VISTA360

HOT INDUSTRY TOPICS ("HIT") LIST
INVESTMENT ADVISERS & FUNDS
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Rules and Regulations			
SEC Delays Proposed Proxy Access Rule Changes ***New***	Fund	On October 2, 2009, SEC Commissioner Elisse B. Walter announced that the proposed proxy access rule changes would be delayed until early 2010. The rule changes proposed in May 2009 have drawn over 500 comment letters. Commissioner Walter said the SEC needs additional time to review the comment letters and "…to make a truly informed decision." The delay will mean that the rules will not be finalized for the 2010 proxy season. The rules are designed to make it easier for shareholders to nominate directors of public companies.	Link to Commissioner Walter's speech
Interim Final Temporary Rule Requiring Disclosure of Certain Money Market Fund Portfolio Holdings ***New***	Fund	The SEC adopted an interim final temporary rule on September 18, 2009, extending and expanding the disclosure requirements of the Treasury Department's Temporary Guarantee Program for Money Market Funds. The guarantee program, which expired on the same day, required participating money market mutual funds to submit their portfolio schedules and related information each week. To facilitate successful oversight of money market funds, the SEC is asking for more information than previously required under the Treasury's guarantee program. The comment period ended on October 26, 2009.	Link to Final Rule
Measures to Strengthen Oversight	Adviser & Fund	The SEC plans to bolster oversight efforts of Nationally Recognized Statistical Ratings Organizations (NRSROs). In a press release dated	Link to Press Release

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of NRSROs ***New***		September 17, 2009, the SEC announced these future measures are aimed at "…enhancing disclosure and improving the quality of the ratings." Among the proposals are: • Rules governing ratings histories. • Amendments strengthening NRSRO compliance programs. • Amendments eliminating the reference to NRSROs in SEC's rules and forms. • Rules requiring disclosure of certain information used to determine a rating. The comment period is now open for the various proposals.	
Regulation S-AM: Limitations on Affiliate Marketing ***New***	Adviser & Fund	The SEC recently adopted Regulation S-AM under the Fair Credit Reporting Act. Regulation S-AM applies to all SEC-registered investment companies and advisers, transfer agents, broker-dealers and municipal securities dealers. The compliance date is January 1, 2010. Regulation S-AM allows a consumer, in certain limited situations, to block affiliates of such registrants from using certain consumer eligibility information supplied by the registrant to market the affiliate's products or services to a consumer unless the consumer is first provided the ability to opt out of such marketing. Unlike Regulation S-P, Regulation S-AM does not limit the registrant's ability to share information. Instead, it limits a registrant's ability to use the eligible information received from an affiliate to solicit the consumer for marketing purposes.	Link to Final Rule

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Proposed Pay-to-Play Rules for Investment Advisers ***New***	Adviser	On August 3, 2009, the SEC proposed Rule 206(4)-5 under the Investment Advisers Act, which will restrict an investment adviser's ability to provide advisory services to a government client for two years after the advisor makes political contributions to certain elected officials. Specifically, this rule would: • Prohibit an investment adviser from receiving compensation for providing advisory services to a government entity for two years after the adviser or its covered associate makes a political contribution to a public official of a government entity that is in a position to influence the award of the advisory business. • Prohibit an adviser from paying third party solicitors to solicit government entities for advisory business. • Prohibit an adviser or its covered associates from coordinating or soliciting any person or political action committee (PAC) to make any (i) contributions to an official of a government entity to which the adviser is providing or seeking to provide advisory services, or (ii) payments to a political party of a state or locality where the adviser is providing or seeking to provide advisory services to a government entity. Please see our Perspective on various states' recent pay-to-play legislation for related information.	Link to Proposed Rule
Other Initiatives			

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CFTC and SEC Issue Joint Report on Regulatory Harmonization ***New***	Adviser & Fund	Pursuant to a White House request, the SEC and CFTC held two meetings in early September to discuss regulatory gaps between the two agencies. The request, which was included in the White Paper on Financial Regulatory reform, called on the agencies to determine ways to eliminate inconsistent oversight and promote greater collaboration. The report released on October 16, 2009, includes 20 recommendations to "enhance enforcement powers, strengthen market and intermediary oversight and improve operational coordination."	Link to Press Release Link to the "Joint Report of the SEC and the CFTC on Harmonization of Regulation"
SEC Reschedules 2009 CCOutreach National Seminar to January 26, 2010 ***New***	Adviser & Fund	The SEC has rescheduled the November 17, 2009 Fund and Adviser CCOutreach National Seminar to January 26, 2010. The SEC will be providing additional Seminar details on its website soon including the panels, topics and agenda.	Link to SEC CCOutreach Program
Securities Lending & Short Selling Roundtable ***New***	Adviser & Fund	The SEC hosted a two day public roundtable on Securities Lending and Short Selling on September 29th and 30th. The event consisted of six separate panel discussions. The panels included corporate issuers, financial services firms, beneficial owner lenders, lending agents, borrowers of securities, SROs, international regulators and members of the academic community. Several issues surrounding securities lending topics and short sale issues were discussed including: • Issues related to securities lending, such as compensation arrangements, disclosure practices, and methods of collateral and	Link to Press Release and Agenda

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		cash reinvestment; • Imposing "pre-borrow" requirements for short sales, or some other means of enhancing the requirement to "locate" shares to be used in a short sale transactions; and • Requiring additional transparency on short sales, such as adding a short sale indicator to the tapes on which transactions are reported for exchange-listed securities, and requiring public disclosure of individual large short positions.	
New Division of Risk, Strategy, and Financial Innovation ***New***	Adviser & Fund	On September 16, 2009, the SEC announced the creation of the new Division of Risk, Strategy, and Financial Innovation. Combining the Office of Economic Analysis (OEA) and the Office of Risk Assessment (ORA), the new division will use sophisticated analysis that integrates economic, financial, and legal disciplines to provide guidance to SEC staff on important developments and trends in the financial industry. Its goals are to identify risks and trends so the SEC can create regulation and train its staff to deal with risks the new developments may pose. This is the first new division created by the SEC in three decades.	Link to Press Release
Division of Enforcement Reorganization ***New***	Adviser & Fund	In response to the report identifying the SEC's failures in detecting Bernard Madoff's multi-billion dollar Ponzi scheme (see below), Robert Khuzami, Director of the SEC's Division of Enforcement, testified in front of the U.S. Senate regarding his division's current and future initiatives aimed at improving the SEC's performance. In his testimony on September 10, 2009, Mr. Khuzami explained that he recently ordered a thorough	Link to Testimony

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		assessment of the division, which resulted in several recommendations aimed at improving SEC Enforcement. Some of the recommendations expected to be implemented include: • Creating five specialized investigative groups made up of in-house experts and newly hired staff with practical industry experience. • Reducing management by 40%, resulting in a flatter organizational structure and providing more investigative staff. • Enhancing training and supervision of staff. • A newly created position of Chief Operating Officer, which will shift the burden of administrative tasks from investigators to operations personnel. • Streamlining the structure around gathering and monitoring of tips and complaints. The changes within Enforcement are expected to result in the division's biggest reorganization in three decades.	
SEC Releases Internal Report of its Handling of Madoff Ponzi Scheme ***New***	Adviser & Fund	On August 31, 2009 the SEC Office of Inspector General (OIG) released its report on the investigation of the failure of the SEC to uncover Bernard Madoff's Ponzi scheme. The OIG found that SEC staff working on examinations and investigations related to Bernard Madoff and his firm often lacked experience, examinations were poorly planned, and investigations were too limited in scope. The OIG recommended Chairman Schapiro discuss report findings with	Link to The SEC OIG Report of the Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme Link to Chairman Schapiro's Statement on the Release of the

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		employees involved who are still with the SEC and take appropriate actions to ensure similar mistakes do not happen in the future. Additionally, the OIG will be issuing two audit reports that will provide the SEC with specific recommendations to improve the SEC's Office of Compliance Inspections and Examinations (OCIE), and Enforcement Division. .	OIG's Report

EXECUTIVE , LEGISLATIVE AND AGENCY INITIATIVES			
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House Considers Reform Legislation ***New***	Adviser & Fund	The US House of Representatives is moving ahead with several pieces of legislation aimed at financial regulatory reform. Among the measures in committee or up for full House vote are: • 401(k) Fair Disclosure and Pension Security Act • Financial Stability Improvement Act • Investor Protection Act • Over-the-Counter Derivatives Markets Act • Consumer Financial Protection Agency Act • Accountability and Transparency in Credit Rating Agencies Act • Private Fund Investment Advisers Registration Act • Amendments to the Fair Credit Reporting Act to provide for an exclusion from Red Flags guidelines for certain businesses.	Link to site tracking pending Congressional legislation Link to House Committee on Financial Services press releases
Treasury Announces Expiration of Guarantee Program	Fund	The Treasury Guarantee Program for Money Market Funds ("The Program") ended on Sept. 18, 2009. The Program was established Sept. 19, 2008 following the collapse of the Reserve Primary Fund, due to money	Link to Treasury Dept. Press Release

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for Money Market Funds ***New***		losses created by debt issued by bankrupt Lehman Brothers. Originally set up for a three-month period, the Program allowed for (and accepted) extensions through its expiration date a year later. The Program backed more than $3 trillion in deposits against losses and helped curb withdrawals. Treasury Secretary Tim Geithner said that the Program "served its purpose of adding stability to the money market mutual fund industry during market disruptions last fall and ultimately delivered a healthy return to taxpayers."	
DOL Approves Use of Summary Prospectus for ERISA accounts ***New***	Fund	The Department of Labor (DOL) released a Field Assistance Bulletin on September 8, 2009, approving the use of a Summary Prospectus to satisfy its prospectus delivery obligations under ERISA §404(c). In its analysis, the DOL concluded information required in the Summary Prospectus provides key information about a mutual fund that will assist participants and beneficiaries in making informed investment decisions.	Link to Field Assistance Bulletin 2009-3
Update on the FTC's Red Flags Rule ***Updated***	Adviser & Fund	On October 30, 2009 the Federal Trade Commission ("FTC") announced it had further extended the deadline for compliance with the Red Flags Rule (the Rule), from November 1, 2009 to June 1, 2010. The Rule requires "financial institutions" or "creditors" with "covered accounts" to create and implement comprehensive identity theft prevention programs. In analyzing the Rule, a company must first determine if it falls under the definition of "financial institution" or a "creditor." The Rule defines a	Link to FTC Press Release Link to Red Flags Rule FAQs

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		"financial institution" as: 1) a state or national bank, 2) a state or federal savings and loan association, 3) a mutual savings bank, 4) a state or federal credit union, or 5) any other entity that directly or indirectly holds a "transaction account" belonging to a consumer. "Transaction accounts" are deposits or accounts from which a consumer can make payments or transfers to third parties. The Rule defines "creditor" very broadly, and includes any company that provides services and allows customers to pay later. Therefore, if an adviser charges a quarterly fee for investment advisory services for the previous quarter, it may be considered a creditor and therefore subject to the Rule. The next step is to figure out if the company has any "covered accounts." The Rule defines that term as either: (1) consumer accounts designed to permit multiple payments or transactions, or (2) any other account that presents a reasonably foreseeable risk from identity theft. If a company determines it has covered accounts, it must implement a written program designed to identify, detect and respond to the red flags of identity theft. If a company determines it does not have covered accounts, but is still deemed a creditor, then it does not need a written program but must conduct periodic reviews to determine if it has acquired any covered accounts.	

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NASAA to Waive IARD System Fees ***New***	Adviser	The North American Securities Administrators Association (NASAA) announced on October 13, 2009, that it will waive the initial and annual system fees paid by investment advisers and their representatives to maintain the Investment Adviser Registration Depository (IARD) system. The fee waiver for advisers went into effect in 2005, while 2009 is the second year the fee is waived for investment adviser representatives.	Link to Press Release
IDC Task Force Report Identifies Key Characteristics for Strong Compliance Programs	Adviser & Fund	Almost six years have passed since the mutual fund compliance program rule (Rule 38a-1 under the Investment Company Act of 1940) has become effective. Recently, the Independent Directors Council (IDC) created a task force to explore investment companies' development and implementation of compliance programs and to provide investment company board members a "comparative tool to help them think about and evaluate compliance." The IDC Task Force issued a report identifying compliance program themes and characteristics the Task Force believes demonstrate a sound compliance program. The report also addresses topics such as the CCO's role; the adviser's support of the CCO; role of the fund board; communications; evaluating the compliance program and the CCO; and CCO compensation.	Link to IDC Report
Massachusetts Data Privacy Regulation ***Updated***	Adviser & Fund	On August 17, 2009 the Massachusetts Office of Consumer Affairs & Business Regulation again extended the deadline for compliance with the Massachusetts Standards for the Protection of Personal Information of Residents of the Commonwealth (Massachusetts Standards) to March 1, 2010 and made amendments to the rules. The Rule generally requires any person who has Personally Identifiable Information (PII) of Massachusetts	Link to Redlined Version of the Massachusetts Standards which show the Aug. 17, 2009 Amendments

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		residents to develop, implement and maintain a comprehensive written program to protect PII. The program should contain administrative, technical and physical safeguards to be followed appropriate to the size, scope and type of business. The Massachusetts Standards apply to persons, corporations, associations, partnerships or other legal entities that have PII of Massachusetts residents (customers or employees), regardless of whether the company has a place of business or staff located in the state of Massachusetts. Under the Massachusetts Standards, PII includes such information as social security numbers, driver's license or state identification card numbers, credit and debit card numbers or financial account numbers. Both investment companies and advisers may retain this type of information about their clients. The most significant amendment is the use of a risk-based approach closely following the SEC's proposed amendments to Regulation S-P and the FTC's Red Flags Rule. Using this approach, businesses will be able to customize their programs towards the size and type of business they operate. However, the Massachusetts Standards do not include a description of what they would consider to be a small business, except to reference a firm of 10 employees as a small business within their Frequently Asked Questions (FAQ list). The encryption requirement has been amended to be applicable if there is a	

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		reasonable method of technology available to the firm to encrypt. Firms should incorporate best practices of not sending personal information in emails if they are unable to encrypt the data. The third-party service provider requirements have been changed to be consistent with the FTC's Red Flags Rule. Firms are considered to be responsible for selecting and retaining service providers that by contract are capable of implementing and maintaining appropriate security measures to safeguard their client's personal information. At least annually firms should review service providers to obtain reasonable assurance their program is operating to prevent identity theft. Additionally, the regulation requires firms to document actions taken in response to any breach of security.	
Industry Groups File Amicus Briefs in Supreme Court Fee Case *(Jones v. Harris Assoc.)* ***Updated***	Funds	The U.S. Supreme Court heard oral arguments in *Jones v. Harris Associates* on November 2, 2009. As you may recall from Vista360's July 2009 HIT list, this case involves a suit brought by mutual fund shareholders against Harris Associates, a mutual fund investment adviser. The shareholders are accusing Harris Associates of charging excessive advisory fees and violating their fiduciary duty under Section 36(b) of the Investment Company Act. The case surrounds the standard by which federal courts evaluate excessive fee cases brought by shareholders. For the past 30 years the standard has been the *Gartenberg* standard, which states that a fund adviser violates its fiduciary duty to shareholders if they charge a fee "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length	Link to the ICI Amicus Brief filed Sept. 3, 2009 Link to the IDC Amicus Brief filed Sept. 3, 2009 Link to the SIFMA Amicus Brief filed Aug. 27, 2009

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		bargaining." The Investment Company Institute (ICI) and the Independent Director's Council (IDC) both submitted amicus[1] briefs on September 3, 2009 to the U.S. Supreme Court. The ICI filed their brief supporting the *Gartenberg* approach and asserting it provides "real and substantial protection to investors." IDC's brief details the responsibilities of independent directors of fund boards and their meticulous fund advisory fee evaluation and approval processes. On August 27, 2009 the Securities Industry and Financial Markets Association (SIFMA) filed an amicus brief in support of the mutual fund investment adviser. Additionally, a number of other trade groups have filed amicus briefs in this case. The U.S. Supreme Court ruling on the case is anticipated during the summer of 2010. [1] An amicus brief is a legal opinion, not solicited by any of the parties involved in a case, providing the court with information on a point of law that may assist the court in a case. The court has the discretion to allow the brief or not.	
Michigan Adopts New Uniform Securities Act ***New***	Advisers	The State of Michigan replaced its securities legislation with the new Uniform Securities Act (2002) 2008, PA 551 (the "Act") on October 1, 2009. Among the provisions of the law is a new registration requirement for investment adviser representatives ("IARs"), unless the IAR is excluded from the definition of IAR or otherwise exempted from the registration requirement. Basically, Michigan's new Act is closer to what the majority of states	See the Act for the complete IAR definition and further information on these exclusions and exemptions.

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		currently require of IARs. The exclusions include those IARs who are employed by a federal covered advisory firm, unless the IAR has a place of business in Michigan, as well as agents whose performance of investment advice is solely incidental to their work as agents and who do not receive special compensation for their services. Further exemptions include those IARs who are employed by advisory firms that do not have more than five clients in Michigan.	

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