*Ethan L. Silver*

# Market Trends: FINRA

by Ethan L. Silver and William Brannan, Lowenstein Sandler LLP

**Overview**

The Financial Industry Regulatory Authority, Inc. (FINRA) had a very active year in 2016 from a regulatory and enforcement perspective. It also experienced substantial internal changes to senior management, including the resignation of its chairman and chief executive officer, Richard Ketchum, effective in August, and the appointment of a new president and chief executive officer, Robert Cook, as well as new chairman, John Brennan. FINRA's enforcement chief Bradley Bennett, also announced his resignation December 2016.

This article will summarize, highlight, and spot trends and direction of the agency based on the numerous regulatory events, rule proposals, and enforcement actions by FINRA in 2016, beginning with FINRA's Annual Regulatory and Examination Letter (2016 Priorities Letter), and culminating with its Annual Regulatory and Examination Letter published in January 2017 (2017 Priorities Letter). For a copy of these letters, see 2016 Regulatory and Examination Priorities Letter (Jan. 2016), available at http://www.finra.org/industry/2016-regulatory-and-examination-priorities-letter and 2017 Regulatory and Examination Priorities Letter (Jan. 2017), available at http://www.finra.org/industry/2017-regulatory-and-examination-priorities-letter. For further information on FINRA, see Understanding FINRA Regulations and Filings and Navigating FINRA Regulations. For further information on broker-dealer regulation in general, see Complying with Broker-Dealer Federal Regulation.

**Regulatory and Examination Priorities Letter 2016**

FINRA began 2016 outlining the issues that it intended to focus on and that it deems especially important to its regulatory programs and mission, including:

- Commitment to addressing and understanding the effects of a firm's culture on the implementation and conduct of its business
- Continued focus on risk management, supervision, and controls, with a particular emphasis on the evolving effects of technology on member obligations
- Focus on sales practices and suitability considerations
- Continued reminder to members of their obligations for supervision and compliance relating to private securities transactions pursuant to FINRA Rule 3280 as well as Rule 603(c) (17 C.F.R. § 242.603) of Regulation National Market System (known as the Vendor Display Rule)

In the 2016 Priorities Letter, FINRA defined a firm's culture as "the set of explicit and implicit norms, practices, and expected behaviors that influence how firm executives, supervisors and employees make and implement decisions in the course of conducting a firm's business." FINRA emphasized five indictors of a firm's culture:

- Whether control functions are valued within the organization
- Whether policy or control breaches are tolerated
- Whether the organization proactively seeks to identify risk and compliance events

- Whether supervisors are effective role models of firm culture
- Whether subcultures (e.g., at a branch office, a trading desk, or an investment banking department) conform to overall corporate culture

FINRA clarified that it does not seek to dictate a firm's culture, but that understanding a firm's culture helps FINRA understand the approaches that a firm takes in order to manage conflicts of interest and ethical behavior. With this in mind, it advised that firms should "take visible actions that help mitigate conflicts of interest, and promote the fair and ethical treatment of customers." FINRA conducted a broad sweep of a dozen or so larger firms to ensure that their culture was satisfactory; however, there was very little penetration on this much-focused on priority when examining smaller firms, who constitute the majority of FINRA members.

FINRA also stated that it would focus on supervision, risk management, and controls in 2016—areas where it has observed repeated concerns. This focus covers incentive structures, investment banking and research business line conflicts, information leakage, and position valuation conflicts. Of particular interest are incentive structures and understanding a firm's conflict mitigation process regarding compensation plans for registered representatives. In 2014, FINRA fined 10 firms more than $43 million for violations of FINRA's research rules. In each of the applicable Letters of Acceptance, Waiver and Consent, FINRA made clear that research analysts should not be inappropriately involved in investment banking activities, and a firm should not use the prospect of favorable research to win business. See, e.g., Citigroup Global Markets Inc. FINRA Acceptance, Waiver and Consent No. 2011030683801 (Dec. 10, 2014), available at http://disciplinaryactions.finra.org/Search/ViewDocument/38172. For further information, see also Research and Investment Banking Participation in Joint Due Diligence. Last year FINRA completed its targeted examination that was launched in 2015 regarding incentive structures and conflicts of interest in connection with firms' retail brokerage businesses. FINRA also aimed to continue its long-time focus on the conflicts of interest inherent in information leakage scenarios. It advised firms to seek to contain information appropriately within various divisions and departments in order to guard against information leakage that may pose conflict of interest issues, such as the front-running of pending rating changes. FINRA also raised attention to conflicts that can arise when traders are allowed to provide valuations for positions that they themselves have established. It is expected that this regulatory focus on eliminating conflicts of interest will not be going away. For an example of disclosure regarding conflicts of interest, see FINRA Rule 5121 Conflicts of Interest Prospectus Disclosure.

Adequate management, supervision, and maintenance of technology infrastructure and systems were identified as keys to addressing the issues of cybersecurity and anti-money laundering (AML) controls. FINRA examinations focused on firms' cybersecurity preparedness and defenses. Given that the threats of cyber-attacks are evolving, firms were advised to continue to update, implement, and assess their defenses. FINRA made clear that the threat of cyber-attacks is broad, and that members need to frame their approach to these threats in a fluid manner (i.e., different businesses and profiles require different approaches to cybersecurity). FINRA stated it would continue to review how firms approach cybersecurity in the context of governance, risk assessment, technical controls, incident response, vendor management, data loss prevention, and staff training, and that this remained an item of focus within FINRA examination teams in various regions as well as by its centralized cybersecurity examiners. FINRA highlighted the threats that outsourcing various technologies or functions poses to firms and the necessary management and supervision required of such outsourcing. Firms must continue to be aware that despite the appropriateness of some functions to be outsourced, the ultimate responsibility for compliance with federal securities laws rests with the member. This requires that members actively supervise outsourced activities, the firms to which such activities are outsourced themselves, and their employees.

The 2016 Priorities Letter also highlighted broad AML control requirements. FINRA specifically emphasized monitoring suspicious activity. Moreover, FINRA advised that members should routinely test their AML systems, and these systems should be designed to detect and report potentially suspicious activity, especially with respect to high risk accounts and activity. FINRA suggested that members should monitor customer activity over a period of time in order to identify patterns, and that members should understand the business purpose of higher risk transactions in order to meet their AML obligations. Microcap securities enjoyed sustained attention from FINRA, as it reminded member firms to conduct due diligence on deposits of large microcap securities to ensure compliance with the registration provisions of the Securities Act of 1933, as amended. With respect to customer trading in microcap securities (penny stocks), FINRA also highlighted the need for a member firm's AML team to identify and adequately assess red flags. True to its focus in its 2016 Priorities Letter at the beginning of the year, FINRA continually emphasized AML issues in its examinations throughout the year and brought many message-sending cases, as discussed below. For further information on AML compliance, see Implementing an Effective Broker-Dealer Anti-Money Laundering Compliance Program. For a form of agreement to be used in AML due diligence, see Anti-Money Laundering Reliance Agreement.

Lastly, the 2016 Priorities Letter underscored FINRA's continued focus on the obligations and duties that both member firms and registered representatives have pursuant to FINRA Rules 3270 and 3280. FINRA noted that one of its most common examination findings is that member firms have not adequately assessed registered representatives' written notifications of proposed outside business activities. The 2016 Priorities Letter made clear that without adequate assessment of a registered representative's written notification of proposed outside business activities, a member firm cannot competently determine whether or not such activities should be treated as a private securities transaction, and thus whether or not such activity is appropriate and should be permitted

by the member firm. FINRA emphasized that it will continue to focus on this area during examinations to make sure that failures to adhere to the requirements of FINRA Rules 3270 and 3280 do not cause customers undue harm. For further information on FINRA examinations, see Handling a FINRA Cycle Examination Checklist.

**Notable Events**

A few of the more notable events of the year included:

- Implementation of the FINRA Funding Portal Rules with respect to equity crowdfunding
- Approval by the Securities and Exchange Commission (SEC) of FINRA's rule set for Capital Acquisition Broker (CAB) Rules
- Continued, if not increased, focus on AML programs and compliance from both an examination and enforcement perspective

See FINRA Regulatory Notice No. 16-06 (FINRA Funding Portal Notice) and 16-07 (both Jan. 2016), available at http://www.finra.org/sites/default/files/Regulatory-Notice-16-06.pdf and http://www.finra.org/sites/default/files/Regulatory-Notice-16-07.pdf, respectively; Exchange Act Release No. 76,970, 81 Fed. Reg. 4931 (Jan. 28, 2016) (Notice of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, File No. SR-FINRA-2015-040); and FINRA Regulatory Notice No. 16-37 (Oct. 2016), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-16-37.pdf.

***Funding Portal Rules***

Pursuant to Title III of the Jumpstart Our Business Startups Act (JOBS Act) and the subsequent SEC adoption of Regulation Crowdfunding, the SEC approved the FINRA proposed Funding Portal Rules (Crowdfunding Rules), effective as of January 29, 2016. See Crowdfunding, SEC Final Rule, Release Nos. 33-9974, 34-76324 (Oct. 30, 2015), available at https://www.sec.gov/rules/final/2015/33-9974.pdf and FINRA Funding Portal Notice. Crowdfunding is generally when a small business raises capital through the Internet from numerous investors making relatively small investments. Crowdfunding significantly increases the ability of the general public to invest in the equity of start-up companies and makes it easier for these companies to raise capital. The Crowdfunding Rules promulgated by FINRA have been streamlined to provide a framework for entities to register for FINRA membership and operate crowdfunding intermediaries (Funding Portals) so that they may engage in equity crowdfunding on behalf of issuers. While everyone will be able to participate in crowdfunding, there are SEC limitations in place as to how much an issuer can raise—$1 million in a 12-month period—and how much an individual can invest, which is based upon the net worth of the individual. As of January 2017, only 21 entities had been approved for membership as Funding Portals. See FINRA, Funding Portals We Regulate, finra.org (last updated Jan. 10, 2017), at http://www.finra.org/about/funding-portals-we-regulate. For further information on the Crowdfunding Rules and Funding Portals, see An Overview of the SEC's Crowdfunding Regulations, Crowdfunding Intermediaries, and Market Trends: Crowdfunding.

***CAB Rules***

After years of industry pleas, FINRA released another form of limited broker registration rules for Capital Acquisition Brokers, defined as broker-dealers that engage in limited activities, primarily focused on capital raising, mergers and acquisitions, corporate financings, and other related advisory services. See FINRA, Capital Acquisition Broker Rules, finra.org. http://www.finra.org/sites/default/files/notice_other_file_ref/CAB-Rules_RegulatoryNotice-16-37.pdf. The genesis of the CAB Rules was the culmination of, among other things, the ABA Private Placement Broker Task Force Report, the continual and annual recommendations of the reports from the SEC Small Business Forum, the SEC no-action letter relating to M&A brokers, and the FINRA limited corporate financing broker rules that were proposed in February 2014. See American Bar Association, Report and Recommendations of the Task Force on Private Placement of Broker-Dealers (June 20, 2005); M&A Brokers, SEC No-Action, Exemptive, and Interpretive Letter, (Jan. 31, 2014), available at https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf; and FINRA, Limited Corporate Financing Brokers, Regulatory Notice No. 14-09 (Feb. 2014), http://www.finra.org/sites/default/files/NoticeDocument/p449586.pdf. See also "FINRA CAB Rules—Broker-Dealer "Lite" Rules" in An Overview of Private Offerings — The Use of Intermediaries in Private Placements.

Despite the demand for and apparent usefulness of a limited rule set for a limited class of brokers, the market has generally reacted with hesitation to planned adoption of the CAB Rules. It remains to be seen if, in the spring of 2017 when the CAB Rules become effective, many entities will find much use for this long awaited limited rule set. Chief among the shortcomings that the industry has identified are:

- Prohibition of selling private placements to any party not meeting the definition of institutional investors, which includes qualified purchasers in the definition but not the more expansive category of accredited investors
- Exclusion of secondary transactions in the capital-raising aspect of the CAB definitions

- Prohibition of an associated person of a CAB from engaging in outside securities transactions

These obstacles are especially pronounced in the private fund industry where the failure to loosen the definition of qualified purchaser will preclude CABs from marketing interests in Section 3(c)(1) funds (private funds whose investors must meet the higher standard of accredited investor), engaging in secondary transactions, and allowing personnel to work in both the CAB and the fund.

***AML Compliance***

As stated above, true to its stated priorities, FINRA continued to increase its focus on the AML implications and challenges of high-risk business activities including micro-cap trading, thinly traded securities, low market value stocks, trading omnibus accounts, and direct market access issues. Throughout 2016, FINRA fined multiple firms for systemic compliance failures. See, e.g., Credit Suisse Securities (USA) LLC. FINRA Letter of Acceptance, Waiver and Consent No. 2013038726101 (Dec. 5 2016), available at https://www.finra.org/sites/default/files/CreditSuisse_AWC_120516.pdf (Credit Suisse Letter). FINRA continues to stress the importance of AML programs and procedures that are able to accurately detect red flags that indicate suspicious activity. FINRA also continues to respond to the SEC's emphasis on the "rigorous execution of Bank Secrecy Act and AML obligations." See SEC Director of Enforcement Andrew Ceresney's Remarks at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference (Feb. 25, 2015), available at https://www.sec.gov/news/speech/022515-spchc.html. FINRA, along with the SEC Division of Enforcement, has emphasized that members should approach their AML obligations firm-wide, actively enable and provide AML Compliance Officers with appropriate oversight responsibility, and seek generally to promote a culture of compliance.

**Disciplinary Action Focus**

Over the course of 2016 there has been a significant increase in the amount of disciplinary actions instituted by FINRA against member firms. While members caught FINRA's attention for various reasons, the main transgressions centered on:

- AML violations
- Actions surrounding the sale of variable annuities
- Rule violations with respect to the participation in private securities transactions

***AML Violations***

In keeping with FINRA's 2016 Priorities Letter, a large set of the disciplinary action focus for the year was on various violations of FINRA Rule 3310 regarding AML compliance programs. Numerous members were fined for systemic compliance failures with respect to their AML programs and obligations pursuant to FINRA Rule 3310. Members were fined for failing to detect red flags indicating suspicious activity, failure to establish and maintain firm-wide AML programs, and failure to appoint AML compliance officers for those programs with appropriate oversight responsibility. See, e.g., Credit Suisse Letter; and LEK Securities Corporation and Samuel Frederik LEK FINRA Disciplinary Proceeding No. 2009020941801 (Dec. 30, 2014), available at https://www.finra.org/sites/default/files/OHO_Web_Decision-ProceedingNo.2009020941801.pdf.

For example, the $17 million fine against one particular member firm, Raymond James Associates, Inc., in May 2016 is instructive. See Disciplinary and Other FINRA Actions Reported for May 2016, available at http://www.finra.org/sites/default/files/publication_file/May_2016_Disciplinary_Actions.pdf. This firm experienced growth from 2006 until 2014 and failed to adequately provide and dedicate resources to its AML compliance programs to account for its business growth. Specifically, it did not maintain procedures that accurately detected and managed red flags suggestive of suspicious activity. FINRA emphasized the need for a holistic, firm-wide AML program, not the bifurcated, patch-work set of procedures and systems that the firm implemented over the eight-year period. FINRA deemed coordination between AML systems and departments within a member firm as essential in order to monitor and detect red flags.

***Variable Annuities***

FINRA also spent 2016 focusing on the obligations of members under FINRA Rule 2330 relating to the marketing, approval, and supervision of variable annuities. FINRA fined multiple firms for unsuitable sales of variable annuities with potentially incompatible, complex, and expensive long-term minimum-income and withdrawal riders. See, e.g., Voya Financial Advisors, Inc. FINRA Letter of Acceptance, Waiver and Consent No. 2014039172901 (Nov. 2, 2016), available at http://www.finra.org/sites/default/files/Voya_AWC_110216.pdf; FTB Advisors, Inc. FINRA Letter of Acceptance, Waiver and Consent No. 2015043292101 (Nov. 2, 2016), available at http://www.finra.org/sites/default/files/FTB_AWC_110216.pdf; and Cetera Advisor Networks LLC et. al FINRA Letter of Acceptance, Waiver and Consent No. 2015045234401 (Nov. 2, 2016), available at http://www.finra.org/sites/default/files/

Cetera_AWC_110216.pdf (Cetera Letter). In what was clearly intended as a message-sending case, FINRA fined one member firm $20 million for supervisory failures that allowed for the widespread approval of variable annuity replacement applications that contained negligent misrepresentations and omissions of material fact. See Metlife Securities, Inc. FINRA Acceptance, Waiver and Consent No. 2014040870001 (May 3, 2016) (noting that while misrepresentations and omissions of material fact were rampant in over three quarters of the tens of thousands of replacement variable annuity applications, the member firms supervisory structure approved 99.79% of all such variable annuity replacement applications), available at http://www.finra.org/sites/default/files/MSI_AWC_050316.pdf.

In fining these member firms, FINRA made clear that the inappropriate sales were the direct result of the failure to:

- Establish, maintain, and enforce a supervisory system reasonably designed to identify red flags in the sale of multi-share class variable annuities
- Implement systems that were sufficient to review variable annuity share classes or to identify potential patterns of unsuitable sales to customers
- Provide its registered representatives and principals with adequate training and guidance on suitability considerations for multi-share variable annuities

These systemic failures were direct violations of the members' obligations under FINRA Rule 2330 as well as FINRA Rule 3110. See Cetera Letter.

***Private Securities Transactions***

FINRA also instituted various disciplinary actions against firms and their registered representatives for violations of FINRA Rule 3270 (related to outside business participation) and 3280. FINRA Rule 3280 requires associated persons to "provide written notice to the member" and receive written approval prior to participating in private securities transactions. FINRA has stated that the purpose of FINRA Rule 3280 is both to protect investors as well as to encourage members to actively supervise the transactions that their registered representatives undertake outside the firm. Further, participation in a private securities transaction continues to be broadly interpreted. In one particular enforcement case against a registered representative of a FINRA member, the registered representative was deemed to have participated in a private securities transaction by referring a customer of an affiliated firm to invest $100,000 in a promissory note offered by a petroleum company. The registered representative received compensation from the petroleum company for the referral. The registered representative failed to provide prior written notice to his member employer of his participation in the securities transaction and therefore failed to receive approval for his involvement in the private securities transaction. See Brian Lewis Pittman, FINRA Letter of Acceptance, Waiver and Consent No. 2201604840901 (Feb. 1, 2016), available at http://disciplinaryactions.finra.org/Search/ViewDocument/64879.

FINRA has not just focused on registered representatives; FINRA has continued to pursue enforcement actions against member firms for their failures to meet their obligations under FINRA Rule 3270 and 3280. Among these actions, FINRA pursued a member firm for failure to adequately institute due diligence and review systems that sufficiently determined if any outside business activities of registered representatives constituted private securities transactions subject to FINRA Rule 3280. See Purshe Kaplan Sterling Investments, Inc. FINRA Letter of Acceptance, Waiver and Consent No. 2013035788401 (Apr. 4, 2016), available at http://disciplinaryactions.finra.org/Search/ViewDocument/66015.

**Other Key Trends**

Over the course of 2016, three general trends have emerged which are expected to continue as priorities into 2017:

- Increased enforcement actions and fines
- Focus on AML deficiencies
- Attention to the obligations of members with respect to cybersecurity and its inherent vulnerabilities

Continuing a trend seen in prior years, FINRA has increased its focus on enforcement actions and the amount of fines assessed against its members. In 2015 FINRA imposed fines totaling $94 million against its members. In 2016, this number rose considerably to a record high of $176 million, representing a significant increase over the prior year's total fines. Furthermore, FINRA is increasing the dollar value of many of the fines against its members. 2016 saw an increase in the amount of fines imposed against members for amounts in excess of $1 million, with 34 such fines totaling over $137 million assessed against members. The trend towards increased fines (both in value and number) was particularly apparent with respect to FINRA's examination and enforcement with respect to AML compliance. FINRA reported 32 AML cases in 2016 resulting in $45.9 million in fines. While the number of cases decreased, the total

amount of fines increased. See FINRA, Monthly and Quarterly Disciplinary Actions, finra.org. The previously referenced $17 million fine against Raymond James for various AML deficiencies is indicative of this trend.

A second trend that has emerged is an emphasis on the need for member firms to take a robust approach to their AML obligations. FINRA has initiated enforcement actions against firms who have not taken a comprehensive, far-reaching approach to their AML obligations. In the 2016 Priorities Letter, FINRA specifically emphasized the importance of monitoring suspicious activity. Further, FINRA has intimated a strong preference for technology-driven approaches to the detection and reporting of suspicious activity; emphasizing that members should

- Monitor, in real-time, customer activity
- Identify patterns
- Continue to evaluate, test, and calibrate the systems that firms use to detect and assess various types of risk

Further, in a continued nod to the increasing role of technology in the business, operations, and customer interactions of its members, FINRA continues to engage members with respect to cybersecurity with a particular emphasis on preserving and protecting customer data. Specifically, FINRA has fined multiple firms for failing to preserve customer records in a way that protected that data from cyber-attacks. See, e.g., Wells Fargo Securities LLC and Wells Fargo Prime Services LLC FINRA Letter of Acceptance, Waiver and Consent No. 2016049784101 (Dec. 14, 2016), available at http://www.finra.org/sites/default/files/WellsFargo_AWC_122116.pdf; RBC Capital Markets LLC et al. FINRA Letter of Acceptance, Waiver and Consent No. 2016049821601 (Dec. 21, 2016), available at http://disciplinaryactions.finra.org/Search/ViewDocument/67058; and RBS Securities, Inc. FINRA Letter of Acceptance, Waiver and Consent No. 2016048685301 (Dec. 21, 2016), available at http://disciplinaryactions.finra.org/Search/ViewDocument/67063. For a discussion of recordkeeping requirements in general, see Broker-Dealer Recordkeeping Requirements.

FINRA's approach to cybersecurity continues to evolve and it has outlined four general areas of focus: (1) the institution of methods to prevent data loss; (2) controls to monitor and protect customer data; (3) the control and protection of customer data in the context of vendor relationships; and (4) re-emphasis on WORM (write once, read many) compliant storage consistent with the recordkeeping rules. WORM is a type of data storage that allows information to be input once on a disk and does not allow the data to be deleted on the drive. FINRA has also emphasized that the issue of cybersecurity will continue to be on its radar (and has since confirmed such with its inclusion in the 2017 Priorities Letter).

**Market Outlook**

On January 4, 2017, FINRA published its 2017 Priorities Letter signaling the issues it intends to focus on throughout the coming year. In many ways the 2017 Priorities Letter is a continuation of the priorities that FINRA set out at the beginning of 2016 with one notable exception. The 2017 Priorities Letter suggests that FINRA will continue to focus primarily on issues highlighted in the 2016 Priorities Letter, including:

- The increasing role of technology in the securities industry and the effect that this has on member obligations and compliance with FINRA Rules
- Sales practices, with a particular emphasis on senior investors
- Outside business activities and private securities transactions

However, in the 2017 Priorities Letter, FINRA introduced a focus on high risk and recidivist brokers. FINRA notes that it will pay particular attention to this issue over the coming year and that it will bolster its existing approach to high risk and recidivist brokers in three ways:

- Rigorously reviewing broker interactions with customers via its recently established and dedicated examination unit
- Reviewing member firms' supervisory procedures for hiring and retaining statutorily disqualified and recidivist brokers
- Continuing to evaluate firms' branch office inspection programs and supervisory systems for branch and non-branch office systems

Much as it did in the 2016 Priorities Letter, FINRA continues to highlight as a regulatory and examination priority the need for members to adapt to the challenges posed by technology as well as effectively incorporate evolving technological capabilities in the context of their FINRA membership obligations. The 2017 Priorities Letter outlines various operational risks impacted by technology including cybersecurity, supervisory controls testing, customer protection, and AML and suspicious activity monitoring. FINRA notes that cybersecurity threats remain one of the most significant that firms face. See FINRA, Report on Cybersecurity Practices (Feb.

2015), available at http://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf. Firms must continue to recognize that there is no one size fits all approach to cybersecurity and that the unique challenges, organizational structures, and customer profiles (as well as many other factors) should dictate the makeup of any tailored cybersecurity program. FINRA notes specifically that it has seen repeated shortcomings in both cybersecurity controls at branch offices and member obligations to preserve records in WORM compliant format. FINRA has made a point to drive home the reality that WORM compliant storage and recordkeeping lays at the heart of FINRA's ability to effectively serve its regulatory and investor protection aims. Best execution practices and obligations must also continue to evolve and FINRA highlights that members must adapt to the continuing automation of the markets when receiving, handling, and routing customer orders. See FINRA, Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets, Regulatory Notice No. 15-46 (Nov. 2015), available at https://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf. With respect to AML and suspicious activity monitoring, FINRA reiterates that automated trading and money movement surveillance patterns must be designed to capture problematic behavior such as suspicious microcap trading activity.

The 2017 Priorities Letter also makes clear that FINRA will increase its focus on sales practices and specifically on the protection of senior investors. Echoing 2016 priorities, the 2017 Priorities Letter suggests that FINRA will increase its existing focus on microcap stocks, customer recommendations, and short term trading of long-term products, but with a view to how these issues affect senior investors. Continuing FINRA's theme of emphasizing the need for member firms to tailor their actions and approaches, FINRA makes clear that it will assess firms' controls to protect investors from fraud with an eye on the profile and risk tolerances of those investors. Specifically, FINRA stresses the need to make sure that products that are sold to seniors are suitable given the profile and risk tolerances generally associated with this group. Further, supervisory mechanisms should detect and prevent problematic sales. For further information on suitability, see FINRA Rule 2111 and FINRA Rule 2111 and Broker-Dealer Suitability Obligations.

Finally, the 2017 Priority Letter reflects continued interest by FINRA in the application of FINRA Rule 3280 and private securities transactions generally by registered representatives. FINRA will continue to evaluate firm procedures for reviewing registered person written notifications of proposed outside business activities and specifically evaluate how firms are determining if and how proposed outside business activities compromise a registered person's obligations within the firm.

It will also be interesting to see what changes, enhancements, and developments the new FINRA leadership will bring to the organization. Mr. Cook has been on a listening tour, meeting and speaking with member firms since taking office, and he continues to put forward new ideas, including potentially publishing exam results to create more transparency for member firms with respect to the areas in which FINRA focuses most. Mr. Cook has also suggested making more compliance tools and resources available to FINRA members. This proposed initiative should have positive effects for smaller firms that have limited resources and for which compliance obligations can pose operational and financial strain. Although Mr. Cook has yet to opine publicly, perhaps he will reevaluate the effectiveness of the CAB Rules and membership requirements to examine whether such registration should be expanded to accredited investors for true private placement brokers and finders for whom the latest release of rules remain too burdensome for them to comply. It will also be important to see who will be named as the new enforcement chief and whether or not there will be a change in focus on the types of cases that FINRA brings in comparison to the last six years under the former chief.