Simpson Thacher

Registered Funds Regulatory Update

April 8, 2026

Table of Contents

SEC Rulemaking 2

- SEC Proposes Amendments to Form N-PORT and Extends Compliance Dates for Names Rule Reporting 2
- SEC Proposes Amendments to the Small Entity Definitions for Investment Companies and Investment Advisers Under the Regulatory Flexibility Act 3

SEC Staff Guidance 5

- SEC Enforcement Division Updates Enforcement Manual 5
- SEC Issues Updated FAQs for Names Rule Amendments 6
- SEC Issues Guidance on Tokenized Securities 7

SEC Remarks 8

- Daly Discusses the Future of E-Delivery 8
- Regulation S-K Up for Review 9

SEC Enforcement 10

- SEC Settles With Two Advisers for Anti-Fraud, Assignment, and Custody Violations 10
- SEC Settles With Adviser and CCO for Improper Trade Violations 11

Litigation 12

- SEC Settles With Adviser Over Revenue Sharing 12
- U.S. Supreme Court to Review SEC's Power to Obtain Disgorgement 13
- Board Sued in Valuation Fraud Suit 15

Industry Developments 17

- SEC Enforcement Division Director Judge Margaret A. Ryan Resigns and David Woodcock is Named as New Director 17
- Two Exchanges Withdraw Rule Change Proposals to Exempt Registered CEFs From Annual Shareholder Meeting Requirements 18

Memorandum 21

- Department of Labor Releases Proposed Rule Aiming to Reduce Litigation Risk Associated With 401(k) Plans Including Access to Private Markets Assets 21

SEC Watch 32

- March 5, 2026 32
- February 11, 2026 34

SEC Rulemaking

SEC Proposes Amendments to Form N-PORT and Extends Compliance Dates for Names Rule Reporting

On February 18, 2026, the SEC Staff proposed amendments to certain reporting requirements on Form N-PORT, which is used by registered investment companies (other than money market funds and small-business investment companies) to report portfolio holdings and related information. SEC Chair Paul Atkins stated that the proposed amendments are intended to "[provide] registrants additional time to file the form, [refine] reporting items, and [reduce] the frequency of public reporting of fund portfolio holdings – all the while retaining insight into funds' portfolio-related issues."

The proposed amendments to Form N-PORT would (i) provide funds with an additional 15 days to file monthly portfolio-related information; (ii) reduce the publication of reports from monthly to quarterly; and (iii) streamline or remove certain reported information, such as eliminating certain information collected to comply with certain "Names Rule" reporting requirements; and (iv) require certain additional information for funds with share classes operating as exchange-traded funds, including net assets, shareholder flows and certain identifying information (*e.g.*, ticker symbols). Comments on the proposed amendments are due April 24, 2026.

The SEC also extended the compliance dates for the new Form N-PORT reporting requirements for Names Rule compliance to provide additional time for funds and the SEC to consider the proposed amendments and avoid certain costs associated with regulatory requirements that the SEC is or may propose to eliminate. The new compliance dates for Form N-PORT Names Rule-related reporting requirements are November 17, 2027 for larger fund groups with net assets of $10 billion or more, and May 18, 2028 for smaller fund groups with less than $10 billion in net assets, in each case as of the end of their most recent fiscal year.

Form N-PORT Reporting, SEC Release No. IC-35962; File No. S7-2026-05
(Feb. 18, 2026), available at: https://www.sec.gov/files/rules/proposed/2026/ic-35962.pdf.

SEC Proposes Amendments to the Small Entity Definitions for Investment Companies and Investment Advisers Under the Regulatory Flexibility Act

On January 7, 2026, the SEC proposed amendments to existing rules under the 1940 Act and Advisers Act that would update the definition for registered investment companies, BDCs, and investment advisers to qualify as "small entities" for purposes of the Regulatory Flexibility Act (RFA). Enacted by Congress in 1980, the RFA was intended to minimize the significant economic impact of regulation on small entities and reduce undue burdens. Its primary purpose is to ensure regulations fit the scale of the regulated entity, thereby preventing a "one-size-fits-all" approach to rulemaking that can result in disproportionate compliance costs. If adopted, the proposal would substantially increase the current asset-based thresholds used to determine small entity status and would subject those thresholds to inflation adjustments.

Rule 0-10 under the 1940 Act determines small entity status by reference to the aggregated net assets of all investment companies in the same group of related investment companies, while Rule 0-7 under the Advisers Act determines adviser small entity status by reference to AUM, total assets, and relevant control relationships. Because both rules were adopted in 1982 and last updated in 1998, the SEC has proposed amendments to modernize the thresholds in light of substantial growth in AUM and net assets and to better reflect the entities it now considers "small."

Under the proposed amendments, Rule 0-10 would (i) increase the net asset threshold for investment companies from $50 million to $10 billion, and (ii) for purposes of aggregating net assets of related funds, refer to a "family of investment companies" (as that term is used in Item B.5 of Form N-CEN) rather than to a "group of related investment companies" as used in the current rule. Proposed amendments to Rule 0-7 would increase the AUM threshold for which an investment adviser is considered a "small entity" from $25 million to $1 billion and make conforming changes to the control relationship thresholds, including related amendments and clarifying changes to Form ADV. The proposal would also provide for inflation adjustments to the asset thresholds by order every 10 years. Importantly, this change in definition would not impact the asset threshold that triggers SEC registration as an investment adviser. The SEC also requested comment on whether to amend the total assets threshold for determining small entity status.

In addition, the SEC published a list of rules that it intends to review and requested public comment on "whether the rules should be continued without change, or should be amended or rescinded to minimize any significant economic impact of the rules upon a substantial number of small entities." The rules set for review include:

- Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act;
- Form ADV and Investment Advisers Act Rules;
- Investment Company Reporting Modernization;
- Investment Company Swing Pricing;

- Investment Company Liquidity Risk Management Programs; and
- Exemptions To Facilitate Intrastate and Regional Securities Offerings.

Comments on the proposed amendments were due March 13, 2026.

Amendments to the "Small Business" and "Small Organization" Definitions for Investment Companies and Investment Advisers for Purposes of the Regulatory Flexibility Act, SEC Release No. IA-6935; File No. S7-2026-01 (Jan. 7, 2026), available at: https://www.sec.gov/files/rules/proposed/2026/ia-6935.pdf.

SEC Staff Guidance

SEC Enforcement Division Updates Enforcement Manual

On February 24, 2026, the SEC's Enforcement Division announced "significant updates" to its Enforcement Manual to "ensure greater uniformity, reflect the Division's best practices, and improve [the S]taff's ability to carry out the mission-critical work they do on behalf of investors."

The Enforcement Manual includes updates to the expanded Wells process, including changes to the process itself, timelines, and oversight. The Wells process is a formal procedure through which the SEC notifies a party that the Staff intends to recommend charges against them and provides the party an opportunity to submit a written statement as to why enforcement action should not be taken. The updated Enforcement Manual also provides a clear expectation that the Staff "should be forthcoming about the contents of the investigative file," allowing potential respondents to have more access and receive more information about evidence obtained from third parties, such as investors.

The updated Enforcement Manual also incorporates the SEC's prior practice of "permitting a settling entity to request that the Commission simultaneously consider an offer of settlement and any related request for Commission waivers from automatic disqualifications and other collateral consequences that result from the underlying enforcement action."

Additional updates to the Enforcement Manual include: (i) providing the Division's procedures for evaluating cooperation in the context of determining civil penalties; (ii) updating the framework for referrals to criminal authorities; and (iii) conforming changes to the Division's current best practices.

The Enforcement Manual was last revised in 2017 and will undergo annual reviews going forward.

SEC Press Release, *SEC's Division of Enforcement Announces Updates to Enforcement Manual* (Feb. 24, 2026), available at: https://www.sec.gov/newsroom/press-releases/2026-20-secs-division-enforcement-announces-updates-enforcement-manual.

SEC Issues Updated FAQs for Names Rule Amendments

On February 18, 2026, the SEC Staff issued a series of updated FAQs related to the adoption of amendments in 2023 to Rule 35d-1 under the 1940 Act, the so-called "Names Rule." The updated FAQs address interpretive issues, including certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks. The Staff had previously issued FAQs regarding the Names Rule amendments in January 2025. The updated FAQs are primarily intended to provide further interpretive clarity on the scope and application of the amended Names Rule in response to industry requests.

Notably, the updated Names Rule FAQs, among other things:

(i) confirm that a fund generally does not need to obtain shareholder approval if it wishes to adopt or revise a fundamental 80% investment policy to comply with the amended Names Rule, unless the revisions constitute a deviation from the existing policy or some other existing fundamental policy;

(ii) confirm that a fund generally does not need to provide 60 days' prior shareholder notice when making non-material changes to an existing non-fundamental 80% investment policy solely to comply with the amended rule, or when amending the policy to make it more stringent in accordance with the amended rule;

(iii) confirm that a fund generally may count assets intended to support its unfunded commitments in "private funds or special purpose vehicles that own or will own one or more private assets" ("portfolio funds") towards its 80% investment policy (*i.e.*, cash and cash equivalents maintained to cover unfunded commitments to invest equity in portfolio funds that are, or will be, included in the fund's 80% basket and that the fund reasonably expects will be called in the future, provided that appropriate disclosure is included in the fund's registration statement);

(iv) confirm that single-state tax-exempt funds are generally required to satisfy the 80% investment requirement only with respect to securities of issuers located in the named state;

(v) confirm that funds with the terms "municipal" and "municipal bond" in their names are treated like tax-exempt funds; however, funds that use the term "municipal" rather than "tax-exempt" may count securities that generate income subject to the alternative minimum tax toward the 80% investment requirement, while funds that use the term "tax-exempt" may not; and

(vi) clarify whether specific terms commonly used in fund names must adopt a 80% investment policy, including: "Income" (where "income" does not refer to "fixed income" securities, on its own, generally, no), "High-Yield" (generally, yes), "Tax-Sensitive" (generally, no), "Money Market" (if the name suggests a type of money market instrument, yes), "Growth" or "Value" (generally, yes, subject to certain limited exceptions), and "Merger" or "Merger Arbitrage" (generally, no).

Staff Guidance, SEC Division of Investment Management, *2025–26 Names Rule FAQs* (last updated Feb 19, 2026), available at: https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/2025-26-names-rule-faqs.

SEC Issues Guidance on Tokenized Securities

On January 28, 2026, the SEC's Divisions of Corporation Finance, Investment Management, and Trading and Markets issued a joint statement clarifying how the federal securities laws apply to tokenized securities and providing a framework to help market participants understand different tokenization models.

The statement defines a "tokenized security" as "a financial instrument enumerated in the definition of 'security' under the federal securities laws 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." The statement establishes two main categories of tokenized securities: (i) issuer-sponsored tokenized securities, and (ii) third party-sponsored tokenized securities.

For issuer-sponsored tokenized securities, which are securities tokenized by or on behalf of the issuers of such securities, the Divisions state that the federal securities laws apply the same way regardless of the "format in which a security is issued or the methods by which holders are recorded (*e.g.*, onchain vs. offchain)." Registration requirements and other regulatory obligations do not change when a security is tokenized rather than issued in a traditional form.

For third-party-sponsored tokenized securities, which are securities tokenized by third parties unaffiliated with the issuer(s) of such securities, the statement describes two models: (i) custodial tokenized securities, and (ii) synthetic tokenized securities. The statement notes that these structures may expose holders to additional risks related to the third party that holders of the underlying security would not face.

The statement emphasizes that tokenization does not create exemptions from existing securities laws or alter how those laws apply. Importantly, the Divisions indicate willingness to engage with market participants on questions regarding the guidance.

SEC Statement, Divisions of Corporation Finance, Investment Management, and Trading and Markets, *Statement on Tokenized Securities* (Jan. 28, 2026), available at: https://www.sec.gov/newsroom/speeches-statements/corp-fin-statement-tokenized-securities-012826-statement-tokenized-securities.

SEC Remarks

Daly Discusses the Future of E-Delivery

In a virtual presentation to the ICI Winter Board meeting on February 3, 2026, Brian Daly, Director of the SEC's Division of Investment Management, discussed how the Division is considering both the changes and opportunities that artificial intelligence could provide to investment products, advisory services, and key personnel, including electronic delivery.

Daly began his discussion by noting that, under the securities laws, technological advances have historically lagged behind periods of societal advances, highlighting as an example the current existing default means for prospectus delivery to investors – "snail" mail. He lamented that despite years of focus on electronic delivery and technological innovation, the SEC has "not, to date, formally proposed a comprehensive 'e-Delivery' rule," and even the SEC's current conception of "electronic delivery" is outdated because the focus thus far has been on adopting 1990s technology—email and PDFs—when we are now living in 2026. In his words, "[t]hat's not innovation. That's just digitizing paper." Instead, Daly suggested that it is time for broader, more innovative proposals, such as leveraging large language models for disclosure, whereby investors can interact with and ask questions to a fund- or adviser-provided AI agent trained on fund documents, which could respond in real time to basic investor questions (*e.g.*, as to fees, redemption procedures, benchmark comparisons, and conflicts), rather than reviewing lengthy legal documents. He noted that such a tool could be very helpful and serve as a "tremendous bridge between investors and the disclosures that all too often are misunderstood or – even worse – go unread."

Daly recognized that AI-based disclosure and similar innovations will inherently raise liability questions and demand careful regulatory design, but noted that such concerns should not be, and are not, insurmountable challenges. He encouraged industry participants to reach out to the Division's Staff with feedback or no-action letter requests on the use of new technologies, such as AI, to improve the investment management process while retaining traditional investor protections.

Brian Daly, SEC Division of Investment Management Director, *Artificial Intelligence and the Future of Investment Management* (Feb. 3, 2026), available at: https://www.sec.gov/newsroom/speeches-statements/daly-020326-artificial-intelligence-future-investment-management.

Regulation S-K Up for Review

On January 13, 2026, SEC Chair Paul Atkins issued a statement on reforming Regulation S-K and soliciting public feedback on its amendment. He stated that he has instructed the Division of Corporation Finance to engage in a comprehensive review of Regulation S-K, noting that the information that it is currently designed to extract does not always reflect what a reasonable investor would deem important in making investments or voting decisions. Regulation S-K sets out the requirements for non-financial, qualitative disclosures in public company filings and is intended to ensure that investors receive material, standardized information regarding, among other things, business operations, risk factors, legal proceedings, and executive compensation.

Atkins stated that Regulation S-K "elicits both material and a plethora of undisputably immaterial information" and that any revisions should be to promote disclosure of material information and ensure that a reasonable investor can "separate the wheat from the chaff" when reviewing public filings. He added that the first step in the SEC's review process began last May, when the SEC requested public comments and held a roundtable on the executive compensation disclosure requirements contained in Item 402 of Regulation S-K, and that the Staff is in the process of evaluating the related comment letters and preparing recommendations to the SEC. Atkins requested public comments on Regulation S-K by April 13, 2026, with the goal of revising the requirements to focus on eliciting disclosure of material information and avoid disclosure of immaterial information.

Paul S. Atkins, SEC Chair, Statement, *Statement on Reforming Regulation S-K* (Jan. 13, 2026), available at: https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326.

SEC Enforcement

SEC Settles With Two Advisers for Anti-Fraud, Assignment, and Custody Violations

On January 20, 2026, the SEC settled charges against two affiliated registered investment advisers for, among other things, (i) including prohibited liability disclaimer and omitting assignment provisions in their advisory agreements, and (ii) failing to obtain an independent public accountant's verification of client funds and securities.

According to the Order, from at least May 2019 through December 2024, the investment advisers entered into investment advisory agreements with clients that contained hedge clauses purporting to "broadly limit" the investment advisers' liability to cases of willful misconduct or gross negligence, thereby misleading clients into believing that they could not, or were otherwise unable to pursue, other non-waivable causes of action against the advisers. The advisory agreements also failed to provide that the agreements could not be assigned by the advisers without client consent and instead affirmatively permitted such assignments without client consent in violation of the Advisers Act. Although the advisers subsequently revised the advisory agreement twice, once in 2020 without addressing the assignment provision, and again in 2024 following an SEC examination, the SEC noted that the 2024 revisions failed to cure the violation because the agreement "continued to fail to provide, in substance, that the adviser could not assign the agreement without the client's consent." The Order also alleged that the investment advisers' compliance manuals contained written policies and procedures concerning liability disclaimers and assignment but the investment advisers failed to implement such policies and procedures.

Finally, the Order alleged that the investment advisers maintained custody of client assets by virtue of language in the agreements that authorized the advisers to "withdraw or direct the disbursements of" client assets maintained with a custodian upon the advisers' instructions (without client approval or confirmation), but failed to comply with the requirements of the custody rule, including, specifically, by failing to obtain an annual examination by a public accountant for calendar years 2019 through 2024, as required by the Advisers Act.

Without admitting or denying the SEC's findings, the investment advisers agreed (i) to cease-and-desist orders; (ii) censures; and (iii) civil monetary penalties totaling $150,000.

In the Matter of FamilyWealth Advisers, LLC, et. al., Release No. 6941 (Jan. 20, 2026), available at: https://www.sec.gov/files/litigation/admin/2026/ia-6941.pdf.

SEC Settles With Adviser and CCO for Improper Trade Violations

On February 10, 2026, the SEC entered into a settlement order with a state-registered investment adviser and its CCO, who was also a minority-owner and executive vice president of the investment adviser, for improper trade allocations.

From December 2015 through October 2019, the CCO allegedly breached his fiduciary duties, and caused the investment adviser to breach its fiduciary duties, by batching client orders and executing securities transactions through block-trading omnibus accounts, rather than through individual accounts over which he had discretionary authority, in order to allocate profitable first-day trades disproportionately to his personal account and unprofitable trades to advisory accounts. As a result, the CCO allegedly allocated $78,490 in excess first-day gains to himself.

In addition, the Order notes that the investment adviser's brochure throughout the relevant period conflicted with Defendants' practices specifically by stating that: (i) the adviser and its employees would seek "to minimize the risk that any advisory client could be systematically advantaged or disadvantaged in connection with… batching [of client orders]"; (ii) no employee would place its own interest over that of a client; and (iii) employee trading was reviewed on a regular basis. Contrary to those disclosures, clients were allegedly systematically disadvantaged as a result of the CCO's batching and allocation of orders and the investment adviser's failure to conduct any review of his trading.

Considering the facts and conduct described, the SEC found that Defendants willfully violated the anti-fraud provisions of Section 206(2) of the Advisers Act. Without admitting or denying the SEC's findings, Defendants each consented to a cease-and-desist order. In addition, the CCO consented to (i) a six-month suspension from association with, among others, any broker, dealer, or investment adviser, (ii) a six-month ban from serving or acting as an employee, officer, or director of an investment adviser or principal underwriter for a registered investment company or any of their affiliates; and (iii) a civil monetary penalty of $40,000, as well as disgorgement and prejudgment interest. The investment adviser also consented to a censure.

In the Matter of Barrington Asset Management, Inc., et al., SEC Admin. File No. 3-22590 (Feb. 10, 2026), available at: https://www.sec.gov/files/litigation/admin/2026/34-104793.pdf.

Litigation

SEC Settles With Adviser Over Revenue Sharing

On March 23, 2026, the U.S. District Court for the District of Massachusetts approved the negotiated settlement between the SEC and Commonwealth Financial Network following an arduous seven-year legal battle relating to Commonwealth's failure to disclose material conflicts of interest related to a revenue sharing agreement with National Financial Services, an affiliate of Fidelity Investments that provides clearing services.

According to the SEC's complaint filed in August 2019, Commonwealth failed to disclose material conflicts of interest relating to its revenue sharing arrangement in which Commonwealth received payments from NFS when it invested client assets in certain classes of mutual funds. The Complaint alleged that: (i) in some instances, the mutual fund share classes purchased by Commonwealth's clients had at least one lower-cost share class available for which Commonwealth received less or no revenue sharing; (ii) in some instances, Commonwealth purchased transaction-fee mutual fund share classes for its clients, NFS charged a transaction fee on the purchase and sale of such shares, and the mutual funds paid a portion of the ongoing fees to NFS that it then shared with Commonwealth; and (iii) certain mutual funds did not provide Commonwealth with any incentive to select them because Commonwealth received no revenue sharing with respect to those funds. In response, Commonwealth argued that the SEC failed to allege facts showing a conflict of interest, insufficient disclosure, and deception.

On April 7, 2023, the District Court granted summary judgment in favor of the SEC, finding that as a matter of law, Commonwealth negligently breached its fiduciary duties to its advisory clients for deficient disclosures in violation of the anti-fraud provisions of the Advisers Act. The District Court agreed with the SEC, taking particular issue with Commonwealth's use of "may" in its disclosure of potential conflicts of interest. Specifically, the District Court noted that Commonwealth presented the revenue sharing payments as hypothetical payments it may receive and stated that Commonwealth may have an incentive to select investments for which it received compensation, when both should have been presented to investors "as a matter of fact."

Furthermore, the District Court noted that, without having more information regarding the cost differences between share classes, Commonwealth's clients did not have access to the "total mix of information" necessary to make informed investment decisions. As such, the District Court determined that Commonwealth's disclosures were inadequate under the Advisers Act and, in April 2024, after denying Commonwealth's February 2024 motion for reconsideration, ordered that Commonwealth pay in the aggregate roughly $93 million in the aggregate – $65.6 million in disgorgement, $21.2 million in prejudgment interest, and $6.5 million in civil penalty. Commonwealth appealed the District Court's decision on questions of materiality. Specifically, it argued that "'[w]hether Commonwealth's revenue sharing arrangement…would be material to a reasonable client and whether its disclosures "provide[d] the information an advisory client would reasonably need to understand and

consent to a conflict of interest' were matters for a jury," and the issue of negligence should have also been submitted to the jury.

On April 1, 2025, the U.S. Court of Appeals for the First Circuit reversed the District Court's ruling, finding that the District Court applied the incorrect test for "materiality." The Court of Appeals discussed whether the issues Commonwealth raised constituted genuine disputes as to material fact and were therefore inappropriate for an order of summary judgment. The Court of Appeals ultimately held that questions of fact remained and should have gone to a jury. Moreover, the Court of Appeals found that a reasonable jury could conclude, based on the facts of the case, that additional disclosures providing more precise descriptions, beyond the conflicts of interest already disclosed, would not have "significantly altered the total mix of information made available," under the test set forth by the U.S. Supreme Court in *Basic Inc. v. Levinson*. Because the finding of liability was reversed, the Court of Appeals also reversed the disgorgement order. The case was then remanded to the District Court for further proceedings.

On February 2, 2026, the District Court granted the SEC's and Commonwealth's joint motion to extend the stay of proceedings in the action to allow the parties to attempt to conclude settlement negotiations, staying the action until March 31, 2026. On March 23, 2026, the District Court entered a final judgment by consent as to Commonwealth for previously filed charges of the Advisers Act violations. Without admitting or denying the SEC's allegations, Commonwealth consented to a civil penalty of $5 million.

SEC Litigation Release, *Commonwealth Equity Services, LLC d/b/a Commonwealth Financial Network*, No. 26508 (Mar. 27, 2026), available at: https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26508.

SEC v. Commonwealth Equity Services, No. 24-1427(1st Cir. Apr. 1, 2025).

U.S. Supreme Court to Review SEC's Power to Obtain Disgorgement

On January 9, 2026, the U.S. Supreme Court agreed to review a 2025 Ninth Circuit decision affirming the SEC's authority to obtain a $2.3 million disgorgement penalty in a civil-enforcement action. The Supreme Court's decision will resolve a circuit split between the Second Circuit and the Ninth and First Circuits regarding the standard for awarding disgorgement as a form of equitable relief. Specifically, the question presented is whether the SEC may seek disgorgement in civil-enforcement actions without a demonstration that investors suffered actual financial loss, or pecuniary harm. This will be the third time in the past decade that the Supreme Court has examined the SEC's authority to seek disgorgement. The Supreme Court last addressed the SEC's disgorgement authority in *Liu v. SEC* in 2020, when it held that disgorgement should not exceed a wrongdoer's net profits and must be awarded for victims. However, *Liu* left unresolved whether victims must be identified and whether they must have suffered financial harm to support a disgorgement award.

Subsequently in 2023, the Second Circuit, in *SEC v. Govil*, applied *Liu* and held that to qualify as an equitable remedy, disgorgement requires a finding that investors suffered pecuniary harm. In *Govil*, the Second Circuit quoted *Liu* to emphasize the point that "'disgorgement must be 'awarded for victims,' and 'a defrauded investor is not a 'victim' for equitable purposes if he suffered no pecuniary harm.'"

In contrast, the Ninth Circuit, in *Striptech v. SEC*, explicitly rejected the Second Circuit's rationale as "[un]persua[sive]," and instead joined the First Circuit in holding that a showing of pecuniary harm is not a statutory "precondition" to disgorgement. While the Ninth Circuit agreed with the Second Circuit in so far as requiring a "victim" for the imposition of equitable disgorgement, it diverged on the basis of the meaning of "victim" in this context. The Ninth Circuit reasoned that requiring pecuniary harm would be inconsistent with disgorgement at common law, which requires interference with "the claimant's legally protected interests," rather than proof of loss, and that the Second Circuit's proposed approach improperly "ignores the fundamental distinction between compensatory damages, which are designed to compensate [a victim for losses], and restitution, which is designed to deprive the wrongdoer of his ill-gotten gains." By contrast in *Govil*, the Second Circuit determined a victim is "one who suffers pecuniary harm from the securities fraud" – highlighting *Liu*'s references to disgorgement as a tool to "restore the status quo" and "return … funds to victims," which the Second Circuit reasoned "presupposes pecuniary harm." The Second Circuit added that disgorgement without pecuniary harm to investors "does not aim to restore the status quo at all," but rather would "'confer [] a windfall on those who received the benefit of the bargain,' contrary to *Liu*'s command to 'bring disgorgement within equitable bounds.'"

The Circuit split has significant practical implications for SEC enforcement. As the petition noted, in fiscal year 2024, the SEC collected $6.1 billion in disgorgement, of which approximately $345 million (less than 6% of that total) was returned to investors, far exceeding the $2.1 billion in civil penalties collected by the SEC during the same period. The amount also far exceeded the aggregate $2.7 billion in disgorgement paid to investors since October 2020.

Under the Ninth Circuit's approach, supported by the SEC, disgorgement would be available regardless of whether investors actually lost money, because disgorgement post-*Liu* is a "profits-focused remedy" that "rests on the principle that a wrongdoer should not 'make a profit out of his wrong.'" By contrast, the Second Circuit's ruling would require the SEC to establish investor losses before seeking that remedy. Oral arguments before the Supreme Court are expected to commence on April 20, 2026.

Petition for a Writ of Certiorari, *Sripetch v. SEC* (Oct. 14, 2025).

Board Sued in Valuation Fraud Suit

On October 29, 2025, an investor in the Wildermuth Fund, a closed-end mutual fund registered with the SEC, filed a class action lawsuit in the District Court of New Jersey against the Fund, its adviser, members of its board, its former auditor and several executives for allegedly engaging in valuation fraud. The Complaint was brought on behalf of investors who purchased shares of the Fund between November 2020 and June 2023 asserting violations of the Exchange Act and the 1940 Act. The Complaint alleges that the Fund's financial statements were "materially false and misleading" and the Fund's NAV was "grossly overstated" during the class period as a result of Defendants' actions.

According to the Complaint, the Fund's initial stated investment objective was intended to mimic that of an endowment fund. However, Defendants allege that over time, the Fund shifted its investment strategy more heavily into riskier private equity investments. Despite this, the Complaint alleges that the Fund failed to disclose to shareholders that it was almost exclusively invested in private equity. In addition, the Complaint highlights conflict-based concerns, noting that the Fund purchased interests in portfolio companies mostly benefitting the Adviser, including its owners, married couple Daniel and Carol Wildermuth. Other alleged conflicts raised in the Complaint include that Daniel Wildermuth, the former President and CEO of the Fund, served on the boards of the portfolio companies in which the Fund invested, thereby earning director compensation while simultaneously collecting the Fund's annual advisory fees. Moreover, Carol Wildermuth also was a founder and CEO of a broker-dealer that earned Fund commissions and fees.

The Adviser and certain senior executives, including the Fund's former CEO and CFO, and several members of the Fund's board allegedly approved Fund valuations that did not reflect the reality of or the operational difficulties at the underlying portfolio companies. Plaintiffs allege that while "the operations and financial trajectory of the portfolio companies were in steady, persistent decline…the Fund's NAV reflected a steady portfolio, which was simply untrue." The Complaint notes that these portfolio companies faced declining revenue and recurring cash flow constraints, and adds that certain portfolio companies instead relied upon ongoing cash infusions from the Fund to continue operations, allegedly "propp[ing] up these portfolio companies and, in turn, artificially propp[ing] up the NAV of the Fund." Despite these facts, the Complaint states, the Board and its valuation and fair value committees continuously approved quarterly and annual valuations without sufficient and reliable evidence to support them.

Further, the Fund's independent auditor, WithumSmith+Brown, PC, also named in the Complaint, issued unqualified opinions on the Fund's financial statements during the class period, reporting that the financial statements and financial highlights were presented fairly in all material respects in accordance with GAAP. Despite these assertions, the Complaint alleges that the auditor did not obtain sufficient audit evidence, referencing prior PCAOB reports related to the auditor's inspection history, and did not apply adequate professional skepticism when reviewing the Fund's private equity valuations. Accordingly, the Complaint asserts that the auditor "knew or was reckless in not knowing" that the Fund, and specifically Daniel and Carol Wildermuth, "lacked credible support" for the Fund's valuations.

In June 2023, the Fund announced a plan of liquidation, adopted based on the recommendations of the Adviser and the Board. In connection with this, investors were notified that there were no issues with the underlying investments held by the Fund. Thereafter, in November 2023, Plaintiffs described a shift in valuation outcomes following the resignation of Daniel and Carol Wildermuth from the Fund and the termination of the Adviser, which was replaced by BW Asset Management, a subsidiary of Kroll, as the new adviser. BWAM conducted an independent assessment of the Fund's private equity holdings, which "told a completely different story" than previous annual reports and public disclosures. For example, BWAM reported that the Fund's NAV declined sharply as a result portfolio company underperformance, rather than the a loss of certain tax advantages as previously suggested by Defendants. BWAM's findings included a comparison of reported values in March 2022 and October 2024 and found that the Fund's investments and NAV had declined by 63.6% and 73.7%, respectively. By 2024, the Fund's NAV had been reduced to less than $2.00 per share, an 80% reduction in NAV per share. In light of these facts, the Complaint asserts that Defendants knew the Fund's NAV was grossly overstated, resulting in the Adviser receiving excessive fees based on the Fund's overstated NAV.

The Complaint asserts claims under the anti-fraud provisions under the Exchange Act, alleging that the Fund and its officers, investment adviser, and the Board defrauded investors by, among other actions, making material misstatements and omissions in periodic SEC filings in order to systematically overstate the value of the Fund's holdings and artificially maintain inflated prices for the Fund's securities. The Complaint also brings control person liability claims against the adviser, officers, and a trustee for violations committed under the Exchange Act, as well as a derivative excessive-fee claim against the adviser and the Board under the 1940 Act. The auditor is also alleged to have violated the anti-fraud provisions of the Exchange Act by issuing unqualified audit opinions despite the absence of credible support for portfolio valuations.

Complaint, *Cramer v. WithumSmith+Brown, PC et al.* (D.N.J. Oct. 29, 2025).

Industry Developments

SEC Enforcement Division Director Judge Margaret A. Ryan Resigns and David Woodcock is Named as New Director

On March 16, 2026, the SEC announced Judge Margaret A. Ryan's resignation from her role as Director of the SEC's Division of Enforcement, after having been appointed to that office last September. SEC Chair Paul Atkins stated that "[u]nder her leadership, the division reprioritized enforcing the nation's securities laws, with a focus on pursuing fraud." During her tenure, the Division focused on prioritizing cases involving misconduct, such as fraud, market manipulation, and breaches of trust to investors, with less emphasis on standalone compliance violations.

On April 8, 2026, the SEC announced David Woodcock's appointment as the Director of the Division, effective May 4, 2026. SEC Chair Paul Atkins welcomed Woodcock, noting his "experience as a senior officer at the SEC, global law firm partner, a certified public accountant, and senior in-house corporate attorney" and as "a foremost expert in all relevant facets of securities law [with] deep institutional knowledge." Woodcock is currently a partner at Gibson, Dunn & Crutcher LLP, where he also serves as chair of the firm's Securities Enforcement Practice Group. He is also an Adjunct Professor of Law at Texas A&M University School of Law teaching securities, ethics, and compliance. Woodcock previously served as a senior in-house corporate attorney at Exxon Mobil Corporation. From 2011 to 2015, he served as Director of the SEC's Fort Worth Regional Office overseeing investigations of the SEC's enforcement program, a member of the Enforcement Advisory Committee, and created and served as Chair of the SEC's cross-office and cross-division Financial Reporting and Audit Task Force.

Sam Waldon, who served as Acting Director of the Division since March, will continue to serve until May 4.

SEC Press Release, *SEC Announces Enforcement Division Director Judge Margaret A. Ryan Has Resigned From Agency* (Mar. 16, 2026), available at: https://www.sec.gov/newsroom/press-releases/2026-27-sec-announces-enforcement-division-director-judge-margaret-ryan-has-resigned-agency.

SEC Press Release, *SEC Appoints David Woodcock as Director of the Division of Enforcement* (Apr. 8, 2026), available at: https://www.sec.gov/newsroom/press-releases/2026-35-sec-appoints-david-woodcock-director-division-enforcement.

Two Exchanges Withdraw Rule Change Proposals to Exempt Registered CEFs From Annual Shareholder Meeting Requirements

The NYSE and Cboe BZX Exchange recently withdrew applications filed with the SEC pursuant to Rule 19b-4 under the Exchange Act seeking to exempt listed CEFs from the requirement to hold annual shareholder meetings.

In June 2024, the NYSE filed an application with the SEC seeking to amend Section 302.00 of the NYSE Listed Company Manual, which requires listed CEFs to hold annual shareholder meetings in each fiscal year, to exempt NYSE-listed CEFs from the annual shareholder meeting requirement. The application was ultimately withdrawn, revised and resubmitted in June 2025. The revised application narrowed the initial proposal so that only newly NYSE-listed CEFs would be exempt from the annual shareholder meeting requirement, leaving any already listed CEFs subject to the annual meeting requirement. The June 2025 application also would have permitted exempt CEFs to voluntarily include annual shareholder meetings in their bylaws if they chose to do so.

In May 2025, Cboe BZX Exchange filed a similar application with the SEC seeking to exempt CEFs listed on the exchange as of or after May 20, 2025, from the annual shareholder meeting requirement set forth in BZX Exchange Rule 14.10(f). The application also included an option for exempted CEFs to voluntarily include annual shareholder meeting requirements in their own bylaws if they chose to do so.

The applications noted that annual shareholder meeting requirements stem only from exchange listing rules, not the 1940 Act, which provide adequate mechanisms to protect CEF shareholder interests. The applications also noted that removing this requirement would help protect against the harms posed by activist investors, which have increasingly targeted CEFs. Furthermore, the applications noted that retail shareholders, those of most concern, show minimal participation in these meetings and emphasized that the proposed rule would not take away any existing shareholder rights because it would only apply to newly-listed CEFs.

In September 2025, the SEC instituted proceedings to determine its findings on the proposed rule change based on each application. In December 2025, the SEC extended the period for consideration to February 2026. However, BZX and NYSE withdrew their applications in December 2025 and January 2026, respectively.

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Withdrawal of a Proposed Rule Change Amending Section 302.00 of the NYSE Listed Company Manual To Exempt Closed-End Funds Registered Under the Investment Company Act of 1940 From the Requirement To Hold Annual Shareholder Meetings, Release No. 34-104548 (Jan. 6, 2026), available at: https://www.federalregister.gov/documents/2026/01/09/2026-00217/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-withdrawal-of-a-proposed-rule.

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 That are Listed as of or After May 20, 2025 From the Annual Meeting of Shareholders Requirement Set

Forth in Exchange Rule 14.10(f), Release No. 34-104447 (Dec. 23, 2025), available at: https://www.federalregister.gov/documents/2025/12/23/2025-23672/self-regulatory-organizations-cboe-bzx-exchange-inc-notice-of-withdrawal-of-a-proposed-rule-change.

For further information regarding this update, please contact one of the following:

WASHINGTON, D.C.

David W. Blass
+1-202-636-5863
david.blass@stblaw.com

Nathan Briggs
+1-202-636-5915
nathan.briggs@stblaw.com

Ryan Brizek
+1-202-636-5806
ryan.brizek@stblaw.com

Justin L. Browder
+1-202-636-5990
justin.browder@stblaw.com

Rajib Chanda
+1-202-636-5543
rajib.chanda@stblaw.com

Anne C. Choe
+1-202-636-5997
anne.choe@stblaw.com

Steven Grigoriou
+1-202-636-5592
steven.grigoriou@stblaw.com

Daniel B. Honeycutt
+1-202-636-5924
daniel.honeycutt@stblaw.com

Meaghan A. Kelly
+1-202-636-5542
mkelly@stblaw.com

Matthew C. Micklavzina
+1-202-636-5916
matthew.micklavzina@stblaw.com

Nicholas Olumoya Ridley
+1-202-636-5826
nicholas.ridley@stblaw.com

Neesa Patel Sood
+1-202-636-5580
neesa.sood@stblaw.com

Jonathan H. Pacheco
+1-202-636-5876
jonathan.pacheco@stblaw.com

Debbie Sutter
+1-202-636-5508
debra.sutter@stblaw.com

Kyle Ross Ahlgren
+1-202-636-5883
kyle.ahlgren@stblaw.com

Jeremy P. Entwistle
+1-202-636-5993
jeremy.entwistle@stblaw.com

Ruoke Liu
+1-202-636-5547
ruoke.liu@stblaw.com

John Dikmak
+1-202-636-5919
john.dikmak@stblaw.com

Cristina Foran
+1-202-636-5937
cristina.foran@stblaw.com

Timothy A. Madore
+1-202-636-5887
andy.madore@stblaw.com

James Eric Mattingly
+1-202-636-5818
james.mattingly@stblaw.com

Erin M. Randall
+1-202-636-5590
erin.randall@stblaw.com

Alexa Shockley
+1-202-636-5848
alexa.shockley@stblaw.com

NEW YORK CITY

Meredith J. Abrams
+1-212-455-3095
meredith.abrams@stblaw.com

Bissie K. Bonner
+1-212-455-7026
bissie.bonner@stblaw.com

Jacqueline Edwards
+1-212-455-3728
jacqueline.edwards@stblaw.com

Jonathan H. Gaines
+1-212-455-3974
jonathan.gaines@stblaw.com

Manny M. Halberstam
+1-212-455-2388
manny.halberstam@stblaw.com

Evan Hudson
+1-212-455-7016
evan.hudson@stblaw.com

William LeBas
+1-212-455-2617
william.lebas@stblaw.com

Benjamin Wells
+1-212-455-2516
bwells@stblaw.com

Stephanie Chaung
+1-212-455-7213
stephanie.chaung@stblaw.com

Stephen Forster
+1-212-455-3940
stephen.forster@stblaw.com

Naffie Lamin
+1-212-455-2330
naffie.lamin@stblaw.com

Jeffrey Caretsky
+1-212-455-7764
jeffrey.caretsky@stblaw.com

Hadley J.H. Dryland
+1-212-455-3477
hadley.dryland@stblaw.com

David C. Howe
+1-212-455-3810
david.howe@stblaw.com

Adrienne J. Jang
+1-212-455-7368
adrienne.jang@stblaw.com

BOSTON

Kenneth E. Burdon
+1-617-778-9001
kenneth.burdon@stblaw.com

Nathan D. Somogie
+1-617-778-9004
nathan.somogie@stblaw.com

Thomas Cheeseman
+1-617-778-9042
thomas.cheeseman@stblaw.com

Seth Davis
+1-617-778-9012
seth.davis@stblaw.com

LOS ANGELES / SAN FRANCISCO

Arthur E. Flynn
+1-415-426-7263
arthur.flynn@stblaw.com

Adam S. Lovell
+1-202-636-5938
adam.lovell@stblaw.com

Memorandum

Department of Labor Releases Proposed Rule Aiming to Reduce Litigation Risk Associated With 401(k) Plans Including Access to Private Markets Assets

April 2, 2026

Introduction

The U.S. Department of Labor ("DOL") has released a proposed rule (the "Proposed Rule")[1] designed to facilitate an ability for individuals in 401(k) plans to allocate a portion of their investments to alternative assets, such as private equity and private credit. At its core, the Proposed Rule constitutes a framework for employers and other fiduciaries of 401(k) plans who are responsible for selecting investment funds that sit on plan menus, regardless of whether that plan investment option has an allocation to alternative assets. Thus, the Proposed Rule is broader than many envisioned, yet it nonetheless likely paves the way for greater inclusion of alternative assets, especially inside of plan options, such as target date funds ("TDFs"). The Proposed Rule is intended to curtail litigation risk against employers over their choices of investment funds for their 401(k) plan menus. Private fund sponsors are not subject to the Proposed Rule (other than, potentially, with respect to their own 401(k) plans, or if an affiliate separately provides plan-level advisory services or otherwise acts as a sponsor or manager of a fund that sits directly on a 401(k) plan menu).[2]

More specifically, the Proposed Rule provides a process-based, presumptive safe harbor for an employer's selection of designated investment alternatives ("DIAs") in 401(k) plans.[3] The safe harbor is meant to facilitate access to alternative assets by 401(k) plan savers by "help[ing] shield" plan fiduciaries "from the risk of excessive litigation about such selection" in plan menus. The framework embedded in the Proposed Rule seeks to provide further clarity on a plan fiduciary's duty of prudence when selecting investment options (including alternative asset classes) for a 401(k) plan. This added clarity, coupled with the safe harbor, is likely to result in greater interest by employers in adding plan investment options with alternatives exposure.

[1] U.S. Department of Labor, *Fiduciary Duties in Selecting Designated Investment Alternatives* (Mar. 30, 2026), available here.

[2] Many private investment funds are structured as "venture capital operating companies," "real estate operating companies, "25% exception funds," or rely on another exception under the DOL's "plan assets" regulation. Those fund sponsors and managers, therefore, are not fiduciaries under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") in their capacities as such. We reiterate that no fund sponsor or manager is subject to the Proposed Rule, other than potentially in the context of their own ERISA plans or if an affiliate provides plan-level advisory services or otherwise acts as a sponsor or manager of a fund that sits directly on a 401(k) plan menu.

[3] A private investment fund is not a DIA for purposes of the Proposed Rule if the investment fund that sits directly on the 401(k) plan menu makes an allocation to the private investment fund.

The Proposed Rule sets forth six factors that a plan fiduciary already would likely consider when deciding whether to offer an investment fund directly on a 401(k) plan menu: Performance, Fees, Liquidity, Valuation, Performance Benchmarks, and Complexity. The proposal, through examples, provides plan fiduciaries a presumption of prudence if they follow certain processes when evaluating each such factor. As noted above, the application of these factors will have an indirect effect on private fund sponsors in that it will affect an employer's appetite for adding plan investment options with alternatives exposure, as well as the management and marketing of the plan investment options themselves (*e.g.*, TDF sponsors and managers) in the construction of their funds.

The Proposed Rule is open for comments from the public, which must be submitted to the DOL by June 1, 2026.

Background

DESIGNATED INVESTMENT ALTERNATIVES

401(k) plans typically offer a menu of investment options known as DIAs into which plan participants can direct the investment of their contributions. Most (but not all) of these investment options are commingled funds, such as target date funds, which are structured as either collective investment trusts ("CITs") or registered investment companies. A plan committee usually acts as the fiduciary responsible for populating the plan's menu of investment options, though there has been an increasing trend for these decision-making responsibilities to be outsourced to third party consultants and advisers.

In recent years, sophisticated asset managers have developed a wide range of investment vehicles that offer exposure to alternative assets, including private equity, private credit, real estate and other alternative strategies. The inclusion of these vehicles as DIAs within 401(k) plans, or the increased allocation of 401(k) assets to alternatives through commingled fund structures, has raised complex fiduciary considerations regarding valuation, liquidity, fees and risk. However, increased allocations to alternative assets can provide much needed diversification, increased downside protection and the potential for better risk-adjusted returns over the long term. The Proposed Rule has the potential to expand allocations to alternative assets in 401(k) plans by addressing some of the most pressing fiduciary considerations.

DUTY OF PRUDENCE

Under section 404(a)(1)(B) of ERISA, plan fiduciaries are subject to a duty of prudence, which requires them to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA also provides a private right of action to plan participants and beneficiaries who may bring civil actions for breach of fiduciary duty.[4]

[4] Sections 409 and 502 of ERISA authorize participants to file suit to hold fiduciaries "personally liable to make good to such plan any losses to the plan resulting from each such breach," and provides for "other equitable or remedial relief."

In 1979, the DOL adopted a regulation describing the fiduciary duty of prudence in the context of plan investment selection (the "1979 Investment Duties Regulation").[5] The 1979 Investment Duties Regulation, in relevant part, provides that a plan fiduciary meets its duty of prudence when selecting an investment if the fiduciary gives "appropriate consideration to those facts and circumstances that … the fiduciary knows or should know are relevant to the particular investment …" and if the fiduciary "acted accordingly." Such considerations include the "risk of loss and the opportunity for gain … associated with the investment" as compared to other available options, and under certain circumstances, "the diversification, liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and projected return of the portfolio relative to the funding objectives of the plan." The Proposed Rule is not intended to replace or contradict any of the principles set forth in the 1979 Investment Duties Regulation. Rather, the Proposed Rule is intended to supplement and expand on the 1979 Investment Duties Regulation, other DOL guidance, and existing case law in the context of investment selection.[6]

AN EVOLVING RETIREMENT LANDSCAPE

The federal government, including the U.S. Securities and Exchange Commission ("SEC"), is pursuing a broad initiative to expand access to private market alternative investments.[7] To further that initiative, President Donald Trump signed an executive order on August 7, 2025 (the "Executive Order"[8]) instructing the DOL to, among other things, propose rules, regulations, or guidance, as it deems appropriate, to clarify the duties that a fiduciary owes to plan participants under ERISA when deciding whether to make available to plan participants an asset allocation fund that includes investments in "alternative assets." The Executive Order noted that the DOL should "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."

The Executive Order defined "alternative assets" to include:

i. Private market investments, including direct and indirect interests in equity, debt, or other financial instruments;

ii. Real estate;

iii. Actively managed investment vehicles that invest in digital assets;

iv. Commodities;

[5] 29 CFR 2550.404a-1(b)(1); 44 Fed. Reg. 37225 (June 26, 1979), available here.

[6] The Proposed Rule's safe harbor is limited to the duty of prudence and does not address the duty of loyalty or prohibited transaction issues (*e.g.*, a private equity fund sponsor adding its own funds to its in-house plan menu).

[7] *See* Chairman Paul S. Atkins, Speech, *Remarks at the Investor Advisory Committee Meeting* (Sep. 18, 2025), available here. *See* Commissioner Mark T. Uyeda, Speech, *The Diversification Deficit: Opening 401(k)s to Private Markets* (Nov. 20, 2025), available here. *See* Commissioner Hester M. Peirce, Speech, *Let Them Ride: Remarks at the Meeting of the SEC Investor Advisory Committee* (Sep. 18, 2025), available here. On March 4, 2026, the SEC hosted a roundtable to discuss governance, valuation, and other considerations with the aim of promoting responsible retailization of private markets, webcast available here.

[8] Democratizing Access to Alternative Assets for 401(k) Investors – The White House (Aug. 7, 2025), available here.

v. Infrastructure finance; and

vi. Lifetime income investment strategies such as longevity risk-sharing pools.

The Executive Order also directed the DOL to consult, as appropriate, the SEC and other Federal regulators, to determine whether those agencies should implement related regulatory changes to give effect to the purpose of the Executive Order. Accordingly, the Proposed Rule has the explicit support of the Chair of the SEC and the Secretary of the Treasury.[9] We expect the DOL, SEC, and the Treasury Department to continue to coordinate on policy efforts to facilitate access to alternative assets in 401(k) plans.

Discussion of Proposed Rule

SCOPE

The Proposed Rule implements the Executive Order by providing guidance regarding the ERISA duty of prudence as it relates to the selection of DIAs. Notably, the Proposed Rule would apply to the selection of *any* type of investment as a DIA, including (but not limited to) investments through an asset allocation fund.[10] The Proposed Rule broadly defines a DIA as "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, including a qualified default investment alternative…." The DIA definition does not extend to self-directed brokerage windows (or similar plan arrangements that enable participants to select investments beyond those designated by a plan), which are not included under the Proposed Rule. Private fund sponsors are not directly subject to the Proposed Rule (other than with respect to their own 401(k) plans or if an affiliate separately provides these types of services to plans).

Additionally, the scope of the Proposed Rule extends only to the individual selection of potential DIAs for a 401(k) plan and does not address the duty of prudence with respect to the creation of a menu of investments as a whole. The DOL noted that it is considering whether to issue guidance on the process for curating a prudent menu of investments overall in a plan.

Further, while ERISA itself applies a duty of prudence to investment selection and ongoing monitoring responsibilities, the Proposed Rule only provides its safe harbor framework for DIA investment selection and not to the ongoing monitoring of DIAs. However, the DOL notes that it "is generally of the view" that the factors and processes in the Proposed Rule apply to the ongoing duty of monitoring and that it anticipates issuing interpretive guidance on monitoring in the "near term." Nevertheless, this approach may create unnecessary distinctions between the fiduciary duties applicable to investment selection, on the one hand, and ongoing monitoring on the other.

[9] *See* U.S. Department of Labor, News Release, *US Department of Labor Proposes Landmark Rule to Democratize Access to Alternative Investments in 401(k) Plans* (Mar. 30, 2026), available here.

[10] The DOL notes that its decision not to provide a safe harbor for specific asset classes follows its historical approach of neutrality across asset classes rather than picking winners and losers.

SAFE HARBOR FACTORS

The Proposed Rule establishes a process-based, presumptive safe harbor by introducing a non-exhaustive list of six factors that a plan fiduciary should consider when selecting a DIA. The DOL believes the six factors included in the Proposed Rule are integral to the vast majority of DIAs provided within participant-directed individual account plans. With respect to each factor, a plan fiduciary can conduct their own evaluation or can reasonably rely on the recommendations of an investment advice fiduciary (*e.g.*, a "3(21)" fiduciary) or an investment manager (*e.g.*, a "3(38)" fiduciary). An employer's appointment of a 3(21) or 3(38) fiduciary is indicative of a prudent process under the Proposed Rule, and an employer or one of its outsourced fiduciaries that evaluates a factor in accordance with the processes described in the Proposed Rule would fall under the safe harbor with respect to that factor and is "entitled to significant deference." We discuss the likely effect of this presumption in more detail in the "Key Takeaways" section below.

Performance

Employers must evaluate whether a potential DIA's expected risk-adjusted returns, considered over an appropriate time horizon and net of anticipated fees and expenses, support a plan's objective. Accordingly, plan fiduciaries need not select an investment strategy with the highest returns, nor aim to achieve the highest possible returns, but rather should seek to maximize returns for a given level of appropriate risk, consistent with plan participants' likely needs over the course of the anticipated investment. The DOL notes that "it may be prudent to select a lower-risk strategy with lower expected returns" such as by seeking diversification benefits from alternative assets that have low correlations to stocks and bonds.[11] Given the long-term nature of retirement savings, it may often be prudent for a plan fiduciary to give greater weight to long-term historical performance over short-term performance.

Fees

A plan fiduciary must also assess a "reasonable number" of "similar" investment alternatives to the potential DIA and evaluate their fees. The fee factor is best viewed as requiring an analysis of the value proposition of a DIA; the Proposed Rule explicitly rejects a lowest-cost requirement and instead requires that fees be "appropriate" in light of other values the DIA provides to the plan.[12] The fiduciary can evaluate expected risk-adjusted returns and other benefits, which may include features such as diversification, downside protection or lifetime income. As an example, the Proposed Rule highlights that a plan fiduciary may offer actively managed funds with higher fees

[11] For this proposition, the DOL cites *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015 (9th Cir. 2025), cert. granted, No. 25-498 (Jan. 16, 2026), which is expected to be argued before the Supreme Court in the coming term. Given its reliance on the 9th Circuit's decision, the DOL may wait until the Supreme Court publishes its opinion before finalizing the rule.

[12] Consistent with case law, the Proposed Rule notes that it would be imprudent for a fiduciary to select a more expensive share class when a less expensive class is available if both share classes are otherwise identical.

alongside passively managed funds with lower fees if the fiduciary concludes that the value of the diversification of the actively managed funds justifies their higher fees.

Liquidity

Fiduciaries must ensure that a potential DIA provides sufficient liquidity at both the plan and participant level to meet events such as participant withdrawals, asset reallocations and plan loans. The rule recognizes that some illiquidity (including in alternative assets) may be appropriate if balanced against participant needs and supported by reasonable liquidity management processes.

If a DIA is a registered open-end fund under the Investment Company Act of 1940, as amended, (the "1940 Act"), its implementation of a written liquidity and risk management program as required by Rule 22e-4 of the 1940 Act would satisfy the liquidity factor. If a DIA is not an open-end fund, such as a CIT, a plan fiduciary may meet the liquidity factor by relying on a written representation by the DIA's manager that it has implemented a liquidity risk management program "substantially similar" to that required under Rule 22e-4. It is not clear from the Proposed Rule whether such a "substantially similar" program would be required to implement the 15% illiquid investment limit or any other specific provision of Rule 22e-4.

Alternatively, a plan fiduciary may conduct a separate analysis to assess whether a pooled investment fund is sufficiently liquid to offer as a DIA. The plan fiduciary must conclude, based on its diligence, that the DIA appropriately balances future liquidity needs with the ability of the DIA to achieve increased risk-adjusted return on investment net of fees, and the ability to maintain its asset allocation targets, even if the DIA faces a significant volume of redemption requests. Further, the plan fiduciary must ensure that investments can deliver on any promises of liquidity that are made to participants and beneficiaries. The Proposed Rule includes an example finding that a plan fiduciary can prudently determine that a DIA with a quarterly liquidity feature is appropriate for the needs of the plan and its participants in light of the expected increase in risk-adjusted return net of fees.

We discuss how this factor is likely to favor DIAs that are 1940 Act-registered open-end funds in the "Key Takeaways" section below.

Valuation

Employers or other responsible fiduciaries must determine that a potential DIA can be valued accurately and in a timely manner in accordance with the needs of the plan. Plan fiduciaries may rely on asset valuations derived from a generally recognized market where valuations are "readily and accurately determinable in a timely manner" such as a national securities exchange. For securities without a generally recognized market value (*e.g.*, private assets),

a fiduciary must ensure that valuation methodologies are independent, robust and free from conflicts of interest.[13] A fiduciary may rely on a written representation that the securities are valued at least quarterly through an independent, conflict-free process consistent with the Financial Accounting Standards Board Accounting Standards Codification 820, titled Fair Value Measurement (or any successor standard).

As with the liquidity factor, above, the valuation factor also incorporates by reference the protections of the 1940 Act. With respect to 1940 Act-registered funds and business development companies ("BDCs"), a fiduciary will have met the safe harbor requirement if it reviews the fund's audited financial statements and valuation-related prospectus disclosures for conformity with Rule 2a-5 under the 1940 Act, which generally governs such funds' valuation methodologies and reporting.

We discuss how this factor is likely to favor DIAs that are 1940 Act-registered funds and BDCs in the "Key Takeaways" section below.

Performance Benchmarks

Fiduciaries must compare a potential DIA to a "meaningful benchmark" with similar "mandates, strategies, objectives, and risks." The Proposed Rule allows flexibility to use composite or customized benchmarks for complex or hybrid strategies, which is of particular importance to alternative investment strategies that can be difficult to benchmark using existing indices or strategies.

Complexity

Fiduciaries must evaluate whether they possess the expertise necessary to understand a potential DIA's structure, risks and fees (such as sophisticated and variable fee arrangements involving performance fees or carried interest), or whether they must seek assistance from qualified advisers. In an example that is particularly relevant to many investments in alternatives, the Proposed Rule confirms that a plan fiduciary could prudently conclude that a fee structure with carried interest or performance fees will deliver increased value that outweighs the variability and potential unpredictability of the amount and timing of such fees. However, the Proposed Rule also includes an example in which the fiduciary "appears to not understand how the [DIA] delivered value to the plan and therefore failed to operationalize it accordingly." The inclusion of this cautionary example stresses the importance that a plan fiduciary understand the "value proposition" of a DIA with exposure to alternative assets and the importance of this value proposition across many of the factors, including performance, fees and complexity.

[13] The valuation of a DIA's assets by its affiliate does not satisfy the safe harbor because such a valuation methodology reflects a "flawed selection process" that does not demonstrate that the fiduciary appropriately considered and determined that the DIA had adopted adequate measures to ensure that the DIA was capable of being timely and accurately valued in accordance with the needs of the plan. The DOL notes: "Where those conflicts could impact risk-adjusted return on investment, the duty of prudence generally requires a fiduciary to take appropriate steps to understand and mitigate any such adverse impacts and make a determination that the conflict of interest has not and will not render the designated investment alternative's valuation inaccurate."

Key Takeaways

The Proposed Rule is designed to reduce litigation risk for plan fiduciaries, and while continued litigation is to be expected, the safe harbor will likely make litigation easier to manage for courts and plan fiduciaries alike.

The DOL notes, "given where the burden lies, a fiduciary that can actively demonstrate that compliance should be able to confidently rely on it to successfully defend its actions." In other words, where an employer can demonstrate a thorough reliance on the safe harbor factors, even post-*Loper Bright*, judges will have a clear roadmap to assess prudence claims against plan fiduciaries with DIAs in plan menus. In the event a case proceeds past the motion to dismiss stage, judges may be inclined to limit discovery to the fiduciary's reasonable documentation evidencing compliance with the safe harbor factors.[14]

However, there are areas in which the safe harbor can be improved to further reduce litigation risk for plan fiduciaries allocating to alternative strategies in DIAs. It is unclear whether the DOL's adoption of a presumption of prudence through rulemaking will affect a court's analysis of a claimed breach of fiduciary duties under ERISA, namely whether courts grant deference to the safe harbor. Features of the Proposed Rule could also raise disputable facts (*e.g.*, whether alternatives considered for fee comparisons were "reasonable" and "similar" and the "sufficiency" of liquidity features). Further, as noted above, any future DOL interpretive guidance on the fiduciary duties for DIA monitoring could prove vulnerable to revision or rescission in the future, which could further dissuade plan fiduciaries from making alternatives available in their plan menus. Industry participants may ultimately seek greater protections for plan fiduciaries in litigation such as a more deferential standard of review or through other proposals to further lower the risk of prolonged litigation.

To be sure, the availability of the safe harbor in the Proposed Rule offers plan fiduciaries a significant tool to defend against prudence claims. Indeed, the DOL notes that the Proposed Rule "would reestablish that plan fiduciaries have the discretion to determine whether to include an investment as a [DIA] without fear of facing litigation, provided they follow the prudent process described in the safe harbor." To the extent courts begin to consistently rely on the safe harbor as described in the Proposed Rule, we would expect a significant reduction in such claims against plan fiduciaries with DIAs, including those with exposures to alternatives.

The widespread adoption of such safe harbor is not without precedent in the courts. In the context of Section 36(b) of the 1940 Act, the Supreme Court adopted the *Gartenberg* standard for breach of fiduciary claims regarding excessive fees charged by investment managers.[15] There, the Supreme Court noted that judges should give significant weight to the fee evaluation conducted by the fund and its independent trustees, focusing on the sufficiency of process. Only if the investment manager withheld important information would a court look beyond

[14] The Supreme Court recently squarely addressed the discretionary authority of district court judges to "expedite or limit discovery as necessary to mitigate unnecessary costs" in the context of ERISA duty of loyalty claims. *Cunningham v. Cornell*, 604 U.S. 693, 709 (2025).

[15] *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010).

process and instead at the actual fee rates.[16] In the same vein, the Proposed Rule's safe harbor should be viewed as empowering judges to defer to the process conducted by plan fiduciaries before ever addressing the merits of the DIA. In fact, no court has ever ruled in favor of the plaintiff in a final disposition of an excessive fee lawsuit under Section 36(b). A reduction in such similar claims in the 401(k) space would significantly reduce overall litigation risk for plan fiduciaries and likely increase exposure to alternatives in DIAs in more plan menus.

The Proposed Rule provides a clearer pathway for alternative assets in 401(k) menus.

The Proposed Rule lowers perceived barriers to inclusion of alternative strategies in DIAs, particularly within asset allocation products. These lower barriers could encourage financial institutions to design new products and translate into a significant movement of capital into alternatives strategies, particularly given the large existing asset base in target date funds and other asset allocation products.

However, because the liquidity and valuation safe harbor factors would allow a plan fiduciary to rely, in large part, on a simple verification of a 1940 Act-registered fund's liquidity and valuation programs, this comparatively clear verification process may encourage plan fiduciaries to favor DIA structures that are in a 1940 Act-registered fund structure, which is not well-suited for many alternative asset classes. In contrast, for a pooled investment vehicle that is not registered under the 1940 Act, such as a CIT, the safe harbor could be understood as requiring that a bank-trustee operate a CIT with liquidity and valuation provisions that are "substantially similar" to the corresponding requirements under the 1940 Act, leading to questions as to who makes that determination and how that determination would be impacted by any future SEC rulemakings under the 1940 Act related to these provisions. Therefore, the Proposed Rule could be viewed as creating an unnecessary impediment to including alternatives in DIAs. Requiring such 1940 Act specific standards ignores the commercial reality that managers of alternative retail products, including those that are not registered under the 1940 Act, are carefully designed to meet the liquidity demands of retail investors and implement thorough conflicts evaluation frameworks that otherwise address the concerns raised in the Proposed Rule.

The Proposed Rule supplements, but does not replace, existing law on the ERISA duty of prudence.

The DOL developed the safe harbor factors based on pertinent case law, existing regulations and previous sub-regulatory guidance. The Proposed Rule does not attempt to remake the duty of prudence or establish a different standard of care with respect to alternative asset classes. Rather, the DOL cites historical cases and guidance in support of a new framework that is designed to help plan fiduciaries operationalize their evaluation of a DIA of any asset class under existing fiduciary principles. As a result, if the safe harbor framework is adopted as proposed

[16] *See id.* at 352 (quoting *Burks v. Lasker*, 441 U.S. 471, 481 (1979)) (emphasizing that the standard "does not call for judicial second-guessing of informed board decisions," and that courts are not to "supplant the judgment of disinterested [trustees] apprised of all relevant information, without additional evidence that the fee exceeds the arm's-length range); *see also id.* at 352-53 (recognizing Congress's approach in Section 36(b) was to reflect that "courts are not well suited to make such precise calculations").

and the courts do not grant deference to the safe harbor, then the rulemaking will still serve as a modern restatement of the DOL's views on the duty of prudence.

The Proposed Rule emphasizes process.

The Proposed Rule highlights the importance of a reasoned, analytical process for compliance with the ERISA fiduciary duty of prudence, which is consistent with its longstanding interpretation as a procedural duty at the time of the investment decision rather than an ex-post assessment with the benefit of hindsight. Additionally, the DOL strongly encourages plan fiduciaries to use third-party advisers, stating that the decisions to hire an investment advice fiduciary or an investment manager is "indicative of" a prudent process. However, the Proposed Rule makes no mention that the qualifications and/or historic performance of the fund manager(s) of the DIAs or the manager(s) of the underlying alternative assets are relevant to satisfying the safe harbor. The six safe harbor factors can likely be satisfied through documentation and third-party diligence materials, but further detail is required on how this will operate in practice.

What's Next

The Proposed Rule is open for comments from the public, including from private fund sponsors, which must be submitted to the DOL by June 1, 2026.

Conclusion

The Proposed Rule represents a meaningful step toward expanded access to alternative investments through defined contribution plans. It supports a more diversified retirement system by emphasizing a plan fiduciary's discretion in determining the best investment options for 401(k) plan participants. This is particularly important in the context of alternative assets that can enhance diversification, improve risk-adjusted returns and better align retirement portfolios with the long-term investment horizons of participants. However, there remain several opportunities for the DOL to refine further the safe harbor framework and clarify terminology.

For further information regarding this memorandum, please contact one of the following authors:

WASHINGTON, D.C.

Rajib Chanda
+1-202-636-5543
rajib.chanda@stblaw.com

David W. Blass
+1-202-636-5863
david.blass@stblaw.com

Erica Rozow
+1-202-636-5961
erica.rozow@stblaw.com

Adam S. Lovell
+1-202-636-5938
adam.lovell@stblaw.com

Blake Delaplane
+1-202-636-5936
blake.delaplane@stblaw.com

BOSTON

George M. Gerstein
+1-617-778-9008
george.gerstein@stblaw.com

SEC Watch

March 5, 2026

In First Public Remarks, Director of Enforcement Ryan Lays Out "Principles, Process, Priorities"

Summary: Enforcement Director Judge Margaret Ryan made her first public remarks at the Los Angeles County Bar Association's Annual Securities Regulation Seminar. Focusing on "principles, process, priorities," Ryan laid out her vision for the Division of Enforcement.

- Noting that she is "acutely aware" of past criticisms of the Division and acknowledging that some of them "are valid and warranted course correction," Ryan zeroed in on updates to the Wells process, discussed further below. Turning to priorities, Ryan unsurprisingly began with "scams" that target retail investors as well as accounting fraud, insider trading, wash trading, and market manipulation schemes. More interestingly, she closed her discussion of priorities by focusing on "compliance" violations and asserted that "many violations of these provisions should not—and do not—result in enforcement" but that some "may warrant enforcement action." Finally, and notably, Ryan appeared to express support for remediation of non-fraud conduct by other Divisions (*e.g.*, Examinations) as an alternative to enforcement.

Takeaway: The Director directly reminded market participants that enforcement activity is not dead, warning that: "reports that enforcement work at the SEC has been tossed to the wayside are not only greatly exaggerated but flat out wrong.

Best Practice Tip: Investment advisers will continue to be at the heart of the SEC's examination and enforcement programs and should continue to ensure practices comport with regulatory requirements. Where there are significant deficiencies, advisers should consider opportunities for proactive remediation outside of the enforcement context.

SEC Announces Updates to the Enforcement Manual

Summary: The Enforcement Division announced "significant updates" to its Enforcement Manual, which had not been updated since 2017. The updates were designed to "ensure greater uniformity" in the enforcement process. Among other things, the revisions standardize the Wells process with respect to process, oversight, and timing. Perhaps most significantly, the updates to the Manual now provide for a clear expectation that the Staff "should be forthcoming about the contents of the investigative file." Of all the changes in the Manual, this has the potential to be the most transformational, as it should—if faithfully applied—allow potential respondents to assess evidence obtained from third-parties, such as investors, which is often critical to assessments of materiality and intent.

- Other noteworthy updates include increased oversight during key milestones of an investigation, a more robust framework for assessing cooperation credit, and the express acknowledgement that settlement discussions may proceed in parallel with requests for the staff to consider waivers from automatic disqualifications and other collateral consequences that result from an enforcement action.

Takeaway: The updates underscore the Commission's efforts to increase internal efficiency and provide predictable process and transparency for potential respondents. Changes such as access to the investigative file, and presumed involvement of senior leadership in not only the Wells process, but all key milestones in an investigation are emblematic of an overall shift in tone that gives the sense that leadership can be approached with more frequency. These changes will be particularly important in investigations with aggressive legal theories or procedural approaches.

Best Practice Tip: It remains to be seen how these changes will play out in active enforcement actions; we will continue to provide updates. In the meantime, advisers with investigations approaching inflection points should consider opportunities for additional advocacy, outreach to senior leadership, or requests to view the investigative file before moving forward.

Division of Investment Management Holds Roundtable on Private Market Valuation and Retail Investor Access

Summary: The Division of Investment Management held a roundtable on March 4 to discuss private market valuations and responsible retailization. In announcing the roundtable, Director of Investment Management Brian Daly said: "With retail exposure to alternative investments becoming more common, we want to help everyday investors understand the different valuation approaches used in these products." The roundtable consisted of two panel discussions. The first considered how "asset classes historically offered in the private markets continue to migrate into publicly offered vehicles" and addressed opportunities, challenges, and considerations for investors. The second focused on fund governance as it relates to providing exposure to private market assets through retail funds.

Takeaway: The roundtable builds on the Administration's and the SEC's focus on expanding access to alternative investments for retail investors. IM's focus on private market valuations is in itself notable, as valuation has been a perennial enforcement priority across administrations.

Best Practice Tip: Retailization presents a generational market opportunity but comes with the potential for increased scrutiny in light of a retail investor base. In the context of turbulent markets, advisers should step up their review of existing valuation policies and procedures and benchmark against industry best practices.

February 11, 2026

Supreme Court to Weigh in on the SEC's Power to Recoup Ill-Gotten Gains

Summary: The Supreme Court agreed to hear *Sripetch v. SEC* to resolve a circuit split over the SEC's disgorgement authority. Specifically, SCOTUS will decide if the Commission must show identifiable investor harm to seek disgorgement in enforcement proceedings. In 2020's *Liu v. SEC*, the Court found that disgorgement was authorized where the money is returned to victims and the amount does not exceed the net profits the wrongdoer reaped in the alleged scheme. Following a statutory change to disgorgement authority in January 2021, the SEC argues that disgorgement is available to prohibit defendants from benefiting from misconduct rather than solely to compensate victims.

Takeaway: The power to require the return of "ill-gotten gains" has long been a key SEC enforcement tool. For the Commission—which obtained orders for more than $6.1 billion in disgorgement and prejudgment interest in 2024—and potential respondents, the stakes are high. The Court's decision could further limit the SEC's authority and curtail an important lever the Commission has relied on in settlement negotiations in enforcement matters.

Best Practice Tip: Stay tuned for updates on the parties' oral arguments in April and the subsequent ruling, likely to be released in July.

Reforms to Regulation S-K on the Horizon

Summary: Chairman Atkins signaled an intent to revise Regulation S-K, the primary regulatory regime that outlines non-financial disclosure requirements for public issuers, by announcing that he has instructed the Division of Corporation Finance to engage in a comprehensive review of the regulation. Specifically, Chairman Atkins noted that the Staff is preparing recommendations to the Commission for revisions to Item 402, which concerns executive compensation. Chairman Atkins's announcement emphasized the need to sharpen required disclosures to enable investors to "separate the wheat from the chaff when reviewing periodic reports and proxy statements."

Takeaway: This announcement is another example of this Commission executing on its desire to reform the disclosure process and *reduce* public company reporting requirements. Though it may not happen this month or this year, reporting companies will likely have their obligations lessened under this Commission.

Best Practice Tip: Chairman Atkins invited engagement on potential reforms to Regulation S-K. Those with strong views on areas of reform or who would like to share industry-specific considerations, should consider submitting a comment letter or requesting a meeting with the Staff.

Commission Personnel Changes

Summary: January saw several notable personnel changes within the Commission, in both the Examinations and Enforcement Divisions. Most notably, Keith Cassidy was named Director of the Division of Examinations. Cassidy is a veteran regulator, having joined the Commission in 2017; he previously served as the Division's Deputy Director and Acting Co-Director, and has held the role of Acting Director since May 2024.

- In addition, on January 12, the Commission announced that Paul Tzur and David Morrel would fill the roles of Deputy Directors in the Division of Enforcement. Tzur is set to oversee the agency's enforcement program in the Chicago, Atlanta, and Miami offices, and Morrel will oversee the enforcement program in the northeast (New York, Boston, and Philadelphia offices). Both Tzur and Morrel return to the Government from private practice, where they focused on civil litigation and either white collar defense or government disputes, respectively.

Takeaway: The work of the Division of Examinations is likely to proceed on a business-as-usual basis given Director Cassidy's long tenure on the Staff; registrants should therefore expect the 2026 examinations program to align with historical practices. In the Enforcement Division, Tzur and Morrel's appointments reflect a restocking at senior levels.

Best Practice Tip: Coincident with permanent appointments across Exams and Enforcement, we are seeing an uptick in exam and enforcement activity. Following a year with historically low activity levels, registrants should prepare for greater Staff engagement.

FINRA Fines Member for Violating Communications Rule

Summary: FINRA announced a settlement with a member firm for violations of FINRA Rule 2210, which governs broker-dealer communications with the public, as well as other compliance and reporting failures. Between 2018 and 2024, the firm distributed retail communications related to private placements that projected investment performance and included target returns, in direct violation of the Rule's prohibition on projected performance. During the same time period, the firm also sent numerous communications that included aggregated returns, *i.e.*, combined or averaged Internal Rates of Return (IRRs) and Cash Multiple Values representing a subset of the sponsor's prior closed deals. The settlement alleges that these practices violated the Rule's prohibition on false or misleading statements.

- These violations relate to 2021 staff-issued FAQs on FINRA Rule 2210's content standards, clarifying that (1) target returns are prohibited projections when presented in retail communications and (2) it is misleading for a communication to include metrics that combine or average the performance of only the individual realized holdings because such metrics may mask unequal or poor returns, and the results may not be representative of the ultimate performance of the program as a whole.

Takeaway: Retail communications are subject to the highest scrutiny under FINRA rules—even those communications that relate to private placements where investors must meet certain sophistication standards.

Further, despite efforts to modernize FINRA Rule 2210, the settlement highlights two areas where the SEC Marketing Rule and FINRA Rule 2210 diverge. Under the SEC Marketing Rule, investment advisers are permitted to include projected performance and the aggregated performance of a subset of investments, in each case subject to certain compliance and disclosure requirements. By contrast, FINRA Rule 2210 flatly prohibits the inclusion of such performance metrics.

Best Practice Tip: FINRA Rule 2210's prohibition on combined or average performance of only realized holdings is relatively lesser known than the Rule's prohibition on projected performance. This settlement highlights that firms should be aware that any composite or aggregated performance may be scrutinized by FINRA staff when conducting an examination or reviewing a firm's communications. Additionally, any dual-registrants or large financial institutions whose communications may be subject to both regimes should remain vigilant as to how the two different regulatory regimes might apply to the same types of communication

---

For further information regarding the SEC Watch, please contact one of the following authors:

Adam S. Aderton
+1-202-636-5549
adam.aderton@stblaw.com

David W. Blass
+1-617-778-9031
david.blass@stblaw.com

Justin L. Browder
+1-202-636-5990
justin.browder@stblaw.com

Nicholas S. Goldin
+1-212-455-3685
ngoldin@stblaw.com

Michael J. Osnato, Jr.
+1-212-455-3252
michael.osnato@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.