

## BDQUARTERLY

The SEC has extended the compliance date for its affiliate marketing rule, Regulation S-AM, from January 1, 2010 to June 1, 2010.

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### The Who, What, and When of TRACE Reporting

#### The Basics

Rule 6200 of the FINRA rules sets forth the specific requirements to which a broker-dealer must adhere in reporting transactions in its fixed income securities business. Reporting to TRACE is required within 15 minutes of trade execution. Firms must designate a Principal responsible for supervision of reporting of transactions to TRACE. The Designated Principal for fixed income activities must register the Firm with TRACE (via its TRACE MPID) and ensure that the firm is at all times in compliance with the TRACE Rules.

Where part or all of the broker-dealer's fixed income transactions will be transmitted by the clearing firm to TRACE, firms must be aware of

the clearing firm's procedures for TRACE-eligible securities. Firms should, on an annual basis, review the clearing firm's process for conducting its review of TRACE-eligible securities transactions. On a monthly basis, the CCO or Designated Principal should review all surveillance reports regarding TRACE-eligible transactions that the clearing firm provides. In performing the review, the Designated Principal should evaluate the following:

- Appropriate disclosure appears in the clearing agreement outlining the clearing firm's services and responsibilities with respect to TRACE-eligible securities;
- When and how transactions are being reported;
- Transaction information being reported; and
- Timeliness of execution.

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Where a firm is a party to a transaction in a TRACE-eligible security that occurs pursuant to, or in connection with an option, a swap, or a similar instrument, the clearing firm must report the transaction to TRACE. In addition, when such a transaction in TRACE-eligible securities is executed at a price that does not represent current market pricing, the transaction will be reported to TRACE by the clearing firm using the “special price” modifier or flag (e.g., when a transaction is executed at a price based on arm’s length negotiation and made for investment, commercial or trading considerations, but does not reflect current market pricing). Similarly, a transaction in TRACE-eligible securities occurring as a result of the termination or settlement of a corporate debt security or certain other types of swaps would also generally be reported with a “special price” flag. The Designated Principal is responsible for notifying the clearing firm when a “special price” flag is to be used in a TRACE report.

Firms should subscribe to the monthly TRACE Quality of Markets Report Card provided through FINRA’s Report Center located on the FINRA web site. The Designated Principal should examine the TRACE results provided by FINRA to review the number of valid and late trade reports and other relevant statistics to assess the clearing firm’s overall compliance with TRACE reporting requirements. These reports should evidence the date of review and should be maintained in an accessible location for eighteen months per Rule 17a-4(e)(8).

#### **Reporting New TRACE Eligible Securities**

Rule 6260 requires that a managing underwriter, or if a managing underwriter is not appointed, the

group of underwriters, of a new TRACE-eligible security must provide notice to the TRACE Operations Center of the new TRACE-eligible security in the form and manner specified in the rule. The statutory definition of “underwriter” includes firms acting as agents for issuers of new TRACE-eligible securities. Where a firm is acting as an underwriter of a TRACE-eligible security, the firm must verify that the following was provided to the TRACE Operations Center:

- The CUSIP number;
- The issuer name;
- The coupon rate;
- The maturity;
- Whether Rule 144A applies;
- A brief description of the issue (e.g., senior subordinated note, senior note); and
- Any other information FINRA deems necessary to properly implement the reporting and dissemination of a TRACE-eligible security.

The Designated Principal must also verify that the firm has provided the information listed above no later than 5:00 p.m. Eastern Time on the business day preceding the day that the registration statement becomes effective, or, if registration is not required, the day before the security will be priced.

A Designated Principal must ensure that the firm has made a good faith determination that the security is a TRACE-eligible security before submitting the information to the TRACE Operations Center.

Additional information on TRACE reporting can be found in [Notice to Members 03-58](#).

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## The Latest Effort on Broker-Dealer/Investment

### Adviser Harmonization

On November 10, 2009, Senator Christopher Dodd, Chairman of the Senate Banking Committee, released the latest effort at financial regulatory reform, the *Restoring American Financial Stability Act of 2009* (“RAFSA”). RAFSA includes a myriad of regulatory reforms, including initiatives aimed at banking, insurance, derivatives, asset-backed securities, credit rating agencies, municipal securities, corporate governance, consumer protection, and overall systemic risk, just to name a few. Buried in Section 913 of the bill is a radical change to the regulation of securities brokers and dealers: RAFSA would remove the main exclusion for broker-dealers from regulation under the Advisers Act.

Specifically, the bill would remove Section 202(a)(11)(C) from the Advisers Act. This change would mean that any investment advice provided to a brokerage client, regardless of its connection to a brokerage transaction or the absence of any separate fee for the advice, would subject the broker-dealer to the Advisers Act and its fiduciary standard of care. Most broker-dealers would need to become dually registered as investment advisers or set up advisory affiliates.

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This approach to broker-dealer/investment adviser regulation differs significantly from the *Wall Street Reform and Consumer Protection Act of 2009* (“Wall Street Act”), passed by the House of Representatives on December 11, 2009. The Wall Street Act calls for the SEC to draft rules to harmonize the standards of conduct applicable to broker-dealers and investment advisers, rather than removing the broker-dealer exclusion from the Advisers Act outright. It is also important to note that RAFSA would theoretically apply the Advisers Act to advice provided to anyone, even institutional clients, whereas the Wall Street Act limits its common fiduciary standard to retail investors and at the point-of-sale only.

Much has been discussed about the impact of these changes on broker-dealers, especially in RAFSA. RAFSA addresses two of these concerns: charging commissions to advisory clients and engaging in principal trading. With respect to commissions, a dually registered adviser has always been able to charge commissions with the proper disclosure, and RAFSA makes clear that the Advisers Act will not prohibit an investment adviser from “entering into an investment advisory relationship that provides for the payment of an asset management fee or a commission.” With respect to principal trading, the bill gives the SEC authority to exempt certain persons or transactions from the principal trading restrictions of Section 206(3) of the Advisers Act, but with some strings attached. In order to allow such an exemption, the Commission must determine that: (1) Such an exemption is in the public interest and for the protection of investors; and (2) The adviser provides investors with adequate protection (CONTINUED)

against conflicts of interest or principal transactions that are not in the best interests of the investors. It seems likely that the SEC will permit some principal trading with advisory clients under this provision with enhanced supervision, disclosure, and structural safeguards.

Left unaddressed are the many other potential impacts of this legislation. Will broker-dealers be required to drastically restructure their operations to wall off those employees providing investment

advice?

Will broker-dealers be restricted from offering certain proprietary products or services? Will broker-dealers need to change (or disclose) their internal compensation practices? Will broker-dealers be sanctioned if they recommend fee-based services when commission-based services would have been less expensive (or vice versa)? The SEC will likely be under substantial pressure to answer these questions before any such fiduciary standard is implemented for broker-dealers. Stay tuned...

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## New Rule Proposed Surrounding Outside Business Activities

On June 30, 2009, as part of the process of developing its consolidated rulebook, FINRA proposed to adopt NASD Rule 3030, *Outside Business Activities of an Associated Person*, as [FINRA Rule 3270](#), *Outside Business Activities of Registered Persons*. The proposed rule would prohibit any registered person from serving as an employee, independent contractor, sole proprietor, officer, director, or partner of another entity unless he or she has provided prior written notice to their broker-dealer. The proposed rule change would expand the obligations imposed under NASD Rule 3030, which currently prohibits any registered person from being employed by or accepting any compensation from any person as a result of any outside business activity, other than passive investment, unless he has provided “prompt” written notice to his member firm.

With respect to timing, FINRA believes that registered persons should not be permitted to participate in outside business activities without the firm’s prior knowledge. Potential investor harm could ensue in the interim period between the

time the registered person commences an outside business activity and the time a firm receives “prompt” written notice. Also, because the term “prompt” is susceptible to differing interpretations, adopting a prior written notice standard could promote consistency within the securities industry. Finally, FINRA believes that a prior written notice standard would allow a firm an opportunity to determine whether the proposed outside business activity is properly being labeled by the registered representative as an outside business activity or an outside securities activity.

Since the proposed rule was released in June, the comments have been flowing in to FINRA. And although FINRA seems to present a compelling argument for its proposal, there has been much backlash from the industry. For example, several commenters to the proposed rule suggest that the verbiage is vague and could open the door to firms being required to supervise the outside, non-securities business activities of their registered representatives. Commenters would like FINRA to either define “investor protection concerns” as it

relates to the non-securities related activities in question or remove the proposed requirement.

Additionally, some commenters disagree with the timing of the notification proposed by FINRA. As noted, the current proposal calls for *notification* to occur before the registered representative engages in the activity, but it stops short of explicitly requiring *consent* of the firm. These commenters suggest that the provision be changed to require the registered representative to obtain written approval

from the firm *before* the registered representative is permitted to engage in the outside business activity. There are also questions regarding the continuing due diligence associated with the new rule; many commenters agreed that the new rule should *require* a registered representative to notify the broker-dealer if there is material change in the registered representative's outside business activity. The final comment period closed December 1, 2009 and the date for proposed FINRA Rule 3270 to take affect has yet to be established.

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## In Case You Missed It!

### Verification of Citizenship for Registered Representatives

[Legislative Bill 403](#) ("LB 403") became effective in Nebraska on October 1, 2009. LB 403 requires every state agency in Nebraska to verify the lawful presence of every individual receiving "public benefits" from a Nebraska state agency. Included in the definition of "public benefits" is a "professional license." As a result of LB 403, all broker-dealers and investment advisers are required to verify and confirm that every new applicant for registration as a registered representative or an investment advisory representative in Nebraska on or after October 1, 2009 is either a United States Citizen or legal resident alien.

Although Nebraska is the first state to enact a regulation of this type, other states are expected to follow suit in the near future.

### Continuing Education Fees to Increase

As noted in [Regulatory Notice 09-67](#), beginning January 4, 2010, the fee for the Regulatory Element of the continuing education requirements under FINRA rules will increase from \$75 to \$100. The fee increase applies to all three Regulatory Element

programs: the General Program (S101), the Series 6 Program (S106), and the Supervisors Program (S201). Firms that offer in-firm delivery of the Regulatory Element will continue to receive a \$3 credit to their Central Registration Depository (CRD<sup>®</sup>) account for the in-firm deliveries that they provide.

### Proposed FINRA Rule 2040: Payments to Unregistered Persons

As part of the process to develop its consolidated rulebook, FINRA is proposing to establish new [FINRA Rule 2040](#), *Payments to Unregistered Persons*. The proposed rule would eliminate the current NASD Non-Member Rules and related NYSE Non-Member Rules and replaces them with a more streamlined rule.

The proposed rule prohibits members or associated persons from, directly or indirectly, paying or offering to pay any compensation, fees, concessions, discounts, commissions or other allowances to:

- (1) Any person that is not registered as a broker-dealer under Section 15(a) of the (CONTINUED)

Exchange Act but, by reason of receipt of any such payments, is required to be so registered under applicable federal securities laws and SEC rules, regulations and published guidance by the SEC or its staff in the form of releases, no-action letters or interpretations; or

(2) Any appropriately registered associated person, unless such payment complies with all applicable federal securities laws, FINRA rules and SEC rules, regulations and published guidance by the SEC or its staff in the form of releases, no-action letters or interpretations.

The proposed change seeks to make the rule consistent with FINRA staff interpretations under NASD Rule 2420 and SEC rules and regulations under Section 15(a) of the Exchange Act.

The proposal also aligns the rule with SEC staff guidance stating that receipt of certain securities transaction-based compensation requires registration as a broker-dealer.

Therefore, under the proposal, persons would look to SEC rules and regulations to determine whether the activities in question require registration as a broker-dealer under Section 15(a) of the Exchange Act. If a non-member entity that receives concessions or commission payments from a member is not required to be registered as a broker-dealer pursuant to an SEC no-action letter, then the member's payment of commissions to such entity would not violate NASD Rule 2420. The comment period for proposed FINRA RULE 2420 expires February 1, 2010.

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## Did You Know...

### Regulatory Notice 09-62: Renewals

Broker-Dealer, Investment Adviser Firm, Agent and Investment Adviser Representative, and Branch Renewals for 2010

The 2010 renewal process began on November 16, 2009, when online Preliminary Renewal Statements were made available to all firms on Web CRD/IARD.

Firms should note the following key dates remaining in the 2010 renewal process:

#### January 4, 2010

Final Renewal Statements are available on Web CRD/IARD.

#### February 5, 2010

Full payment of Final Renewal Statements is due.

### SEC Extends Regulation S-AM

#### Compliance Date

The SEC has extended the compliance date for its affiliate marketing rule, [Regulation S-AM](#), from January 1, 2010 to June 1, 2010. Regulation S-AM limits the use by registered investment advisers, transfer agents, investment companies, and broker-dealers of certain "eligibility information" received from affiliates for marketing purposes, unless the consumer has been given notice and an opportunity to opt out of such solicitations. The regulation implements Section 624 of the Fair Credit Reporting Act, as amended by the Fair and Accurate Credit Transactions Act of 2003. The extension was granted in response to requests from the Investment Company Institute and the Investment Adviser Association, which expressed concerns regarding the difficulties that their members are facing in complying with the regulation.

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Regulation S-AM, as originally promulgated, provided, in addition to the January 1, 2010 compliance date, that it does not prohibit the covered entities from using eligibility information received from an affiliate to make a marketing solicitation to a consumer if they received such information prior to January 1, 2010. The SEC's extension did not explicitly amend this provision; however, Section 624(a)(5) of the Fair Credit Reporting Act

states that it does not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing the legislations. Accordingly, the extension of the compliance date should also mean that the covered entities can at any time use information received from an affiliate prior to June 1, 2010.

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## Regulatory Notices, Updates, and Rule Changes

### FINRA Regulatory Notices

December

[Regulatory Notice 08-83](#) FINRA Requests Comment on Proposed FINRA Rule Regarding Front Running of Block Transactions. **Comment Period Expires:** February 27, 2009.

[Regulatory Notice 08-82](#) FINRA Reminds Firms of Their Sales Practice Obligations with Regard to Cash Alternatives

[Regulatory Notice 08-81](#) FINRA Reminds Firms of Their Sales Practice Obligations with Regard to the Sale of Securities in a High Yield Environment

[Regulatory Notice 08-80](#) FINRA Requests Comment on Proposed FINRA Rule Addressing Best Execution. **Comment Period Expires:** February 27, 2009

[Regulatory Notice 08-79](#) SEC Approves Rules Establishing Procedures for Arbitrators Considering Expungement Requests. **Effective Date:** January 26, 2009

[Regulatory Notice 08-78](#) FINRA Announces SEC Approval and Effective Date for New Consolidated FINRA Rules Relating to Warrants, Options and Security Futures. **Effective Date:** February 17, 2009

[Regulatory Notice 08-77](#) Customer Account Statements: FINRA Provides Guidance on Estimated Annual Income and Estimated Yield

[Regulatory Notice 08-76](#) Technology Changes for Reporting Clearing Methods and Arrangements. **Effective Date:** December 15, 2008

[Regulatory Notice 08-75](#) Guaranteed Senior Unsecured Debt Is a TRACE-Eligible Security

[Regulatory Notice 08-74](#) FINRA Provides Guidance on Amendments to FINRA Rules Relating to SEC Regulation M. **Effective Date:** December 15, 2008

[Regulatory Notice 08-73](#) SEC Approves Amendments to NASD Rule 2220 to Update the Standards for Options Communications. **Effective Date:** March 4, 2009

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#### November

[Regulatory Notice 09-72](#) SEC Approval and Effective Dates for New Consolidated FINRA Rules. **Effective Date (all rules except FINRA Rule 2330):** February 15, 2010. **Effective Date (FINRA Rule 2330):** February 8, 2010

[Regulatory Notice 09-71](#) SEC Approves Consolidated FINRA Rules Governing Financial Responsibility. **Effective Date:** February 8, 2010

[Regulatory Notice 09-70](#) FINRA Requests Comment on Proposed Consolidated FINRA Rules Governing Registration and Qualification Requirements. **Comment Period Expires:** February 1, 2010

[Regulatory Notice 09-69](#) FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Payments to Unregistered Persons. **Comment Period Expires:** February 1, 2010

[Regulatory Notice 08-68](#) FINRA Requests Comment on Proposed FINRA Rule Addressing the Circulation of Rumors.

[Regulatory Notice 08-67](#) FINRA Announces Electronic Filing Process For Qualification Examination Waiver Requests and Series 16 Experience Acceptability Requests. **Effective Date:** January 16, 2009

[Regulatory Notice 09-66](#) SEC Approves Changes to FINRA's BrokerCheck Disclosure Rule to Retain and Make Publicly Available Information about Final Regulatory Actions Against Former Brokers. **Effective Date:** November 30, 2009

[Regulatory Notice 09-65](#) FINRA Delays the Effective Date for Increased Margin Requirements for Options on Leveraged ETFs and Day-Trading

Requirements for Leveraged ETFs. **New Effective Date:** April 30, 2010

[Regulatory Notice 09-64](#) Verification of Instructions to Transmit or Withdraw Assets from Customer Accounts

[Regulatory Notice 09-63](#) FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Discretionary Accounts and Transactions. **Comment Period Expires:** December 28, 2009

[Regulatory Notice 09-62](#) Broker-Dealer, Investment Adviser Firm, Agent and Investment Adviser Representative, and Branch Renewals for 2010.

#### October

[Regulatory Notice 09-61](#) Securities Industry/Regulatory Council on Continuing Education Issues Firm Element Advisory Update

[Regulatory Notice 09-60](#) SEC Approval and Effective Dates for New Consolidated FINRA Rules. **Effective Date (all rules except FINRA Rule 3310):** December 14, 2009. **Effective Date (FINRA Rule 3310):** January 1, 2010

[Regulatory Notice 09-59](#) FINRA Provides Guidance on Pandemic Preparedness

[Regulatory Notice 09-58](#) SEC Approves Amendments Regarding Best Execution and Interpositioning. **Effective Date:** September 8, 2009

#### September

[Regulatory Notice 09-57](#) SEC Approves Amendments Expanding TRACE to Include Agency Debt Securities and Primary Market Transactions. **Effective Date:** March 1, 2010

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[Regulatory Notice 09-56](#) Proposed Changes to the Personnel Assessment and Gross Income Assessment Fees. **Effective Date:** Upon SEC Approval with an Implementation Date of January 1, 2010

[Regulatory Notice 09-55](#) FINRA Requests Comments on Proposed New Rules Governing Communications with the Public. **Comment Period Expired:** November 20, 2009

[Regulatory Notice 09-54](#) SEC Approves Amendments Requiring Related Market Center Indicator in Non-Tape Reports Submitted to FINRA. **Effective Date:** March 1, 2010

#### **Securities and Exchange Commission**

##### **December**

[Release No. 33-9089](#) Proxy Disclosure Enhancements. **Effective Date:** February 28, 2010

[Release No. 33-9087](#) Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities. **Effective Date:** December 31, 2009

##### **November**

[Release No. 34-61050](#) Amendments to Rules for Nationally Recognized Statistical Rating Organizations. **Effective Date:** February 2, 2010

[Release No. 34-61003](#) Final Model Privacy Form under the Gramm-Leach-Bliley Act. **Effective Date:** December 31, 2009

[Release No. 34-60946](#) Regulation S-AM: Limitations on Affiliate Marketing; Extension of Compliance Date. **Effective Date:** The effective date for Regulation S-AM (17 CFR 248.101 through 248.128) remains September 10, 2009.

The compliance date for Regulation S-AM is extended from January 1, 2010 to June 1, 2010

##### **October**

[Release No. 33-9077](#) Adoption of Updated EDGAR Filer Manual. **Effective Date:** October 30, 2009

[Release No. 34-60789](#) References to Ratings of Nationally Recognized Statistical Rating Organizations. **Effective Date:** December 18, 2009

[Release No. 33-9072](#) Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers. **Effective Date:** November 12, 2009

##### **September**

[Release No. IC-28903](#) Disclosure of Certain Money Market Fund Portfolio Holdings (Interim Final Temporary Rule; Request for Comment). **Effective Date:** September 18, 2009

[Release No. 33-9063](#) Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps (Interim Final Temporary Rules; Extension). **Effective Date:** September 17, 2009

#### **Municipal Securities Rulemaking Board**

##### **December**

[MSRB Notice 2009-62](#) Amendments Filed to Rule G-37 Regarding Contributions to Bond Ballot Campaigns

[MSRB Notice 2009-61](#) Reminder of December 1, 2009 Effective Date of Amendments to Rule A-13 on Underwriting Assessments

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**November**

[MSRB Notice 2009-60](#) MSRB Primary Market and Continuing Disclosure Submission Services - Reminder of Upcoming Word-Searchable Document Requirement and Update on Other Submission-Related Matters

[MSRB Notice 2009-59](#) Rule Amendments and Interpretive Notice Filed Regarding Priority of Orders in Primary Offerings

[MSRB Notice 2009-58](#) Proposed Rule A-16 on Examination Fees

**October**

[MSRB Notice 2009-57](#) Upcoming Changes to the Real-Time Transaction Reporting System

**September**

[MSRB Notice 2009-56](#) Amendments to Rule A-13 on Underwriting Assessments

[MSRB Notice 2009-55](#) Amendments Approved to Rules G-11 and G-12 Regarding Settlement Dates and Payments of Designations

[MSRB Notice 2009-54](#) Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities

[MSRB Notice 2009-53](#) MSRB and SIFMA to Co-Host Regulatory and Compliance Seminars in New York and Chicago

[MSRB Notice 2009-51](#) Request for Comment: Disclosure of Bank and Bank Holding Company Political Action Committee Contributions

[MSRB Notice 2009-50](#) Use of Electronic Confirmations Produced By a Clearing Agency or Qualified Vendor to Satisfy the Requirements of Rule G-15(a)

Financial Crimes Enforcement Network

FinCEN Issues [Spanish-Language Educational Pamphlet](#) on Currency Transaction Reporting (11/24/2009)

FinCEN Proposes [Changes to Financial Investigative Tool](#); Amends BSA Administrative Ruling Notifications (11/16/2009)

FinCEN Announces [Expanded Outreach Program](#) (10/13/2009)

FinCEN Releases [Report on Outreach to Large Depository Institutions](#) (10/13/2009)

## Filing Dates

### 2009 Monthly/Quarterly FOCUS

#### Part II/IIA Filings

Month Ending	Due Date
December 31, 2009	January 27, 2010
January 31, 2010	February 24, 2010
February 28, 2010	March 23, 2010

### 2009 Annual Audit Filings

Fiscal Year End	Due Date
November 30, 2009	January 29, 2010
December 31, 2009	March 1, 2010
January 31, 2010	April 1, 2010

### 2009 Customer Complaint Filings

Quarter Ending	Due Date
4th quarter 2009	January 15, 2010

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## Conferences/Roundtables/Webcasts

### **FINRA Conferences**

#### Annual Conference

May 26-28, 2010

Baltimore, MD

#### Fixed Income Conference

March 9, 2010

New York, NY

#### Advertising Regulation Conference

Spring 2010

Date and Location TBD

### **ACA Conferences**

#### IAA/ACA Insight Investment Adviser

#### Compliance Forum

February 25-26, 2010

Arlington, VA

**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.

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