with retail investors better than the numbers alone.

A retail investor contacted the Ombudsman after he invested in an issuer based on public reports that the issuer would be awarded a large government contract in the fight against COVID-19. Despite an initial rise in stock price, it plummeted after reports of alleged insider trading by company insiders. The investor was distraught over losing his investment and asked the Ombudsman for help in recovering his losses. Because of the investor's concerns relating to possible insider trading and fraud, the Ombudsman recommended that he submit a complaint to the Division of Enforcement (Enforcement) through the SEC's Tips, Complaints, and Referrals (TCR) system. However, the Ombudsman explained to the investor that the SEC does not pursue investigations and enforcement actions solely to recover money that a particular investor may have lost, but rather to enforce the federal securities laws. She recommended that the investor consult with private legal counsel for assistance in protecting his particular legal rights. The investor expressed his appreciation to the Ombudsman for listening to his concerns, and directing him to the appropriate SEC resources for further assistance.

A retail investor submitted a complaint to the Ombudsman relating to her attempts to trade on an online trading platform. The investor noticed that a particular company's stock price was rising at a fast pace and placed an order to purchase shares of the stock on the online trading platform. When she noticed the stock price beginning to drop, she attempted to sell her shares but found that the platform had restricted trades in the stock. She made several requests for support over the next few hours, but by the time she received a response from the platform, the stock price had dropped well below her purchase price. She expressed her frustration with the trading platform and her belief that the platform's alleged inaction caused her significant losses. Because the investor's complaint was primarily about her personal investment matters, the Ombudsman referred her to the SEC Office of Investor Education and Advocacy (OIEA) for further information and assistance.

Several investors contacted the Ombudsman to complain about research firms issuing negative reports about public companies, while at the same time selling short on these companies and reaping profits. While some investors complained that the reports were false, others expressed their concerns about the profit-based motive for these reports and suggested that the SEC prohibit this type of conduct. The Ombudsman encouraged those retail investors who were concerned about possible violations of the securities laws to submit their complaints directly to Enforcement through the TCR portal. In addition, the Ombudsman suggested that investors wanting the Commission to consider changes to rules governing short sellers express their concerns and submit their feedback directly to the Division of Trading and Markets, which is the rule-making division responsible for issues relating to short selling.

A retail investor discovered some very old paper stock certificates and asked the Ombudsman if the certificates had any value. The Ombudsman provided the investor with links to information on the SEC's website about old stock certificates. Because the investor's question also related to a personal investment matter, the Ombudsman referred her to OIEA for further assistance. The investor told the Ombudsman that while she knew that it might be very difficult to determine the value of such old stock certificates, she appreciated the information as well as the referral to OIEA.

A retail investor in Europe contacted the Ombudsman about communications he received from an entity purporting to be a U.S. securities regulator. The entity advised the investor that he was eligible to receive proceeds from a class action lawsuit and sent him a "court order" to support its claim. The Ombudsman reviewed the document and identified certain red flags to the investor, including suspicious docket numbers and court employees. The Ombudsman told the investor that he may have been the victim of an advance fee fraud, which is a common fraudulent scheme directed at non-U.S. investors. This type of scam generally involves requests that investors provide personal information and ultimately pay a fee in advance of receiving any proceeds, money, stocks, or warrants to complete a transaction. After the investor pays the advance fee or similar fees as directed, the soliciting person or entity may break off contact. In the end, the proposed transaction or settlement does not take place, and the investor is never paid and never recovers the fees paid in advance. The Ombudsman provided the investor with links to guidance on advance fee fraud available on [SEC.gov](https://www.sec.gov), and recommended that he both contact OIEA for additional resources and assistance and submit a TCR to Enforcement. The Ombudsman also suggested that the investor refrain from sending any funds and that he consider consulting private counsel for further advice. The investor expressed his appreciation to the Ombudsman for her assistance.

A retail investor contacted the Ombudsman to express his disappointment with the SEC's Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (Staff Guidance)²¹³ which addressed compliance with the SEC's proxy rules in light of the health and safety concerns presented by COVID-19. This investor felt very strongly that his requests for paper proxies should be met by the issuers without any delays. He noted that for many stocks that he owned, the issuers sent incomplete meeting information, and as a result, he could not exercise his right to vote with respect to these issuers. He asked that the SEC strongly consider revoking the Staff Guidance and communicate to public companies that they should respect the wishes of shareholders. The Ombudsman replied to this investor and highlighted the information in the Staff Guidance that encouraged people to contact the staff in the SEC Division of Corporation Finance to discuss concerns resulting from delays in the printing and mailing of proxy materials.

The Ombudsman heard from several retail investors who disagreed with the SEC's proposal to amend Form 13F to update the reporting threshold for institutional investment managers from \$100 million to \$3.5 billion.²¹⁴ These investors expressed concern that the proposed rule appeared to be designed to protect hedge funds over the needs of retail investors. They argued that the proposed amendment would greatly decrease the transparency of hedge funds, most of which would be below the new reporting threshold. The Ombudsman listened to their concerns and advised the investors to submit formal comments on the rulemaking so that their views would be reviewed and considered by the appropriate rulemaking staff, and referred them to the instructions in the proposed order for submitting comments on the rulemaking.

A new filer was unable to upload a required disclosure form to EDGAR, despite numerous attempts, and contacted the Ombudsman to express his concerns. He said that several SEC staff members told him that the EDGAR filing system was being upgraded and was experiencing some technical issues. Given certain market and timing sensitivities for this particular form, the filer asked the Ombudsman if he could submit hard copies of the filing, or email them to the appropriate office. The Ombudsman referred the individual to staff in the Edgar Business Office, who walked him through the submission process and corrected the uploading error, enabling him to successfully submit his filing. The filer expressed his appreciation to the Ombudsman for taking the time to listen and for connecting him with the appropriate SEC office to resolve his concerns.

A retail investor complained to the Ombudsman about the seemingly delayed posting of comment letters and responses on EDGAR between the SEC and an issuer relating to the issuer's Form 10-K. He argued that the comment letters should have been posted when each letter was sent. The Ombudsman listened to the investor's concerns, explained the comment letter process, and referred the investor to additional guidance on the SEC Division of Corporation Finance's webpage relating to the review of periodic reports and the availability of comment letters on EDGAR. The Ombudsman also provided the investor with information on how to submit any additional questions or feedback relating to the comment letter process directly to the Division of Corporation Finance.

Our interactions with investors provide insight into the information investors rely upon and the assistance they want when making investment decisions. The tailored information and responses the Ombudsman provides to investors are unique and require a high degree of securities law analysis and expertise, conflict resolution skills, diplomacy, and judgment. Even when the information or response communicated to an investor appears simple, the threshold questions and considerations required to understand the inquiry and to identify next steps, SEC staff resources, and potential policy implications necessitate having staff with a level of securities law knowledge typically gained through several years of prior experience. When our interactions with investors highlight their lack of information or gaps in their understanding, we attempt to deliver personalized, straightforward service by communicating the information necessary to help investors better understand the solutions the SEC can provide, by liaising with the appropriate persons and entities, and by empowering and equipping investors to make well-informed decisions.

STREAMLINED COMMUNICATIONS WITH RETAIL INVESTORS

The Ombudsman Matter Management System (OMMS) is an electronic platform for receiving inquiries, as well as tracking and analyzing matter and contact information, while ensuring all necessary data management, confidentiality, and reporting requirements are met. The OMMS Form, a web-based, mobile friendly form permitting the submission of inquiries, complaints, and documents directly to the Ombudsman, guides the submitter through a series of questions specifically tailored to elicit information concerning matters within the scope of the Ombudsman's function. In addition, the OMMS Form allows submitters to easily upload and submit related documents for staff

review. For any persons who do not wish, or are unable, to use the OMMS Form, they may still contact the Ombudsman by email, telephone, fax, and mail.

When an OMMS Form is submitted, OMMS automatically creates a matter record. The Ombudsman also manually creates an OMMS matter record for each inquiry received by telephone, email, or other means outside of the OMMS Form. Once an OMMS matter record is created, the Ombudsman and staff can review the matter details, track all related contacts and correspondence, update matter comments, and communicate with the investor via the OMMS platform. OMMS also allows the Ombudsman and staff to search and analyze matters and contacts by submitter, primary issue, fiscal year, and a number of other categories, and review data and customize specific reports when a deeper examination is required.

As a result of our ongoing efforts to streamline and enhance communications with retail investors during Fiscal Year 2020, we received 715 new matters submitted via the OMMS Form, representing 43.4 percent of the 1,647 new matters received during Fiscal Year 2020. As a comparison, during Fiscal Year 2019, we received 791 new matters submitted via the OMMS Form, representing 53.4 percent of the 1,480 new matters received during Fiscal Year 2019. The Ombudsman will continue to encourage persons to submit their inquiries via the OMMS Form, closely monitor questions and suggestions relating to the OMMS Form, and work with the Office of Information Technology, the technology contractor, and the Office of Public Affairs to enhance the OMMS user experience and the Ombudsman-related information and resources available to the public.

STANDARDS OF PRACTICE

Any retail investor with an issue or concern related to the SEC or an SRO subject to SEC oversight may contact the Ombudsman. The Ombudsman is available to identify existing SEC options and resources to address issues or concerns, and to explore informal, objective steps to address issues

or concerns that may fall outside of the agency’s existing inquiry and complaint processes. Similar to ombudsmen at other federal agencies, the Ombudsman follows three core standards of practice:

| Confidentiality | Impartiality | Independence |
|---|--|--|
| <p>The Ombudsman has established safeguards to protect confidentiality, including the use of OMMS, a separate email address, dedicated telephone and fax lines, and secure file storage. The Ombudsman generally treats matters as confidential, and takes reasonable steps to maintain the confidentiality of communications. The Ombudsman also attempts to address matters without sharing information outside of the Ombudsman staff, unless given permission to do so. However, the Ombudsman may need to contact other SEC divisions or offices, SROs, entities, and/or individuals and share information without permission under certain circumstances including, but not limited to: a threat of imminent risk or serious harm; assertions, complaints, or information relating to violations of the securities laws; allegations of government fraud, waste, or abuse; or if otherwise required by law.</p> | <p>The Ombudsman does not represent or act as an advocate for any individual or entity, and does not take sides on any issues. The Ombudsman maintains a neutral position, considers the interests and concerns of all involved parties, and works to resolve questions and complaints by clarifying issues and procedures, facilitating discussions, and identifying options and resources.</p> | <p>By statute, the Ombudsman reports directly to the Investor Advocate, who reports directly to the Chairman of the SEC. However, the Office of the Investor Advocate and the Ombudsman are designed to remain somewhat independent from the rest of the SEC. Through the Congressional reports filed every six months by the Investor Advocate, the Ombudsman reports directly to Congress without any prior review or comment by the Commission or other Commission staff.</p> |

The Ombudsman's Challenge

The mission statement of the SEC is to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”²¹⁵ At the center of many complaints the Ombudsman receives is a misunderstanding about the SEC’s relationship and obligations to individual investors because of the “protect investors” language in the mission statement. In these situations, investors frequently assume the purpose for SEC investigations and enforcement actions is to address their specific allegations or protect their specific, individual interests. While the SEC’s enforcement actions may at times align with the personal interests of harmed investors, the SEC does not pursue investigations and enforcement actions solely to represent a specific investor’s particular legal interests or to recover money a particular investor may have lost. Rather, the SEC advocates for—or supports—the collective interests of all investors and the public by maintaining fair, orderly, and efficient capital markets through the enforcement of the federal securities laws.

A primary question we encounter is, then, what can the Ombudsman do for investors who have been harmed by violations of the federal securities laws? In appropriate circumstances, the Ombudsman may be able to present options to investors or foster communications between the investor and SEC or SRO staff. However, the Ombudsman is not authorized to do many things that investors request, including:

- deciding the facts in a dispute that the investor has with the Commission or an SRO, or in a dispute before an SRO, such as an arbitration or mediation;
- intervening on behalf of, or representing the interest of, an investor in a formal dispute or investigation process;
- providing advice on how the federal securities laws may impact their particular investments or legal options; or
- changing formal outcomes, including decisions about whether to investigate an allegation of wrongdoing, settle an enforcement action, or create a Fair Fund.

With these limitations in mind, the Ombudsman routinely explains to investors that they have the ability to protect their interests and preserve their legal rights in ways that the Ombudsman cannot. For example, an investor can file an arbitration or mediation complaint with FINRA to address a broker dispute, or hire private legal counsel to advise the investor on the best ways to protect the investor’s rights or reach a particular outcome. Investors who do not have the means to hire legal counsel may decide to request representation or counseling services through no-cost legal clinics sponsored by various law schools.

While the Ombudsman staff cannot represent the interests of investors in private disputes, we do serve these investors by providing information that will assist them in making better informed choices for themselves.

Assisting Investors through Advocacy

Even when we cannot help investors achieve the specific results they desire, the concerns we hear from investors help to shape the policy agenda of the Office of the Investor Advocate. We also engage with those who represent investors, including law school investor advocacy clinics, to gain a deeper understanding of potential legal and structural barriers encountered by investors.

To retail investors, FINRA is perhaps the most well-known SRO under SEC oversight. FINRA operates BrokerCheck²¹⁶ and a dispute resolution forum,²¹⁷ both of which are commonly used by retail investors. As discussed in prior reports, the Ombudsman closely follows FINRA's rulemaking and dispute resolution forum activities that may have a direct and significant impact on retail investors. We also look for ways to improve SEC or SRO processes and regulations for the collective benefit of investors, and we advocate for those types of reforms. Selected areas of interest and importance to retail investors are discussed below.

AREAS OF INTEREST AND IMPORTANCE TO RETAIL INVESTORS

Retail Investor Concerns relating to the COVID-19 Pandemic

The COVID-19 pandemic has had an unprecedented impact on financial markets, and the SEC has taken numerous steps to provide ongoing information to retail investors. The SEC's homepage has a banner—"SEC Response to COVID-19"—that takes the reader to an overview of the agency's current "operational initiatives, market-focused actions, guidance and targeted assistance and relief, investor protection efforts and other work" in response to the effects of COVID-19 pandemic.²¹⁸

The Ombudsman heard from several retail investors in February and March 2020 who wanted the SEC to take actions to address the volatility of the stock market due to the COVID-19 pandemic. Several of these investors urged the SEC to reinstate the SEC's original uptick rule, which prohibited short selling a stock unless the

price of the stock had ticked upward.²¹⁹ Others suggested that the SEC stop, or at least pause, all algorithmic and computer trading for an indefinite period. Although the market stabilized somewhat in early April 2020, the Ombudsman continued to receive COVID-19-related submissions from retail investors. These included complaints about insider trading by company insiders or public officials based on nonpublic information, and complaints about alleged short selling by research firms who published negative reports and then profited from the ensuing drop in stock price. Other investors complained about their online trading platforms being temporarily unavailable or failing to respond to their requests. The Ombudsman team answered their questions, provided appropriate information and resources, assured them that the SEC appreciated hearing their views and concerns, and encouraged them to follow the agency's rulemaking activity and COVID-19 updates on SEC.gov.

The SEC transitioned to mandatory telework for all employees on March 10, 2020. While the transition required substantial adjustments early on, the SEC remained committed to its mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.²²⁰ As the Ombudsman team primarily communicates with investors by phone or email, or through OMMS, the transition to telework for the Ombudsman team was relatively seamless. The Ombudsman staff continues to work together as a team to review and respond to investor questions and complaints, and to identify procedures, options and resources to help retail investors resolve their concerns.

FINRA Arbitration and Mediation during the COVID-19 Pandemic

As a general matter, retail investors are bound by clauses in their contracts with member firms to resolve any disputes through arbitration or mediation in the FINRA dispute resolution forum. However, the risks associated with the COVID-19 pandemic necessitated changes to the in-person dispute resolution process. On March 17, 2020, FINRA postponed all in-person arbitration and mediation proceedings through May 31, 2020.²²¹ After subsequent interim postponements, FINRA ultimately decided to administratively postpone all in-person arbitration and mediation proceedings scheduled through January 31, 2021.²²² For now, parties may agree to reschedule, or they may agree to conduct their proceedings virtually by telephone or by video conference arranged by FINRA through the Zoom platform.²²³

As COVID-19 continued to spread, there was an expectation that the number of new customer arbitration filings would surge due to market volatility and customer service disruptions at member firms as a result of the pandemic.²²⁴ However, as of August 31, 2020, there were only 1,359 new customer arbitration cases filed in 2020—329 fewer than were filed by that date in 2019.²²⁵ Attorneys representing retail investors and firms appear to be adjusting well to the virtual hearing environment,²²⁶ which may prove beneficial to their clients. However, retail investors representing themselves, and elderly investors more so, may experience challenges transitioning to the virtual hearing environment—including technology difficulties, the absence of the interpersonal dynamic that occurs during the in-person process,

and postponements—that could potentially affect settlement options, the presentation of evidence, hearing outcomes, and award amounts. While they cannot provide legal advice or representation, FINRA Dispute Resolution Services staff are available to provide technical support and resources to all parties and arbitrators. Parties may contact their case administrator if they have questions or need additional assistance throughout the virtual hearing process.²²⁷

FINRA Rule Limiting Brokers as Beneficiaries

On July 2, 2020, FINRA submitted to the SEC a proposed rule that would change FINRA rules governing the circumstances under which a registered person may be named as a beneficiary or hold a position of trust for a customer.²²⁸ The proposed rule addresses FINRA's concerns regarding the vulnerabilities faced by older investors who may be isolated or suffering from cognitive decline,²²⁹ and the conflicts of interest that arise when a registered person is named as a beneficiary, executor, or trustee for a customer, or when a registered person holds a power of attorney on behalf of a customer. FINRA recognizes many member firms have rules in place to address and limit these potential conflicts. However, despite members' best efforts, potentially problematic arrangements may develop and can remain unknown to member firms and surviving family members for years to come.²³⁰

With this proposed rule, FINRA aims to create a new national standard to ensure consistency across all member firms and better protect retail investors. The proposed rule would require a registered person to decline being named a beneficiary of,

or from receiving a bequest from, the customer's estate, as soon as the registered person becomes aware of either gift. The registered person will then be required to inform his member firm employer of the gift. The member firm must evaluate and grant written approval in order for the registered person to receive the gift. The proposed rule will not apply where the retail investor is a member of the registered person's immediate family.

The SEC received one comment letter from an industry interest group and two comment letters from public advocacy groups.²³¹ The Securities Industry and Financial Markets Association (SIFMA) and the Public Investors Advocate Bar Association (PIABA) supported the proposed rule; however, PIABA believed that the rule should go further and "prescribe a uniform written notice provision rather than permitting individual member firms to specify the required form of written notice for its registered persons."²³² The North American Securities Administrators Association, Inc. (NASAA) opposed the proposed rule and maintained that "a registered person should simply be prohibited from being named to customer beneficiary and trust position arrangements, with only a narrow exception for arrangements involving a registered person's immediate family."²³³ NASAA also recommended that beneficiary and trust arrangements with immediate family members be "subject to firm scrutiny and approval."²³⁴

In its response letter, FINRA reiterated its belief that an outright ban on all positions of trust is not appropriate because there are instances when "a registered person with financial acumen and knowledge of a customer's financial circumstances may be better positioned to serve in a position of trust than other alternatives available to the customer."²³⁵ FINRA also defended the application of the proposed rule to customers who are not immediate family members (as defined in the proposed rule) because "[t]he risk that a registered person misused his or her role in the broker-customer relationship to be named a beneficiary or hold a position of trust is reduced when the customer is an immediate family member."²³⁶

The Commission considered the proposed rule and the comment letters and found that "the proposed rule strikes a balance by allowing a firm to reasonably assess the risks to customers associated with those conflicts of interest and permitting a registered representative to be named a beneficiary of a customer or hold a position of trust on behalf of a customer for personal monetary gain if the firm reasonably determines the risks are acceptable."²³⁷ In approving the rule on October 7, 2020, the Commission noted that the rule "will provide additional investor protections, especially for broker-dealers who do not currently have policies and procedures in place to address these scenarios, or have such policies and procedures that are either less restrictive than the proposed rule change or are applied inconsistently."²³⁸ When the rule becomes effective on February 15, 2021,²³⁹ it will join FINRA's existing Senior Exploitation Rules,²⁴⁰ which have been in effect since 2018.

OUTREACH ACTIVITIES

SEC Investor Advocacy Clinic Summit

During Fiscal Year 2019, the Ombudsman took significant steps to strengthen the Office's Law School Clinic Outreach Program²⁴¹ by hosting the first SEC Investor Advocacy Clinic Summit (the Summit) at SEC Headquarters in April 2019. The Summit, a success on all fronts, provided an exceptional, in-person opportunity for SEC and SRO staff to interact with directors and law students from 10 clinics, learn about their policy perspectives and clinic initiatives, and take a closer look at their client experiences during the daylong event. As previously discussed in the Report on Objectives for Fiscal Year 2021,²⁴² the Ombudsman team planned to host a second Summit on March 26, 2020 at SEC Headquarters. The Ombudsman expected to host over 100 confirmed participants and speakers at the Summit, including clinic directors and law students from 9 of the 12 active law school advocacy clinics,²⁴³ SEC commissioners and senior agency staff, and senior leaders from SROs and stakeholders including FINRA, NASAA, and PIABA. Additionally, harmed investors who benefited from the services provided by the clinics were also confirmed to attend and share their experiences with attendees. Unfortunately, the in-person Summit was cancelled in early March 2020 when the SEC transitioned to mandatory telework in the wake of the COVID-19 pandemic.²⁴⁴

During the Reporting Period, the Ombudsman team resumed planning the Summit as a virtual event, tentatively scheduled for the spring of 2021. In September 2020, the Ombudsman staff began

contacting the clinic directors to gauge interest in a virtual Summit and to determine possible program topics. Several clinics expressed interest in a virtual Summit, and, although a virtual event presents a different set of logistical challenges, we are developing topics and formats to facilitate participation, engagement, and the thoughtful exploration of ideas to benefit retail investors. In particular, we may spend time examining the experiences of their retail investor clients during the pandemic—from lessons learned relating to elderly investors and social isolation, to the impact of virtual hearings on the arbitration process, to changes in investing behavior and risks, to novel frauds and schemes—and discussing regulatory and policy approaches responsive to their needs.

Additional Outreach Activities

During the Reporting Period, the Ombudsman continued to seek out opportunities to increase awareness and elevate the visibility of the services the Ombudsman and the SEC provide to retail investors. These outreach activities included participation in the ombudsman and securities industry events, professional conferences, and related activities listed below.

- American Bar Association Section of Dispute Resolution—Annual Spring Meeting Webinar (Panelist)
- American Bar Association Section of Dispute Resolution—Ombuds Day (Panelist)
- American Bar Association Section of Dispute Resolution—Ombuds Subcommittee monthly meetings
- Coalition of Federal Ombudsmen Annual Conference (Experienced Ombudsman discussion leader)

- Coalition of Federal Ombudsmen monthly meetings
- Corporate Counsel Women of Color Annual Conference
- Drexel University School of Law, Securities Law Summer Speaker Series webinar (Speaker)
- Federal Financial Regulatory Ombudsmen Working Group quarterly meetings
- Fordham University School of Law, Black Law Students Association, Career Opportunities Panel (Panelist)
- Fordham University School of Law, Black Law Students Association, Women’s Committee, Career Strategies Panel (Panelist)
- Fordham University School of Law, Securities Arbitration Clinic webinar (Speaker)
- International Network of Financial Services Ombudsmen Annual Conference
- International Ombudsman Association Annual Conference—Government Sector Session (Co-Presenter)
- Northeast Ombudsmen Working Group quarterly meetings
- SEC New York Regional Office and Fordham University School of Law, “Preventing Community-Based Financial Fraud“ investor outreach conference (Panelist)
- Securities Arbitration Clinic Directors Annual Roundtable
- University of Cambridge, Executive MBA Program, “The Bridge” virtual discussion (Panelist)

OUTLOOK FOR FISCAL YEAR 2021

On a day-to-day basis, the most apparent aspect of my role as Ombudsman is the interactions with retail investors and others who contact me with their questions or concerns about the SEC or the

SROs we oversee. As Ombudsman, I am available to serve as an additional channel of communication between retail investors and the SEC or SROs and to clarify certain regulations, policies, and practices. Where an established resolution process exists, I typically explain the process and direct the investor to the appropriate staff or resources, and I will follow up with the investor, if necessary. I may also identify resources outside of the SEC to help investors resolve their questions and concerns.

From the beginning, however, I recognized that I have no real control over the volume or substance of matters that I receive. Because of that, I have never equated the number of matters I receive to the value of the role. That said, from Fiscal Year 2015—my first full fiscal year in the Ombudsman role—through Fiscal Year 2020, my very small team fielded over 13,200 investor contacts. While that is an impressive number, the quality of the information we provide as we liaise with retail investors is more meaningful and significant than the number of contacts. Assisting just one investor with one issue can make a significant difference to that investor, and at times, may inform our approach as we consider policies, regulations, and rulemakings.

As noted in prior reports, current staffing levels have not kept pace with the increased volume of investor matters and contacts. Compared to the 4,088 investor contacts fielded by me and one full-time attorney in Fiscal Year 2020—an average of 2,044 investor contacts each—other SEC divisions and offices with similar external response duties have many more full-time staff responsible for significantly fewer responses per person per fiscal year. The approval to hire one senior special

counsel in Fiscal Year 2021 will double the size of my full-time staff and will help me meet my statutory requirements, address complex investor issues, and collaborate with colleagues across the agency and at the SROs to ensure that the concerns of retail investors are considered throughout the regulatory and policy making processes. I will need additional full-time staff as I expand my programmatic and policy work through internal collaborations with SEC divisions and offices, through increased outreach and engagement with retail investors and SROs, and, if the proposed legislation is passed, through leading the efforts to establish an investor advocacy clinic grant program.

Finally, in Fiscal Year 2021, I will continue to track detailed matter and contact information relating to investor complaints. I will also refine the secondary issue category reporting capability in OMMS to identify additional areas within certain primary issue categories that may require targeted research and analysis. As I have in the past, I will continue to seek out meaningful opportunities to share my work and the work of the SEC with retail investors, industry organizations, and the broader ombudsman community in ways that may directly benefit retail investors. I look forward to providing additional updates on our Fiscal Year 2021 activities in my next Ombudsman's Report.

A handwritten signature in black ink, reading "Tracey L. McNeil". The signature is written in a cursive, flowing style.

Tracey L. McNeil
Ombudsman

REPORT ON INVESTOR TESTING

We launched our investor testing initiative, POSITIER, in 2017 with the hope of using the program to fulfill our Office’s statutory mandate and provide empirical evidence to help the Commission fulfill its investor protection mission. Over the past three and a half years, we have built what we consider to be the most innovative and versatile data collection architecture in government. POSITIER is unique in that it provides rapidly deployable, cost-effective, and high-quality data collection capacities with a high degree of flexibility. This combination of analytic power and flexibility gives us tools to respond rapidly to emergent developments in the economy.

We have used these tools to engage in an unprecedented number of innovative data collection projects related to investor issues, behavior, and thinking. To date, we have completed nearly 50 testing efforts in addition to 23 nationally representative probability-based surveys, 4 quota sample survey projects, and 9 qualitative research studies. Last year, we also created our own longitudinal survey panel to track a group of investors over time. In August of this year, we launched a monthly survey following these investors, which has enabled us to develop insights on the effects of market movements and COVID-19. In sum, over just three and a half years, our efforts have yielded over 25 million new data elements.

Research plays a number of critical roles in the Office of the Investor Advocate and contributes to the broader mission of the SEC:

- It allows us to assist the Investor Advocate in meeting our statutory mandate to conduct research on investors and identify issues of importance to investors. For example, it allows us to identify areas of concern for the investing public, such as financial literacy deficiencies, disclosure problems, or inappropriate financial products so that the Investor Advocate can advocate for solutions on these issues.
- It enables us to develop tools and data that are useful for rulemaking and other policy pursuits. By developing a library of investor research, we can quickly contribute to evidence-based policymaking as questions arise rather than starting from scratch in time-sensitive rulemakings. Our versatile toolkit also provides a mechanism for collecting data in a compressed timeframe.



- It allows us to explore investor issues outside of a specific rule proposal, and to consider investor issues that might fall outside of the range of a particular rule-writing office. For example, issues that affect investors may not fit neatly into the responsibilities of the Division of Investment Management or the Division of Trading and Markets and, as a result, may not receive the attention they deserve.
- It develops our credibility with academics, policymakers, and rule-writing divisions. Research that is in the public domain can be cited in rule proposals and can be used to inform rule-writers' initial views on a rulemaking. It encourages engagement with academics and other experts to ensure that our research and rulemaking activities achieve the highest possible standards of quality and maximize benefits to investors in a way that also accounts for industry impact.
- Further, it allows us to provide an attractive work environment for staff, fellows, and others who are crucial to helping our Office achieve its mission. To advocate effectively on behalf of investors, we need to attract the best human capital so that our thinking and research skills remain at the leading edge.²⁴⁵

Since the founding of POSITIER, we have tried to build our research group within the Office of the Investor Advocate and expand our network. Just a week before the pandemic forced the SEC to move to a remote work environment, we welcomed a second staff member, Alycia Chin. Alycia is a highly regarded researcher of national prominence. She holds a Ph.D. from Carnegie Mellon University and has worked on consumer disclosure and related issues for the PCAOB and the CFPB. Alycia's expertise in financial disclosure is nearly unmatched in government, with published

work on consumer attention issues, comprehension of disclosed product features, and evaluations of financial products. She has a long record of accomplishment in conducting consumer and investor tests for policymaking purposes, including developing disclosures to inform rulemaking and conducting retrospective reviews of adopted rules.

While COVID-19 has upended some of our research and data collection this year, POSITIER's flexibility has enabled us to adapt more readily and easily than many other evidence initiatives in government. For example, although we planned to conduct in-person focus groups starting in March, we quickly pivoted to an online bulletin board format and research topics amenable to that structure. Although we look forward to eventually conducting in-person surveys on selected topics, we currently deploy surveys by phone or online rather than in-person, which has further insulated our work from the pandemic's disruptive effects and enabled us to continue to hear from investors and non-investors during this unique period.

We have accomplished our work despite an array of difficult headwinds. As noted by the Investor Advocate in this Report's administrative and legislative recommendations, unrealistic human resource levels and fiscal uncertainty have impeded our ability to fulfill our Office's statutory mission, which envisions advocacy for investors that is rooted in sound research. In addition, we have encountered cultural and institutional challenges that impede our ability to contribute to the SEC's broader mission, including obstacles to the use of non-sensitive data and an institutional ecosystem that tends to keep social scientists at arm's-length until after most policy decisions have already been finalized.

Our report this year will discuss some of these challenges in detail. We also suggest institutional changes that would integrate research into work processes and bring science to bear on policy development at the Commission. These changes can help the SEC more effectively achieve its tripartite mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

SELECTED RESULTS OF INVESTOR RESEARCH

In this section, we share highlights from the results produced by our group over the past year, along with a glimpse into some of our ongoing research projects.

Investor Financial Literacy

A lack of financial literacy is commonly viewed as an obstacle limiting retail investors' ability to make appropriate financial choices and achieve financial security. Financial literacy is related to consequential life outcomes such as wealth accumulation, financial management, and uptake of financial advice.²⁴⁶ Data from the FINRA Foundation suggests that financial literacy levels were low in 2009 and have deteriorated further over the subsequent decade.²⁴⁷ Unfortunately, programs to raise financial literacy have not demonstrated widespread effectiveness except in very limited circumstances.²⁴⁸ Furthermore, some evidence suggests that those who are already financially literate are more likely to access financial education programs,²⁴⁹ limiting the impact of such programs on reducing financial literacy gaps.

The most widely used approach to measuring general financial literacy is a set of questions developed by Annamaria Lusardi and Olivia S. Mitchell,²⁵⁰ which tests knowledge of basic

economic concepts, with extended versions that probe deeper on particular issues.²⁵¹ The Lusardi-Mitchell measures have helped to raise awareness of the importance of financial literacy and are extremely valuable in most contexts. Yet, we found the traditional approach to be not well attuned to identifying the problems faced by investors. The existing set of questions focuses on broad understanding of economic principles that may not be representative of the technical knowledge needed to make good investment decisions. Additionally, these questions do not speak directly to the specialized policy areas of the SEC and other financial regulators. As such, these measures may be less meaningful when studying investment outcomes. In particular, as we began to study investor understanding of mutual fund fee characteristics as recommended by the Investor Advisory Committee,²⁵² it was apparent that general financial literacy might fall short in helping us evaluate whether investors understand their choices with respect to specialized financial products. For example, general financial literacy may guide an individual to include mutual funds in an investment portfolio, but fail to prevent the selection of suboptimal funds.

To address this limitation, we developed a specialized battery of questions related to mutual fund characteristics and issues relevant to individual investor choice problems. In developing the questions, we first considered the extant literature.²⁵³ We also sought to identify issues related to investors' ability to navigate the disclosure-centric world of mutual fund investing, including mutual fund features that current rules suggest are essential for investors to consider. In the end, we developed an easy-to-administer battery of 11 true-false questions relating to risk, fees, and other features of funds.²⁵⁴

While our exact methods are still being refined, our initial results using a nationally representative, probability-based panel survey reveal fresh insights. In our data, most respondents were unable to answer the majority of these basic questions correctly. This startling result suggests a significant fraction of potential investors lack adequate knowledge to guide their decision-making in the mutual fund marketplace. As with all research, our work must be approached cautiously in terms of policy implications, lest it be misinterpreted, but we can say that our scale provides an important litmus test of whether investors have the capacity to make choices using the information with which they are provided in the current regulatory environment. Important next steps are to establish whether knowledgeable individuals are more likely to purchase mutual funds, as well as the extent to which investors learn from their experiences holding funds.

In addition to developing a battery of questions to gauge financial literacy specific to mutual funds, we have explored other questions related to mutual fund disclosures. For example, we have conducted research on investors' ability to understand fee disclosures as set forth in fee tables. We gave respondents a mocked up fee table and asked them to approximate the actual fees that would be paid on a hypothetical investment. Only 20 percent of respondents answered this question correctly. Remaining respondents were nearly evenly split between explicitly stating that they did not know the answer, and those that gave answers ranging from \$0 to less than 10 percent of the true fees charged. Again, policy implications must be approached cautiously—this result does not suggest that fees should not be disclosed. Rather,

these results suggest that further study is needed because existing efforts to raise investor awareness and understanding of mutual fund fees may not be effective.

Readability of Disclosures

Why do investors face so many obstacles to understanding their investments? Could it be that disclosures—the primary method by which the SEC expects investors to acquire knowledge about their funds—are provided only after a purchase has been made, and that they are dense documents with difficult-to-interpret implications? Just as former SEC Chairman Christopher Cox predicted over a decade ago, we have begun to examine the readability of mutual fund disclosures using the Flesch-Kincaid scoring system in research conducted with Dan Silverman of Arizona State University.²⁵⁵ We started here because the Flesch-Kincaid score is one of the most commonly used measures of readability, despite its imperfections. Our preliminary work suggests that nearly 40 percent of summary prospectus documents are harder to read than the seminal Black-Scholes option pricing paper (which requires advanced college or post-college reading levels), and only a handful are as readable as a *USA Today* newspaper article (which maps to a 10th-12th grade reading level).

Given that our retirement system generally asks individuals to manage their own retirement savings, these results suggest severe obstacles for the approximately two-thirds of Americans that do not have a college degree, as well as the 43 million American adults that have trouble with simple literacy tasks like comparing and contrasting information.²⁵⁶

Other Research

Over the past year, we have conducted a number of other studies. Some we hope to finalize and release soon, while others represent longer-term research undertakings. These research studies include:

- A qualitative study of digital asset users' behaviors and vulnerabilities;
- Qualitative and quantitative research on wealth proxies and wealth measurement;
- Research on racial and gender inequities in investment and wealth;
- Research on financial markets, with a particular focus on issues affecting retail investors;
- Impacts of COVID-19 on households' economic situations; and
- Investor responses to framing, context, and terminology used in disclosures and economic surveys.

OBSTACLES TO INVESTOR TESTING

In POSITIER, we would argue that the SEC has the most sophisticated, flexible, cost-effective, and responsive evidence generation toolkit in government. Nevertheless, we still do not have the thorough testing program that investors deserve. To effectively support the work of the Investor Advocate and contribute in a positive way to the Commission's broader mission, three elements are critical for our success: (1) resources to build our research team and carry out research projects; (2) an SEC culture that supports evidence-based policy development and incorporates researchers early in the policymaking process; and (3) independence so that we can conduct objective research that is free from political influence and make our work public without interference.

Adequate Resources to Support POSITIER

One major distinction between our Office's work under POSITIER and other research groups in government is the human resource levels allocated to our group. While we pride ourselves in running a unit that requires only a fraction of the resources required by our peers, our staffing levels are simply unrealistic for fulfilling our statutory mission. Our initiative is a comprehensive testing program with survey and data collection capacities intended to inform the Investor Advocate, the Investor Advisory Committee, the Commission, and the public, as well as to guide the identification of problems for investors and assist in the development of rule proposals.

In other agencies, such as the Federal Reserve (Fed) and the Consumer Financial Protection Bureau (CFPB), survey and testing teams tend to be comprised of 6-12 staff for each project. In the SEC's Division of Economic and Risk Analysis (DERA), economic analysis research projects (which do not normally involve the time-consuming data collection that is required for investor testing) each have comparable staffing levels to Fed and CFPB research projects. By contrast, for most of its history, our group has had one researcher working on approximately 20 projects—an approach which is unsustainable. Under a multi-year hiring freeze that had been in place since POSITIER's launch, we cobbled together a patchwork of temporary support for a long-term staffing need. Although each POSITIER visitor has made a meaningful contribution to our work, time spent recruiting and onboarding for highly technical positions erodes the value of such temporary labor and limits our ability to be effective in the long-term. Nevertheless, we have persevered and collected unprecedented amounts of data during our initial years because testing initiatives were desperately needed.

Earlier this year, Alycia Chin joined our group, immediately providing impact. Yet we simply need more help. Success requires more than naming a point-person to be responsible for a project; it requires resources commensurate with the task at hand. And it requires a variety of skill sets, from survey design to data analytics to household finance economics to marketing and decision science. Unfortunately, we do not have even a single complete testing team, much less multiple teams that can focus on a variety of survey and other data collection projects. In short, we believe that the CFPB, Fed, and other agencies offer an appropriate benchmark for adequate staffing levels to engage in the types of data collection and analysis we are already attempting to conduct. Testing programs of the scale envisioned in H.R. 1815,²⁵⁷ the SEC Disclosure Effectiveness Testing Act, would require multiple testing teams with a variety of skill sets on each team. No matter the scope of our work, we believe it will provide benefits to investors that far exceed the costs.

We are frequently asked whether SEC economists within DERA already have the capability to do the type of investor testing we envision. DERA has a large contingent of highly skilled economists, but it is important to note that they are specialized in areas like asset pricing and corporate finance sub-fields—important issues for the Commission, but ones that have little topical or methodological connection to our Office’s main research interests. Indeed, our Office is charged with the statutory obligation to examine the impact on investors of SEC and SRO rules, so we believe it is imperative that we develop a robust research program that is able to independently assess the viability of

policy proposals, staffed by researchers that are specialized in our issue areas, and freely able to critique DERA’s or an SRO’s economic analysis when it lacks adequate perspective on investors.

Importantly, we need not only additional human capital, but also an adequate and stable amount of fiscal resources to field surveys and perform our other research tasks, often with the assistance of third-party vendors. Uncertainties regarding fiscal resources, ever present across government in the past decade, have been particularly challenging for our program. In recent years, we have had little information about our funding level until as late as March. Since our projects take time to plan and execute, in some years we have had to compress a year’s worth of work into about six months—not accounting for other obstacles such as government shutdowns, continuing resolutions, and other challenges. While the consequences of major fiscal disruptions are well-documented,²⁵⁸ what has received less attention are the planning challenges and other distractions that such uncertainty creates. In some years, we have been left constantly rewriting our internal work plan to adapt to changing fiscal circumstances.

POSITIER is highly adaptable to changing circumstances, but these disruptions and a lack of fiscal flexibility mean more resources devoted to planning and less to execution. They also have knock-on repercussions for our contractors who must constantly adapt to changing conditions by reallocating their workers and potentially disrupting their other work streams. More commitment, and more certainty, would allow us to use our resources more effectively.

While resolving budget discussions at the Federal level involves much debate beyond our purview, we believe there are some concrete steps that could facilitate investor testing. In particular, ring-fencing our Office's budget with a lower bound set as a fixed fraction of the SEC's budget, in a manner similar to the Office of the Inspector General, would help provide clarity and budgeting continuity.

Creating a Culture that Supports Evidence-based Policy Development

In recent years, our Office's ability to influence policy at the early stages has been limited. If we are only able to comment on a rule proposal after it has been written, there are constraints on our ability to deploy our tools to make the rule more effective. In the long-term, changing this dynamic requires institutional changes so that we are formally integrated into the policy development process rather than being positioned as a critic after the fact. A simple step would be for rule-writing divisions to consult with our Office early in the rule-writing process, even if they do not anticipate new or specialized investor testing for the rule proposal. We believe rulemakings would benefit from the input of social scientists and other experts from our team who could, for example, help rule-writers understand the ways that average people process information and make investment decisions.

Strengthening Independence

While integration and access within the rule-writing process is critical for success, our Office must also preserve its independence in order to maintain our commitment to research validity. Two issues are relevant here. First, the Office of the Investor Advocate is *de-jure* an independent office because of the provisions in the Dodd-Frank Act, but it

relies on the will of the Chair's office for fiscal resources so it is not *de facto* fiscally independent. Fiscal independence would help institutionalize our Office's autonomy and forestall a future Commission from using fiscal disruption to circumscribe our role. A second consequential component of our independence is our ability to make our research products public and discuss our work with academic experts. This aspect of independence is crucial to creating credible testing results that can withstand reasonable scrutiny. To date, the SEC has chosen to condition release of our research on approval from the Commission. This *de facto* restriction risks allowing a future Commission to veto viable research projects that may conflict with preconceived beliefs or policy objectives, potentially undermining our ability to provide an independent voice for investors.

A DIFFERENT APPROACH TO POLICYMAKING

Challenges in the SEC's rulemaking process arise from a mix of cultural, institutional, and other issues, which may limit the SEC's ability to adopt rules that can achieve the best outcomes at the lowest cost. In this section, we lay out a vision for reforming the policymaking process to develop policies more suitable to the needs of the investing public. Our fundamental view is that an evidence-based approach to institutional effectiveness is essential to the integrity of financial regulators and government itself. Because effective regulation is essential to functioning financial markets and protecting the investing public, it is important to collect the evidence needed to ensure that regulations serve the needs of the population and accomplish their intended purposes.

To achieve more effective policymaking, we believe that it is essential to build a collaborative work environment that brings intellectual diversity into the problem identification and idea generation process. Rule-writing groups need to work across not only office boundaries, but also professional boundaries so that social scientists and other professional groups are included in the process early and on equal footing. Equal footing is key, because if the range of possibility is circumscribed from the outset by a particular point of view, then the insights and perspectives potentially offered by diverse professional groups will likely have more limited impact. In this regard, multidisciplinary teams are often critical because the issues the SEC faces are complex. Disclosures, for example, have an important legal basis, but disclosure effectiveness also heavily depends on economic, psychological, and other factors. The equality of such diverse perspectives would be facilitated by an SEC that included more intellectual and professional diversity in leadership positions throughout the agency.

Below we outline some steps and basic principles for what would be, in our view, an evidence-based rulemaking process (summarized in Figure 4):

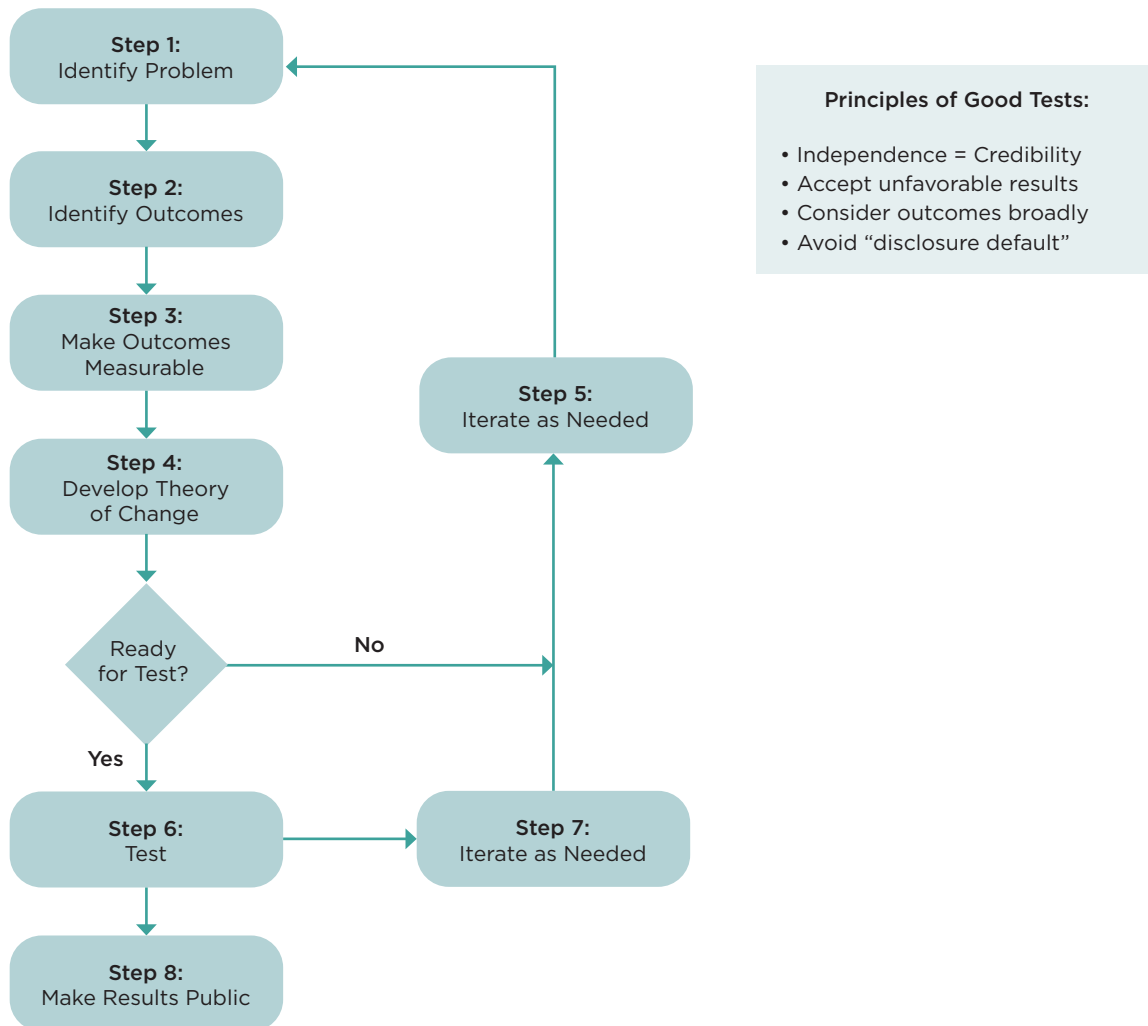
Step 1: Identify the problem.

All too often, policy develops from an idea about a certain action (e.g., delivering new information, delivering a program, introducing a new regulation). A policy action is a natural starting

point, but it typically fixates the policy process on that particular solution, limiting inquiry on other potential options. It further leads to success being measured in terms of the implementation of the specific activity itself (*i.e.*, the policy has been enacted, which is a success), rather than in terms of improved outcomes in society.

In our view, policy development should instead strive for an articulation and understanding of the problem that requires government intervention. As indicated above, problem identification should involve a collaboration of professional groups working together in the same room on equal footing, including economists, social scientists, and other relevant professional groups, in addition to the attorneys who are traditionally rule-writers. Such a working group should ask critical questions such as: What are the social or economic challenges that individuals, markets, institutions, or other parties face? What is the market failure that requires government intervention? What is the source of that market failure? How are different groups in society affected by the problem? Where does our existing regulatory regime fail?

Figure 4: An Evidence-Based Rulemaking Policy Process



Step 2: Identify specific, concrete outcomes.

No policy proposal can truly succeed without concrete details about desired outcomes—whether and how policymakers intend to affect individuals, firms, or markets. A new policy makes a change to the economic environment and will have consequences; if it does not, why consider a policy change at all? Identifying the intended shift in outcomes is essential to the success of any initiative. Yet, policymakers often overlook this critical stage in policy development.

Consider the proximate and distal outcomes associated with a change in fee disclosures. The proximate outcome might be something along the lines of, “investors better understand the fees they pay for their investments.” But, understanding may be of limited use if it does not lead the investor to make better choices, so a distal outcome might be something like, “investors make better choices based on fees.” Importantly, outcomes can be distinguished from the policy change itself (e.g., requiring a new fee disclosure) and confirmation

that the policy has been enacted (e.g., 98% of entities provide new disclosure or a new form filing with the SEC).

Step 3: Ensure outcomes are measurable.

An important attribute of policy outcomes is that they should be *measurable*. Measurable outcomes are essential so that their effectiveness can be determined using tools like the ones POSITIER has developed related to investor impact, or that DERA has at its disposal for other aspects of market impact. Measurable outcomes allow researchers to develop a framework for assessing how the policies may impact the public *ex-ante*, and also enable *ex-post* assessments of whether an initiative is effective in the field. To demonstrate the ability to measure certain outcomes, researchers might conduct a study that collects baseline data. Such a study also supports careful thinking about future data collection efforts to enable improved *ex-post* evaluation of policy effectiveness.

Outcomes studied should reflect both directly targeted outcomes and potential adverse side effects. For example, a new disclosure may induce better comprehension of risks than a status quo disclosure for those that read it, but it could also frighten skittish investors unnecessarily, leaving

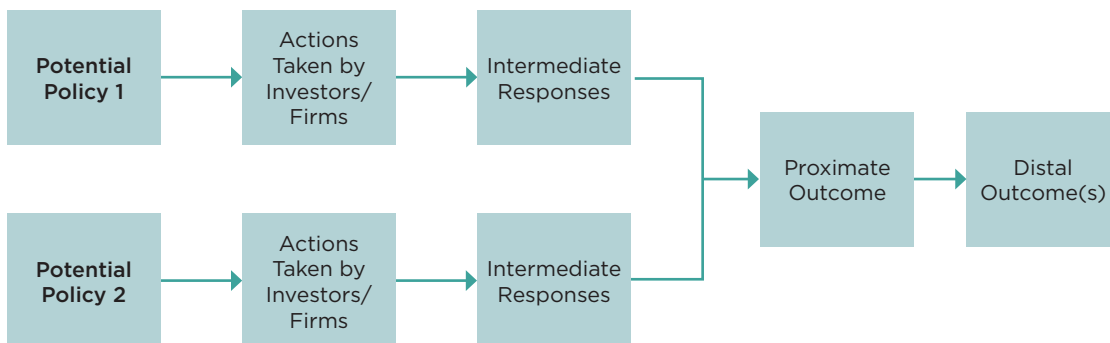
them unprepared for retirement. As such, outcomes should be focused enough to speak to the problem, but broad enough to account for unintended consequences of a policy.

Step 4: Articulate a convincing Theory of Change.

This is arguably the most crucial step in the process. A Theory of Change is a map from actions the policymaker is considering undertaking to the desired outcomes. Because policy and social phenomena are complex, a Theory of Change typically involves multiple intermediate steps between the actions and outcomes. Those steps should be grounded in social science theory and evidence, or else identified as assumptions that need to be checked.

Figure 5 sketches a stylized theory of change with two candidate policies. For illustrative purposes, the diagram is highly simplified as compared with a proper theory of change. For each of the two candidate policies, the theory traces the path that the policy action takes through investors and markets, along with assumptions, moderating factors, and so on that ultimately lead to the proximate and distal outcomes. A theory of change carefully outlines assumptions and places where

Figure 5: Stylized Theory of Change



evidence is available and more evidence is needed, and—if constructed properly—naturally leads policymakers to a framework that helps answer outstanding questions, identify competing policy proposals, and provides a basis for investor testing.

As a concrete example, suppose policymakers are considering a change that would require firms to disclose new information on risky financial products. The desired outcome may be to limit the extent to which less experienced investors lose money in those products. A Theory of Change analysis asks: what has to happen for such an action to translate into the desired result? For example, an investor in this case would need to recognize that a new disclosure has been issued (and perhaps distinguish it from junk mail); open and read the disclosure; understand the terms used in the disclosure; comprehend the information; understand the implications of the disclosure; perhaps decide to change their investment strategy, and so forth. Often, investors may need to undertake an economically costly search for further information, perhaps exploring alternative investment options. To make a change in their financial mix, they might pay for financial advice to better understand risks or issues, and then pay the transaction costs to sell one investment and buy another. Finally, there is always the chance that they will inadvertently pick an equally problematic investment—perhaps one that also suffers from a lack of adequate disclosure. Going back to the simplest, earliest steps of this Theory of Change—the assumption that the mailed disclosure is opened and read—if the existing data suggests that 44 percent of junk mail is discarded unopened,²⁵⁹ then the Theory of Change for this policy may already be on shaky grounds.

A Theory of Change should have rigorous underpinnings in social science and legal theory, but should be relatively concise in its presentation: each theory can typically be summarized with a box-and-arrow cause-and-effect diagram on a few pages. Construction should typically work backwards from intended outcomes to policy action. Working backwards creates a natural tendency to consider alternative policies as the Theory of Change is developed.

At an institution like the SEC, there will be a natural tendency to have causal chains that stop short of actionable change and end at something along the lines of, “investors are informed.” A narrow focus on “informed” investors often leads to policymaking that relies primarily on disclosures—and a tendency to default to solving all problems through new or different disclosures (we refer to this as the “disclosure default”). We would argue that in most instances focusing only on disclosure is incomplete. One issue is that this stance ignores the fact that there are often significant obstacles that inhibit an investor from turning information into action (for example, the search costs of identifying and evaluating alternatives, or an understanding of the exact implications of disclosed legal nuances), and those challenges need to be included in the policymaking calculus. In addition, even if an investor is aware of the existence of the problem, they may not have a grasp of the magnitude of its implications, and they may not know how to identify a better option. The final outcome should be thought of in terms of an observable change for institutions or markets, and ultimately for investors. From our Office’s perspective, policymakers should take on the tough task of developing policies that advance a particular cause or goal, not simply rely on abstract or untested assumptions that a policy will work.

Note that policy development experts do not necessarily need to solve every issue in the Theory of Change for a policy to be viable, but they do need to be cognizant of potential obstacles so that they can identify the most promising solutions. Even in instances of a shaky connection between actions and outcomes, the Theory of Change is extraordinarily valuable because it provides a framework for social scientists, policymakers, and the public to have an honest discussion about how a proposal might work and any possible alternative policy options. Alternatives almost always exist and should be considered because policies are costly to implement and are difficult to get right. If the initial causal chain is built on shaky footing, working backwards from intended outcomes will help in the identification of additional, potentially more effective, policy options. Perhaps an investor awareness bulletin achieves the same outcome with a lower burden for firms and investors, or perhaps a certain type of product should not be offered to retail investors. If the problem is that investors do not read their mail, or cannot distinguish it from advertising material, providing more mail might not be an answer. If people do not understand the technical terms used in disclosures, then other policy levers might be worth pursuing. A disciplined approach to formulating a Theory of Change provides the framework for investor testing to quantify the effects of various potential pathways and determine the most effective approach to achieving the desired outcomes.

While we have articulated an example in the context of investor concerns, this is not simply a matter of pursuing investor interests. This approach will be beneficial to all stakeholders. If there is a tension between, for example, investor interests and business interests from a particular

policy, clearly articulating a coherent Theory of Change is vital because it also provides the basis for thinking through and quantifying the costs and benefits of a proposal. If a given proposal costs billions of dollars to implement and only helps a handful of investors, perhaps other options should be considered. POSITIER seeks to develop sensible and actionable policies that make sense for stakeholders while enhancing investor protection.

Unfortunately, we are not aware of any SEC rule proposal that has been framed around a Theory of Change. Instead, rule texts are lengthy and filled with legal nuance. Although some building blocks may be embedded in the hundreds of pages of language accompanying a rule proposal, the lack of a concise articulation that can guide others to a basic understanding of how the policy change is expected to work makes collaboration and discussion extremely difficult. Further, it is much more costly for individual investors to understand the key elements of the proposal and weigh in if they choose. We recognize that there will still be obstacles to this kind of retail investor participation in the notice and comment process, but describing the Theory of Change would alleviate the requirement of reading a 1,000-page proposal. It also would set the stage for us to pursue more proactive engagements with investors by using high-quality surveys and other research tools to inform the policymaking process, rather than relying solely upon the public comment process.

Introducing a Theory of Change-focused approach to policy development would be a quantum leap for the SEC, and one that would require long-term cultural shifts along with mandates from leadership. To be most effective, it should be the starting point in policy development, rather than

something that is retrofitted *after* a policy has been finalized. Speaking from personal experience over several decades working on policy development and evaluation in business, consulting, and government service, it seems that the fundamental problem hindering effectiveness of a policy or a coherent evidence program is often a nonexistent or ill-conceived Theory of Change.

Step 5: Iterate on prior steps until things make sense.

To be effective, policymaking should be approached with humility and intellectual curiosity, while maintaining a focus on urgency that is commensurate with the nature of the problem. It is difficult to make serious progress towards addressing economic and social ills if one begins with ideological beliefs or affiliations that circumscribe policy solutions to those that fit a given ideology or brand, while ignoring lower-cost, more effective and less-burdensome approaches that would achieve the same or better results with fewer resources. Similarly, it is a serious danger to become overly wedded to one potential solution and only collect evidence to support that solution rather than to determine if that solution is in fact the most viable. In either case, doing so likely leads to less effective government, with potential negative effects on the public's trust in regulatory institutions.

Step 6: Test proposals.

Evidence should provide insights to guide policymakers to this point, but almost invariably there should be new questions that arise at this stage that call for further data generation or inquiry. Policy options that have been identified may require tests to assess their feasibility. Generating specific insights to test a particular proposal is almost always necessary because either

the extant research does not translate directly to the exact problem, or the world simply may have changed since the research was published. Seemingly minor variations on design may substantially affect user experiences and have different consequences for the success of the policy. In fact, in many cases, we recommend not only initial small-scale testing, but we also strongly urge field-testing or pilot projects to validate that small-scale tests translate directly to the field. With POSITIER, we have developed a unique toolkit for conducting testing rapidly and iteratively in a way that can provide insights. The goal need not be perfection—too much iteration can cause unnecessary delays with limited benefits. Yet even a small amount of testing can often provide enormous benefits. Too often at the SEC and other agencies, it is the conclusion that it is not worthwhile to test at all because policymakers do not have the time or money. Such reluctance to test can be interpreted another way: that it is better to impose potentially adverse consequences on stakeholders rather than engaging in the research that would help to identify and mitigate such problems. Put bluntly, forgoing testing may result in significant costs to stakeholders who must bear the consequences of ill-conceived policies.

With POSITIER, we have made the process much easier, leaving little excuse in terms of time or costs. In the past, a single test often took three to five years to conduct at budgets of several million dollars, which meant leadership was often understandably unenthusiastic about testing. POSITIER upends this calculus completely because we have developed rapidly deployable and cost-effective data collection tools that have generated data and research results quickly. Within the past year, we were prepared to put a unique high-frequency survey into the field

in a little over a week, and on numerous other occasions we conducted data collection and analysis on highly abridged timeframes. The problems that POSITIER cannot solve are a lack of interest among decision-makers and a lack of adequate resourcing to our testing initiative. With a greater commitment to testing and commensurate cultural change, testing can be integrated into the Commission's ethos at all levels, allowing it to provide value and get policy right.

Step 7: Repeat and revisit steps 1-6 as needed.

A learning organization is one “where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nurtured, where collective aspiration is set free, and where people are continually learning how to learn together.”²⁶⁰

We believe the SEC should always aspire to become more of a learning organization. This does not mean that policy should wait until all research is completed before taking action. Rather, it suggests that the SEC should be continually evaluating and reassessing the regulatory environment and its own approaches.

In this vein, it is important to recognize the importance of accepting unfavorable results.

To faithfully develop good policies, one needs a readiness to ask questions and develop testable hypotheses. The possibility is always present that such testing might demonstrate a policy's lack of effect, or that the benefits do not outweigh the costs. To get to better policy, it is crucial to ask the right questions and be accepting of answers that contradict one's beliefs or initial assumptions, and go back to the drawing board as necessary.

Step 8: Make the results public.

As important as it is to conduct research and ask viable questions, our Office must make research public unless there is a pressing confidentiality reason for secrecy (which should be the exception rather than the norm). The Office of Evaluation Science, an evaluation group at the General Services Administration, has committed that it will share “findings from every completed evaluation” to increase transparency and ensure that learning can occur.²⁶¹ We would prefer a similar policy at the SEC.

Testing relies crucially on credibility, so that results are believable, and public-facing results coupled with the independence of research is essential to that credibility. The Investor Advocate's role as an independent office enables us to pursue investor-focused research with the intention of promoting investor interests, and it creates more favorable conditions for credible testing than would be the case if investor testing were to be conducted in other parts of the SEC that may have institutional incentives for research results to turn out a certain way. Our independence allows us to make sure that tough questions, methodological complexities, and investor interests are not ignored.

The above steps articulate a framework for evidence-based policy development. For some, these steps will seem logical, perhaps even obvious. For others, they will seem new and may run counter to decades of tradition. We strongly believe that an approach of this kind would lead to better policies that protect investors, maintain market stability, and promote capital formation.

CONCLUDING COMMENTS

POSITIER was developed within the vision and framework articulated in a host of executive orders, OMB guidance, legislation, and other directives of recent years that were intended to enhance overall policy effectiveness. This year's Report on Activities has attempted to provide an overview of our successes, while also articulating headwinds that our Office faces, including institutional challenges that impede the development or effective use of research. We have

also outlined revised processes that can make the SEC more effective in its mission. We hope these suggestions are insightful and can lead to an environment that would truly benefit investors and other stakeholders and help the SEC fulfill its mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. We look forward to continuing to build a rigorous, investor-focused research program in FY 2021 and beyond.



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Chief Architect, POSITIER Investor
Testing Initiative
Chief Evaluation Officer
Office of the Investor Advocate

I PROPOSE TO GREAT
CONSERVATION CORP
WORK... MORE IMPO
THE MATERIAL GAIN
AND SPIRITUAL VALU



SUMMARY OF INVESTOR ADVISORY COMMITTEE RECOMMENDATIONS AND SEC RESPONSES

Congress established the Investor Advisory Committee to advise and consult with the Commission on regulatory priorities, initiatives to protect investor interests, initiatives to promote investor confidence and the integrity of the securities marketplace, and other issues.²⁶² The IAC is composed of the Investor Advocate, a representative of state securities commissions, a representative of the interests of senior citizens, and not fewer than 10 or more than 20 members appointed by the Commission to represent the interests of various types of individual and institutional investors.²⁶³

Exchange Act Section 39 authorizes the IAC to submit findings and recommendations for review and consideration by the Commission.²⁶⁴ The statute also requires the SEC “promptly” to issue a public statement assessing each finding or recommendation of the IAC and disclosing the action, if any, the Commission intends to take

with respect to the finding or recommendation.²⁶⁵ While the Commission must respond to the IAC’s recommendations, it is under no obligation to agree with or act upon the recommendations.²⁶⁶

In each of its reports to Congress, including this one, the Office of the Investor Advocate summarizes the IAC recommendations and the SEC’s responses to them.²⁶⁷ We continue to report on recommendations until we believe the Commission’s response is final. For summaries of Commission activities related to previous IAC recommendations, please see our earlier reports to Congress. The Commission may be pursuing initiatives that are responsive to IAC recommendations but have not yet been made public. Commission staff—including the staff of this Office—are prohibited from disclosing nonpublic information.²⁶⁸ Therefore, any such initiatives are not reflected in this Report.

| Topic | Date | IAC Recommendation | SEC Response |
|--|---------------|---|---|
| Accounting and Financial Disclosure ²⁶⁹ | May 21, 2020 | Reconsider a 2020 rulemaking proposal that would permit issuers to omit fourth quarter results in annual reports and that would eliminate the tabular presentation of contractual obligation information. Closely monitor issuers' use of non-GAAP metrics and accounting developments relating to reverse factoring. | On June 23, 2020, the SEC's Division of Corporation Finance staff published disclosure guidance addressing supplier finance programs in the context of pandemic-related disruptions. ²⁷⁰ On October 21, 2020, the FASB decided to add a project to its technical agenda to address the disclosure of supplier finance programs involving trade payables. ²⁷¹ On November 19, 2020, the Commission adopted the amendments to Regulation S-K, largely as proposed. ²⁷² |
| ESG Disclosure ²⁷³ | May 21, 2020 | Commence an effort to update issuer reporting requirements to include material, decision-useful disclosure concerning environmental, social, and governance matters. Consider the utility of both principles-based and prescriptive reporting requirements. | Pending. |
| Disclosure Effectiveness ²⁷⁴ | May 21, 2020 | Enhance the effectiveness of new and existing disclosure relied on primarily by retail investors by, among other things, adopting an iterative process that includes disclosure research, design, and testing. | On August 5, 2020, the Commission proposed comprehensive modifications to the mutual fund and exchange-traded fund disclosure framework. ²⁷⁵ The Office of the Investor Advocate is conducting investor research that may be relevant to this proposal. |
| SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals ²⁷⁶ | Jan. 24, 2020 | Revisit priorities in improving the proxy system, revise and republish the 2019 proxy voting rulemaking proposals, and reconsider the 2019 proxy voting guidance. | On July 22, 2020, the Commission adopted the amendments to the proxy rules without republishing them for further comment. ²⁷⁷ On September 23, 2020, the Commission adopted the amendments to Exchange Act Rule 14a-8 without republishing them for further comment. ²⁷⁸ |

| Topic | Date | IAC Recommendation | SEC Response |
|--|---------------|--|--|
| Exchange Rebate Tier Disclosure ²⁷⁹ | Jan. 24, 2020 | Require the national securities exchanges to provide the Commission with regular disclosures regarding rebate tiers offered to their members, and take steps to require monthly public disclosure of these rebate practices. | Pending. |
| Proxy Plumbing ²⁸⁰ | Sept. 5, 2019 | Require end-to-end vote confirmations to end users of the proxy system, require all involved to cooperate in reconciling vote-related information, conduct studies on investor views on anonymity and share lending, and finalize the 2016 universal proxy rulemaking proposal. | Pending. |
| Structural Changes to the US Capital Markets Regarding Investment Research in a Post-MiFID II World ²⁸¹ | July 25, 2019 | Prioritize certain concepts and guiding principles, including the following: (1) consumers of research, regardless of location, should be allowed to choose whether to purchase research “bundled” or “unbundled” from trading costs; and (2) there should be greater transparency regarding research costs and how those costs are borne. | On November 12, 2019, the Commission extended temporary no-action relief from compliance with registration under the Advisers Act for brokers that receive payments for research in hard dollars or through research payment accounts from managers subject to MiFID II through July 3, 2023. ²⁸² |
| Human Capital Management Disclosure ²⁸³ | Mar. 28, 2019 | Revise issuer disclosure requirements to elicit more insightful disclosure concerning how human capital within a firm is managed and incentivized. | On August 26, 2020, the Commission adopted rule amendments to modernize the description of business, legal proceedings, and risk factor disclosures that issuers are required to make pursuant to Regulation S-K. The amendments include the addition of human capital resources as a disclosure topic. ²⁸⁴ |

| Topic | Date | IAC Recommendation | SEC Response |
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| Transaction Fee Pilot for NMS Stocks ²⁸⁵ | Sept. 13, 2018 | Adopt a proposed Transaction Fee Pilot with the following conditions: (1) include a “no rebate” bucket; (2) permit companies to opt out of the pilot; and (3) consider consolidating Test Groups 1 and 2. | On December 19, 2018, Commission approved the adoption of new Rule 610T of Regulation NMS to conduct a Transaction Fee Pilot in NMS stocks. ²⁸⁶ On June 16, 2020, following a lawsuit filed by several exchanges, the transaction fee pilot was struck down in the U.S. Circuit Court of Appeals for the District of Columbia. ²⁸⁷ |
| Financial Support for Law School Clinics that Support Investors ²⁸⁸ | Mar. 8, 2018 | Explore ways to improve external funding sources to the law school investor advocacy clinics. Work with FINRA, NASAA, and other potential partners, and request legislation from Congress to consider permanent funding. | Pending. |
| Dual Class and Other Entrenching Governance Structures in Public Companies ²⁸⁹ | Mar. 8, 2018 | Direct Division of Corporate Finance staff to scrutinize disclosure documents filed by issuers with dual class and other entrenching governance structures, comment on such documents so as to enhance the salience and detail of risk disclosure, and develop guidance to address a range of issues that such structures raise. | Pending. |
| Mutual Fund Cost Disclosure ²⁹⁰ | Apr. 14, 2016 | Enhance investors’ understanding of mutual fund costs and the impact of those costs on total accumulations over time. Provide standardized disclosure of actual dollar costs on customer account statements. | On June 5, 2018, the Commission published a request for comment on ways to enhance the delivery, design, and content of fund disclosures, including shareholder reports and prospectuses. The request for comment solicited investor feedback on fund fees and expenses, and it included other questions related to the IAC recommendation (<i>e.g.</i> , dollar vs. percentage disclosure, disclosure within account statements, etc.). ²⁹¹ On Oct. 30, 2018, the Commission proposed amendments to help investors make informed investment decisions regarding variable annuity and variable life insurance contracts. ²⁹² On March 11, 2020, the Commission adopted the amendments largely as proposed. ²⁹³ |

| Topic | Date | IAC Recommendation | SEC Response |
|---|---------------|--|--|
| Accredited Investor Definition ²⁹⁴ | Oct. 9, 2014 | Evaluate whether the current definition achieves the goal of identifying a class of individuals who are able to make an informed investment decision and protect their interests without the protections of registration and disclosure. Consider other definitional approaches. | On August 26, 2020, the Commission adopted amendments to the definition of accredited investor. ²⁹⁵ Among other changes, the amendments allow individuals to qualify as accredited investors if they possess certain professional credentials or affiliations, even if they do not meet the income or net worth thresholds. The Commission chose not to modify the definition's income or net worth thresholds. |
| Impartiality in the Disclosure of Preliminary Voting Results ²⁹⁶ | Oct. 9, 2014 | Ensure impartiality in the disclosure of preliminary voting results. | Pending. |
| Universal Proxy Ballots ²⁹⁷ | July 25, 2013 | Allow universal ballots in connection with short-slate director nominations. | On October 26, 2016, the Commission proposed amendments to the proxy rules to require parties in a contested election to use universal proxy cards that would include the names of all board of director nominees. ²⁹⁸ The rulemaking has not been finalized. |

ENDNOTES

- 1 Exchange Act § 4(g)(6), 15 U.S.C. § 78d(g)(6).
- 2 Exchange Act § 4(g)(6)(A)(i), 15 U.S.C. § 78d(g)(6)(A)(i).
- 3 See SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2020* (June 27, 2019) [hereinafter *Report on Objectives, Fiscal Year 2020*], <https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2020.pdf>.
- 4 Exchange Act § 4(g)(6)(B)(i), 15 U.S.C. § 78d(g)(6)(B)(i).
- 5 *Id.* Exchange Act Section 4(g)(6)(B) requires the Report on Activities to include an “inventory” of the most serious problems encountered by investors during the Reporting Period. The inventory must identify any action taken by the Commission or an SRO to resolve each problem, the length of time that each item has remained on our inventory and, for items on which no action has been taken, the reasons for inaction and an identification of any official who is responsible for such action.
- 6 15 U.S.C. § 78d(g)(6)(B).
- 7 Congressional Review Act, 5 U.S.C. § 801(b), providing for Congressional disapproval of rules and regulations by joint resolution.
- 8 See Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Exchange Act Rel. No. 89964, 85 Fed. Reg. 70,240 (Nov. 4, 2020) [hereinafter Rule 14a-8 Amendments Adopting Release]. See also Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Exchange Act Rel. No. 87458, 84 Fed. Reg. 66,458 (Dec. 4, 2019) [hereinafter Rule 14a-8 Amendments Proposing Release].
- 9 See, e.g., Letter from Kenneth A. Bertsch, Executive Director, and Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 20, 2020), SEC File No. S7-23-19, <https://www.sec.gov/comments/s7-23-19/s72319-6729684-207400.pdf>; Letter from Lucian A. Bebchuk, James Barr Ames Professor of Law, Economics, and Finance, Harvard Law School (Feb. 3, 2020), SEC File No. S7-23-19, <https://www.sec.gov/comments/s7-23-19/s72319-6744343-207928.pdf>.
- 10 See Rule 14a-8 Amendments Proposing Release, *supra* note 8, at 66,477 & Fig. 1.
- 11 See Rule 14a-8 Amendments Adopting Release, *supra* note 8, at 70,257-70,258.
- 12 See Rule 14a-8 Amendments Adopting Release, *supra* note 8, at 70,267.
- 13 See Rule 14a-8 Amendments Adopting Release, *supra* note 8, at 70,269-70,270 (citing letter from Council of Institutional Investors et al. dated Sept. 4, 2020).
- 14 See Rule 14a-8 Amendments Adopting Release, *supra* note 8, at 70,274 (counting all Russell 3000 Index constituents for an upper-bound cost-savings estimate).
- 15 See Memorandum from S.P. Kothari, Chief Economist, regarding the analysis of data provided by Broadridge Financial Solutions, Inc. (Aug 14, 2020), at 8, <https://www.sec.gov/comments/s7-23-19/s72319-7645492-222330.pdf>
- 16 See Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 89372, 85 Fed. Reg. 55,082 (Sept. 3, 2020) [hereinafter Proxy Voting Advice Adopting Release]. See also Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 87457, 84 Fed. Reg. 66,518 (Dec. 4, 2019) [hereinafter Proxy Voting Advice Proposing Release].
- 17 See Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Investment Advisers Act Rel. No. 5547, 85 Fed. Reg. 55,155 (Sept. 3, 2020).
- 18 See Proxy Voting Advice Proposing Release, *supra* note 16, at 66,520 (Dec. 4, 2019) (citing concerns about “the accuracy and soundness of the information and methodologies used to formulate proxy voting advice businesses’ recommendations”).
- 19 See Proxy Voting Advice Adopting Release, *supra* note 16, at 55,107 (“Indeed, the principle that more complete and robust information and discussion leads to more informed investor decision-making, and therefore results in choices more closely aligned with investors’ interests, has shaped our federal securities laws since their inception and is a principal factor in the Commission’s adoption of these amendments. Regardless of the incidence of errors in proxy voting advice, we believe it is appropriate to adopt reasonable measures designed to promote the reliability and completeness of information available to investors and those acting on their behalf at the time they make voting determinations.”).
- 20 The concerns cited about proxy voting advice businesses being not sufficiently transparent about the methodologies, models, and formulas used to generate recommendations—all came from the issuer community rather than from clients of proxy voting advice businesses and investors. See Proxy Voting Advice Adopting Release, *supra* note 16, at 55,120 & n.438 (Sept. 3, 2020).

- 21 See Jonathan Macey, Behind the SEC's War on Freedom of Speech, BLOOMBERG OPINION, Mar. 2, 2020, <https://www.bloomberqint.com/gadfly/sec-s-new-rules-undermine-shareholder-rights> (“It is indeed strange that the SEC, whose mission is to protect investors, is putting its thumb forcefully on the scale in favor of companies and against investors. Its proposal would land a one-two punch against corporate democracy and freedom of speech. Not only is the commission demonstrating a deep hostility for the value of dissent. It is also abandoning the idea that the free and open exchange of competing views will result in the triumph of good investment policies over inferior ones.”).
- 22 See SEC, Recommendation of the Investor Advisory Committee Regarding SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (Jan. 24, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf>.
- 23 See Proxy Voting Advice Adopting Release, *supra* note 16, at 55,132 (Sept. 3, 2020).
- 24 See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Rel. No. 10884 (approved Nov. 2, 2020), <https://www.sec.gov/rules/final/2020/33-10844.pdf>.
- 25 In a 2019 concept release, the Commission provided statistical data on this shift: “In 2018, registered offerings accounted for \$1.4 trillion of new capital compared to approximately \$2.9 trillion that we estimate was raised through exempt offering channels.” Concept Release on Harmonization of Securities Offering Exemptions, Securities Act Rel. No. 10649, 84 Fed. Reg. 30,460, 30,465 (June 26, 2019).
- 26 See Written Testimony of Elisabeth de Fontenay, Professor of Law, Duke University, Before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Capital Markets, Securities, and Investments, 116th Cong. (Sept. 11, 2019), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-defontenaye-20190911.pdf> (explaining the growth in private capital raising at the expense of public capital markets). See also Written Testimony of Renee M. Jones, Associate Dean for Academic Affairs and Professor of Law, Boston College Law School, Before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Capital Markets, Securities, and Investments (Sept. 9, 2019), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-jonesr-20190911.pdf> (same).
- 27 See, e.g., Letter from Christopher Gerold, NASAA President (June 1, 2020) (“NASAA opposes a 30-day integration safe harbor because we believe that such a brief time period would render the integration doctrine a nullity.”), <https://www.nasaa.org/wp-content/uploads/2020/06/NASAA-Harmonization-Comment-Letter-060120.pdf>.
- 28 *Id.* (“Issuers would have tremendous freedom to game the 30-day safe harbor, undermining the integration doctrine, because the SEC cannot possibly police compliance with it”)
- 29 See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Rel. No. 10763, 85 Fed. Reg. 17,956, 18,004 (Mar. 31, 2020) (“Expanded access to exempt securities could enable non-accredited investors to allocate capital across a broader range of opportunities.”); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Rel. No. 10884 (approved Nov. 2, 2020), page 197, <https://www.sec.gov/rules/final/2020/33-10844.pdf> (“Greater flexibility under the amendments may enable non-accredited investors to optimize their capital allocation through incrementally greater access to exempt offering investment opportunities.”). See also Concept Release on Harmonization of Securities Offering Exemptions, Securities Act Rel. No. 10649, 84 Fed. Reg. 30,460, 30,467 (June 26, 2019) (contemplating allowing more non-accredited investors into exempt offerings in order to expand access to attractive investment opportunities in the exempt market).
- 30 See, e.g., Letter from Erik Gerding, Professor of Law and Wolf-Nichol Fellow, University of Colorado Law School, et al. (Sept. 24, 2019), SEC File No. S7-08-19, <https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf>.
- 31 See Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084 (adopted Oct. 28, 2020), <https://www.sec.gov/rules/final/2020/ic-34084.pdf> [hereinafter Derivatives Rule]; Allison Herren Lee, Commissioner, SEC, Public Statement: Statement on the Final Rule on Funds’ Use of Derivatives (Oct. 28, 2020), <https://www.sec.gov/news/public-statement/lee-derivatives-2020-10-28> [hereinafter Lee Derivatives Statement]; Caroline A. Crenshaw, Commissioner, SEC, Public Statement: Statement on the Final Rule on Funds’ Use of Derivatives (Oct. 28, 2020), <https://www.sec.gov/news/public-statement/crenshaw-derivatives-2020-10-28> [hereinafter Crenshaw Derivatives Statement].
- 32 See Press Release, SEC, SEC Adopts Modernized Regulatory Framework for Derivatives Use by Registered Funds and Business Development Companies, 2020-269 (Oct. 28, 2020), available at <https://www.sec.gov/news/press-release/2020-269>.
- 33 See Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers’ Transactions in Certain Leveraged/Inverse Investment Vehicles, Investment Company Act Release No. 33704, 85 Fed. Reg. 4,446 (proposed Nov. 25, 2019) [hereinafter Proposed Derivatives Rule].

- 34 *See id.* at section II.D.2.a.
- 35 *See id.* at section II.D.2.b.
- 36 *See id.* at section II.D.2.a.
- 37 *See id.* at section II.G.2.
- 38 *See* Exchange-Traded Funds, Securities Act Rel. No. 10695, Investment Company Act Release No. 33646, 84 Fed. Reg. 57,162 (adopted Sept. 25, 2019) [hereinafter ETF Rule] at section II.A.3.
- 39 *See, e.g.,* Jay Clayton, Chairman, SEC, Public Statement: Taking Significant Steps to Modernize Our Regulatory Framework (Sept. 26, 2019), <https://www.sec.gov/news/public-statement/clayton-2019-09-26-three-rulemakings> (“I believe it would be premature to include leveraged and inverse ETFs within the scope of [the ETF Rule] before the Commission has addressed the investor protection concerns that have been raised regarding these products.”). We note that the Derivatives Rule amends the ETF Rule to include leveraged and inverse ETFs within its scope before the Commission has addressed the investor protection concerns that have been raised regarding these products. *See* Derivatives Rule at section II.D.6.
- 40 *See, e.g.,* SEC Charges Wells Fargo In Connection With Investment Recommendation Practices, Press Release 2020-43 (Feb. 27, 2020), <https://www.sec.gov/news/press-release/2020-43>; *In the Matter of Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors Financial Network, LLC*, Exchange Act Release No. 88295 (Feb. 27, 2020) [hereinafter Wells Fargo Order] (The order finds that some Wells Fargo brokers and advisers did not fully understand the risk of losses these complex products posed when held long term. As a result, certain Wells Fargo investment advisers and registered representatives made unsuitable recommendations to certain clients to buy and hold single-inverse ETFs for months or years. According to the order, a number of these clients were senior citizens and retirees who had limited incomes and net worth, and conservative or moderate risk tolerances.); *In the Matter of Morgan Wilshire Securities Inc.*, Exchange Act Release No. 89979 (Sept. 24, 2020), <https://www.sec.gov/litigation/admin/2020/34-89979.pdf> (“During the relevant period, certain Morgan Wilshire registered representatives recommended that a number of their retail customers buy inverse ETFs without regard to holding periods. Based on these recommendations, Morgan Wilshire customers purchased and held these inverse ETFs for longer than a single day, and in many cases, months, or years. Those registered representatives did not adequately understand all of the features and risks of inverse ETFs.”).
- 41 *See, e.g.,* Chris Flood, SEC Decision on Leveraged ETFs Sparks Concern for Retail Investors, *ft.com* (Oct. 29, 2020), <https://www.ft.com/content/f607fc5d-8b10-4c09-9274-d040e617caa6> (noting that, despite the single-day investment horizon for leveraged/inverse ETFs, “about a quarter of the investors in some popular leveraged ETFs held on to these positions for more than a month while 8 percent owned their holdings for three months.”).
- 42 *See* Derivatives Rule, *supra* note 31, at section II.D.2.c.
- 43 *See id.* at section II.F.5.
- 44 *See* Lee Derivatives Statement, *supra* note 31.
- 45 *See* Derivatives Rule, *supra* note 31, at section II.D.2.b.ii.
- 46 *See* Lee Derivatives Statement, *supra* note 31. *See also* Crenshaw Derivatives Statement, *supra* note 31 (“[T]oday’s rule fails to provide a meaningful limit on registered funds’ ability to take on leverage.”).
- 47 *See* Derivatives Rule, *supra* note 31, at section II.F.
- 48 *See Request for rulemaking on environmental, social, and governance (ESG) disclosure*, SEC File No. 4-730 (Oct. 1, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf> (a petition for rulemaking to the SEC on standardized disclosure related to environmental, social, and governance issues, including climate disclosure, signed by investors and organizations representing more than \$5 trillion in assets under management).
- 49 *See* SEC, Recommendation of the Investor Advisory Committee Regarding Recommendation of the Investor as Owner Subcommittee on ESG Disclosure (May 14, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf> [hereinafter 2018 ESG Rulemaking Petition]
- 50 *See* 2018 ESG Rulemaking Petition, *supra* note 48, at 13 (noting that the 2010 Commission guidance regarding disclosure related to climate change “has not been successful in producing consistent, comparable, high-quality information concerning climate change risks and opportunities”); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 50 *Env. L. Rep.* 10638, 10639 (2020) (“Climate change disclosure remains limited due in large part to the vagueness of the disclosure obligation and issuers’ ability to determine, in their judgment, that a given issue is not material enough to warrant disclosure.”).
- 51 *See Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990)

- 52 *Holding Foreign Companies Accountable Act*, S. 945 (116th Congress, 2019-2020), <https://www.congress.gov/bill/116th-congress/senate-bill/945>. See Congress Clears Bill to Ban Trading in Chinese Firms that Thwart U.S. Auditors, Politico (Dec. 2, 2020), <https://www.politico.com/news/2020/12/02/congress-clears-bill-to-ban-trading-in-chinese-firms-that-thwart-us-auditors-442362>.
- 53 See, e.g., Dual Class Stock, Counsel for Institutional Investors, https://www.cii.org/dualclass_stock (Nov. 24, 2020).
- 54 See *Nasdaq to Advance Diversity through New Proposed Listing Requirements* (Dec. 1, 2020), <https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01>.
- 55 *Improving Corporate Governance Through Diversity Act of 2019*, H.R. 5084 (116th Congress, 2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/5084>.
- 56 See Allison Herren Lee, Commissioner, SEC, *The Promise of Structured Data: True Modernization of Disclosure Effectiveness* (Nov. 17, 2020), <https://www.sec.gov/news/speech/lee-structured-data-2020-11-17> (also advocating for machine-readable disclosures).
- 57 *Financial Transparency Act of 2019*, H.R. 4476, (116th Congress, 2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/4476?q=%7B%22search%22%3A%5B%22HR+4476%22%5D%7D&r=1&cs=1> (co-sponsored by Reps. Carolyn Maloney (D-NY) and Patrick McHenry (R-NC)).
- 58 See Exec. Order No. 13,642, *Making Open and Machine Readable the New Default for Government Information* (2013); OMB Memorandum M-13-09 *Fiscal Year 2013 PortfolioStat Guidance: Strengthening Federal IT Portfolio Management*; OMB Memorandum M-13-13, *Open Data Policy-Managing Information as an Asset*; OMB Memorandum M-19-15 *Improving Implementation of the Information Quality Act*; OMB Memorandum M-19-18, *Federal Data Strategy*.
- 59 See Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435, § 201, 132 Stat. 5529, 5534-5544 (2019) (with the OPEN Government Data Act beginning at Section 202).
- 60 As formal clinic names vary, for purposes of this Report, the law school securities law, securities arbitration, and investor protection focused clinics referenced herein are referred to as investor advocacy clinics or clinics.
- 61 Press Release, SEC, SEC Announces Pilot Securities Arbitration Clinic to Help Small Investors—Levitt Responds to Concerns Voiced at Town Meetings, 97-101 (Nov. 12, 1997), available at <https://www.sec.gov/news/press/pressarchive/1997/97-101.txt>.
- 62 See *Ex-Quest Chairman Settles IPO suit*, CNN Money (May 12, 2003), https://money.cnn.com/2003/05/13/news/spitzer_ipo/index.htm.
- 63 Press Release, Univ. of Pittsburgh, Pitt Law School to Open Securities Arbitration Clinic (May 2, 2011), <http://www.news.pitt.edu/news/pitt-law-school-open-securities-arbitration-clinic>.
- 64 See FINRA Investor Education Foundation, Press Release, FINRA Foundation Announces \$1 Million in Grants to Fund Securities Advocacy Clinics (Jan. 28, 2010), <https://www.finra.org/media-center/news-releases/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy>; see also Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597, 604 (2014) (“As a result of these grants, clinics opened at other law schools such as Florida International University, Howard University, Suffolk University, and Pepperdine in 2009; at Seton Hall University and University of Miami in 2010; and at Georgia State and Michigan State University in 2012.”).
- 65 From 1997 to 2012, 24 investor advocacy clinics were established, and 22 were still in operation in 2012: twelve in New York (Pace University Law School, Fordham University School of Law, Brooklyn Law School, SUNY Buffalo Law School, Benjamin N. Cardozo School of Law, Cornell University School of Law, Hofstra University School of Law, New York Law School, St. John’s University School of Law, Syracuse University College of Law, and Touro Law Center); two in California (University of San Francisco School of Law and Pepperdine University School of Law), two in Florida (Florida International University School of Law and University of Miami School of Law); and one each in the District of Columbia (Howard University School of Law), Georgia (Georgia State University College of Law), Illinois (Northwestern University School of Law), Massachusetts (Suffolk University School of Law), Michigan (Michigan State University School of Law), New Jersey (Seton Hall University School of Law), and Pennsylvania (University of Pittsburgh School of Law). Clinics were also established, and subsequently closed, at Albany Law School (2004 – 2005) and Duquesne Law School (2001– 2011). See Gross, *supra* note 64, at 602-603.

- 66 As of the close of the Reporting Period, there were twelve clinics in active operation: six in New York (Benjamin N. Cardozo School of Law, Cornell Law School, Fordham University School of Law, New York Law School, Pace University School of Law, and St. John's University School of Law); and one each in the District of Columbia (Howard University School of Law), Florida (University of Miami School of Law), Illinois (Northwestern University School of Law), Nevada (University of Nevada Las Vegas School of Law), New Jersey (Seton Hall University School of Law), and Pennsylvania (University of Pittsburgh School of Law).
- 67 See SEC, *Recommendation of the Investor Advisory Committee Subcommittee of the Whole: Financial Support for Law School Clinics that Support Investors*, (Mar. 8, 2018), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac030818-law-clinics-recommendation.pdf>. To date, the Commission's response to this Recommendation is pending.
- 68 *Id.*
- 69 Report 116-122 at 82, <https://www.congress.gov/116/crpt/hrpt122/CRPT-116hrpt122.pdf>. This report was submitted by Congressman Quigley (D-IL-05) to accompany H.R. 3351, Financial Services and General Government Appropriations Bill, 2020, <https://www.congress.gov/bill/116th-congress/house-bill/3351/text>. The bill, incorporated in the Consolidated Appropriations Act, 2020, became law on December 20, 2019. Pub. L. No. 116-93, 133 Stat. 2317, <https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.pdf> (2019).
- 70 *Id.*
- 71 *Id.* See also <https://docs.house.gov/bills/2019/1216/BILLS-116HR1158SA-JES-DIVISION-C.pdf>, at 37. The Joint Explanatory Statement that passed along with the Act clarified that “[u]nder the agreement, reporting directives addressed to the SEC’s operating divisions are instead addressed to the SEC.”
- 72 See IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3601, 112 Stat. 685, 774 (1998), 26 U.S.C. § 7526, and Low Income Taxpayer Clinics, 2018 Grant Application Package and Guidelines (2018), at 3-5, <https://www.irs.gov/pub/irs-pdf/p3319.pdf>.
- 73 See Low Income Taxpayer Clinics, 2018 Grant Application Package and Guidelines (2018), at 3-5, <https://www.irs.gov/pub/irs-pdf/p3319.pdf>.
- 74 See *supra* note 72.
- 75 Low Income Taxpayer Clinics Program Report 2019, <https://www.irs.gov/pub/irs-pdf/p5066.pdf>, at 8.
- 76 See *supra* note 66.
- 77 Clinic clients often include senior citizens as well as middle-class and working class Americans such as hairdressers, mail carriers, welders, schoolteachers, first-time investors, and millennials. See Letter from Nicole G. Iannarone, Director, Investor Advocacy Clinic, Georgia State University College of Law, et al. to FINRA (June 19, 2017), https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf at 2.
- 78 The NASAA’s membership is comprised of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. By statute, a state securities regulator serves as a voting member of the SEC’s Investor Advisory Committee.
- 79 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, § 989A (2010).
- 80 See Stephen Deane, Elder Financial Exploitation Why It Is a Concern, What Regulators Are Doing About it, and Looking Ahead (June 2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf>.
- 81 Written Testimony of Amanda Senn, Alabama Securities Commission Chief Deputy Director and NASAA Cybersecurity Committee Chair, on behalf of the NASAA, at the HFSC Subcommittee on National Security, International Development and Monetary Policy hearing on Cybercriminals and Fraudsters: How Bad Actors Are Exploiting the Financial System During the COVID-19 Pandemic, p.9, (June 16, 2020) available at <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba10-wstate-senna-20200616.pdf>.
- 82 On June 18, 2014, a bipartisan group of senators led by Sen. Susan Collins (R-ME) sent the CFPB a letter stating that “The grants authorized in Section 989(A) reflect a bipartisan concern that seniors are susceptible to fraud, and this threat is likely to intensify with the aging of America’s ‘baby boom’ generation. We are concerned that if the CFPB fails to establish a procedure for reviewing and awarding the grants authorized by Section 989A, states securities and insurance regulators will be deprived of resources that would greatly augment their efforts, to the considerable detriment of aging and retired Americans. The CFPB has an obligation to implement this critical senior investor protection grant program, and it is imperative that it do so.”
- 83 Letter from CFPB Director Richard Cordray to Senate Special Committee on Aging Chairman Bill Nelson (D-FL) and Senate Special Committee on Aging Ranking Member Susan Collins (R-ME) (Aug. 9, 2014).
- 84 See Section 1017(a), “Transfers of Funds from Board of Governors” of the Dodd-Frank Act.

- 85 See draft legislation noticed in connection with the House Financial Services Committee (HFSC) hearing entitled, “Oversight of the CFPB” (Oct. 9, 2019) and the HFSC Subcommittee on National Security, International Development and Monetary Policy hearing entitled, “Cybercriminals and Fraudsters: How Bad Actors Are Exploiting the Financial System During the COVID-19 Pandemic” (Jun. 16, 2020), *available at* <https://financialservices.house.gov/uploadedfiles/bills-116pih-sipfpa.pdf>.
- 86 On January 14, 2020, in response to a written inquiry from Senate Banking Committee member Bob Menendez (D-NJ), CFPB Director Kathleen Kraninger stated that “*Currently, the Bureau does not have plans for the disbursement of grants or the implementation of Section 989(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), As previously noted, no appropriations were provided to implement these grants, nor did Congress mandate that grants be provided.*” See Hearing record—Senate Banking Committee hearing on Oversight of the CFPB (Oct. 14, 2019).
- 87 See <https://thehill.com/blogs/congress-blog/politics/475180-congress-should-seize-the-opportunity-to-clear-the-way-for>.
- 88 *Report on Objectives, Fiscal Year 2020, supra* note 3.
- 89 The Office of the Investor Advocate was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). On February 24, 2014, SEC Chair Mary Jo White appointed Rick A. Fleming as the Commission’s first Investor Advocate.
- 90 See Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Securities Exchange Act Rel. No. 88093, 85 Fed. Reg. 12,068 (Feb. 28, 2020).
- 91 See SEC, Recommendation of the Investor Advisory Committee Regarding Recommendation of the Investor as Owner Subcommittee on Accounting and Financial Reporting Disclosure (May 5, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/accounting-and-financial-disclosure.pdf>.
- 92 See Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Securities Act Rel. No. 10890 (approved Nov. 19, 2020), <https://www.sec.gov/rules/final/2020/33-10890.pdf>.
- 93 See SEC, Office of the Investor Advocate, *Report on Activities, Fiscal Year 2019*, <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2019.pdf> [hereinafter Report on Activities, Fiscal Year 2019] at 19 (Reverse Factoring’s Rising Popularity and Hidden Risks).
- 94 See, e.g., Jean Eaglesham, Supply Chain Debt Draws Warnings, WALL ST. J. (Apr. 6, 2020).
- 95 See Julie Steinberg, SEC Asks Boeing, Coca-Cola to Disclose More About Popular Financing Tool, WALL ST. J. (Aug. 27, 2020); Coronavirus (COVID-19)—Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources, CF Disclosure Guidance Topic No. 9A (June 23, 2020), <https://www.sec.gov/corpfin/covid-19-disclosure-considerations>.
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- 98 See Modernization of Regulation S-K Items 101, 103, and 105, Securities Exchange Act Rel. No. 89670, 85 Fed. Reg. 63,726 (Oct. 8, 2020).
- 99 See SEC, Recommendation of the Investor Advisory Committee Regarding Human Capital Management Disclosure (Mar. 28, 2019), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf>.
- 100 See Update of Statistical Disclosures for Bank and Savings and Loan Registrants, Securities Exchange Act Rel. No. 89835, 85 Fed. Reg. 66,108 (Oct. 16, 2020). See also Update of Statistical Disclosures for Bank and Savings and Loan Registrants, Securities Exchange Act Rel. No. 86984, 84 Fed. Reg. 52,936 (Oct. 3, 2019) (proposing release).
- 101 For an example of our public advocacy on this topic, see Rick A. Fleming, Investor Advocate, SEC, Improving Disclosure with Smart Data (Oct. 24, 2016), <https://www.sec.gov/news/speech/improvingdisclosure-with-smart-data.html>. See generally “A Primer on Machine Readability for Online Documents and Data,” Data.gov Developers Blog, <https://www.data.gov/developers/blog/primer-machine-readability-online-documents-and-data> (last accessed Nov. 15, 2020).
- 102 See Update of Statistical Disclosures for Bank and Savings and Loan Registrants, Securities Exchange Act Rel. No. 89835, 85 Fed. Reg. 66,108, 66,109 (Oct. 16, 2020) (declining to require disclosure in a machine-readable format and noting “we are cognizant of the additional costs that would be incurred”).

- 103 See Financial Disclosures About Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities, Securities Exchange Act Rel. No. 88307, 85 Fed. Reg. 21,940 (Apr. 20, 2020).
- 104 See Amendments to Financial Disclosures about Acquired and Disposed Businesses, Securities Exchange Act Rel. No. 88,914, 85 Fed. Reg. 54,002 (Aug. 31, 2020).
- 105 See *Report on Activities, Fiscal Year 2019*, *supra* note 93, at 5; SEC, Office of the Investor Advocate, *Report on Objectives, Fiscal Year 2021* (June 29, 2020), <https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2021.pdf> [hereinafter Report on Objectives, Fiscal Year 2021] at 7.
- 106 See Amending the “Accredited Investor” Definition, Securities Act Rel. No. 10734, 85 Fed. Reg. 2,574 (Jan. 15, 2020).
- 107 See *id.* at 2,594.
- 108 See Accredited Investor Definition, Securities Act Rel. No. 10824, 85 Fed. Reg. 64,234 (Oct. 9, 2020).
- 109 See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Rel. No. 10763, 85 Fed. Reg. 17,956 (Mar. 31, 2020).
- 110 See, e.g., Letter from Erik Gerding, Professor of Law and Wolf-Nichol Fellow, University of Colorado Law School, et al. (Sept. 24, 2019), SEC File No. S7-08-19, <https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf>.
- 111 In a 2019 concept release, the Commission provided statistical data on this shift: “In 2018, registered offerings accounted for \$1.4 trillion of new capital compared to approximately \$2.9 trillion that we estimate was raised through exempt offering channels.” Concept Release on Harmonization of Securities Offering Exemptions, Securities Act Rel. No. 10649, 84 Fed. Reg. 30,460, 30,465 (June 26, 2019).
- 112 See Letter from Erik Gerding, Professor of Law and Wolf-Nichol Fellow, University of Colorado Law School, et al. (Sept. 24, 2019), SEC File No. S7-08-19, <https://www.sec.gov/comments/s7-08-19/s70819-6193340-192501.pdf>.
- 113 See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Rel. No. 10884 (approved Nov. 2, 2020), pages 26-27, <https://www.sec.gov/rules/final/2020/33-10844.pdf>.
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- 117 See Commission Statement on Market Structure Innovation for Thinly Traded Securities, Exchange Act Release No. 87327, 84 Fed. Reg. 56,956 (Oct. 24, 2019).
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- 156 The heightened sales practice requirements were, unfortunately, ultimately stripped from the Derivatives Rule adopted by the Commission. See *supra* notes 31-47 and accompanying text.
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- “This evidence is good news for investors generally, but there have also been some indications of potential issues. For example, there has been concern expressed by some fixed income investors that offerings off the ‘shelf’ can frequently involve truncated time periods that do not give them sufficient time to assess all of the factors necessary to evaluate the issuer’s credit. These impacts cause our staff to ask whether any such issue could be addressed by increasing the speed and access by which investors obtain the necessary information or should we consider further adjustments to the 2005 rules, such as ‘speed bumps’ like those introduced for certain asset-backed securities offerings last year?”
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- 188 For empirical evidence on underwriters’ allocation practices in the primary market for corporate bonds, see Stanislava Nikolova, Liying Wang, and Juan (Julie) Wu, *Institutional Allocation in the Primary Market for Corporate Bonds* (Aug. 9, 2019), Journal of Financial Economics (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3181983. See also Katie Linsell, The Robots Are Coming for the Bond Market, BLOOMBERG NEWS (Jan. 18, 2018), <https://www.bloomberg.com/news/articles/2018-01-19/machines-are-encroaching-on-bond-markets-last-line-of-resistance> (“Getting allocations at the point of sale can make the difference between a good year and a bad one for a money manager.”).
- 189 See Molly Smith, Bond Buyers Push Wall Street to Modernize Underwriting Process, BLOOMBERG NEWS (Aug. 17, 2020), <https://www.bloomberg.com/news/articles/2020-08-17/bond-buyers-push-wall-street-to-modernize-underwriting-process>.
- 190 See 2015 CRT Presentation, *supra* note 183, at 9.
- 191 See Dan Barnes, DirectBooks launches platform for issuance of US corporate bonds, THE DESK (Nov. 19, 2020), <https://www.fi-desk.com/directbooks-launches-platform-for-issuance-of-us-corporate-bonds-european-expansion-on-cards/> (“Efficient access to the primary market is essential to bond investors. It allows them to replace bonds that have reached maturity, and as bonds are often held to maturity, liquidity in secondary market trading is sporadic rather than continual.”).
- 192 See *Investment Grade Primary Best Practices Framework*, The Credit Roundtable (Aug. 17, 2020), https://cdn.ymaws.com/thecreditroundtable.org/resource/resmgr/recent_news/2008_crt_investment_grade_pr.pdf. See also Molly Smith, Bond Buyers Push Wall Street to Modernize Underwriting Process, BLOOMBERG NEWS (Aug. 17, 2020), <https://www.bloomberg.com/news/articles/2020-08-17/bond-buyers-push-wall-street-to-modernize-underwriting-process>; Brian Chappata, Bond Traders Ought to Swap Myth for Modernity, BLOOMBERG OPINION (Aug. 18, 2020) (opining that “it’s hard to come up with a serious case against this modernization push”).
- 193 Many institutional investors have compliance procedures they must follow, such as demonstrating that accounts suitable to participate in the offering (according to explicit client guidelines) are identified at the start of the process, so that there is an audit trail showing that these same accounts are the ones ultimately allocated bonds.

- 194 *Improving Covenant Protections in the Investment Grade Bond Market*, The Credit Roundtable (Dec. 17, 2007; updated July 2, 2008), https://cdn.ymaws.com/thecreditroundtable.org/resource/collection/003C92A4-87FF-4401-A9F3-96ESC704F962/_CovenantWhitePaper_Covenant_White_Paper_revis.pdf.
- 195 *See, e.g.*, The Fixed-Income Trading System Evolution: Creating Something Completely New, Greenwich Associates (2020) (describing technology developments).
- 196 *See* Chetna Mistry, A Buy-Side View—What’s Wrong With Primary Markets?, Western Asset Research Blog (Mar. 30, 2020), <https://www.westernasset.com/us/en/research/blog/whats-wrong-with-primary-markets-2020-03-30.cfm>.
- 197 *See* Big banks develop new platform for bond issuances, FINANCIAL TIMES (Mar. 25, 2018), <https://www.ft.com/content/972bfd3a-2d84-11e8-9b4b-bc4b9f08f381> (“Corporate bond issuance is a leading driver of bank revenues and has become increasingly important since the financial crisis, with low interest rates spurring a borrowing splurge.”).
- 198 *See* Paul Kilby, Buyside body wants changes in how US bonds are sold, INTERNATIONAL FINANCE REVIEW (Aug. 21, 2020), <https://www.ifre.com/story/2498707/buyside-body-wants-changes-in-how-us-bonds-are-sold-l8n2fn0el> (describing DirectBooks and quoting a representative of the sell-side consortium, “DirectBooks will be a very helpful solution as are other technologies to create structured data dissemination. That will enable a lot more of this information to be readily available and easily accessible for the investor base.”).
- 199 *See* Dan Barnes, DirectBooks launches platform for issuance of US corporate bonds, THE DESK (Nov. 19, 2020), <https://www.fi-desk.com/directbooks-launches-platform-for-issuance-of-us-corporate-bonds-european-expansion-on-cards/> (quoting DirectBooks CEO Rich Kerschner: “This does not replace the sales process— that is not the goal here. . . . There might be additional communications sent back and forth, and by phone, so they maintain their sales relationship.”). *See also* Katie Linsell, The Robots Are Coming for the Bond Market, BLOOMBERG NEWS (Jan. 18, 2018), <https://www.bloomberg.com/news/articles/2018-01-19/machines-are-encroaching-on-bond-markets-last-line-of-resistance> (describing the commercial incentives of various stakeholders); Buy-side fights back against primary market pressure, THE DESK (Oct. 19, 2020), <https://www.fi-desk.com/buy-side-fights-back-against-primary-market-pressure/> (same).
- 200 *See supra* notes 42-47 and accompanying text.
- 201 *See* Derivatives Rule, *supra* note 31 at section II.G.2.
- 202 *See* Jay Clayton, Chairman, SEC, Dalia Blass, Director, SEC Division of Investment Management, William Hinman, Director, SEC Division of Corporation Finance, and Brett Redfearn, Director, SEC Division of Trading and Markets, *Joint Statement Regarding Complex Financial Products and Retail Investors* (Oct. 28, 2020), <https://www.sec.gov/news/public-statement/clayton-blass-hinman-redfearn-complex-financial-products-2020-10-28>.
- 203 *See id.*
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- 207 The Commission has not approved exemptive relief for a new leveraged/inverse ETF sponsor since 2008. *See* SEC Directory of Exemptive Orders Issued On or After January 1, 2007, <https://www.sec.gov/rules/icreleases.shtml#etf-leveraged>. In addition, the Commission and its staff periodically issues alerts or bulletins to investors regarding the unique dangers of leveraged/inverse ETFs. *See, e.g.*, SEC Staff and FINRA, *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors* (Aug. 1, 2009), <https://www.sec.gov/investor/pubs/leveragedetfs-alert.htm> (“The SEC staff and FINRA are issuing this Alert because we believe individual investors may be confused about the performance objectives of leveraged and inverse exchange-traded funds.”). The unique investor protection concerns associated with leveraged/inverse ETFs are also well-documented in media reports. *See, e.g.*, Claire Ballentine, Bloomberg, *Risky Corner of ETF Market Could See More Debuts After SEC Vote* (Oct. 26, 2020), <https://www.bloomberg.com/news/articles/2020-10-26/risky-corner-of-etf-market-could-see-more-debuts-after-sec-vote> (“Leveraged funds have a reputation as the ‘bad boys’ of the industry because their strategies can exacerbate losses, especially for less-experienced traders.”). Finally, numerous enforcement cases at the Commission and FINRA have shown that investment professionals themselves often lack a basic understanding of these complex products. *See, e.g., supra* note 40.
- 208 *See* Derivatives Rule, *supra* note 31 at sections II.D (allowing ETFs to seek leverage or inverse leverage up to 200% without obtaining previously-required individualized exemptive relief), II.F.5 (exempting currently operational ETFs with leverage or inverse leverage exceeding 200% from the Derivatives Rule VaR test generally applicable to other funds), and II.F.6 (amending the ETF Rule’s scope to allow leveraged and inverse ETFs to form and operate pursuant to the rule (which originally encompassed only traditional, “plain-vanilla” ETFs)).

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- 212 As used in this report, the term “Ombudsman” may refer to the Ombudsman, or to the Ombudsman and Office of the Investor Advocate staff and contractors directly supporting the ombudsman function.
- 213 See Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns, <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.
- 214 See Reporting Threshold for Institutional Investment Managers, Exchange Act Release No. 89290, 85 Fed. Reg. 46,016 (Jul. 31, 2020).
- 215 SEC, *What We Do*, <https://www.sec.gov/about/what-we-do> (Oct. 15, 2020).
- 216 BrokerCheck is a free tool that enables investors to research the professional backgrounds of brokers and brokerage firms. *About BrokerCheck*, <http://www.finra.org/investors/about-brokercheck> (last visited Dec. 4, 2020).
- 217 When an investor opens an account at a brokerage firm, the agreement typically includes a mandatory pre-dispute arbitration clause that specifies that any legal dispute between the investor and the broker will be resolved by arbitration or mediation in the FINRA dispute resolution forum. As a result, most investors have some general knowledge of the FINRA dispute resolution forum and the arbitration and mediation processes.
- 218 See SEC Coronavirus (COVID-19) Response, <https://www.sec.gov/sec-coronavirus-covid-19-response>.
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- 220 See, e.g., Jay Clayton, Chairman, SEC, Speech: An Update on FY 2020 Results (Oct. 8, 2020), <https://www.sec.gov/news/speech/clayton-sec-speaks-2020-10-08> (“I am pleased to report that while the pandemic significantly impacted *how* we do our work, it did not negatively impact the work itself.”).
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- 224 See Securities Arbitration Alert blog, (Oct. 30, 2020), <https://www.secarbalert.com/blog/finra-drs-posts-stats-thru-third-quarter-still-no-covid-crash-surge-in-customer-arbitration-claims-but-industry-new-case-filings-have-for-the-first-time-we-think-eclipsed-customer/>.
- 225 See FINRA, *Dispute Resolutions Statistics* <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#virtual>.
- 226 See Tracey Longo, *FINRA Suspends In-Person Hearings Until December*, FINANCIAL ADVISOR (Sep. 14, 2020), <https://www.fa-mag.com/news/finra-suspends-in-person-hearings-until-december-57937.html>.
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- 240 FINRA Rule 2165 (Financial Exploitation of Specified Adults) (<https://www.finra.org/rules-guidance/rulebooks/finra-rules/2165>) permits FINRA members to place temporary holds on disbursements of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers, and FINRA Rule 4512 (Customer Account Information) (<https://www.finra.org/rules-guidance/rulebooks/finra-rules/4512>) requires FINRA members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for a customer’s account. See FINRA Investor Insights, Protecting Seniors From Financial Exploitation, (Apr. 25, 2018), <https://www.finra.org/investors/insights/senior-financial-exploitation>. See also Stephen Deane, SEC Office of the Investor Advocate, *How the SEC Works to Protect Senior Investors* (May 2019), <https://www.sec.gov/about/offices/investorad/how-the-sec-works-to-protect-senior-investors.pdf>.
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