LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

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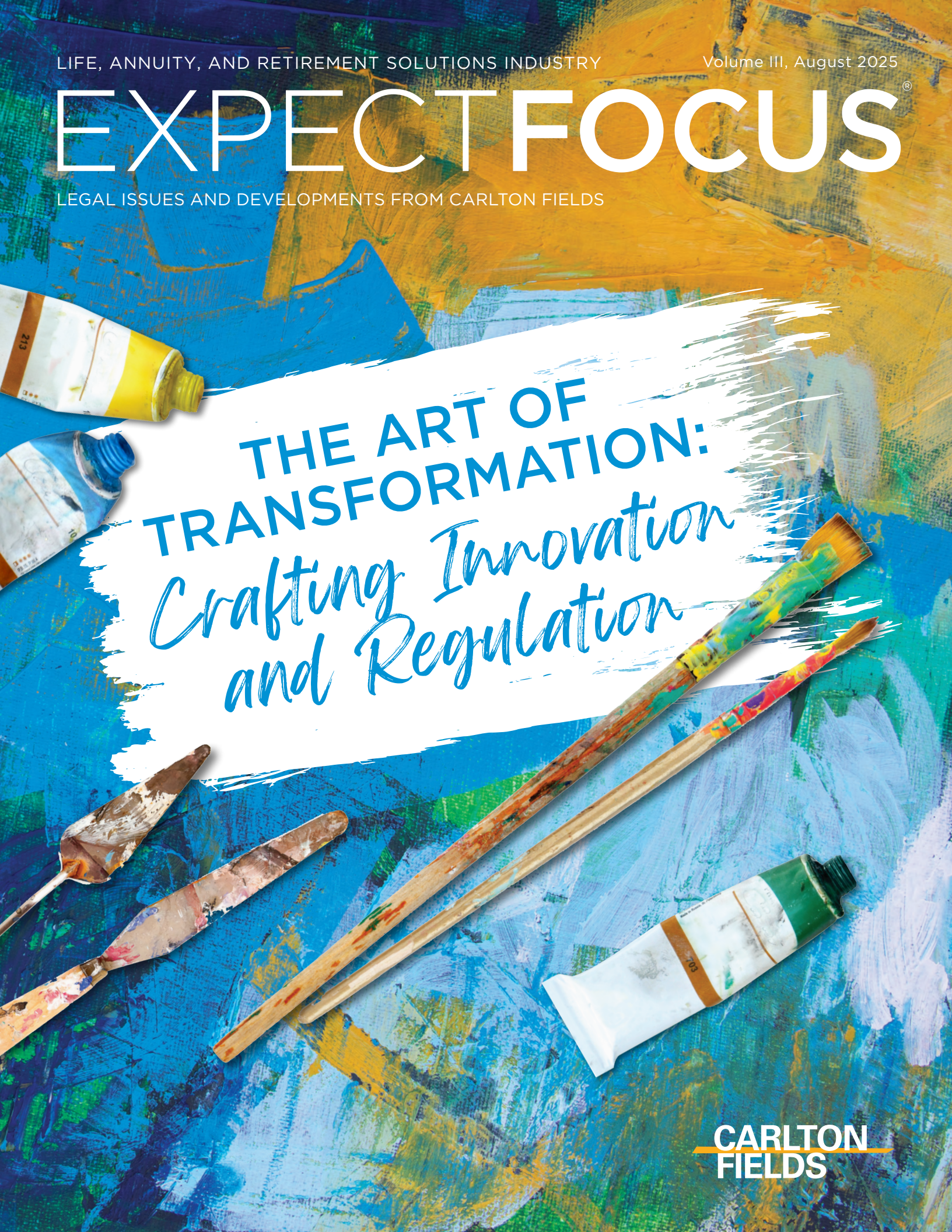
EXPECT FOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS



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Paint by Tokenization: SEC Launches Project Crypto

BY CLIFFORD PEREZ

At the beginning of July, SEC Chair Paul Atkins painted a picture: tokenization was the "next step" in the evolution of securities. Generally, tokenization entails creating a digital representation of a real-world asset — like currency, real estate, or art — on a blockchain. Tokenized assets are a form of "crypto asset," i.e., assets issued or transferred on a distributed ledger or blockchain. On the last day of July, Atkins primed the canvas for tokenized securities by launching "Project Crypto" with Commissioner Hester Peirce and her Crypto Task Force. Project Crypto is an SEC initiative to modify securities rules and regulations to facilitate the U.S. financial markets to "move on-chain."

Project Crypto will use the recent report from the President's Working Group on Digital Asset Markets as a reference. The report recommends that the SEC create a regulatory framework to "maintain U.S. dominance in crypto asset markets" and facilitate the distribution of crypto assets in the United States. To do so, Atkins sketched out several changes to the SEC's rules and regulations, which include:

- Creating clear guidelines for which crypto assets are securities.
- Creating clear and simple "rules of the road" to permit crypto asset distributions, custody, and trading.
- Revising the SEC's custody requirements for registered intermediaries to facilitate the custody of crypto assets.
- Creating a framework that will allow nonsecurity crypto assets and crypto asset securities to be traded side by side on SEC-regulated platforms.
- Revising SEC rules to facilitate the use of on-chain software systems in U.S. securities markets.

Atkins also wants the SEC staff to work with firms proposing to market tokenized securities to identify the appropriate relief needed to facilitate the tokenization process.

Tokenization has faced a creative block in the past several years due to regulatory uncertainty around the application of securities laws to crypto assets. When a tokenized asset is deemed to be a security, securities laws apply fully because, as Peirce framed nicely in her own speech in July, "[t]okenized securities are still securities." Nevertheless, numerous types of tokenized securities may be developed, and securities laws — as well as any regulatory relief provided by the SEC — doubtless will sometimes depend on the type. It is to be hoped that Project Crypto will touch up the regulatory landscape in ways that sensibly accommodate such products.

FinCEN Postpones Opening Night for RIA AML Programs

BY BRIAN MORRIS

On July 21, 2025, the Financial Crimes Enforcement Network (FinCEN) announced its intention to postpone, for two years, the effective date of a final rule subjecting investment advisers to the anti-money laundering (AML) compliance provisions of the Bank Secrecy Act (BSA).

FinCEN had adopted its final rule on August 28, 2024, originally scheduled to become effective on January 1, 2026. For additional information on that rule, please refer to "Deadline Approaches for RIAs to Adopt AML Programs: CIP Requirements Remain in Limbo," *Expect Focus — Life, Annuity, and Retirement Solutions* (January 2025). As adopted, the rule did not include any requirement that investment advisers implement customer identification programs (CIPs) or take steps to identify beneficial owners of customer entities — elements that were included as part of a companion rule proposed jointly by FinCEN and the SEC on May 21, 2024.

The Investment Company Institute (ICI) sent two letters to the relevant theater manager at the Treasury Department, requesting that the date for RIAs to comply with AML provisions of the BSA be delayed. Among other reasons, the ICI cited that the proposed CIP rule had not yet been finalized. It also emphasized the importance of giving advisers adequate implementation time after gaining a full understanding of all required elements of a compliant AML program, particularly since CIP is a fundamental component of an effective AML program.

In postponing the date for RIAs to comply with the AML provisions of the BSA until January 1, 2028, FinCEN recognized that the final rule must be effectively tailored to the diverse business models and risk profiles of the investment adviser sector. In addition, FinCEN acknowledged that the extension may ease potential compliance costs for the industry and reduce regulatory uncertainty while it conducts a broader review of the rule, including through a future rulemaking process. Finally, FinCEN indicated that, in conjunction with the SEC, it also intended to revisit the proposed CIP rule.

This (and any future) postponements should enable RIA scriptwriters to incorporate regulators' ultimate views on required BSA compliance for investment advisers by the time the curtain rises on the advisers' AML programs.

Enforcement of SEC Amendments to Regulation S-P: A Trump-Era *Trompe L'oeil*?

BY ELLIOTT SIEBERS

On May 16, 2024, the SEC, under former Chair Gary Gensler, adopted sweeping amendments to Regulation S-P, which governs the privacy and data security of nonpublic consumer personal and financial information for a broad range of financial institutions. The amendments, effective August 2, 2024, introduced new requirements for incident response, customer notification, service provider oversight, and record-keeping, as well as expanded the scope of covered institutions and protected information. Compliance with the amendments will be implemented in phases based on covered entity size: larger entities are required to comply by December 3, 2025, while smaller entities have until June 3, 2026.

However, a year after the amendments were adopted, then-Acting SEC Chair Mark Uyeda, a Trump-appointed Republican who succeeded Gensler, a Democrat, painted a different vision for what the SEC's priorities ought to be when it comes to privacy and data security. "Let's try and not be the cybersecurity cop," was Uyeda's sentiment, as expressed in public remarks delivered to the Managed Funds Association's Legal and Compliance Conference on May 13, 2025. Uyeda also used the occasion to color as questionable the SEC's congressional mandate to exercise certain types of enforcement authority over privacy and cybersecurity matters. Uyeda's remarks seemed to portend that the SEC, now under the leadership of Trump-appointed Chair Paul Atkins, will take a less "enforcement-first" approach to privacy and data security and will instead work with entities that have been the victim of a cyber incident.

It's not the first time Uyeda has cast doubt on the SEC's role as cybersecurity watchdog. In an October 2024 joint statement, Commissioners Uyeda and Hester Peirce (also a Republican) were seeing red as they criticized the SEC for bringing charges against four companies for allegedly materially deficient disclosures relating to certain cybersecurity breaches. As discussed in our prior article, the dissenters argued, among other things, that the majority had not performed an adequate analysis of whether the alleged disclosure deficiencies actually were "material" under well-established applicable legal standards. *See* "SEC Commissioners on the Hunt for Materiality: Disagree on Cybersecurity Enforcement Actions," *Expect Focus – Life, Annuity, and Retirement Solutions* (January 2025).

Time will tell whether the type of new enforcement policy that Uyeda's remarks appear to have sketched out will become a reality or prove merely to have been a convincing artistic illusion. In any event, the December 3, 2025, deadline for the initial phase of compliance with the significantly expanded version of Regulation S-P still seems to be very real and is fast approaching.

Dancing Away From ESG Disclosures: A Pivot Back to Materiality

BY ELISHEVA KLESTZICK

On June 5, 2025, SEC Commissioner Hester Peirce delivered a major address at the International Center for Insurance Regulation Digital Insurance Forum. In a pointed critique of what has been an accelerating march of environmental, social, and governance (ESG) disclosure mandates, Peirce drew on the words of philosopher and musicologist Theodor Adorno: "Progress occurs where it ends." With that cue, she performed a rhetorical pirouette away from the ESG movement and back toward the time-honored choreography of materiality in securities regulation.

Peirce rejected any assertion that ESG is inherently material to a business's long-term financial value. Instead, she argued that many ESG considerations fail to meet the proper U.S. securities law standards for mandatory disclosure. Peirce criticized the "one-size-fits-all" framework that has characterized much of ESG disclosure — a regulatory stance that assumed anything branded ESG must necessarily be material to a company's future financial performance. In Peirce's view, that interpretation is out of step with the individualized, fact-and-circumstances analysis that materiality demands.

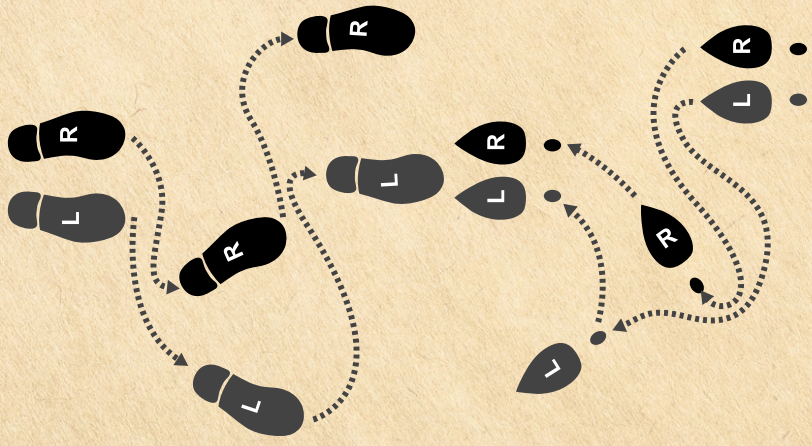
Moreover, Peirce warned that misguided ESG initiatives not only misdirect focus but also cause harm throughout the investment ecosystem, disrupting the delicate balance among key players:

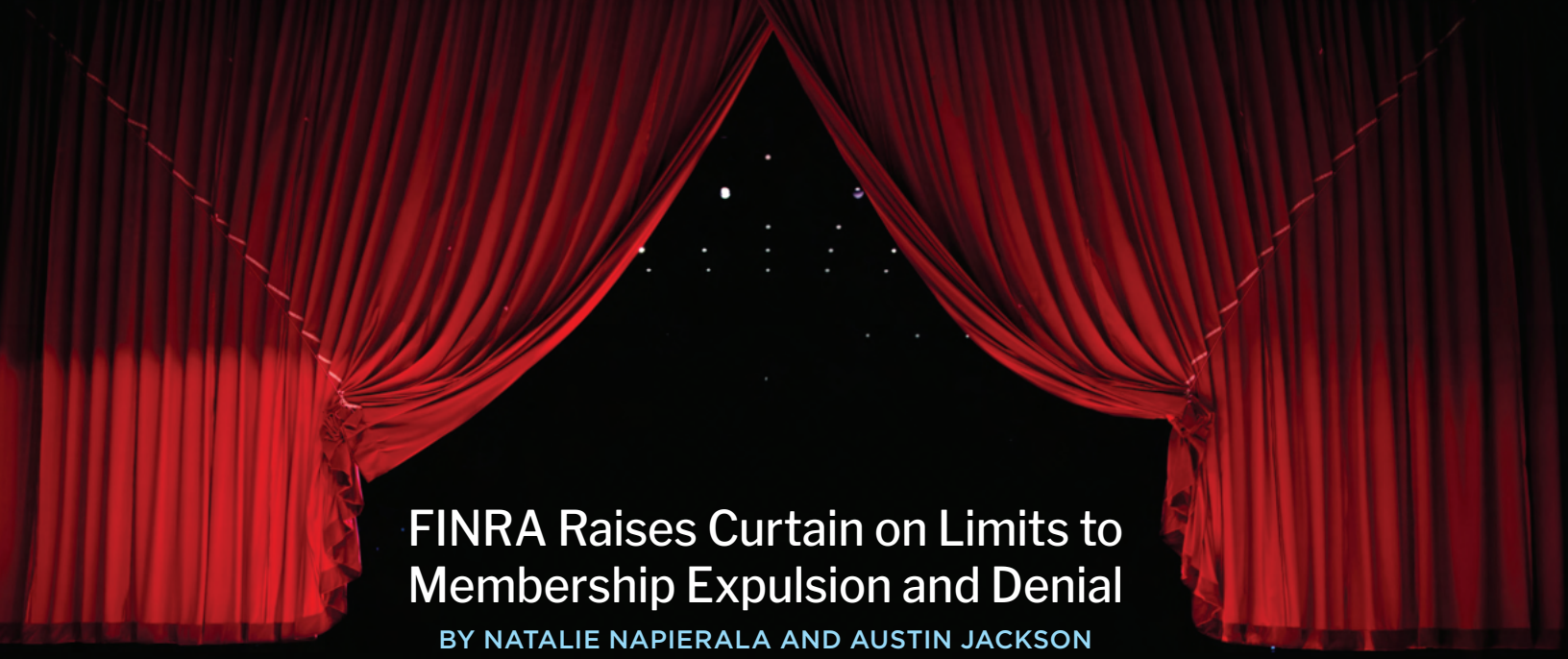
- **Capital allocation** toward ESG goals masks the preferences of elite soloists — powerful political and financial actors who channel resources toward personal agendas and chosen projects rather than genuine societal needs.
- **Regulators**, including securities and insurance regulators and the central bank, are pulled off balance as they devote disproportionate time and resources to ESG projects, sidelining more pressing risks such as interest rate volatility.
- **Companies and boards** expend significant resources responding to ESG pressures from proxy advisers and ESG rating agencies, often resulting in strategic missteps that ignore core financial realities.
- **Investors** are misled by ESG-labeled disclosures that overshadow traditional financial indicators. The volume and ambiguity of these disclosures diminish the clear rhythm of financial reporting.
- **Shareholder litigation and SEC enforcement** based on ESG disclosures cost companies millions. Meanwhile, classic governance proposals — like staggered boards or poison pills — receive less attention, despite their more direct connection to financial performance.

Peirce applauded a growing trend against expansive ESG mandates. At both state and federal levels, ESG-focused rulemaking is being challenged, rescinded, or rolled back. To prevent ESG from becoming enshrined as a mandatory disclosure category, Peirce proposed codifying an express commitment to materiality within the SEC rulebook, thereby empowering the SEC to modify or eliminate mandates that lack grounding in materiality.

This stance is consistent with Peirce's long-standing views on ESG. For example, as early as 2022, she dissented from the SEC's proposed ESG disclosure rules for investment advisers and investment companies, warning that the ambiguous rules "float on a cloud of smoke, false promises, and internal contradiction." Peirce argued that the proposal failed to clearly define E, S, or G, leading to greenwashing and box-checking behaviors that undermined investor transparency and fiduciary responsibility. Her views proved prescient: On June 12, 2025, the SEC's Division of Investment Management formally withdrew those proposed rulemaking notices.

Ultimately, Peirce characterized ESG as an ideological detour masquerading as financial insight. Rather than continuing this improvisational routine, she called for a return to a more structured performance — one guided by long-standing principles of materiality. In her view, the SEC must retake the lead to ensure that disclosures follow established steps of materiality and financial significance, and not the shifting tempo of ESG trends.





FINRA Raises Curtain on Limits to Membership Expulsion and Denial

BY NATALIE NAPIERALA AND AUSTIN JACKSON

In a dramatic response to a federal appellate court critique, the Financial Industry Regulatory Authority (FINRA) has rewritten part of its regulatory script. On June 2, 2025 — the same day the U.S. Supreme Court denied certiorari in *Alpine Securities Corp. v. FINRA* — FINRA filed a proposed rule change designed to protect its enforcement actions from constitutional challenges. FINRA designated the filing as a "noncontroversial" rule change, and it requested that the proposed rule become effective immediately upon receipt by the SEC.

Prior to this proposal, FINRA could impose disciplinary sanctions, including expulsions, without the SEC's review. But in *Alpine*, the D.C. Circuit Court of Appeals held that FINRA could not unilaterally expel a member firm before the SEC had an opportunity to review the merits of FINRA's decision. For more details about *Alpine*, please refer to "U.S. Supreme Court Denies Alpine's Petition Challenging Constitutionality of FINRA Enforcement Proceedings."

Much like a last-minute script rewritten before opening night, it appears FINRA's rule change is intended to stave off the critics — comprising, in this case, the federal judiciary. For example, the amendment delays the effectiveness of FINRA's decisions to expel member firms, cancel membership, or deny applications for continued membership by disqualified member firms until (i) the 30-day window to file for SEC review has passed without the filing of an application or (ii) if an application for review is timely filed, the SEC completes its review. This intermission applies to decisions issued in expedited proceedings under the FINRA Rule 9550 Series, disciplinary actions under the FINRA Rule 9300 Series, eligibility proceedings under the FINRA Rule 9520 Series and Funding Portal Rule 900(b), and expulsions under FINRA Rule 8320.

While the proposed rule change seeks to address constitutional concerns spotlighted in *Alpine*, its protections may be incomplete. On its face, the rule appears to apply only to member firms, not to individuals. Even so, the change reflects a broader shift — one that revises the script, slows the tempo, and gives the SEC a more prominent role in FINRA's regulatory performance. As FINRA's enforcement mechanism continues to evolve, further legal challenges are all but certain to take the stage.

NAIC Working Group Begins Sculpting a Framework to Assess Third-Party Data and Models

BY ANN BLACK AND MARGARET DONNELLY

After taking a brief hiatus since the 2024 Fall National Meeting, the National Association of Insurance Commissioners' Third-Party Data and Models (H) Working Group began shaping its focus. Based on a regulatory survey of current state frameworks, issues to be solved, and the definition of "third party," the group began developing a framework to assess third-party data and models. This framework would address the following problems:

- The inability to assess the fairness of insurers' data and model use, including potential unfair discrimination and verification of model outputs.
- Limited governance and oversight of how third-party models and data are tested, controlled, and monitored.
- The inability to determine whether rates are excessive, inadequate, or unfairly discriminatory when third-party models or data are used.

To model the sculpture, the group is working to define "third party" and intends to use existing NAIC definitions as a point of reference. The group also received input from regulators and interested parties. For its August 13 meeting, the working group assembled the input received on:

- Who should be included in or excluded from the definition of a third-party vendor.
- The functions data providers serve.
- What should be included in or excluded from the definition of third-party data.
- Whether the definitions apply to specific insurers or all insurers.
- Which insurer operations should be included and excluded.

With this input, the working group hopes to create a maquette — working definitions for its framework.

This article was co-authored by Carlton Fields law clerk Jake Heiges.

Supreme Court Demurs on Disgorgement Standards

BY DEAN CONWAY

On June 6, 2025, the U.S. Supreme Court denied a petition for a writ of certiorari in *Navellier & Associates Inc. v. SEC* pertaining to the circumstances under which the SEC is entitled to an award of disgorgement. Arising out of the First Circuit Court of Appeals, the *Navellier* petition asked the Supreme Court to resolve a circuit split among the First, Second, and Fifth Circuits regarding whether the SEC was entitled to disgorge a wrongdoer's ill-gotten profits in the absence of investor harm. By denying the petition, the Supreme Court left untouched divergent disgorgement standards that may limit the SEC's ability to recover disgorgement, depending on where a case is filed.

For more than 50 years, the SEC has routinely sought (and often been awarded) disgorgement in its civil enforcement actions. The boundaries of this core SEC remedy largely went unquestioned until 2020, when the Supreme Court considered for the first time whether disgorgement was an "equitable" remedy authorized under section 21(d)(5) of the Securities Exchange Act of 1934 (Exchange Act). Specifically, in *Liu v. SEC*, the Supreme Court confirmed that disgorgement is *equitable* relief that is permissible under section 21(d)(5), so long as it does not exceed a wrongdoer's net *profits* and is awarded for *victims*.

Following *Liu*, Congress in 2021 amended the Exchange Act by adding section 21(d)(7), which provides that the SEC "may seek, and any federal court may order, disgorgement." Even though that amendment sought to clarify the SEC's authority to seek disgorgement, it did not settle questions raised by *Liu*. Specifically, uncertainty remained regarding whether *Liu* prevented an award of disgorgement when investors did not suffer any pecuniary harm and whether disgorgement was a "legal" remedy not subject to the "equitable" limitations of *Liu*.

The Fifth Circuit was the first appeals court to consider the scope of disgorgement after the 2021 amendment. In its 2022 opinion in *SEC v. Hallam*, the circuit court held that, as amended, section 21(d) "authorizes disgorgement in a legal — not equitable — sense. In doing so, it ratifies the pre-*Liu* disgorgement framework used by every circuit court of appeals." In other words, consistent with past practice, the SEC only needed to approximate a wrongdoer's ill-gotten profits but was not required to demonstrate that investors suffered any pecuniary harm. Similarly, in a 2024 opinion in *SEC v. Navellier & Associates Inc.*, the First Circuit reached a similar conclusion as *Hallam*, holding that neither *Liu* nor First Circuit precedent "require[s] investors to suffer pecuniary harm as a precondition to a disgorgement award." *Navellier* opined that disgorgement is a "profit-based measure of unjust enrichment" that is not tethered to the "direct economic loss [of] the complaining party."

The Second Circuit also considered the amendment's impact on disgorgement but reached a decision that conflicted with the First and Fifth Circuits. In its 2023 opinion in *SEC v. Govil*, the appeals court "expressly disagreed" with *Hallam*'s conclusion that disgorgement "is not limited by the equitable principles recognized in *Liu*." To the contrary, the Second Circuit concluded that the "equitable limitations on disgorgement survive the [2021 amendment]" and that equitable disgorgement can only "be awarded for victims" based on a finding that they suffered "pecuniary harm."

Accordingly, unless the Supreme Court acts, the existence of pecuniary harm — depending on the circuit — may or may not be a necessary element of proof for an award of disgorgement.

Pushing Back on SEC Disclosure Comments

Is Too Much Harmony Dangerous?

BY THOMAS LAUERMAN

If a registrant agrees to make a disclosure change requested by its SEC staff reviewer, should the registrant's response letter nevertheless include a disclaimer to the effect that the registrant does not (or does not necessarily) agree with the comment? A recent Ninth Circuit Court of Appeals opinion suggests that such a disclaimer of comment agreement may sometimes be advisable, notwithstanding any dissonance with the staff that the disclaimer may cause.

Singing a Different Tune to Different Listeners

In this Ninth Circuit case, the sellers of a security pursuant to SEC Regulation A accepted an SEC staff comment to delete some performance projections from the offering circular. However, the sellers continued to include the projections in other sales-related disclosures in connection with the offering. One dissatisfied purchaser in the offering filed a class action complaint alleging, among other things, that (1) the sellers' use of these projections violated section 12(a)(2) of the Securities Act of 1933 because they constituted material misstatements and (2) the sellers' failure to disclose the views that the SEC staff expressed in its comment about the projections also violated section 12(a)(2) because the staff's views were necessary for the projections not to be materially misleading.

Courts in Ninth Circuit Eventually Get on Same Page

The lower court granted the sellers' motion to dismiss the first of these counts, on grounds that the plaintiff did not adequately allege that the sellers knew the projection was false (and thus failed to meet section 12(a)(2)'s pleading requirements). Also, the lower court dismissed the second count on grounds that the staff's comment letter was available to the plaintiff as a public document posted on the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.

As if playing from a different score, however, the Ninth Circuit reversed these dismissals, while emphasizing that, given the procedural posture of the case, it accepted as true the facts alleged by (and construed them in the light most favorable to) the plaintiff. This Ninth Circuit opinion, issued in June 2025, specifically noted that the SEC's request that the projections be removed from the offering circular had characterized the projections as "unsubstantiated." The appeals court also pointed out that, although the sellers had argued with the reviewing staff about some of the staff's comments, the sellers had not expressed to the reviewing staff any disagreement over the projections comment; and the court stated that this permitted an inference that the sellers were aware of the projections' falsity. The Ninth Circuit's opinion also rejected the argument that mere "constructive" knowledge by the plaintiff (such as via an EDGAR posting) would avoid liability for a material omission under section 12(a)(2).

What Does the Audience Need to Hear?

Despite these statements in the Ninth Circuit's opinion, there may be relatively few instances where concern over potential legal exposure will make it advisable for a registrant to communicate a disclaimer of comment agreement (i.e., a statement that the registrant does not necessarily agree with a comment that the registrant nevertheless has decided to accept) to the SEC staff. Such a disclaimer generally would not serve much purpose unless the registrant, in any disclosure documents other than the one on which the staff commented, uses or continues to rely upon disclosures that materially deviate from the views expressed in the staff's comment. Even in such cases, however, it may be doubtful whether a disclaimer of comment agreement will ultimately have much protective effect.

Rather, in most cases, registrants will be better served by simply not making (or continuing to rely upon) any disclosures that are inconsistent with a staff comment that the registrant has accepted, unless, after due consideration, the registrant concludes that it (1) has good reasons for doing so and (2) is comfortable that the noncompliant disclosure is not materially inaccurate or misleading and is unlikely to undermine the registrant's reputation and relationships with the SEC staff. In this regard, registrants should be mindful that, depending on the circumstances, SEC staff members may review other disclosures that a registrant has made, in order to identify inconsistencies with a filing on which the staff is commenting.

The facts and considerations in particular cases will, like variations on a theme, lead to different conclusions about whether a disclaimer of comment agreement should be made and what form any disclaimer should take. Accordingly, registrants and their counsel will probably do best to avoid generalizations, while nevertheless remaining mindful of the potential implications of the Ninth Circuit's approach for SEC staff comments that the registrant accepts.

FINRA's Symphonic Reimagining of Its OBA and PST Rules

BY ANN FURMAN

Disharmony resulted earlier this year when FINRA attempted to "reduce unnecessary burdens and simplify" its rules on outside business activities (Rule 3270) and private securities transactions (Rule 3280).

In March, FINRA published and requested comment on a proposed new "outside activity" rule 3290 — a composition that would blend and replace rules 3270 and 3280. In doing so, FINRA abandoned a different score governing outside business activities and private securities transactions that it composed and published for comment in 2018.

Loud Chorus of Registered Investment Adviser Opposition

In proposing rule 3290, FINRA's intent was to "enhance efficiency without compromising protections for investors and members." Yet FINRA was promptly flooded with comment letters from registered investment advisers saying that FINRA had exceeded its authority regarding supervision and record-keeping obligations for outside investment adviser activities. Commenters asserted, for example, that the proposed rule unjustifiably would "subject independent RIA/IAs to an additional layer of corporate and regulatory oversight" and "add additional ambiguity and burdens on both member firms and unaffiliated registered investment advisory firms." Other registered investment advisers chimed in with multiple variations on the theme.

In May, FINRA, sensing it risked losing its audience, took the unusual step of issuing a statement "to correct misinformation," declaring that "statements published in news media" — respecting reporting and approval obligations and outside investment adviser activities — were false and mischaracterized FINRA's proposal. In its statement, FINRA spelled out in plain language multiple explanatory points, as if trying to make classically minded listeners appreciate atonal music.

Investment-Related Activity

Proposed rule 3290 applies only to "investment-related" activities. So activities such as "refereeing sports games, driving for a car service, bartending on weekends" would be excluded from the rule. The proposal defines investment-related differently (and more expansively) from how Forms BD, U4, and U5 define the term. Commenters have called on FINRA to reconcile the definitional differences, noting that the different definitions require broker-dealers to "decide how (or if) to supervise activities that are [currently] outside the scope of Rule 3290." Apart from advocating such definitional harmony, commenters sang different (indeed opposite) tunes as to whether the rule should be narrowed to cover only investment-related activities.

Investment Adviser Activity

On the controversial topic of broker-dealers' supervision of and record-keeping for investment adviser activity of their dually registered personnel, proposed rule 3290 distinguishes between (a) activities performed at an investment adviser *affiliated* with the broker-dealer, which are excluded under the proposed rule and (b) activities performed at an *unaffiliated* investment adviser, which are covered under the proposed rule. The exclusion of affiliated investment adviser activity reflects FINRA's view that broker-dealers are able "to implement meaningful controls across [affiliated] business lines." Investor advocate commenters thought this aspect of the proposal was off-key, arguing that the Securities Exchange Act requirement to maintain reasonable supervisory procedures requires broker-dealers to supervise the investment-related activities of their registered representatives "no matter where such activities occur." Other commenters thought this whole theme was inappropriate for the proposal, arguing that broker-dealers should not bear supervisory responsibility for any investment adviser activity — affiliated or unaffiliated — because it is outside their control and such responsibility could lead to duplicative oversight and potential investor confusion.

The proposed rule clarifies that broker-dealers' associated persons could perform solos as portfolio managers or investment committee members for mutual funds, exchange-traded funds, unit investment trusts, or registered closed-end funds, among others, without any supervision by the broker-dealer.

Next Steps

FINRA is still reviewing comments and, before submitting this proposed work to the SEC for approval, could revise, add, or delete individual parts, or even whole movements. It also could solicit further public comments to learn more about what the industry's critics of its music might think.

New Kids on the Blockchain: Cryptocurrencies in 401(k) Accounts

BY GINA ALSDORF

Department of Labor (DOL) watchers have experienced regulatory whiplash in recent years. During the Biden administration, for example, the DOL issued Compliance Assistance Release (CAR) No. 2022-01, which flouted its previously professed policy of neutrality regarding the types of investments chosen by plan fiduciaries. Instead, the CAR clearly aimed to chill the adoption of cryptocurrencies and digital assets as investment options in plans.

In May 2025, the DOL reversed course by rescinding the CAR. As Trump-appointed Secretary of Labor Lori Chavez-DeRemer put it, "The Biden administration's department of labor made a choice to put their thumb on the scale. We're rolling back this overreach and making it clear that investment decisions should be made by fiduciaries, not D.C. bureaucrats." The reversal set the law back to neutral. Indeed, ERISA does not on its face favor any particular investments.

On August 7, the Trump administration went further, in effect promoting alternative assets as a class of investments for 401(k)s by means of an executive order, "Democratizing Access to Alternative Assets for 401(k) Investors." Among other things, the executive order directs the DOL to clarify its position on alternative assets including digital assets, Further, it directs the DOL to determine what appropriate fiduciary process would be associated with offering asset allocation funds containing those assets. It does not, however, change the law and the foundational duties of a fiduciary under ERISA.

Fiduciaries must still discharge their duties with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters" would use in conducting a similar enterprise. Rather than a prescriptive list of rules, ERISA imposes duties of loyalty, prudence, and diversification in the selection of investments. This is likely because, even on basic tenets of retirement planning, investment professionals often widely disagree on what is an appropriate strategy for retirement investing. Some favor modern portfolio theory, which emphasizes a diverse portfolio; but many quite different alternatives are in the mix (e.g., factor-based investing, behavioral portfolio theory, risk parity, and post-modern portfolio theory). Inasmuch as theories come in and out of favor, ERISA has never been construed to mandate a single path for prudence. Rather, ERISA and related case law establish a principles-based approach for fiduciaries in selecting investments based on (a) the procedures used by a fiduciary in approving an investment for inclusion on a plan's investment menu and (b) the circumstances at the time the decision was made.

The now-rescinded CAR cautioned fiduciaries to use "extreme care" prior to adding cryptocurrency to plan menus. It pointed to several aspects of cryptocurrency that created "apprehension" for the DOL, including:

1. The volatility and speculative nature of cryptocurrencies
2. Plan participants not having enough understanding to make informed investment decisions
3. Custodial and record-keeping concerns
4. Valuation concerns
5. The lack of a cohesive regulatory framework

The DOL also added that it would be opening investigations where sponsors allowed crypto investments in their plans. Although the concerns expressed by the DOL at the time of the CAR are valid, rescinding the CAR will facilitate a more balanced evaluation by fiduciaries that the Supreme Court described in *Hughes v. Northwestern University*. There, the court recognized that the DOL's historic position has been that "plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." The court further resolved a split among the circuits by making clear that each designated investment alternative should be evaluated individually, such that the availability of one or more prudent alternatives does not excuse any imprudent alternative.

Rescinding the CAR restores a more neutral stance to the regulatory environment. However, this does not mean that fiduciaries will be clamoring for cryptocurrencies and other digital assets as designated investment alternatives (DIAs) for their plans. Based on fiduciary duties and the volatility of most cryptocurrencies alone, prudent fiduciaries often will hesitate to allow such investments in a plan lineup. Fiduciaries can be personally liable for losses where the selection and monitoring of investments are deemed to have been imprudent.

There may, however, be more room for cryptocurrencies in self-directed brokerage options (SDBOs). Even there, it may be necessary or advisable for fiduciaries to attach some guardrails. An SDBO allows investment in non-menu stocks, funds, bonds, etc. The CAR intimated that sponsors might have liability for crypto investments made via self-directed brokerage windows. This is the opposite of how SDBO windows are viewed. The fiduciary decision is generally considered to be whether it is prudent to offer the window in toto as a DIA. If the underlying assets are considered part of the plan menu, the fiduciary could often face the nearly impossible task of assessing the prudence of the hundreds of choices that such windows commonly make available. It will be interesting to see how self-directed brokerage evolves given the popularity of cryptocurrency.

The CAR also stood in contrast to the DOL's previous position per Field Assistance Bulletin No. 2012-02R. There, the DOL did not consider the underlying investments in a self-directed brokerage account to be DIAs, i.e., part of the plan menu, which would require plan-level disclosures. Instead, it considered the disclosure obligation to cover the self-directed brokerage window as a whole. To date, no court has opined that the underlying investments of a self-directed brokerage window are DIAs subject to prudent selection and monitoring by the plan sponsor.

Regardless of the intent of any changes that result from the executive order, it remains unclear whether any action the DOL takes will prove to have much practical impact on the conduct of fiduciaries. They will continue to do their duty, hire experts, review investments with prudent processes, and make determinations based on facts and circumstances.

Everyday Investor Participation in Private Strategies: What Role for Investor Advocate in SEC Drama?

BY
THOMAS LAUERMAN

The SEC is under pressure to increase direct or indirect participation by everyday "retail" investors (consisting primarily of those who do not qualify as "accredited investors" under SEC Regulation D) in certain investment strategies that have largely been foreclosed to them. These "private strategies" can include, for example, a focus on private equity or private credit investments. The pressure is coming from many sources, such as the investment company industry (including both SEC-registered and unregistered funds), insurers that issue certain investment products, other elements within the retirement fund industry, and Trump administration executive orders.

Since the departure of former SEC Chair Gary Gensler, the SEC itself has shown an increased inclination to facilitate greater retail participation in private strategies. But private strategies present a variety of investment risks that can be very difficult even for highly knowledgeable institutional investors to fully assess or mitigate, regardless of the quantity or quality of information and disclosures to which they have access. Such risks commonly include:

- High leverage and limited liquidity.
- Complex and sometimes subtle arrangements for imposing (directly or indirectly) substantial fees and expenses on the investors.
- Asset valuations that often are necessarily subjective and potentially subject to manipulation.
- Other significant potential conflicts of interest between the retail investors and the promoters or managers of the private strategies.
- Complex contractual provisions that may significantly limit any liabilities that such persons might have to the investors.

Office of the Investor Advocate

Although the SEC's Office of the Investor Advocate (OIAD) is located within the SEC, the Dodd-Frank Act mandates that the OIAD report directly to Congress and in other ways bestows on the OIAD substantial freedom from control or undue influence by other parts of the SEC or its commissioners. The OIAD's key functions include:

- Identifying problems with financial products and other areas in which investors would benefit from regulatory changes.
- Analyzing the potential impact of proposed rules and regulations on investors.
- Proposing appropriate changes to the SEC and Congress.

Accordingly, it would seem appropriate and potentially useful for the OIAD to play a substantive role in the unfolding drama at the SEC over retail investments in private strategies.

However, the OIAD's most recent annual report to Congress specifically describes only a somewhat limited agenda in this regard for the coming year. The report states that the investor advocate will "explore some of the issues surrounding the inclusion of alternative investments, such as private equity and private credit, in retirement savings plans and their implications for retail investors" and "consider, among other things, the interplay between the investor protection issues in this area and the often-complex issues that arise under the Employee Retirement Income Security Act of 1974 ... when defined contribution plans offer these investment products."

The fact that this language speaks only of employee participation in private funds via retirement plans, and gives particular emphasis to investor protection issues under ERISA, could indicate that the OIAD will play only a bit role — or even merely be part of the scenery — in the SEC's deliberations. After all, ERISA issues are primarily within the purview of the Department of Labor rather than the SEC.

Nevertheless, securities law investor protection issues quite similar to such ERISA issues also commonly arise in various non-ERISA plan forms of retail investor participation in private strategies. This would include, for example, direct retail investment in closed-end investment companies that, in turn, invest in private strategies. So it would be natural and appropriate for the OIAD also to consider investor protection issues in those other contexts.

Moreover, the OIAD's report describes its plans for the coming year as being a "continuation" of the work described in its report to Congress a year ago. That report described plans relating to private markets that were considerably broader than those specified in this year's report. So, although the curtain has already risen, much suspense remains about whether this year's report sets out the OIAD's whole script for its performance on private markets.

NAIC Working Group Paints a Picture of Insurer Oversight Expectations

BY ANN BLACK AND MARGARET DONNELLY

On August 7, 2025, the National Association of Insurance Commissioners' Annuity Suitability (A) Working Group released draft safe harbor regulatory guidance that paints a clearer picture of how insurers should oversee third parties responsible for supervising annuity sales, in compliance with Suitability in Annuity Transactions Model Regulation (No. 275-1). Read our prior article, "NAIC Annuity Suitability Working Group Issues Guidance on Insurers' Oversight of Third-Party Supervising Entities," to get the full picture on the draft guidance and open questions.

The guidance focuses on two key areas of Model Regulation No. 275-1: the safe harbor under section 6(E) and reliance on third-party supervision under section 6(C)(3)(a). For both, the working group emphasizes that insurers must:

- **Verify** that the applicable safe harbor conditions are satisfied.
- **Actively** monitor the supervising entity.
- **Provide** the supervising entity with necessary data to support effective oversight.

The draft guidance illustrates what "active" monitoring looks like using three complementary strokes:

- **Contractual clarity:** Agreements must clearly assign compliance obligations and communicate the insurer's expectations.
- **Onboarding diligence:** Insurers should review policies, procedures, and regulatory actions to ensure they adequately address both registered and unregistered annuities.
- **Ongoing oversight:** This may include questionnaires, engagement on compliance issues, transaction reviews (e.g., replacements, early surrenders), audits, and annual certifications that are "detailed and active."

The guidance also underscores the need for insurers to provide supervising entities with periodic reports, including customer demographics, annuity features, and sales activity. While the draft adds helpful structure, it also raises questions — such as what qualifies as "periodic engagement," whether audits can be skipped based on risk, and how to determine certification adequacy.

The working group is accepting comments through September 22, 2025.

A Collage of Cases: Recent Decisions in Life, Disability, and Accidental Death Insurance Litigation

BY STEPHANIE FICHERA AND ANNICK RUNYON

ERISA – Attorneys' Fees and Social Security Disability Offset

In *Stark v. Reliance Standard Life Insurance Co.*, the Tenth Circuit Court of Appeals affirmed a district court order dismissing ERISA claims brought by the guardian of the beneficiary of a long-term disability (LTD) plan.

The beneficiary suffered a hypoxic brain injury, leaving her totally disabled and unable to work. While receiving LTD benefits, the insurer sent a notice about deducting estimated Social Security disability (SSD) benefits from her monthly benefit payments. The insured's guardian asked to waive the SSD deduction because of financial hardship, and the insurer agreed to the waiver while the insured's SSD application was pending.

After an administrative law judge found the beneficiary to be totally disabled and entitled to backdated SSD benefits, the insurer sent her a letter in 2010 stating that it had overpaid benefits by nearly $27,676.73 because her LTD payments should have been reduced by the amount of her SSD payments. The insurer requested reimbursement.

The insurer continued paying LTD benefits for several years but determined in 2022 that recent testing did not support the conclusion that the beneficiary was totally disabled and terminated her benefits. Her guardian hired attorneys and submitted an administrative appeal, which resulted in the insurer reinstating her benefits. The guardian requested that the insurer pay her attorneys' fees, and the insurer denied the request. This suit followed, alleging wrongful termination of benefits, breach of fiduciary duty for failure to produce records during the administrative appeal, and the improper deduction of SSD payments from monthly benefits.

The district court granted the insurer's motion to dismiss. On appeal to the Tenth Circuit, and as a matter of first impression, the beneficiary's guardian argued that ERISA obligates the insurer to make her whole for attorneys' fees and costs for successfully appealing the termination of her LTD benefits under section 1132(a)(3)'s catchall provision. The court disagreed, explaining that ERISA contains a limited fee-shifting provision in section 1132(g) and agreeing with other circuits that attorneys' fees are unavailable for pre-litigation administrative proceedings.

Next, the guardian claimed that she alleged a plausible claim under section 1132(a)(1)(B) for reimbursement of the SSD offset deductions that the insurer subtracted from her monthly benefits. The court did not address the merits of this claim because it was time-barred and the guardian had failed to exhaust her administrative remedies. The insurer had sent a letter explaining the SSD offset and the insured's right to appeal under ERISA. The guardian never requested a review of the determination or responded to the letter.

Lastly, the court rejected the guardian's argument that the insurer breached its fiduciary duty by failing to provide records she requested during her administrative appeal, agreeing with the district court that no concrete harm was pleaded because benefits had been restored.

ERISA – Short-Term/Long-Term Disability With COVID

The U.S. District Court for the District of Colorado in *J.J.H. v. Unum Life Insurance Company of America* affirmed the insurer's denial of disability benefits stemming from COVID-19.

The plaintiff is an attorney and participant in her law firm's employee benefits plan, which provides short-term disability (STD) and LTD benefits. After contracting COVID-19, she continued to work from home without taking formal leave or experiencing a reduction in pay. The participant applied for and received STD benefits based on "post-COVID fatigue" and "cognitive attention deficit" and later transitioned to LTD.

After an investigation, the insurer discovered that the participant was still working a reduced schedule but did not have a reduction in earnings. Thus, she was not eligible for LTD benefits under the policy. The law firm confirmed it would withhold future checks to recoup the overpayment, and the insurer continued its investigation by acquiring information about her position and medical records.

A clinical consultant later concluded that the participant would not be precluded from performing the full-time demands of her position. Numerous physicians communicated about her illness, and one physician advised that "no medical disagreement currently exists" as to the participant's restrictions and limitations. The insurer ultimately determined that she was not disabled and that her benefits were to be terminated. After three denials and an appeal, the participant brought suit, alleging that the insurer denied her LTD benefits in violation of ERISA.

The court concluded that the insurer's benefits decision was supported by substantial evidence. The record reflected a lengthy medical review process consisting of six levels of review by four medical professionals, all of whom agreed that the participant's work restrictions or limitations were not supported.

The participant argued that the insurer improperly relied on the legal premise that the ability to do some work precludes a later finding of disability. Although the insurer's medical reviewers considered the participant's work history after she contracted COVID-19 in their determinations, it was only one factor, and no medical opinion gave her work history considerable weight.

Lastly, the participant argued that the insurer failed to reconcile the contradictory position that she was disabled through the 90-day elimination period for STD but not for LTD. The court found that the insurer's decision to engage in a more detailed review at the LTD stage was reasonable, especially given that the participant's STD benefits were self-funded by her law firm. Thus, the court affirmed the insurer's benefits determination.

Accidental Death Policy Exclusions

In *Jensen v. Life Insurance Company of North America*, the Tenth Circuit Court of Appeals affirmed the denial of accidental death benefits based on an exclusion for loss caused by medical treatment for sickness.

The insured was covered under an ERISA-governed group accident policy that provided benefits for accidental death and dismemberment (AD&D). The insured suffered from chronic pain and was prescribed oxycodone. Shortly before his death, he visited a different doctor and was prescribed clonazepam for anxiety. The insured died as a result of oxycodone and clonazepam toxicity. The insurer denied his wife's claim for AD&D benefits. After conducting a de novo review, the district court entered judgment for the insurer, concluding that the policy's exclusion for losses caused by medical treatment for sickness applied.

The medical treatment exclusion provided that benefits would not be paid for a covered loss that was caused by or resulted from "sickness, disease, bodily or mental infirmity, bacterial or viral infection or medical or surgical treatment thereof." The appellate court rejected the plaintiff's efforts to read ambiguity into and expand the policy's language to provide coverage for the insured's death. In construing the provision, the court noted that the "purpose of AD&D insurance is to provide benefits when death (or another covered loss) results solely from an accident; such insurance does not typically provide benefits for accidents that occur in the course of medical treatment." The court also pointed out that the policy stated on its cover page that it did not pay benefits for a loss caused by sickness.

The court further rejected the plaintiff's argument that the medical treatment exclusion was ambiguous because it conflicted with the policy's voluntary ingestion exclusion. That exclusion stated that no benefits would be paid for voluntarily ingested drugs, "unless prescribed or taken under the direction of a physician and taken in accordance with the prescribed dosage." Reading the policy as a whole, the court concluded that this clause "preserves benefits for loss caused by taking medications as prescribed for *accidental injuries*" and "does not conflict with the policy's exclusion of benefits for loss caused by taking medications prescribed for sickness, illness, or bodily or mental infirmity."

STOLI Litigation

In *Wells Fargo Bank, N.A. v. Estate of Gold*, the U.S. District Court for the Eastern District of New York applied Wisconsin law on stranger-originated life insurance (STOLI) to determine entitlement to the proceeds of a policy that was initially purchased through a STOLI transaction.

In *Gold*, the insured's agent/son recommended that they take out a policy on her life using financing to pay the premiums. The insured and her agent/son took out the policy through a life insurance trust with the intent of relinquishing the rights to the policy to a third party in exchange for a $90,000 payment. Years later, the policy was sold on the secondary market. The owner at the time of the insured's death — Wells Fargo Bank N.A. as securities intermediary for Vida Longevity Fund LP — submitted a claim for the policy's proceeds; the insured's estate submitted a competing claim.

The court found that there was no insurable interest present at the inception of the policy because, from the outset of the transaction, "all of the involved parties expected and intended a third party to receive the proceeds of the policy."

Unlike many states, which deem life insurance policies purchased without an insurable interest to be *void ab initio*, Wisconsin law allows a court to order the proceeds of a policy that lacks an insurable interest "to be paid to someone other than the person to whom the policy is designated to be payable, who is equitably entitled" to the proceeds. The policy was designated to be payable to Vida, and Vida/Wells Fargo showed that, given the intended STOLI transaction, the estate was not equitably entitled to the proceeds. Thus, the court granted Vida's/Wells Fargo's motion for summary judgment. The estate filed its notice of appeal to the Second Circuit Court of Appeals on July 29, 2025.

Working in Two Mediums, NAIC Big Data and Artificial Intelligence Working Group Conceptualizes Tools for Regulators and AI Model Law

BY ANN BLACK AND MARGARET DONNELLY

Since the Spring National Meeting, the National Association of Insurance Commissioners' Big Data and Artificial Intelligence (H) Working Group has been conceptualizing new tools for regulators and exploring whether and to what extent a model law is needed to govern insurers' use of artificial intelligence.

Regulatory Tools

The working group was tasked with sculpting tools that would enable regulators to identify and assess AI systems' related risks in an efficient and standardized manner. It structured the tools into four questionnaires to supplement existing market conduct, product review, form filing, financial analysis, and financial examination review procedures. The group assembled questionnaires based on the type of risk identification or assessment being conducted:

- **Exhibit A: Quantify Regulated Entity's Use of AI Systems**

  The information gathered includes the number of AI system models in use and those with consumer impact and material financial impact; the number of models implemented in the last 12 months; the number of consumer complaints resulting from models; and the number of future AI system models planned.

- **Exhibit B: AI Systems Governance Risk Assessment Framework (Two Options: Narrative or Checklist)**

  The information gathered includes the insurer's risk assessment and governance framework pertaining to the use of AI systems; use of AI systems that have financial, consumer, or risk control impacts; development, testing, and implementation of AI systems that differ from established IT protocols; use and oversight of AI system vendors; use of open-source AI; and development of AI in the next six months.

- **Exhibit C: AI Systems High-Risk Model Details**

  This exhibit gathers more detailed information on high-risk AI system models, such as those that make automated decisions or involve processes that could cause adverse consumer, financial, or financial reporting impacts.

- **Exhibit D: AI Systems Model Data Details**

  The information gathered includes the type of data used (external vs. internal) and how it is used by operational area; the type of AI models (predictive vs. generative); and the source of the data (internal and external, including vendor name).

To aid regulators and insurers, the working group explained which exhibit to use as follows:

Risk Identification or Assessment	A	B	C	D
Identify reputational risk and consumer complaints	X (Checklist)	X		
Assess company financial risk – number of models implemented recently	X (Checklist)	X		
Identify adverse consumer outcomes – AI systems and data use by operational area	X	X	X	X
Evaluate actions taken against company's use of high-risk AI systems (as defined by the company)			X	
Evaluate robustness of AI controls		X	X	
Determine the types of data used by operational area				X

The tool was released on July 7, with the public comment period ending on August 6.

Model AI Law

In determining whether and how to craft a model AI law, on May 15, the working group issued an eight-question request for information regarding an NAIC model law on the use of artificial intelligence in the insurance industry for a 25-day public comment period ending June 9, 2025.

Stakeholders differed on the need for a model law. Those who disagreed with the need for a model law urged that the AI model bulletin is the appropriate course for regulation. Those who asserted a model law is necessary believe that the existing laws and framework are insufficient to properly protect consumers because existing laws were not designed with an AI application in mind.

The stakeholders generally agreed that the work of the group should be guided by:

- The NAIC's three-pillar framework of governance, transparency, and accountability
- A model should align with the broader NAIC regulatory structure
- A need to define when human decision-making should occur
- A risk-based, size-agnostic approach
- Flexibility

The National Council of Insurance Legislators (NCOIL) submitted comments that included a draft of its June 2025 model act regarding insurers' use of AI. The model act would require a "qualified human professional" to make the final decision on all claims, require the insurer to maintain records of all actions taken by the qualified human professional, and require the insurer to explain to consumers that AI was used in the decision-making process.

Next Steps

At its August 12 meeting, the working group will continue to hear comments on the RFI with the goal of working toward a unified solution. Another meeting will be scheduled to review the comments on the regulatory tools.

This article was co-authored by Carlton Fields law clerk Jake Heiges.

Painting Outside the Lines: New Strokes in ERISA Forfeiture Litigation

BY IRMA SOLARES AND SEAN HUGHES

ERISA forfeiture class action litigation has continued to see various developments and potential new theories emerging in 2025. As Carlton Fields has previously reported, starting in late 2023, a new trend of lawsuits emerged challenging the use of forfeiture dollars in retirement plans. Various federal district courts have recently issued conflicting decisions and, notably, three dismissed cases are on appeal to the Ninth Circuit — *Hutchins v. HP Inc., Sievert v. Knight-Swift Transportation Holdings Inc.,* and *Wright v. JP Morgan Chase & Co.* The Ninth Circuit will be the first federal circuit court to weigh in on these forfeiture issues.

While many of these forfeiture-based class actions have been dismissed, the U.S. District Court for the Central District of Illinois in *Buescher v. North American Lighting Inc.* recently denied the defendants' motion to dismiss with respect to the plaintiff's forfeiture-related claims for breach of fiduciary duties of loyalty and prudence, prohibited transactions, and breach of the duty to monitor. In *Buescher,* the plaintiff claimed that the defendants improperly allocated forfeitures under the 401(k) plan for their own benefit when they decided to use forfeitures to offset nonelective contributions instead of using them to pay plan expenses. The plaintiff alleged that the 401(k) plan committee breached its fiduciary duty of prudence by (1) using an imprudent and flawed process to determine how forfeitures would be allocated and (2) failing to exhaust forfeitures by year's end, as instructed by the IRS. In their motion to dismiss, the defendants argued, in part, that the 401(k) plan permitted the allocation of forfeitures to offset employer contributions and that such allocations were permitted by both ERISA and the tax code.

When evaluating the plaintiff's imprudent process claim, the court rejected the defendants' contention that the plaintiff's claims were conclusory and lacking specific facts. The plaintiff alleged that the plan committee had failed to investigate whether the defendant was at risk of defaulting on its obligations or whether some forfeiture funds would be left over even after covering plan expenses. The plaintiff also alleged that the committee did not consult with a nonconflicted decision-maker before making its allocation determination. Further, the court noted that the defendants misunderstood and/or mischaracterized the plaintiff's claims when arguing that the plaintiff's theory of imprudence was reliant on the "faulty assumption that allocation of forfeitures to employer contributions is per se imprudent such that any process reaching that result is imprudent." The court stated that the plaintiff had alleged that the proper allocation of forfeitures was a context-dependent inquiry and that allocation toward offsetting employer contributions may at least sometimes be in the best interests of participants. Ultimately, the court denied the defendants' motion to dismiss with respect to the breach of the fiduciary duty of prudence based on plausible allegations that they employed an imprudent decision-making process.

The plaintiff in *Buescher* also came forward with a new forfeiture-based theory: forfeiture exhaustion. The plaintiff alleged that several financial statements showed a year-end balance in the forfeiture account, which he claimed violated IRS and Treasury regulations. In support, he cited IRS Publication 4278-B (2010), which stated that forfeitures were required to be used or allocated in the same plan year they were incurred. The publication further explained that the Internal Revenue Code "does not authorize forfeiture suspense accounts to hold unallocated monies beyond the plan year in which they arise" and "[a] plan's failure to use forfeitures in a timely manner denies plan participants additional benefits or reduced plan expenses." The defendants argued that the plaintiff had failed to explain how ERISA provided a cause of action to pursue alleged violations of the Internal Revenue Code, revenue rulings, or regulations. The court, however, was not convinced, stating that the plaintiff was not relying on the IRS publication for its force of law and that the failure to use forfeitures in a timely manner denied plan participants additional benefits or reduced plan expenses, which directly resulted in a claim for imprudence under 29 U.S.C. § 1104(a)(1)(B). Accordingly, the court denied the defendants' motion to dismiss regarding their breach of the duty of prudence by failing to exhaust forfeitures.

Similarly, in March 2025, the Northern District of California denied the defendants' motion to dismiss an ERISA forfeiture-related putative class action.

In *McManus v. Clorox Co.*, the plaintiff brought claims alleging breaches of the fiduciary duties of loyalty and prudence in connection with the Clorox 401(k) plan's usage of forfeited funds to reduce employer contributions rather than pay plan expenses. In evaluating the duty of prudence claims, the court found that the plaintiff's allegations that the defendants were motivated solely by their self-interest and conducted no reasoned and impartial decision-making process were plausible, given that no other justification was readily apparent. The court was also not persuaded by the defendants' argument that the plan documents allowed for the practice of allocating forfeitures in such a way because "a fiduciary is not allowed to violate ERISA merely because language in a plan document allows it."

Lastly, the plaintiff argued that, when a plan document gives a fiduciary the discretion to choose between using forfeitures to reduce employer contributions or pay plan expenses, and the plan document does not specify which allocation should take priority, defendants have a conflict of interest with the plan's participants. When such a conflict is present, fiduciaries have a duty to investigate, confer with an impartial decision-maker, or decide in the interest of the plan participants. When evaluating this theory, the court found that the plaintiff's allegations were sufficiently context-specific to survive a motion to dismiss because the defendants had enough information to know whether their fiduciary decision was prudent. Interestingly, in denying the motion to dismiss, the court in *McManus* stated: "This case presents a novel interpretation of ERISA on which there is no binding authority. Reasonable minds can differ, and several district courts do."

While other courts have rejected this conflict-of-interest theory, namely *Hutchins v. HP Inc.*, the success of *McManus* may persuade other plaintiffs to continue to assert it. Additionally, because the forfeiture exhaustion theory has now seen success with the survival of the plaintiff's claims in *Buescher*, other plaintiffs may incorporate this theory into other ERISA class actions. District courts continue to issue conflicting decisions related to forfeiture litigation. As such, any guidance received from the Ninth Circuit in the cases on appeal will be significant to the development of these forfeiture-related cases.

Carlton Fields Welcomes Veteran Industry C-Suite Executive Adam Scaramella to Financial Services Regulatory Practice

We are pleased to welcome **Adam Scaramella** to our Financial Services Regulatory Practice as a shareholder in the firm's Florham Park, New Jersey, office. He was most recently president of Prudential Investment Management Services LLC and vice president of regulatory supervision for the Prudential Insurance Company of America.

Adam brings decades of experience advising and leading broker-dealers, insurance companies, investment advisers, and investment companies in matters before securities and insurance regulators. His practice focuses on securities and insurance regulatory matters, product development and distribution, compliance governance, and risk management.

Throughout his career at Prudential, Adam held several senior leadership positions, including chief legal officer for Prudential Advisors and chief counsel at Prudential Retirement and Annuities, where he led legal teams supporting product development, distribution, marketing, operations, and regulatory affairs across both retail and institutional businesses. His regulatory counselling experience includes advising on matters involving the SEC, FINRA, the Department of Labor, and state insurance and securities regulators. In these roles, he served as a primary liaison with key regulatory bodies and industry trade associations, providing strategic legal support for federal and state lobbying initiatives.

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:

- Plan Sponsor and Asset Manager Considerations Under 401(k) Alternatives Executive Order
  A new executive order could reshape 401(k) plans by opening the door to private equity, digital assets, and other alternatives.
- SEC Cost-Benefit Analysis: A New Face and a New Role
  The SEC is in the process of revamping its cost-benefit analysis approach for regulations, spurred in large part by presidential executive orders that have set the stage for regulatory relaxation and revision.
- Unsafe Harbor? Deregulation and the Limit of the Secure Act Safe Harbor for Selection of Lifetime Income Provider
  Proposed deregulation threatens to strip away safe harbor protections for plan fiduciaries selecting lifetime income providers.
- One Fell Swoop: SEC Erases Ambitious Gensler-Era Rulemaking Agenda
  In a sweeping move, the SEC has scrapped 14 ambitious Gensler-era rules on ESG, cybersecurity, and more.
- Some Constitutional Clarity for SEC Administrative Law Courts but Uncertainty Remains
  A recent federal court backed the legitimacy of SEC administrative proceedings while firmly leaving the constitutional fate of ALJ tenure protections unresolved.
- U.S. Supreme Court Denies Alpine's Petition Challenging Constitutionality of FINRA Enforcement Proceedings
  The Supreme Court declined Alpine Securities' appeal, leaving FINRA's expedited enforcement powers intact.
- No Consensus: Pros and Cons of a Strategic Digital Asset Reserve
  A proposed U.S. strategic digital asset reserve sparks debate over crypto's risks and rewards.
- SEC Engages in "Targeted, Common-Sense" Reorganization
  The SEC's recent reorganization consolidates its regional offices and specialized units under a streamlined, deputy-led structure, aiming to enhance efficiency amid a 15% staff reduction.
- Implementing Executive Order, FTC Calls on Public and Regulated Community to Identify Anticompetitive Regulations for Potential Repeal
  The Federal Trade Commission has launched a public inquiry to identify and eliminate federal regulations that hinder competition, inviting comments from businesses, consumers, and other stakeholders.

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

News and Notes

The ***Best Lawyers in America© 2026*** recognized 182 Carlton Fields attorneys. One hundred and thirty-six attorneys were named to the "Best Lawyers" lists, and 46 were named to the "Ones to Watch" list. Additionally, seven Carlton Fields attorneys were named "Lawyer of the Year" for their practice areas in their communities.

Carlton Fields earned top rankings for 11 practices and 20 of its attorneys in ***Chambers USA 2025***, including insurance.

Markham Leventhal was appointed to the National Alliance of Life Companies' board of directors. The board guides the organization's advocacy and regulatory efforts, supporting member life insurers through advocacy and industry engagement.

Carlton Fields was named among **Vault's 2026 Top Law Firms for Diversity**. The firm ranked in the top 20 for Overall Inclusion, People with Disabilities, and LGBTQ+ Individuals. It also ranked in the top 25 for People of Color, and in the top 30 for Women. For its summer associate program, the firm ranked in the top five for Attorney Interaction. The firm has been ranked as a top firm for diversity by Vault for nearly two decades.

Carlton Fields welcomes the following attorneys to the firm: shareholders **David Carrier** (mass tort and product liability, Minneapolis), **Jenny Covington** (mass tort and product liability, Minneapolis), **Eden Darrell** (mass tort and product liability, Los Angeles), **Jenna Durr** (mass tort and product liability, Minneapolis), **Molly Jean Given** (mass tort and product liability, Minneapolis), **Michael Justus** (intellectual property, Tampa), **Jeffrey Miles** (business litigation, Los Angeles), **Frank Olah** (labor and employment, Los Angeles), **Craig Samuel** (business transactions, Atlanta), and **Adam Scaramella** (financial services regulatory, New Jersey); senior counsel **Christopher Ash** (property and casualty insurance, New York), **Heather Aislynn Johns** (real estate and commercial finance, Washington, D.C.), and **Eric Kay** (appellate practice and trial support, Miami); and associates **Julia Adamson** (mass tort and product liability, Minneapolis), **Claire Barlow** (mass tort and product liability, Minneapolis), **James Barlow** (construction, Tampa), **Marc Bernatchez** (labor and employment, Hartford), **Matthew Brooks** (construction, Orlando), **Sibel Cagatay** (business litigation, New York), **Andrew Craig** (business litigation, Miami), **Natalie Donis** (mass tort and product liability, Orlando), **Matthew Smaron** (mass tort and product liability, Minneapolis), and **Delaney Nelson** (mass tort and product liability, Minneapolis).

The firm sponsored the **ACLI Compliance & Legal Conference** on July 14–16 in New Orleans, Louisiana. **Trish Carreiro** spoke on the topic of "Navigating Third-Party Management: A Legal Perspective."

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

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

The firm is pleased to support the **ACLI Annual Conference** on October 15–17 in Nashville, Tennessee, as a sponsor. **Trish Carreiro** will speak on the topic of third-party risk management.

Carlton Fields Launches Minnesota Office With Leading Product Liability, Mass Torts, and Class Action Team

Carlton Fields has opened a new office in **Minneapolis, Minnesota**. The new office is led by trial attorneys **Jenny Covington** and **Molly Jean Given**, as co-office managing shareholders, and boasts a renowned national product liability defense practice and experience trying high-stakes cases across the country. In addition to Jenny and Molly, **David Carrier** and **Jenna Durr** have joined the new office as shareholders.

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

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

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