

Compliance Matters

Trust, Fiduciary, Investments

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Matters to consider

1. Trust & Fiduciary in Review
2. SEC Best Interest
3. Proxy Voting/ Beneficial Ownership
4. Affiliated Transactions
5. Affiliated Funds
6. Conflicts of Interest (Mutual Fund Fees, Share Classes, Revenue Sharing)
7. Reg R Checkup
8. Fiduciary Access to Digital Assets
9. Key Takeaways
10. On the Horizon

A Few Driving Principals for Trust and Fiduciary Activities

- 12 USC 92a Trust Powers (Title 12 of the United States Code, Section 92, paragraph 'a')
- 12 CFR 12 Recordkeeping and Confirmation Requirements for Securities Activities/Settlement of Securities Transactions
- UTC Uniform Trust Code
- UPIA Uniform Prudent Investors Act
- UPAIA Uniform Principal And Income Act
- 29 USC 18 ERISA (Employee Retirement Income Security Act of 1974)
- State Trusts Laws defines how trusts are to be administered
- FDIC/FRB/PCOAB agencies and regulatory bodies
- IA & IC Investment Advisers Act and the Investment Company Act
- Scott,
Laws of Trust Duties and Liabilities of Trustee
- 12 CFR 9 Fiduciary Activities of National Banks (Title 12 of the Code of Federal **Regulations**, Part **9**)

“Regulation 9” 12 CFR 9 Fiduciary Activities of National Banks

9.1 Authorities, purpose and scope	9.12 Self-dealing and conflicts of interest
9.2 Definitions	9.13 Custody of fiduciary assets
9.3 Approval requirements	9.14 Deposit of securities with state authorities
9.4 Administration of fiduciary powers	9.15 Fiduciary compensation
9.5 Policies and procedures	9.16 Receivership or voluntary liquidation of the bank
9.6 Review of fiduciary accounts	9.17 Surrender or revocation of fiduciary powers
9.7 Multi-state fiduciary operations	9.18 Collective investment funds
9.8 Recordkeeping	9.20 Transfer agents
9.9 Audits of fiduciary activities	9.100 Acting as an indenture trustee and creditor
9.10 Fiduciary funds awaiting investment or distribution	9,101 Providing investment advice for a fee
9.11 Investment of fiduciary funds	Interpretations, Bulletins, Manuals, Handbooks

Fiduciary Capacity Definitions

OCC's Reg 9 definition

- Fiduciary capacity means: trustee, executor, administration, registrar of stock and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minor act, investment adviser – if the bank receives a fee for its investment advice, or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a.
- Investment discretion means, with respect to an account:
 - Sole or shared authority (whether or not that authority is exercised) to determine what securities or other assets to purchase, sell or retain on behalf of the account
 - Delegated authority - A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.

Fiduciary Capacity Definitions

SEC and other regulators description

- An adviser's relationship with its clients is fundamentally one of trust and confidence. This emanates from the fact that clients consent to having the adviser act on their behalf, making the clients vulnerable to the adviser. The law provides some measure of protection for clients in light of that vulnerability by imposing on adviser's fiduciary duties owed to their clients.
- Under common law principles of agency, an investment adviser, as agent, owes fiduciary duties to its clients, as principal. Certain other aspects of an adviser's fiduciary duties are grounded in the law of trusts.
- A registered adviser's fiduciary duty also emanates from federal statutes, most notably Section 206 of the Investment Advisers Act of 1940 ("Advisers Act").

Fiduciary Capacity Definitions

Advisers may have a fiduciary duty to their clients emanating from other sources as well, such as:

- Section 38(a) of the Investment Company Act of 1940 - An adviser can be held liable for breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which it serves as adviser.
- ERISA – Persons who operate pensions, retirement, welfare and other types of benefit plans covered by the Employee Retirement Income Security Act of 1974 (“ERISA”) may be considered fiduciaries.
- Blue Sky Laws – In many cases, securities statutes and regulations adopted by various states prohibit conduct similar to that prohibited by Section 206 of the Advisers Act
- States – Due to the vacating of the DOL’s Fiduciary Rule, some states have, or are working on introducing fiduciary legislation/regulation for certain investment related advice and recommendation activities.

Consequences of Non-Compliance

- Liability under securities and/or anti-fraud laws
- Cease and desist
- Monetary fines, penalties, limitations to growth
- Private civil actions
- Censure
- Criminal action and sanctions
- Personal accountability - civil and criminal
- Combination of all of the above
- Reputation risk and embarrassment

SEC Best Interest Package (Reg BI) And Related Fiduciary Developments

On June 5, 2019, the **SEC** voted to approve their rules and guidance governing retail advice to enhance the transparency and quality of investors' relationship with investment advisers and broker-dealers. The approved package of rules and guidance included: (1) Regulation Best Interest – Standards of Conduct for Broker-Dealers; (2) Form CRS Relationship Summary; (3) Standard of Conduct for Investment Advisers; and (4) an interpretation of the “solely incidental” clause for broker-dealers. Compliance date is June 30, 2020.

Some **states** have indicated there is a lack of fiduciary expectations in Reg BI and are pursuing their statutory version of a fiduciary law. New Jersey introduced a fiduciary bill in January 2019. Nevada released a regulation proposal in January 2019 following the passage of a fiduciary duty law in 2017. Maryland introduced a fiduciary bill in January 2019 which was rejected by its senate committee in April 2019. On June 14, 2019, Massachusetts proposed its own fiduciary rule.

SEC Best Interest Package (Reg BI) And Related Fiduciary Developments

With the vacating of the DOL's Fiduciary Rule, the **Certified Financial Planner Board (CFP Board)** extended its fiduciary standard to apply whenever CFPs provide financial advice.

June 2019 - The Office of the Comptroller of the Currency ("OCC") invited comments to its advance notice of proposed rulemaking regarding fiduciary activities rules and a potential rule for **non-fiduciary custody activities** for national banks. The rule would update the definition 'fiduciary capacity' so that the term would be more consistent with how certain states recognize trust-related activities.

Latest Developments Best Interest

- The House voted 227-200 on June 26, 2019 to pass the H.R. 3551 (including the Waters amendment) in an effort to block funding for the enforcement of the SEC's Reg BI.
- The DOL continues to indicate they will issue revised fiduciary regulations and clarifications.
- SIFMA is working with its members to develop a practical FAQ document to assist in the implementation of Regulation BI.
- Impact of Regulation BI may extend to IRA account rollovers and type of account recommendations.
- Manufacturers and distributors of fund share classes may have to review their responsibilities and marketing materials.
- CFP Board postpones enforcement of its fiduciary standards until June 30, 2020.

SEC Best Interest Package (Reg BI) And Related Fiduciary Developments

Why: Pressure on SEC to fill the void caused by the vacating of the DOL Fiduciary Rule in 2018. While the SEC has approved the implementation of Regulation BI effective June 30, 2020, it is not considered a fiduciary rule. Accordingly, some states who believe a fiduciary rule is necessary have moved on toward their state law revisions.

Considerations:

The state fiduciary laws are not finalized and should be monitored carefully if operating in those states. CFP fiduciary standards are also effective June 30, 2019 and impacted financial institutions will have to review how to ensure their CFP designated employees adhering to those professional standards.

Proxy Voting

The challenges associated with ensuring financial institutions are voting proxies in the best interest of their clients.

What: Investment Advisers Act of 1940, Rule 206(4)-6 compliance; DOL Interpretive Bulletin 2016-01 compliance; Compliance with 17 CFR 240.14b-1 applicable to broker-dealers; OCC requirements typically adopt SEC requirements; FDIC and State Departments of Financial Institutions/Services adopt SEC along with any specific State rules.

Why: It is difficult for a beneficial owner (whose shares are not registered in their individual name) to find out if the vote was cast as instructed and properly counted. Some in the industry have admitted the proxy voting system remains noisy, imprecise, and disturbingly opaque.

Proxy Voting

Considerations:

- Record dates
- Objecting vs non-objecting (post 1986)
- Affirmatively Consenting vs Non-consenting (pre 1986)
- Loaned Securities (cannot vote) / recalls
- Voting authorities
- Voting Policies – For or Against Management
- Shareholder Proposals
- Timing –list of NOBO holders; distribute materials; vote & tally; submit tally
- Special Interest Groups / Shareholders

Proxy Voting Compliance

Maintain and practice written guidelines and procedures suitable to the account responsibilities, describing how to handle:

- routine proxies are voted
- non-routine proxies are voted
- conflicts (own shares or assets; directors or principals; related interests)
- shareholder proposals/special interest groups
- social issues/ESG
- mergers/buyouts/acquisitions

Committee or Proxy Advisor?

What will documentation look like?

Where are the results reported?

NOTE: You must adopt and implement written policies and procedures that are reasonably designed to ensure that proxies are voted in the Best Interest of the beneficiary or clients.

Latest Developments Proxy Voting

- The Securities and Exchange Commission issued new guidance on August 21, 2019 on the proxy voting responsibilities of investment advisers **and** the application of proxy rules to voting advice. The guidance clarifies how an investment adviser's fiduciary duty and Rule 206(4)-6 under the Advisers Act relate to an adviser's proxy voting on behalf of clients, particularly if the investment adviser retains a proxy advisory firm.
- In the future, the SEC intends to consider (1) proposed rules to amend the submission and resubmission thresholds for shareholder proposals under Rule 14a-8 in the Securities Exchange Act (SEA); (2) proposed rule amendments to address proxy advisory firms' reliance on the proxy solicitation exemptions in the SEA 14a-2; and (3) actions to modernize the proxy system generally to promote greater efficiency and in shareholder voting.

Affiliate Transactions / covered transactions

What: The attempt to prohibit or limit conflicts through relationships. There are many definitions of the term “affiliate”. It generally describes the relationship between entities wherein one owns less than a majority (less than 50%) stake in the other's stock or debt. The relationship could materialize inadvertently.

Why: In the interest of the Safety and Soundness of the bank or publicly traded companies, and client interest, by prohibiting or limiting conflicts, attempts to:

- limit the risk to the Bank or company from transactions between and among affiliates;
- limit bank's or company's ability to transfer safety nets (e.g. bank deposit insurance, discount window privileges, [market] capitalization); inadvertently trigger capital event or legal lending limit issues for the Bank; dump or conceal of underperforming assets/investments/securities; or take undue advantage of the firm or client

Affiliate Transactions / covered transactions

What is an affiliate?

Securities Exchange Commission (SEC) Investment Company Act

Transactions of Investment Companies With Portfolio and Subadviser Affiliates

1) persons or companies under common control; 2) investment advisers and any subadvisers of an investment company; 2) persons or companies that control, own or vote, directly or indirectly, 5% or more of the shares; 3) persons or companies so controlled, owned or voted; 4) officers, directors, employees; or partners of such persons; 5) if unregistered company, the depositor

Federal Reserve Act (FRB) 12 USC 371c **Transactions with or among affiliates or subsidiaries**

1) controls the bank 2) is under control or common ownership; 3) owning 25% or more of the voting power or equity (15% for a merchant bank); 4) includes an investment company for which the bank acts as an adviser (CIFs, mutual fund, REITs, etc), 5) any company that by virtue of its relationship could have a negative impact on the bank, 6) extensions of credit including daylight ODs

Affiliate Transactions / covered transactions

FRB 23A) “Covered Transactions” includes, among other things, extensions of credit to an affiliate; ***purchases of or investment in securities***; purchases of an asset; *acceptance* of **securities** issued by an affiliate as collateral for a loan to any person; ***guarantees*** on behalf of an affiliate (including issuance of a letter of credit)

FRB 23B) prohibits transactions unless terms and conditions are substantially the same or at least as favorable as those for nonaffiliated transactions [*market terms*];

FRB Reg W: extension of Sections 23A and 23B to implement and interpret, and provides exemptions

Affiliate Transactions / covered transactions

Federal Reserve FR Y-6 | must report 5% and 10% holdings or voting power for bank-related securities

GAAP | ownership of between 20% and 50%; controlling vs non-controlling; passive vs active; *“influence”*

IRS | Parent company must own at least 80% of the voting stock of a company to be considered an affiliate.

Distinction between “affiliate” and “subsidiary” and “insider”

Affiliate Transactions / covered transactions

Considerations:

- Extremely difficult to manage (manual efforts)
- Need permissions before transactions occur, not after
- “Permissions” process is lengthy (Exemption letters, court orders)
- Conflicting financial intercompany consolidation definitions
- Incomplete affiliate list
- Information barriers/siloed businesses and functions
- Limited inventory of products, services, transactions, relationships
- Limited knowledge of requirements
- Limited knowledge of how requirements apply
- Pricing of services or products
- 3rd Party Vendor /Outsourced Oversight monitoring
- Services provided to/by a Trust Department unit that are separate legal entities
- Implied ‘guarantees’ contained in the content of marketing or advertising materials

Affiliated Funds

Investment Company Act of 1940 Section 17 A - affiliations with non-proprietary open-ended mutual funds through ownership (discretion/voting) of 5% or more of the voting shares.

What: Implemented to curb abuses and deficiencies in the operation of registered investment companies and imposes requirements regarding the custody of assets, investment activities, and transactions with affiliates of certain registered investment companies. Section 17 of the Act contains prohibitions and limitations on transactions with affiliated mutual funds.

Why: Implemented to protect public investors from the abuse of insider “self-dealings”. It is designed to prevent the insiders from using a mutual fund to benefit themselves to the detriment of the fund and its shareholders. Discretionary trust accounts are often invested in mutual funds and these fiduciary investments (in aggregate) may limit investment opportunities and revenue opportunities for the fiduciary institution.

Affiliated Funds

Considerations:

- Identifying what/ where funds are used
- Entity level programs
- Documented procedures
- Establish frequency of assessment
- Root cause analysis of incidents or errors and program adjustments to ensure ongoing compliance
- ERISA impact
- FRB Affiliated Transactions implications
- State laws

Affiliated Funds Compliance

- Maintain inventories of applicable business units; sources/distributors, and where/when allowed for both internally or with outside broker
- Maintain proper documentation of approvals
 - Board/executive approval to offer investment
 - Client/beneficiary approval to purchase/hold
- Maintain copies of disclosures applicable at time of decision
- Assess the impact of changes to funds on past investment decisions
- Know how to affect timely corrections
- Attend or request appropriate training
- Leverage technology

Conflicts of Interest Fees & Revenue Sharing Arrangements

Compensation or revenue sharing arrangements between affiliates or subsidiaries or others

What: Generally permitted (even under State laws) with adequate disclosures and where it is unlikely that firm would be in a position to take advantage of the client. SEC's Best Interest rule either prohibits certain compensation arrangements or requires additional specific disclosures.

Why: Call for transparency continues to increase. Firms must provide sufficient transparency so that clients can *independently* make informed decisions:

- a) knowing that you are being paid by both the client and 3rd party (or parties)
- b) for the recommendation you may be making, and
- c) whether or not that arrangement has an impact on portfolio decisions.

Conflicts of Interest Fees & Revenue Sharing Arrangements

Considerations:

- Extremely difficult to manage (manual efforts)
- Mutual Fund fees & services
- Share Classes {SEC's initiatives 'SCSDI ", FINRA 529 savings plan reviews}
- Soft Dollar benefits and conditions
- Preferred clients (with IPO allocations or trade execution)
- Pricing Services & Methodologies
- Sales Incentives
- Disclosures vs practice

Conflicts achieving compliance

- Know that this can be a moving target
- Identify the revenue components
- Identify the services and benefits received or provided
- Document which requirements apply and how they apply to which products and services (Federal, state, other)
- Consider using a core Conflicts Working Group to look beyond the business silos
- Maintain written agreements and monitor for adherence to terms of the agreements
- Think horizontally and vertically; broad and deep

Violation of duties:

- to disclose
- obtain best execution, and
- maintain and adhere to policies & procedures to prevent and detect

Even if there is no investment discretion.

Latest Developments Affiliate Transactions/Conflicts

- July 23, 2019 SEC observes deficiencies in disclosures of conflicts:
 - disciplinary events of the Adviser or its supervised person(s)
 - conflicts of interest in compensation arrangements including, the incurrence of transaction-based fees by the supervised persons and forgivable loans earned through client-based incentives
 - fees charged relative to the service performed

Regulation R-Checkup

Exceptions for Banks from the Definition of Broker in the Securities Exchange Act of 1934

Bank/ Broker-Dealer ongoing compliance with an often-overlooked regulation critical to fiduciary organizations

What: Sets forth a series of *exceptions and related exemptions* to allow banks (*not their non-bank affiliates or related entities*) to continue to engage in their traditional securities services for customers as part of their trust, fiduciary, custodial, deposit sweep, and other activities, in the Gramm-Leach-Bliley Act (and subsequently in Regulation R).

Why: Title II of the Gramm-Leach-Bliley Act (GLBA) eliminated the former blanket exemptions for banks from regulation as securities brokers and dealers under the Securities Exchange Act of 1934. GLBA sought to modernize the regulation of financial services institutions based on principles of functional regulations, with the SEC as the primary regulator of securities activities. However, Congress included in GLBA a series of exemptions to allow banks to continue their traditional securities services activities for customers as part of their trust, fiduciary, custodial, deposit sweep, and other activities.

Regulation R-Checkup

Considerations:

- Networking Arrangements
- Institutional Referrals
- Deposit Sweep accounts
- Trust and Fiduciary Activities
- Trust and Fiduciary Chiefly Compensated Calculation and reporting
- Safekeeping and Custody activities
- Securities Lending activities
- Special Accounts, transferred accounts, de minimis number
- Transactions in Money Market Mutual Funds
- Affiliate transactions processing
- Offshore safe harbor/ foreign securities
- Employee Benefit, IRAs and similar accounts
- Accommodation trades

Regulation R Compliance

- Who is the point of contact for maintaining exemptions and exceptions?
- Is the revenue collected from mutual funds used in compensation for employees – including quotas, campaigns and bonuses?
- How often are the sweep vehicles reviewed?
- Has your calculation for “chiefly compensated” considered input from Finance and Employee Compensation?

Relationship/ ‘trust’ or ‘fiduciary’

“Total Income”

Bank-wide basis $\geq 70\%$

Account basis $\geq 50\%$ (each account)

Fiduciary Access to Digital Assets

Digital Asset = “An electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”

What: Fiduciary’s need to address access to digital assets as part of account administration. Provides a legal avenue to digital assets of deceased or incapacitated persons. Uniformed Fiduciary Access to Digital Assets Act (UFADAA) completed in 2014.

Why: Duty to custody, safeguard, and render an accounting of fiduciary assets. The Uniform Law Commission in 2014 granted default access to fiduciaries; was argued to conflict with TOAs and federal computer fraud laws; invasion of decedent's privacy; infringe on privacy of the 3rd parties; potential mis-categorization of digital assets - internet domains; blogs; internet businesses; crypto/virtual currency accounts; books; music; podcasts.

Revised in 2015 (Revised Uniform Fiduciary Access to Digital Assets ‘RUFADAA’) recognizes 4 types of fiduciaries: executors or estate administrators; court appointed guardians or conservators; agents under POA; and trustees. Provides immunity to the custodians for acts done in good faith to comply with the RUFADAA.

Fiduciary Access to Digital Assets

Considerations:

- Duty & ability to account for, collect and custody assets
- State enactments may vary
- Living vs deceased or incapacitated
- Access to assets vs access to digital communication (mail, social media, bill pay)
- Content vs Catalogue (list)
- 3rd party agreements / terms or conditions of service
- Private keys /inability to recover lost digital assets
- Mis-categorization of digital assets (“funds”, “securities”, “neutral”)
- Settlement practices – DVP or not

Fiduciary Access to Digital Assets Compliance

Establish written procedures for collecting and managing information needed to access digital accounts.

- Request **explicit** authority from grantor/beneficiary, explicitly naming trustee as **Digital Executor**
- Include direction as to time periods, i.e. now or after death
- If you use a digital vault for passwords, pins, access codes, consider controls over the digital vault
- Check state laws for requirements and definitions
- Perform the appropriate due diligence over the digital asset (what is needed to gain access; remove access, dispose of asset)
- Remember that fiduciary duties are uniformly applicable to tangible AND digital assets

Not so

Latest developments in Digital Assets

- July 2019 - SEC Division of Market Trading and FINRA issue joint statement on Digital Asset Securities encouraging firms to notify FINRA if they engage in activities related to digital assets, including those that are non-securities; consider financial responsibility and the custodial requirements under SEC rule 15c3; consider recordkeeping rules and impact of Securities Investor Protection Act (“SIPA”) on digital assets.
- State laws (Dept of Financial Services) are addressing licensing for digital currencies
- FinCEN regulations apply for Money Services Businesses for digital currency, also subject to IRS regulations for AML compliance
- SEC - certain digital assets may be securities and subject to Investment Company and Investment Adviser’s Acts
- To-date, 50 states have adopted a RUFADAA, definitions of digital assets and associated rights vary.

FRB Supervisory Guidance – January 11, 2018

Status of January 4, 2018 FRB proposal setting forth core principles of effective senior management, the management of business lines, and independent risk management and controls for large financial institutions.

What: The proposal consolidates and clarifies the FRB's existing expectations regarding risk management and delineates the roles and responsibilities for individuals and functions related to risk management.

Why: The FRB is complementing the Board Expectation guidance by (1) aligning the attributes of senior management with those of an effective board of directors and (2) better distinguishing expectations for boards from those of senior management.

Impact: Board should set the firm's strategy and risk tolerance and senior management should be responsible for implementing the strategy and risk tolerance approved by the board.

FRB Supervisory Guidance – January 11, 2018

Considerations:

- Independent Risk Management should provide an objective, critical assessment of risks and evaluate whether a firm remains aligned with its stated risk tolerance.
- Establish a system of internal control to guide practices, provide appropriate checks and balances, and confirm quality of operations.
- Internal audit should provide independent assessments of the effectiveness of the risk management framework and the system of internal control.
- Until this proposal is finalized, the FRB will continue to rely primarily on the principles set forth in SR letter 12-17 and CA letter 12-14 to assess the effectiveness of the firm's board of directors. Additionally, the FRB will continue relying on existing risk management guidance to assess the effectiveness of a firm's management of business lines and independent risk management and controls.

Headline News

- August 7, 2019 – FINRA issues regulatory notice reminding member firms of the SEC’s adoption of the Regulation Best Interest packet (Regulatory Notice 19-26)
- August 9, 2019 – SEC Case Take Revenue Sharing Rules In a Completely New Direction
- August 12, 2019 – 401(k) World Will Get Smaller (and Not Just Because of M&A)
- August 14, 2019 - Changes To Accredited Investor Rules Take Priority At SEC
- August 15, 2019 - SEC Releases Videos for Investors on Choosing and Working with a Financial Professional
- August 19, 2019 – Legal Scholars Warn Reg BI Lowers the Standards for RIAs
- August 20, 2019 – Academics Sound Alarm on Potential Pricing Fraud in Bond Funds

Headline News

- August 22, 2019 – Which Brokerage Clients Clean Up in Cash Sweeps
- August 22, 2019 – DOL Pushes New 401 (k) Disclosure Rule Forward
- August 22, 2019 – SEC Lays Out How to Use Proxy Advisors, Protect Fiduciary Role
- August 27, 2019 - FDIC Clarifies Its Risk-Focused Approach to Exam Policies
- August 28, 2019 – Rev-Share Deals Leave Fee-Based Clients Worse Off- Study
- September 3, 2019 – SEC’s Proxy Reform Emphasizes Accountability, Transparency
- September 5, 2019 – SEC Rev-Share Crackdowns Shine New Light on Old Deals

Key Takeaways

Managing or mitigating incidents of non-compliance

Establish procedures to identify and mitigate breaches

- ❑ Identify the responsible point of contact
- ❑ Identify the accountabilities and accountable parties
- ❑ Maintain an inventory of activities and related attributes
- ❑ Maintain an accurate inventory of prospective services/products provided by affiliates
- ❑ Maintain an accurate alignment of requirements to your inventories
- ❑ Maintain an inventory of prohibited activities, investments, relationships
- ❑ Conduct investment due-diligence beyond the first layer
- ❑ Perform arms-length Third Party Vendor/Outsourced services assessments

Key Takeaways

Risk Management is no longer siloed or fragmented

How does your approach fit within your regulator's standards and your customer's expectations.

- Is our framework clear?
- How would we identify a concern?
- Can it be prevented?
- How will we know when an event occurs?
- What do we do about it?

As a Fiduciary, look beyond the obvious – think **Reputation Risk**.

Questions?