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The Responsibilities of Retailization

By Jack O'Brien, Tony Zacharski, and Chris Trueax

The Securities Exchange Commission (SEC or Commission) and its Staff have made it clear to the marketplace—both Wall Street and Main Street—that they are “open for business” in their role as a regulator of the securities markets.¹ They are showing this by their active engagement in conversations about potential no-action or exemptive relief for innovative new product designs and solutions to operational challenges, as well as through reported initiatives at the Commission level. This openness and practicality stands in sharp contrast to the 1,375 days during which Gary Gensler was Chair of the Commission,² when the Staff seemed to be acting under a mandate to pursue particular initiatives that felt more prudential in nature (and, arguably, unnecessary in some cases)³ while appearing to give lower priority to most inbound requests from the industry.⁴ The SEC’s recent shift dovetails well with unprecedented and rapidly accelerating changes in the financial markets in the form of blockchain, digital assets and artificial intelligence, and it dovetails with a clear trend of increasing access for retail investors to alternative asset classes and investment strategies that historically have been limited to institutional or high net worth individual investors—a trend that is referred to in the industry as “retailization.”

The trend of retailization has been about 15 years in the making. Coming out of the Great Financial Crisis—or GFC, as it is now most commonly referred to—Congress, via the Dodd-Frank Act, amended the Investment Advisers Act of 1940 to eliminate exemptions from registration that were widely relied on by large private

*The Responsibilities...**continued from page 1*

fund managers and replace them with relatively narrow exemptions, which required many fund managers to register with the SEC as investment advisers. With the disincentive of SEC registration no longer an issue, many such managers started to explore registered funds as potential channels for distributing their investment strategies to retail investors. Shortly thereafter, the term “liquid alts” was heard with increasing frequency in board rooms and in the marketplace as strategies traditionally considered to be “alternative” (in that they were more complex than long-only buy-and-hold strategies in equity and fixed income asset classes) started to be wrapped in registered investment companies, in particular, registered open-end funds that offer investors daily liquidity. Over time, the intermediaries that operate the platforms on which these products are sold have become more familiar with them. This trend has accelerated over the last two to three years as a result of investor inquiries and competitive pressures. Asset managers whose foundations are in the private fund and alternative asset space are increasingly embracing the retail side of the market (which, in round numbers, is roughly the same size of assets as the institutional market, just with much smaller per-client account sizes). Among the last remaining headwinds to this product evolution was the regulatory approval process, with the SEC and its Staff often slowing down innovative open-end products through laborious disclosure review processes and, frequently, requests for issuers to delay effectiveness to allow the SEC Staff to continue to evaluate the product. On the registered closed-end fund side, certain forms of exemptive relief could take years to obtain (with substantial legal bills in accompaniment). Since shortly after Mark Uyeda took over as Acting Chair of the SEC and now continuing under Chair Paul Atkins and Division of Investment Management Director

Brian Daly (who has a substantial background in the private fund space), the regulatory headwind to innovation through retailization has dissipated substantially.

But with this pivot in regulatory approach comes responsibility on the shoulders of the industry and, in particular, the lawyers and compliance professionals who work in this industry. For nearly four years under Chair Gensler, industry participants understandably criticized the lack of useful guidance from the Staff and its disengagement on requests to approve innovative new products or expand retail investor access to new or existing products from which they could benefit. Now that the financial services industry has a regulator that is once again open to innovation and has provided a measure of regulatory breathing room, it is incumbent on the industry to ensure that risk is appropriately analyzed and addressed in the product ideation and distribution stages and that robust controls remain in place to ensure that new, potentially riskier products, are only winding up in the accounts of investors for which they are suitable. Gatekeepers in the form of in-house compliance and legal departments, board structures at funds and advisers, and external counsel will need to counterbalance and pressure-test the product and sales functions in a manner that does not stifle growth and opportunities, but which also does not squander the current market-regulatory balance that the industry has been clamoring for and has now attained.

In this article, we discuss a few examples of recent market and regulatory trends that exemplify the SEC and its Staff’s more market-friendly approach so far in 2025 or that represent substantial opportunities for innovation. We also discuss ways that the industry can put in place appropriate guardrails to ensure that this current environment does not lead to a slowly expanding bubble of market risk that could burst somewhere down the line, possibly resulting in another large-scale regulatory reset like we saw in the Dodd-Frank Act.

Retailization: Regulatory and Market Developments

506(c) Offerings Are Now More Practical

On March 12, 2025, the SEC Staff in the Division of Corporation Finance published a no-action letter on Rule 506(c) of Regulation D,⁵ which will provide issuers with an easier path to offering private funds through general solicitation and public advertising (for example, unrestricted public websites, television, or radio broadcasts).

Regulation D, which is a safe harbor from the securities registration requirements of the Securities Act of 1933 (Securities Act), is commonly used by non-US issuers that conduct private offerings in the United States. To date, issuers have more commonly relied on long-standing Rule 506(b) of Regulation D despite its prohibition on general solicitation. In contrast to a 506(b) offering, an issuer in a 506(c) offering (which was created via the JOBS Act during President Obama's administration) may engage in general solicitation provided that the issuer takes "reasonable steps" to verify that each investor is an accredited investor, rather than merely relying on investor responses in the subscription agreement as permitted by Rule 506(b). Rule 506(c) provides a non-exhaustive list of potentially intrusive and extensive backup materials that, if obtained, are deemed to satisfy the reasonable steps requirement.

Historically, issuers have shied away from using Rule 506(c) to avoid the need to request back-up materials, which can result in an awkward, clunky investor experience and can impose additional recordkeeping and confidentiality obligations on the issuer. Similarly, some investors have been reluctant to participate in Rule 506(c) offerings due to the nature of the materials requested for verification, which could include personally identifiable or sensitive information about the investor (for example, two years of income tax returns, bank statements, brokerage statements and third-party appraisals, a consumer report from one of the nationwide consumer reporting agencies, and/or written confirmations

from brokers, attorneys, or accountants), and the administrative burden associated with collecting such materials.

The new guidance issued by the SEC Staff in the no-action letter simplifies the verification process. The SEC Staff agreed that issuers will be deemed to have taken reasonable steps to verify a purchaser's accredited investor status if they do three things: (i) require minimum investments of at least \$200,000 for natural persons and at least \$1 million for legal entities; (ii) obtain representations from the purchaser confirming that it is an accredited investor and it has not financed its investment through a third party; and (iii) not have actual knowledge of any facts that indicate a purchaser is not an accredited investor or has financed the investment. (And, no, willful blindness is not a sufficient means of avoiding actual knowledge).

With the burdensome front-end barriers of investor verification removed, retail investors (provided they meet the eligibility threshold of "accredited investor") should expect to see more private fund products start to become available, either as standalone private funds that rely on Section 3(c)(1) of the Investment Company Act of 1940 (1940 Act) to avoid registration with the SEC as an "investment company" (and are therefore limited to 100 or fewer beneficial owners), or as parallel offerings of a strategy primarily offered through a 3(c)(7) private fund (which is available only to "qualified purchaser" investors).⁶ Together with recent substantial innovation at feeder vehicle platforms and private fund administrative services that make account statement and tax reporting less burdensome for fund managers and investors, this no-action relief will likely result in an expanded menu of product offerings for retail investors and the intermediaries that support retail accounts.

Registered Closed-End Funds Can Now Invest More in Private Funds

Effective as of March 19, 2025, the SEC Staff dropped its longstanding position requiring registered closed-end funds that seek to invest more

than 15 percent of their total assets in interests of private funds to impose a \$25,000 minimum initial investment and verify that all investors of the closed-end fund be “accredited investors,” as defined in Regulation D under the Securities Act. This position, held by the SEC Staff since 2002, was administered through the SEC Staff comment process during reviews of registration statement filings and was not provided by any statute or rule.

On the first day of the SEC Speaks Conference held May 19-20, 2025, SEC Chair Paul Atkins noted that due to significant market developments over the past 23 years, he had directed the SEC Staff to reconsider its appropriateness. His statements built on prior remarks by Sarah ten Siethoff, Deputy Director of the SEC’s Division of Investment Management, in March at the Investment Company Institute’s Investment Management Conference, where she indicated that the position could be subject to reconsideration. On the second day of the SEC Speaks Conference, then-Director of the Division of Investment Management Natasha Vij Greiner formalized the policy change when she announced that the SEC Staff would no longer provide comments limiting the investment minimum or requiring an accredited investor standard for funds seeking to invest more than 15 percent of assets in private funds during the registration statement review process. Both Chair Atkins and then-Director Greiner emphasized the importance of ensuring that closed-end funds’ registration statements contain robust disclosure about their investments in private funds, particularly regarding conflicts of interest, illiquidity and fees.

Following those remarks, registrants with material investments in private funds promptly began to revise their offering documents to eliminate the accredited investor requirement, typically effectuating such changes through supplements filed pursuant to Rule 424(b)(3) under the Securities Act (rather than Rule 486(a) under the Securities Act, which is used in connection with a material post-effective

amendment to a registration statement). Using Rule 424(b)(3) supplements allows for immediate updates to fund disclosure without review by the SEC Staff.

The Staff, however, appears to believe that with the loosening of restrictions on these funds, additional disclosures should be considered and potentially implemented. On August 15, the Staff published Accounting and Disclosure Information 2025-16 regarding registered closed-end fund investment in private funds, which focused on disclosure issues associated with such underlying investments.⁷ These disclosure obligations can be broken down into three categories: (1) tailored disclosure requirements, (2) standard disclosure requirements, and (3) other standard (if material) disclosure requirements.

1. Tailored Disclosures:

- Information about the costs, strategies, and risks, as well as the investment process-related due diligence practices conducted by the closed-end fund manager when evaluating private fund investment opportunities (including investment, operational, legal, and, as applicable, tax considerations);
- The various fee structures imposed by the underlying private funds (including performance related compensation) and how those fees could affect the underlying private funds’ returns and the closed-end fund’s performance;
- How multiple layers of direct and indirect fees will affect the returns realized by an investor in the closed-end fund, in particular, the effect of any underlying private fund performance fees or incentive allocations on the closed-end fund’s performance, including the possibility that certain of the underlying private funds may pay performance fees, even if the performance of other underlying private funds or the overall performance of the closed-end fund itself is negative; and

- The types of underlying private funds in which the closed-end fund proposes to invest and the associated risks and considerations, including (to the extent material) the private funds' investment strategies, risks associated with more volatile or speculative investments, conflicts of interest, and the liquidity of the private funds' underlying investments.
2. Standard Disclosures:
 - Underlying private funds are not limited by the 1940 Act in how they invest their assets (for example, leverage and transactions with affiliates);
 - Underlying private funds' investments may impact the strategies, risks, and costs of and for the closed-end fund itself; and
 - Shareholders may have limited information about the underlying private funds in which the closed-end fund invests, including with respect to the underlying private funds' holdings, liquidity, and valuation.
 3. Other Standard Disclosures (Only if Material):
 - The risks of the legal jurisdictions of the underlying private funds;
 - The risks of "liquidity terms" for the underlying private fund investments (such as mandatory minimum holding periods, limitations or suspensions of redemptions, and the possibility of "payment in kind" distributions in response to a redemption request) and explaining how these terms may impact the fees, performance, and liquidity of the closed-end fund; and
 - The tax considerations when investing in private funds that produce non-qualifying income and that could impact the closed-end fund's pass-through status as a Regulated Investment Company (referred to as a RIC) under Subchapter M of the Internal Revenue Code of 1986.

What does this mean for the market? Much to the disappointment of multiple clients who

contacted us shortly after this development, the Staff's guidance does not mean that private fund issuers will now be permitted to create registered feeder funds into their private funds. A registered fund that is formed for the purpose of investing solely in a private fund would be disregarded and would put the private fund at substantial risk of violating its exemption from SEC registration. However, the removal of the Staff's 23-year-old position does represent substantial opportunities for new fund-of-fund product formation in the form of registered closed-end funds of private underlying funds, provided that the closed-end fund's portfolio is sufficiently diversified and the underlying private funds are of sufficient size.

Private fund managers may find this new distribution channel exciting, but they should consider risks associated with indirect ownership by retail investors as well as how the retail investors would affect their current limited partnership relationships (for example, most favored nations provisions, allocation of costs and expenses). High net worth retail channels (that are not quite "qualified purchaser" status) have long sought solutions for offering their clients exposure to alternative investment strategies and alternative asset classes, which now will be more possible. Managers are already whiteboarding new registered closed-end fund portfolios of underlying private equity, private credit, real estate and hedge fund strategy exposures, which is a trend the market should expect to continue, particularly if some of the early entrants are successful in gathering assets. Further, intermediary platforms have become more familiar with registered closed-end fund structures in recent years (after many years of confusion and inconsistency), which represents another headwind that has quieted down.

"Joint Transaction" Relief for Closed-End Funds Is Now More Readily Available

In February 2025, certain funds sponsored by FS Investments filed an application with the SEC (FS Application) for co-investment relief, which would provide greater flexibility for registered funds

to engage in co-investment transactions that are otherwise prohibited by Sections 17(d) and, if a business development company, 57(a)(4) of the 1940 Act and Rule 17d-1 thereunder.⁸ The FS Application reflects a more simplified, principles-based co-investment framework in contrast to the cumbersome, highly technical exemptive regime that currently exists.

Co-investment relief has become a virtual necessity for many managers of registered closed-end funds investing in private assets. Managers of such registered closed-end funds frequently also manage private funds with overlapping investment strategies, and managers may wish to have closed-end funds participate in the same investment opportunities as the private funds. Those co-investment opportunities, however, usually are restricted by Section 17(d) of the 1940 Act and Rule 17d-1 thereunder, which generally prohibit joint transactions involving a registered fund and its affiliates, unless such transactions are approved by the SEC pursuant to an exemptive order. Section 57(a)(4) of the 1940 Act applies similar restrictions to business development companies.

For co-investment opportunities that involve negotiation of terms other than price⁹ (Negotiated Co-Investments), the SEC historically has required that funds and their advisers apply for an exemptive order and agree to more than a dozen technical conditions that restrict how the funds and advisers behave with respect to identifying, entering into, allocating and approving Negotiated Co-Investments. For example, the existing co-investment regime requires the board of each registered fund to consider and approve transactions under a co-investment program that, under some programs, requires board members to be “on call” to provide approval of individual deals within a matter of hours (potentially multiple times per week and sometimes per day), or such funds risk losing out on time-sensitive investment opportunities.

The simplified approach to co-investment relief reflected in the FS Application has been the subject of discussion with the SEC Staff since 2019. Multiple other funds also recently have filed

similar co-investment exemptive applications, seeking streamlined relief, which have now been granted, typically after a modest review period and reasonable, fairly light comments from the SEC Staff. Under these streamlined orders, board approval requirements for joint transactions are reduced and investment allocations can be set forth in firm policies and procedures instead of the applications themselves.

Notably, an early version of the FS Application (as well as several parallel applications from other fund managers) would have extended the co-investment relief to open-end funds and permitted them to engage in joint transactions, but the final version of the FS Application that was approved removed open-end funds from the requested relief. As these streamlined orders continue to become normalized, there may be an opportunity to engage productively with the SEC Staff to address its historical concerns with extending comparable relief to registered open-end funds.

New “Trump Accounts” Could Form Lifelong Investor Relationships

There is no investor who is more retail than a newborn baby. On July 4, 2025, President Trump signed into law the “One Big Beautiful Bill Act,” a sweeping budget bill. The Act creates “Trump Accounts”¹⁰ that automatically will give each baby born as a US citizen from 2025 through 2028 an account with the US Treasury containing an initial balance of \$1,000. The money in each account will be invested in a low-cost index fund, the annual fees and expenses of which cannot exceed 0.1 percent. There are no household income requirements for a baby’s eligibility to receive a Trump Account.

In addition to the seed money provided by the federal government, parents will be able to make additional contributions of up to \$5,000 per year and employers will be able to contribute up to \$2,500 per year, with yearly contribution limits indexed for inflation.

Under the Act, each account will be treated as property of the child, held in a custodial trust until

the child turns 18. Then, the account will be treated as a traditional Individual Retirement Account. Funds withdrawn from an account before 59.5 years of age will be taxable, but penalty-free if used for certain purposes, such as for education expenses, starting a business, or buying a first home.

Although many questions remain with respect to how Trump Accounts will be implemented and operated, they are expected to become available by July 2026. With approximately 3.6 million babies born in the United States in 2024, the program could represent approximately \$15 billion in investment assets over the four-year period, even without any additional contributions from parents or employers and without any market appreciation. Depending on the assumptions made in various models, the four-year batch of accounts could represent hundreds of billions—if not a couple trillion—in assets by the time the last eligible babies turn 18 in 2046.

In a market that is largely saturated with financial services providers, and with incoming generations of investors skewing toward more impersonal, app-based investment decisionmaking who are expected to put less value on personal relationships, Trump Accounts could represent an opportunity for participating firms to be front-of-mind for these account holders as they turn into adults and start to accumulate additional wealth. However, 18 years (and, realistically much longer) is a long time to wait in the hopes that these small individual accounts result in sticky investors with significant account balances, and participating firms will have to invest in their accounting and administrative infrastructure without certainty that if they build it, the accounts will come.

Private Funds and Crypto Will Be Expanding Within Retirement Plans

In an executive order¹¹ issued on August 7, 2025 (and a corresponding Fact Sheet¹²), President Trump directed the Secretary of Labor to examine the Department of Labor's guidance regarding a fiduciary's duties under the Employee Retirement Income

Security Act of 1974 (ERISA) in connection with making allocations to alternative assets available to retirees and also directed the Secretary of Labor to clarify the Department's position on alternative assets and the appropriate fiduciary process associated with offering funds that contain investments in alternative assets under ERISA. These directives are to be carried out within 180 days (approximately the beginning of February). The order also directs the SEC, in consultation with the Secretary of Labor, to consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans, which may include amendments to regulations and guidance relating to accredited investor and qualified purchaser status.

As a backdrop to this directive, the order states that the vast majority of the 90 million Americans who participate in employer-sponsored defined-contribution plans do not have the opportunity to invest in alternative assets, thereby missing out on opportunities for growth and diversification. The order defined "alternative assets" quite broadly to include, among other things, financial instruments not traded on public exchanges, indirect interests in real estate, investment vehicles that invest in digital assets, and direct and indirect commodity investments.

As a result of this order, the Department of Labor could pick up where it left off at the tail-end of President Trump's first term, when, in 2020, it issued Information Letter 06-03-2020, in which it expressed the view that including private equity in certain retirement plan investment structures would not, by itself, violate ERISA's fiduciary duties.¹³ Under President Biden, the Department of Labor walked that position back a bit with a supplemental statement in December 2021, clarifying that the Department did not endorse or recommend private equity investments. In addition to re-centering the issue of plan options in alternative assets, generally, the order also effectively rescinded the Department's approach to cryptocurrencies under the Biden

administration, which had urged that plan fiduciaries exercise “extreme care” before offering cryptocurrency investment options.

Currently, only a handful of plan sponsors offer alternative assets on 401(k) plan menus. With the order, and eventual guidance from the Department of Labor, that number will increase, perhaps substantially. Defined contribution retirement plans represent a huge potential pool of capital, upwards of \$12 trillion, that could be available to private equity, cryptocurrency, and other types of alternative assets.

Managing the Risks of Retailization

The current regulatory environment and retailization trend is coalescing with market innovations in digital assets and artificial intelligence in ways that are resulting in a force multiplier of change that is occurring at an unprecedented pace. Although the pendulum of the administrative state has long oscillated between on/off regulatory environments, there has never been a deregulatory oscillation that has occurred in parallel with such a rapidly innovating marketplace. Although this environment is thrilling in its opportunity, it also comes with responsibility, lest the industry squander the entrustment of a lighter-touch SEC.

Accordingly, it is incumbent upon the lawyers, compliance professionals, and other gatekeepers in the financial services industry to appropriately tap the brakes and ask the right questions to challenge the pace of innovation, where appropriate. Striking the right balance between the business advantage of being the first mover (or at least not being left too far behind the earlier movers) and acting with appropriate diligence and caution so as to carefully assess the risks associated with being an early mover in a new (and somewhat unknown) environment is perhaps the hardest task of a gatekeeper. Lawyers—stereotypically risk-avoidant—often are seen as inhibiting the business’s objectives when their questions slow timelines. And the fact that lawyers rarely get

recognition for difficult-to-measure losses avoided only reinforces this reputation.

Here are seven ways that gatekeepers should think about their roles in this new world of retailization, which, if used measuredly, should not impair business objectives.

1. *(Actually) Use New Product Committees.* Many firms use New Product Committees to stress test the theses of the product, portfolio management, strategist and sales teams before green-lighting new products and/or approving them for launch. To function well, those teams should be multi-disciplinary and include legal and compliance professionals. But team members from legal and compliance must use their seats at the table and not be afraid to speak up. New Product Committees should not act as rubber stamps for business objectives, particularly where those products will be distributed into retail channels where reputation, regulatory and litigation risks are heightened. These committees should meet as necessary, on an ad hoc basis, and depending on the size of the organization, also may determine to meet regularly. Minimum quorum requirements for the committee to conduct business should be adopted (which should be more than three people) and both attendance and participation should be strongly encouraged (if not required). Materials should be distributed reasonably in advance of committee meetings to foster discourse during the meeting, and they should be concise enough to encourage review in advance of the meeting. Unless unique circumstances require, participants should be required to be on camera if they are not meeting in the same room.
2. *Insist on Excellent Disclosure.* Alternative investments represent risk, particularly those that are more novel in nature, such as digital assets. That risk is more acute when the investors are retail persons because negative consequences are more

impactful. There is no more straightforward means of mitigating this risk than through clear and concise disclosure.¹⁴ Lawyers and compliance professionals should put themselves in the shoes of retail persons and critically assess the risks associated with new products and new strategies, and then work collaboratively with the business to understand the nuances of those risks and draft disclosure accordingly. Fund boards and corporate boards also should be familiar with disclosure and the disclosure process, but without becoming too hands-on and duplicating the efforts of management.

3. *Use Boards Functionally.* With registered funds and publicly traded companies, but also with advisory boards at many private fund complexes, there is a built-in gatekeeping function, where persons with industry experience are formally tasked with second-guessing management. The business should seek to view boards as a resource and not an impediment; correspondingly, boards should presume that business objectives are well-thought out and driven by appropriate motivations. Too often the business-board dichotomy is coated with a negative glaze of mutual suspicion, which limits the potential usefulness of the structure. Where the business views the board process as an opportunity for input and feedback, and not as a headwind, the process will run more smoothly. In exchange, boards tend to perform most effectively when they observe the management-oversight balance and refrain from re-engineering robust, thoughtful processes undertaken by the business simply because the personnel on the board would have done it differently when they were in a management role.
4. *Refresh Sales Practices Through Training.* There is nothing that the sales function likes better than a new story to tell. The combination of novel products and novel markets represents an abundance of opportunity for sales teams. The environment that the market is quickly moving into

is the kind of environment in which sales professionals thrive. But to manage enterprise (and industry) risk, gatekeepers need to keep a watchful eye on sales teams to ensure that the stories they are telling are factual and consistent with the lawyer-drafted disclosure that accompanies the products they are selling, and being told to prospective investors who are suitable, for whom the products would be appropriate, and who have appropriate financial sophistication. The industry should seek to avoid a repeat performance of the multiple instances of sales practice and suitability violations that the Financial Industry Regulatory Authority (FINRA) brought against brokerage firms and registered representatives with respect to sales of inverse and leveraged exchange-traded funds (ETFs) (which typically are intended for very short holding periods) to retirees and other retail investors.¹⁵ By taking the time to roll-out complex-wide new product training initiatives that educate the sales force, drafting appropriately tailored sales practice guidelines, and then empowering the compliance function to internally police sales practices with spot-checks, a firm can substantially reduce the risks associated with moving into these new retail opportunities. Outside counsel can also be a resource for developing and delivering internal training initiatives and developing sales practice guidelines.

5. *Consider Using a Regulatory Risk Committee.* Many financial services firms have moved in the last few years to chartering an internal committee that surveils regulatory risk throughout the market. Although the recent uptick in this practice seemed to be a result of the expanding rulemaking environment under former SEC Chair Gensler, those committees should continue on in a lighter regulatory environment, even if rejiggered. Particularly for firms that are global in nature, a regulatory risk committee can be a useful means of periodically coordinating

on changing or different regulatory approaches (within and across jurisdictions) that can inform business initiatives. With the perception of reduced oversight from federal regulators, it is also likely that certain state and municipal regulators will feel the need to redouble their regulatory efforts (a trend we are already seeing). Accordingly, these committees should help to surveil risk bubbles that are populating locally.

6. *Foster a Collaborative, Transparent Culture.* In a fast-paced environment with novelty and innovation, it is inevitable that mistakes will be made. The risks associated with those mistakes will be mitigated if they are identified more quickly and escalated without fear of disregard or retribution (they may even turn into opportunities for additional creativity and innovation). Control teams tasked with stress testing new products and strategies should be encouraged to openly communicate their findings so that appropriate decisionmakers can address risk magnitude and potential recalibrations or corrective measures. Roles and responsibilities should be clearly assigned, with reporting lines demarcated. Particularly in an industry with statutory whistleblower protections, all persons within a firm must feel that they can report concerns to superiors without fear of retribution. Setting the right cultural tone within an organization starts (or ends) with top executives, but boards and legal and compliance functions are critical amplifiers.
7. *Engage with Regulators.* Finally, the industry should meet the SEC (and its other regulators) partway and take the Staff up on its offer to engage in dialogue about new products, strategies and structures for the retail market. Although registrants must always assess the downside risk of getting a “no” answer, the current Staff has been refreshingly receptive to outreach that is well thought-out in advance, which includes an assessment of current market practices and applicable past Commission and Staff guidance.

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NOTES

¹ Paul S. Atkins, Chairman, Statement on the Spring 2025 Regulatory Agenda (Sept. 4, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-2025-regulatory-agenda-090425>.

² Mr. Gensler was sworn in on April 17, 2021 and served until January 20, 2025.

³ See, for example, *Regulation Best Execution*, SEC Release No. 34-96496 (Dec. 14, 2022), 88 Fed. Reg. 5440 (Jan. 27, 2023) (proposed rule), available at <https://www.federalregister.gov/documents/2023/01/27/2022-27644/regulation-best-execution>; *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, SEC Release No. IA. 6383; 88 Fed. Reg. 63,206 (Sept. 14, 2023) (final rule), available at <https://www.sec.gov/files/rules/final/2023/ia-6383.pdf>; *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, SEC Release Nos. IA-5956; IC-34497, 87 Fed. Reg. 13524 (Mar. 9, 2022) (proposed rule), available at <https://www.sec.gov/rules-regulations/2025/06/cybersecurity-risk-management-investment-advisers-registered-investment-companies-business>; *Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environment, Social, and Governance Investment Practices*, SEC Release Nos. IC-34594; IA-6034 (May 25, 2022), 87 Fed. Reg. 36654 (June 17, 2022) (proposed rule), available at <https://www.sec.gov/rules-regulations/2025/06/s7-17-22>; *Safeguarding Advisory Clients Assets*, SEC Release

No. IA-6240 (Feb. 15, 2023), 88 Fed. Reg. 14672 (Mar. 9, 2023) (proposed rule), available at <https://www.sec.gov/rules-regulations/2025/06/safeguarding-advisory-client-assets>; *Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*, SEC Release Nos. 34-97990; IA-6353; 88 Fed. Reg. 53960 (Aug. 9, 2023) (proposed rule), available at <https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf>.

- ⁴ For example, the SEC Staff entertained numerous exemptive applications to permit dual ETF/mutual fund share classes and continue to signal willingness to provide such relief, and they also have provided updated guidance on the Marketing Rule. See Division of Investment Management, Securities and Exchange Commission, Marketing Compliance Frequently Asked Questions, (updated Mar. 19, 2025), available at <https://www.sec.gov/rules-regulations/staff-guidance/division-investment-management-frequently-asked-questions/marketing-compliance-frequently-asked-questions>.
- ⁵ Latham & Watkins LLP, SEC Staff No-Action Letter (March 12, 2025), available at <https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/latham-watkins-503c-031225>.
- ⁶ Goodwin, Procter & Hoar, SEC Staff No-Action Letter (Feb. 28, 1997), available at <https://www.sec.gov/divisions/investment/noaction/1997/goodwinprocterhoar022897.pdf>.
- ⁷ Accounting & Disclosure Information (ADI) 2025-16: Registered Closed-End Funds of Private Funds, Division of Investment Management, U.S. Securities and Exchange Commission, August 15, 2025, available at <https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds>.
- ⁸ The amended FS Application (filed April 3, 2025) is available at <https://www.sec.gov/Archives/edgar/data/1568194/000119312525071964/d920107d40appa.htm>. For an additional discussion

of the FS Application and implications for the resulting order in the registered funds industry, see the following article drafted by a team from Simpson Thacher, Ryan Brizek, Kenneth Burdon, Jonathan Gaines & Adam Lovell, “Co-Investment Programs: From Byzantine to Spartan,” *The Investment Lawyer* Vol. 32, No. 8 (Aug. 1, 2025).

- ⁹ Massachusetts Mutual Life Insurance Co., SEC Staff No-Action Letter (Jun. 7, 2000), <https://www.sec.gov/divisions/investment/noaction/2000/massmutuallife060700.pdf>, and Massachusetts Mutual Life Insurance Co., SEC Staff No-Action Letter (July 28, 2000), <https://www.sec.gov/divisions/investment/noaction/2000/massmutuallife060700.pdf>. These no-action letters permit funds to enter into co-investment opportunities with certain affiliates that only involve negotiation of price but no other terms, under certain conditions, without requiring an exemptive order.
- ¹⁰ One Big Beautiful Bill Act, Pub. L. No. 119-21, Sec. 70204, 139 Stat. 72, 179 (2025), available at <https://www.congress.gov/119/plaws/publ21/PLAW-119publ21.pdf>.
- ¹¹ Exec. Order No. 14,330, 90 Fed. Reg. 38,921 (August 7, 2025). The executive order is available at <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>.
- ¹² The Fact Sheet is available at <https://www.whitehouse.gov/fact-sheets/2025/08/fact-sheet-president-donald-j-trump-democratizes-access-to-alternative-assets-for-401k-investors/>.
- ¹³ See, Letter from Louis J. Campagna, Off. of Regulations & Interpretations, U.S. Dep’t of Lab., to Jon W. Breyfogle, Groom Law Grp., Chartered (June 3, 2020), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/2020-06-03> (last visited Sept. 18, 2025).
- ¹⁴ Accounting & Disclosure Information (ADI) 2025-16, discussed above, is a reminder that the SEC Staff continues to place importance on disclosure obligations.

¹⁵ See, for example, FINRA, FINRA Monthly Disciplinary Actions (May 2019), at 2 - 5, https://www.finra.org/sites/default/files/2019-08/Disciplinary_Actions_May_2019.pdf; Parkland Securities, LLC, case no. 2016052300601; Sigma Financial Corporation, case no. 2016052300602; Corinthian

Partners, LLC, case no. 2016047621801; Press Release, U.S. Sec. & Exch. Comm'n. SEC Charges Investment Advisory Firms and Broker-Dealers in Connection with Sales of Complex Exchange-Traded Products (November 13, 2020), available at <https://www.sec.gov/newsroom/press-releases/2020-282>.