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LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

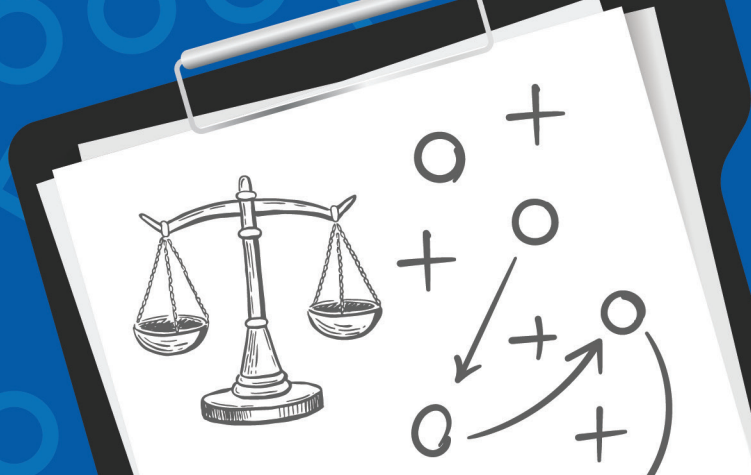
THE NEW PLAYBOOK:

DEVELOPMENTS IN A CHANGING INDUSTRY



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SEC Benches Its Gag Rule

BY NATALIE NAPIERALA AND AUSTIN JACKSON

Since 1972, the SEC has run the same play on settlement: defendants resolved enforcement actions on a “neither admit nor deny” basis and, under the SEC’s Rule of Procedure 202.5(e), they agreed not to publicly deny the allegations in the complaint or administrative order. Critics labeled the defendants’ inability to challenge those allegations the “gag rule.” On May 18, 2026, the SEC tore that page from its playbook, rescinding the policy and ending a 50-year procedural rule.

In rescinding Rule 202.5(e), the SEC explained that the change “aligns the Commission with the overwhelming majority of federal agencies that do not have a similar rule and gives the Commission more flexibility in settling enforcement actions, which conserves resources, provides certainty, and potentially expedites the return of money to injured investors.” The SEC reasoned that the effect on the public interest from such denials “may be minimal” and that the rule “may have created an incorrect impression that the Commission is trying to shield itself from criticism.” SEC Chairman Paul Atkins framed the rescission under the First Amendment, observing that “[s]peech critical of the government is an important part of the American tradition.” The SEC also announced that it will not enforce existing no-deny provisions included in prior settlement documents.

The rescission likely ended legal challenges to the policy as well. For example, in *Powell v. SEC*, a group of entities and individuals who had settled with the SEC had challenged the rule as an unconstitutional restraint on speech. In August 2025, the Ninth Circuit upheld the rule but flagged “legitimate First Amendment concerns,” and the challengers petitioned the U.S. Supreme Court for review. On June 29, 2026, the Supreme Court denied certiorari without comment after the government argued that the repeal mooted the challenge, leaving the constitutional question undecided and the old play, at least in theory, available to a future SEC.

The rule change is now spreading through the league. In June, the Commodity Futures Trading Commission (CFTC) scrapped its own no-deny policy, acknowledging that it was not aware of any instance in which it had sought to reopen a settled matter following a violation of the requirement and that most federal enforcers, including the Department of Justice, settle cases without any comparable policy. Like the SEC, the CFTC will not enforce no-deny clauses in settlements already on the books.

So will the newly ungagged defendants rush to the microphone? Likely fewer than the headlines suggest, given that a public denial can invite fresh scrutiny and potentially hand ammunition to private plaintiffs. For most defendants, the smartest move may be to keep the new option in the playbook and to call it only when the down and distance demand.



FINRA Issues Guidance on Its Securities Compensation Playbook

BY ANN FURMAN

FINRA has completed the first year of its comprehensive FINRA Forward initiative in an effort to modernize its playbook. In its April 2026 report titled “[FINRA Forward: A Year of Progress](#),” FINRA discusses its broad review of its rules. It also identifies — as a significant regulatory policy initiative underway — the publishing of guidance regarding the payment of transaction-based compensation to personal services entities under the SEC staff’s important no-action letter issued in 2025 to the Financial Services Institute (FSI).

As we [previously reported](#), the FSI letter resolved longstanding uncertainty relating to whether transaction-based compensation may be (1) paid by a registered broker-dealer to a “personal services entity” that is not so registered and (2) received by a broker-dealer’s associated persons from entities other than that broker-dealer. The FSI letter permits these compensation arrangements, subject to satisfaction of conditions.

To update its playbook accordingly, FINRA issued guidance in June 2026 on how its rules apply in relation to the FSI letter. FINRA made this guidance retroactive — effective November 17, 2025, the date of the FSI letter. The June 2026 guidance does not impose any new obligations, but rather elucidates the application of several existing FINRA rules and obligations in the context of the FSI letter.

With regard to payment of transaction-based compensation to an unregistered personal services entity, FINRA’s guidance clarifies that the FSI letter satisfies one condition of the exceptions to three FINRA rules:

- Rule 2040, which prohibits payments to unregistered persons; and
- Rules 2320 and 2341, which prohibit a firm’s associated persons from accepting compensation from anyone other than that firm in connection with the sale and distribution of variable contracts of an insurance company or investment company securities, respectively.

Specifically, FINRA’s guidance clarifies that firms wishing to pay transaction-based compensation to a personal services entity pursuant to the FSI letter, and associated persons who wish to receive transaction-based compensation from such a personal services entity, will satisfy Rules 2040, 2320, and 2341 by complying with the conditions of the FSI letter.

With regard to supervision, FINRA’s guidance instructs firms wishing to pay transaction-based compensation to a personal services entity pursuant to the FSI letter to review and update their existing supervisory systems and written procedures under FINRA Rule 3110 to be sure they adequately address the conditions set forth in the FSI letter, particularly those conditions relating to:

- Registration and control by the broker-dealer.
- The business activities of the personal services entity.
- Limitations on the activities of unregistered personnel.
- Related payment administration and agreements.
- Record-keeping and regulator access.

Finally, FINRA’s guidance addresses payment of transaction-based compensation to a personal services entity in the context of Rule 2210 (requirements for communications with the public). It also reiterates conditions of the FSI letter that require record-keeping of payments a firm makes to a personal services entity and regulator access to records in the possession of the personal services entity maintained on behalf of the firm.

Although firms may need to revise somewhat their compliance policies and procedures in order to rely on the FSI letter and FINRA’s June 2026 guidance, these developments doubtless mark a very welcome change in the state of play for many firms.

A New Player in Cost of Insurance Challenges: The Tax Cuts and Jobs Act

BY IRMA SOLARES

Cost of insurance (COI) complaints premised on the Tax Cuts and Jobs Act (TCJA) do not appear to be slowing down. Approximately six class actions have been filed claiming that enactment of the TCJA in 2017 resulted in a substantial “windfall” for insurers. The plaintiffs allege that insurers breached their insurance contracts by failing to pass on savings realized as a result of the TCJA, which reduced the federal corporate tax rate from 35% to 21%. Four class actions were filed in the last nine months alone. The most recent action, *Dubin v. Sun Life Assurance Co. of Canada*, contains many of the same allegations as the previously filed complaints.

The class actions contain a new twist on now familiar failure-to-decrease COI allegations: that the tax cuts from the TCJA should have resulted in a significant reduction of COI deductions. Insurers, the plaintiffs allege, experienced not only improved mortality since 2017 but also benefited from a 14-percentage-point decrease in the tax rate. Several actions allege that insurers have in fact continued to *increase* COI deductions based on pre-TCJA rate scales notwithstanding improved mortality and tax experience touted in their financial statements.

Each complaint relies on policy language that expressly lists taxes among the enumerated factors on which COI rates are based, arguing that this creates a symmetrical obligation to lower rates when tax expectations improve. Indeed, several of the complaints draw a comparison to the litigation that ensued in the 1990s following the enactment of the Revenue Reconciliation Act of 1990 (DAC Tax Reform Act), where insurers that had not enumerated taxes as a COI factor were successfully challenged for passing along tax *increases*. The DAC Tax Reform Act litigation prompted insurers to add language to their policies expressly enumerating taxes and expenses as COI factors. The plaintiffs claim that the contracts do not permit an insurer to simply ignore improvements in its future expectations, while reserving the right to increase charges if expectations worsen. The plaintiffs liken this approach to a “heads I win, tails you lose” scenario to the detriment of policyowners.

While company expenses are also a COI factor listed by many companies, the *Dubin* complaint claims that it is “all but impossible for any deterioration of the defendant’s expectations for the persistency or expense factors to have offset the magnitude of the 2017 tax cuts’ positive impact and improvement in mortality expectations.” Thus, the improvement in mortality and tax liability should have led to a significant decrease in the COI rates used to calculate COI charges for the plaintiff and members of the proposed class, but did not.

The majority of these actions are largely in the early stages, so it remains to be seen how courts will rule on the substantive TCJA allegations.



NAIC Statutory Accounting Working Group Calls an Audible on ICOLI

BY ANN BLACK, EDMUND ZAHAREWICZ, AND THOMAS WARD

The statutory accounting playbook for insurance company-owned life insurance (ICOLI) is simple. Under Statement of Statutory Accounting Principles No. 21—Other Admitted Assets (SSAP No. 21), paragraph 9:

1. An insurer may acquire a life insurance policy;
2. An insurer may report its realizable value (generally, the cash surrender value) as an admitted asset as an “other-than-invested asset” even if the cash surrender value is allocated to an underlying investment vehicle; and
3. Because ICOLI is reported as an “other-than-invested asset,” no risk-based capital (RBC) charge applies for life insurers purchasing ICOLI.

This playbook, however, only applies if the life insurance policies:

- Comply “with Internal Revenue Code (IRC) § 7702, in which the reporting entity is the owner and beneficiary”; and
- Are “acquired with the primary consideration of the costs related to employee benefit obligations or the loss of a key person.”

But the National Association of Insurance Commissioners (NAIC) Statutory Accounting Principles (E) Working Group wonders if some insurers are running a different play. During its meeting on August 12, the working group exposed Ref #2026-08, an agenda item to reconsider reporting guidance for ICOLI under SSAP No. 21, paragraph 9. Vice Chair Dale Bruggeman of the Ohio Department of Insurance expressed concern over the alleged marketing of ICOLI by some for its RBC advantage and the use of these assets for cash flow testing, which he explained was outside the spirit of SSAP No. 21, paragraph 9. Bruggeman stated that when things go beyond the principles that the working group laid out, then the group needs to tighten the reins.

During the meeting, the Institutional Insurance Group (IIG) explained that ICOLI is first and foremost an insurance contract, not an invested asset. But it acknowledged that some arrangements may not fit that description. The IIG stated that it could support:

- A separate Schedule BA reporting line for ICOLI; and
- Exposure limits based on a percentage of an insurer’s capital.

But the IIG’s support is conditioned on risk-based capital treatment that reflects differences in the guarantees and volatility of ICOLI products. Further, Hannover Re raised concerns about changing RBC treatment for existing ICOLI contracts, noting that changes could cause policy lapses or create other solvency risks.

As a result of the meeting, the working group is seeking:

- Public comment by October 2, 2026, on whether amounts reported under SSAP No. 21 for ICOLI should be captured on Schedule BA (similar to other invested assets), with reporting lines to capture the amounts outside an investment vehicle, and the amounts within an investment vehicle, divided by investment category; and
- Feedback from the Capital Adequacy (E) Task Force on the potential RBC treatment of such amounts.

In the end, the working group may rewrite a playbook that has long treated qualifying ICOLI as insurance rather than a conventional invested asset. A blunt shift in reporting, concentration limits, or RBC treatment could penalize or disincentivize long-recognized uses of ICOLI, disrupt in-force contracts, and create surrender and liquidity pressures that undermine — rather than advance — solvency oversight.



SEC Risk Alert on Investment Adviser Economic Conflicts of Interest: A Silver Linings Playbook for Improvement

BY THOMAS LAUERMAN

On June 9, 2026, the SEC issued a risk alert highlighting examination observations related to investment advisers' obligations to identify, disclose, and manage economic conflicts of interest. By discussing past deficiencies, the alert serves, in effect, as a "silver linings playbook." Like a football team that studies its performance after a bad game or ballroom dancers who practice their routine with discipline, advisers who attend to the SEC's observations not only will improve the chances of a winning outcome in their next exam but also will better serve their clients.



The alert highlights deficiencies involving cash management recommendations, revenue-generating arrangements, fee calculations, disclosures, and compliance programs. For example, the spotlighted disclosure missteps found by the SEC often related to cash management and sweep programs where advisers or affiliates received financial benefits. The SEC also observed issues involving revenue-sharing, share-class selection, and compensation structures, creating incentives that were not adequately disclosed.

Nevertheless, the alert provides a game tape of the foot faults others have had that can help protect clients and secure advisers' regulatory compliance.

Key Takeaways

- Conduct comprehensive inventories of economic conflicts and compensation arrangements, and then review disclosure adequacy.
- Evaluate cash sweep, cash management, and revenue-sharing arrangements for conflicts and disclosures.
- Verify that advisory fees are calculated and billed in accordance with agreements and disclosure.
- Periodically test conflict-management and fee controls.
- Strengthen supervisory procedures, as needed.

Like a football game or a ballroom dancing competition, chances of success are maximized by planning future moves, and the SEC alert is a useful new tool for this purpose. If advisers remain disciplined, in step with regulatory expectations, and transparent, they can find their silver lining.

SEC and CFTC Consider Status of Event Contracts and Other Innovative Products

Agencies Seek to Clarify Their Roles

BY DEAN CONWAY

On June 18, 2026, the SEC and the Commodity Futures Trading Commission (CFTC) issued a [joint request for comment](#) on “potential opportunities to further update, clarify, and harmonize certain derivatives product definitions and interpretive issues.” This request seeks public input on 15 questions that focus on two primary topics: “definitional clarity” pertaining to “swaps” and “security-based swaps” and alternative compliance. Alternative compliance addresses whether compliance with one agency’s regulatory framework can satisfy substantially similar requirements of the other in situations in which both the SEC and the CFTC have statutory interests under Title VII of the Dodd-Frank Act. This joint effort is the latest example of collaborative coordination by the two agencies to promote regulatory clarity and close regulatory gaps in the emerging prediction markets space and other innovative products.

With the rise of “innovative products and structures of products,” market participants have called for clarity regarding “regulatory lines for agency oversight.” As the request for comment notes, market participants have raised “questions about whether certain event contracts are swaps, [security-based swaps], or mixed swaps, or types of instruments that fall within statutory exclusions from the ‘swap’ definition.” The Dodd-Frank Act gives the role of regulating swaps primarily to the CFTC and the role of regulating security-based swaps primarily to the SEC. The Department of Justice is also playing a role in connection with certain event contracts. See [“DOJ and CFTC Run New Routes to Pursue Insider Trading Case on Polymarket.”](#)

Swaps are financial contracts in which two counterparties agree to exchange (“swap”) payments with each other based on such things as interest rates, currencies, or commodity prices. Security-based swaps are swaps based on a single security or loan, a narrow-based security index, or certain issuer-related events. Finally, a “mixed swap” contains elements of both a swap and a security-based swap and is subject to joint regulation in which both the SEC and the CFTC play a role.

As markets expand and evolve, difficult definitional questions have arisen regarding regulation of an increasingly complex swaps market. As a result, the agencies are seeking market participants’ input regarding whether new rules need to be issued or existing rules need to be revised to address these changes. For example, the agencies’ June 18 request seeks comments concerning what type of event contracts or other innovative products raise interpretive issues and what, if any, criteria are necessary for distinguishing between the various types of swaps; whether additional clarity is needed regarding the characteristics of a swap and a mixed swap; and even whether certain products such as cash-settled “perpetual” contracts that reference an equity security should be treated as a security future rather than a security-based swap. Finally, the request seeks comments on potential areas of possible joint or coordinated approaches to alternative compliance, including tailored procedural and reporting rules.

Comments in response to the agencies’ request were due by August 24, 2026.



SEC's Crypto Interpretive Guidance: New Game in Town But Not Everyone Is Playing Along

BY HARRY EISENSTEIN

As noted in our previous *Expect Focus* article, “[Gensler-Era Crypto Regulation Goes Under the Knife: SEC/CFTC Operation Targets Uncertainty Around Crypto Assets’ Legal Status](#),” the SEC and the Commodity Futures Trading Commission jointly issued extensive [interpretive guidance](#) providing a new playbook on the status of various types of crypto assets and transactions under the federal securities laws. That guidance, issued on March 17, 2026, focuses in particular on the application of certain elements of the traditional *Howey* test, in order to determine whether a given crypto asset involves an “investment contract” and therefore a “security” for federal securities law purposes.



One of the March 17 guidance’s foundational points in this regard is that offers and sales of crypto assets are not always subject to an investment contract and, consequently, may not entail offers or sales of securities. Moreover, even if an issuer undertakes obligations that give rise to an investment contract under the *Howey* test, a security may subsequently cease to be present, for example, if and when the issuer has fulfilled or abandoned those obligations.

While this analytical approach has been promoted and embraced by many in the industry, such as [the Digital Chamber](#), it has come under criticism from others, most notably by [Senators Elizabeth Warren and Chris Van Hollen](#). Among other things, they note that the abandonment prong of this analysis provides a “roadmap to escape securities regulation” and “leaves investors unprotected and without certainty as to whether their investments are covered by the securities laws.” The senators are especially concerned about how participants in secondary market transactions for crypto assets will be able to understand the security status of those assets.

The senators have also decried the guidance’s identification of certain types of crypto assets that generally should not be treated as securities. They argue that this would allow the crypto industry to “disguise[] securities in one of the many products that the Commission has just categorically exempted.”

In addition to the senators’ critique, [several market participants](#) have submitted comments on the March 17 guidance, requesting further clarification. Further, the SEC on August 18, 2026, issued a [wide-ranging rulemaking proposal on crypto asset offerings](#). While primarily focused on [highly anticipated exemptions](#) for certain of these offerings, it also proposes — among other things — a security status safe harbor that would potentially address some of the comments requesting more certainty as to the applicability of the federal securities laws.

New Page in CFTC Playbook

Self-Reporting, Cooperation, and Remediation Earn Declinations and Penalty Reductions

BY CAITLYN HOLUTA

On May 19, 2026, the Commodity Futures Trading Commission's Division of Enforcement announced a new **policy** that incentivizes market participants to invest in meaningful compliance programs, voluntarily self-report potential misconduct, and remediate wrongdoing. The division's departure from its prior policy offers a clear, but demanding, path to declination and crediting through defined criteria. The new policy shifts away from the division's prior position that declinations were available only in "extraordinary circumstances" and does away with its previous more subjective, qualitative standards.

The division's new approach also brings it more in line with the Department of Justice, which released its first-ever departmentwide corporate enforcement policy for criminal matters in March 2026. The DOJ's policy, similar to the division's, focuses on self-reporting, cooperation, and remediation, and it will be important for registrants' and market participants' cooperation strategies and responses to investigations to account for both policies, especially in matters that may implicate parallel CFTC and DOJ exposure.

The CFTC enforcement division's new policy outlines a program in which the division will not recommend enforcement against a party that:

- Initiates a "voluntary self-report" to the CFTC;
- Provides "full cooperation";
- Effects "timely and appropriate remediation" of the misconduct;
- Provides "full restitution" and/or disgorgement, if applicable; and
- Has no "aggravating circumstances" that preclude eligibility, such as pervasive intentional or reckless misconduct by a firm's ownership or senior management, recidivist intentional or reckless misconduct, or misconduct that has caused particularly egregious aggregate harm.

The new policy further provides that parties that only partially satisfy the aforementioned criteria may receive:

- At least a 50% reduction in civil monetary penalties if they meet all criteria except that their self-report does not satisfy the policy's requirements to qualify as a "voluntary self-report"; or
- At least a 25% reduction if they would meet all criteria but for aggravating factors.

Moreover, non-qualifying parties may still receive some cooperation credit for any self-reporting or cooperation that did occur.

All in all, most firms will be happy to now turn over a new page in their relationship, if any, with the CFTC's enforcement division.



NAIC Market Regulation and Consumer Affairs Committee Tackles Emerging Issues

BY ANN BLACK AND THOMAS WARD

During the National Association of Insurance Commissioners (NAIC) Summer National Meeting this August, the Market Regulation and Consumer Affairs (D) Committee highlighted two developing issues — a proposed uniform process for reporting producer terminations for cause and operational concerns arising from artificial intelligence-assisted consumer complaints.

Developing a Uniform Appointment Termination for Cause Form

Earlier this year, the Producer Licensing (D) Task Force took the field by forming an ad hoc subgroup to develop a uniform appointment termination for cause form. The subgroup reached a first down by circulating a draft of the termination form before the NAIC Summer National Meeting. The form creates a uniform reporting framework that eliminates barriers to reporting. The Producer Licensing (D) Task Force also discussed converting the form to an electronic format with drop-down selections, including termination reasons drawn from the Producer Licensing Model Act. The task force is also considering whether mandatory online fraud reporting could be connected to future termination for cause reporting. It also plans to survey each state to ensure that the project accommodates jurisdictional needs.

An Emerging Concern About AI-Assisted Consumer Complaints

At the Market Regulation and Consumer Affairs (D) Committee's meeting, the American Property Casualty Insurance Association blew the whistle on the increase in AI-assisted consumer complaints and claims. The association emphasized that its observations were anecdotal, but regulators also agreed that the issue is emerging across insurance and other regulated fields. Regulators identified recurring challenges — lengthy or duplicative submissions, inaccurate legal citations, persistent follow-up communications, and efforts to reopen closed matters, straining complaint-tracking systems and staff resources. Some states have begun pre-game screening measures, including portal disclaimers encouraging consumers to verify AI-generated content. Nevada regulators noted that complaints may also bypass ordinary complaint-intake channels by being sent directly to senior officials or the state governor's office.

No NAIC-wide solution emerged. Some regulators suggested it may be premature to throw a flag for a false start; another regulator raised the possibility of NAIC-supported screening through complaint-intake systems; and Missouri regulators emphasized staff training. All participants stressed that any response must preserve consumer protection.

AI-assisted complaints are therefore becoming an operational, consumer-protection, and compliance issue. Insurers and regulators should start making a game plan to implement practical controls for intake, escalation, documentation, response consistency, staff training, and handling of inaccurate or adversarial AI-generated allegations.



Supremes Limit Plays Investors Can Run Against RICs Resolve Circuit Split on Section 47(b) Private Rights of Action

BY THOMAS LAUERMAN

In June 2026, the U.S. Supreme Court held in [*FS Credit Opportunities Corp. v. Saba Capital Master Fund Ltd.*](#) that Section 47(b) of the Investment Company Act of 1940 (1940 Act) does not impliedly empower private parties to sue for rescission of contracts that allegedly violate the act.

Disputes on the Field

Saba Capital Master Fund Ltd. and related entities brought suit in the Southern District of New York against certain closed-end registered investment companies, known as closed-end funds. Saba is among what are sometimes referred to as “activist investors,” and sought the rescission of board resolutions pursuant to which the closed-end funds had subjected themselves to a so-called control share statute enacted by their state of incorporation. In our article titled [“Gone With the Wind? Closed-End Funds Risk Extinction,”](#) we described how closed-end funds commonly have in place control share and other provisions intended to protect against conduct by activist investors that may be detrimental to the interests of other investors in those funds. As we also mentioned, closed-end funds, generally, have found that such provisions have served their purpose only to a limited extent.

In any event, Saba asserted that the control share voting provisions violated a 1940 Act requirement that, with various exceptions, all shares of a registered investment company have the same voting rights. At the district court level, Judge Jed S. Rakoff held that Saba had an implied right under Section 47(b) to maintain its action to rescind the control share voting provisions. The Second Circuit affirmed this holding, which was consistent with a prior decision in that circuit that had found an implied private right of action for rescission under Section 47(b) but inconsistent with the law in several other federal circuits, where the existence of such an implied right had been rejected. The closed-end funds then petitioned for certiorari on this point, which the Supreme Court granted.

For more information about the implications of this dispute, please refer to our article titled [“Can Shareholders Rescind an Investment Company’s Contracts Based on 1940 Act Violations?”](#)

Ruling From Up in the Booth

The Supreme Court ruled 6–3 in favor of the closed-end funds (with the three Democratic-appointed justices dissenting). Writing for the majority, Justice Amy Coney Barrett did acknowledge that Saba’s arguments in support of an implied right of action — which were based on both the statutory language and legislative history — were “not without force,” though the majority ultimately found them unpersuasive.

The opinion discusses how the Supreme Court in recent decades has become, as a general matter, more parsimonious in inferring private rights of action in federal statutes and less influenced by certain types of legislative history — and the current majority gives no evidence of reversing course in these regards. Accordingly, the court refused to find an implied right of action in Section 47(b), notwithstanding that: (i) Section 47(b)(1) includes language to the effect that a contract that is made, or whose performance involves, a violation of the 1940 Act “is unenforceable by either party” to the contract (subject to certain exceptions), and (ii) Section 47(b)(2) includes language to the effect that, if such a contract has already been performed, “a court may not deny rescission thereof at the instance of any party” (again, subject to exceptions).

Even though Section 47(b)(2), at least, thus specifically mentions “rescission,” the court explained that the function of Section 47(b)(2) is to override a common law principle that limits the remedy of rescission in cases where the contract in question has already been performed. According to the opinion, therefore, Section 47(b)(2) is merely an instruction to the adjudicator that expands the scope of any otherwise valid cause of action a party may have for rescission but that does not otherwise create or imply any additional right of rescission for any party.

The majority's decision in this case also may have been influenced by the potentially enormous volume and breadth of the litigation that might develop if private actions under Section 47(b) were permitted. The great bulk of all the activities in which closed-end funds and other registered investment companies engage are conducted via contracts with various service providers. If the court had upheld private rights of action pursuant to Section 47(b)(2), therefore, plaintiffs' lawyers could perhaps bring troublesome lawsuits seeking rescission of one or another contract relating to almost any 1940 Act violation, plausible or not, that they could dream up. The court's opinion, however, does not elaborate that point, but merely includes a brief sentence to the effect that Saba's proposed interpretation could enable it "to void any type of contract that violates" the 1940 Act and characterizes that as "a sweeping right."

Game Not Over

Although this is an important case, the extent to which registered investment companies are subject to private actions and can impose control share (or similar) protections is far from entirely settled. Neither the SEC nor the courts have definitively ruled upon the extent to which such protections are inconsistent with the 1940 Act or any other federal securities law provisions.

Moreover, some have suggested that, rather than relying on Section 47(b), activist investors may attempt to reframe their legal challenges as causes of action under Section 47(a), which was not addressed by the court's opinion in Saba. Private investor challenges might also be possible based on, for example, certain provisions of state corporation law or breaches of fiduciary duty or other common law principles.

So there is at least some time left on the clock, and everyone should not head for the showers just yet.



SEC Staff Maps Out Pooled Employer Plans' Route to Exemptions

BY W. THOMAS CONNER

Employee benefit plans issue interests in their plans to plan participants. Such plans, and their related trusts, generally rely on the so-called single trust exemption in Section 3(a)(2) of the Securities Act of 1933 to avoid having to register the offering of their interests with the SEC.

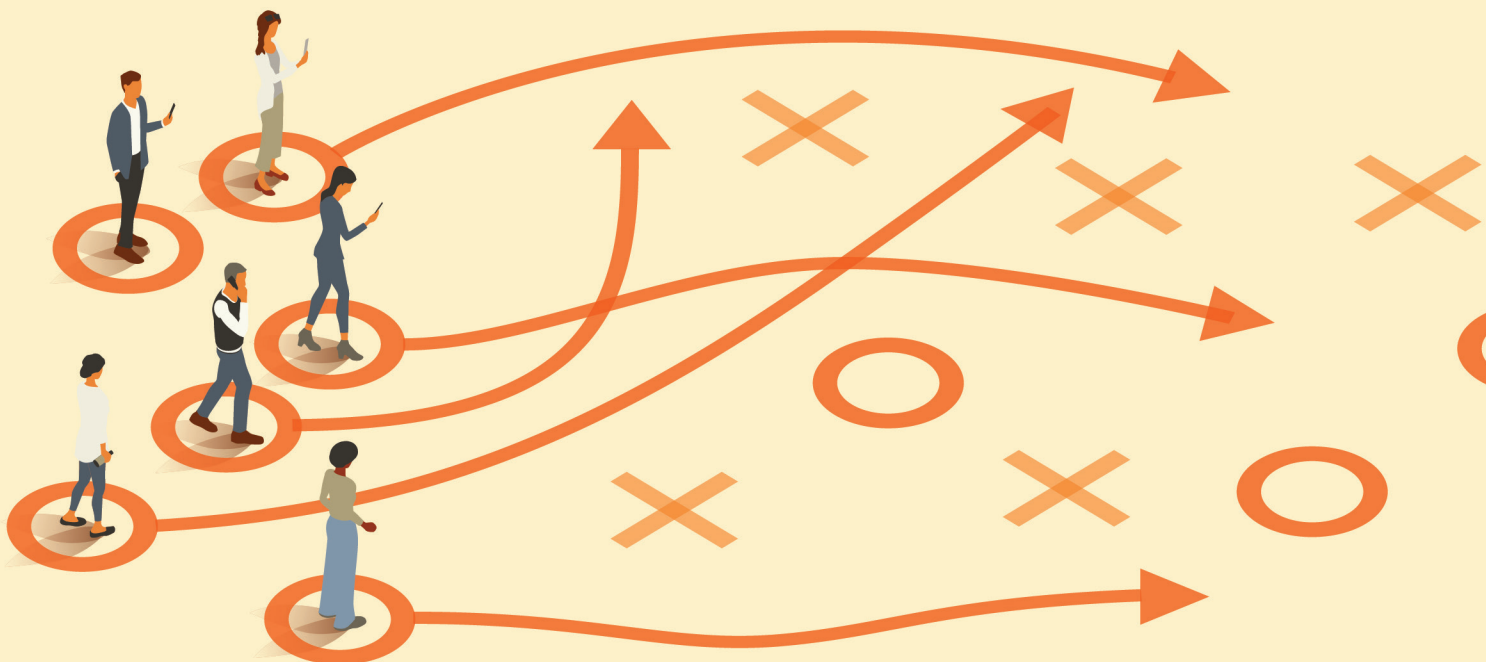
Similarly, because employee benefit plans are pools of assets, many such plans, and their related trusts, also rely on the single trust exclusion in Section 3(c)(11) of the Investment Company Act of 1940 to avoid regulation as investment companies.

Historically, smaller employers often have encountered roadblocks to offering employee benefit plans. Specifically, such employers may not have the human resources to administer a plan or the financial resources to pay required third-party administrators, accountants, attorneys, and other professionals. To encourage smaller employers to provide retirement plans for their employees, Congress in 2019 enacted the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019. One of the SECURE Act's goals was to permit the establishment of pooled employer plans (PEPs), which make it possible for multiple, unrelated employers to join a single retirement plan and offer retirement benefits to their employees through the plan.

Sections 3(a)(2) and 3(c)(11) Clarified

The SECURE Act made certain necessary changes to the tax code and the Employee Retirement Income Security Act (ERISA) to accommodate PEPs. However, no changes were made to the federal securities laws. As a result, there has been simmering uncertainty as to whether PEPs may rely on the Section 3(a)(2) and 3(c)(11) exemptions to avoid registration under the 1933 and 1940 Acts because they are not true "single trust funds."

This uncertainty, in part, resulted from the SEC's historical position that only trusts established and maintained by one employer (or closely related employers and/or an employee union) are single trust funds for this purpose. However, following the SECURE Act, the staff of the SEC's Division of Corporation Finance and the Division of Investment Management resurveyed the regulatory landscape around PEPs. And, in May 2026, they published [guidance](#) to the effect that, because the SECURE Act was intended to promote the use of PEPs, they would not object if PEPs are treated as "single trusts" and rely on the exemptions. This staff guidance has provided plans with much-needed certainty about the regulatory terrain.



Rule 180 Clarified

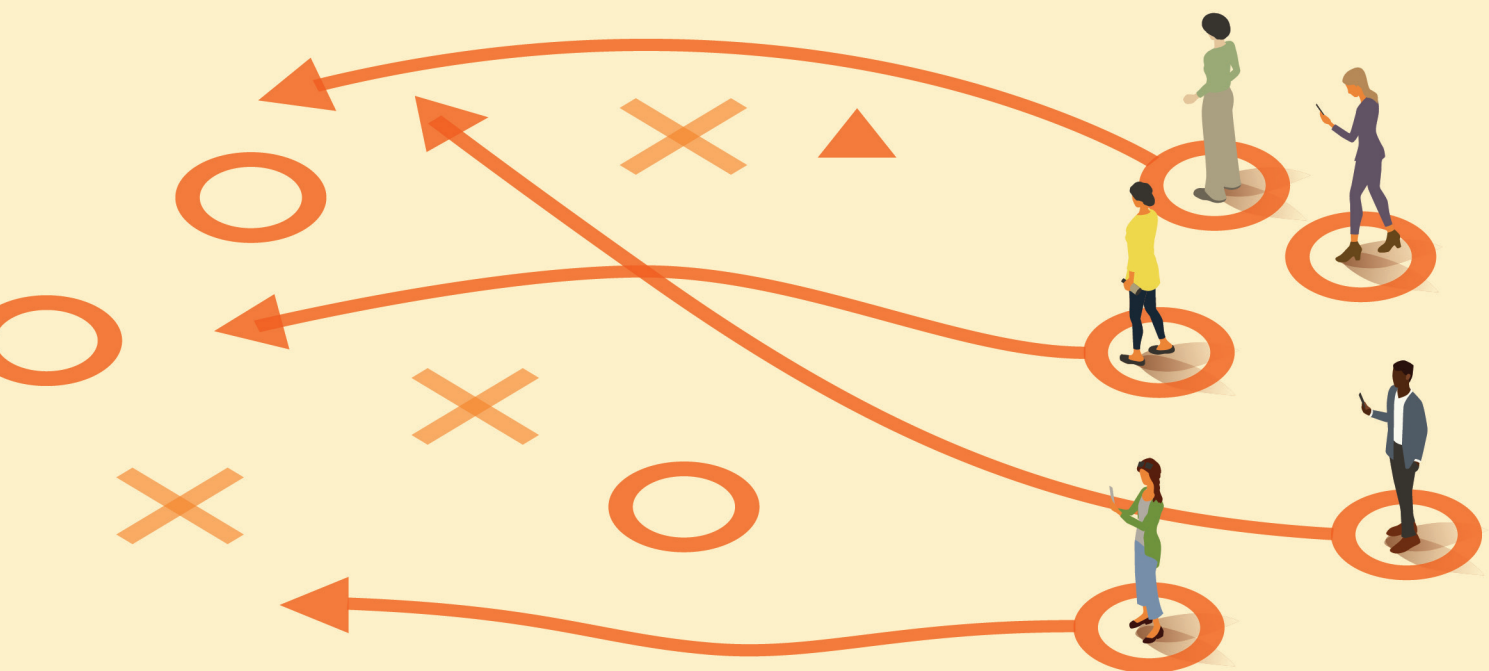
The staff's guidance also addressed a related legal uncertainty. Some PEPs include employers with one or more employees who are "self-employed individuals." For reasons summarized further below, this could result in such plans being unable to invest in collective investment trusts (CITs). CITs generally have lower fees than mutual funds and have therefore become popular funding options for employee benefit plans. Such lower fees are possible because CITs can generally rely on the Section 3(a)(2) and 3(c)(11) exemptions so that, unlike mutual funds, they do not have to contend with the myriad requirements under the 1933 and 1940 Acts.

A potential dead end has arisen, however, because the single trust exemption provided in Section 3(a)(2) of the 1933 Act is, by its terms, unavailable in connection with plans that include self-employed individuals. Accordingly, many such plans (and their related trusts) instead rely on Rule 180 under the 1933 Act. (Rule 180 is an exemptive rule created specifically for Keogh or HR-10 plans, which are plans for self-employed individuals.) But one of the conditions for relying on Rule 180 is that the plan be for employees of a single employer or employees of interrelated partnerships. Accordingly, if a CIT accepted assets from a plan that included self-employed persons, significant questions could arise as to whether the CIT (and plans investing in that CIT) could rely on the Section 3(a)(2) exemption.

Fortunately, the SEC staff's guidance provides a way around this potential roadblock to investments in CITs by plans that have self-employed participants. Specifically, the staff clarified that it would not object if PEPs are considered as single-employer plans for purposes of Rule 180.

The Road Ahead

What impact will the staff's guidance have from a business standpoint? The staff's guidance may provide a significant boost to PEPs generally, as the universe of such plans continues to grow, and to CITs in particular as they compete with mutual funds for the increasing amount of assets thus requiring investment management.



Drawing Up the NAIC's Game Plan on Annuity Illustrations

BY ANN BLACK AND MARGARET DONNELLY

The National Association of Insurance Commissioners' (NAIC) Life Insurance and Annuities Illustrations (A) Working Group has been building out its approach to amending the annuity illustration requirements of the NAIC's Annuity Disclosure Model Regulation (Model #245). The amendments are being made to address regulatory concern that illustrations are creating unrealistic consumer expectations. Based on an informal review of indexed annuity illustrations, regulators found that two-thirds of products reviewed showed illustrated rates between 11% and 27%. Nearly all the highest illustrated rates are traced back to new proprietary indexes illustrated using backcasted data.

On June 2, 2026, the working group's chair, Ben Slutsker, exposed two items for comment by interested parties: a summary guide cataloging potential modifications to Model #245 and a flow chart asking whether an actuarial guideline could serve as a stopgap measure while states work to adopt an updated model.

Seven comment letters were received from the American Academy of Actuaries, the American Council of Life Insurers, the Committee of Annuity Insurers, Finseca, the Indexed Annuity Leadership Council, the Insured Retirement Institute, and the New York State Department of Financial Services (NYDFS). In the letters, industry commenters huddled up on key points of consensus for the NAIC's game plan:

- **Play 1: Illustration Length**

During its July 30, 2026, meeting, the working group reached a preliminary consensus to run three plays to reduce illustration length: shorter illustration ledgers, fewer redundancies in narrative summaries, and a combined side-by-side ledger.

Notably, working group members want these built in as standardized requirements, rather than optional features, with actuary Tomasz Serbinowski of Utah warning that leaving shorter illustration periods optional may invite unwanted gamesmanship by carriers.

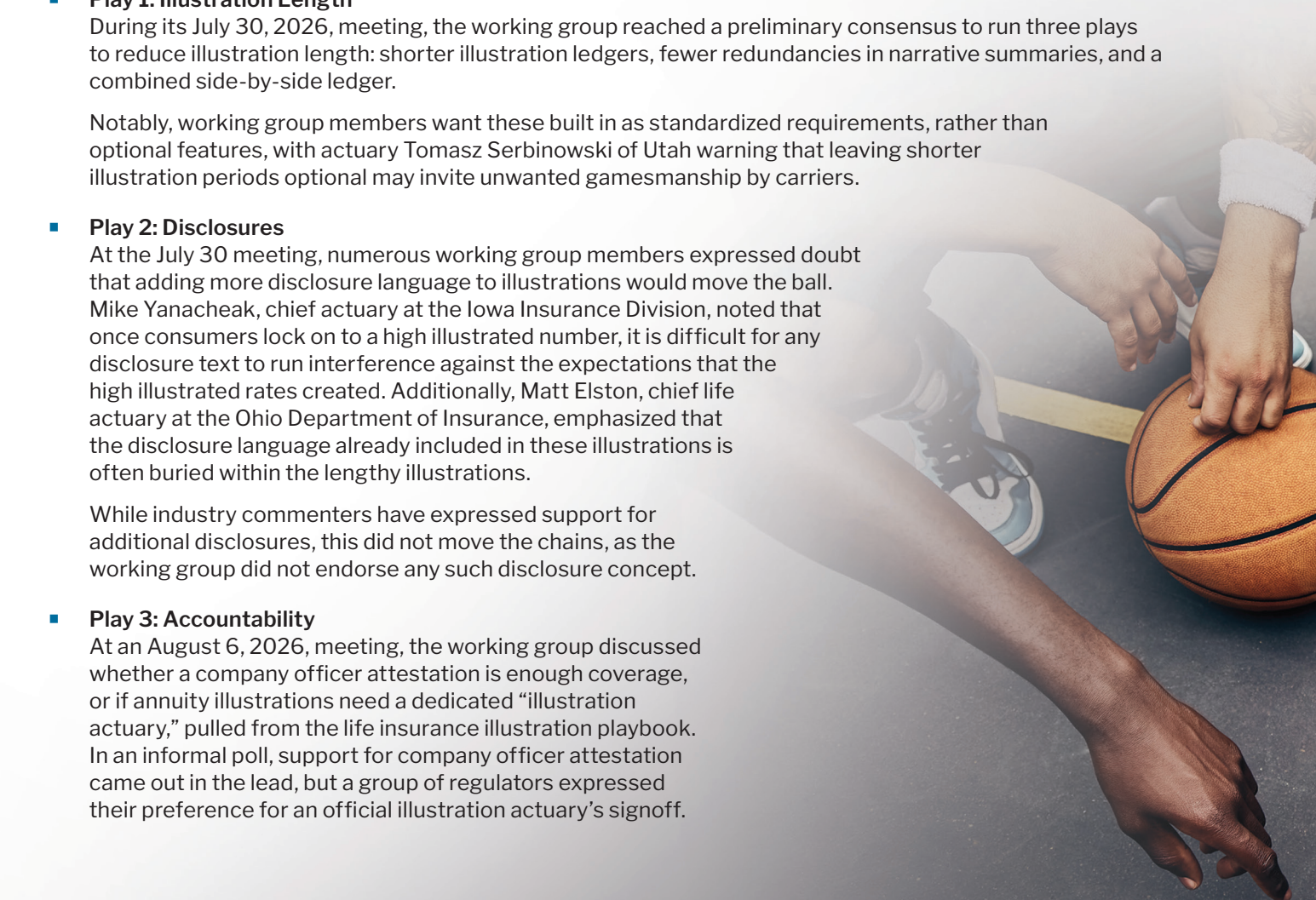
- **Play 2: Disclosures**

At the July 30 meeting, numerous working group members expressed doubt that adding more disclosure language to illustrations would move the ball. Mike Yanacheak, chief actuary at the Iowa Insurance Division, noted that once consumers lock on to a high illustrated number, it is difficult for any disclosure text to run interference against the expectations that the high illustrated rates created. Additionally, Matt Elston, chief life actuary at the Ohio Department of Insurance, emphasized that the disclosure language already included in these illustrations is often buried within the lengthy illustrations.

While industry commenters have expressed support for additional disclosures, this did not move the chains, as the working group did not endorse any such disclosure concept.

- **Play 3: Accountability**

At an August 6, 2026, meeting, the working group discussed whether a company officer attestation is enough coverage, or if annuity illustrations need a dedicated "illustration actuary," pulled from the life insurance illustration playbook. In an informal poll, support for company officer attestation came out in the lead, but a group of regulators expressed their preference for an official illustration actuary's signoff.



■ Play 4: Illustrated Rates

At the August 6 meeting, Slutsker broke the issue of illustrated rates into three separate plays: (a) whether to permit hypothetical index returns at all; (b) how to treat nonguaranteed elements; and (c) other illustrated rate scenarios.

The group focused on the hypothetical index returns play, because that's where the proprietary backcasted indexes driving this inquiry line up. Working group members noted that even in states with current Model #245's 10-year history rule for indexes to be illustrated, some companies interpret this as permitting newer indexes to illustrate so long as the index's underlying components individually have 10 years of history.

The Indexed Annuity Leadership Council argued that newer indices should still be eligible to play, provided the right guardrails are in place — a read backed by Elston.

William Carmello, chief life actuary at the NYDFS, argued for the most aggressive defense, questioning whether any historical returns belong on the field, given that past performance cannot predict future results.

With preliminary consensus on illustration length, disclosures, and accountability reached, two of the toughest calls in the game are still to be decided — how illustrated rates of return should be addressed and what the stopgap solution in implementing a revised Model #245 should look like.



FINRA Eyes Rules Overhaul for Retail Communications

BY EDMUND ZAHAREWICZ AND TALIA SVID

On July 9, 2026, the Financial Industry Regulatory Authority (FINRA) published a [regulatory notice](#) requesting comment on its proposal to modernize its rule on communications with the public, Rule 2210. The proposal comes largely in response to evolving communication practices and technologies, including social media and generative artificial intelligence (AI).

Principles-Based Supervision of Retail Communications

Under current Rule 2210, an appropriately qualified registered principal generally must approve each retail communication before it is used or filed with FINRA's Advertising Regulation Department. Compliance with this basic requirement has become increasingly challenging for certain categories of communications, particularly those involving social media and AI-generated content.

In view of the emergence of such technologies, the proposal would replace the prescriptive pre-use approval requirement with a more risk-based standard for supervising retail communications. Under the proposal, members would be required to establish written procedures appropriate to their business, size, and structure to determine which retail communications require principal approval before use. But when a member's procedures do not require such review of all retail communications before first use, its procedures would need to provide for:

- Training of associated persons on the member's procedures;
- Documentation of that training; and
- Surveillance and follow-up to ensure that the procedures are implemented and adhered to.

Members would also be required to maintain evidence that these supervisory procedures have been implemented and to make that evidence available to FINRA upon request.

In addition, in developing their procedures, members would need to consider the following nonexhaustive list of risk factors:

- The nature and complexity of the products or services involved, including the member's or associated person's familiarity with them.
- The qualifications and experience of the preparer of the communication, including anyone paid for or involved in preparing the content, or who endorses or approves it.
- Whether the communication:
 - Makes a financial or investment recommendation or otherwise promotes a product or service of the member;
 - Promotes a product or service offered through an affiliate of the member or another third party;
 - Appears tailored to a specific audience or individual; or
 - Includes performance data, rankings, or comparisons.
- The medium of and distribution method for the communication.
- The member's or associated persons' history of communication concerns identified in member or regulatory reviews as to particular products, services, or methods.

While the proposal would give members flexibility in determining which communications require pre-use approval based on risk factors, Rule 2210's substantive content standards would not change. Accordingly, members would remain fully responsible for ensuring that communications are fair and balanced, not misleading, and otherwise consistent with those standards.

Addressing Social Media and AI Challenges

The proposal addresses several challenges related to social media and AI. Current FINRA guidance distinguishes between “static” and “interactive” social media content, with only interactive content carved out from the basic pre-use approval requirement. This distinction has become more difficult to apply as social media platforms have evolved. FINRA notes that social media risk, including risk tied to “financial influencers,” does not depend solely on whether content is static or interactive. The proposal would eliminate this distinction and apply the same risk-based supervisory standard to social media as to other retail communications.

The current basic pre-use approval requirement also has presented practical challenges for AI-generated retail communications, particularly in light of the potential speed and volume of such content. Under the proposal, members would apply the same above-described risk-based supervisory standard to AI-generated communications, allowing firms to adjust their level of review based on the risk of the particular tool and content.

Revised Filing Requirements

The proposal would also revise two filing-related requirements. First, the proposal would permit communications concerning registered investment companies that include self-published performance rankings or performance comparisons to be filed within 10 business days after first use or publication. Currently, the rule requires filing at least 10 business days before first use, with the communication withheld from publication until the department has completed its review.

Second, the proposal would begin the rule’s one-year filing requirement for new FINRA members on the date the respective member files its first communication with the department. Currently, during a member’s first year of FINRA membership, the member is required to file widely disseminated retail communications (such as advertisements) with the department at least 10 business days before first use. According to FINRA, many new members do not file any advertisements for several months after becoming a member, thereby effectively shortening the first-year review filing period.

Principles-Based Standard for Recommendations

Lastly, Rule 2210 currently requires retail communications that contain a securities recommendation to have a reasonable basis for the recommendation and to disclose specified information involving potential conflicts of interest. It also requires a member to offer to furnish information supporting the recommendation and requires detailed disclosure in retail communications and correspondence that refers to past specific recommendations of the member. The proposal would replace these requirements with a general prohibition on communications that include a reference to a past specific recommendation provided by the member or an associated person “where such recommendation is not presented in a fair and balanced manner.”

In lieu of the current requirements, the proposal would rely on the rule’s general content standards to ensure investors receive appropriate disclosures necessary to make communications containing a recommendation fair and balanced and not misleading. According to FINRA, “this approach would align the standards for broker-dealers referencing recommendations more closely with the standard for investment advisers giving investment advice.” The proposal also notes that, separate from Rule 2210, SEC Regulation Best Interest (Reg BI) applies when a member or associated person recommends a security or investment strategy involving securities to a retail customer.

Comments on the proposal are due September 11, 2026.



Around the Track: NAIC's Technology Regulation Work So Far in 2026

BY ANN BLACK, PATRICIA CARREIRO, TALIA SVID, AND THOMAS WARD

The National Association of Insurance Commissioners (NAIC) Innovation, Cybersecurity, and Technology (H) Committee's working groups continue training for their regulatory relay, with each group carrying the baton on its own charge while keeping pace with the committee's broader race to coordinate NAIC efforts regarding innovation, cybersecurity, privacy, and technology.

1. Big Data & Artificial Intelligence (H) Working Group

The Big Data & Artificial Intelligence (H) Working Group maintained its stride in "enabl[ing] regulators to identify and assess AI systems' related risks on an on-going basis with a scope that considers both financial and consumer risks evolving specifically from company's use of AI systems to the extent such risks can be parsed from the comprehensive structure." Together with 12 states, the working group is piloting the Risk Evaluation Supplement 4.0 (formerly the AI Systems Evaluation Tool).

The pilot is expected to run through September, with each pilot state gathering feedback from participating companies (including through a centralized survey) by the end of that month. The working group expects the next trial to be version 5.0 of the supplement, with two further handoffs for public exposure, and the final lap at the NAIC Fall National Meeting, where the tool would be adopted.

2. Third-Party Data & Models (H) Working Group

The Third-Party Data & Models (H) Working Group got off the block by exposing its third-party regulatory framework for property and casualty pricing and underwriting on July 8. The draft:

- Encourages third-party data and model vendors to register through a shared multistate registry hosted by the NAIC.
- Preserves each state's existing rate, underwriting, and data/model filing requirements for third-party data and models.
- Requires vendors to annually attest through the multistate registry, via a senior leader, that their governance programs are effective and legally compliant.
- Requires vendors to notify the registry of material changes to, or decommissioning of, a dataset or model.
- Preserves insurers' full accountability for their own compliance obligations regardless of third-party involvement.



On August 12, the working group met to discuss the draft framework. Commenters generally agreed on a core play — insurers remain ultimately responsible for how vendor tools are used. Some commenters emphasized that vendors need protection for proprietary information and more tailored annual attestation obligations. Further, Nevada regulators drew an important boundary line — maintaining that a model's mathematics, weighting, and methodologies warrant confidential treatment but that consumers should be able to learn when a third-party model affects them, including the insurer's use of the vendor and what consumer data was used, to be able to correct any errors. A smaller team will evaluate the comments and revise the framework for possible adoption at the NAIC Fall National Meeting.

3. Privacy Protections (H) Working Group

The Privacy Protections (H) Working Group and multiple teams have been maintaining pace in proposing revisions to the Privacy of Consumer Financial and Health Information Regulation (Model #672) article by article after the NAIC scrapped the game plan to create a new Insurance Consumer Privacy Protection Model Law (Model #674). At long last, the working group has rounded the track and sent out its long-awaited exposure draft for a revised Model #672.

At the final heat on August 13, the working group heard comments from interested parties on the exposure draft. The exposure draft, however, may not yet have caught its stride as commenters questioned how to add clear guidance, ensure meaningful consumer rights, align with existing privacy regimes, and avoid creating fraud prevention gaps and imposing disproportionate burdens for smaller licensees. Comments, with specific alternative language, are racing to the finish line on September 22, after which the working group will develop its game plan for next steps.

4. Cybersecurity (H) Working Group

The Cybersecurity (H) Working Group wrapped up its sprint to receive comments on its exposure draft of a Cybersecurity Event Response Coordination Framework by July 24. The working group is racing to develop its Cybersecurity Event Notification Portal project, but the NAIC's June cybersecurity incident has refreshed focus on an old hurdle: ensuring the security of the sensitive information that insurers would enter into the portal. At the working group's August 14 meeting, Chair Michael Yaworsky, Florida's Insurance Commissioner, requested that, before the portal's race continues to the executive committee, a clear and easy-to-read document be created to help everyone understand the security precautions that will be used for the data within the portal.



Ninth Circuit Throws a Flag on 401(k) Class Certification

BY IRMA SOLARES

Another federal court of appeals recently vacated a class certification order in a breach of fiduciary duty case under the Employee Retirement Income Security Act (ERISA) involving a defined contribution retirement plan. The Ninth Circuit's decision in *Munoz v. Alorica Inc.* reflects arguments that plan sponsors and other defendants can use to resist class certification in similar defined contribution plan litigation.

In *Munoz*, former participants in the Alorica 401(k) retirement plan brought ERISA claims alleging that plan fiduciaries mismanaged investment options and overpaid for record-keeping services. The district court certified a class, and the defendants appealed under Federal Rule of Civil Procedure 23(f). The Ninth Circuit vacated the certification order and remanded, although it rejected the defendants' standing arguments.

The appellate court found that the district court analyzed typicality only with respect to the plaintiffs' record-keeping fee theory and failed to address whether differences between investment options rendered the named plaintiffs' claims atypical of the class with respect to the separate imprudent-investment theory of liability. Because Rule 23 requires a rigorous analysis of each certification prerequisite, this omission alone warranted vacatur.

The court also noted that the district court did not adequately consider evidence of a possible intraclass conflict. The defendants had presented evidence that, under the plaintiffs' own loss model, converting record-keeping fees to an asset-based fee structure would have resulted in some class members paying higher fees than they actually paid during the class period. In other words, the remedy the named plaintiffs sought could be detrimental to certain class members. The district court dismissed this concern based only on the dollar amount the named plaintiffs personally paid in fees, without resolving the broader factual dispute about how the proposed loss methodology would affect other class members. The Ninth Circuit held that this failure to resolve a "key factual dispute" bearing on adequacy of representation was error.

Notably, however, the Ninth Circuit preserved the plaintiffs' standing to sue over investment options they had not personally invested in and over the record-keeping claim, holding that such distinctions go to class certification, not Article III standing. The decision is therefore not a wholesale rejection of the case, but it confirms that the certification analysis demands an evidence-based inquiry rather than a generalized finding that claims are common or that representation is adequate.

Munoz comes on the heels of the Fourth Circuit's recent decision in *Trauernicht v. Genworth Financial Inc.*, on which we have [previously reported](#). Read together, the two decisions reflect a consistent appellate message: courts asked to certify ERISA classes in the defined contribution context must conduct a rigorous, evidence-based analysis of Rule 23's prerequisites. Several arguments recur across both cases and are likely to be useful in future class certification challenges involving 401(k) and other defined contribution plans:

- **Defined contribution plans are structurally different from defined benefit plans for class certification purposes.** Because losses are tied to individual accounts rather than a common pool of funds, recoveries are inherently individualized, undermining certification under Rule 23(b)(1) and weakening arguments for inherent commonality.
- **Evidence of uninjured class members defeats commonality.** Where a defendant can show, using appropriate comparators or loss models, that a meaningful segment of the class suffered no injury, or actually benefited (such as lower record-keeping fees than proposed by plaintiffs), courts should not certify a class that lumps injured and uninjured members together.

- **Multiple theories of liability each require their own Rule 23 analysis.** A court cannot certify a class based on a rigorous analysis of one theory (e.g., record-keeping fees) while assuming the same conclusions apply to a different and distinct theory (e.g., imprudent investment selection).
- **Evidence of intraclass conflicts cannot be ignored.** Where a proposed remedy or loss methodology could disadvantage some class members relative to others, courts must resolve that conflict as part of the adequacy-of-representation inquiry.
- **Rule 23's requirements must be tested, not presumed.** Both appellate courts vacated certification orders in part because the district courts treated commonality, typicality, or the propriety of Rule 23(b)(1) treatment as flowing automatically from the nature of an ERISA fiduciary breach claim, rather than testing the record.

For defendants facing class certification motions in defined contribution plan litigation, both decisions support developing a robust evidentiary record early — including expert analysis of account-level loss modeling, comparator funds (which were a central issue in *Trauernicht*), and the practical effects of any proposed remedy on different segments of the putative class — to demonstrate that the class, as defined, does not share a common injury and that named plaintiffs' claims and interests are not typical of, or aligned with, the class they seek to represent.



New Script for SEC Disgorgement Demands Supreme Court Rejects Pecuniary Harm Requirement

BY JUSTIN CHRETIEN AND ZACK BABBITT

On June 4, 2026, the U.S. Supreme Court upheld the SEC's authority to seek disgorgement without first showing pecuniary harm to investors. The unanimous holding in *Sripetch v. SEC* confirmed the skepticism of the justices that was evident throughout oral argument in April. The opinion, authored by Justice Neil Gorsuch, resolves a split in which the Second Circuit had required a showing of pecuniary harm, while the First and Ninth Circuits declined to impose such a requirement.

Setting the Stage

In 2024, the U.S. District Court for the Southern District of California entered final judgment against petitioner Sripetch after a consent judgment in an SEC civil enforcement action under the Securities Exchange Act of 1934. The SEC alleged a fraudulent scalping scheme and other securities law violations involving penny stock companies. Pursuant to the final judgment, the SEC ordered Sripetch to disgorge approximately \$2.25 million as well as \$1.05 million in prejudgment interest. Sripetch appealed the order of disgorgement, arguing that the SEC had the burden of proving pecuniary harm to investors under 15 U.S.C. §§ 78u(d)(5) (Section 5) and (d)(7) (Section 7).

The case reached the Supreme Court against a backdrop of continuing uncertainty following the court's decision in *Liu v. SEC*. In *Liu*, the court held that disgorgement may qualify as equitable relief under Section 5 if limited to the wrongdoer's net profits and if awarded "for victims." However, *Liu* left several questions unresolved, including whether courts must find that investors suffered pecuniary harm before ordering disgorgement.

Congress Thickens the Plot

In 2021, approximately six months after *Liu*, Congress amended the Exchange Act to add Section 7, which expressly authorizes the SEC to seek disgorgement in civil actions. Notably, unlike Section 5, Section 7 did not include the phrase "for the benefit of investors," thereby creating a new statutory basis for disgorgement that might not carry the same equitable limitations set forth in *Liu*.

Thus, in his petition, Sripetch first argued that, under Sections 5 and 7, disgorgement without pecuniary harm violates traditional principles of equity. However, he also argued that disgorgement without pecuniary harm should be considered a civil penalty, which, in turn, triggers the Seventh Amendment right to a jury trial per the Supreme Court's decision in *SEC v. Jarkesy*. Although Sripetch raised the *Jarkesy* issue, the court did not consider this argument. Justice Gorsuch stated that "[t]he only question we took this case to resolve is whether the SEC must show that an investor suffered a pecuniary loss before it may secure a disgorgement remedy under either [Section 5 or Section 7]." Likewise, in his concurrence, Justice Clarence Thomas addressed the jury trial requirement insofar as the court may take up the issue in a future case.

Supreme Court Clarifies Stage Directions for SEC

The court disagreed with Sripetch's first claim, i.e., that awarding disgorgement without proving pecuniary harm violates traditional principles of equity as delineated in *Liu*. During oral argument, Justice Sonia Sotomayor, who had authored *Liu*, emphasized that a considerable body of historical precedent, common law, and legal scholarship indicates that "disgorgement as an equitable remedy never required proof of pecuniary loss." Likewise, the court confirmed that, historically, various forms of equitable relief, including disgorgement, all had the same underlying principle: "the final award to the plaintiff is not measured by his loss but by the defendant's gain attributable to his wrongdoing against the plaintiff." This is because a "plaintiff whose legally protected interest had been invaded [is] entitled to the defendant's gain from that wrongful conduct even without showing pecuniary loss." In short, the court found that the purpose of a disgorgement remedy is restitution of the wrongdoer's ill-gotten gains rather than "to compensate the plaintiff for a The court also disagreed with Sripetch's second claim, i.e., that disgorgement in this case was functioning as a civil penalty.

The court's conclusion was previewed in oral argument, where Justice Ketanji Brown Jackson stated that disgorgement in the case means "depriving [Sripetch] of money he didn't have, that was never his," as opposed to a penalty that would require Sripetch to not only return stolen funds but also to pay an additional fine "for having engaged in that behavior." Also during oral argument, Justice Amy Coney Barrett emphasized that "[i]f all you're taking away is the ill-gotten gains, so they're the proceeds that the wrongdoer isn't entitled to in the first place, ... why would that necessarily be a penalty?"

Possible Sequel Productions

Justice Thomas, writing in a concurrence, agreed with Justice Gorsuch that Section 7 permits the SEC to seek disgorgement without pecuniary harm and that the court need not take up the Seventh Amendment issue at this time. Finding that "SEC disgorgement does not resemble any traditional equitable remedy," Justice Thomas expressed that the court "will soon need to address whether disgorgement under [Section 7] is a legal remedy."

Ultimately, the decision in *Sripetch v. SEC* confirms that disgorgement remains a character within the SEC's cast of sanctions and that it may be used without showing pecuniary harm. Whether, and under what circumstances, ordering disgorgement requires a jury trial, however, is a potential open question.

This article was co-authored by Carlton Fields summer associate Ruska Mumladze.



A New Playbook for Market Conduct

BY ANN BLACK, TALIA SVID, AND THOMAS WARD

The National Association of Insurance Commissioners (NAIC) is considering what changes are needed to the market conduct examinations playbook and tasked the Market Conduct Regulation Modernization (D) Working Group to:

1. Assess, with input from NAIC members and interested stakeholders, the current state of the market conduct regulatory framework and the need for changes in response to changing markets, business models, and consumer expectations; and
2. Provide recommendations for the improvement and modernization of the market conduct regulatory framework to the Market Regulation and Consumer Affairs (D) Committee by the Fall National Meeting.

From May through July, the working group began its game film study by holding four stakeholder listening sessions based on its May 8 industry discussion questions. The working group then held regulator-only play design sessions ahead of its August 13 meeting during the NAIC Summer National Meeting.

The May 8 industry discussion questions organized the working group's scouting around six core game-plan topics. Notable scouting reports on the six topics from the listening sessions and comment letters, and a playback of the working group's discussion during the Summer National Meeting, are summarized below.

Standardization — Market Conduct Data (Collection and Analysis) and Interstate Collaboration

Commenters broadly sought standardization of data requests and an understanding of why specific data elements are requested and how they will be used. Standardization would also include uniformity in regulator questions, consistent terminology and definitions used by all regulators, and standardized file layouts, such as Excel templates. Several comments also noted that requested information should be limited to that which is necessary, relevant, and reasonably available.

Standardization also promotes a “one-ask” framework for multistate examinations with a lead state coordinating the requests, templates and checklists, timelines for responses and extensions, and a central portal or location for information.

Examination Handbook and Processes

Insurers noted a breakdown in the consistent use of the *Market Regulation Handbook* and called for a review of how the handbook is used. If the handbook is inconsistently used, any edits or improvements to it will not yield the intended uniformity and efficiency. Insurers discussed the lack of adherence to the handbook's error benchmark of what constitutes a “business practice” or a “pattern and practice” warranting a finding of noncompliance.

Several commented that the handbook should focus examinations on conduct that poses risk to consumers. This would include a process that identifies risk that is the subject of the exam, and a phased exam process, like that used in financial exams. This would avoid examinations of operational anomalies caused by low-volume populations, closed blocks, legacy systems, or unique product structures. Resources spent on low-risk reviews are resources that would be better spent where oversight is more needed.

Several also noted that the examination process should address the qualifications of, oversight and coordination over, and cost of, contract examiners. In addition, contract examiners should not be a barrier to direct communication between insurers and examiners. One comment noted that the cost of the contract examiners can exceed the fines at issue.

Other Entity/Third-Party Oversight

Commenters urged the working group to coordinate with the NAIC's Third-Party Data and Models (H) Working Group to avoid running the same play twice. Some also urged that insurers should not be compelled to disclose vendors' proprietary models, source code, or trade secrets.

During the Summer National Meeting, the working group further discussed the expanding roster of third parties and multiple layers of subcontracts in performing regulated insurance functions. States questioned the bench depth of the subcontractors. The working group emphasized that passing the ball to a vendor does not take the insurer off the field: the insurer remains responsible for compliance and for providing meaningful access to information during examinations.

The emerging playbook calls for carriers to maintain vendor-governance controls — including due diligence, contractual rights to information, oversight of subcontracts, periodic auditing or testing, and remediation processes. The working group also recognized the need to give examiners sufficient access to test vendor-supported models and systems while protecting legitimate proprietary information. Before drawing up a new play, the working group may first scout existing state licensing, examination access, and insurer oversight requirements — including the third-party administrator model — to determine whether the next move should be a revised model, clearer examination authority, or stronger accountability expectations.

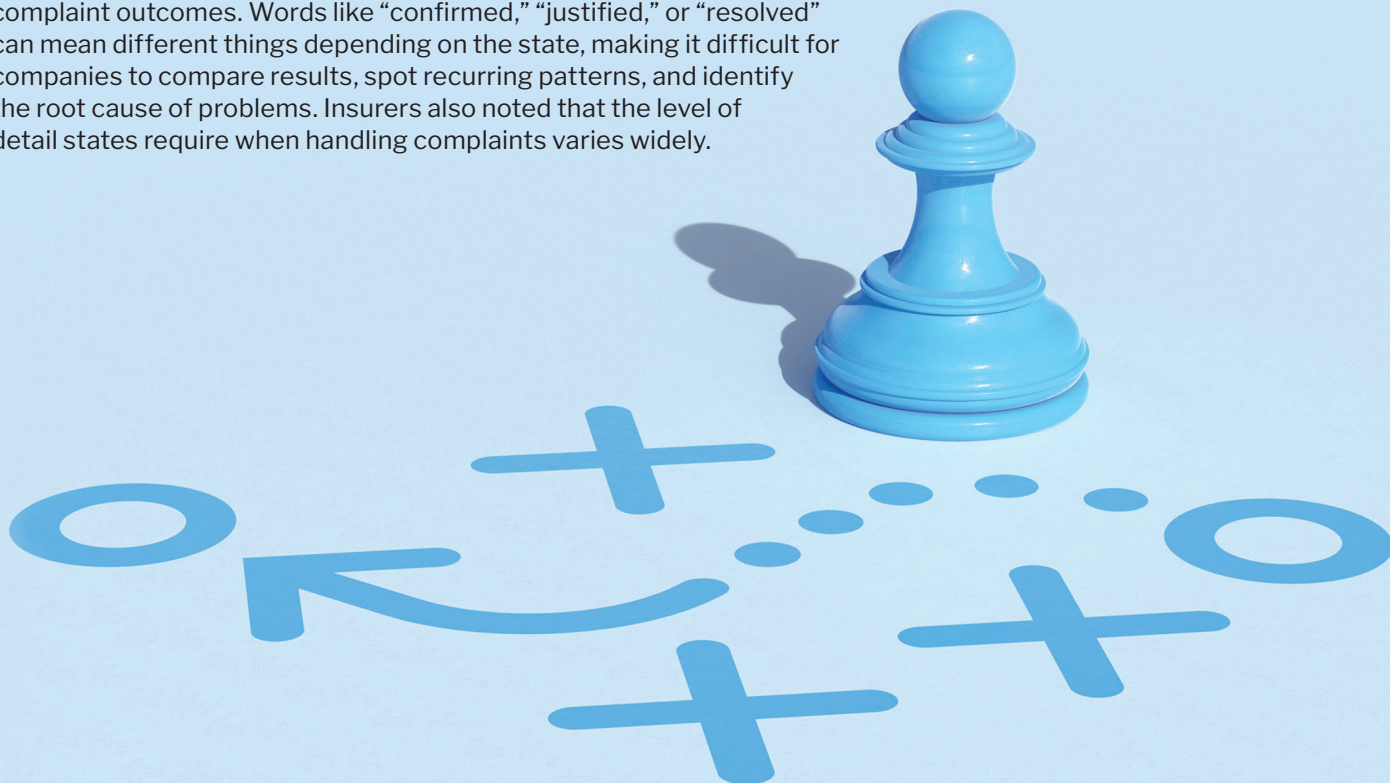
Corrective Actions, Communications, and Enforcement

Commenters advocated a framework that encourages self-reporting and recognizes proactive remediation, corrective action, and cooperation as mitigating factors in any subsequent regulatory action. Commenters spoke of self-reporting situations that have resulted in overly punitive or inconsistent regulatory responses.

Publishing anonymized summaries of common exam findings would also help companies proactively benchmark and adjust their game plans.

Consumer Complaints

Insurers pointed out that states use different terms and codes to describe complaint outcomes. Words like “confirmed,” “justified,” or “resolved” can mean different things depending on the state, making it difficult for companies to compare results, spot recurring patterns, and identify the root cause of problems. Insurers also noted that the level of detail states require when handling complaints varies widely.



DOJ and CFTC Run New Routes to Pursue Insider Trading Case on Polymarket

BY JASON BERKUN

On May 27, 2026, the Department of Justice (DOJ) brought criminal allegations, and the Commodity Futures Trading Commission (CFTC) brought civil allegations, against Michele Spagnuolo, an Italian citizen residing in Switzerland. The allegations are that he misappropriated material nonpublic information (MNPI) to defraud Google, for whom he worked as a software engineer.

Spagnuolo bought at least 23 “Yes” or “No” listings on Polymarket as to who would be in the top trending Google searches for 2025, with near-perfect accuracy. As alleged, Spagnuolo breached his duty of trust and confidentiality to Google by using MNPI to purchase the listings. After Google publicized the results, Spagnuolo profited more than \$1.2 million, raising speculation of foul play.

Polymarket, a so-called prediction market platform whose U.S. affiliate, Polymarket US, is registered with the CFTC as a designated contract market, enables parties to stake their money on nearly anything. Whereas the DOJ describes this process as placing “bets,” the CFTC characterizes it as “trading.” The listing prices are based on the probability that the market believes an event, or the outcome of an event, will occur. For correct guesses or “predictions,” one dollar is paid out per share purchased.

Because of Spagnuolo’s purported deception toward Google, the DOJ charged him with willfully committing criminal commodities fraud, wire fraud, and money laundering, while the CFTC alleged that he committed civil commodities fraud. But the allegations, particularly for commodities fraud, depend on novel interpretations of law that had never previously been called on the field until a month prior, when the DOJ and CFTC had brought allegations against a U.S. Army member for using classified nonpublic information to profit from the capture of former Venezuelan President Nicolás Maduro.

Whereas wire fraud applies regardless of the type of financial instrument used, commodities fraud (whether criminal or civil) requires that a “swap,” “future,” or “option” be in the playbook. Swaps are broadly defined and include transactions that provide for any payment that is dependent on the occurrence or nonoccurrence of an event associated with a commercial consequence. According to the CFTC, the “event” for purposes of this case is the 2025 “Year in Search” list, and the “commercial consequence” is the effect this ranking has on Google’s profitability. On other playing fields, federal courts have primarily addressed, and reached inconsistent conclusions on, whether sports-related listings are swaps subject to the CFTC’s jurisdiction.



But the DOJ and CFTC are not the only playmakers with authority to bring charges based on abusive use of MNPI. To the extent that any contract is based on the occurrence or nonoccurrence of an event relating to an issuer of a security or issuers of securities in a narrow-based index, provided that the event directly affects the financial statements, condition, or obligations of the issuer, the SEC may engage in a parallel call on the field. In this connection, on June 18, 2026, the SEC and CFTC issued a joint request for public comment on the interpretation and treatment of security-based swaps. See “[SEC and CFTC Consider Status of Event Contracts and Other Innovative Products](#).”

So long as prediction markets continue to operate in the United States, allegations of insider trading like those against Spagnuolo will not be the last. The ability to trade on MNPI is easier than ever. To keep up with technological changes, issuers of securities, financial intermediaries, and any other party with access to MNPI should update their policies, as necessary, to protect against the risk of trading on MNPI. Although insider trading has always been a risk, advancement in technology and developing new markets necessitate changes to the industry playbook.

Some Additional Context

State gaming officials are individually engaged in contentious nationwide litigation against Polymarket for allegedly operating an unlicensed gaming business. These officials have argued that the listings are wagers subject to state law and have rejected Polymarket’s characterization of them as “swaps” subject to the CFTC’s exclusive jurisdiction. Remarkably, the CFTC has sued many of the same state gaming officials, seeking injunctive relief and echoing Polymarket’s argument.

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STAY AHEAD WITH EO WATCH:

TIMELY INSIGHTS ON EXECUTIVE ORDERS IMPACTING YOUR INDUSTRY

Presidential actions in the Trump administration continue to play a crucial role in shaping U.S. policy. It is important for businesses to stay informed about the potential impact of recent executive orders, memoranda, and proclamations.

To support our clients in navigating this evolving landscape, Carlton Fields is pleased to continue **EO Watch** — our dedicated online hub for analyzing select executive orders. EO Watch provides clear, actionable insights to help businesses understand and address the implications of these executive actions on operations, compliance, and strategy.

For financial services, life insurance, and securities industry clients, here are some of the latest **EO Watch** articles of interest:

- **SEC Staff Continues March for Co-Investment: Still Stepping to Trump Administration Tune**
SEC staff relief now lets registered open-end funds share in co-investment exemptive orders with affiliated closed-end funds, widening retail access to private assets.
- **Coming Back to Fintech Innovation: Another Executive Order**
A new executive order directs regulators to cut red tape and streamline fintech-bank partnerships and payment system access.
- **Small Savers, Big Future: Our Journey to TrumpIRA.gov**
An executive order launches TrumpIRA.gov, a no-minimum, fee-capped IRA portal targeting workers without employer retirement plans.
- **Private Fund Reporting Form Moving in Trump's Direction, But Form PF's Basic Approach Is Not Changing**
The SEC and CFTC propose raising Form PF's filing thresholds and trimming reporting burdens, while keeping its core framework unchanged.
- **SEC Staff Clarifies Broker-Dealer Status of Self-Custody Wallet Interface Providers**
SEC staff reversed course, confirming neutral self-custody wallet interface providers need not register as broker-dealers.
- **A Safe Harbor in Rough Waters: Department of Labor's Proposed Regulation on Alternative Assets**
The DOL's proposed rule offers 401(k) fiduciaries a safe harbor from litigation risk when adding alternative assets to plan lineups.

Access our full collection of EO insights at <https://www.carltonfields.com/services/executive-order-watch>.



NEWS AND NOTES

Carlton Fields earned top rankings for 11 practices and 23 of its attorneys in **Chambers USA 2026**.

Carlton Fields has been named the **Litigation Department of the Year** in the insurance category by the *Daily Business Review* for the 2026 Florida Legal Awards. The firm won the same award last year.

Austin Jackson was named to **2026 Lawdragon “500 X – The Next Generation”** list, spotlighting legal professionals who have made significant contributions to the industry early in their careers. Austin is an associate in Carlton Fields’ Securities Litigation and Enforcement Practice and a frequent contributor to *Expect Focus*.

Richard Choi was named to the **BTI “Client Service All-Stars”** list, an annual listing of attorneys selected by corporate counsel for delivering the absolute best in client service.

Carlton Fields released its **2026 Carlton Fields Class Action Survey**, providing an overview of key trends, risks, and best practices in class action management. The milestone 15th anniversary edition provides a rare long-view lens on how class action litigation has expanded, evolved, and become embedded in corporate risk management, revealing record corporate exposure to class actions and a sharp rise in artificial intelligence- and privacy-related risks.

Carlton Fields was pleased to sponsor the **DRI Life, Health, Disability, and ERISA Seminar** on April 29–May 1 in Atlanta, Georgia.

Carlton Fields sponsored the **National Association for Fixed Annuities (NAFA) Annuity Leadership Forum** on June 22–23 in Washington, D.C. **Trish Carreiro** spoke on tech and transformation in the industry and **Richard Choi** served as a speaker for a program on regulation by enforcement.

The firm sponsored the **American Council of Life Insurers (ACLI) Compliance, Legal, and Fraud Prevention Conference** on July 13–15 in Chicago, Illinois. **Clifton Gruhn** and **Irma Solares** served as panelists for the litigation update program.

Carlton Fields is sponsoring the **National Alliance of Life Companies (NALC) Fall Conference** on September 16–18 in Colorado Springs, Colorado.

The firm is proud to support **Securities Docket’s Securities Enforcement Forum Central** on October 1 in Chicago, Illinois. **Dean Conway** will speak on defending parallel investigations involving the SEC, USAO, state AGs, and others.

Carlton Fields will sponsor the **American Council of Life Insurers (ACLI) Annual Conference** on October 14–16 in Orlando, Florida.

Carlton Fields will participate in the **ALI CLE Conference on Life Insurance Company Products** on November 5–6, 2026, in Washington, D.C. **Richard Choi** will serve as co-chair, and **Trish Carreiro, Tom Conner, Dean Conway, Carol McClarnon, and Barry Weissman** will participate as program panelists.

Carlton Fields welcomes the following attorneys to the firm: associates **Francesca Colilli** (construction, Tampa), **Paul Diouf** (real estate, Los Angeles), **Jason Long** (appellate practice and trial support, Miami), **Darya Momeni** (business litigation, West Palm Beach), **Georgette Reid** (business litigation, New Jersey), and **Austin Shaffer** (business litigation, Atlanta).

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Carlton Fields proudly marks its **125th anniversary this year**. For more than a century, the firm has been defined by excellence — serving clients, shaping industries, and strengthening communities. As we celebrate this milestone, we remain equally focused on the future, building on our legacy through continued investment in technology, collaboration, and the development of future leaders. We are grateful to the clients and colleagues who have been part of this journey and are even more excited about what lies ahead.

Carlton Fields serves business clients in key industries across the country and around the globe. Through our core practices, we help our clients grow their businesses and protect their vital interests. The firm serves clients in eight key industries:

- Life, Annuity, and Retirement Solutions
- Banking, Commercial, and Consumer Finance
- Construction
- Health Care
- Property and Casualty Insurance
- Real Estate
- Securities and Investment Companies
- Technology and Telecommunications

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