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SEC Releases FAQs Addressing CCO Liability

The SEC's Division of Trading and Markets issued guidance on Monday in the form of FAQs addressing concerns about failure-to-supervise charges being brought against broker-dealer compliance and legal personnel. Under Section 15(b)(6) of the Exchange Act, the Commission is authorized to bring enforcement proceedings against a person associated with a broker-dealer if someone under that person's supervision violates the federal securities laws. Similarly, Section 203(e)(6) of the Advisers Act provides for the imposition of sanctions on investment adviser personnel for failing to reasonably supervise a person subject to his or her supervision who violates the federal securities laws. Although these FAQs only specifically address liability for broker-dealer personnel, investment adviser compliance and legal personnel can apply the guidance provided by the FAQs to minimize the risk of failure-to-supervise charges under the Advisers Act.

The SEC's action come in response to the industry's growing anxiety over the marked increase in enforcement actions against chief compliance officers ("CCOs"), which many fear could have a chilling effect on the willingness of CCOs to carry out their responsibilities. The FAQs provide some comfort and guidance with respect to CCO's avoiding liability. Specifically, the FAQs make clear that the "staff does not single out compliance or legal personnel,"

and further explain that compliance and legal personnel are not deemed to be "supervisors" solely because they occupy legal or compliance positions. Instead, the question of whether a person is a supervisor depends upon his or her degree of responsibility, and ability or authority to affect the conduct of employees. According to the FAQs, some of the factors to consider in determining whether a person has the requisite degree of responsibility to be considered a supervisor includes:

- Has the person clearly been given, or otherwise assumed, supervisory authority or responsibility for particular business activities or situations?
- Do the firm's policies and procedures, or other documents, identify the person as responsible for supervising, or for overseeing, one or more business persons or activities?
- Did the person have the power to affect another's conduct? Did the person, for example, have the ability to hire, reward or punish that person?
- Did the person otherwise have authority and responsibility such that he or she could have prevented the violation from continuing, even if he or she did not have the power to fire, demote or reduce the pay of the person in question?

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- Did the person know that he or she was responsible for the actions of another, and that he or she could have taken effective action to fulfill that responsibility?
- Should the person nonetheless reasonably have known in light of all the facts and circumstances that he or she had the authority or responsibility within the administrative structure to exercise control to prevent the underlying violation?

CCOs should familiarize themselves with the FAQs, which provide a meaningful, if long overdue, discussion of the factors the SEC will consider when assessing CCO liability at a regulated firm. A copy of the FAQs is available by [clicking here](#). Please feel free to contact us if you have any questions regarding these compliance issues or any other SEC-related matter.

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