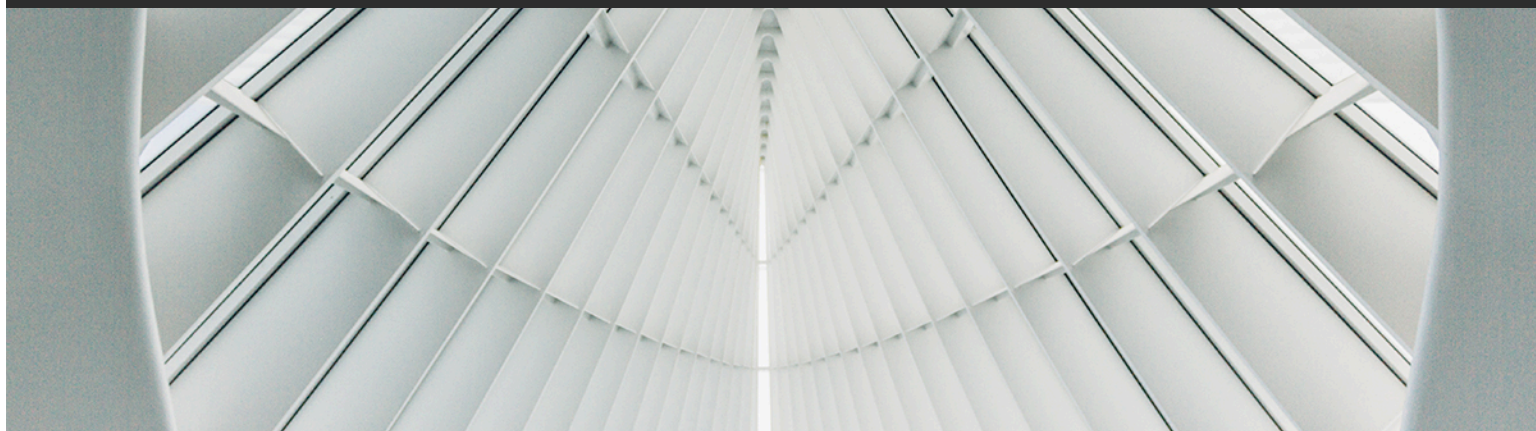


Alert | Securities Litigation



September 2017

SIFMA C&L Regional Seminar Charlotte

Below is a summary of the Sept. 18, 2017, SIFMA C&L Charlotte Regional Seminar, in the event that you or your colleagues were unable to attend.

Hot Topics in Securities Enforcement

The panel included moderator Jack Sena (Associate GC, Head of Regulatory Inquiries, BOA), Scott Friestad (Associate Director, SEC Enforcement), Russ Ryan (SVP and Deputy Chief, FINRA Enforcement), and former regulators. There was no state regulator on the panel.

The regulators acknowledged that the recent changes in their respective enforcement heads, SEC (Jay Clayton) and FINRA (Susan Schroeder), would not have noticeable immediate dramatic changes from their prior leadership. Both the SEC and FINRA will focus on issues arising from senior investors, but candidly admitted they must be smarter in deploying their resources. Friestad indicated that the SEC would focus less on technical and theoretical violations of the securities laws, but more on cases that involve individual retail investors. The SEC also plans to focus on capital markets and capital raising issues, which is consistent with recent speeches from Clayton. There was little to no discussion on enforcement efforts with respect to investment advisors, although that has certainly appeared to be a focus based on recent settlements. On the FINRA front, Ryan stressed that FINRA will focus on high risk and recidivist firms/brokers and put their resources toward getting “these people out of the industry.” He did not say that this meant that the rest of the industry could relax, however.

As observed in other SIFMA panels, there was a discussion of the problems associated with regulatory piling on by the SEC, DOJ, FINRA, and the state regulators. Ryan seemed to believe that the problem may be overblown because FINRA only had a handful of cases where multiple agencies/regulators were

simultaneously investigating the same conduct at a particular firm. Regardless, Friestad and Ryan commented that while they understand the potential problem, it was likely beyond their control. They said that rarely do they call another agency/regulator to join in or to coordinate an investigation.

The panel discussed the status of the constitutional challenge cases -- referring to the fact that SEC ALJs were not properly appointed and therefore there was a perpetuated violation of the Appointments Clause of the U.S. Constitution. As you may be aware, our group has experience in this area and handled one of the first cases to enjoin an ALJ proceeding, although it was reversed on procedural grounds. It is expected that the issue will make its way to the U.S. Supreme Court, which could be reasonably soon. The challenge is the impact on existing and resolved administrative proceedings if the Supreme Court declares that the ALJs' appointment was unconstitutional. Could such a ruling per se invalidate all cases? Both regulators had no answer. Friestad said that while this remained a hot issue, the SEC planned to bring more cases in federal court. This is welcomed news to the defense bar as it is well known that the SEC administrative proceedings do not afford the same protections and tools available in federal court. To some laughter, Friestad said that he thought both forums were fair.

Other topics the panel covered included the SEC's use of tolling agreements (which the SEC will continue to use); FINRA will likely close old cases (unless they involve fraud): use of requests for admissions in settlement (FINRA will not use, SEC will probably use less): and the impact of the Newman decision and Martoma appeal on insider trading cases (Newman is an outlier case given the degree of separation of tipper to tippee trading on inside information).

Hot Topics in AML and OFAC Compliance

The panel included moderator William Fox (MD, Global Head of Financial Crimes Compliance), Sarah Green (Senior Director of AML Compliance, FINRA), Charlie George (SVP, Group Financial Crimes Manager, Wells Fargo Bank), Bob Molloy (Chief AML Officer, Raymond James), and outside counsel. Green summarized FINRA's AML priorities, which included identifying gaps in firms' systems (inputs and lapses of inputs): making sure systems maintain appropriate parameters (revisit as business changes): ensuring firms' systems have correct outputs of information: foreign currency transactions/suspense accounts: and trade surveillance (testing and delegation documented in policies and procedures). The SEC's priorities included risk assessments, AML programs tailored to business risks: monitoring: and SAR reporting/timeliness. The first priorities are similar to FINRA's. With respect to SAR filing, the panel cautioned to be careful about using templates/check-the-box SAR reporting and not including important and relevant information in the SAR, noting the Alpine Securities Corporation SEC matter (Civ. No. 7:17-CV-4179).

While FINRA Rule 3310 requires firms to develop and implement a reasonable AML program in line with the requirements of the Bank Secrecy Act (i.e., combat terrorist financing, money laundering, and other crimes), Green added that the purpose of an AML program is to protect customers and market integrity. Her concern involved those situations where "the end customer loses out." One panelist noted that AML today includes "AML and all suspicious activity."

The panel also discussed recent enforcement matters, specifically Spencer Edwards Inc. (Disc. Pro. No. 201230358653030); Wood Company, Inc. (Complaint No. 2011025444501); Merrimac Corporate Securities, Inc. & Robert G. Nash (Complaint No. 2011027666902); Mariva Capital Markets (AWC 2015043415301); Valdes & Moreno, Inc. (AWC 2016048244301); Dominick & Dominick LLC (AWC 2014041218901); Electronic Transaction Clearing, Inc. (Disc. Pro. No. 2013037709301): and, just released, C.L. King & Associates (Disc. Pro. No. 2014040476901 and

<http://www.finra.org/newsroom/2017/finra-hearing-panel-fines-cl-king-associates-750000-negligent->

[misrepresentations-and](#)). These cases predominantly involved low-priced securities where it appears that the firms missed what the panel described as “basic blocking and tackling” – make sure to document investigations of red flags, train analysts, and tailor the systems and surveillance to the firms’ business (not boilerplate/check the box and cover all of the firms’ business lines, even if low-priced securities are a very small piece of the firms’ business). The C.L. King case is notable because a FINRA hearing panel fined the firm \$750,000 and suspended the AMLCO for six months as well as fined him \$20,000. Caution -- AMLCO is still a very hot topic, though Green did say that FINRA will not seek to impose AMLCO liability where the AMLCO escalates issues and takes appropriate steps to try to remediate issues. At least one panelist warned to be on the lookout for low-priced securities substitutes for the new AML avenue (such as Y shares).

The panel also advised AML officers who identify issues and do not feel they are receiving an adequate response from their firms. Simply put, the advice was to “elevate and document” -- bring the issue to more senior management and document the fact you did so. There was an implication that doing this might insulate the AML officer individually because at some point “there is only so much one can do.”

Arbitration and Litigation

This panel included moderator Allison Patton (MD, Co-Head, MSSB Litigation), Robert Rudnicki (Assistant General Counsel, Raymond James), Michael Brady (Bass, Berry & Simms), Andrea Greene (Bressler Amery), and Stefanie Wayco (Greenberg Traurig). This panel focused on four topics: litigating senior investor claims, eligibility motions, Bank Secrecy Act materials and protections during discovery, and subpoenas to regulators in FINRA arbitration. The key takeaways for these four topics were:

1. on senior investors, claims under state elder abuse laws appear to be on the rise -- be cognizant of challenges on legal and factual issues related to proving/evidence of impairment;
2. on eligibility motions, in determining whether to file a motion, consider the impact on whether some or all claims may be successfully dismissed and the impact on potential dual litigations (court/arbitration), costs, and damages calculations;
3. on BSA and discovery, BSA materials have an unqualified protection from disclosure that is not waivable. Be familiar with what documents fall under that protection; and
4. claimants’ counsel have been piggybacking on powers of regulators in conducting investigations and subpoenas to the regulators in FINRA arbitrations are on the rise. It is important to watch out for sensitive financial privacy issues, protection of customer information, and know that FINRA will not redact documents before production.

CCO Roundtable

This panel included moderator Kristen Dugan (MD, BOA), Suzy Auletta (EVP/CCO, LPL Financial), John Ivan (SVP/CCO, Raymond James), Sam Turvey (MD, Senior CO, TIAA-CREF), and outside counsel. The key takeaway from this panel is with respect to big data and controls, as CCO document all decision-making on setting parameters and include key persons within the various business units. The panel emphasized root-cause analysis and the import of testing the firm’s systems to make sure they are operating correctly, documenting steps taken, and escalating appropriately.

Authors

This GT Alert was prepared by **Terry Weiss** and **Stefanie M. Wayco**. Questions about this information can be directed to:

- **Terry R Weiss** | +1 678.553.2603 | weisstr@gtlaw.com
- **Stefanie M. Wayco** | +1 678.553.1132 | waycos@gtlaw.com
- Or your **Greenberg Traurig** attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.[^] Tokyo.[∞] Warsaw.[~] Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ▫Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2017 Greenberg Traurig, LLP. All rights reserved.*