

# Regulatory Examination Priorities

Implications for the Insured  
Retirement Industry

2023

Every year, the Securities and Exchange Commission (“SEC”) and the Financial Industry Regulatory Authority (“FINRA”) release documents that review industry hot topics and high-risk categories that will be prioritized during regulatory examinations. In January, FINRA released their [2023 Report on Examination and Risk Monitoring Program](#) and subsequently, the SEC’s Department of Examinations released their [2023 Examination Priorities](#) in early February.

These two documents are extremely helpful and can serve as valuable tools to help organizations when preparing for future regulatory examinations. Oftentimes the priorities of these regulators overlap as they share oversight of certain regulated entities, products and services, and share similar goals in protecting investors. This IRI report is designed to help members identify and highlight where examination priorities overlap and to provide insight on those areas of focus and other hot topics within the industry.

Any questions about this report should be directed to Rebecca Plowman, IRI’s Director, Compliance & Implementation, at [rplowman@irionline.org](mailto:rplowman@irionline.org).



The Insured Retirement Institute (IRI) is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community. Learn more at [www.IRionline.org](http://www.IRionline.org).

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# Standard of Conduct: Regulation Best Interest

To no surprise, both the SEC and FINRA identify Regulation Best Interest (“Reg BI”) and Form CRS as 2023 examination priorities. Firms were required to comply with the new Reg BI and Form CRS requirements as of June 30, 2020, and the industry is starting to see more aggressive enforcement and can expect even more as we near the three-year anniversary. For example, in March, at an industry conference, a senior FINRA executive confirmed they plan to complete at least 1,000 Reg BI related examinations by the end of the year which is nearly one-third of FINRA’s member firms.<sup>1</sup>

**FINRA plans to complete 1,000 Reg-BI focused exams by the end of 2023.**

Just prior to the release of the SEC’s 2023 examination priorities, on January 30, the Division of Examinations released a Risk Alert: [Observations from Broker-Dealer Examinations Related to Regulation Best Interest](#). Initial examinations “focused on whether firms established written policies and procedures reasonably designed to comply with Regulation Best Interest and whether firms made reasonable progress in implementing those policies and procedures” and now moving forward the SEC will incorporate compliance with Reg BI into retail-focused exams of broker-dealers.

SEC examinations for broker-dealers and dually registered investment advisers (“RIAs”) will continue to focus on:

1. investment advice and recommendations, investment strategies and account types;
2. disclosures, and whether those disclosures provide all material facts related to conflicts of interest;
3. processes for making a best interest evaluation, reviewing reasonably available alternatives, evaluating costs, risk and identifying and addressing conflicts of interest; and
4. factors considered in the investor’s investment profile, including investment goals and account characteristics.

Both the SEC and FINRA’s examination priorities focus on the need for written policies and procedures regarding conflicts of interest and periodic reviews to ensure conflicts are being identified and mitigated or eliminated. Both regulators found that processes in place failed to identify the actual conflict, did not identify all conflicts, and failed to appropriately mitigate conflicts that created incentives for the financial professional to put their interests ahead



<sup>1</sup>Financial Advisor Magazine, “[FINRA Exec Says 1,000 Reg BI Exams Are On Tap for 2023](#)”, (March 2023)

of the customer. In addition to the recent SEC Risk Alert, the SEC release a third staff bulletin, [Standard of Conduct for Broker-Dealers and Investment Advisers Care Obligations](#). Firms can also continue to refer to the previously issued staff bulletins regarding [Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest](#) and [Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors](#).

FINRA's report largely aligned with the SEC's Risk Alert and generally found policies and procedures were generic and not tailored to the firm's specific business model. Policies and procedures lacked the level of detail regarding the firm's specific processes needed to achieve compliance with best interest obligations. Firms provided general training to financial

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representatives about Reg BI, but failed to provide specific instruction or detail on how to comply with the requirements of the regulation.

## FORM CRS

FINRA's report found that firms' Form CRS filings significantly departed from [Form CRS instructions](#) and were not being properly amended and filed. Both the SEC and FINRA remind firms of their obligations to deliver Form CRS to current, new and prospective customers as well as ensuring that the current version is posted on the firm's public website. Additionally, firms can meet the Form CRS "in writing" requirement via paper or electronic means as long as it is consistent with the existing guidance for electronic delivery. As addressed in the SEC's [FAQs](#), firms should keep in mind that "notice plus access" and "access equals delivery" do not meet electronic delivery requirements.

## ENFORCEMENT ACTIONS

Firms may also recall that in [June 2022, the SEC issued their first Reg BI related charges](#) related to failures to comply with the Care Obligation. The defendants allegedly did not exercise reasonable diligence, care, and skill to understand

the risks, rewards and costs associated with the recommendations made to customers. According to the complaint, registered representatives of the firm recommended the purchase of certain bonds that were high risk, illiquid and only suitable for customers with substantial financial resources to at least seven retail customers without a reasonable basis to believe the purchase was in those customers' best interest. Additionally, those customers were retired and/or had limited liquid net worth with moderate-conservative or moderate risk tolerances.

Similar to the notes in both the SEC and FINRA's exam priorities, the complaint further states the firm failed to comply with Compliance Obligations due to inadequate policies and procedures. Those procedures were limited and only reiterated the objectives of Reg BI and did not provide specific or tailored guidance to the firm's operations or procedures for enforcing its policies.

More recently, in [February 2023, FINRA issued its first fine against a firm](#) for failures to comply with Reg BI. FINRA found the firm generally failed to establish, maintain and enforce written policies and procedures as well as a supervisory system, including written supervisory procedures, reasonably designed to achieve compliance with Reg BI. Upon the compliance date of Reg BI, the firm failed to make any reference to Reg BI in any of its written policies and procedures and only started to incorporate Reg BI in November 2021. However, the firm continued to lack procedures to prevent, detect or promptly correct violations or to otherwise achieve compliance with Reg BI. Additionally, the firm failed to have similar procedures in place to achieve compliance with Form CRS and only started referencing Form CRS in November 2021, only to revert back to procedures with no reference in March 2022. This resulted in a censure and \$35,000 fine in addition to remedial action to achieve compliance with Reg BI.

FINRA also issued fines and suspensions directly to an [ex-broker in October 2022 for violations under the Care Obligation](#) related to excessive trading and again at the end of January 2023 to two different financial advisers for similar churning activity in customer accounts. One financial adviser received a [seven-month suspension](#) and the other a [three-month suspension](#), however, both received a \$5,000 fine and are required to pay restitution, plus interest.

## COMPLIANCE CONSIDERATIONS

Industry firms should consider reviewing their policies and procedures to look for areas where they can be bolstered by providing more specific details and instruction on how the firm complies with Reg BI. Firms should also reevaluate their supervisory systems and policies and procedures regarding conflicts of interest to ensure conflicts are being identified and mitigated or eliminated. Additionally, training provided to producers should provide specific detail on how to comply with the requirements of the regulation and the firm's policies and procedures. Firms should review Form CRS any time there are modifications to the business to identify material changes that may need updated and subsequently requiring Form CRS to be refilled. Firms should also make sure there are processes and procedures in place to ensure it is reviewed regularly for compliance with the Form CRS instructions and appropriately updated on websites and sent to consumers when changes are made.

IRI is engaged on the various standards of conduct, most notably through IRI's Standard of Conduct Task Force. Led by IRI's Regulatory Affairs Team, this Task Force focuses on all federal and state activity (legislative, regulatory, and judicial) relating to the standard of conduct applicable to financial professionals who provide advice or recommendations to retail consumers, including Reg BI as well as NAIC Model Regulation 275 and fiduciary responsibilities under ERISA. Additionally, support is provided to members through IRI's Reg BI Implementation Working Group where members discuss specific challenges or questions related to compliance with the regulation. IRI staff continues to follow and report on Reg BI related information including, enforcement actions, regulatory guidance and by providing access to other industry resources and comparison charts.



## Digital Communications and Recordkeeping

Along with the focus on use of emerging technologies in the industry, the events of March 2020 have pushed the industry to consider alternative methods

**The SEC fined 16 firms for non-compliant use of texting and recordkeeping failures in an amount that totaled over \$1.1 billion.**

of communications with investors. This has led regulators to have a particular interest in “off

channel” digital communications, such as texting via personal devices and apps like WhatsApp, and recordkeeping obligations. In September 2022, the [SEC fined 16 firms for non-compliant use of texting and recordkeeping failures](#) in an amount that totaled over \$1.1 billion. The charges and penalties are based on the long-standing recordkeeping requirements for firm-wide policies and procedures for such

communications, and the SEC indicated they will enforce compliance with these requirements in future examinations. The SEC continues to emphasize the importance of this topic as indicated by the focus on investment advisers' monitoring and recordkeeping practices of electronic communications in their 2023 examination priorities.

Furthermore, FINRA asks firms to consider whether their policies and procedures address all permitted and prohibited digital communication channels and features available to customers and their representatives. Other items to consider include firm practices for detecting and supervising for non-compliant or unapproved use of digital communication channels and how firms maintain books and records in compliance with SEC and FINRA recordkeeping rules.

## AMENDMENTS TO ELECTRONIC RECORDKEEPING REQUIREMENTS

In 2022, the [SEC adopted amendments to the recordkeeping rules](#) applicable to broker-dealers, security-based swap dealers, and major security-based swap participants. Notably, these amendments now provide for an alternative to the non-rewriteable, non-erasable format requirement, known as the write once, read many (WORM) format. The amendments include an audit-trail alternative that requires a broker-dealer to preserve electronic records in a manner that permits the recreation of an original record if it is altered, over-written, or erased along with some additional requirements depending on whether the firm is a broker-dealer, security-based swap dealer, or major security-based swap participant. It is also important to note that the


language of the Third-Party Access Undertaking has been revised. If firms continue to use their current third-party access arrangement to comply, they must ensure the third-party files new undertakings including the amended language by May 3, 2023.

FINRA has created a [comparison chart](#) to help firms understand these amendments as compared to the prior version of these rules.

## COMPLIANCE CONSIDERATIONS

As the industry continues to evolve, technology advances are and will be necessary to keep up with the expectations and demands of consumers. However, when using new technology, especially digital and electronic, firms need to ensure they are assessing whether these new practices are being implemented in a way that complies with all the applicable requirements. The industry is heavily regulated when it comes to how firms, producers and advisers communicate with consumers; and firms should consider reviewing how they are complying with all applicable rules and regulations including, but not limited to, advertising, recordkeeping, supervision, and consumer privacy requirements.

IRI continually monitors regulatory activity around this subject as it remains a hot topic within the industry. As firms work through the various compliance requirements and regulators' scrutiny during examinations, questions and concerns can be discussed with IRI's Compliance and Implementation Committee. This Committee is a resource for members to work through and discuss regulatory complexities with industry peers and share best practices and industry resources.



Firms should consider reviewing how they are complying with advertising, recordkeeping, supervision, and consumer privacy requirements.

# Environmental, Social, and Governance (ESG)

ESG-related investments and strategies are becoming more and more popular, but it has also become the center of political debate and has prompted a wide array of legal and regulatory activity across the United States. Federal and state regulators, legislators, and States' Attorneys General are becoming more involved in ESG-related investments as consumer demand for such funds and the offering of funds that incorporate ESG criteria rises. The SEC is focused on whether funds should be required to update and amend their disclosures to reflect ESG factors and investments, whether the funds themselves are appropriately named, and whether recommendations of these products are in investors' best interest. Similarly, FINRA will also focus on communications promoting ESG factors, procedures for reviewing such communications, and that disclosure language is appropriately included.

## COMPLIANCE CONSIDERATIONS

Although FINRA and SEC currently have yet to finalize any ESG-related regulations, the SEC has two proposed rules pending from May 2022, which that would have a significant impact on ESG-related funds, investment strategies and disclosures:

- > [Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices](#) — proposes amendments to rules and reporting forms to promote consistent, comparable, and reliable information for investors concerning funds' and advisers' incorporation of ESG factors.
- > [Investment Company Names Proposal](#) — proposes amendments to enhance and modernize the Investment Company Act "Names Rule" to address changes in the fund industry and compliance practices to prevent misleading investors about a fund's investments and risks.

On a related note, the SEC has a third pending proposal from 2022 [The Enhancement and Standardization of Climate-Related Disclosures for Investors](#), which, as stated in the SEC's press release, "would require registrants to include certain climate-

related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements. The required information about climate-related risks also would include disclosure of a registrant's greenhouse gas emissions, which have become a commonly used metric to assess a registrant's exposure to such risks."

Additionally, under the Department of Labor ("DOL"), organizations should review and consider the final "ESG Rule", [Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights](#). The ESG Rule sets forth requirements that allow plan fiduciaries to consider ESG factors when selecting retirement investments and exercising shareholder rights. Most notably, EBSA's current ESG Rule is "neutral" as it does not put the government's thumb on the scale to favor or prohibit ESG investments.

ESG-related issues for the industry likely will not fade away anytime soon and may only get more complex as Congress, the SEC, and federal and state regulators continue ESG political debates. IRI's Government Affairs and Regulatory Affairs Teams keep a close watch on ESG-related legislation and potential rulemaking and will report updates via IRI's ESG Issues Task Force. IRI continues to support a neutral, impartial framework that will provide certainty and stability so the industry and retirement plan sponsors can adapt appropriately as retirement savers' preferences and priorities evolve.





# New Marketing Rule for Investment Advisers

In December 2020, the SEC adopted changes to modernize the rules under the Investment Advisers Act for investment adviser advertisements (Rule 206(4)-1) and payments to solicitors (Rule 206(4)-3) and to replace and combine them into a single “[Marketing Rule](#)”. The new Marketing Rule had a compliance date of November 4, 2022, and in September 2022, the SEC Division of Examinations released a Risk Alert, [Examinations Focused on the New Investment Adviser Marketing Rule](#), which provides insight on the key areas of focus during examinations. Those areas included: (1) policies and procedures, (2) the substantiation requirement, (3) performance advertising requirements, and (4) books and records.



The Marketing Rule made significant changes to the definition of “advertising” and it now applies to a much broader scope of communications. The new definition now includes electronic communications, such as social media, and can help facilitate compliant use of such communications. Additionally, the rule allows use of various other communications, such as endorsements and testimonials, which were previously not permitted. Of course, use of endorsements and testimonials will need to ensure specific disclosures are made, including any compensation paid to the promoter, and that other oversight and written agreement requirements are met.

## COMPLIANCE CONSIDERATIONS

The Marketing Rule made significant changes to the marketing standards for investment advisers by updating outdated standards to make them more flexible for evolving technology and communication practices. The changes to the definition of advertising should prompt investment advisers to review their current advertising practices, policies and procedures and make any necessary adjustments to ensure compliance with the new rule. The SEC also revised their [Marketing Compliance FAQs](#) and [Investment Adviser Marketing: A Small Entity Compliance](#)

[Guide](#) which should also be reviewed for additional information. More recently, in March 2023, the SEC also released a Risk Alert, [Observations from Examinations of Newly-Registered Advisers](#), and although geared toward new registrants, can be helpful when evaluating compliance with changes to the advertising rules.

In addition to reviewing current processes, it may be necessary to create new policies and procedures. Specifically, due to the rule scoping in a broad range of new communications, such as digital advertising and use of social media,

When considering use of endorsements and testimonials, investment advisers should consider reviewing the Federal Trade Commission’s (“FTC”) Endorsement Guidelines

endorsements, and testimonials. When considering use of endorsements and testimonials, investment advisers should consider reviewing the [Federal Trade Commission’s \(“FTC”\) Endorsement Guidelines](#). The FTC’s guidance can help provide some general information of acceptable practices when using endorsements and testimonials in advertising. IRI can help provide support for members through various committees, including the Securities Committee and the Compliance and Implementation Committee.

# Cryptocurrency and Technology

In recent years, the broader financial services industry has seen increased interest and use of cryptocurrencies (“crypto”) and other innovative technology and accordingly will be top priorities for both the SEC and FINRA during examinations this year.

## CRYPTO

Digital assets, like crypto, have yet to be widely adopted in the insured retirement space, but the developing regulatory framework for digital assets will likely play a key role in shaping whether and how they could be used in the future. The SEC is particularly concerned with the recent financial distress among crypto asset market participants and, when appropriate, will examine registered entities that have been or could be impacted. They will also focus on new or never before examined registrants offering crypto or crypto-related assets. Additionally, in December 2022, the SEC Division of Corporation Finance provided a [Sample Letter to Companies Regarding Recent Developments in Crypto Asset Markets](#). The Division of Corporation Finance selectively reviews filings made under the Securities Act of 1933 and the Securities Exchange Act of 1934 and provided this illustrative letter to help companies evaluate their disclosures regarding crypto assets.

FINRA makes it clear that crypto-related assets need to include proper disclosures to prevent confusion regarding the entity offering the crypto asset and to ensure consumers understand crypto-

related products and services may not be covered under federal securities laws or other protections such as the Securities Investor Protection Act of 1970. In addition, FINRA has announced [targeted examinations on crypto asset retail communications](#). These exams also align with the goals of the SEC to further investigate the sale of crypto assets and ensure they are being appropriately evaluated and represented to investors.

Both the SEC and FINRA are concerned with ensuring that recommendations of crypto-related assets are compliant with the applicable standard of conduct, and so is the DOL. Firms should also consider the information released in the DOL’s Compliance Assistance Release No. 2022.01, [401\(k\) Plan Investments in “Cryptocurrencies”](#), which cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu for plan participants and reminds them of their fiduciary obligations.

## EMERGING TECHNOLOGIES

Additionally, both the SEC and FINRA will be focused on emerging technologies such as the use of social media marketing, social trading platforms, “robo-advisors,” on-line brokerage services, and other automated services like mobile apps. These types of services will be assessed to determine:

- > Were recommendations made or advice provided?
- > If advice was given, was it in the best interest of the investor and how does the firm comply with the related obligations?
- > Were representations fair and accurate?
- > Are there adequate controls and surveillance in place to ensure that all required disclosures were made?
- > Do any of these practices present particular risks to seniors or other investor classes?

Emerging technologies also includes use of digital communication channels, such as social media, texting apps and other evolving technology



to keep pace with investor demands. To help ensure compliant use of these technologies, firms should refer back to the applicable standards of conduct and other regulatory obligations such as those under advertising, communication, and recordkeeping rules. Firms should also review their policies and procedures and training to ensure that use of any new technology is effectively addressed and supervised.

## COMPLIANCE CONSIDERATIONS

The cryptocurrency market has clearly caught the attention of regulators and the media. Although it does not appear that the use of crypto-assets is taking off quickly as there is a lot of concern regarding this high-risk investment for retirement savers. In a May 2022 [press release](#), the SEC stated they doubled the size of their Crypto Assets and Cyber Unit to better “police wrongdoing in the crypto markets” and that the SEC had brought more than 80 enforcement actions related to fraudulent and unregistered crypto asset offerings and platforms.

IRI is currently following developments related to the SEC’s proposed rule (February 15, 2023) [Safeguarding Advisory Client Assets](#) as this proposal

would make sweeping changes to its custody rule for RIAs. Many have characterized the proposal as a cryptocurrency rule, but its impact would go far beyond the classification of digital assets and would reach RIAs, custodians, and auditors. Most notably, the proposal would:

- > Expand the scope of assets covered by the custody rule to encompass all assets regardless of whether they are funds or securities, including crypto assets, derivatives, and physical assets;
- > Significantly increase the number of RIAs held to have custody of client assets by treating discretionary authority as a form of custody; and
- > Require RIAs to enter into contracts with qualified custodians holding their clients’ assets.

This proposal also includes amendments to Form ADV, additional recordkeeping requirements, auditing requirements, and disclosures. IRI’s Securities Committee will fully assess the impact, draft comments in response and continue to monitor activity related to this proposal.



## Other Areas of Interest

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The SEC and FINRA reports identify a number of other topics they will focus on during examinations this year, including the following:

- > Investment Company Act Rule 18f-4 (Derivatives Rule)
- > Investment Company Act Fair Valuation Rule 2a-5
- > RIAs to Private Funds
- > Anti-Money Laundering (AML)
- > Financial Crimes
- > Manipulative Trading

If any of these topics are relevant to your business, you should carefully review the SEC and FINRA reports prior to your examinations to ensure that you fully understand their concerns and priorities in these areas.

### REGULATORY PROPOSALS

Below is a list of other regulatory proposals that will have an impact on the insured retirement industry. IRI is monitoring activity related to these proposals and provides updates through the appropriate IRI committees.

- > [Open-End Fund Liquidity Risk Management Programs and Swing Pricing: Form N-PORT Reporting](#) (“Swing Pricing and Hard Close Proposal”)
- > [Regulation Best Execution](#)
- > [Proposed Amendment to Prohibited Transaction Class Exemption 84-14 \(the QPAM Exemption\)](#)
- > [DOL’s PTE Procedures Proposed Amendments](#)

## IRI and Member Engagement

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IRI members that have questions or concerns related to any of the topics covered in this document should feel free to reach out to any staff member of IRI at any time. The staff at IRI is always ready to assist members when working through the complexities of industry regulation. A list of IRI’s [standing committees](#) can be located on IRI’s website and more detailed information about specific working groups and task forces can be viewed by logging in to the member portal on our website.

**Resources:** [How to log in to my account](#) or [How to create an account](#)



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