



## BDQUARTERLY

“A strong and reinvigorated SEC will be on the beat *like never before* to catch wrongdoers.”

– SEC Chairman Mary Schapiro, Practising Law Institute’s “SEC Speaks in 2009” Program  
Washington, DC, February 6, 2009

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### SEC Commissioner Lays Out Framework for IA-BD Reform

SEC Commissioner Elisse Walter has called for Congress to enact “harmonizing legislation” that would, among other things, require advisers to become members of a self-regulatory organization (SRO).

Walter laid out her ideas on investment adviser and broker-dealer regulatory reform at the May 5 Mutual Fund Directors Forum Conference in Washington, DC. Notably, Walter did not invoke the Bernie Madoff scandal or focus on “stove-piped” regulation in justifying her push for IA-BD reform. Instead, her remarks were couched in investor protection terms. “Aunt Millie,” she said,

should not have to bear the burden of determining the status of her financial professional. Moreover, Aunt Millie should receive an appropriate level of protection, regardless of who she is dealing with. Advisers and brokers “often provide practically indistinguishable services to retail investors and direct them to the same products,” Walter asserted.

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With that, Walter laid out three “fundamental principles” that she said should guide any investment adviser and broker-dealer reform effort:

- Regulation of a financial professionals should depend on what they do, not what they call themselves or how they are paid.
- Retail investors should not bear the burden of understanding distinctions between financial professionals.
- Investors should receive the same level of protection when they purchase comparable products and services, regardless of the financial professional involved.

Walter then described two paths to accomplish reform:

#### **Path #1: SEC Rulemaking**

In the absence of Congressional legislation, the SEC could attempt to address IA-BD reform using its current rulemaking authority.

Walter did not detail the rulemaking that the SEC would pursue in these areas. She did, however, spend a great deal of time explaining why the “demarcation” approach should not be pursued. That approach, she said, would rely on enhanced disclosures about the different duties and obligations of IAs and BDs, and would draw regulatory lines “more sharply” to better distinguish brokers from advisers.

Both of those tactics, she noted, were attempted in the SEC’s 2005 fee-based brokerage rulemaking. Walter said that despite her 30 years of experience as a securities regulator, she did not completely understand the disclosure statement mandated by that rulemaking. For example, she questioned

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According to Walter, one advantage of SROs is that they can provide arbitration forums tailored to their members’ business.

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whether the interests of any financial professional – investment adviser or broker-dealer – and their investors are ever exactly the same. “They may be generally aligned but they will never be the same, which is the rationale for requiring the disclosure of material conflicts of interest” for investment advisers, she noted.

#### **Path #2: Legislation by Congress**

In Walter’s view, to fully harmonize investment adviser and broker-dealer regulation, Congressional involvement is required. “In formulating new legislation, I believe Congress should take a ‘soup to nuts’ approach,” she said. “As I like to say, Congress should throw both statutes on the floor, select what is best in each, and cover any holes through which the floor boards show.”

Walter listed the topics that might be addressed by legislation and the SEC’s subsequent rulemaking process. (Note that this list contains several items – qualification requirements, an SRO, and a standard of care – not included on Walter’s list of items the SEC could tackle via rulemaking):

**Registration.** In Walter’s view, there should be a “unitary system for registration,” as well as a “vetting process” whereby each new registrant is required to demonstrate that it has the “operational capacity to carry on its proposed business.”

**Qualification Requirements.** All “associated persons” of an investment adviser or broker-dealer would be required to be licensed, pass a (CONTINUED)

“proficiency test,” and meet continuing education requirements. She also said that all financial professionals should be required to be members of one or more SROs.

**Disclosure Obligations.** Investment advisers and broker-dealers would provide investors with a “uniform disclosure document” (presumably, replacing the Form ADV), explaining their material conflicts of interest at account opening. Walter said that some form of periodic updating also should be considered. Investors should have access to a centralized database containing the disciplinary and employment history of all financial firms and their personnel.

**Remedies.** According to Walter, one advantage of SROs is that they can provide arbitration forums tailored to their members’ business. “Arbitration is generally faster and more cost-effective than

litigation,” she asserted. However, Walter said that she does not favor a mandated pre-dispute approach to arbitration.

**Uniform Standard of Conduct.** Walter said that financial professionals should be subject to a uniform standard of conduct; specifically, to act as fiduciaries at all times. She suggested that the SEC should provide formal guidance explaining what a fiduciary standard entails in order to provide clarity to investors and the industry. She also seemed to suggest that brokers and advisers be allowed to raise and lower their obligations as fiduciaries depending on what they are doing. “What a fiduciary duty requires depends on the scope of the engagement,” she said. “[I]t will mean one thing for a mere order taker, another thing for someone who provides a one-time financial plan, and yet something else for someone who exercises ongoing investment discretion over an account,” she said.

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## In Case You Missed It!

At the FINRA Annual Conference in May, Michael Rufino, FINRA Senior VP, listed his “Top 10 Things Firms Should Consider Doing Differently for AML in this Market Environment”<sup>1</sup>.

1. Evaluate the workload of analysts;
2. Check that procedures are being followed;
3. Re-evaluate the parameters being utilized;
4. Speak with IT on developing interim reports, if necessary;
5. Dialogue with business side to know clients and underlying activity;
6. Train the staff on what to look for in this environment;
  - Fortune 500 companies selling below \$5
  - Red Flags
  - Escalation
7. Be on the lookout for unregistered offerings;
8. Focus on incoming/outgoing money movements:
  - Customers seem to be selling securities and moving money more now than ever, but not necessarily as the result of a trading strategy.
  - Speak with other firms on what they are doing and seeing through informal roundtable discussions;
10. Utilize 314(b) more often.

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<sup>1</sup>– Rufino, Michael (May 7, 2009). *Mitigating Money-Laundering Risks*. PowerPoint presented at the 2009 FINRA Annual Conference, Boston, MA.

## Did You Know?

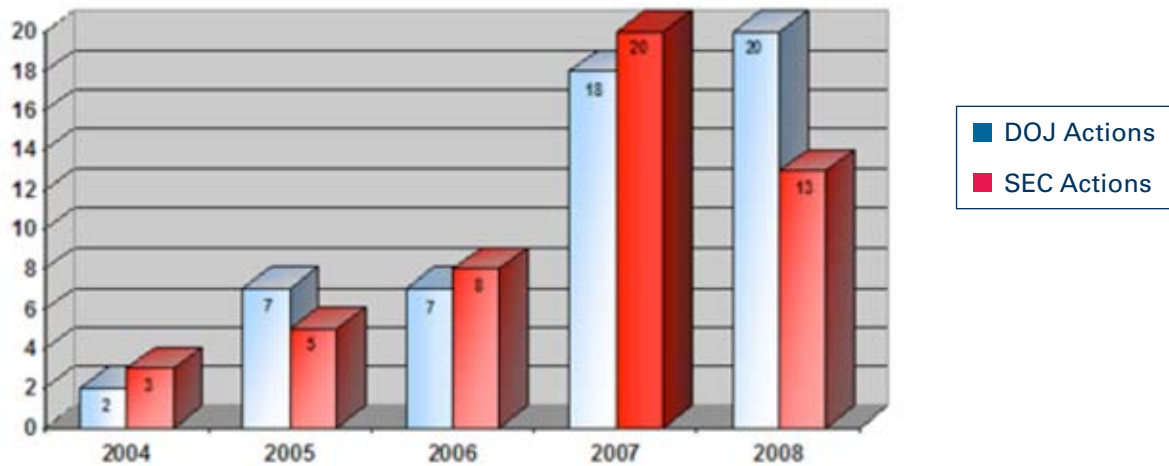
Foreign Corrupt Practices Act (“FCPA”) cases are on the rise. Accordingly, FINRA included FCPA issues in its March 9, 2009 examination priorities letter.

Firms should conduct a risk assessment of their business practices, such as identifying any relationships with government or state-owned enterprises that help identify businesses in geographic regions con-

sidered high risk, and monitor payments to third party consultants. Based on this risk assessment, your firm should tailor its FCPA compliance program and training appropriately.

### Number Of FCPA Enforcement Actions Filed By DOJ And The SEC During The Past Five Years<sup>1</sup>

2008		2007		2006		2005		2004	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
20	13	18	20	7	8	7	5	2	3



<sup>1</sup>– Gibson, Dunn & Crutcher LLP. 2008 Year-End FCPA Update. Retrieved June 4, 2009 from <http://www.gibsondunn.com/Publications/Pages/2008YearEndFCPAUpdate.aspx>

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## Red Flags Rule

The Federal Trade Commission has delayed the enforcement of its new Red Flags Rule once again, pushing the rule's compliance date back another three months.

Originally slated to take effect November 1, 2008, the Red Flags Rule was later postponed to May 1, 2009 and is now scheduled to take effect August 1, 2009. This extension does not affect banks and credit unions that have another federal regulator. Those entities remain subject to the original November 1, 2008 compliance date.

The purported purpose of the latest postponement is to give financial institutions and creditors additional time to develop and implement identity theft programs as required by the rule. In its press release, the FTC conveyed hopes that industries and associations could share guidance during the interim. The agency also announced that it would use the deferred time period to release a template aimed at helping entities with a low risk of identity theft to comply with the law (e.g., businesses that know all their customers personally).

Concerned with a growing number of incidences of identity theft, the FTC issued the Red Flags rule to require financial institutions and creditors with covered accounts to develop and implement written identity theft prevention programs. To comply with the rule, these programs must include reasonable policies and procedures for detecting, preventing and responding to patterns or specific activities that could indicate identity theft.

The Red Flags Rule also requires broker-dealers that issue credit and debit cards to develop policies and procedures to assess the validity of a request for a change of address. Broker-dealers that use consumer reports must also develop reasonable policies and procedures when they receive a notice of address discrepancy from a consumer reporting agency.

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The FTC has emphasized the broad scope of the Red Flags Rule to financial institutions and creditors. The agency has stated that it considers the term "creditors" to include all entities that regularly permit deferred payments for goods or services. For more information, broker-dealers should refer to FINRA's Regulatory Notice 08-69 (November 26, 2008), which contains specific guidance regarding the application of the Red Flags Rule to broker-dealers. The full text of the rule can be found at <http://www.ftc.gov/os/fedreg/2007/november/071109redflags.pdf>

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## Customer Complaints on the Rise? Complaint Reporting and Compliance Best Practices

The predictable tide of new customer complaints is upon us. FINRA Dispute Resolution reports that arbitrations filed in 2008 were up 53% over 2007. New arbitrations through April 2009 are up 81% over the same period in 2008, and are projected to reach levels not seen since the aftermath of the dot-com bust and 9/11. The majority of arbitrations filed in the last 18 months still involve mutual funds, stocks, and bonds; however, cases involving more complex products – such as variable annuities, auction-rate securities, and other derivatives – are up sharply.

As if all that were not enough, FINRA recently made significant changes to the complaint and disciplinary reporting requirements. Whether your firm has never received a complaint (congratulations) or is fighting a new wave, now may be a good time to revisit your policies and procedures regarding complaint handling and reporting. If your procedures are sound and you follow the required steps consistently, your firm will be in a good position to avoid unnecessary liabilities to customers or regulators.

### Step 1: Receive the Complaint

This may seem like a step you want to avoid, but in many ways it is the most important. Before a firm can investigate and report a complaint, the firm (meaning the appropriate supervisory, compliance, and legal staff) must receive the complaint. Representatives should be adequately trained to recognize potential written or oral complaints and promptly refer them to their supervisors. People who handle correspondence should also be trained periodically to recognize potential complaints and forward them to the appropriate personnel. Reviews of electronic communications should include a component focused on identifying complaints. Firms should also provide compliance reminders on this issue.

No one wants to report a complaint to their firm, much less to regulators or the public, but the

consequences of not reporting can be severe for the employee and the firm. FINRA's guidelines provide for fines between \$2,500 and \$25,000 against an individual for late reporting and \$2,500 and \$50,000 for failing to report. The clock starts ticking when the complaint comes in the door (or phone or computer) of the firm.

### Step 2: Log It

The most important tool for ensuring compliance with reporting requirements is a good complaint log. For both medium and larger firms, the compliance department and the affected branch/department should maintain a log. Make sure that the date of receipt recorded is the date of receipt *by the firm*; examiners make their own logs and may identify late filings based on discrepancies.

### Step 3: Investigate It

The complaint log should also clearly indicate who is responsible for investigating the complaint. It should also indicate when important parts of the investigation, such as getting a statement from the representative, have been completed. With complaints on complex products on the rise, it is important that compliance and legal personnel handling these complaints be familiar with the characteristics of the products involved. They should get up to speed early in the process, speaking with internal and external experts in the area discussed in the complaint.

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Recent amendments to the arbitration/litigation questions on Forms U4 and U5 make timely investigation of these matters critical to timely reporting. Effective May 18, 2009, individuals who are not named parties in a statement of claim or complaint must still report the matter if:

- (1) the Statement of Claim or Complaint specifically mentions the individual by name and alleges the individual was involved in one or more sales practice violations; or
- (2) the Statement of Claim or Complaint does not mention the individual by name, but the firm has made a good faith determination that the sales practice violation(s) alleged involves one or more particular individuals.<sup>2</sup>

You do not get extra time to make a “good faith determination” before reporting is required. Therefore, reviews of arbitrations and litigations must be undertaken expeditiously. As with all complaints, it is important to document the basis for decisions to report or not to report. If information later comes to light that requires reporting on additional individuals or facts, good documentation will demonstrate that the original determination was made in good faith.

#### **Step 4: Report It**

The complaint log should prominently identify the actual due date for reporting each complaint pursuant to NASD Rule 3070 (10 days) and Form U4/U5 (30 days/10 for statutory disqualification). Keep in mind that FINRA increased the reporting threshold for settlements of customer complaints, arbitration, and litigation from \$10,000 to \$15,000 effective May 18th. Settlements reached prior to May 18th must still be reported at the \$10,000 threshold.

#### **Step 5: Resolve It**

In the end, the resolution of a complaint is a business decision, not a compliance issue. However, the

steps you take in the decision have compliance implications. Firms must follow their written procedures for acknowledging, responding, and making the appropriate log entries to document compliance. Be sure to document all details of any informal settlement, no matter how minor, including any non-monetary consideration. If the firm receives another complaint from the same customer, either about a breach of the settlement or a new issue, this documentation will be critical.

#### **Step 6: Step Back**

Whatever the result of a complaint, compliance obligations do not end when the complaint is resolved. FINRA and the SEC expect compliance departments to periodically assess their internal complaint histories to determine whether there are problems with an individual, branch, control procedure, or sales practice that should be addressed. Documentation of this review should include a description of the information reviewed and any follow-up.

FINRA provides two quarterly reports through its Report Center facility that can assist in this effort. The *Sales Practice Complaint Report* displays trends in sales practice complaints for both your firm and all reporting firms. The *Customer Complaint Report* provides similar firm and industry information for all types of complaints, broken down by both the product type and the nature of the complaint. Copies of these reports should be maintained with documentation of your firm’s periodic review of complaints.

#### **Conclusion**

Firms should continually look to enhance their complaint procedures, especially during severe market conditions. This will help you to effectively identify and address potential issues that signal more significant disturbances in your culture of compliance.

<sup>2</sup>– See FINRA Regulatory Notice 09-23.

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## ACA Introduces Francois Cooke

ACA is proud to announce that Francois Cooke has joined our Broker-Dealer Services division as a Managing Director.

Francois brings over 20 years of experience with broker-dealers, investment advisers, and transfer agents to ACA. Francois previously was a lead Partner of the Financial Services Regulatory Practice at a Big 4 accounting firm. Prior to that, Francois was a Vice President of a nationally recognized consulting firm, an examiner at the SEC in Miami, and an examiner in FINRA's Philadelphia District Office. Francois has an

M.B.A. from the University of Virginia, and a B.S. in Communications from Cornell University.

Francois has spoken at industry conferences including multiple speaking engagements for the Securities Industry and Financial Markets. He will be based in our NY Metro office but will provide consulting assistance to clients throughout the U.S.

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## Regulatory Notices, Updates, and Rule Changes

### FINRA

#### June

**Regulatory Notice 09-34** FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Investment Company Securities  
**Comment Period Expires:** August 3, 2009

**Regulatory Notice 09-33** SEC Approval and Effective Date for New Consolidated FINRA Rules  
**Effective Date:** August 17, 2009 Posted on: 6/15/09

**Regulatory Notice 09-32** SEC Approves Amendments to NASD Rule 2821 Governing Purchases and Exchanges of Deferred Variable Annuities  
**Effective Date:** February 8, 2010

**Regulatory Notice 09-31** FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds Posted on: 6/11/09

**Regulatory Notice 09-30** SEC Approves Rule Establishing an Interim Pilot Program on Margin Requirements for Transactions in Credit Default Swaps  
**Effective Date:** June 3, 2009

**Regulatory Notice 09-29** FINRA Requests Comment on Proposed FINRA Rule Addressing the Origination and Circulation of Rumors  
**Comment Period Expires:** July 16, 2009

#### May

**Regulatory Notice 09-28** FINRA Reminds Firms of Their Obligation to Provide Accurate Information in Disseminating, or Using Services to Disseminate, Indications of Interest Posted on: 5/27/09

**Regulatory Notice 09-27** SEC Approves New FINRA Rule 5122 Relating to Private Placements of Securities Issued by a Member Firm or a Control Entity  
**Effective Date:** June 17, 2009

**Regulatory Notice 09-26** Securities Industry/Regulatory Council on Continuing Education Issues Firm Element Advisory Update Posted on: 5/19/09

**Regulatory Notice 09-25** Proposed Consolidated FINRA Rules Governing Suitability and Know-Your-Customer Obligations  
**Comment Period Expires:** June 29, 2009 Posted on: 5/15/09

**Regulatory Notice 09-24** SEC Approves Amendments Expanding the Definition of "TRACE-Eligible Security"  
**Effective Date:** June 15, 2009

**Regulatory Notice 09-23** SEC Approval of Proposed Changes to Forms U4 and U5 and FINRA Rule 8312 (FINRA Broker Check Disclosure)  
**Effective Date:** May 18, 2009; **Effective Date (Regulatory Action Disclosure Questions):** November 14, 2009

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### **FINRA (continued)**

#### **April**

**Regulatory Notice 09-22** FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Personal Securities Transactions for or by Associated Persons Comment **Period Expired:** June 5, 2009

**Regulatory Notice 09-21** FINRA Adopts Amendments Relating to Reporting Transfers of Proprietary Positions in Debt and Equity Securities in Connection With Certain Corporate Control Transactions **Effective Date:** May 4, 2009

**Regulatory Notice 09-20** SEC Approval and Effective Date for New Consolidated FINRA Rules on the Transfer of Customer Accounts, Recommendations to Customers in OTC Equity Securities and Anti-Intimidation/Coordination **Effective Date:** June 15, 2009

**Regulatory Notice 09-19** Amendments to FINRA Rule 9520 Series to Establish Procedures Applicable to Firms and Associated Persons Subject to Certain Statutory Disqualifications **Effective Date:** June 15, 2009

#### **March**

**Regulatory Notice 09-18** EBS Submissions Following Implementation of the Option Symbology Initiative Posted on: 3/30/09

**Regulatory Notice 09-17** FINRA Provides Guidance on its Enforcement Process Posted on: 3/18/09

**Regulatory Notice 09-16** SEC Approves Amendments to Require Arbitrators to Provide an Explained Decision at Parties' Joint Request **Effective Date:** April 13, 2009

**Regulatory Notice 09-15** FINRA Requests Comment on Proposed Consolidated FINRA Rules Governing Limit and Market Order Protection Comment **Period Expired:** April 24, 2009

**Regulatory Notice 09-14** SEC Approves Alternative Means for Calculating the Minimum Price-Improvement Obligations under Certain Circumstances **Effective Date:** February 11, 2009

### **Securities and Exchange Commission**

#### **May**

**Release No. 33-8998A** Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies (Correction of 33-8998) **Effective Date:** June 4, 2009

**Release No. 33-9006A** Interactive Data for Mutual Fund Risk/Return Summary (Correction of 33-9006) **Effective Date:** July 15, 2009

#### **April**

**Release No. 33-9027** Adoption of Updated EDGAR Filer Manual **Effective Date:** April 23, 2009

**Release No. 33-9026** Technical Amendments to Rules, Forms, Schedules and Codification of Financial Reporting Policies **Effective Date:** April 23, 2009

**Release 33-9022** Adoption of Updated EDGAR Filer Manual (Conforming Version) **Effective Date:** April 16, 2009

**Release No. 33-9002A** Interactive Data to Improve Financial Reporting (Correction of 33-9002) **Effective Date:** April 13, 2009

#### **March**

**Release No. 34-59342** Amendments to Rules for Nationally Recognized Statistical Rating Organizations **Effective Date:** April 10, 2009

### **Municipal Securities Rulemaking Board**

#### **June**

**MSRB Notice 2009-34** MSRB Announces Webinars for Issuers on Continuing Disclosure Registration

**MSRB Notice 2009-33** Final Specifications for the EMMA Continuing Disclosure Subscription Service

**MSRB Notice 2009-32** Final Specifications for the EMMA Continuing Disclosure Automated Submission Interface

**MSRB Notice 2009-31** MSRB to Accept Voluntary Continuing Disclosures to EMMA

**MSRB Notice 2009-30** Build America Bonds: Application of Rule G-37 to Solicitations of Issuers

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**Municipal Securities Rulemaking Board  
(continued)**

**MSRB Notice 2009-29** Webinars about the Business-to-Business Submission and Subscription Process for the Primary Market Disclosure Service of EMMA

**MSRB Notice 2009-28** MSRB Establishes Electronic Official Statement Dissemination Standard under Rule G-32 and Launches Permanent Primary Market Disclosure Service of EMMA

**MSRB Notice 2009-27** MSRB Launches Continuing Disclosure Pilot of EMMA

**May**

**MSRB Notice 2009-26** MSRB Files to Terminate its CDINet System Effective July 1, 2009

**MSRB Notice 2009-25** Webinars About the Submission Process for Advance Refunding Documents and 529 College Savings Plan Documents to EMMA

**MSRB Notice 2009-24** MSRB Discontinues e-OS System

**MSRB Notice 2009-22** SEC Approves Primary Market Disclosure Service on EMMA for Electronic Dissemination of Official Statements

**MSRB Notice 2009-21** Webinars About the Submission Process for the Primary Market Disclosure Service of EMMA

**MSRB Notice 2009-20** Request for Comment Regarding Settlement of Syndicate Accounts and Secondary Market Trading Accounts

**MSRB Notice 2009-19** Webinars About the Submission Process for the Continuing Disclosure Service of EMMA

**MSRB Notice 2009-18** MSRB Updates Timing on Launch of New Services on EMMA

**MSRB Notice 2009-17** Upcoming Enhancements to the SHORT System and Data Elements Clarification

**April**

**MSRB Notice 2009-16** Notice of Filing of Amendment to Rule G-8, on Books and Records, Relating to ARS and VRDO

**MSRB Notice 2009-15** MSRB Provides Guidance on Build America Bonds and Other Tax Credit Bonds

**MSRB Notice 2009-14** MSRB Files EMMA Continuing Disclosure Subscription Service and Publishes Preliminary Specifications for Subscription and Document Submission Feeds

**MSRB Notice 2009-13** MSRB and RBDA to Hold Municipal Securities Seminar on May 13, 2009

**MSRB Notice 2009-12** MSRB Files to Allow Voluntary Continuing Disclosures on EMMA

**March**

**MSRB Notice 2009-11** Reminder of April 1, 2009 Effective Date of MSRB Short System for Variable Rate Demand Obligations

**MSRB Notice 2009-10** MSRB Files to Establish Pilot for EMMA's Continuing Disclosure Service

**MSRB Notice 2009-09** Final Specifications for the MSRB's EMMA Primary Market Subscription Service

**MSRB Notice 2009-08** Final Specifications for the MSRB's EMMA Primary Market Automated Submission Interface

**Financial Crimes Enforcement Network**

**Joint News Release** – Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud (04/06/2009)

## Conferences/Webcasts

### FINRA

#### Small Firm Conference Series

July 16, 2009 • Chicago, IL

October 1, 2009 • San Francisco, CA

### ACA Compliance Group

#### Webcasts

OATS and Trade Reporting for Broker-Dealers

August 4, 2009 • 1:00 pm EDT

[SIGN UP](#)

Mutual Fund Distributors

September 1, 2009 • 1:00 pm EDT

[SIGN UP](#)

Communications with the Public

October 27, 2009 • 1:00 pm EDT

[SIGN UP](#)

## Filing Dates

### 2009 Monthly/Quarterly FOCUS Part II/IIA Filings

Quarter Ending	Due Date
June 30, 2009	July 24, 2009
September 30, 2009	October 23, 2009

### 2009 Annual Audit Filings

Fiscal Year End	Due Date
April 30, 2009	June 29, 2009
May 31, 2009	July 30, 2009
June 30, 2009	August 31, 2009

### 2009 Customer Complaint Filings

Quarter Ending	Due Date
2nd quarter 2009	July 15, 2009
3rd quarter 2009	October 15, 2009

**ACA Compliance Group (ACA) is a full-service compliance consulting firm committed to offering unparalleled regulatory compliance and GIPS verification services** designed to satisfy the needs of investment advisers, private funds, investment companies, insurance companies and broker-dealers.

In these uncertain times, compliance officers must closely monitor changing regulations while fulfilling their current compliance obligations. As an alternative to increasing their compliance staff, leading financial services firms choose to partner with ACA.

ACA clients benefit from the creation of customized compliance programs that meet the increasingly complex regulatory requirements. Please contact us to discuss how ACA's team of former FINRA, NYSE and SEC regulators can help you effectively manage your compliance burden.

Nothing herein should be construed as legal advice or as a legal opinion for any particular situation. ACA makes no representations about the accuracy of the information contained herein or its appropriateness for any given situation.