



**HOT INDUSTRY TOPICS (“HIT”) LIST
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Lori Richards to Leave SEC <i>New</i>	Adviser & Fund	Lori Richards, the Director of the SEC’s Office of Compliance Inspections and Examinations (“OCIE”), plans to step down on August 7, 2009, after more than two decades of government service. Ms. Richards has been the Director of OCIE since its creation in 1995. John Walsh, Associate Director and Chief Counsel of OCIE, will serve as acting Director.	SEC press release dated July 8, 2009.
SEC Posts Additional Information Regarding Requests for Confirmation of Client Assets <i>New</i>	Adviser	In May, the SEC made further information available regarding its new examination practice in which its staff will contact advisory clients directly to verify account balances. As of May 13, 2009, all requests to clients will include a form titled “Routine Account Information Confirmation” and a letter explaining the SEC’s request. The SEC intends to contact clients of firms that use independent qualified custodians, as well as those whose firms have custody of their assets.	Link to SEC Information, Client Letter, and Form.
EDGAR Filer Manual Updated – Volumes I & II	Adviser & Fund	Changes to the DRAFT EDGAR Filer Manual (Volume I) General Information (Version 6) are being made primarily to support the following EDGAR Release 9.15.1 update: <ul style="list-style-type: none"> • New EDGAR filers can now attach a scanned notarized authentication document in PDF format to their Form ID submission versus having to fax the authentication document. • Faxing the document is still an acceptable form of 	DRAFT Updated EDGAR Filer Manual (Volumes I – II).

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<i>New</i>		<p>communication.</p> <p>Changes to the DRAFT EDGAR Filing Manual (Volume II) EDGAR Filing (Version 11) are being made primarily to support the following:</p> <ul style="list-style-type: none"> • XBRL changes • Form D changes 	
<i>New</i>	Adviser & Fund	In April 2009, the SEC unveiled the Industry and Markets Fellows Program, which will work out of the agency’s Office of Risk Assessment (“ORA”). The new program is intended to recruit professionals with specialized knowledge of complex financial industry practices and products, thereby aiding the ORA in proactively identifying and addressing emerging risks to the industry.	SEC press release dated April 30, 2009.
<i>New</i>	Adviser & Fund	On April 9, 2009 the SEC put forth two proposals to address the restrictions on short selling. The first proposal would reinstate or modify the Uptick Rule repealed in 2007. The second proposal would implement temporary security-specific safeguards to be enacted for the remainder of the trading day should a security experience a severe decline in price.	<p>Federal Register, Amendments to Regulation SHO, dated April 20, 2009.</p> <p>SEC comments received on proposed amendments. Comment period ended on June 19, 2009.</p>
	Fund	On May 20, 2009 the SEC proposed a number of rule amendments designed to facilitate shareholder rights to nominate directors of corporate boards. The Commission’s	Federal Register , Facilitating Shareholder Director Nominations, dated June 18, 2009.

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Shareholders to Nominate Directors <i>New</i>		proposed Exchange Act Rule 14a-11 seeks to provide material shareholders with direct access to a company’s proxy voting materials for the purpose of nominating board members. The Commission anticipates a sizeable number of comments in response to the amendments, as there are strong opinions on both sides of this debated topic.	SEC Comments received on proposed rule. Comment period ends on August 17, 2009.
Proposed Custody Rule Amendments	Adviser	<p>The SEC is proposing amendments to Rule 206(4)-2 (the Custody Rule) to strengthen controls over investment advisers that have custody of client assets. The amendments would apply to advisers that have custody of assets directly or through an affiliate, as well as those who have the authority to withdraw their clients’ funds.</p> <p>The proposed amendments include requiring registered investment advisers that have custody of client assets to undergo an annual surprise exam by an independent public accountant. Additionally, if client assets are not held by an independent custodian, the adviser would be required to obtain a written report from an accountant registered with the Public Company Accounting Oversight Board (“PCAOB”). The report, typically called a Type II SAS 70, attests to the adviser’s controls relating to the safekeeping of client assets. The amendments also seek to require custodians to send statements directly to clients, rather than sending the</p>	<p>Federal Register, Custody of Funds or Securities of Clients by Investment Advisers, dated May 27, 2009.</p> <p>SEC comments received on proposed rule. Comment period ends on July 28, 2009.</p>

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<i>New</i>		<p>statements to the adviser for delivery.</p> <p>Vista360 expects a busy comment period, especially with regard to those advisers who are deemed to have custody solely due to the adviser’s ability to deduct fees directly from clients’ custody accounts.</p>	
Money Market Fund Regulation Requirements: Proposed Reforms <i>New</i>	Fund	<p>In June, the SEC proposed changes to Rule 2a-7 that would tighten the liquidity, maturity and quality of securities in which money funds invest. The amendments would also require funds to report their portfolio holdings to the SEC monthly. Lastly, the SEC may permit a fund that has “broken the buck” to suspend redemptions to allow for the orderly liquidation of fund assets.</p>	<p>SEC Proposed Reforms, dated June 30, 2009.</p> <p>SEC comments received on proposed rule. Comment period ends September 8, 2009.</p>
Joint SEC and DOL Hearing on Target Date Funds	Fund	<p>On June 18, 2009, the SEC and the Department of Labor (“DOL”) held a joint hearing to discuss target date funds. The goal was to gather information from industry participants to help the SEC craft meaningful regulation of these funds and other similar investment products.</p> <ul style="list-style-type: none"> • Hearing witnesses included representatives of plan participants and beneficiaries, plan sponsors, investor organizations, academia and the financial services industry. • Topics included investor & plan sponsor considerations, glide paths, and disclosures. 	<p>SEC press release dated June 15, 2009.</p>

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<i>New</i>		<ul style="list-style-type: none"> • The SEC is considering more regulation, while industry groups (like ICI) prefer enhanced disclosure instead. • Due to the increased awareness and interest in these investment products, ICI published FAQs on target date funds for members and the general public. 	
Strengthening Examination Oversight: Changes to Regulatory Examinations	Adviser & Fund	<p>In her June 17, 2009 speech at SIFMA’s Compliance and Legal Division’s Regional Seminar in St. Louis, Lori Richards announced a new training program for OCIE staff.</p> <ul style="list-style-type: none"> • The program will be co-sponsored by the SEC, FINRA and the North American Securities Administrators Association. • The SEC plans to use a convicted fraudster to explain how he fooled investors and auditors. (<i>The SEC declined to identify the fraudster.</i>) • Also, the SEC plans to use criminal investigators from the FBI, forensic auditors and state examiners and investigators. • SEC staff intends to perform more due diligence and research up-front before going to on-site exams, which will increase the amount of work required by funds and advisers to prepare for SEC exams. • SEC staff plans to leverage work performed by a firm’s independent auditors. <p>Richards also announced the SEC is seeking applicants for</p>	Full text of speech: “Strengthening Examination Oversight: Changes to Regulatory Examinations.”

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<i>New</i>		<p>newly created Senior Specialized Examiner positions. The SEC is looking for individuals with expertise in securities trading, portfolio management, valuation & forensic accounting.</p> <p>Richards said OCIE staff is working with other agency staff and FINRA to identify key points & technology that will improve their risk-based oversight methodology.</p>	

EXECUTIVE AND LEGISLATIVE INITIATIVES			
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Obama Administration Releases White Paper on Financial Regulatory Reform	Adviser & Fund	<p>The Department of the Treasury released an 89-page white paper on June 17, 2009, that recommends both legislative and regulatory reforms of the financial system. The reforms are aimed at restoring confidence in the integrity of the system, and are designed to meet five key objectives:</p> <ol style="list-style-type: none"> 1. Promote robust supervision and regulation of financial firms; 2. Establish comprehensive supervision of financial markets; 3. Protect consumers and investors from financial abuse; 4. Provide the government with the tools it needs to manage the financial crises; and 5. Raise international regulatory standards and improve international cooperation. 	Full text of white paper: “A New Foundation: Rebuilding Financial Supervision and Regulation.”

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<i>New</i>		<p>The recommendations to both Congress and the regulators that may affect fund companies and investment advisers may be summarized briefly as:</p> <ul style="list-style-type: none"> • Designate and regulate “Tier 1 Financial Holding Companies,” which are companies deemed so large or complex that they may present a systemic risk to the financial markets; • Create a Financial Services Oversight Council; • Regulate managers of hedge funds and private investment pools; • Strengthen regulatory framework around money market mutual funds; • Expand SEC authority; • Harmonize regulation of broker-dealers and investment advisers; • Harmonize futures and securities regulation; and • Create a Consumer Protection Agency. <p>Vista360 will continue to monitor the impact of this initiative.</p>	
Regulatory Reform of OTC Derivatives	Adviser & Fund	The Treasury Department has announced the establishment of a comprehensive regulatory framework for over-the-counter (“OTC”) derivatives, which under current law are largely	Department of Treasury press release dated May 13, 2009.

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<i>New</i>		unregulated. The reforms include broadening federal regulatory authority to: (1) police the derivative markets and dealers; (2) establish clearing, margin and capital requirements to reduce risk; (3) impose position and investor limits to prevent market manipulation and excessive speculation; and (4) enhance reporting and recordkeeping requirements.	SEC press release dated May 13, 2009.
Treasury Extends Temporary Guarantee Program for Money Market Funds <i>New</i>	Fund	<p>On March 31, 2009 The U.S. Treasury Department announced another extension to its Temporary Guarantee Program for Money Market Funds through September 18, 2009. The program was scheduled to end on April 30, 2009.</p> <p>Funds that are not currently participating in the Program are not eligible to participate in the extension. The deadline for participation in the extended Program was April 13, 2009. Unlike the first extension, certain large fund managers (Fidelity, Schwab and Vanguard) have dropped the Treasury guarantee on their government money market funds, but appear to be continuing to use the insurance for their prime and tax-exempt money market funds. Federated and Morgan Stanley are among the fund managers that have elected to continue the guarantee on their government funds. Fund managers cited the high cost of the Guarantee Program as a basis for declining coverage.</p>	Department of Treasury press release dated March 31, 2009.

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DOL 401(k) and IRA Investment Advice Regulation <i>Updated</i>	Adviser	<p>On May 21, 2009, the DOL extended the effective date to November 18, 2009 for the finalized rule under the Pension Protection Act (“PPA”) making investment advice more accessible for participants in 401(k) plans and retirement accounts. The extended date will give the DOL additional time to consider legal and policy issues raised by comments on the final rule.</p> <p>The rule will allow greater flexibility for participants of 401(k) plans and IRAs to obtain investment advice. Advice can be provided through the use of a certified unbiased computer model and through an adviser compensated on a “level-fee” basis. Other requirements include disclosing of fees the adviser will receive for the advice provided.</p>	<p>DOL press release dated May 21, 2009.</p> <p>Federal Register, Investment Advice-Participants and Beneficiaries, dated January 21, 2009.</p>
Update on the FTC’s Red Flags Rule <i>Updated</i>	Fund	<p>On April 30, 2009 the Federal Trade Commission (“FTC”) announced it has further extended the deadline for compliance with the Red Flags Rule, from May 1, 2009 to August 1, 2009. The extension will provide fund companies with some additional time to put the finishing touches on their procedures and programs designed to comply with the rules. The extension could be a result of the current economic environment, or a result of the FTC realizing many more firms were affected by the rule than originally projected.</p>	<p>FTC Release: FTC Extended Enforcement Policy.</p>

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<p>Social Networking</p> <p><i>New</i></p>	<p>Adviser & Fund</p>	<p>In recent months, many advisers and funds have been jumping on the social networking bandwagon, creating Facebook pages or Twitter accounts as a way to connect with clients. Firms like Vanguard, TIAA-CREF and Wells Fargo are using such sites as a way to reach out to younger investors, educate clients and market their services. While these sites provide financial services firms a way to contact and expand their client base, this approach is not without significant compliance risks. Since many of these sites allow user-generated content to be posted, firms that use social networking sites need to invest time and personnel to monitor them to ensure the content is within the confines of the federal securities laws. If you are interested in using social networking to reach out to clients, please contact Vista360 for guidance.</p>	<p>New York Law Journal article, “Social Networking Data Presents New Challenges,” dated June 30, 2009.</p>
<p>Proposed GIPS Changes Effective January 2011</p>	<p>Adviser</p>	<p>The Global Investment Performance Standards (“GIPS”) Executive Committee, which is the governing body of GIPS, proposed revisions on January 30, 2009 to the standards. The revisions are planned for early 2010 with an effective date of January 2011. Comments on the proposals were due July 1, 2009. The current standards became effective on January 1, 2006.</p> <p>The following items represent the most significant changes:</p>	<p>GIPS Executive Committee press release.</p>

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		<ol style="list-style-type: none"> 1. The GIPS Compliance Statement - Firms will be required to disclose within their compliance statement whether they have been verified and for which periods the firm has been verified. This change is to encourage firms to comply with the GIPS recommendation that firms claiming compliance with the GIPS standards become verified. 2. Fair Value – Firms will be required to value their portfolios at fair value versus market value. The change is consistent with the financial reporting standards set by the International Accounting Standards Board and the Financial Accounting Standards Board. (Fair value is discussed in the current standards Appendix D.) 3. Non-Fee Paying Portfolios – Discretionary non-fee paying accounts must be included in at least one composite. It was previously the choice of the firm to include non-fee paying accounts in any of the firm’s composites. 4. Standard Deviation – Firms will be required to show the three-year annualized ex-post standard deviation of the composite and its benchmark. The Executive Committee feels showing this specific measure of risk will allow for better comparison between firms and investment strategies. 5. Risk Disclosure – Firms will be required to include within the description of the composites sufficient information so that prospective clients will be able to understand the inherent risks associated with each composite’s investment 	

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<i>New</i>		<p>strategy.</p> <p>6. Proprietary Assets – Firms will be required to disclose what percentage of the composite, if any, proprietary assets (such as seed capital or house money accounts) represent.</p> <p>7. Verification – To increase the understanding and consistency of verification, specific procedures have been developed and must be followed by verifiers.</p> <p>8. Real Estate External Valuation – Real estate investments must be valued by an external, independent appraiser at least once every 12-months. This proposal would be effective for periods beginning January 1, 2012.</p> <p>9. Closed-End Real Estate Funds – The new provisions include a requirement to present an annualized-since-inception internal rate of return for each year since the composite’s inception. Other provisions are similar to those recommended or required under the private equity provisions of GIPS.</p> <p>10. Disclosures – The Committee is asking for comments regarding the length of time disclosures should be required to be included in a compliant presentation.</p>	
Amendments to FINRA Forms U4 & U5	Adviser	The SEC recently approved amendments to FINRA Forms U4 and U5. These are the forms submitted through the Central Registration Depository (“CRD”) system by investment advisers and broker-dealers to manage their representative’s	See Vista360’s June 2009 Perspective for additional details.

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<i>New</i>		registrations with regulatory organizations and state jurisdictions. All registered representatives are required to answer the new DRP disclosure questions on Form U4 the next time the firm files a Form U4 amendment, but no later than the deadline of November 14, 2009.	
U.S. Supreme Court to Review Mutual Fund Excessive Fee Case	Funds	<p>Mutual fund management fees have been a hot topic in recent years as more Americans use 401(k) plans to finance their retirement. Critics say investment advisers charge higher fees to mutual fund shareholders (retail accounts) than to institutional investors and pension funds, while providing virtually the same services to each. Proponents argue that institutional accounts require less work and thus a lower fee is justified.</p> <p>Two shareholder lawsuits are bringing this excessive fee debate into the headlines. In <i>Jones v. Harris Associates</i>, the U.S. Court of Appeals for the Seventh Circuit rejected a claim by shareholders who accused the adviser, Harris, of violating its fiduciary obligations under §36(b) of the Investment Company Act of 1940 (the Act) by charging excessive advisory fees. In the second case, <i>John E. Gallus v. Ameriprise Financial</i>, the U.S. Court of Appeals for the Eighth Circuit reversed the district court’s dismissal of a shareholder suit claiming the adviser violated its fiduciary duty under</p>	<p>WilmerHale alert on <i>Jones v. Harris</i>, dated May 27, 2008.</p> <p>LawUpdates article on <i>Gallus v. Ameriprise Financial</i>, dated April 8, 2009.</p>

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		<p>§36(b) by charging excessive fees to its retail clients versus its institutional clients.</p> <p>In ruling against the shareholders in <i>Jones</i>, the Seventh Circuit abandoned the long-standing <i>Gartenberg</i> standard that courts have relied upon in excessive fee cases since 1982. In <i>Gartenberg v. Merrill Lynch Asset Management, Inc.</i>, the Second Circuit held in a landmark decision that an advisory fee violates §36(b) of the Act when it is “so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm’s length bargaining.” The Seventh Circuit’s rejection of this standard resulted in a new test for reviewing advisory fees that relies on the market rather than the courts. In his opinion, Judge Easterbrook noted that a “fiduciary duty differs from rate regulation. A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation.” This new test implies that as long as an advisor fully discloses a fee, it meets its fiduciary duty under §36(b). Therefore, if investors think the fee is excessive, they will vote with their feet and move their money elsewhere.</p> <p>In <i>Gallus</i>, the Eighth Circuit ruled in favor of the shareholders and reversed the district court’s dismissal of the case, holding that the lower court erred in determining no §36(b) violation</p>	

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		<p>occurred. While the Eighth Circuit agreed that the lower court properly applied the <i>Gartenberg</i> test, it did not take into account a comparison between the fees that Ameriprise, the funds’ adviser, charged its institutional clients and its mutual fund clients.</p> <p>The decisions of these two cases are in stark contrast to one another. While the Seventh Circuit rejected <i>Gartenberg</i>, the Eighth Circuit essentially affirmed this standard for deciding excessive fee cases. On March 9, 2009, the U.S. Supreme Court agreed to review the decision of the Seventh Circuit in <i>Jones</i>. The Supreme Court will hear oral arguments in early October 2009 and a final decision is anticipated sometime in early 2010. <i>Gallus</i> was remanded to the lower court, which is expected to wait until the Supreme Court rules on <i>Jones</i> before deciding.</p> <p>There is much speculation regarding what the Supreme Court will decide due to the current political scrutiny of the financial services industry, the impact the downturn in the market has had on American’s retirement savings and the fact that in almost three decades shareholders in such cases have not prevailed before a judge. Vista360 will continue to monitor the developments of these important rulings.</p>	

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