

LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

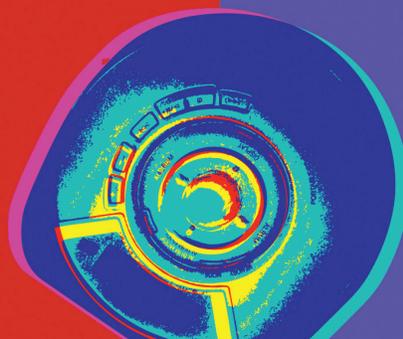
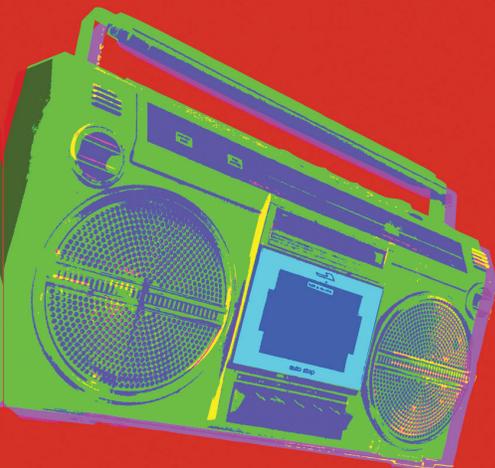
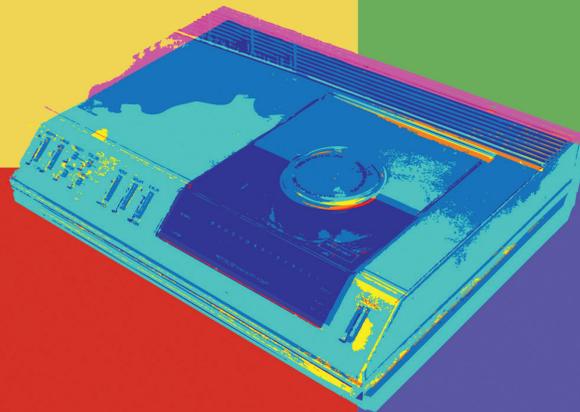
Volume I, January 2026

# EXPECT FOCUS<sup>®</sup>

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

## INDUSTRY REMIX:

## A Playlist of Change



**CARLTON  
FIELDS**

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## EXPECTFOCUS®

LIFE, ANNUITY, AND RETIREMENT SOLUTIONS JANUARY 2026

**Executive Editor** Thomas Lauerman

**Assistant Editors** Stephanie Fichera  
Todd Fuller

**Production Manager** Jessica Bennett

**Art Director & Designer** Amy Chytka

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# Use of State-Regulated Entities to Custody Assets: Will SEC Expand Playlist?

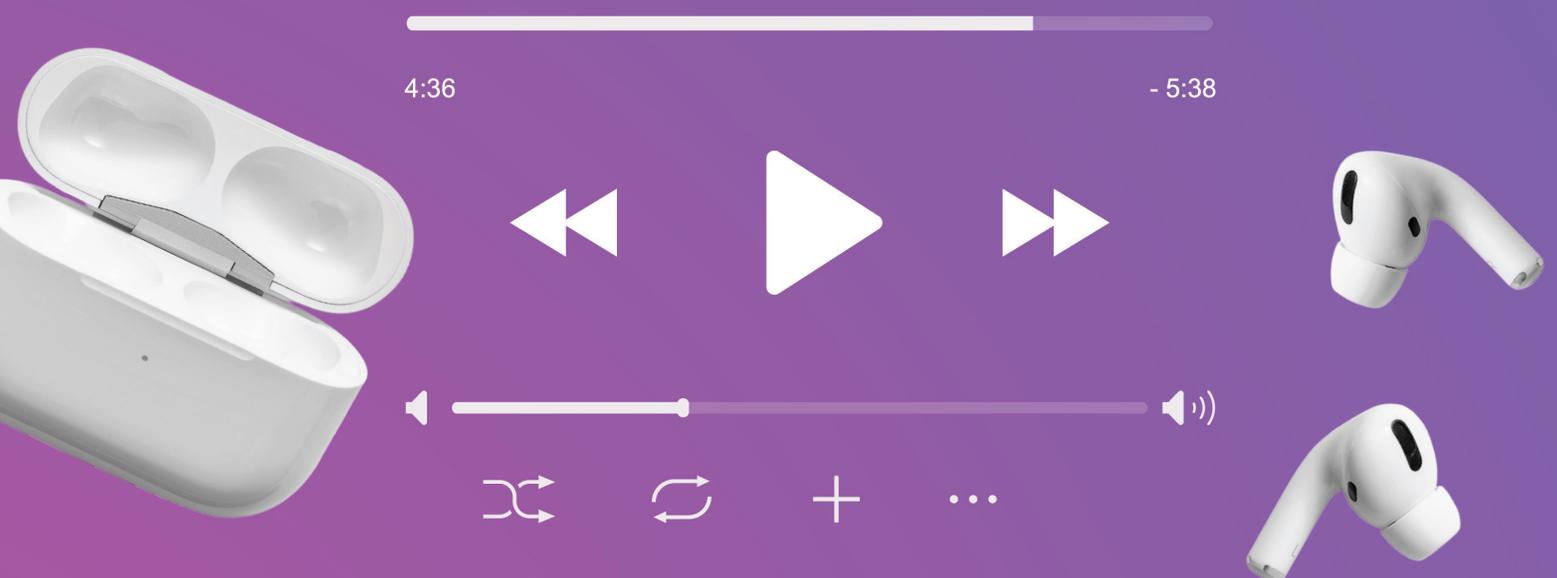
BY HARRY EISENSTEIN

Just before the October federal government shutdown, the SEC staff issued a **no-action letter** providing some clarity as to when a state-regulated banking or trust institution can serve as a “qualified custodian” under the Investment Advisers Act of 1940 or a permissible custodian under the Investment Company Act of 1940 with respect to digital assets that are subject to the custody provisions of those acts (crypto assets). The no-action letter provides needed clarity as to the use of these state-regulated entities (SREs) to custody crypto assets and, as a result, expands the universe of entities that can be used for that purpose.

The letter also, however, raises the question of whether investment companies and registered investment advisers can use SREs to custody non-crypto assets.

The letter points out the robust nature of the current regulatory regime in place for SREs, such as minimum capital requirements, investment restrictions, and periodic reporting and examination obligations. Moreover, the letter specifies conditions for custodying crypto assets with these entities, including independent audits of SREs' financials, maintenance by SREs of procedures designed to protect custodied assets, and prohibitions on certain transfers of interests in custodied assets. However, nothing in the letter's discussion of the current regulatory regime for SREs or the letter's conditions seems intrinsically limited to crypto assets. Rather, the regulatory regime and conditions described in the letter seem equally applicable to any asset for which a registered investment adviser or registered investment company would have a custody obligation.

Nevertheless, because the letter is by its terms addressed to the custody of crypto assets, registered investment companies and registered investment advisers may decide to consult with the SEC staff before custodying non-crypto assets with an SRE. To be sure, there may not be the need for a broader supply of custodians for non-crypto assets, as there is for crypto assets. Nonetheless, given the increased focus on avoiding unnecessarily restrictive regulatory requirements under the current administration at the SEC, there seems to be a reasonable prospect that any such consultations would yield a favorable result.



# No More Waiting in the Wings: Commodity-Based ETPs Get Generic Listing Rules

BY THOMAS CONNER

On September 17, 2025, the SEC issued an order approving new “generic” listing standards that are music to the ears of commodity-based exchange-traded products (ETPs), including those backed by crypto assets. Importantly, the order effectively removes a discordant regulatory tool used by the SEC for many years to block crypto ETPs. Now, crypto and other commodity-based ETPs will have a more certain and up-tempo path to market.

## Background and Prelude

Before a security can be bought and sold in the secondary market, it must first be approved for listing on a stock exchange. Securities that are not particularly novel or risky will often meet the requirements of approved “generic” listing standards without first submitting a proposed rule change to the SEC.

Shares issued by exchange-traded funds (ETFs) are no different — they must satisfy generic listing rules or seek individual approval from the SEC. Shares of ETFs that are registered and regulated under the Investment Company Act of 1940 (1940 Act) generally meet the requirements of generic exchange listing rules. However, so-called exchange-traded products (ETPs) that invest in currency, commodities (such as gold or spot bitcoin), or commodity-based derivative products such as futures and swaps (such as futures or swaps on agriculture products or bitcoin) are not subject to the 1940 Act and have historically been required to file individual listing applications.

Individual listing applications often proceed at what may be kindly referred to as an andante pace and have historically served as a venue for the SEC to disapprove ETPs that the agency determined were subject to market manipulation. Chief among these have been spot crypto ETPs. The SEC blocked the listing overtures of any spot crypto ETP until 2023, when the D.C. Circuit held that the SEC had acted arbitrarily by disapproving a listing application for a proposed spot crypto ETP while approving comparable futures-based products. The decision effectively handed a libretto to the SEC that it could no longer ignore, compelling the agency to approve spot bitcoin and ether ETPs in 2024.

Most recently, the SEC’s September 17, 2025, action approved generic listing standards for ETPs that qualify as “commodity-based trust shares.”

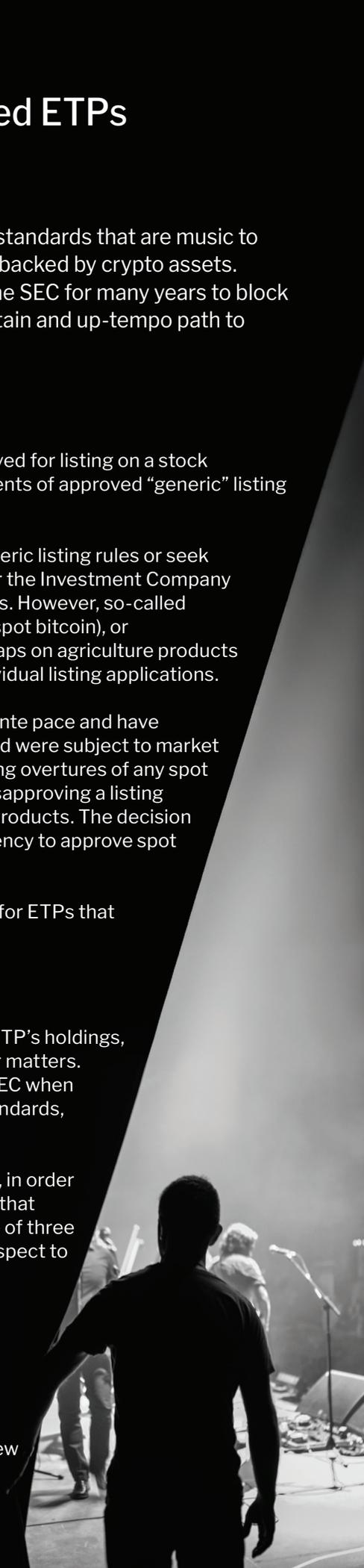
## Which ETPs May Make Quicker Entrance?

The new generic listing standards include requirements regarding a commodity-based ETP’s holdings, website disclosures, liquidity risk, initial and continued listing criteria, firewalls, and other matters. Exchanges will continue to be required to file individual rule change proposals with the SEC when seeking to list and trade commodity-based ETPs that do not meet the generic listing standards, including leveraged and inverse leveraged ETPs.

One of the most important features of the new generic listing rules is a requirement that, in order for an ETP to qualify for automatic listing, a commodity held by the ETP, or a commodity that underlies a derivative, commodity-based asset held by the ETP, must satisfy at least one of three somewhat technical criteria specified in the rules. Additional requirements apply with respect to an ETP’s holdings of equity securities, fixed income securities, and listed options.

## Finale

Importantly, while new crypto ETPs must continue to have registration statements declared effective by the SEC, the SEC does not have the broad authority under the new ETP generic listing standards to reject a registration statement on policy grounds that it has with listing proposals. Accordingly, the new rules will likely result in a crescendo of new crypto ETP launches.



# SEC Rearranges Score for Declaring Registrations Effective Acceleration Now in Harmony With Mandatory Arbitration

BY DEAN CONWAY

Under its current leadership, the SEC has emphasized capital formation as a key priority. Consistent with that focus, on September 17, 2025, the SEC issued a [policy statement](#) clarifying that the presence of mandatory investor arbitration provisions will no longer impact the acceleration of effectiveness of registration statements.

The policy statement reversed a long-standing and opaque practice — never formalized as SEC policy — of delaying the acceleration of registration statements that contained mandatory arbitration provisions. The policy statement now makes clear that the staff’s decision to accelerate effectiveness will depend solely on the adequacy of the filing’s disclosures, including disclosures related to any arbitration provision. The SEC, however, did not express a view concerning whether “arbitration provisions are appropriate or optimal for issuers or investors.”

Prior to the policy statement, there had long been persistent staff concerns that the “anti-waiver” provisions of the federal securities laws overrode the Federal Arbitration Act (FAA), a concern that caused the staff to delay the effectiveness of registration statements that reflect mandatory arbitration provisions. The policy statement clarified, however, that absent congressional direction, the federal securities statutes “do not override the [FAA’s] policy favoring enforcement of arbitration agreements.”

The policy statement underscores that the SEC is not a merit-based regulator, and it should be a market-driven decision whether to include mandatory arbitration provisions in registration statements. However, the policy statement struck a sour note with Caroline Crenshaw, currently the sole Democrat commissioner, who published a [dissent](#) stating that the SEC’s decision “stack[ed] the deck” against small investors who, absent the availability of shareholder class actions, will be “prevented from vindicating their rights.”

Moreover, the broader practical impact of the policy statement remains an open question. For example, whether mandatory investor-issuer arbitration provisions can be included in a corporation’s governing documents is a matter of state corporate law where the issuer is incorporated (and the laws are not uniform as among the states). Significantly, a recent amendment to the Delaware General Corporation Law has the effect of prohibiting mandatory arbitration provisions. This Delaware amendment has been subject to criticism, including by SEC Chairman Paul Atkins. Among other issues, purported state law limits on mandatory arbitration provisions are in tension with the FAA, and the resulting uncertainty may need to be decided by the courts.

Accordingly, it’s too soon to know what precise impact the policy statement will have on shareholder class actions. While issuers would like to avoid costly and protracted class action litigation under the securities laws, it’s equally likely that the securities class action bar would challenge the mandatory arbitration of federal securities law claims, which has never been considered by the Supreme Court.

Finally, as a practical matter, some issuers might still prefer the certainty and efficiency of litigating a single federal court action with the safeguards of the Private Securities Litigation Reform Act and the other benefits of federal court (such as experienced judges, predictable procedures, full discovery, and robust appellate rights) as opposed to numerous individual arbitrations in a forum with less predictability, limited discovery, and constrained appeal opportunities.

Ultimately, however, the market will resolve such dissonances, which is precisely where this SEC believes the decision belongs.

# Balancing Retail Private Market Access and Investor Protection: SEC Committee Weighs Regulatory Remix

BY ZACK BABBITT

On September 18, 2025, the SEC's Investor Advisory Committee (IAC) published a [major report](#) outlining its recommendations for facilitating increased participation by retail investors in private investment markets. In recent months, significant pressure for increased access has come from numerous sources, making it important and timely to consider what protections for retail investors can and should accompany any increase.

This article provides only a brief outline of the IAC report's 26 pages of recommendations and analysis. Generally speaking, the IAC believes that the regulatory framework of registered funds (e.g., mutual funds, exchange-traded funds (ETFs), and closed-end funds) can provide the optimal way for retail investors to directly and indirectly gain more access to private market assets.

To facilitate increased **indirect** retail investor access and protection, the IAC recommends:

- **Reforming valuation disclosures**, including requiring that registered funds disclose more information on how the values of portfolio assets that are not actively traded are determined. In addition, funds should disclose “when fund sponsors reject or replace third party appraisals”; and fund directors should require funds they oversee to disclose additional “details as to how valuations are determined” to facilitate comparisons “across various investment vehicles.”
- **Reforming staff interpretations and/or rules** under the Investment Company Act of 1940. Specifically, the SEC should (a) consider codifying, as well as extending to open-end funds, the type of simplified co-investment relief that the SEC has recently granted by exemptive order for closed-end funds; (b) amend 1940 Act Rule 23c-3 to allow for monthly, instead of quarterly, repurchasing of securities by interval funds; (c) eliminate the need for closed-end funds to obtain individual exemptive orders to offer multiple classes of shares; and (d) allow interval funds and tender offer funds to operate as series investment companies.
- **Reforming liquidity disclosures**. Among other things, registered funds should make clear to investors the major differences between retail funds invested in alternative assets that may be “subject to longer redemption timelines and lockups,” as compared with funds that do not invest in such assets. To do this, the IAC proposes that registered funds implement simplified risk disclosures, layered disclosure forms, and standardized language across documents.
- **Reforming investor protections**. The IAC believes the SEC should (a) work with FINRA and state regulators to develop guidelines as to when private market investments are in an investor's best interest and to ensure that sales to retail investors comply with applicable requirements of the SEC's Regulation Best Interest and fiduciary duties under the Investment Advisers Act of 1940; (b) ensure proper disclosure of financial conflicts of interest; (c) prohibit “clearly conflicted” transactions that do not have fund director approval; and (d) continue to rigorously enforce rules and regulations governing deceptive marketing and false claims to investors, including “advertising of funds primarily invested in illiquid assets ... as more liquid or less risky than they are in reality.”

The IAC report also recommends that, if action is taken to facilitate increased **direct** retail investor access to private investments, the SEC implement the following types of “guardrails” to enhance retail investor protection:

- **Expanded focus on investor sophistication**, versus wealth and income, when evaluating accredited investor status. The SEC should expand the categories of permitted Regulation D investors to include those it believes have sufficient knowledge and experience in financial and business matters to evaluate the merits and risks of a prospective investment based on the investors' **credentials** and **designations**. Further, the IAC supports the idea of a test that retail investors would take to enable them to qualify as accredited investors, provided that it (a) sufficiently probes the retail investors' ability to understand the unique features and risks of the private markets and (b) is developed by the SEC in consultation with other federal and state regulators and stakeholders in the industry.

- **Prudential limits to the amount that can be invested** by retail investors who do not meet the sophistication or wealth criteria. For example, the SEC should allow those not meeting the sophistication and wealth criteria to invest directly the greater of (a) 10% of the individual’s previous year individual or joint spousal annual income; (b) “up to 10% of individual or joint spousal net worth,” exclusive of any residences or automobiles; or (c) up to 10% of the value of the individual’s total investments in securities.
- **Strict enforcement of specific already existing requirements.** The IAC believes that the SEC should strictly enforce the current Form D filing requirements, including by developing and imposing penalties for failures to make timely filings. The SEC also should require that filers who take advantage of a “decline to disclose option” on Form D provide an explanation for doing so.
- **Other enhancements to Form D filing requirements.** The IAC’s report recommends that the SEC expand the information provided in Form D filings to include (a) the identity of any issuer legal counsel, accountants, or auditors; (b) a brief description of the issuer’s “general solicitation” plans, if any; (c) a brief description of the issuer’s existing and proposed business; (d) the name of any officer or director with greater than a 5% equity interest in the issuer; (e) expanded information about use of proceeds; (f) disclosure of any findings of securities fraud or noncompliance with the securities laws by the issuer or any of its related persons; and (g) disclosure of material risks and conflicts of interest, including details regarding any fees, costs, or charges assessed to investors.

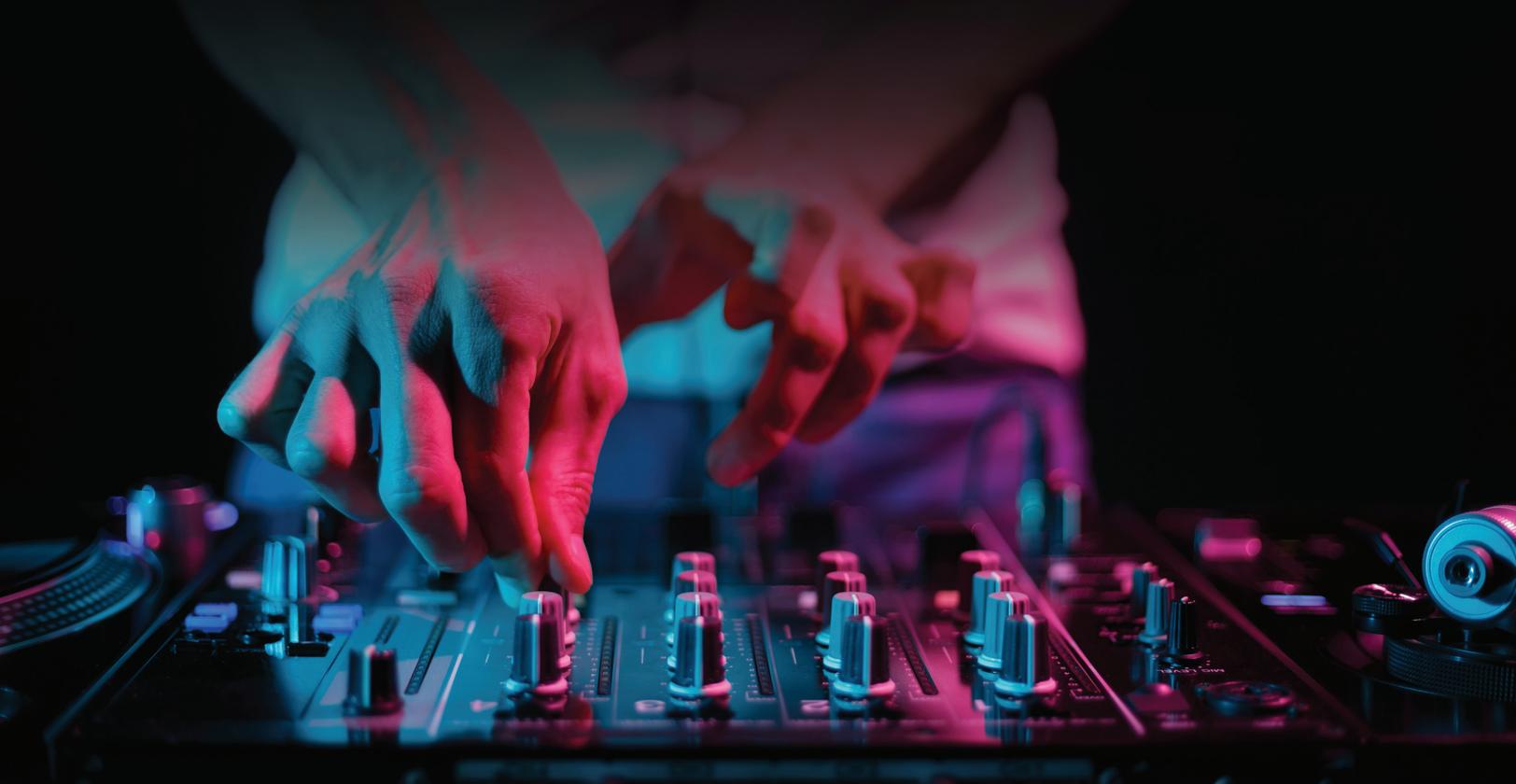
It bears emphasizing that this article by no means mentions all of the recommendations that the IAC makes in its report. Moreover, the report makes clear that the IAC itself believes that considerable additional analysis remains necessary to flesh out, refine, and further supplement its recommendations so far. The IAC, therefore, seems to expect the regulatory remixing to continue in earnest for a good while yet.



# SEC Chairman Drops His Remix of Wells Process

BY NATALIE NAPIERALA AND AUSTIN JACKSON

In an October 2025 address, SEC Chairman Paul Atkins dropped a new track on the SEC's enforcement playlist, and due process is the headliner. Specifically, Atkins announced reforms to the Wells submission process that are designed to restore fairness, increase transparency, and improve the quality of the SEC's decisions.



Wells submissions are advocacy documents that the SEC permits a potential respondent or defendant to submit for the purpose of dissuading the SEC from commencing an enforcement action that it may be contemplating against the submitter. Atkins urged the SEC staff to preserve the Wells process's "original purpose" and to guard against "plain mistakes, extreme legal theories, misinformation, biases, and conflicts of interest." His statements are akin to remastering a favorite record.

The first change resets the tempo. Enforcement staff will now provide at least four weeks for defense counsel to respond to a Wells. And extensions may be available in complex matters.

The second change raises the volume on transparency. Staff is directed to be more forthcoming about its evidence and potential charges and to share meaningful portions of the SEC's investigative file. Wells submitters should no longer have to guess which tune the staff intends to play.

Atkins also spotlighted the value of "white paper" submissions, which allow potential defendants and respondents to address legal or factual issues without the expense or exposure of a full formal Wells submission. Atkins noted that white papers are especially useful "in cases where a potential respondent or defendant feels obligated to make a public disclosure of a Wells notice or to save on the costs of making a Wells submission." Atkins further emphasized that the SEC (and not merely the staff) will receive each white paper and Wells submission, in both settled and contested cases, ensuring that the submitters' voices make it into the final mix.

For defense counsel and potential defendants and respondents, the message is simple: treat the Wells/white paper process as a headline performance, not a mere soundcheck. Engage early with the staff, request the evidence and a detailed explanation of the potential charges, and use the additional time now allotted to draft a white paper or a Wells submission that will really resonate with the SEC.



## NAIC's Third-Party Data and Model Vendors Regulatory Framework Strikes Some Sour Notes

BY ANN BLACK AND PATRICIA CARREIRO

The National Association of Insurance Commissioners' (NAIC) Third-Party Data and Models (H) Working Group issued a preview of its breakout single: a proposed risk-based regulatory framework for third-party data and model vendors. While stressing that insurers are still responsible for carrying the accountability tune, the draft framework's melody focuses on ensuring regulatory oversight of such vendors, particularly with respect to insurance functions with direct consumer impact.

The proposal, however, is likely to strike some sour notes, including:

- Vendor registration
- Annual attestations
- Regulatory access requirements
- Material change notifications
- State-specific, discretionary model filings and reviews

The group is accepting comments until February 6, and there is much unsung. What harmonies will be struck, what tempo the process will take, and how much of this proposal will remain on the studio floor remain to be seen.

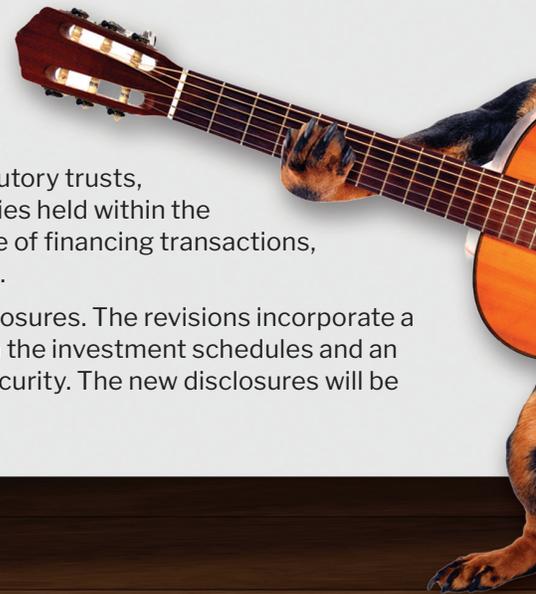
# NAIC Fall Meeting Lineup: Key Acts to Watch

BY ANN BLACK AND MARGARET DONNELLY

At the National Association of Insurance Commissioners (NAIC) Fall National Meeting, new updates and activities from various NAIC groups stepped up to the main stage.

Here are the headliners for life insurance and annuities companies:

-  The show goes on for Valuation Manual (VM) 22 work as the **Life Actuarial (A) Task Force (LATF)** considered the following VM-22 projects:
  - LATF heard a proposal that would enable insurers to establish reserves for pension risk transfer (PRT) annuities based on a calculation that employs the insurer's own asset and reinvestment assumptions consistent with the insurer's investment policy, subject to a guardrail. This proposal would modify VM-22 investment guardrails for group annuities supporting PRT business to better reflect actual investments. LATF exposed conceptual slides and consideration questions regarding this proposal and will continue to consider whether this proposal could be applied beyond PRT business.
  - Discussions have been ongoing regarding the retrospective application of VM-22 for in-force contracts. At the meeting, LATF presented a list of discussion topics and a "menu of approaches" to VM-22 in-force application. Although LATF has not determined which approach will be used, these discussion topics and list of approaches will continue to set the stage for decisions on VM-22's application to in-force contracts.
  - LATF exposed a proposal to adopt a consistent reinvestment guardrail for each of VM-20, VM-21, and VM-22. LATF regulators noted that this proposal should be considered in light of impact testing on the proposed reinvestment guardrails, which will be provided by the American Council of Life Insurers.
-  One of the meeting's most talked-about acts, the **Big Data and Artificial Intelligence (H) Working Group**, drew a crowd to discuss edits on its Artificial Intelligence (AI) Systems Evaluation Tool, which would enable regulators to identify and assess AI-related market conduct and financial risks. During its session, the group's work focused on revisions to the background, intent, and scope of the tool, as well as the tool's Exhibit A, which is intended to obtain and quantify information pertaining to insurers' use of AI systems. The group also outlined its plans to pilot the tool with several state insurance departments in 2026, although the structure of this pilot program has not yet been determined. Industry feedback on the tool suggests the pilot program may need further rehearsal, as a joint comment letter from several trade groups expressed that "the industry remains significantly concerned about the lack of detail and guidance around the proposed Pilot of the Tool."
-  The **Statutory Accounting Principles (E) Working Group (SAPWG)** had a full setlist of agenda items at the national meeting, including the following:
  - SAPWG adopted new guidance that allows for qualifying statutory trust structures to hold and report residential mortgage loans (RMLs) on Schedule B as if the RMLs were held directly by the insurer itself. The new guidance also establishes new disclosures for these qualifying statutory trusts, including a description of the trusts, a summary of the assets and liabilities held within the trust, disclosure of any material litigation or regulator reviews, disclosure of financing transactions, and a summary of loans held in the trust disaggregated by loan standing.
  - SAPWG also adopted revisions to incorporate new private security disclosures. The revisions incorporate a new reporting column to identify private placement securities by type in the investment schedules and an aggregate disclosure detailing key investment information by type of security. The new disclosures will be effective and required as of year-end 2026.



- The **Risk-Based Capital (RBC) Model Governance (EX) Task Force** hit a high note in adopting the Principles for RBC Requirements. The principles are intended to serve as guidance for governing the purpose and use of, as well as maintaining and prioritizing updates to, the RBC requirements. Notably, the RBC principles provide that, while RBC requirements are primarily used to facilitate regulatory action with respect to weakly capitalized companies, the requirements may also be used for other purposes, reflecting the trend of broader use of RBC information beyond the regulatory community. Insurers can stay tuned for further work on the RBC framework in 2026, as the Capital Adequacy Task Force and RBC Model Governance Task Force will continue work on updating and streamlining the RBC preamble in light of the adopted principles.
- This national meeting served as a farewell performance for the **Valuation of Securities (E) Task Force**, as effective January 1, 2026, the group will be broken up and replaced by the Invested Assets (E) Task Force, with three reporting working groups:
  - Invested Assets (E) Working Group, focused primarily on portfolio level analysis.
  - Investment Designation Analysis (E) Working Group, focused primarily on analysis of individual investments to appropriately assign their NAIC designations.
  - Credit Rating Provider (E) Working Group, focused primarily on the administration of the Credit Rating Provider Due Diligence Framework, which is currently under development.

Needless to say, true NAIC fans are breathless with anticipation to see which of these initiatives will be the biggest hits in 2026!



# The Sound of Silence: Lessons in Fiduciary Oversight and ESG

BY IRMA SOLARES AND ELISHEVA KLESTZICK

Streaming live from the Northern District of Texas, *Spence v. American Airlines Inc.* introduces a new track into the evolving soundscape of ESG and fiduciary oversight. The decision may be read to send a clear signal through the mix: where a court concludes that fiduciaries allow social or political aims to influence retirement plan management, courts may treat the resulting dissonance as a breach of ERISA's most fundamental obligations. In *Spence*, the court held, at the district court level, that ERISA fiduciaries must keep their decision-making aligned strictly with pecuniary interests. The opinion suggests that even passive, quiet acceptance of ESG activism can, in the court's view, disrupt that required rhythm. According to the court's reasoning, silence in the face of investment manager activism itself may create exposure to a breach of the duty of loyalty.

## Background

*Spence* arose from a class action brought by an American Airlines pilot challenging oversight of about \$26 billion in plan assets. The plan was overseen by the Employee Benefits Committee (EBC), the named administrator and fiduciary under the plan's and the EBC's governing documents. American Airlines also exercised significant discretionary authority, appointing and removing EBC members, interacting with advisers, and overseeing investment manager relationships, leading the U.S. District Court for the Northern District of Texas to find that it acted as a functional co-fiduciary.

BlackRock Institutional Trust Co. served as the primary investment manager for all of the passively managed funds in the plan, with delegated proxy voting authority under the investment management agreements (IMAs). BlackRock's IMAs required votes to be cast exclusively in participants' "long-term economic interests." Over the relevant period, however, BlackRock incorporated socio-political ESG-and climate-driven objectives into its stewardship guidelines and proxy voting practices, according to the court.

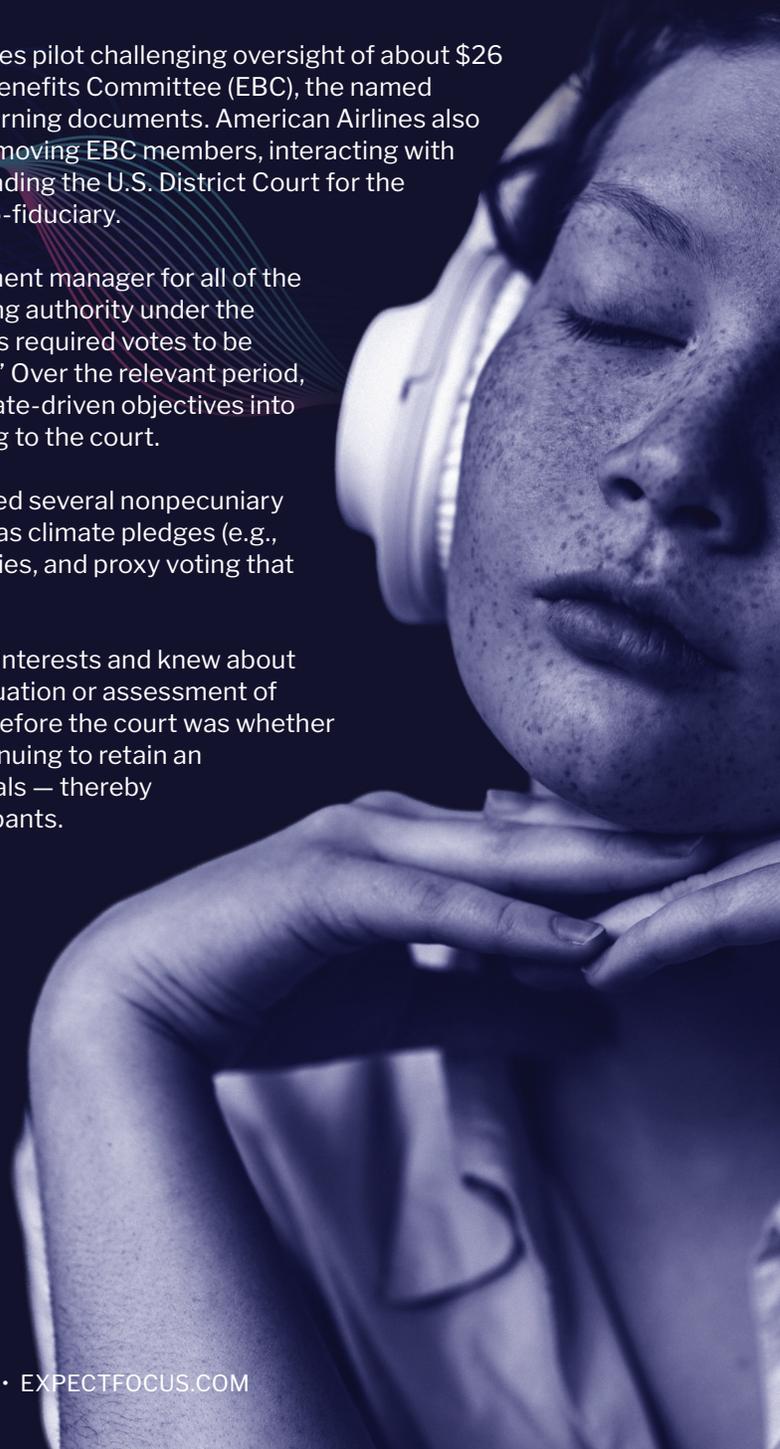
BlackRock's "ESG activism," as described in the opinion, included several nonpecuniary initiatives cited by the court as evidence of mixed motive, such as climate pledges (e.g., "net zero by 2050"), board diversity and decarbonization priorities, and proxy voting that advanced ESG goals without clear financial justification.

The defendants were aware of BlackRock's nonpecuniary ESG interests and knew about the CEO's public letters but, as the court noted, "no formal evaluation or assessment of BlackRock's ESG crusade commenced." The central question before the court was whether the defendants mismanaged plan assets by selecting and continuing to retain an investment manager that pursued nonpecuniary ESG policy goals — thereby potentially failing to ensure purely pecuniary returns for participants.

## ERISA Fiduciary Duties of Loyalty, Monitoring, and Prudence

### Duty of Prudence

ERISA's prudence standard is objective and process-focused, requiring fiduciaries to act with the care, skill, prudence, and diligence of a knowledgeable investment professional. The court found that the defendants' oversight processes aligned with prevailing industry standards. It emphasized that industry practice commonly relies on investment managers' self-reporting of proxy voting issues.



## Duties of Loyalty and Monitoring

The court found that the defendants breached their ERISA fiduciary duty of loyalty by allowing what the court described as “impermissible cross-pollination of interests and influence” and by failing to act solely in the exclusive financial interests of participants. Specific failures cited by the court included insufficient monitoring of BlackRock’s ESG-motivated proxy voting, failing to determine whether such votes had any pecuniary basis, ignoring required attestations, remaining silent in the face of ESG activism, and allowing corporate ESG commitments (including DEI, net-zero emissions, and sustainable aviation fuel initiatives) to influence plan management.

## Defining Themes

A throughline emerges across the court’s analysis: ERISA fidelity depends not only on outcomes but also on motives, process, and the structural separation of pecuniary and nonpecuniary aims. The opinion repeatedly returns to this theme, treating intent, oversight, and silence as interconnected elements of fiduciary responsibility.

### ESG Defined by Intent

The court grounded its reasoning in the principle that ESG must be defined by purpose:

[A]n investment strategy assumes an ESG label when it is aimed at, in whole or in part, bringing about certain types of societal change. ... Investing that aims to reduce material risks or increase return for the exclusive purpose of obtaining a financial benefit is not ESG investing.

Additionally, the court highlighted its treatment of investment strategies influenced by both economic and noneconomic goals:

Even with mixed benefits, the presence of a non-pecuniary consideration reveals that the investment manager is not acting exclusively in an economic manner.

### Silence as Approval

One of the most consequential aspects of *Spence* is the court’s treatment of inaction. This portion of the opinion forms a central pillar of the court’s reasoning, reinforcing that fiduciaries must actively safeguard pecuniary purpose rather than passively assume it.

The court stated that the “most obvious explanation” for the defendants’ silence and “lack of accountability” over BlackRock’s ESG activism and proxy voting activities in the Exxon matter was that the defendants “approved” and “endorse[d]” BlackRock’s ESG motivated conduct.

The opinion suggests that fiduciaries who “do nothing” in response to an investment manager’s ESG-motivated investing — whether using plan assets or in external contexts — may be viewed by a court as indicating support for the manager’s actions.

### Remedies – Final Judgment

On September 30, 2025, despite its harsh criticism of BlackRock and the defendants, the court issued its **final judgment** denying monetary damages after finding that the plaintiff had not proven losses.

However, pursuant to ERISA section 409(a) and Fifth Circuit precedent, the court imposed “other equitable or remedial relief” to prevent future breaches. This included a permanent injunction limiting nonpecuniary-influenced proxy voting, appointment of two independent EBC members for five years, and annual reporting and certifications confirming pecuniary purpose and transparency, along with corporate disclosure of ESG-related memberships or statements.

These remedies, broad in scope and duration, reflect the court’s conclusion that fiduciary silence, mixed motives, and insufficient structural separation necessitated structural correction in this case.

## Key Takeaways for Plan Sponsors and Management

### Refrain From Mashups

Fiduciaries should maintain a firm separation between corporate ESG initiatives and ERISA fiduciary decision-making. When corporate sustainability goals overlap with plan oversight, courts may view such blending as evidence of disloyalty. *Spence* illustrates that even well-intentioned alignment can, depending on the facts and judicial interpretation, create the appearance of mixed motives when fiduciary and corporate priorities are not kept clearly separate.

### Be the Ultimate DJ

Fiduciaries should implement and document robust processes for selecting, monitoring, and evaluating investment managers, including oversight of stewardship policies, proxy-voting guidelines, and any stated ESG frameworks. The court emphasized that monitoring should not be passive; fiduciaries may wish to show ongoing engagement with managers’ practices and rationales.

### Oversee Daily Mixes

Investment managers may engage in ESG activism across multiple contexts. *Spence* highlights that activism outside the plan can still influence judicial assessment of fiduciary oversight. Fiduciaries may benefit from regularly reviewing public letters, stewardship reports, and voting trends, not just plan-specific communications.

### External Signals Matter

Public commitments, ESG coalition memberships, climate pledges, and stewardship statements may reveal nonpecuniary aims. The court treated these external signals as relevant indicators of motivation, underscoring the importance of monitoring how investment managers frame their objectives. Fiduciaries may wish to assess whether these commitments meaningfully align with an exclusive pecuniary purpose.

## Choose Charts Over Trending

Fiduciaries should seek to ensure that investment strategies and proxy votes rest on demonstrable financial rationales rather than social or political aims. *Spence* reflects the court's view that silence or inaction in the face of known nonpecuniary activism can be interpreted as endorsement. Affirmative documentation of financial reasoning — and timely follow-up when concerns arise — may help fiduciaries maintain the required pecuniary focus.

## Next Track

The defendants moved for reconsideration of the final judgment in the district court. The decision may ultimately be reviewed by the Fifth Circuit on appeal, and its reasoning or remedies could be modified or reversed.

## Conclusion

ESG activism often seeks to steer investor behavior through value-based arguments and socially driven engagement strategies, tugging at the heartstrings of millions of investors worldwide. But in *Spence*, the court cut the serenade short, delivering a cautionary lyric: fiduciaries may face risk if nonpecuniary ESG objectives are blended into the management of retirement plan assets. Grounded in ERISA's primacy of pecuniary purpose, the court's decision underscores its view of the dangers of cross-pollination, silence, and lack of active oversight. As courts heighten scrutiny of proxy voting, investment manager selection, and corporate fiduciary overlap, plan sponsors may wish to ensure their processes stay precisely in tune with ERISA's exclusive benefit rule.



# Panelists Preview Potential Crypto/Insurance Hit Parade

BY GINA ALSDORF

In October, the American Council of Life Insurers annual meeting featured a panel titled “Crypto, Life Insurance, and Regulation: The Next Frontier in Financial Innovation.” The panelists, including the author of this article, previewed potential applications of crypto-based technologies in the insurance product context. This panel, which also included Wyoming Commissioner of Insurance Jeffrey Rude and the Bermuda Monetary Authority’s (BMA) chief fintech officer Moad Fahmi, seemed to strike a resonant chord with its audience.

Rude and Fahmi, in particular, have had front-row seats to digital asset innovation. For example, Wyoming not only recently became the first state to pass legislation permitting insurers to hold cryptocurrency but also the first state to issue its own stablecoin: the Frontier Stable Token (FRNT). A stablecoin is a type of digital token, pegged to the value of another asset (such as a currency), that is designed primarily to facilitate payments. Traditional payment systems are dependent on intermediaries and can be expensive and slow. Stablecoins were created as a more direct payment alternative that has the speed and security of other cryptocurrency transactions but reduces the volatility in value. FRNT’s value is pegged to the U.S. dollar and is reserved at 102% with short-term Treasury bonds and hard U.S. currency. Interest on the reserves is earmarked by law to fund Wyoming’s public schools.

Additionally, Wyoming, in concert with blockchain startup Hashfire, ran a pilot program this past year that used FRNT to pay state contractors. This rockstar program automated the approval and contract verification process for payments using a smart contract, which reduced the time to process payments from 45 days to mere seconds.

Fahmi also had marquis-worthy insights, with Bermuda having long provided a stage for innovative insurance ideas. In 2018, the BMA created its insurance regulatory sandbox and innovation hub, which grants regulatory exemptions and provides businesses a venue to test and improve ideas before taking them to the larger market. So far, the sandbox has graduated seven businesses, including an insurer that is transacting bitcoin-based life insurance. Life insurance premiums, policy loans, and insurance benefits are all denominated and paid in bitcoin.

Bermuda is a unique arena to advance cryptocurrency, as it:

- Is one of the first jurisdictions to enact comprehensive legislation dealing with digital assets.
- Has a tax code that makes most cryptocurrency transactions tax-free.
- Is a world leader in reinsurance and home to many insurers and reinsurers.
- Has the expertise and infrastructure to support complex insurance businesses.

The U.S. regulatory environment for digital assets remains complicated. The lack of comprehensive cryptocurrency regulation and the multitude of regulators involved makes crypto-based insurance products hard to develop. Digital assets are also treated as property under U.S. tax law. Accordingly, almost any cryptocurrency transaction in the United States is subject to taxation.

Even with potential regulatory and tax concerns, however, a handful of insurers have started developing U.S. products with crypto exposure. One product with potential is a crypto index-linked annuity (CILA). The hope is that such products’ favorable tax treatment and crypto exposure will appeal to the next generation of investors. The potential structure of and regulatory concerns (such as hedging and reserving) about these products are still being explored. However, the first CILAs will likely be linked to a bitcoin-based index. Though not supported by bitcoin directly, such a CILA would allow for the tax advantages of an annuity, with some of the upside returns of cryptocurrency, while smoothing out volatility by incorporating both a “cap” and a “floor.”



Nevertheless, according to the panel, “smart contracts” might be the top performer among crypto-based technologies for insurers. Smart contracts are self-executing programs, coded on a blockchain, that can offer automation of processes, reduced costs, security, transparency, and comprehensive audit trails. In addition to public blockchain options for smart contracts, consortium blockchains, such as the RiskStream Collaborative (made up of several large insurance companies), are looking to create efficiencies by streamlining workflows and verification of data in multiparty business transactions. Blockchain offers a lot of promise.

Regardless of what may be their greatest insurance hit, blockchain- and cryptocurrency-based financial products are on the road to popularity and therefore should be watched carefully.



# Circuit Courts Chime in on Eligibility for Long-Term Disability Benefits

BY ANNICK RUNYON AND DAVID SAFIR

Federal circuit courts of appeal chimed in on participants' eligibility for long-term disability (LTD) benefits in two recent decisions. Both decisions affirmed administrators' denial of benefits and addressed the impact of information provided (or not provided) by plan participants during administrative appeals.

## Eleventh Circuit – Failure to Submit Additional Mental Health Evidence on Appeal

The Eleventh Circuit affirmed the district court's grant of summary judgment for an insurer-claims administrator, finding that the administrator's termination of the participant's disability benefits based on her bipolar disorder was not unreasonable or wrong.

The plaintiff was a commercial litigator with a history of bipolar disorder. In 2019, she experienced a mental health crisis and received psychiatric treatment.

Based on her psychiatrist's notes reporting that she exhibited "impaired judgment" and "poor decision-making," the administrator approved the plaintiff's claim for LTD benefits based on her mental disorder in 2019. In 2020, the plaintiff participated in additional mental health treatment, including a partial hospitalization program, after which her therapist documented intact functioning and normal cognition.

When reviewing the plaintiff's disability claim in 2021, the administrator attempted to contact her therapist. After several unsuccessful attempts, the administrator terminated the plaintiff's benefits based on her therapist's post-discharge notes.

The plaintiff requested an administrative appeal of the administrator's decision. In response, the administrator hired a psychiatrist to conduct an independent review, who concluded that the plaintiff was not disabled after her release from the hospitalization program. The administrator invited the plaintiff to submit additional clinical evidence to support her claim of continued disability; however, she declined to do so. The administrator subsequently denied the plaintiff's administrative appeal.

The plaintiff filed suit in the Southern District of Florida, and the district court upheld the administrator's decision.

The Eleventh Circuit affirmed. The court agreed that the administrator's decision to terminate the plaintiff's benefits was not de novo wrong. The only evidence the plaintiff submitted to the administrator in support of her continued disability claim was the therapist's notes, which did not indicate that she remained unable to work. The plaintiff bore the burden of demonstrating continued disability, and the court found it notable that she declined to submit further evidence when invited to do so. The court also concluded that the administrator did not improperly rely on the opinion of the independent medical reviewer, even though the reviewer had not examined the participant.



## Seventh Circuit – Inconsistent Appeal Information Treated as New Claim

The Seventh Circuit affirmed summary judgment for an administrator who denied a professional musician's claim for LTD benefits under an ERISA plan.

The plaintiff was a world-class musician who served as the principal flutist for the Indianapolis Symphony Orchestra. In mid-March 2020, the symphony placed its musicians, including the plaintiff, on furlough due to the COVID-19 pandemic. In December 2020, while still furloughed, she developed multiple symptoms, including vertigo, fatigue, and brain fog. Although some symptoms subsided, her dizziness worsened, and she developed tinnitus.

The symphony rehired the plaintiff in September 2021. She soon found that performing exacerbated her dizziness and that her tinnitus impaired her ability to hear other musicians. The symphony placed her on sick leave, and she applied for LTD benefits under the symphony's group policy. In her application for benefits, the plaintiff reported March 13, 2020, as the last day she had worked before her disability and December 11, 2020, as the first date she could not work on a full-time basis.

The administrator denied the plaintiff's claim. Under the policy, only "active, full-time employees" were eligible for LTD benefits. The administrator advised that, according to her application, the plaintiff's disability commenced in December 2020, while she was furloughed and was not an eligible active, full-time employee.

The plaintiff appealed the decision, providing additional materials showing she had been rehired on September 1, 2021, and requesting coverage for an inability to work beginning on that date. Her appeal failed, and she filed suit. The Southern District of Indiana granted summary judgment to the administrator.

The Seventh Circuit affirmed, concluding that the plaintiff was not eligible for coverage based on the information in her initial application because she was not employed by the symphony when she became disabled.

In addition, the court concluded that the plaintiff's amended benefits request on appeal constituted a new claim for benefits, requiring a separate application for a different loss. Even though ERISA requires administrators to consider all information related to a claim, the amendment conflicted with the facts asserted in the initial application. The court noted that no claims-processing system can work if an applicant could submit contradictory facts on appeal. The court could not consider whether the plaintiff was entitled to coverage on her new claim because she had failed to exhaust her administrative remedies, and therefore her suit was premature.



# Will Shareholder Meeting Players Continue to Pick Up Anti-ESG Themes?

BY THOMAS LAUERMAN

Since Inauguration Day in January 2025, the new administration has in various ways publicly trumpeted the advisability of reversing numerous environmental, social, and governance (ESG) policies that many governmental and other entities have adopted in recent decades. Although this is in many ways a controversial theme, Trump-appointed SEC Chairman Paul Atkins has been singing a similar tune.

## Atkins' October Address

For example, in October, Atkins delivered a [major address](#) that included discussion of ways that companies might more often be able to exclude “precatory” proposals from their proxy statements filed with the SEC. For additional relevant detail about this address, please see “SEC Chairman’s [‘Make IPOs Great Again’ Project](#).” Briefly, “precatory” shareholder proposals are those that make a suggestion or recommendation, often relating to environmental or social issues, that, even if approved by shareholders, would not have any binding effect on the company or its board.

Atkins argued that requiring companies’ proxy statements to include such precatory proposals is among the costly burdens that unduly discourage companies from going public and thus becoming subject to the SEC’s proxy rules. He also argued that the SEC and its staff should, generally speaking, grant more deference to state corporate law governing the circumstances under which companies must permit shareholders to present their proposals. Inasmuch as precatory proposals frequently relate to ESG matters, Atkins’ suggestion of possible ways to reduce the number of such proposals was implicitly anti-ESG. That is, in his view, the SEC should not put its thumb on the scale — as much as it has in the past — in favor of such proposals being accorded a shareholder vote at company expense.

## SEC Staff’s Further Development of Atkins’ Melodic Motif

On November 17, the SEC staff issued a “[Statement Regarding the Division of Corporation Finance’s Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season](#).” For the current proxy season (which ends September 30, 2026) this staff statement provides the score for various instruments that must play in harmony in order to implement certain key ideas and objectives of Atkins’ October address. Among other things:

- Except as noted in the next bullet below, the staff will take a rest from responding to requests for “no-action” assurance with respect to company omissions of shareholder proposals from their proxy materials. The November 17 statement explains this pause in new no-action assurances by reference to the staff’s belief that the now-available guidance (including from both the SEC and staff) provides a sufficient basis for companies to make reasonable judgments about the permissibility of such omissions.
- The staff will, however, continue to toot its no-action horns, if the reason a company wants to exclude a precatory proposal from its proxy statement is that the proposal is improper under state law. In this connection, the staff statement cites the October address, in which, as to companies incorporated in Delaware, Atkins stated as follows:

[I]f there is no fundamental right under Delaware law for a company’s shareholders to vote on precatory proposals — and the company has not created that right through its governing documents — then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable [from the company’s proxy statement as being improper under state law]. If a company makes this argument and seeks the SEC staff’s views, and the company obtains an opinion of counsel that the proposal is not a “proper subject” for shareholder action under Delaware law, this argument should prevail, at least for that company. I have high confidence that the SEC staff will honor this position.
- The November 17 statement indicates that, as to proposals by registered investment company shareholders, the SEC’s Division of Investment Management will read from the same songbook and follow procedures comparable to those set forth for the Division of Corporation Finance.

The staff did not announce whether it expects to give a repeat performance of its November 17 statement for any future proxy season.

## Performances by State Courts and Legislatures

State courts and legislatures also will probably chime in meaningfully, particularly as the SEC seems inclined to yield more of the stage to state law than it historically has.

For example, Atkins' October address specifically mentioned:

- A recent amendment to Texas law that allows a Texas company to elect to be governed by a much increased stock ownership prerequisite for shareholders to propose a matter for a vote. Moreover, the articles of incorporation or other governing documents may include similar preconditions for submission of shareholder proposals that substantially exceed the preconditions prescribed by the SEC's proxy rules. Atkins explained his view that the SEC should defer to any such higher share ownership standard that might be applicable, thereby providing another potentially potent means for companies to avoid unwanted shareholder proposals, including any promoting ESG policies.
- Delaware's constitution authorizes the SEC to certify questions to Delaware's highest court for declaratory judgments. This could be highly useful in the event that disputes or uncertainties about Delaware law arise, particularly in view of the large number of public reporting companies that are organized under Delaware law.

The above-mentioned Texas law amendment, at least, seems to harmonize with Atkins' tune. But it remains to be seen to what extent other new state legislation and court decisions will play along.

## The Company Chorus

It is also unclear to what extent individual companies will take advantage of such opportunities as they may have to join any anti-ESG chorus. Even if a company may have grounds to assert that a given shareholder proposal is improper, shareholder relations or other business considerations may weigh in favor of allowing certain proposals.

Similarly, each company will need to weigh the public relations and business considerations applicable to its particular circumstances when deciding such questions as whether to press state legislatures to change any laws relevant to shareholder proposals or whether the company should change its domicile to a state whose laws it views as more favorable in this regard.

# The SEC and Fixed Indexed Annuities: Regulation by Enforcement Is Alive and Well

BY JUSTIN CHRETIEN

Notwithstanding the SEC's recently publicized shift away from "regulation by enforcement," the practice appears alive and well when it comes to fixed indexed annuities (FIAs). In particular, the SEC's continuing litigation in *SEC v. Cutter* seeks to expand registered investment adviser disclosure obligations to include the sale of FIAs by advisers who are also state-licensed insurance agents (adviser/agents), and SEC exams and investigations across the country are increasingly focused on disclosures made in connection with FIA sales by these adviser/agents.

In 2009, the SEC adopted Rule 151A under the Securities Act, which generally brought FIAs into the SEC's regulatory sphere. That rule was short-lived, however, as the D.C. Circuit Court of Appeals vacated it in 2010, finding the SEC's economic analysis supporting the rule to be "arbitrary and capricious." Later in 2010, the so-called Harkin Amendment was included in the Dodd-Frank Act, which made clear that, subject to certain conditions, FIAs would not be subject to SEC regulation. The SEC then withdrew Rule 151A, effectively acknowledging that FIAs generally are not securities under federal law. But what the SEC could not achieve in 2009 through rulemaking, it now endeavors to do through enforcement.

## Cutter

In *SEC v. Cutter*, the SEC charged Jeffrey Cutter, an adviser/agent, and his advisory firm with violations of the anti-fraud provisions of the Investment Advisers Act (Advisers Act). The SEC alleged that the defendants engaged in a "long-running, multi-faceted fraud scheme" to maximize Cutter's income without disclosing the amount of compensation he received from the sale of FIAs to advisory clients. The SEC also alleged that several clients were not informed of the tax implications of Cutter's advice to sell existing securities to invest in the firm's model securities portfolios and that he made misrepresentations regarding his clients' financial objectives and financial position in annuity applications. In short, the SEC argued that the defendants' disclosures were not "full and fair" as required under the Supreme Court's 1963 decision in *SEC v. Capital Gains Research Bureau Inc.* It is notable that *Capital Gains* is a 62-year-old case that preceded the relatively recent adoption of SEC Form ADV Part 2, which specifically details today's disclosure requirements for advisers. It is also notable that Form ADV Part 2 — adopted decades after *Capital Gains* — does not require advisers to disclose to advisory clients the amount of compensation received by advisers from the sale of FIAs.

After a seven-day trial, the *Cutter* jury returned a verdict for the SEC on one count — a negligent violation of the anti-fraud rules — and a defense verdict on the more serious counts alleging reckless or knowing violations of the anti-fraud rules or a failure to implement reasonable compliance procedures. But the verdict form did not specify the conduct constituting negligence. Thus, the verdict may simply reflect the jury's finding that the defendants were negligent in disclosing tax implications regarding the sale of existing securities or in accurately reflecting clients' financial information in annuity applications, as mentioned above.

It is certainly not clear that the *Cutter* jury found the defendants negligent for not disclosing the amounts of compensation received from the sale of FIAs. But even if that were the case, it would be premised upon an expansive view of the fiduciary duty under the Advisers Act regarding disclosures of compensation arising from outside business activities that would implicate — and exceed — the duties of insurance agents to disclose such compensation under state law.



*Cutter* illustrates the problems of regulation by enforcement. To start, the SEC lacks statutory or regulatory authority to regulate the sale of FIAs generally, which is most appropriately viewed as simply an outside business activity in which many investment advisers engage. Indeed, there is a body of law that generally bifurcates federal securities regulation and state insurance regulation. Moreover, no SEC rule or form specifically requires disclosure of the amount of compensation received for the sales of FIAs. Thus, *Cutter* seems to present a classic regulation-by-enforcement case in which the extent of the fiduciary duty under the Advisers Act becomes a question of law to be decided by a district court, not by Congress or the SEC. As such, outcomes in similar cases may vary depending on the circumstances and the court, leading to inconsistent results.

Significantly, because the verdict did not specify the conduct the jury considered to be violative, it does not provide clear guidance, fair notice, or meaningful due process to the industry regarding the scope of the fiduciary duty under the Advisers Act. This uncertainty underscores the risks inherent in using enforcement actions to define regulatory obligations.

## SEC Exams and Investigations

Several recent SEC exams and formal investigations have focused on records of disclosures and transactions involving the sale of FIAs by adviser/agents to advisory clients. These exams and investigations reflect the same enforcement-driven approach, notwithstanding the lack of statutory or regulatory authority to regulate the sale of FIAs.

## Document Production Difficulties

Following requests for many types of FIA-related documents, SEC staff can often be surprised when an advisory firm says, “We do not have such records.” Indeed, SEC staff may not be aware that the sale of insurance products is governed by non-SEC rules and that advisory firms therefore seldom have certain types of records they seek. For example, all 50 states have adopted the National Association of Insurance Commissioners (NAIC) Model 275 as a “best interest” standard for insurers and insurance producers. That standard imposes care, disclosure, conflict-of-interest, and documentation obligations on producers, but allocates record-keeping responsibilities primarily to insurers.

Under the NAIC standard, disclosures must be made regarding the scope and terms of the relationship, the producer’s authority to sell the offered products, a description of the sources and types of cash and noncash compensation to be received, and a notice of the consumer’s right to request additional information regarding cash compensation. Notably, however, there is no requirement under the NAIC standard for producers to disclose the amount of cash compensation unless the consumer requests it. Producers must make written records of recommendations and their bases, but insurers typically maintain those records on the producers’ behalf.

Thus, investment advisory firms will not likely have many of the records that the SEC may seek regarding sales of FIAs by their adviser/agents. Such adviser/agents may have limited access to insurers’ websites, but their ability to obtain records will be governed by the producers’ contracts with the insurers. Other intermediaries involved in FIA marketing likewise generally do not maintain these records, which are held by insurers themselves.

## Conclusion

For the reasons discussed above, the SEC’s claims in *Cutter* and its requests in exams and investigations that investment advisers provide certain records relating to FIA sales can fairly be characterized as regulation by enforcement. If the SEC truly disfavors regulation by enforcement, it should refrain from bringing such claims or requesting such documents until its remit to do so is made clearer.

# Whispering Words of Wisdom in Breakthrough SEC Staff No-Action Letter

BY ANN FURMAN

Not content to “let it be,” the Financial Services Institute (FSI) sought and received, on November 17, 2025, a significant SEC staff no-action letter relating to the broker-dealer status of personal service entities (PSEs) owned by registered representatives. Prior to the FSI letter, decades of conflicting guidance and doubt found PSEs in “times of trouble.”

The status question is whether PSEs may receive transaction-based compensation without registering as broker-dealers under the Securities Exchange Act of 1934 (Exchange Act). The FSI letter answers this question in the affirmative: the SEC staff will not recommend enforcement action to the SEC against a PSE solely for receiving transaction-based compensation under the terms and conditions described in the FSI letter.

## Why Do Registered Representatives Form PSEs?

In lieu of receiving transaction-based compensation in an individual capacity, some registered representatives form a limited liability company or other business entity that receives compensation for services rendered by the registered representatives to third parties. PSEs may result in tax savings and assist with succession and tax planning. PSEs are sometimes known as practice groups or ensembles and may engage in non-brokerage-related activities that do not require the PSE to register as a broker-dealer.

## Regulatory Landscape

FSI’s incoming request letter urged a “fresh look” at the compensation question due to contradictory interpretive positions and court decisions analyzing the fundamental question of whether the person or entity receiving transaction-based compensation is “engaged in the business of effecting transactions in securities for the account of others.” FSI’s incoming letter discussed years of SEC no-action letter guidance and court opinions analyzing whether “mere receipt” of transaction-based compensation is dispositive of broker-dealer activity.

## Conditions

Reliance on the FSI letter is subject to satisfaction of conditions that FSI designed to provide the staff with assurances that the PSE would not be engaged in soliciting, executing, or negotiating securities transactions, or any other activities that would reasonably cause the PSE to meet the definition of a broker or dealer under the Exchange Act, as follows:

- Broker-dealer maintains a bank account for paying transaction-based compensation to its registered representatives who are also employees or independent contractors of the PSE and associated with broker-dealer.
- Broker-dealer instructs the PSE regarding (or otherwise approves) the size and timing of transaction-based compensation to be paid to the registered representatives. Broker-dealer has final discretion regarding the size and timing of the payment to each of the registered representatives.
- Upon receiving instructions or approval from broker-dealer, the PSE promptly distributes transaction-based compensation to the registered representatives, provided that the PSE may retain a portion of such payments for its use in paying its overhead and administrative expenses.
- Broker-dealer maintains records regarding all compensation payments it makes to the PSE that provides required details regarding payments made to each registered representative.
- Each of the registered representatives and registered principals of the PSE are registered with the same broker-dealer.

- Each owner of the PSE is a registered person of broker-dealer.
- The PSE's location is either designated as a branch office or as an office of supervisory jurisdiction of broker-dealer.
- Broker-dealer and PSE enter into a written independent contractor servicing agreement containing specified provisions.

## Importance of FSI Letter to FINRA Rule 2040

While not discussed in the FSI letter, the letter “will be an answer” to another regulatory issue. FINRA Rule 2040 prohibits payments of transaction-based compensation to unregistered persons who, by reason of receipt of transaction-based compensation, are required to be registered. Supplementary Material .01 to Rule 2040 notes that “FINRA expects members to determine that their proposed activities would not require the recipient of the payments to register as a broker-dealer and to reasonably support such determination.” For broker-dealers that are unsure whether an unregistered person may be required to register, Rule 2040.01 states that support for the determination may be derived from “no-action letters or interpretations from the Commission or Commission staff that apply to their facts and circumstances.”

The FSI letter is just the kind of interpretation from which broker-dealers and registered representative-owned PSEs may derive support for the payment of transaction-based compensation to unregistered PSEs without requiring PSEs to register as broker-dealers. So long as unregistered PSEs satisfy the conditions of the FSI letter and enter into a written servicing agreement with the broker-dealer, the FSI letter “whispers words of wisdom” that Rule 2040 is not violated because broker-dealer registration is not required for PSEs that receive transaction-based compensation.



# The Show Goes On: SEC Gag Orders Survive Constitutional Challenge

BY DEAN CONWAY

For more than five decades, the SEC’s “no admit, no deny” (NAND) settlement policy has served as an important script for its enforcement program. Under Rule 202.5(e) of the SEC’s Rules of Practice, defendants and respondents may settle enforcement proceedings without admitting the allegations only if they likewise do not deny them. In a recent decision, the Ninth Circuit Court of Appeals rejected a challenge to the SEC’s denial of a petition to eliminate the rule’s “no deny” requirement. The court did caution, however, that the rule does have outer boundaries.

The petitioners’ appeal broadly contended that Rule 202.5(e) is unconstitutional because it prohibits a defendant from publicly denying the allegations of a settled SEC complaint or administrative order. The court noted that the petition “maintains that Rule 202.5(e) is per se unconstitutional” and concluded, therefore, that the petition is “properly analyzed as a facial challenge.”

The court recognized that substantial First Amendment concerns would likely exist if the SEC utilized the rule “to prevent criticism of the agency, its officers, or its enforcement programs” but found instead that the petitioners’ challenge was an assertion that the First Amendment is violated when a defendant agrees on a “voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle” its case. The court rejected this challenge, however, finding that the “law has long regarded the voluntary relinquishment of constitutional rights as permissible,” and concluded that Rule 202.5(e) is not facially invalid.

The court also observed that the SEC’s remedy in connection with a defendant’s breach of an NAND consent judgment did not include restraint on speech: “And, critically, the consequence for violating the Rule is not speech suppression or the automatic undoing of the settlement agreement, but only that the SEC may seek to reopen the civil enforcement proceedings.” In other words, the SEC could not reopen the proceedings without the court’s approval, and, in any event, the SEC had no power to ask the court to restrain a defendant’s speech.

The Ninth Circuit’s upholding of the SEC’s long-standing settlement policy has potential benefits for both the SEC and defendants facing enforcement actions. First, the SEC continues to have access to a tool that allows it to efficiently manage its docket and free up scarce resources that otherwise might be consumed by protracted litigation. Without Rule 202.5(e), the SEC in some cases will confront more difficult choices. For example, the SEC may not want a notorious fraudster to settle a case and then publicly proclaim that the SEC’s allegations were meritless. If the SEC were dissatisfied with the possibility of this outcome, then it would be forced to take more cases to trial and potentially diminish the depth and scope of its enforcement program. Second, this decision continues to provide defendants with an off-ramp from enforcement actions that does not include an admission. Admissions in SEC enforcement cases are potentially problematic for defendants because of collateral consequences in related civil securities lawsuits or parallel criminal actions. In addition, NAND settlements also provide defendants with a path to avoid costly and distracting litigation.



# SEC Retunes on Jointly Considering Settlement Offers and Waiver Requests

BY CLIFFORD PEREZ

In September, the SEC retuned its approach to considering settlement offers for enforcement actions with related waiver requests. This new approach puts the SEC back on pitch with a stance it previously held from July 2019 until February 2021, which allowed it to consider both simultaneously.

Settlement agreements can benefit the SEC, investors, and entities involved in enforcement actions by providing quicker remedies, enhanced certainty, and reduced costs. But the SEC sometimes places requirements in these settlements that can have significant collateral effects on an entity's operations, such as losing well-known seasoned issuer (WKSJ) status, statutory safe harbors for forward-looking statements, Regulation D exemptions for private offerings, and the ability to serve in various capacities for certain SEC-regulated entities.

The SEC is willing in many cases to waive fully, or partially, these consequences, and parties seeking settlement offers often request such waivers concurrently with their settlement offers. Resolution of both the waiver and settlement agreement is often critical to resolving an enforcement action by settlement. Previously, the SEC's tune was that it had to consider these settlement offers and waivers separately, since they are reviewed by different SEC divisions. But the current SEC thinks this reasoning is off-key, since treating a related settlement offer and waiver request as two separate events can add complexity to the decision, and undermine factors that lead to appropriate settlements.

The SEC's new tune allows it to consider a settlement offer and related waiver request together. In this way, the SEC can consider both with all the facts, conduct, and consequences relevant to both issues, and with the analysis and advice of all the relevant divisions. The SEC can thus better offer settlements and waivers that promote its public policy mandates and provide comprehensive settlements that are in the best interests of investors. But, the SEC noted, it still reserves the option to play the old tune and consider each request separately where it deems advisable.

# The Beat Goes On for the NAIC's Cybersecurity and Privacy Protections Working Groups

BY PATRICIA CARREIRO

This coming year will be an encore performance for the National Association of Insurance Commissioners' cybersecurity and privacy protections working groups.

After remixing in June 2024, when the Privacy Protections (H) Working Group scrapped its draft new privacy model in favor of starting anew, the group spent 2025 composing (and receiving comments on) its single tracks (i.e., draft sections of its new privacy model). Some harmonies have seemingly been struck (e.g., additional data use restrictions and expanded consumer rights are coming), but production on key tracks, like definitions, remains ongoing, and the group's release date for its new privacy model album has been extended to fall 2026.

In cybersecurity news, the Cybersecurity (H) Working Group will continue spinning up its Centralized Cybersecurity Event Notification Portal throughout 2026. The group continues tuning its work plan and developing its score regarding which states will be within the portal's vocal range, which melodies will be included on the reporting form, and how unique state law verses will pair with the one-stop reporting refrain.

There will likely be some discord before these pieces are finalized, but the beat goes on.



# Exxon Mobil's Retail Voting Program Invites Retail Investors to Join the Choir

BY BRIAN SOARES

On September 15, 2025, the SEC's Division of Corporation Finance issued a no-action letter to Exxon Mobil Corp. confirming that it will not recommend enforcement action under the proxy rules regarding the company's proposed retail voting program. This no-cost, voluntary program will allow shareholders to authorize the voting of their shares through a standing instruction requiring the company to vote those shares based on the recommendation of the company's board at each shareholder meeting. These standing voting instructions will remain in effect for all future meetings, unless and until the shareholders elect otherwise and hang up their choir robes.

As of now, the division's relief does not apply to investment companies, which fall within the purview of the Division of Investment Management. However, the mechanics of the program ought to be of interest to registered investment companies, which are subject to a quorum requirement imposed by the Investment Company Act of 1940 and, like non-investment company registrants, struggle with disengaged retail investors.

The purpose of Exxon Mobil's retail voting program includes promoting voting by retail shareholders and reducing the time and other burdens incurred by retail investors in the proxy voting process. According to the company, nearly 40% of its outstanding shares are held by retail investors, yet only a quarter of those shares were voted at its most recent annual meeting.

Under the program, participants will receive annual reminders of their enrollment in the program and their standing voting instruction. Participating shareholders also will receive all proxy materials filed for upcoming shareholder meetings. Accordingly, participants will always have the option to override their standing election under the program for any meeting by voting through the proxy materials received for that meeting. However, the program will not be available to investment advisers exercising voting authority over client securities.

Although the staff's letter also does not apply to registered investment companies, the staff of the Division of Investment Management could decide to sing from the same hymnal and apply a similar analysis to retail voting programs for such companies. Investment companies interested in adopting similar programs to promote voting by retail investors and reduce the costs of satisfying the 1940 Act's quorum requirement may consider contacting the staff of the Division of Investment Management to discuss no-action or interpretive relief under arrangements similar to Exxon Mobil's. Relief relating to the statutory quorum requirement of the 1940 Act could be viewed as more significant than the relief that Exxon Mobil requested. But the SEC staff's openness to working with industry participants under Chairman Paul Atkins' administration may offer a good opportunity to explore such relief.

On the other hand, some voices are being raised in opposition to the Exxon Mobil no-action relief, including via a class action lawsuit that has been filed in federal court on behalf of the company's shareholders. So it will probably remain unclear for a while yet who will be in the choir and what song they ultimately will sing.



# When the Beats Go Blockchain

## Nasdaq's Tokenization Rave Awaits SEC Approval

BY JASON BERKUN

Nasdaq is gearing up to drop one of the biggest beats the securities industry has heard since Nasdaq created the first electronic facility for trading securities: a proposal to permit tokenized securities to trade alongside non-tokenized securities. Under Nasdaq's proposal, Nasdaq would collaborate on a new festival with the Depository Trust Company (DTC) to execute, clear, and settle tokenized securities. If the SEC presses "play," tokenized trading could go live by late 2026.

Tokenization itself is a genre shift — representing real-world assets, such as securities, with cryptographically secured tokens. Tokenization opens new opportunities to efficiently transfer value between parties. In Nasdaq's proposal, tokenized and non-tokenized securities would share the same order book, execute trades according to the same priority rules, and maintain identical rights, from voting to dividends to liquidation.

But Nasdaq is not the only festival organizer. The DTC, serving as Nasdaq's tokenization partner, received an SEC no-action letter in December 2025, permitting the DTC to offer its tokenization services for three years without the festival shutting down. To the extent that the DTC and Nasdaq have varying visions of their festival, these differences will likely need to be resolved before the SEC signals the green light. The SEC will need to evaluate key priorities before approval, such as the types of legally permitted trading venues, ledger discrepancies, and settlement times — a full lineup of issues before the festival may begin.

Nasdaq is mixing older regulatory rules with the rhythm of blockchain infrastructure. If the SEC approves the proposal, capital markets could transition into a more modern pulse — one that turns every investor-selected tokenized trade into a synchronized dance routine with its non-tokenized security counterpart on Nasdaq's trading facilities.



# Stay Ahead With EO Watch:

## Timely Insights on Executive Orders Impacting Your Industry

Presidential actions in the new administration are playing 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 proud to present **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 No-Action Letter to DTC for Tokenization Services: The Coming 2026 Transformation of Trading Securities on a Blockchain**  
An SEC no-action letter clears the way for DTC to pilot blockchain-based tokenized securities in 2026, signaling a potential transformation of how U.S. securities are transferred and traded.
- **What Part Will the SEC Play in Proxy Adviser Drama? Agency's Role and Script Remain Elusive**  
A new executive order targets ESG-focused proxy advisers, but the SEC's ability to act remains legally and politically uncertain.
- **AI Executive Order Calls for Changes, But the Need for Good Governance Remains**  
A new executive order targets state artificial intelligence laws while pushing for a light-touch national standard.
- **The Rise of Lifetime Income Options**  
Lifetime income options could restore pension-like security in 401(k)s supported by evolving regulations.
- **Alternative Retirement Plan Investment: The Checklist**  
A recent executive order instructed the Department of Labor to reexamine existing guidance on alternative assets, including cryptocurrency, in ERISA-covered 401(k) plans.
- **Nasdaq Looking to Unveil Tokenized Trading Platform Next Year: Will the SEC Approve?**  
Nasdaq's plan to trade tokenized securities faces SEC scrutiny over custody, settlement, and investor protections.
- **SEC Chairman's "Make IPOs Great Again" Project**  
SEC Chair Paul Atkins aims to boost IPOs by limiting precatory proposals, raising ownership thresholds, and curbing frivolous litigation.
- **New SEC Staff Guidance Furthering Policies of Trump Defined-Contribution Plan Executive Order**  
The SEC removed limits on closed-end funds investing in private funds, making them potentially more accessible to retirement plans.
- **Plan Sponsor and Asset Manager Considerations Under 401(k) Alternatives Executive Order**  
A new executive order may let 401(k)s invest in alternatives like private equity, while regulators update rules to protect investors.

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



# News and Notes

Carlton Fields was named to BTI Consulting Group's "**2025 Client Service A-Team Law Firms**" list, recognizing firms that earn recommendations from outside counsel for superior client service. The firm was also named to the "Client Service Trailblazers" list as one of 55 firms that turn chaos into solutions for clients amid legal volatility and an unpredictable regulatory environment, and a "commercial litigation leader" in BTI's *Litigation Outlook 2026* report.

Carlton Fields earned **national first-tier rankings** for seven of its practices in the 2026 edition of Best Law Firms®. In addition, the firm achieved 60 metropolitan first-tier rankings across eight of its offices.

**Ann Black** received the 2025 Miami-Dade Bar Circle of Excellence Award, which recognizes attorneys who demonstrate exceptional performance in Florida's legal profession.

Carlton Fields has relocated its New York City office to 730 Third Avenue, 19th Floor, New York, NY, 10017.

The Leadership Council on Legal Diversity has named Carlton Fields as a recipient of the **2025 Compass Award**. The award recognizes law firms and corporations that show a strong commitment to building a more inclusive legal profession.

Carlton Fields successfully represented Embry-Riddle Aeronautical University in two class action lawsuits over the university's retirement plan. The team included attorneys **Markham Leventhal**, **Allison Oasis Kahn**, **Irma Solares**, **Jason Gould**, and **Sean Hughes**.

Carlton Fields was a sponsor of the **NALC Fall Conference** on September 10–13 in Quebec, Canada. **Trish Carreiro** presented a program titled "Mitigating Emerging Technology Implementation Risks."

The firm participated in the **ALIC Fly-In** on October 9 in New York. **Todd Fuller** presented a program titled "Premium Finance Risks and Litigation: Assessing Risks, Defense of Claims, What Does the Future Hold?"

The firm was pleased to support the **ACLI Annual Conference** on October 15–17 in Nashville, Tennessee, as a sponsor. **Gina Alsdorf** participated as a panelist on a program related to crypto, life insurance, and regulation, and **Trish Carreiro** spoke on the topic of third-party risk management.

Carlton Fields participated in the **ALI CLE Conference on Life Insurance Company Products** on November 13–14, 2025, in Washington, D.C. **Richard Choi** acted as co-chair, and **Trish Carreiro**, **Dean Conway**, **Harry Eisenstein**, **Adam Scaramella**, and **Barry Weissman** served as speakers.

The firm is a proud sponsor of the **SIFMA C&L Annual Seminar** on March 22–25 in Orlando, Florida.

Carlton Fields will sponsor the **Global Insurance Symposium** on April 14–15 in Des Moines, Iowa.

Carlton Fields will sponsor the **IRI Annual Conference** on April 22–24 in Tampa, Florida.

Carlton Fields welcomes the following attorneys to the firm: shareholder **Holly Unger Dutton** (mass tort and product liability, Los Angeles), **Dennis Raglin** (business litigation, Los Angeles), **Susan Taylor** (government law and consulting, West Palm Beach), and **Valerie Makarewicz** (white collar crime and government investigations, Los Angeles); of counsel **Lucas Michelen** (labor and employment, Tampa); and associates **Ammar Asad** (white collar crime and government investigations, Miami), **Zack Babbitt** (financial services regulatory, Washington, D.C.), **Benjamin Calpino** (business litigation, Miami), **Alison Gomez de la Vega** (construction, Tampa), **Calesta Groff** (health care, Tampa), **Marla Katz** (real estate and commercial finance, Hartford), **Priya Khetarpal** (health care, Tampa), **Meredith Little** (mass tort and product liability, Tampa), **Ryan Ogburn** (real estate and commercial finance, Tampa), **Kaitlin Prece** (business litigation, Miami), **David Safir** (life, annuity, and retirement litigation, Miami), **Dustin Shore** (health care, Tampa), **Caleb Spano** (construction, Tampa), **Talia Svid** (financial services regulatory, Miami), **Caitlin Tzimirotas** (labor and employment, Hartford), **Thomas Ward** (financial services regulatory, Miami), **Douglas Wickham Jr.** (business litigation, Tampa), **Joshua Wilkinson** (business litigation, Los Angeles), **Jacqueline Wlodarczyk** (business litigation, New Jersey), and **Olivia Zukowski** (business litigation, Tampa).

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

## Our Office Locations

### Atlanta

1230 Peachtree Street, NE  
Suite 900  
Atlanta, Georgia 30309-3591  
404.815.3400 | fax 404.815.3415

### Hartford

One State Street | Suite 1800  
Hartford, Connecticut 06103-3102  
860.392.5000 | fax 860.392.5058

### Los Angeles

2029 Century Park East | Suite 1200  
Los Angeles, California 90067-2913  
310.843.6300 | fax 310.843.6301

### Miami

700 NW 1st Avenue | Suite 1200  
Miami, Florida 33136-4118  
305.530.0050 | fax 305.530.0055

### Minneapolis

80 South Eighth Street | Suite 2800  
Minneapolis, Minnesota 55402-2113  
612.605.9510 | 612.605.9511

### New Jersey

180 Park Avenue | Suite 106  
Florham Park, New Jersey 07932-1054  
973.828.2600 | fax 973.828.2601

### New York

730 Third Avenue | 19th Floor  
New York, New York 10017-3206  
212.785.2577 | fax 212.785.5203

### Orlando

200 S. Orange Avenue | Suite 1000  
Orlando, Florida 32801-3456  
407.849.0300 | fax 407.648.9099

### Tallahassee

215 S. Monroe Street | Suite 500  
Tallahassee, Florida 32301-1866  
850.224.1585 | fax 850.222.0398

### Tampa

4221 W. Boy Scout Boulevard | Suite 1000  
Tampa, Florida 33607-5780  
813.223.7000 | fax 813.229.4133

### Washington, DC

1625 Eye Street, NW | Suite 800  
Washington, DC 20006-4064  
202.965.8100 | fax 202.965.8104

### West Palm Beach

525 Okeechobee Boulevard | Suite 1200  
West Palm Beach, Florida 33401-6350  
561.659.7070 | fax 561.659.7368

For more information, visit our website at [www.carltonfields.com](http://www.carltonfields.com).

Carlton Fields, P.A. practices law in California through Carlton Fields, LLP.