

FINRA's Expansive View of "Participation" in a Private Securities Transaction

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Recent settled enforcement actions illustrate FINRA's expansive view of what it means to "participate" in a private securities transaction. Private securities transactions, sometimes characterized as "selling away," involve transactions that are outside the regular scope of a registered representative's employment with his or her FINRA member firm.

Under FINRA Rule 3280, registered representatives may be considered to participate in a private securities transaction even if they do not receive selling compensation for the transaction. Selling away activity typically involves offering securities or effecting securities transactions for customers without notifying the firm. Recently, however, FINRA also has taken the position that some relatively limited activities — including some that may not involve offering or effecting — constitute participating in a private securities transaction.

For example, in cases in which no selling compensation has been or will be received (or FINRA's letter of acceptance, waiver, and consent (AWC) was silent on receipt of compensation), FINRA believed that the following activities constituted participating in a private securities transaction:

- **Introduce Customer to Issuer:** "[Registered representative] introduced Customer A to the president of a company seeking investments in limited partnership units." FINRA AWC (June 21, 2022).
- **Provide Offering Documents to Customer:** "[Registered representative] provided to Customer A the private placement memorandum for the investment and a presentation about the company." FINRA AWC (June 21, 2022).
- **Forward Offering Documents:** "[Registered representative] forwarded offering documents for the LLC to six individuals, none of whom were [broker-dealer firm] customers." FINRA AWC (May 13, 2022).

- **Introduce Customer to Third Party, Phone Calls, Facilitate Wire Transfer:** “[Registered representative] introduced the customer to a third party with experience in [tax-advantaged] investments. ... [Registered representative] also provided information about the customer to the third party, participated in two phone calls with the customer and the third party, and facilitated the wire transfer out of the customer’s [brokerage] account used to fund the investment.” FINRA AWC (April 20, 2022).

These non-compensation cases confirm that FINRA is interpreting Rule 3280’s “participating in any manner” language broadly to include, in some cases, the performance of functions that may not be regarded as offering a security or effecting a securities transaction.

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