SEPTEMBER 2026

Investment Management **Update**

In This Update

Covering legal developments and regulatory news for funds, their advisers, and industry participants for the quarter ended June 30.

Rulemaking and Guidance

SEC Divisions of Investment Management and Corporation Finance Issue Staff Guidance Supporting Retirement Plans for Small Businesses

05.05.26

On May 5, the Securities and Exchange Commission's (SEC) Divisions of Investment Management and Corporation Finance (Division) issued guidance addressing certain questions regarding the application of the applicable federal securities laws to pooled employer plans (PEPs), which help American workers save for retirement.

In 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act. As part of the SECURE Act, Congress created PEPs, which enable multiple small businesses to bundle together to provide their respective employees with access to high-quality, low-cost retirement plans. One of the major benefits of PEPs is that they allow multiple, unrelated employers to join a single retirement plan, which then reduces some of the costs, administrative burdens, and other potential liability attached to sponsoring a retirement plan on their own.

The guidance states that the Division's staff will not object if PEPs avail themselves of the existing exemptions widely applicable to tax-qualified ERISA retirement plans. The Division also confirmed that PEPs may use a Form S-8 registration statement if employers choose to offer employees securities as part of these plans.

05.05.26

The SEC has issued a final order raising the dollar thresholds pursuant to Rule 205-3 under the Investment Advisers Act of 1940 (Advisers Act) that determine whether a client qualifies to be charged performance-based compensation. The final order increases the "qualified client" thresholds under the Advisers Act by raising the assets-under-management test from $1.1 million to $1.4 million, and the net worth test increases from $2.2 million to $2.7 million. The changes reflect the SEC's required five-year inflation adjustment under the Advisers Act. The increased threshold is effective June 29, 2026.

Background on Section 205 of the Advisers Act and "Qualified Client" Thresholds Test

Section 205(a)(1) of the Advisers Act generally prohibits SEC-registered (and certain state-registered/exempt) investment advisers from charging compensation tied to capital gains or capital appreciation, such as incentive fees, performance allocations or carried interest. Rule 205-3 under the Advisers Act provides an exception to this general rule if the client is deemed a "qualified client."

For private funds relying on the Section 3(c)(1) exemption from registration under the Investment Company Act, registered investment companies and business development companies, each equity owner is typically treated as the client for this purpose, which means the qualified client determination has to be made at the investor level.

Once the new thresholds go into effect, individuals and companies with at least $1.4 million of assets under management with the adviser will be considered "qualified clients." Individuals and companies with a net worth of at least $2.7 million will also be considered qualified clients. The net worth test continues to include assets held jointly with a spouse. The value of a natural person's primary residence is excluded, with related mortgage debt also excluded, except to the extent it exceeds the property's fair market value.

Transition Timing and Impact of Increased Thresholds

The SEC's final order was effective as of June 29, 2026. To the extent that contractual relationships were entered into prior to this effective date, the increased dollar amount thresholds will not generally apply retroactively to such contractual relationships. New fund subscriptions, advisory contracts and other admissions or transfers after June 29, 2026, must be evaluated on the new monetary thresholds.

Additionally, private funds relying on the Section 3(c)(7) exemption from registration under the Investment Company Act (*i.e.*, the "qualified purchaser exemption") should not be affected by the new thresholds because "qualified purchaser" is itself a category of qualified client. Rules permitting certain employees to be treated as qualified clients also remain unchanged.

A copy of the SEC's Final Rule Order is available on the Federal Register here: Federal Register: Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 Under the Investment Advisers Act of 1940.

Guidance Regarding the Application of FINRA Rules in Relation to the SEC No-Action Letter on Personal Services Entities

06.09.26

Overview

FINRA has issued Regulatory Notice 26-12 providing guidance on how existing FINRA rules apply to personal services entity (PSE) compensation arrangements in light of the SEC staff's November 2025 no-action letter (the 2025 No-Action Letter). The 2025 No-Action Letter permits registered representative-owned PSEs to receive transaction-based compensation (TBC) without registering as broker-dealers under Section 15(a) of the Exchange Act, subject to specified conditions. The Notice is confirmatory in nature — it does not impose any new obligations on member firms beyond those already set forth in the 2025 No-Action Letter, but rather clarifies how existing FINRA rules interact with that relief. Member firms may apply this guidance to PSE arrangements entered into on or after November 17, 2025.

Background

Prior to the 2025 No-Action Letter, member firms faced longstanding regulatory uncertainty regarding the payment of TBC to entities owned by registered representatives. FINRA Rule 2040 (Payments to Unregistered Persons) generally prohibits members from paying TBC to any person not registered as a broker-dealer if the receipt of such payments, together with related activities, would trigger a registration requirement. Although Rule 2040 permits payments to unregistered persons where a member reasonably determines no registration is required — including by relying on SEC no-action letters — no clear, comprehensive framework existed specifically for PSE arrangements.

In November 2025, SEC staff issued the 2025 No-Action Letter, providing that it would not recommend enforcement action against a PSE solely for receiving TBC without broker-dealer registration, provided that the conditions of the letter are satisfied. FINRA issued the Notice as part of its FINRA Forward initiative to modernize its regulatory framework and resolve longstanding industry uncertainty by confirming the alignment of its existing rules with the SEC's relief.

Key Provisions of the Notice

Compensation Payments — Rules 2040, 2320, and 2341

The Notice confirms that member firms satisfying the conditions of the 2025 No-Action Letter will also be in compliance with FINRA's compensation payment rules. Specifically:

- Rule 2040 permits TBC payments to unregistered persons where the member reasonably determines, by relying on SEC no-action relief applicable to its facts and circumstances, that the recipient is not required to register as a broker-dealer. Compliance with the 2025 No-Action Letter satisfies this standard.

- Rules 2320 and 2341 similarly permit associated persons to receive compensation from nonmember entities in connection with variable contracts and investment company securities where a member relies on appropriate SEC no-action relief. Compliance with the 2025 No-Action Letter satisfies both rules.

Notably, the Notice does not address the treatment of PSE overhead retention, leaving open questions about how overhead should be defined, allocated, and documented — particularly where multiple registered representatives jointly own a PSE and overhead allocations could effectively result in the indirect transfer of TBC to a representative who did not earn the underlying compensation.

Supervision — Rule 3110

The Notice emphasizes that the 2025 No-Action Letter does not diminish a member's supervisory obligations. Under FINRA Rule 3110, members must establish, maintain, and enforce a supervisory system and written supervisory procedures (WSPs) reasonably designed to achieve compliance with applicable federal securities laws and FINRA rules. Members wishing to pay TBC to a PSE must review and update their supervisory systems and WSPs to address the conditions of the 2025 No-Action Letter. FINRA specifically highlights the following supervisory focus areas:

- Registration: Each owner of the PSE must be a registered person of the member, and each of the PSE's registered representatives and registered principals must be registered with the same member.
- Member Control: The member must determine which PSE personnel are associated persons of the member and must maintain sole and exclusive control over all securities-related activities conducted by those persons.
- Outside Business Activities and Private Securities Transactions: PSE arrangements must be reviewed under FINRA Rules 3270 (Outside Business Activities) and 3280 (Private Securities Transactions) to assess whether prior written notice or approval is required.
- Office of Supervisory Jurisdiction Designation: Members must evaluate whether a PSE's office location constitutes an Office of Supervisory Jurisdiction or branch office requiring registration.

Communications With the Public — Rule 2210

While registered representatives employed by a PSE may communicate with customers in writing regarding the member's securities business, the PSE itself may not hold itself out as a broker-dealer. All such communications remain subject to FINRA Rule 2210, which requires that they be fair, balanced, not misleading, and in accordance with the principles of fair dealing and good faith.

Recordkeeping — Rules 17a-3 and 17a-4

The Notice reminds members of their obligation to make, keep current, and preserve all records associated with PSE arrangements in compliance with Exchange Act Rules 17a-3 and 17a-4, as well as FINRA Rule 4511. Firms should ensure that their recordkeeping systems capture the documentation required to demonstrate satisfaction of the conditions of the 2025 No-Action Letter, including the written servicing agreement between the member and the PSE, compensation records, and compliance cooperation documentation.

Practical Implications for Member Firms

Member firms considering or currently operating PSE arrangements should take the following steps:

- Review the 2025 No-Action Letter conditions in detail to confirm that all required structural elements (*e.g.*, registered ownership, written servicing agreement, exclusive member control) are in place before paying TBC to a PSE;
- Audit and update WSPs under Rule 3110 to specifically address PSE arrangements, including registration controls, supervisory oversight of associated persons employed by the PSE, and office designation analysis;
- Evaluate outside business activity and private securities transaction disclosures for existing and prospective PSE arrangements under Rules 3270 and 3280;
- Establish robust recordkeeping protocols to document PSE arrangements, compensation payments, compliance cooperation provisions, and associated persons' activities in satisfaction of Exchange Act Rules 17a-3 and 17a-4; and
- Exercise caution on overhead allocations where PSEs are jointly owned, given the absence of specific FINRA guidance on permissible overhead definitions, caps, and documentation standards.

Daily Customer and Broker-Dealer Proprietary Account (PAB) Reserve Computations

06.29.26

Overview

FINRA has issued an Information Notice reminding carrying member firms of the SEC's compliance date for required daily customer and broker-dealer proprietary account (PAB) reserve computations under Securities Exchange Act Rule 15c3-3. The Notice applies to carrying members with average total credits equal to or greater than $500 million, as measured across their 12 most recently filed month-end FOCUS reports. The Notice also highlights SEC Division of Trading and Markets staff guidance regarding a reserve deposit adjustment for sweep program credits and identifies specific non-computation days in calendar years 2026 and 2027.

Background

The SEC amended Securities Exchange Act Rule 15c3-3 to increase the frequency with which certain carrying broker-dealers must compute the net cash they owe to customers (the customer reserve computation) and to PAB account holders (the PAB reserve computation) from weekly to daily. The compliance date was previously extended by six months from December 31, 2025, to June 30, 2026, giving qualifying firms additional time to develop the necessary policies, procedures, and automated systems. Carrying members must use close-of-business information from June 30, 2026, to perform their first required daily computations on July 1, 2026.

The daily computation requirement applies to any carrying member that reported average total credits equal to or greater than $500 million across each of the 12 month-end FOCUS reports filed from January 31, 2025, through December 31, 2025.

Key Provisions of the Information Notice

Daily Computation Requirement
Qualifying carrying members must now perform customer and PAB reserve computations on a daily basis rather than weekly. The computation must be based on the close-of-business information from the prior business day, with any required deposit due the following morning.

Sweep Program Credit Adjustment
The Notice highlights SEC Division staff guidance (FAQ #5) addressing a specific operational timing issue for firms that offer sweep programs. Where a required deposit arises from a daily customer reserve computation, a carrying broker-dealer may reduce that required deposit by the amount of sweep program credits that are included in the computation and transferred to the sweep program on the following business day (*i.e.*, the "funds in motion" adjustment). This relief is intended to prevent double-counting of credits

that will be swept out of the customer reserve formula before the deposit would ordinarily be funded.

To avail themselves of this adjustment, carrying members must report the sweep credit adjustment on their FOCUS Report (Form X-17A-5 Part II) in the manner prescribed by FINRA guidance.

Non-Computation Days

Consistent with SEC Division staff guidance, the Notice provides that carrying members performing required daily customer and/or PAB reserve computations are not required to perform such computations on:

- Federal Holidays.
- Good Friday.
- Specified Additional Days adjacent to holidays identified by FINRA for calendar years 2026 and 2027 (*e.g.*, the Friday before Memorial Day and the Friday after Thanksgiving).

FINRA has provided the specific dates for these non-computation days to assist members with their reporting obligations.

Practical Implications for Carrying Member Firms

Carrying members subject to the $500 million threshold should take the following steps:

- Confirm threshold status by reviewing average total credits across the 12 month-end FOCUS reports filed from January 31, 2025, through December 31, 2025;
- Implement daily computation systems and confirm that automated processes are in place to calculate customer and PAB reserve requirements as of each business day's close;
- Assess sweep program activity to determine whether the sweep credit deposit adjustment is applicable, and ensure that FOCUS Report filings accurately reflect any such adjustments;
- Update policies and procedures to account for non-computation days identified in the Notice and to document the basis for any days on which a computation is not performed; and
- Train operations and regulatory reporting staff on the new daily computation workflow, including funding timelines and FOCUS reporting requirements.

FUNDamental QuickStudy: SEC Division of Examinations Issues Risk Alert on Economic Conflicts of Interest for Investment Advisers

06.29.26

On June 9, 2026, the SEC's Division of Examinations published a Risk Alert highlighting exam observations related to investment advisers' obligations concerning economic conflicts of interest and associated fee practices. The Risk Alert signals that examiners will be taking a closer look at the economic incentives that advisers and their financial professionals may have when recommending products, services, or account types to clients, including the source and structure of compensation and other economic benefits.

What the SEC Observed

The Risk Alert highlights the following observations of examiners from their examinations of SEC-registered investment advisers:

1. Economic conflicts of interest that were undisclosed, or where the disclosures were incomplete or misleading.
2. Practices that were inconsistent with advisory agreements and disclosures.
3. Compliance programs that did not fully address economic conflicts of interest and risks.

Five Key Areas of Deficiencies Identified

1. Cash Management Recommendations

Examiners observed that advisers recommending cash sweep programs — where clients' uninvested cash is automatically moved into interest-bearing accounts or money market funds — failed to adequately disclose:

- Revenue the advisers received from certain custodians based on the cash balances their clients held with those custodians.
- Incentives to recommend cash sweep vehicles that resulted in the greatest possible compensation to the adviser.
- Certain clients' cash balances were subject to the advisers' asset-based fees and/or the impact fees may have on their investment returns with respect to cash balances (including instances where clients generated negative returns due to the fees and expenses associated with these recommended cash management programs).
- Their only cash management recommendations were higher-cost money market funds participating in revenue-sharing arrangements with the adviser.
- The existence of lower-cost, higher-yielding share classes of the same funds that did not provide revenue sharing to the adviser.
- The economic incentive the revenue-sharing arrangement created for the adviser to recommend those funds over available alternatives.

2. Conflicts of Interest Associated With Other Revenue Opportunities

Examiners identified a broad range of undisclosed conflicts stemming from economic benefits received by advisers, including:

- Mutual fund share class selection: Advisers or affiliated broker-dealers received Rule 12b-1 fees from fund share classes when lower-cost share classes were available to clients, without adequate disclosure.
- Custodial credits and interest rate markups: Advisers failed to disclose custodial credits received, interest rate markups applied to client margin loans, or transaction fees marked up beyond what the clearing broker charged, and that the advisers would incur termination fees should they terminate such custody and clearing relationships.
- Affiliate relationships: Dually registered firms (operating as both an investment adviser and a broker-dealer) failed to disclose the economic conflicts created by their affiliate structure in client-facing materials.

3. Form ADV Disclosure Gaps

Examiners identified material gaps and inaccuracies in Form ADV disclosures, including:

- Incomplete or outdated disclosures in Items 10 and 12 regarding financial industry affiliations, brokerage practices, and compensation arrangements;
- Disclosures that were inconsistent with the adviser's actual business practices; and
- Failure to update Form ADV when material changes in conflicts arose.

4. Fee Billing Practices Inconsistent With Advisory Agreements

Examiners found recurring fee billing errors, including:

- Failure to refund prepaid fees upon client termination of the advisory relationship;
- Incorrect application of tiered fee schedules, including failure to apply breakpoints;
- Householding errors — failing to aggregate related accounts for fee calculation purposes, resulting in clients being overbilled; and
- Billing practices that were inconsistent with the methodology described in advisory agreements and Form ADV disclosures.

5. Weaknesses in Compliance Programs

Examiners identified violations of Advisers Act Rule 206(4)-7 (the Compliance Rule), observing that compliance programs were not reasonably designed to prevent violations related to economic conflicts of interest. Specific deficiencies included:

- Incomplete coverage of billing arrangements and revenue sharing in written policies and procedures;
- Conflicting internal documentation — policies that were inconsistent with actual practices; and
- Lack of fee-monitoring controls, including the absence of processes to detect billing errors, monitor tiered fee application, or ensure timely refunds.

Key Compliance Takeaways

In light of the Risk Alert, investment advisers should consider the following action items:

- **Audit cash management practices.** Review all cash sweep and money market fund recommendations to assess whether revenue-sharing arrangements are fully disclosed, and whether lower-cost alternatives were considered and communicated to clients.
- **Review share class selection processes.** Confirm that share class selection policies address the availability of lower-cost share classes and that all 12b-1 fee arrangements are disclosed.
- **Update Form ADV.** Scrutinize Items 10 and 12 to ensure that financial industry affiliations, brokerage practices, and all compensation arrangements are disclosed completely, accurately, and consistently with current business practices.
- **Conduct a fee billing review.** Reconcile fee calculations against advisory agreements and disclosed methodologies. Identify any overbilling and remediate promptly, including issuing refunds for terminated accounts with prepaid fees.
- **Strengthen compliance programs.** Ensure written policies and procedures specifically address fee billing practices, revenue-sharing arrangements, and all identified conflicts. Implement monitoring controls and testing protocols to detect billing discrepancies on an ongoing basis.
- **Train financial professionals.** Ensure that personnel involved in making recommendations understand the firm's conflicts and the importance of acting in clients' best interests notwithstanding any economic incentives.
- **Assess advisory agreement terms.** Review liability disclaimers, hedge clauses, and assignment provisions for consistency with fiduciary obligations.

Bottom Line

Economic conflicts of interest remain a top examination priority for the Division of Examinations, and the Division has indicated that inadequate disclosure of economic conflicts is viewed as a core fiduciary concern, not simply a technical compliance shortcoming. Advisers that fail to identify, disclose, and manage these conflicts risk enforcement scrutiny and should act to rectify any potential issues.

As we have in the past, we will continue to monitor this matter and related developments and will provide future client updates as applicable. This publication is for guidance only and is not intended to be a substitute for specific legal advice. Please contact your Troutman Pepper Locke attorneys with any questions about how this Risk Alert may affect your firm.

06.30.26

Overview

On June 30, the SEC issued a request for public comment (the Request) on exchange-traded funds (ETFs) that seek to invest in innovative asset classes or employ novel investment strategies (Novel ETFs). The Request signals the SEC's intent to examine and potentially reshape the regulatory framework governing a rapidly evolving segment of the ETF market.

The Request was published in the *Federal Register* on July 2, 2026. Comments must be received on or before August 31, 2026.

Background

The U.S. ETF market has experienced remarkable growth over the past several years, expanding from approximately $4 trillion in 2019 to more than $12 trillion at the end of 2025. As ETFs have grown in scale and complexity, so too have the strategies they employ — from cryptocurrency-linked products to funds using options overlays, leverage, and other sophisticated investment techniques.

Against this backdrop, the SEC is seeking to ensure that its regulatory framework keeps pace with market developments while continuing to protect investors and preserve fair, orderly, and efficient markets.

What the SEC Is Asking

The Request focuses on three primary areas:

1. Investment Company Status – Whether and how certain Novel ETFs should be treated as investment companies under the Investment Company Act of 1940, and the implications of that classification.
2. Regulation of Novel ETFs – How the SEC should regulate ETFs employing innovative strategies or investing in nontraditional asset classes, including what safeguards or disclosures may be appropriate.
3. Registration Process – How the registration and review process for Novel ETFs can be made more consistent, transparent, and efficient to support continued innovation without sacrificing investor protections.

Why This Matters

The Request reflects a broader shift in the SEC's posture toward market innovation under the current SEC leadership — one that seeks to facilitate capital formation and market development while maintaining core investor protections. For market participants, this is a meaningful opportunity to shape the rules that will govern next-generation ETF products.

Specifically, this development is relevant to:

- ETF sponsors and asset managers developing or considering novel fund structures.
- Institutional investors and fund-of-funds that allocate to ETFs using complex strategies.
- Private equity and investment fund sponsors exploring ETF wrappers for alternative strategies.
- Broker-dealers and market makers active in ETF trading and distribution.

Next Steps and Considerations

Market participants and other interested stakeholders should consider the following:

- Review the full Request for Comment and identify issues directly relevant to their business or investment strategies.
- Prepare and submit comments by August 31, 2026, within the 60-day comment window. Comment letters are public and can be an effective way to engage with the SEC on issues of significance to your organization.
- Monitor rulemaking developments that may follow the comment period, which could include proposed rules, exemptive relief, or updated staff guidance affecting Novel ETF structures.

For questions about how the SEC's review of Novel ETFs may affect your organization, contact our Investment Management Practice Group. Our attorneys regularly advise ETF sponsors, asset managers, and market participants on SEC regulatory matters and fund structure considerations.

Litigation and Enforcement

SEC Formally Rescinds ‘No Deny’ Settlement Policy and Says It Won’t Enforce Existing Gag Provisions

05.18.26

On May 12, we wrote about the SEC’s longstanding “no-deny” settlement policy heading “for a crossroads” at the Office of Management and Budget (OMB) and the Supreme Court. That crossroads arrived quickly. Just six days later, the SEC announced that it has rescinded Rule 202.5(e), the informal rule that, since 1972, conditioned settlement of an enforcement action on a defendant’s agreement not to publicly deny the Commission’s allegations. In its press release, the SEC said the policy had set the agency apart from most other federal regulators and may have created the misimpression that the Commission was trying to insulate itself from criticism, and it emphasized that ending the policy will give the SEC greater flexibility to resolve cases while preserving resources and speeding relief to investors.

The most significant practical point is that the SEC is not only eliminating the policy going forward, but also disavowing enforcement of existing no-deny provisions. The Commission stated that it is not aware of ever having moved to reopen a case based on a breach of a no-deny clause, and that in light of the rescission it will not seek to vacate prior settlements or reopen administrative proceedings if a settling defendant now publicly denies the allegations. In other words, defendants and respondents who previously signed settlements containing no-deny language may, as a matter of SEC policy, speak publicly about their cases without fear that the Commission will invoke those clauses to unwind the deal. Of course, any such statements remain subject to other applicable laws (for example, antifraud and defamation principles).

The SEC also made clear what has not changed. The agency’s basic “neither admit nor deny” settlement framework remains intact, and the rescission does not limit the Commission’s ability either to settle without admissions or, in appropriate cases, to require admissions as a condition of settlement. What has changed is that the agency will no longer require a blanket promise of silence or nondenial as the price of resolving an enforcement action. For companies and individuals, including regulated entities, this is a major shift in the enforcement landscape that will affect how parties evaluate the collateral consequences of settling, including reputational risk, disclosure strategy, and follow-on litigation.

Finally, this development directly intersects with the Powell/New Civil Liberties Alliance challenge we discussed in our prior post, which attacks the “Gag Rule” on First Amendment grounds and is headed toward a potential Supreme Court consideration. The SEC’s decision to rescind Rule 202.5(e) and to decline to enforce existing no-deny provisions may reshape, or even moot, aspects of that litigation, depending on how the

Court views the impact of the SEC's action in rescinding Rule 202.5(e). Either way, the Commission's action is a watershed moment in SEC settlement practice and opens the door to significantly more public debate, by former SEC targets themselves, about the merits and fairness of past enforcement actions.

Supreme Court Shuts the Door on Private Rescission Claims Under Section 47(b) of the Investment Company Act

06.11.26

On June 11, the U.S. Supreme Court handed down its decision in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345, holding 6-3 that Section 47(b) of the Investment Company Act of 1940 does not give private parties a right to sue for rescission of contracts that allegedly violate the Act. The ruling resolves a circuit split and eliminates a potentially powerful litigation tool that activist investors had used to challenge closed-end fund governance measures.

What Was at Stake

Saba Capital, an activist investor focused on closed-end funds, had acquired significant positions in several funds and then sued to challenge those funds' decisions to opt into Maryland's Control Share Acquisition Act (MCSAA). The MCSAA limits voting rights for shareholders who acquire large ownership stakes unless other shareholders approve, a common defensive measure against activist takeovers.

Saba argued that the funds' control-share provisions violated Section 18(i) of the Investment Company Act, which requires that every share of stock have equal voting rights. Because Section 18(i) has no express private right of action, Saba turned to Section 47(b), which addresses the enforceability of contracts that violate the Act, as its vehicle to bring suit and seek rescission of the funds' bylaws.

The lower courts agreed with Saba. The Supreme Court did not.

The Court's Reasoning

Writing for the majority, Justice Barrett drew a straightforward distinction: Section 47(b) tells courts what remedies they may grant once a case is properly before them, but it does not answer the separate question of who may bring suit in the first place. In other words, rescission is a remedy, not a cause of action, and Section 47(b) does not create one.

The Court pointed to the broader structure of the Investment Company Act to reinforce the point. Congress expressly created private rights of action in other provisions of the statute (Sections 30(h) and 36(b)), demonstrating that when Congress wanted to authorize private enforcement, it knew how and did so explicitly. The absence of similar language in Section 47(b) was telling.

The majority also rejected Saba's reliance on a 1979 Supreme Court decision, *Transamerica Mortgage Advisors, Inc. v. Lewis*, which had recognized an implied private remedy under comparable language in the Investment Advisers Act. The Court reasoned that Congress amended Section 47(b) in 1980, after *Transamerica*, removing the "shall be void" language on which that decision relied and replacing it with language directed at what "a court" may do. Changed language, the Court held, means changed meaning.

What It Means in Practice

- **For closed-end funds and their boards:** The decision provides meaningful reassurance. Funds that have adopted, or are considering adopting, control-share provisions and other anti-activist governance measures face significantly reduced litigation risk. Private parties can no longer use Section 47(b) as a back door to challenge these arrangements.
- **For activist investors:** A significant avenue of attack is now closed. Activists seeking to challenge fund governance must look to other theories, express causes of action under the Investment Company Act, state-law claims, fiduciary-duty arguments, or SEC involvement, rather than Section 47(b) itself.
- **For the regulatory landscape more broadly:** The decision reinforces the SEC's role as the primary enforcer of the Investment Company Act's substantive provisions. It also continues the Supreme Court's long-running trend of limiting implied rights of action and insisting that Congress, not courts, decides who may enforce federal statutes.

What the Decision Did Not Resolve

Notably, the Court did not address whether the MCSAA actually violates Section 18(i) of the Investment Company Act. Because the lower court decisions were vacated, funds relying on control-share statutes should continue to follow the SEC's current guidance that opting into the MCSAA does not automatically violate the Act's equal-voting requirements. Private claims under Section 30(h) (short-swing profits) and Section 36(b) (excessive fees) also remain available, and activist investors will undoubtedly continue to explore state-law and other federal avenues to challenge fund governance.

The Bottom Line

The Supreme Court's decision in *FS Credit Opportunities* eliminates Section 47(b) as a standalone litigation weapon for private parties. For closed-end fund boards and managers, it provides welcome certainty. For activist investors, it narrows the playbook, but does not close it entirely.

A copy of the Supreme Court's opinion is available here: https://www.supremecourt.gov/opinions/25pdf/24-345_i42k.pdf.

SEC and SRO News

David Woodcock Appointed as Director of the Division of Enforcement

04.08.26

On April 8, the SEC announced the appointment of David Woodcock as Director of the Division of Enforcement, effective May 4, 2026. Woodcock, a veteran securities enforcement attorney, returns to the agency after a decade in private practice.

Woodcock previously served as Director of the Fort Worth Regional Office from 2011 to 2015, where he led enforcement investigations across nearly every major area of the SEC's program. During that stint, he created and chaired the Financial Reporting and Audit Task Force, which targeted complex accounting fraud cases. Before joining the SEC the first time, Woodcock worked as a certified public accountant at a Big Four firm, served as a senior in-house attorney at Exxon Mobil Corporation, and earned a law degree from the University of Texas. Most recently, he was a partner at Gibson, Dunn & Crutcher, chairing the firm's Securities Enforcement Practice Group.

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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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John focuses his practice on investment company and investment adviser regulatory issues, and related issues affecting the investment management activities of financial institutions. He assists clients with the formation and registration of investment companies and investment advisers, and provides advice about regulatory compliance and securities law issues. He serves as fund counsel to a broad array of mutual fund complexes and is experienced in the issues impacting both large-scale fund operations and smaller complexes operating as niche players.

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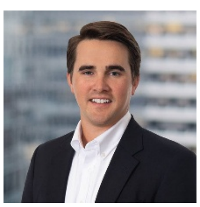
Genna provides targeted, practical advice to asset managers and financial services industry participants. She routinely advises clients on SEC and state investment adviser, broker-dealer, and private fund regulation; Investment Advisers Act compliance programs, annual reviews and ongoing compliance matters; and regulatory examinations and investigations. Genna represents asset managers trading digital assets as well as investing in digital asset treasury companies (DATs). She also has extensive experience representing financial institutions in a variety of transactional and regulatory matters.



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Theodore advises private and registered funds and their sponsors on formation, transactions, and regulatory compliance. He has experience with open-end and closed-end funds, and funds pursuing a variety of strategies, including private equity, real estate, private credit, and hedge funds. Theodore counsels investment advisers as to formation, registration, compliance, and disclosure matters. His sponsor work also includes design and implementation of carried interest programs and upper tier structuring, and he has advised investment advisers in connection with regulatory exams. Theodore regularly addresses status issues under the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

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Terrance advises registered investment companies, investment advisers, hedge funds, broker-dealers and other financial services industry firms, bringing industry experience and a practical approach to addressing their ongoing management needs. He has been involved in the investment industry for more than 25 years and is well-versed in all applications of the Investment Company Act of 1940 and the Investment Advisers Act of 1940. Terrance also has extensive experience with the ongoing representation of several mutual fund complexes.

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Joe is an associate in the firm's Corporate practice, advising clients on mergers and acquisitions, venture financing, securities transactions, and corporate governance. He represents private equity funds and portfolio companies in technology, business support services, and real estate sectors. Joe also counsels capital markets clients on securities offerings, SEC compliance, and cross-border transactions, and advises emerging companies on corporate governance and organizational matters.

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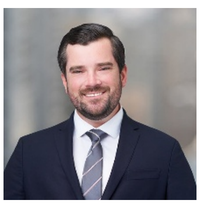

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Michael is an associate in the firm's Corporate practice. He received his J.D. from the Temple University Beasley School of Law, where he served as managing editor for the Temple Law Review. Prior to attending law school, Michael served on active duty 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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Taylor is an associate in the firm's Corporate practice. While attending law school, Taylor served as a member of the Villanova Student Bar Association, the Villanova Black Law Students Association, and the Corporate Law Society. Additionally, Taylor was a student attorney in the school's Clinic for Law and Entrepreneurship, where she helped provide pro bono legal services to Philadelphia-area community enterprises, nonprofit organizations, entrepreneurs, and small businesses.

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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.

Related Practices and Industries

- Investment Management and Compliance
- Investment Funds
- Private Fund Services