MAY 2026

Investment Management **Update**

In This Update

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

Rulemaking and Guidance

SEC Small Business Advisory Committee to Continue Discussion on Regulatory Framework for Finders and Begin Exploring the Private Secondary Market

01.22.26

On January 22, the Securities and Exchange Commission's (SEC) Small Business Capital Formation Advisory Committee (Committee) announced a public meeting at the SEC's headquarters in Washington, D.C., on Tuesday, February 24 at 10 a.m. ET.

The Committee provides advice and recommendations to the SEC on rules, regulations, and policy matters relating to small businesses.

The meeting continued the Committee's discussion on potential regulatory improvements regarding "finders" who assist companies with raising capital in private markets from accredited investors. Steven Jafarzadeh, chief compliance officer and partner at Stonehaven, presented to the Committee to share insights regarding how the current regulatory framework affects "finders".

During the afternoon session of the meeting, the Committee heard from the SEC Office of the Advocate for Small Business Capital Formation staff, who provided an overview of the office's 2025 Staff Report, including in-depth data on the state of capital raising activity from startups to small-cap companies. This session also explored the private secondary market and how it has grown to fill liquidity needs and meet investor demand for private securities and its impact on the venture landscape.

In recent years, continuation funds, special purpose vehicles, and private tender offers have become more prevalent as ways to rebalance portfolios and provide liquidity to investors and employees. To better understand the private secondary market and related deal flow drivers, trends, opportunities, and challenges that stem from private secondary transactions, the Committee heard from Emily Zheng, senior research analyst at Pitchbook; Nigel Dawn, managing director at Evercore; and William Duval, special counsel at Cooley LLP.

01.27.26

The Financial Industry Regulatory Authority (FINRA) has proposed a sweeping update to how broker-dealers handle outside business activities and private securities transactions. FINRA seeks to consolidate and replace Rules 3270 (Outside Business Activities of Registered Persons) and 3280 (Private Securities Transactions of an Associated Person) with a single new rule: Rule 3290 (Outside Activities Requirements). The proposal preserves the core investor protection concepts of the existing rules but refocuses them on investment-related activities.

From Rules 3270 and 3280 to a Single Framework

Rule 3270 currently requires registered persons to provide prior written notice to their member firm before engaging in any business activity outside the scope of their relationship with the firm, *i.e.*, an "outside business activity" (OBA). Rule 3280 governs "private securities transactions" (PSTs) by associated persons, requiring written notice and, where selling compensation is involved, member approval, books and records treatment, and supervision as if the transactions were executed through the member.

This dual structure forces firms to classify each outside role as an OBA or a PST, a distinction that has been particularly complex for investment advisory activity. Over time, this patchwork has become duplicative and not always aligned with actual risk. Rule 3290 is FINRA's attempt to rationalize this space.

The Pivot to Investment-Related Activity

A central innovation is the concept of "investment-related activity." Rather than requiring notice and review for any and all outside business activities, Rule 3290 would focus on activities that pertain to financial assets such as securities, crypto assets, commodities, derivatives, currency, banking, real estate, and insurance. It explicitly includes roles with broker-dealers, issuers, investment advisers, funds, futures firms, banks, and similar institutions, and it captures personal securities transactions away from the firm (buying away), except where already governed by Rule 3210.

FINRA's retrospective review confirmed that current OBA rules require reporting of countless noninvestment side gigs, such as refereeing, bartending, and rideshare driving, which are unlikely to confuse customers or implicate the firm's business. Under Rule 3290, those activities would fall outside the rule's scope. The expectation is that firms will no longer be inundated with low-value OBA notices and can instead focus compliance resources on outside activities that customers could reasonably view as part of a representative's financial services practice.

Notice and Member Assessment

The proposal leaves the basic notice architecture largely intact. Registered persons would still be required to provide prior written notice of any investment-related outside

activity. Associated persons, whether registered or not, would still be required to provide prior written notice of any outside securities transaction, describing the activity or transaction, the person's role, and whether selling compensation will be received. Material changes would require updated notice.

On receipt of a notice, members must determine whether the activity is properly characterized (outside activity versus outside securities transaction; with or without selling compensation), whether it involves the customer of the associated or registered person, whether it could interfere with the person's responsibilities, and whether customers or the public might reasonably view the activity as part of the firm's business.

Outcomes differ depending on the type of activity. For a registered person's investment-related outside activity, the firm must consider whether to impose conditions, limitations, or a prohibition, but is not required by Rule 3290 to acknowledge, approve, or supervise the activity. For an associated person's outside securities transaction without selling compensation, the firm must provide prompt written acknowledgment and may impose conditions on the activity, but again is not required to supervise. For an outside securities transaction with selling compensation, the firm must decide whether to approve (with or without conditions) or disapprove, must communicate that determination in writing, and if it approves, must record the transaction and supervise it as if executed on behalf of the member. In that respect, Rule 3290 preserves the familiar PST treatment for compensated away business. FINRA also emphasizes that nothing in the proposal alters firms' existing obligation to investigate and respond to "red flags" under Rule 3110.

Targeted Exclusions

To further refine the rule's scope, FINRA proposes several explicit exclusions. Activity performed on behalf of the member or an affiliate would not be treated as "away" activity, on the premise that firms can impose effective controls across affiliated business lines.

The proposal also excludes personal investments in nonsecurities. FINRA has clarified that personal transactions in nonsecurity crypto assets, such as bitcoin, fall outside Rule 3290, and therefore require no prior notice or approval under this rule. Where a crypto asset is a security, personal transactions would require prior written notice and acknowledgment, but absent selling compensation, would not require approval.

Similarly, Rule 3290 would exclude the purchase, sale, rental, or lease of a main home and up to two secondary homes, if owned in specified ways, including through entities or trusts controlled by the associated person and immediate family. FINRA views these personal real estate transactions as low risk from the perspective of customer confusion and firm exposure. Existing exclusions for no-compensation transactions among immediate family and for transactions already subject to Rule 3210 (including many mutual funds, 529 plans, and variable contract transactions) are also retained.

Outside Investment Advisor (IA) Activities

One of the most notable changes relates to outside investment advisory activity at unaffiliated advisers. Under longstanding guidance, associated persons' IA activities that

went beyond mere recommendation and involved effecting or placing orders were treated as "participation in" private securities transactions, triggering supervision and recordkeeping obligations under Rule 3280. Broker-dealers have struggled to supervise unaffiliated IA business given information and privacy constraints, and have faced litigation risk tied to activities already regulated under the Investment Advisers Act and state law.

The proposal addresses these concerns by treating an associated person's activity at a registered investment adviser as an outside activity, not an outside securities transaction. The associated person must still provide prior written notice, and the member must still conduct an upfront assessment, but the member is not required by FINRA rules to supervise or maintain books and records for the IA activity. Firms remain free to impose contractual supervisory arrangements if they choose. For many firms, this will be a meaningful reduction in regulatory burden and ambiguity, though it underscores the continuing importance of front-end assessment and client disclosure.

Banks, GLBA/Reg R, and Exemptive Authority

Rule 3290 also clarifies how certain bank and networking arrangements fit into the framework. Where an associated person's activity at a nonaffiliate is conducted under a contract between the member and another entity (for example, a bank networking arrangement) and is on behalf of the member, it is not treated as an outside activity but remains within the firm's ordinary supervisory responsibilities. By contrast, securities activity for a nonaffiliate that is not covered by such a contract but qualifies under Gramm-Leach-Bliley Act or Regulation R exceptions is treated as an outside activity rather than an outside securities transaction, subject to notice and assessment but not supervision and recordkeeping as a PST.

Recognizing that Rule 3290's broad scope may create edge cases, FINRA also proposes general exemptive authority under the Rule 9600 Series. For good cause shown, and where consistent with investor protection and the public interest, FINRA staff could grant conditional or unconditional exemptions from particular provisions.

What Firms Should Be Doing Now

Although Rule 3290 is still a proposal, it is detailed enough that firms can begin planning. Broker-dealers should inventory their current OBA and PST programs and consider how their populations of outside activities and IA relationships map onto the proposed framework. Policies and forms built around "any business activity" will need to be revised to focus on investment-related activity and to incorporate the new exclusions, especially for personal nonsecurities investments and real estate. Training will need to explain the new definitions, including the distinction between personal crypto investing and investment-related business in digital assets.

Most importantly, firms should consider how to recalibrate their risk-based supervisory approach. If Rule 3290 is adopted substantially as proposed, regulators will expect to see

less time spent on immaterial activities and more on outside roles that customers might reasonably believe fall under the firm’s umbrella.

FINRA Adopts Amendments to the Capital Acquisition Broker Rules

02.23.26

FINRA has adopted amendments to the Capital Acquisition Broker (CAB) rules designed to reduce regulatory friction while preserving CABs' limited, institutional-focused business model and investor protections. The amendments took effect on March 25, 2026.

Overview: Why the Changes Matter

CABs are FINRA member firms that assist with capital formation and strategic transactions for institutional and other sophisticated parties. They do not carry customer accounts, hold customer funds or securities, or engage in trading or market-making, and therefore operate under a more tailored rule set than full-service broker-dealers. The amendments aim to:

- Expand the types of investors CABs can work with in private offerings.
- Broaden the range of parties CABs may represent in M&A and other transactions.
- Align CAB rules more closely with broader FINRA standards on private securities transactions and compensation.
- Update CAB treatment of M&A brokers to conform to the SEC's statutory exemption.

Key Change 1: Expanded "Institutional Investor" Definition – Including Certain Employees

What changed:
FINRA has expanded the definition of "institutional investor" in CAB Rule 016(i) to include certain "eligible employees" of an issuer (or its controlling persons) for which the CAB is providing permitted services. "Eligible employees" include:

- "Knowledgeable employees" of private funds and their advisers (as defined in Investment Company Act Rule 3c-5); and
- Similar officers, directors, and policymaking employees of other issuers.

This means CABs may now participate in offerings of unregistered securities to a broader pool of sophisticated insiders, not just traditional institutions such as banks, insurance companies, funds, and governmental entities.

Reg BI / Form CRS note:
If an eligible employee qualifies as a "retail customer" under Regulation Best Interest or a "retail investor" under Form CRS, CABs must comply with those obligations when making recommendations. CABs and clients should be prepared to identify when these rules apply.

Key Change 2: CABs Can Represent More Parties in Offerings and Change-of-Control Transactions

Newly issued, unregistered securities
Previously, CABs could act as a placement agent or finder only **for the issuer** in

offerings of newly issued, unregistered securities to institutional investors. Under the amendments, CABs may now also:

- Act as placement agent or finder **for institutional investor buyers** in these offerings.

Change-of-control transactions
Before the amendments, CABs could act only for the issuer or a "control person" in change-of-control transactions involving privately held companies. Now, CABs may:

- Represent **either buyer or seller** in a change-of-control transaction; and
- Represent **both buyer and seller** in the same transaction if:
  - The CAB clearly discloses in writing whom it represents; and
  - Both parties provide written consent to the joint representation.

FINRA also clarifies "control" by focusing on who has the power to direct the company's management or policies after the transaction, with a presumption of control at specified ownership thresholds.

Key Change 3: Expanded Role in Secondary Transactions of Unregistered Securities

Historically, CABs could be involved in secondary transactions of unregistered securities only when those transactions involved a change of control of a privately held company.

New CAB Rule 016(c)(1)(H) now permits CABs to:

- Act as a placement agent or finder for institutional investors seeking to **buy or sell unregistered securities in secondary trades**, so long as:
  - Both the buyer and seller are institutional investors; and
  - The transaction qualifies for an exemption from registration (for example, under Securities Act Rules 144 or 144A).

Key Change 4: Private Securities Transactions by CAB Associated Persons

Previously, persons associated with a CAB were effectively barred from participating in private securities transactions (PSTs). The amendments now permit CAB associated persons to participate in PSTs under a framework aligned with FINRA Rule 3280, including:

- **Written notice requirement:** Before participating in a PST, the associated person must notify the CAB in writing, describing the transaction, their role, and whether they will receive selling compensation.
- **If selling compensation is involved:**
  - The CAB must approve or disapprove in writing.
  - If approved, the CAB must record the transaction and supervise the

associated person's involvement as if the transaction were executed through the CAB.

  - If disapproved, the associated person cannot participate.

- **If no selling compensation is involved:**

  - The CAB must promptly acknowledge the notice in writing and may impose conditions on participation.

Key Change 5: Securities as Compensation

New CAB Rule 511 expressly allows CABs to receive securities issued by a privately held issuer client as compensation for services permitted under CAB Rule 016(c)(1), provided that:

- The receipt, exercise, and subsequent sale of those securities do not cause the CAB to engage in activities that CABs are otherwise prohibited from performing.

This codifies existing FINRA staff guidance around securities-based compensation for CABs.

Key Change 6: Alignment With the SEC's M&A Broker Exemption

FINRA has updated CAB Rule 016(c)(1)(G) to reflect the statutory exemption for M&A brokers in Section 15(b)(13) of the Securities Exchange Act of 1934, which replaced the SEC's now-withdrawn 2014 M&A Brokers no-action letter. Under the amended rule, CABs may:

- Effect securities transactions in connection with the transfer of ownership and control of a privately held company in accordance with:

  - Section 15(b)(13); or

  - Any SEC rule, release, interpretation, or no-action letter allowing the same or materially similar activities without broker-dealer registration.

What Clients Should Be Doing Now

CABs, issuers, private funds, and institutional investors should consider:

- **Reevaluating use of CABs:**

  - Can CABs play a broader role in primary offerings, secondary liquidity solutions, and M&A transactions under the new rules?

- **Updating policies and procedures:**

  - Incorporate the expanded "institutional investor" and "eligible employee" categories.

  - Build processes to determine when Reg BI and Form CRS apply to eligible employees.

    - Implement or refine PST review, approval, and supervision frameworks for CAB associated persons.
    - Address conflict management and disclosure where a CAB may represent both sides of a transaction.
- **Revisiting compensation structures:**
    - Explore equity or other securities-based compensation for CAB engagements, with controls to ensure CAB activity stays within permitted bounds.

SEC's Division of Enforcement Announces Updates to Enforcement Manual

02.24.26

The SEC's Division of Enforcement has announced substantial revisions to its Enforcement Manual, marking the first comprehensive update since 2017. The revisions are intended to enhance the fairness, transparency, and efficiency of the SEC's enforcement program and to promote greater consistency in investigative and charging practices. The Division has also indicated that the Manual will be subject to review and revision on an annual basis going forward, signaling an ongoing effort to keep enforcement procedures aligned with current practices and policy priorities.

Standardization of the Wells Process

A central component of the revisions concerns the Wells process, through which prospective respondents and defendants are afforded an opportunity to respond to potential staff recommendations for enforcement action before the Commission makes a charging decision. The updated Manual seeks to promote greater uniformity and predictability in this process.

Under the revised framework, recipients of a Wells notice will ordinarily be provided four weeks to submit their Wells response. The Manual further provides that Wells meetings will be scheduled within four weeks of the staff's receipt of a Wells submission and will include a member of the Division's senior leadership. The Manual also offers guidance regarding the types of information and arguments that are most useful to the staff and the Commission in assessing Wells submissions.

These changes are designed to foster more open and informed dialogue between SEC staff and prospective respondents, encourage more consistent treatment across matters, and facilitate more timely resolution of investigations and recommendations, whether by closure of an investigation or by authorization of an enforcement action.

Simultaneous Consideration of Settlements and Waiver Requests

The updated Manual also addresses the coordination of settlement recommendations with related requests for waivers from automatic disqualifications and other collateral consequences that may arise from an SEC enforcement action. The revisions reflect the Commission's restoration of its prior practice of permitting settling parties to request simultaneous consideration of settlement offers and associated waiver requests.

This approach is intended to provide parties with greater visibility into the full regulatory and collateral implications of a proposed settlement, to conserve Commission and staff resources, and to promote more efficient and transparent resolution of enforcement matters. In particular, concurrent consideration of settlement and waiver issues may allow parties to better assess, at the time of resolution, the broader impact of an SEC order on their ongoing activities and regulatory status.

Additional Procedural and Policy Updates

Beyond these headline changes, the revised Enforcement Manual incorporates several additional updates to the Division's procedures and guidance, including:

- A more detailed articulation of the Division's framework for evaluating cooperation by entities and individuals, including how cooperation may affect the determination and calculation of civil penalties;
- Measures intended to encourage more consistent internal collaboration within the Division of Enforcement;
- Updates to the formal order process governing the opening and conduct of formal investigations; and
- An updated framework for referrals to criminal authorities, better aligning referral practices with current enforcement priorities and inter-agency coordination.

Collectively, these revisions are intended to align the Manual with the Division's current best practices, provide clearer expectations to market participants, and enhance the transparency and predictability of the SEC's enforcement program.

Implications for Regulated Entities and Market Participants

For registrants, public companies, financial institutions, and individuals that may become involved in SEC investigations, the revised Enforcement Manual signals a more structured and standardized approach to key phases of the enforcement process, particularly at the Wells stage and in the context of settlements with potential collateral regulatory consequences. The move to annual reviews of the Manual suggests that the Division's processes and priorities may continue to evolve.

Clients facing, or at risk of, SEC scrutiny should consider these developments when assessing their engagement with the SEC staff, including strategy around Wells submissions, settlement discussions, cooperation considerations, and potential collateral consequences of any resolution.

FINRA Adopts Amendments to Rule 3220 (Influencing or Rewarding Employees of Others)

02.27.26

FINRA Adopts Amendments to Gifts Rule (Rule 3220)
Effective Date: March 30, 2026

Overview
FINRA has adopted amendments to FINRA Rule 3220 (Influencing or Rewarding Employees of Others) (the Gifts Rule) as part of its FINRA Forward initiative to modernize its regulatory framework and support member compliance. The Gifts Rule addresses the provision of gifts by member firms and their associated persons to employees of institutional customers, vendors, and counterparties where such gifts are "in relation to the business of the employer of the recipient." The rule continues not to apply to gifts to a firm's own associated persons or to individual retail customers.

FINRA has also adopted conforming amendments to increase the gift limit to the same level in FINRA Rule 2310 (Direct Participation Programs), Rule 2320 (Variable Contracts of an Insurance Company), Rule 2341 (Investment Company Securities), and Rule 5110 (Corporate Financing Rule – Underwriting Terms and Arrangements).

Key Changes to Rule 3220

Increased Annual Gift Limit
The amendments increase the annual per-recipient gift limit from $100 to $300. FINRA has indicated that this adjustment is intended to reflect inflation since the limit was last raised in 1992 and to remain appropriate for a number of years, subject to periodic review.

Codification of Guidance and Supplementary Material

New supplementary material to Rule 3220 codifies existing FINRA guidance and interpretations, and provides greater clarity on how the Gifts Rule applies in practice, including with respect to:

- **Gifts incidental to business entertainment:** Gifts provided in connection with business entertainment are subject to the $300 limit, although the cost of the entertainment itself is not included in calculating the value of the gift.
- **Valuation and aggregation:** The amendments clarify valuation standards (including special treatment for event tickets) and require aggregation of all gifts from the firm and its associated persons to a given recipient for purposes of applying the $300 limit.
- **Supervision and recordkeeping:** Firms must maintain supervisory systems and procedures reasonably designed to ensure that business-related gifts and gratuities are reported, reviewed for compliance with the rule, and appropriately recorded.

- **Excluded categories of gifts:** The rule codifies that certain categories of gifts are excluded from both the $300 limit and the recordkeeping requirements, including:
    - Personal gifts given for infrequent life events (*e.g.*, weddings, births), where personal in nature and not business-related;
    - Customary and reasonable bereavement gifts;
    - Gifts of *de minimis* value and nominal promotional items bearing the member's logo;
    - Customary, decorative commemorative items recognizing a business transaction (even if over $300); and
    - Certain donations to individuals affected by natural disasters declared major disasters by the president.

The amendments also make it explicit that the Gifts Rule does not apply to gifts from a member to its own associated persons or to gifts to individual retail customers.

Exemptive Relief

The amended rule expressly authorizes FINRA staff to grant exemptions from Rule 3220 for good cause shown, providing a formal mechanism for firms to seek relief where the purposes of the rule would not be undermined by an exception.

Practical Implications for Member Firms

In advance of the March 30 effective date, member firms should:

- Update written supervisory procedures, compliance policies, and training materials to reflect the new $300 limit and the codified guidance;
- Review and, as necessary, enhance gift and entertainment tracking systems to ensure appropriate valuation, aggregation, and documentation at the recipient level; and
- Reassess treatment of personal, bereavement, *de minimis*, promotional, commemorative, and disaster-related gifts to ensure alignment with the revised rule and exclusions.

The amendments are intended to modernize and clarify FINRA's gifts framework while preserving the underlying objective of preventing conflicts of interest and other improprieties arising from gifts provided in a business context.

03.05.26

Fund of Funds Arrangements – Frequently Asked Questions
Updated: March 5, 2026

Overview

On March 5, the SEC's Division of Investment Management staff published new FAQs on Rule 12d1-4 under the Investment Company Act of 1940 (the Fund of Funds Rule), adopted in October 2020. Rule 12d1-4 allows registered investment companies and business development companies (BDCs) to invest in other funds in excess of the familiar Section 12(d)(1) limits (3% of an acquired fund's voting securities, 5% of assets in any one fund, and 10% of assets in funds overall).

The FAQs clarify how the staff expects funds to apply Rule 12d1-4 in practice, with a particular focus on when a fund of funds investment agreement is required and how to treat certain structured credit investments for purposes of the rule's "complex multi-tier fund structure" limitations.

Key Clarifications

Fund of funds agreements are required whenever a fund relies on Rule 12d1-4

The FAQs confirm that an acquiring fund must enter into a fund of funds investment agreement with an acquired fund any time it relies on Rule 12d1-4 to exceed any of the Section 12(d)(1)(A) limits — whether the fund is exceeding the 3% voting securities limit, the 5% single-fund asset limit, or the 10% aggregate asset limit.

If the acquiring fund relies on the rule only to exceed the 5% or 10% limits (and does not cross the 3% voting securities threshold), the agreement does not need to include "material terms" tied to the specific findings required when a fund exceeds the 3% limit, because those findings are not triggered. The staff emphasizes that the agreement requirement is intended to give funds a mechanism to negotiate appropriate protections to protect their interests.

UITs are subject to the same investment agreement requirement.

The FAQs make clear that unit investment trusts (UITs) are not treated differently for these purposes. A UIT that relies on Rule 12d1-4 to acquire shares of an acquired fund in excess of any of the Section 12(d)(1)(A) limits must also have a fund of funds investment agreement in place, even if the UIT's position in that acquired fund remains below the 3% ownership limit. Any use of Rule 12d1-4 by a UIT to go beyond the statutory limits triggers the same agreement requirement that applies to management companies.

No retroactive agreement requirement for pre-existing holdings.

Because Section 12(d)(1) is an acquisition-based test, a fund is not required to enter into a fund of funds investment agreement solely because it previously acquired shares of another fund while staying within the statutory limits and without relying on Rule 12d1-4. However, if the acquiring fund later wishes to purchase additional shares of that same acquired fund in reliance on Rule 12d1-4, it must first enter into a fund of funds

investment agreement with that acquired fund.

CLO debt securities need not be counted toward the 10% bucket.
Rule 12d1-4(b)(3)(ii) generally limits an acquired fund's investments in other funds and certain "private funds" to 10% of its total assets (the 10% bucket). Many CLO issuers rely on the private fund exclusions in Sections 3(c)(1) or 3(c)(7), so on its face, CLO debt could appear to count toward this 10% limit.

The staff, however, draws a distinction between CLO debt and more traditional "fund-like" investments (such as hedge funds or private equity funds). CLO debt is backed by the cash flows of a pool of loans and operates more like a financing instrument, while equity interests in pooled vehicles give investors direct economic exposure to the underlying assets and raise the multi-tier structure concerns Rule 12d1-4 is aimed at.

Because of this difference, the staff does not believe CLO debt raises the same policy concerns as multitier fund structures. As a result, the staff has stated that it would not recommend enforcement action if an acquired fund does not include debt securities issued by CLOs when calculating the 10% limit under Rule 12d1-4(b)(3)(ii).

Practical Implications for Registered Funds and BDCs

In light of the FAQs, registered funds, BDCs, and their advisers may want to:

- Review all fund of funds arrangements that rely on Rule 12d1-4 to make sure a fund of funds investment agreement is in place whenever the rule is used to exceed the 3%, 5%, or 10% limits, and consider shorter, simpler forms where only the 5% or 10% limits are involved.
- Make sure compliance and trading systems can flag when a fund is first relying on Rule 12d1-4 for additional purchases, so that the required agreements are signed before those purchases are made.
- For UITs, bring documentation and oversight in line with what is used for management companies, including having the same types of agreements and monitoring of reliance on Rule 12d1-4.
- Review how CLO holdings are classified and monitored, clearly separating CLO debt (which may be excluded from the 10% bucket) from CLO equity and other private fund interests (which still count toward the limit).

Overall, the FAQs confirm that fund of funds investment agreements are a key condition of using Rule 12d1-4, while also giving funds some practical flexibility for existing positions and for investments in CLO debt.

SEC Clarifies the Application of Federal Securities Laws to Crypto Assets

03.17.26

The SEC, with the support of the Commodity Futures Trading Commission (CFTC), has issued an interpretive release clarifying how existing U.S. federal securities laws apply to crypto assets and related activities. This is not a new rule, but it does signal how both agencies will analyze digital assets going forward. The interpretation, issued March 17, 2026, is intended to provide a more predictable framework after years of case-by-case "regulation by enforcement."

How the SEC Categorizes Crypto Assets

At the core of the interpretation is a taxonomy of crypto assets. The SEC explains that many tokens are not, by their nature, securities.

Digital Commodities – NOT Securities – Crypto assets that are intrinsically linked to and derive their value from the programmatic operation of a crypto system that is "functional," as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others.

Digital Collectibles – NOT Securities – Crypto assets that are designed to be collected and/or used and may represent or convey rights to artwork, music, videos, trading cards, in-game items, or digital representations or references to internet memes, characters, current events, or trends, among other things.

Digital Tools – NOT Securities – Crypto assets that perform a practical function, such as a membership, ticket, credential, title instrument, or identity badge.

Stablecoins – GENIUS Act Stablecoins NOT Securities – Defined in the GENIUS Act as "payment stablecoin issued by a permitted payment stablecoin issuer." Other stablecoins, however, are evaluated case-by-case and may or may not be securities depending on their structure and marketing.

Digital Securities (or "tokenized securities") – Securities – Financial instruments enumerated in the definition of "security" that is formatted as or represented by a crypto asset, where the record of ownership is maintained in whole or in part on or through one or more crypto networks.

When a Nonsecurity Token Becomes a Securities Offering

The interpretation draws a clear line between what a token is and how it is sold and promoted. A crypto asset that falls into a non-security category — such as a digital commodity, collectible, or tool — can still be part of a securities offering if it is sold under an "investment contract."

Under the *Howey* test, this occurs when there is:

- An investment of money in a common enterprise;

- Based on representations or promises that a team will undertake essential managerial efforts;
- Such that purchasers reasonably expect profits from those efforts.

The SEC emphasizes that:

- It focuses on statements and commitments made by or attributable to the issuer or its authorized agents (for example, whitepapers, websites, social media, investor decks, or other communications under the issuer's control). Statements by independent third parties generally do not, by themselves, create an investment contract.
- The timing and content of those statements matter: detailed promises about future efforts and how they will generate profits for token holders, made before or at the time of sale, weigh toward investment-contract status. Later statements typically do not retroactively convert earlier nonsecurities sales.

For market participants, this means that even if a token is designed to be functional or consumptive, profit-focused fundraising and marketing that emphasize the issuer's future efforts can bring the offering within the securities-law regime.

How and When "Investment Contract" Status Can End

Importantly, the SEC and CFTC recognize that investment contracts do not have to last forever. A nonsecurity crypto asset that was initially sold under an investment contract can cease to be subject to that contract when the relevant promises have been fulfilled, or when the issuer has clearly failed to perform and the contract has effectively run its course. At that point, the token's ongoing trading is analyzed based on its inherent category — for example, as a digital commodity — rather than as a continuing securities offering.

This gives projects that used tokens to raise capital a potential "lifecycle": a period in which securities-law obligations are front-loaded and more intense, followed by a phase where the token may trade as a nonsecurity, provided there is a well-documented end to the relevant commitments. In practice, it will be critical for teams to be clear about what they are promising, to track when those promises are met or terminated, and to be prepared to evidence that transition.

Clarification on Mining, Staking, Wrapping, and Airdrops

The interpretation directly addresses protocol mining, staking, wrapping, and airdrops, emphasizing that outcomes are fact-specific and depend heavily on design and implementation.

Protocol Mining. Protocol-level mining (*e.g.*, proof-of-work), where participants contribute computing power to operate or secure a network and receive protocol-driven rewards, is not an offer and sale of a security in the fact patterns described; rewards are treated as compensation for network services. By contrast, investment schemes where

investors merely buy interests in a mining enterprise without providing such resources can still be securities offerings.

Protocol Staking. Protocol-level staking (*e.g.*, proof-of-stake), where participants lock or delegate nonsecurity digital commodities to secure or validate the network and receive protocol-driven rewards, is likewise not a securities offering in the structures described. This depends on the underlying token being a digital commodity (not a digital security or a token still subject to an investment contract) and on validators, custodians, and liquid-staking providers acting in limited administrative roles, without guaranteeing returns or exercising broad investment discretion over user assets.

Wrapping. Wrapping a non-security token — by depositing a non-security crypto asset that is not subject to an investment contract and receiving a 1:1 redeemable wrapped token to use on another chain — is not, by itself, a securities offering. However, a wrapped token that represents a digital security, or a token still subject to an investment contract, is itself a security and must comply with securities-law requirements.

Airdrops. Airdrops may fall outside the Howey "investment of money" element — and thus outside the investment-contract analysis — where a nonsecurity token is distributed for free and recipients provide no money, goods, services, or other consideration in exchange. The interpretation is narrower than many market practices: if users must take new promotional or economic actions after an airdrop is announced, or if the airdrop involves digital securities, this nonsecurity analysis does not apply. In addition, even if the initial airdrop is not a securities transaction, later promotional sales or structured offerings of the same token can independently trigger securities-law obligations.

Conclusion

Taken together, this interpretation provides a clearer roadmap for how regulators will look at crypto assets and related activities, while reinforcing the need for structured legal and compliance review. Market participants will be wise to understand the SEC's position on the application of federal securities laws to crypto assets and conduct themselves accordingly.

SEC AND SRO NEWS

Keith E. Cassidy Named Director of the Division of Examinations

01.20.26

On January 20, the SEC announced that Keith E. Cassidy has been appointed Director of the Division of Examinations of the SEC. Cassidy has served as the Acting Director of the Division of Examinations since May 2024. As Acting Director, he led several initiatives to bolster the national examinations program, which included developing an examination projection model to improve risk-based resource allocation and adopting a metric-based operational effectiveness framework.

Cassidy first joined the Division of Examinations in 2017 to lead the Technology Controls Program, where he oversaw technology-focused examinations along with the SEC's CyberWatch Program and the Cybersecurity Program Office. He also previously served as Director of the SEC's Office of Legislative and Intergovernmental Affairs. Prior to this current appointment, he served in various roles at the Division of Examinations, including the Deputy Director, Acting Co-Director, and National Associate Director of the Technology Controls Program. Cassidy is also currently the SEC's senior staff representative to the Financial Banking Information Infrastructure Committee, the Cyber Incident Response Council, and the G7 Cyber Experts Group, and serves as the SEC's federal senior intelligence coordinator.

Before joining the SEC staff in 2010, Cassidy was Chief of Staff and Counsel in the Department of Justice's Office of Legislative Affairs and an attorney in the United States Senate.

Furthermore, Cassidy is a Lieutenant Colonel in the U.S. Marine Corps Reserve, currently serving as the Commanding Officer of 4th Reconnaissance Battalion. He holds a J.D. from the George Washington University Law School, an LL.M. in Securities and Financial Regulation from Georgetown Law Center, and a B.A. in history from the University of Virginia. He is also a Certified Information Systems Security Professional (CISSP).

SEC and CFTC Announce Historic Memorandum of Understanding Between Agencies

03.11.26

On March 11, the SEC and the CFTC signed a memorandum of understanding (MOU) that both agencies describe as "historic." The MOU is intended to reset the relationship between the agencies by reducing turf battles, avoiding duplicative regulation, and providing clearer, technology-neutral oversight — particularly in markets where securities and derivatives regimes overlap, including crypto. While it does not change either agency's statutory authority, it creates a formal framework for coordination that will materially affect how policy, examinations, and enforcement play out in practice.

Background

The SEC and CFTC share oversight of increasingly convergent markets such as trading venues, clearinghouses, data repositories, pooled vehicles, intermediaries, and products that sit at the intersection of securities and derivatives. For years, market participants, especially dual registrants, have faced duplicative registrations, overlapping rules, and parallel exams or investigations. The agencies expressly acknowledge that this fragmentation has at times "stifled innovation and pushed market participants to other jurisdictions."

To combat these challenges, the new MOU replaces the 2018 coordination MOU and builds on earlier efforts to forge a partnership between the agencies (including the 2004 security futures MOU). The new MOU emphasizes "minimum effective dose" regulation that supports lawful innovation, fair notice (as opposed to "regulation by enforcement), and a renewed commitment to collaboration. It is accompanied by a Joint Harmonization Initiative co-led by Robert Teply of the SEC and Meghan Tente of the CFTC, which will carry the coordination into concrete workstreams.

Key Points

- **No Change to Statutory Authority, But Clearer Coordination Commitments**
  The MOU repeatedly states that it does not alter, expand, or limit either agency's statutory jurisdiction. Instead, it commits each to abandon a "turf war" mentality and to coordinate where responsibilities intersect, with regular senior-level engagement and designated points of contact.

- **Guiding Principles: Efficiency, Clarity, Risk Focus, and Fair Notice**
  The agencies commit to regulatory efficiency (reducing gaps and duplication), regulatory clarity and consistency, and functional, risk-based oversight that focuses on economic reality rather than labels. They also emphasize fair notice and expressly commit to "not regulating through enforcement," signaling more transparent rulemaking and guidance.

- **Joint Harmonization Initiative and Six Priority Areas**
  Through the Joint Harmonization Initiative, the SEC and CFTC will coordinate in six

key areas: (1) clarifying product definitions via joint interpretations and rules; (2) modernizing clearing, margin, and collateral frameworks; (3) reducing frictions for dually registered venues and intermediaries; (4) providing fit-for-purpose frameworks for crypto and emerging technologies; (5) streamlining regulatory reporting; and (6) coordinating cross-market exams, economic analysis, risk monitoring, surveillance, and enforcement.

- **Impact on Dual Registrants and "Covered Firms"**
  The MOU focuses heavily on "covered firms," including dual-registrant investment advisers/commodity pool operators or CTAs, broker-dealers/FCMs or introducing brokers, clearing agencies/DCOs, swap and security-based swap infrastructures, and swap dealers/security-based swap dealers. For these firms, the agencies will share exam information, coordinate exam planning, and consider joint or aligned exams to reduce burdens and inconsistent expectations.

- **Crypto, Onchain Systems, and "Super-Apps"**
  The MOU explicitly recognizes crypto assets, on-chain and automated systems, and new trading models as blurring traditional lines. The agencies commit to a "fit-for-purpose" framework for crypto and other emerging technologies and to exploring "alternative compliance" and appropriately regulated "super apps" where they can achieve regulatory objectives more efficiently while preserving investor and customer protection.

- **Data Sharing, Analytics, and Procurement Coordination**
  Subject to confidentiality and information security standards, the agencies will share data and analyses on matters of common interest, including direct access to swap and security-based swap data from repositories under appropriate arrangements. They also plan to coordinate procurement (*e.g.*, on-chain market data and analytical tools) and develop complementary analytical capabilities to improve cross-market risk monitoring.

- **Coordinated Enforcement to Avoid Duplicative Outcomes**
  In enforcement, the SEC and CFTC will seek consultation in overlapping matters (including, where appropriate, before Wells notices), coordinate charges and remedies where parallel actions are filed, and align public communications. The aim is to promote consistent and proportional outcomes while avoiding conflicting obligations, though each agency retains full autonomy to enforce its own laws.

- **Robust Confidentiality Framework for Shared Information**
  The MOU sets detailed rules for handling "nonpublic information," preserving privilege, and responding to FOIA requests, subpoenas, and congressional demands. Information shared under the MOU is not deemed publicly disclosed and is intended not to waive confidentiality or privilege, while still allowing each agency to use it for exams, enforcement, risk analysis, and rulemaking.

- **Non-Binding Document With Practical Significance**
  The MOU is expressly nonbinding and does not create enforceable rights for

private parties. Nonetheless, by replacing the 2018 MOU and embedding recurring processes such as regular meetings, cross-training, and senior-level coordination, it is likely to shape how both agencies exercise their authority day to day.

Our Take

For firms active in both SEC and CFTC markets, this MOU is a signal that overlapping oversight will become more coordinated, more data-driven, and less duplicative. Dual registrants should anticipate closer alignment in exams and enforcement and fewer instances of inconsistent messaging between the agencies. At the same time, the emphasis on “minimum effective dose” regulation, fair notice, and fit-for-purpose frameworks opens the door for constructive engagement on streamlining requirements and designing compliant, innovative products and platforms, particularly in crypto and other technology-heavy areas.

SEC Enforcement Division Director Judge Margaret A. Ryan Has Resigned From the Agency

03.16.26

On March 16, the SEC announced that Judge Margaret A. Ryan has resigned from her role as Director of the Division of Enforcement (the Division).

Under Judge Ryan's leadership, the agency has sought to return the Division to Congress' original intent by refocusing on enforcement of the federal securities laws, particularly in the areas of fraud and market manipulation.

During her tenure, Judge Ryan led a significant course correction within the Division, moving away from technical rule violations that do not involve allegations of investor harm and toward cases that provide meaningful investor protection and enhance market integrity. She reoriented staff toward misconduct causing the greatest harm — such as fraud, market manipulation, and abuses of trust — shifted the emphasis from the volume of cases filed to their impact, and renewed the focus on holding individual wrongdoers accountable to strengthen deterrence and better protect investors.

Principal Deputy Director Sam Waldon served as Acting Director until David Woodcock assumed the permanent role as Director of the Division of Enforcement on May 4, 2026.

Prior to his appointment, Woodcock was most recently a partner in the Dallas and Washington, D.C. offices of Gibson, Dunn & Crutcher LLP and chair of its Securities Enforcement Practice Group. He is a widely recognized securities and governance attorney who previously served as Director of the SEC's Fort Worth Regional Office from 2011 to 2015.

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Joseph's work encompasses the representation of investment advisers, mutual funds, closed-end investment companies, unit investment trusts, hedge funds, offshore funds and publicly owned venture capital funds, usually organized as business development companies. He advises clients on the development of new or innovative securities products that are regulated by the Investment Company Act and works closely with the SEC, state securities regulators, and federal and state banking regulatory authorities that are primarily responsible for the oversight of collectively managed investment vehicles.

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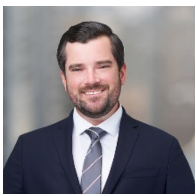

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Michael is an associate in the firm’s Corporate practice. He received his J.D. from the Temple University Beasley School of Law, where he served as managing editor for the Temple Law Review. Prior to attending law school, Michael served on active duty as an officer in the United States Army. The majority of his military career was spent serving in the 101st Airborne Division with whom he deployed to Afghanistan. His service also saw time spent leading soldiers in South Korea and across the nation in Tennessee, Oklahoma, Louisiana, and Washington state.

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James advises clients on transactional and regulatory matters, including the formation of privately offered investment funds; the formation, registration, and offering of publicly traded closed-end investment companies, business development companies, and exchange-traded funds. He also advises on the operation of commodity pools; public securities offerings (including IPOs); and compliance with the Investment Advisers Act of 1940, Investment Company Act of 1940, Commodity Exchange Act, Securities Act of 1933, and the Securities Exchange Act of 1934.

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A financial professional for more than 35 years, Barbara has broad experience with financial and compliance issues in investment management, including the design and oversight of procedures to assist investment professionals and other fiduciaries in carrying out their responsibilities. She is a designated Investment Adviser Certified Compliance Professional.

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