

TB: Ask FINRA: A Panel of Senior FINRA Officials Responds to Your Questions
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Moderator:

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Panel:

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I. Consolidation of Examination and Risk Monitoring Programs

- a. In October 2018, FINRA announced the consolidation of its exam and risk monitoring programs. Where is FINRA in the integration process, today?
- b. How does FINRA anticipate this new structure will impact firms? Should firms modify their approach to exams?

II. Key Takeaways From FINRA’s 2020 Risk Monitoring Examination Priorities Letter

a. Regulation Best Interest (“Reg. BI”)

- i. Does FINRA view Reg. BI as supplanting the suitability standard or just imposing additional/heightened obligations? Does Reg. BI impact any other FINRA rules or guidance?
- ii. What is FINRA’s perspective on the proliferation of state standards of fiduciary conduct?
- iii. What can firms expect from FINRA examiners who are evaluating their compliance with Reg. BI? What can firms do to prepare for FINRA’s scrutiny of their Reg. BI compliance and supervisory programs?
- iv. How much, if at all, will FINRA consider the growing pains that often accompany efforts to comply with new regulations, especially one as transformative as Reg. BI, in evaluating firm compliance?

b. Communications with the public

- i. Firms are increasingly relying on social media as a means of communication with existing and prospective clients. Has FINRA identified best social media practices? Conversely, has FINRA identified any problematic trends in social media use?

- ii. Has FINRA dealt with the advancement of ephemeral messages, i.e. messages that are erased shortly after they are sent?

c. Cash Sweep Programs

- i. Given the industry's recent focus on these programs, coupled with the recent activity in the civil litigation space (i.e. the *Valley v. Merrill Lynch* class action) does FINRA anticipate bringing enforcement actions against cash sweep programs?
- ii. Is FINRA concerned that Reg. BI may have implications for cash sweep programs?

d. IPOs

- i. While FINRA lists IPOs amongst its 2020 Priorities, it makes no mention of newer non-traditional offerings, like DPOs and ICOs. Can we expect that FINRA will begin paying special attention to these types of offerings in the near future?

e. Digital Assets

- i. Is FINRA in a position to forecast when there will be a comprehensive regulatory approach to secondary market trading of digital assets?
- ii. Is FINRA considering any rulemaking regarding digital assets?
- iii. Does FINRA consider digital assets securities, given the recent line of SEC enforcement actions, and the SEC's Framework for Investment Contract Analysis of Digital Assets?
- iv. In July, FINRA published a statement on digital asset custody in partnership with the SEC. At the time FINRA and the SEC raised concerns regarding how broker-dealers will be able to satisfy their obligations under the Customer Protection Rule when dealing with digital assets. Has FINRA since identified best practices for broker-dealers transacting in digital assets?
- v. Is FINRA working with the SEC when New or Continuing Membership Applications are filed for activities related to blockchain digital assets?
- vi. Are there especially common stumbling blocks members or prospective members encounter when seeking FINRA approval to transact in digital assets?

f. Cybersecurity and Tech Governance

- i. How does FINRA use data analytics to aid in its examination, surveillance, and enforcement functions?
- ii. How does FINRA protect its trove of personal information from cybersecurity threats?
- iii. Does FINRA anticipate an uptick in enforcement actions against firms that fail to comply with Reg. S-P Rule 30?
- iv. Will FINRA articulate cybersecurity guidance in the near future?
 - 1. Alternatively, has FINRA identified best practices?

III. FINRA360 Developments

- a. Any preview of potential additional changes coming out of FINRA360?
- b. What prompted FINRA to select Rule 4530 for review?
- c. Any other rules on tap for OGC's retrospective rule review project this year?
- d. Will the adoption of Reg. BI impact the number of rules selected for review?

IV. Enforcement

a. Consolidation of the Enforcement Department

- i. Has the reorganization of the Enforcement Department been completed? Can you describe the new structure?
- ii. How has the new structure impacted how FINRA handles investigations and disciplinary actions?

b. Extraordinary Cooperation

- i. FINRA's new guidelines on cooperation appear to emphasize self-disclosure both upon discovery of a violation and throughout the investigation. How does FINRA respond to concerns that this trends towards waiver?
- ii. Does FINRA believe there is an overall trend in the regulator space towards waiver?
- iii. How does FINRA suggest firms navigate the line between self-disclosure and waiver? How should firms weigh the risk that waiver may open the firm up to a host of vulnerabilities, including employee lawsuits, and employee mistrust? Is FINRA concerned that their cooperation program will incentivize firms to capitulate to the regulator's perspective rather than conduct a comprehensive internal investigation?

c. Cooperation and Hypotheticals

- i. The DOJ has indicated they are no longer willing to accept hypothetical witness statements from cooperating entities. Will FINRA follow suit?
 - 1. If so, isn't this further indication that regulators are increasingly essentially asking for waiver?

d. Anti-Piling-On Policy

- i. After the DOJ announced their effort to reduce duplicative regulation, FINRA announced they would be adopting the approach as well. How has that played out in practice?
 - 1. FINRA recently clarified that it will bring EBS related actions against firms even if the SEC is already pursuing the same misconduct. How does this reconcile with the anti-piling on policy?

e. Vulnerable Adults

- i. FINRA, the SEC, and NASAA all recently released initiatives aimed at curbing the financial exploitation of vulnerable adults. Have those programs been effective?
- ii. Given the aging baby boomer population and the finance industry's increasing use of digital media, does FINRA anticipate financial exploitation will continue to outpace regulators' preventative measures?

V. CAT

- a. What is the status of CAT's implementation?
 - i. When does FINRA estimate CAT will be fully operational?
 - ii. SEC Chairman Clayton recently introduced amendments designed to speed up the CAT implementation process. What problems were these amendments designed to cure?
- b. What is FINRA CAT, LLC's relationship to FINRA?
- c. Has CAT yet proved useful for regulators? How so?
- d. What steps is FINRA taking to safeguard personal information stored in the CAT?

VI. Regulatory Services Arrangements

- a. Have you heard any complaints from members stemming from FINRA's representation of so many SROs? Some members believe they have observed some of the following:
 - i. Lack of uniformity in rule interpretation and enforcement philosophy among the SROs on a single matter
 - ii. SRO pile-on by SROs with little or no violative activity occurring on their exchange, causing increase in fines
 - iii. Ability of an outlier SRO to push a more aggressive approach through a collective settlement
 - iv. Multitude of CRD filings for one action, making disciplinary history appear much worse than it is
 - v. Members unable to engage with the exchanges themselves