

FEBRUARY 2026

Investment Management Update

In This Update

Covering legal developments and regulatory news for funds, their advisers, and industry participants for the quarter ended December 31.

Rulemaking and Guidance

SEC NO-ACTION LETTER: EXPANDING CUSTODY OPTIONS FOR CRYPTO ASSETS WITH STATE TRUST COMPANIES

10.7.25

On September 30, 2025, the Office of the Chief Counsel of the Securities and Exchange Commission's (SEC) Division of Investment Management (the Division) issued a no-action response (the No-Action Letter) stating that it would not recommend enforcement against registered investment advisers (RIAs) or certain regulated funds (*i.e.*, registered investment companies and business development companies) for maintaining crypto assets and related cash and cash equivalents with certain state-chartered financial institutions (state trust companies) so long as particular conditions are met.^[1] In doing so, the No-Action Letter permits regulated funds and RIAs to treat state trust companies as "banks" for purposes of the custody requirements of the Investment Company Act of 1940, as amended (the 1940 Act), the Investment Advisers Act of 1940, as amended (the Advisers Act) and the rules thereunder.

CUSTODY REQUIREMENTS UNDER THE 1940 ACT AND ADVISERS ACT

The custody requirements established by the 1940 Act and Advisers Act are designed to prevent the theft, loss, and misappropriation of investor assets. Sections 17(f) and 26(a) of the 1940 Act require registered funds to place and maintain securities and similar investments with certain qualified custodians. Similarly, RIAs that have custody of their clients' funds and securities must maintain such items with a "qualified custodian" pursuant to Rule 206(4)-2 of the Advisers Act. Qualified custodians include entities that meet the definition of "bank" under §2(a)(5) of the 1940 Act or §202(a)(2) of the Advisers Act.

Typically, national and state-chartered banks qualify as a custodian for registered funds and RIAs by meeting the definition of a bank under the 1940 Act and the Advisers Act. State trust companies, however, are legal entities organized under state law that are: (i) supervised and examined by a state authority having supervision over banks and (ii) permitted to exercise fiduciary powers under applicable state law.^[2] For a state trust company to meet the definition of "bank" under the 1940 Act and Advisers Act, it must also satisfy the requirement that "a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency." The interpretation of this portion of the definition was the subject of the No-Action Letter.

STATE TRUST COMPANIES AS "BANKS"

The No-Action Letter permits regulated funds and RIAs to maintain crypto assets (and cash and/or cash equivalents reasonably necessary to effect transactions in crypto assets) with state trust companies, if the following conditions are met:

1. **Authorization and Policies:** The RIA and/or regulated fund must verify that the state trust company is authorized by the relevant State Banking Authority to provide custody

services for crypto assets and has policies to safeguard these assets, focusing on private key management and cybersecurity.

2. **Financial and Control Reports:** The RIA and/or regulated fund must review the state trust company's latest audited financial statements and internal control reports to ensure controls are effective and meet custodial service objectives.
3. **Custodial Services Agreement:** A written agreement must be in place, ensuring that the state trust company cannot lend or pledge the crypto assets without prior consent and that these assets are segregated from the company's own assets.
4. **Risk Disclosure:** The RIA and/or regulated fund must disclose any material risk of using state trust companies as custodians to their clients or board members.
5. **Best Interest Determination:** The RIA and/or regulated fund must determine that using the state trust company's custody services is in the best interest of their clients or shareholders, as applicable.

In an atypical response to staff no-action letters, two SEC commissioners commented on the issuance of the No Action Letter — one voicing support, and one expressing a more cautionary view.^[3]

CONCLUSION

The Division's No-Action Letter marks the latest development in the regulatory landscape for crypto asset custody, allowing crypto assets to be placed and maintained at state trust companies, potentially broadening the universe of eligible providers for custody services. Maintaining crypto assets requires a complex web of technology and operational systems to protect digital assets from misappropriation, making it particularly challenging for compliance. As the RIA and fund industries navigate these complexities, participants remain hopeful that the SEC will provide further guidance on crypto asset custody issues, as evidenced by recent comment letters to the SEC's Crypto Task Force.^[4] Stay up to date with the latest on crypto asset regulatory and market developments by subscribing to our [Financial Services Blog](#), our [Consumer Financial Services Law Monitor](#), and to our podcast, [The Crypto Exchange](#), via Apple Podcasts, Google Play, Stitcher, or your preferred platform.

[1] Simpson Thacher & Bartlett LLP, SEC No-Action Letter, Sept. 30, 2025, available [here](#).

[2] Id.

[3] Commissioner Hester M. Pierce, Statement on "Out of the Gray Zone: Statement on The Division of Investment Management's No-Action Letter Relating to the Custody of Crypto Assets with State Trust Companies" U.S. Sec. & Exch. Comm'n (Sept. 30, 2025) available [here](#); Commissioner Caroline A. Crenshaw, Statement on "Poking Holes: Statement in Response to No-Action Relief for State Trust Companies Acting as Crypto Asset Custodians" U.S. Sec. & Exch. Comm'n (Sept. 30, 2025) available [here](#).

[4] For example, see the [SEC comment letter submitted by National Society of Compliance Professionals on September 8, 2025](#), which underscores the need for additional guidance on crypto asset custody, available [here](#).

SEC Division of Examinations Announces 2026 Priorities

11.17.25

On November 17, 2025, the Securities and Exchange Commission's (SEC) Division of Examinations announced its [fiscal year \(FY\) 2026 examination priorities](#).^[1] The most significant changes to the division's priorities from FY 2025 include:

- A focus on compliance with the soon-to-be-effective 2024 Regulation S-P amendments;
- A focus on compliance with the newly implemented Regulation S-ID;
- A change in the priorities of review for broker-dealer trading-related practices;
- Commencement of registered security-based swap execution facilities reviews;
- A new focus on AI-based cybersecurity risks when evaluating internal cybersecurity policies; and
- The elimination of cryptocurrency regulation as an independent division area of focus for FY 2026.

1. Investment Advisers

Adherence to Fiduciary Standards of Conduct: The division continues to focus on advisers' exercise of their duties of care and loyalty and has identified the following exam areas for review of advice and disclosure consistent with such duties:

- (i) Advisers' financial conflicts of interest;
- (ii) Factors considered in providing investment advice to clients including costs, objectives, features, liquidity, risks, volatility, performance across conditions, time horizon, and exit costs;
- (iii) Best execution;
- (iv) Higher-risk products (such as alternative investments (e.g., private credit, locked-up private funds), complex or option-based/leveraged exchange-traded funds (ETF), and ETF wrappers on less-liquid strategies); and
- (v) Higher-cost products.

Examinations will evaluate whether recommendations match product disclosures and clients' objectives and risk profiles, with a new emphasis on separately managed accounts or newly registered funds (including allocation favoritism and interfund transfers).

Effectiveness of Advisers' Compliance Programs: The division will continue to assess the effectiveness of advisers' compliance programs, focusing on:

- Conflicts that arise from account and product compensation structures;

- Advisers' practices or products — for example, activist engagements (timely, accurate filings such as Schedules 13D/13G, Form 13F, Forms 3–5, and Form N-PX); and
- Compliance when business models change or firms begin advising new asset types, clients, or services.

2. Investment Companies

For registered investment companies (RICs), including mutual funds and ETFs, examinations will continue to touch on disclosures, filings, governance practices, and compliance programs.

Particular focus will be paid to:

- (a) Fund fees and expenses, together with any associated waivers and reimbursements; and
- (b) Portfolio management practices and disclosures, for consistency with statements about investment strategies or approaches and for consistency with amended Rule 35d-1 (the Names Rule).

Never-before-examined RICs, especially those recently registered, will be prioritized for examination.

The division has also updated its specific areas to assess developments, including:

- (c) RICs that participate in mergers or similar transactions, including any associated operational and compliance challenges;
- (d) Certain RICs that use complex strategies and/or have significant holdings of less liquid or illiquid investments (*e.g.*, closed-end funds and interval funds), including any associated issues regarding valuation and conflicts of interest; and
- (e) RICs with novel strategies or investments.

3. Broker-Dealers

(a) Broker-Dealer Trading-Related Practices.

Updated areas of review for broker-dealer equity and fixed income trading practices will include practices associated with extended hours trading, municipal securities, priority of orders, and mark-up disclosures. The division has noted that reviews will focus on:

- (i) Best execution;
- (ii) The pricing and valuation of illiquid instruments such as variable rate demand obligations, other municipal securities, and non-traded REITS; and
- (iii) Disclosures regarding order routing and order execution information, including as required by Rule 605 under Regulation NMS.

(b) Retail Sales Practice.

The division will continue to review retail sales practices for compliance with Regulation Best Interest. Examinations are expected to concentrate on complex or tax-advantaged products like variable and registered index-linked annuities; ETFs investing in illiquid assets; municipal

securities; private placements; structured products; alternative investments; and other products with complex fees or return calculations, exotic benchmarks, illiquidity, or rapid retail growth.

4. Additional Risk Areas

(a) Information Security and Operational Resiliency.

The division will review registrants' practices to prevent disruptions to mission-critical services and protect investor data. The division will also evaluate training and controls for emerging threats tied to artificial intelligence (AI) and polymorphic malware, how firms use threat intelligence, and overall operational resiliency.

(b) Regulation S-ID and Regulation S-P.

The Division plans to assess compliance with Regulations S-ID and S-P. For Regulation S-ID, exams will review firms' written Identity Theft Prevention Programs to ensure they detect, prevent, and mitigate identity theft in covered accounts — particularly red flag detection during account takeovers and fraudulent transfers — and include staff training. In advance of the Regulation S-P amendment compliance dates, the division will engage firms on incident response program readiness; after the applicable compliance dates, it will examine whether firms have implemented policies and procedures with administrative, technical, and physical safeguards to protect customer information.

(c) Crypto Assets.

Notably, the division has not renewed its commitment to observing the proliferation of investments involving crypto assets and reviewing the offer, sale, recommendation, advice, trading, and other activities involving cryptocurrencies for FY 2026.

5. Other Market Participants

(a) Clearing Agencies.

New focus areas across for clearing agency registrants include recovery and wind-down, collateral management, operations, and inter-clearing agency arrangements.

(b) Municipal Advisors.

The division will continue examining municipal advisors' fiduciary duty, MSRB Rule G-42 compliance, and completion of required SEC filings and obligations (qualification, registration, recordkeeping, supervision).

(c) Transfer Agents.

The division will continue examining transfer agents' processing of items and transfers, recordkeeping and retention, safeguarding of funds and securities, and SEC filings, focusing on those using emerging technologies. Following the compliance date, it will also assess adherence to the 2024 Regulation S-P amendments, including the safeguards rule, disposal rule, and requirements to establish incident response programs.

(d) Funding Portals.

The division will examine funding portals' arrangements with qualified third parties for maintaining and transmitting investor funds, ensuring required records are made and preserved, and

reviewing written policies and procedures for reasonable design and compliance with applicable securities laws. After the compliance date, it may also assess compliance with the 2024 Regulation S-P amendments.

(e) Security-Based Swap Execution Facilities (SBSEFs).

The division will begin examining registered SBSEFs, focusing on their rules and internal policies and procedures for trade monitoring, trade processing, and participant oversight. It will also assess how SBSEFs establish risk analysis and oversight programs designed to identify and minimize operational risk.

As we have in the past, we will continue to monitor these issues and will provide future client updates. This alert is not intended to be used as a substitute for legal advice and should be utilized for guidance only.

[1] U.S. Sec. & Exch. Comm'n, SEC Division of Examinations Announces 2026 Priorities, Press Release No. 2025-132 (Nov. 17, 2025) <https://www.sec.gov/newsroom/press-releases/2025-132-sec-division-examinations-announces-2026-priorities>.

Key Takeaways From FINRA's 2026 Annual Regulatory Oversight Report

12.9.25

The Financial Industry Regulatory Authority's ([FINRA 2026 Annual Regulatory Oversight Report](#)) is the most current and comprehensive statement of FINRA's priorities and expectations for member firms. It does not create new legal obligations, but it is clearly designed as an exam and enforcement roadmap. The 2026 Report weaves together FINRA's FINRA Forward modernization program, new and evolving risks (especially cyber-enabled fraud and generative AI (GenAI)), and detailed observations on firms' supervisory, operational, and financial controls. Firms should use it as a structured checklist for 2026 risk assessments, revisions to written supervisory procedures (WSPs), and enhancements to testing, surveillance, and training.

FINRA FORWARD AND THE ROLE OF THE REPORT

FINRA Forward, launched in 2025, underpins much of this year's Report. It has three pillars: modernizing FINRA's rules to better reflect current markets, "empowering member firm compliance" with more tools and feedback, and intensifying focus on cybersecurity and fraud. Organizationally, FINRA has unified Member Supervision, Market Oversight, and Enforcement into a single Regulatory Operations function, which means firms should expect more integrated, cross-silo supervision and enforcement.

The Report is explicitly positioned as an evolving reference library. It updates prior topics, adds new ones (notably a dedicated GenAI section), and highlights "effective practices" and resources. Firms are encouraged to read it selectively, focusing on areas relevant to their business lines and risk profile, but examiners will reasonably expect that the Report has informed the firm's compliance planning.

CYBERSECURITY AND CYBER-ENABLED FRAUD

Cyber remains at the top of FINRA's agenda. The Report ties cyber risk directly to Regulation S-P (privacy and safeguarding), Regulation S-ID (identity theft red flags), FINRA Rule 3110 (supervision), Rule 4370 (BCP), and Exchange Act books-and-records rules. It emphasizes the 2024 amendments to Regulation S-P, which require a written program to detect, respond to, and recover from unauthorized access to "sensitive customer information," including customer notification. Larger firms were to have complied by December 3, 2025, while smaller firms have until June 3, 2026.

Substantively, FINRA continues to see ransomware and extortion events, data breaches, phishing/smishing/quishing, new account fraud, account takeovers, account impersonation, and imposter sites. Relationship investment scams, often initiated via text or social media, are a particular concern. The Report also flags GenAI-enabled threats such as deepfake audio/video and AI-generated documents/polymorphic malware, as well as "cybercrime-as-a-service" tools that allow less technical actors to launch sophisticated attacks.

FINRA's "effective practices" now look more like baseline expectations: multifactor authentication for staff and customers; monitoring for unusual logins and payment requests; domain and social media impersonation surveillance; outbound data-loss controls; network segmentation; BYOD governance; routine training; cross-team coordination between cyber and anti-money laundering (AML); and structured vendor risk management. The practical question is no longer whether these controls exist but whether they are formally documented, consistently implemented and demonstrably tested.

AML, EXTERNAL FRAUD, AND IDENTITY-BASED THREATS

The Report devotes extensive attention to AML (FINRA Rule 3310) and "external fraud" threats. FINRA continues to find AML programs that are not properly tailored to firms' businesses, that under-resource monitoring and investigations (especially after business growth), and that fail to escalate red flags from outside the AML function (e.g., cyber alerts, clearing firm inquiries).

FINRA highlights evolving fraud patterns: disaster-related donation scams; social media "investment clubs" used to drive pump-and-dump activity; gold bar courier scams in which customers are convinced to liquidate portfolios and hand physical metals to "couriers" crypto confidence schemes relying on phony apps; and mail-theft-related check fraud. In parallel, FINRA sees persistent new account fraud and account takeovers, increasingly enabled by GenAI through highly targeted phishing, voice clones used in call-center interactions, AI-generated identity documents, and deepfake "selfies" that defeat automated KYC.

The Report expects firms to incorporate these typologies into their risk-based AML and fraud programs, CIP/CDD controls, independent testing, and training. It emphasizes the importance of robust identity verification at onboarding and during investigations, careful scrutiny of omnibus accounts and small-cap offerings, clear escalation paths for suspicious activity, and use of available tools such as FINRA Rule 2165 (temporary holds) and trusted contact information when exploitation is suspected.

GENAI: GOVERNANCE, RISK, AND AI AGENTS

For the first time, FINRA devotes a standalone section to GenAI. The central message is that FINRA's rules are technology-neutral, meaning using GenAI does not change a firm's obligations under supervision, communications, recordkeeping, outsourcing, or fair-dealing standards. However, GenAI amplifies many existing risks and introduces new governance challenges.

FINRA notes that most current use cases are internal and efficiency-oriented such as summarization and information extraction, conversational assistants, coding support, synthetic data generation, and workflow automation. But even internal deployments can impact supervisory systems and decision-making. The Report warns about "hallucinations" (confident but incorrect outputs) and bias (skewed outputs due to limited or outdated training data) and expects firms to test for and manage these risks, especially where GenAI touches regulatory analysis, surveillance, customer communications, or product design.

Firms are urged to implement enterprise-level GenAI oversight, with formal review and approval processes for new use cases; model risk management adapted to GenAI; testing for accuracy, reliability, privacy, and bias; logging of prompts and outputs; and appropriate human-in-the-loop

review. FINRA also flags AI “agents,” autonomous systems that plan and execute tasks, as an emerging concern.

THIRD-PARTY AND TECHNOLOGY RISK

The Report also reinforces FINRA’s longstanding view that outsourcing does not outsource responsibility. Firms must maintain a supervisory system reasonably designed to oversee activities performed by vendors, including technology, AML monitoring, cybersecurity, and key back-office functions. FINRA notes more frequent cyber incidents and outages at vendors and stresses the importance of understanding concentrations of systemic risk where many firms rely on the same providers.

In 2025, FINRA enhanced its own capabilities by launching Cyber & Operational REsilience (CORE), which collects and shares cyber and technology risk intelligence with potentially affected firms. The Report encourages firms to keep FINRA apprised of changes in critical vendors and to integrate vendor-related scenarios into incident response planning and testing.

Effective practices include maintaining detailed vendor inventories; structured initial and ongoing due diligence that covers security, resilience and any use of GenAI; contractual limits on how vendor tools may consume and use firm and customer data; continuous monitoring for vulnerabilities and breaches; coordinated incident response with vendors; and disciplined off-boarding to ensure data is returned or destroyed and access is revoked.

CRYPTO ASSETS

The Report reiterates that FINRA’s focus is on member firms’ crypto activities, especially where crypto assets are securities or are offered and sold as investment contracts. FINRA highlights enforcement issues around communications (Rule 2210) that misstate or omit risks, overstate protections (e.g., SIPC coverage), or make unsound comparisons to traditional investments, including content disseminated through influencers.

FINRA also continues to see deficiencies in firms’ due diligence on crypto-related private placements and products, AML programs that do not adequately address crypto-related risks, and operational issues such as improper ACATS rejections when customers maintain associated crypto accounts with affiliates. The Report expects firms to understand the legal basis for unregistered offerings, the mechanics and risk profile of crypto securities, and to use on-chain analytics where appropriate in AML and fraud monitoring.

RETAIL COMMUNICATIONS, SOCIAL MEDIA, AND AI-GENERATED CONTENT

FINRA’s communications findings have a strong digital flavor. Many firms lack robust supervision and recordkeeping around social media influencers acting on the firm’s behalf, including failure to pre-approve static content, supervise interactive content, or archive posts as required. Mobile app interfaces and push notifications are another area of concern, particularly where they do not adequately explain products (options, margin, complex or crypto-linked strategies), understate risk, or use gamified “nudges” that are promissory or misleading. When GenAI is used to draft or deliver communications, FINRA expects full compliance with existing standards: communications must be fair and balanced, consistent with products actually offered, and properly supervised and retained. Chatbots interacting with customers are treated as firm communications and must be

supervised and archived accordingly. References to AI-enabled products or services must accurately reflect how AI is used and balance potential benefits with clear discussion of risks.

REGULATION BEST INTEREST AND COMPLEX PRODUCTS

Regulation Best Interest (Reg BI) continues to be a central focus. The Report details failures under the Care Obligation (inadequate product due diligence, recommendations inconsistent with customer profiles, insufficient consideration of costs and reasonably available alternatives, weak documentation of account-type and rollover recommendations), as well as under the Conflict of Interest, Disclosure, and Compliance Obligations. Many of these issues are most acute around complex or higher-risk products, including variable annuities, RILAs, options, and certain private placements.

In private placements, FINRA emphasizes that firms must conduct reasonable investigations of issuers, offerings and management; respond to red flags; maintain evidence of due diligence; and comply with private placement filing requirements. FINRA notes continuing concerns with pre-IPO fund offerings, including misstatements about holdings and access to pre-IPO shares.

In the annuities space, FINRA highlights problematic exchange patterns, including transactions that increase fees, restart surrender periods or forfeit valuable riders without sufficient benefit, and notes that many firms lack robust WSPs, data and surveillance for RILA recommendations. As an effective practice, FINRA suggests applying Rule 2330-style heightened controls to RILAs, with documented rationales, principal review, and exchange trend monitoring.

MARKET INTEGRITY: CAT, BEST EXECUTION, MANIPULATION, MARKET ACCESS, AND EXTENDED HOURS

The market integrity section touches several pillars. For the Consolidated Audit Trail (CAT), FINRA continues to find incomplete, inaccurate and untimely reporting, weak error correction and insufficient oversight of third-party reporting agents. Firms should be able to map internal records to CAT fields, systematically review CAT feedback, and sample reported data against trade blotters.

Best execution under FINRA Rule 5310 remains a core obligation. FINRA expects “regular and rigorous” reviews of execution quality that genuinely compare venues and order types, consider the impact of payment for order flow and venue incentives, and result in modifications or documented justifications where appropriate. The Report also highlights continuing inaccuracies and omissions in Rule 606 order routing disclosures and expects firms to have WSPs that ensure accuracy, completeness, and timely publication.

Manipulative trading, particularly in small-cap exchange-listed issuers, remains a high-priority surveillance area. FINRA describes evolving pump-and-dump schemes that exploit nominee accounts, foreign omnibus accounts, undisclosed secondary offerings and, increasingly, account takeover-driven purchases. Firms are expected to tailor surveillance to their business and customer base and to integrate these patterns into AML and market abuse monitoring.

Under the Market Access Rule (SEA Rule 15c3-5), FINRA expects pre-trade financial and regulatory risk controls that are calibrated to firms’ business models and demonstrably reasonable, with clear documentation and controls over intra-day adjustments. Overreliance on

venue-provided controls, without firm-level oversight, is viewed as inadequate. Firms are also expected to conduct holistic post-trade reviews for manipulative activity and document annual effectiveness reviews.

Extended-hours trading triggers familiar obligations: clear and prominent risk disclosures under Rule 2265, incorporation of extended-hours orders into best execution, CAT and TRF reporting, and supervisory processes that address lower liquidity, wider spreads and venue-specific price bands overnight. FINRA also expects firms to think about operational readiness and customer support during overnight trading sessions.

FINANCIAL RESPONSIBILITY, LIQUIDITY, AND CUSTOMER PROTECTION

The Report underscores ongoing issues and new requirements under the net capital rule, customer protection rule, and liquidity management expectations. FINRA continues to identify improper revenue and expense recognition, misclassified assets and liabilities, and incorrect haircuts or OCC charges, particularly in underwriting arrangements. It points to recent SEC actions requiring EDGAR submission of annual reports, forthcoming XBRL tagging requirements for FOCUS reports, and amendments to customer and PAB reserve computations. Most notably, the requirement for certain firms to move to daily reserve computations by June 30, 2026, with corresponding funding and liquidity implications.

FINRA's Supplemental Liquidity Schedule (SLS) has become an important supervisory tool, and the Report notes recurring SLS errors, such as misidentified counterparties, incomplete reporting of securities borrowing and lending, and inaccurate collateral data. Firms are expected to maintain liquidity governance frameworks, run stress tests that reflect both firm-specific and market-wide shocks, and maintain contingency funding plans that realistically account for contractual covenants and the potential unavailability of certain funding sources under stress.

Under the Customer Protection Rule (Rule 15c3-3), FINRA continues to observe weaknesses in reserve formula computations, customer vs. noncustomer classifications, management of suspense items, possession or control of customer securities, and reconciliations with external custodians. FINRA stresses the importance of experienced FINOPs with appropriate access to books and records and of ongoing variance analyses and control testing.

SENIOR INVESTORS AND TRUSTED CONTACTS

The Report reaffirms FINRA's focus on senior and vulnerable investors. It notes that many firms still fail to make reasonable efforts to obtain trusted contact information (Rule 4512), do not provide customers with clear disclosures about how trusted contacts may be used, and rely on Rule 2165 (temporary holds) without documented training or internal review procedures. FINRA encourages firms to integrate senior investor protection into their broader fraud and AML frameworks, including escalation protocols that involve trusted contacts, Adult Protective Services and law enforcement where appropriate, and to provide staff with practical "playbooks" and training on recognizing exploitation and diminished capacity.

PRACTICAL IMPLICATIONS

In practice, the Report functions as a detailed "to-do list" for 2026. Firms should map its topics to their own business activities, update risk assessments, and then prioritize enhancements to

WSPs, surveillance, testing, and training. This is particularly important in the areas of cyber and fraud (including GenAI-enabled threats), GenAI governance, Reg BI and complex products, digital communications, market integrity controls, liquidity management, and senior investor protection. While the Report does not introduce new binding rules, it sets out the standards against which FINRA will evaluate whether a firm's compliance program is reasonable, risk-based and responsive to today's investor and market risks.

The Division of Examinations Publishes a Risk Alert to Promote Compliance with the Marketing Rule

12.16.25

The Securities and Exchange Commission's (the SEC) Division of Examinations (the Division) issued a Risk Alert on December 16, 2025 to promote investment advisers' compliance with amended Rule 206(4)-1 (the Marketing Rule or the Rule)¹ under the Investment Advisers Act of 1940 (the Advisers Act). The Risk Alert addresses observations regarding advisers' satisfaction of disclosure requirements and oversight and compliance practices under the Testimonials and Endorsements Provisions, as well as advisers' due diligence and disclosure requirements under the Third-Party Ratings Provisions.

BACKGROUND ON THE MARKETING RULE

Applicable to investment advisers subject to Section 203 of the Advisers Act, the Marketing Rule is the SEC's comprehensive framework governing how such advisers may market their services and investment strategies. Amended by the SEC in 2020, the most recent changes became effective November 2022.

Designed "to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business," the Marketing Rule's framework includes requirements and guidance relating to testimonials, endorsements, and third-party ratings.²

TESTIMONIALS AND ENDORSEMENTS³

Clear and Prominent

The Marketing Rule permits advisers to use testimonials and endorsements in advertisements, but only if they meet specific disclosure, oversight, and eligibility conditions. At the time the advertisement is disseminated, the adviser must ensure there are clear and prominent disclosures stating:

¹ SEC, [Final Rule: Investment Adviser Marketing](#), Advisers Act Rel. No. 5653 (Dec. 22, 2020) (Marketing Rule Adopting Release) (adopting amendments under the Advisers Act to update the rules that govern adviser marketing). The Marketing Rule applies to investment advisers registered or required to be registered with the SEC under Section 203 of the Advisers Act.

² Advisers Act 206(4)-1.

³ Advisers Act 206(4)-1(b).

- Whether the person giving the testimonial⁴ or endorsement⁵ is a current client or investor;
- Whether the person is being compensated (directly or indirectly);
- The material terms of that compensation; and
- Any material conflicts of interest arising from the relationship or compensation arrangement.

The SEC staff has observed widespread noncompliance with the Marketing Rule’s testimonial and endorsement requirements, particularly with respect to disclosures. Testimonials and endorsements on adviser websites, d/b/a sites, social media, and referral or review platforms often lacked clear and prominent disclosures about whether the promoter is a client, whether the promoter is compensated and on what terms, and any related conflicts of interest. Even where disclosures existed, they were frequently ineffective — buried in small print, placed away from the testimonial, or accessible only via hyperlinks. The staff also noted that some advisers failed to recognize that lead generators, influencers, referral networks, and incentivized client reviews are endorsements subject to the Rule.

OVERSIGHT

Advisers also must oversee promoters and, in most cases, enter into written agreements with them. The adviser must have a reasonable basis for believing that the testimonial or endorsement, including the required disclosures, complies with the Marketing Rule. Written agreements with compensated promoters generally must describe the scope of the promotional activities and the terms of compensation. While there is a limited de minimis exception (for total compensation of \$1,000 or less over the preceding 12 months) and a partial exemption for certain affiliated personnel, advisers are prohibited from compensating “ineligible persons” — *i.e.*, those subject to specified disqualifying events — where the adviser knows or should know of the disqualification.

The SEC identified weaknesses in oversight, documentation, and use of exemptions. Some advisers lacked written agreements with compensated promoters or used agreements that did not adequately describe the scope of promotional activities or compensation terms. Others misapplied the de minimis exception by evaluating each payment separately rather than total compensation over a 12-month period. Examinations also found instances where advisers

⁴ Advisers Act 206(4)-1(e)(17). (“Testimonial means any statement by a current client or investor in a private fund advised by the investment adviser: (i) About the client or investor’s experience with the investment adviser or its supervised persons; (ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.”).

⁵ Advisers Act 206(4)-1(e)(5) (“Endorsement means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that: (i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s experience with the investment adviser or its supervised persons; (ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.”).

compensated ineligible persons despite disqualifying disciplinary histories, and many advisers had not adequately updated or implemented their compliance policies and procedures to address the use of testimonials and endorsements under the Marketing Rule.

THIRD-PARTY RATINGS⁶

The Marketing Rule permits advisers to use third-party ratings in advertisements, but only if they satisfy specific due diligence and disclosure requirements. An adviser must have a reasonable basis for believing that any questionnaire or survey used to prepare the rating makes it at least as easy to provide unfavorable as favorable responses and is not designed or structured to produce a predetermined result.

In addition, the adviser must provide, or have a reasonable basis to believe the rating includes, clear and prominent disclosures of key information, including:

- The date of the rating;
- The period on which the rating is based;
- The identity of the third party that created and tabulated the rating; and
- Whether the adviser directly or indirectly compensated the third party in connection with obtaining or using the rating.

Any such compensation — including fees for consideration, logo use, reprints, or enhanced visibility — must be clearly described so that investors can evaluate potential conflicts of interest.

The staff observed that many advisers are out of compliance with the Rule when using third-party ratings in advertisements. Advisers frequently relied on ratings in websites, social media, pitchbooks, brochures, press releases, blogs, newsletters, and similar materials without adequately assessing the underlying questionnaires or surveys, and often lacked a reasonable basis to believe the rating process was neutral and not designed to produce predetermined, favorable results. In many cases, firms had no documented process or supporting records demonstrating this required due diligence.

The staff also identified recurring disclosure deficiencies. Advertisements often omitted clear and prominent disclosures of the rating date, the period covered, or the identity of the third-party rating provider, and a logo alone was sometimes used in place of a meaningful identification. Some advisers listed multiyear award ranges that included years in which they did not actually receive the rating. In addition, advisers frequently failed to clearly and prominently disclose that they compensated the rating provider — such as by paying for consideration, logo use, reprints, enhanced exposure, or referral-related benefits — or buried these disclosures in footnotes, small print, or hyperlinks.

⁶ Advisers Act 206(4)-1(c).

CONCLUSION

The Division's published observations make clear that it is paying attention to advisers' compliance with the Marketing Rule, particularly around testimonials, endorsements, and third-party ratings. This Risk Alert signals that advisers should expect continued exam focus on clear and prominent disclosures, oversight of promoters, and documented due diligence on third-party ratings. In response, advisers and their legal counsel should review their marketing practices, agreements, and policies and procedures with the expectation that these areas will remain an enforcement and examination focus.

For a copy of the Division of Examination's Risk Alert, click here: [Risk Alert](#).

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