ORICAL

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Dear CCOs,

As a timely follow up to our CCO Alert from last week regarding publicly available information on adviser websites, the SEC's Division of Examinations just published a new Risk Alert: *Initial Observations Regarding Advisers Act Marketing Rule Compliance*. The Risk Alert shares preliminary observations from examinations of investment advisers' compliance with the Marketing Rule, including deficiencies of policies and procedures, books and records keeping requirements, and inaccurate completion of the Marketing Rule items contained in Form ADV. Further, the Risk Alert provides observations of deficiencies related to the following: (1) untrue statements of material fact and unsubstantiated statements of material fact; (2) omission of material facts or misleading inference, (3) fair and balanced treatment of material risks or limitations, (4) references to specific investment advice that were not presented in a fair and balanced manner, and (5) inclusion or exclusion of performance results or time period in matters that were not fair and balanced.

Separately, earlier this month the SEC prevailed at trial against Matthew Panuwat, a former employee of biopharmaceutical company Medivation, Inc., based on a novel theory of insider trading referred to as "shadow trading." After less than three hours of deliberations, a jury found Panuwat, liable for insider trading based on his trading in a second, entirely separate biopharmaceutical company, Incyte Corporation. The SEC's complaint alleged that Panuwat used highly confidential information about an impending announcement of Pfizer Inc.'s acquisition of Medivation to purchase short-term, out-of-the-money call options of Incyte.

While insider trading generally refers to the trading of a company's security based upon material non-public information ("MNPI") about that company, the SEC successfully expanded the scope to a misappropriation of confidential information about one company to trade in securities of a second company, where there is a sufficient business connection between the two companies, whether as peers or competitors. The SEC argued that material information about one company is material to another company to which it is "economically-linked;" specifically, the SEC focused on the "scarcity value" concept, such that when the target market is small, an acquisition announcement for one company could impact another company. Interestingly, the SEC dismissed allegations that this theory of liability was a novel one, and instead focused on the elements of the existing misappropriation theory of liability, whereby someone knowingly misappropriates confidential MNPI for securities trading purposes, in breach of a duty arising from a relationship of trust and confidence owed to the source of the information. Among other things, this verdict raises important considerations for advisers with regard to the scope of their insider trading policies.

Please contact Orical to discuss any of your regulatory, operational, or compliance concerns,
at info@orical.org or (212) 257-5790.