Regulation without Rules:
An Unfortunate Washington Tradition
A Discussion in the Context of the SEC’s SCSD Initiative

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  - Faculty prepared course materials.
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  - Course Materials (Textbook, Instructional Aides, etc.)
  - Lectures
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- 33 & 34 Act
- IA Act 1940
- IC Act of 1940
- Crypto Currencies
- Digital Assets
- CTA Regulation
- CPO Regulation
- AIFMD
- UCITS
- MiFID
- EMIR
- DOL / ERISA
- AML / KYC
- Trading & Markets
- Insider Trading
- Market Manipulation
- Systemic Risk
- Political Contributions
- Whistleblower
- FCPA
- Anti-Bribery
- Sanctions
- Anti Trust
- HSR

**Compliance**
- Process
- Surveillance
- Supervision
- Analytics
- Case Management
- Risk Assessments
- Forensic Testing
- Reviews
- Remediation
- Reporting
- Marketing
- Disclosure Practices
- Client/Customer/IR
- Fiduciary Duty
- AML
- Social Media
- Code of Ethics
- Trading & Markets
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- Operational Process
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- Fund Governance
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- BEPS
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SEC Examiners NOW interview your personnel to find deficiencies in their core competencies and skill sets. RCA’s Examination Interview System (REIS) simulates the interview process to identify and resolve knowledge gaps by assigning accredited, up-to-date, relevant, targeted, talent development.

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<th>Design &amp; Deploy</th>
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<td>Configures mock exam interviews by subject or topic for a division, department, group or particular employee.</td>
<td>The cloud-based system simulates the interview process with a database of over 15,000 queries spanning 4500 topics using a “self-paced” environment.</td>
<td>Automatically identifies, assesses and evaluates each employee’s gaps in core competencies skill sets and knowledge.</td>
<td>Automatically delivers enterprise-class, customizable TRACKING and REPORTING via an enterprise-class data base.</td>
<td>Automatically assigns accredited, up-to-date, relevant, targeted, talent development.</td>
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Robert Van Grover, JD, Partner, Seward & Kissel LLP

“I attend and speak at RCA CCE® (Continuing Compliance Education)® programs because there are a serious number of our clients there and a serious number of Seward and Kissel alumni.”
Speaker Introductions

Paul Atkins
Patomak Global Partners
CEO and founder
Former SEC Commissioner

David Bellaire
Executive Vice President &
General Counsel,
Financial Services Institute (FSI)

Brian Rubin
Washington office leader of
Eversheds Sutherland (US)
Litigation group and head of the
firm’s SEC, FINRA, and state
securities enforcement practice

Former NASD (now FINRA)
Deputy Chief Counsel of
Enforcement and Senior
Enforcement Counsel at the SEC

Represented firms pre-SCSD
Initiative, involved in the SCSDI,
and post-SCSDI
Roadmap for Today’s Discussion

01. History of Rule 12b-1 fees and disclosure

02. The Share Class Selection Disclosure (SCSD) Initiative and firms’ experiences

03. Regulatory and due process concerns

04. Ongoing SEC Enforcement Division efforts

05. Washington landscape: broader trend at agencies and congressional focus
What is the SCSD Initiative?

The Initiative was launched by the SEC’s Enforcement Division in February 2018

Advisory firms were given four months to voluntarily identify and report fee disclosure and share class recommendations where the SEC may have deemed their disclosures inadequate around fees, known as 12b-1 fees, that investors pay, and advisers’ recommendations of higher cost share classes when lower cost shares of the same investments were available

March 2019:
The SEC announced a settlement with 79 investment advisers collecting more than $125 million

30 September 2019:
The SEC announced a second settlement with 16 additional self-reporting firms and one non-reporting firm, collecting an additional roughly $10 million
Background of Firms in SCSDI

- Fully disclosed introducing broker-dealers utilizing major clearing firms
- Dual registered with the SEC as an investment advisor firm or affiliated with an SEC registered advisory firm
- Independent contractor advisors providing financial planning, asset management, and trade execution
Background of Firms in SCSDI

Main Street - middle-class to mass-affluent clientele planning for retirement, education of their children, and other financial goals

Firms’ pricing model was developed to provide services at a competitive cost while supporting asset gathering financial advisors.
What are Rule 12b-1 Fees?

Mutual funds are permitted to charge “Rule 12b-1” fees to cover the marketing and sales costs involved with selling the fund, referred to as the fund’s distribution costs.

These fees are deducted from a mutual fund to compensate intermediaries for sales efforts and certain related services provided to the fund’s investors.
Background on 12b-1 Fees

In the 1970s:

- Mutual funds experienced a prolonged period of net redemptions
- Money market funds and no-load fund groups emerged

Funds asserted that using fund assets to fuel sales could benefit fund shareholders by increasing economies of scale and reducing fund expense ratios

- 1976 Armstrong Associates No-Action Letter
- Mutual Liquid Assets No-Action Letter
- Banner Ready Resources registration statement

1980: Commission adopts Rule 12b-1, permitting funds to use assets to pay broker-dealers for distribution activities
The rule was always controversial

- 1980 rulemaking process took four years, included public hearings over multiple days, and multiple issuances requesting public comment
- Shortly after the rule was adopted, staff did not like how the rule was being used, how high the fees were, etc.
- Over the years, SEC has tried to address various aspects of the fees in many ways, beginning in 1988 with proposed amendments
Recent Considerations of 12b-1

In the 2000s, the SEC undertook multiple examinations of the 12b-1 regime

2004 Amendment and request for comment

2007 Rule 12b-1 Roundtable

Nearly 1,500 comment letters received

2009 Final Rule on Mutual Fund Governance

Commission rejected comments that it should consider additional disclosures regarding 12b-1 fees

2010 Proposed Rule
2010 Proposed Rule

Proposed 12b-1 rule put out for notice and comment in accordance with the *Administrative Procedure Act*

Provided the Commission ample opportunity to address issues with 12b-1 fees

Despite the Commissioners voting unanimously to issue the proposed rule, a final rule never came to fruition due to industry concerns

Rule 12b-1’s administrative history set reasonable expectations for the regulated community that changes to Rule 12b-1 would be addressed via rulemaking
Disclosure Considerations- Form ADV

Form ADV is the uniform form used by investment advisers to register with the SEC and state securities authorities.

At the same time the Commission adopted the 2010 Rule 12b-1 proposal, it adopted amendments to Part 2 of Form ADV to require advisers to provide clients with narrative brochures containing plain English descriptions of the advisers’ businesses, services, and conflicts of interest.

- Part 1: information about adviser's business
- Part 2A: brochure disclosure items
- Part 2B: brochure supplements

2017 Amendments to Part 1

SEC could’ve amended Form ADV Part 2 to address share class selection disclosures
SCSD Initiative Premise

Charge against advisers: violation of Sections 206(2) and 207 of the Investment Advisers Act of 1940

206(2): prohibits an investment adviser, directly or indirectly, from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," and imposes a fiduciary duty on IAs to act in client’s best interest including full disclosure of material facts.

207: makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein."
SCSD Initiative Announced in 2018

The Enforcement Division announced the Initiative on February 12, 2018

It’s professed legal support included:

- Settled enforcement actions - mostly from the second half of 2017, one case from 2015, and one from 2013
- The “relevant period” for the violation and disgorgement was January 1, 2014 through the date misconduct stopped
- As will be discussed, enforcement actions settled on a “neither admit nor deny basis” do not establish facts or law
- The settlement also cited a 2016 OCIE (staff) risk alert
“We have brought enforcement actions in such cases. See, e.g., In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser’s disclosure that it may receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest)”

This release came three months after the SCSD settlements
Lack of Due Process

Neither settled enforcement actions nor staff guidance (2016 OCIE risk alert) establish enforceable law

The Administrative Procedure Act (1946) governs the regulatory rulemaking process

- 2007 OMB Memo:
  “Concern about whether agencies are properly observing the notice-and-comment requirements of the APA has received significant attention. The courts, Congress, and other authorities have emphasized that rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they initially are labeled.”

2012 Supreme Court cases

- Christopher v. SmithKline Beecham Corp.
- FCC v. Fox Television Stations, Inc.
Courts Have Rejected Using Settled Actions

Lipsky v. Commonwealth United Corp. (2d Cir. 1976)

“both consent decrees and pleas of nolo contendere are not true adjudications of the underlying issues”
Weaknesses of SEC’s Approach?

The SEC did not engage in a notice-and-comment rulemaking on this change of policy, as required by the APA

“Rules” are defined broadly under the APA and CRA: “the whole or a part of an agency statement of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”

Courts have upheld the principle that due process requires fair notice of agency interpretations

• Christopher v. SmithKline Beecham Corp.
• FCC v. Fox Television Stations, Inc.

The particular disclosure requirements raised by SEC staff were not previously set forth in regulation; based on public documents to-date after 79 settlements, it is still unclear as to what wording would be satisfactory

A Section 21(a) Report would have been a better approach
SEC Leadership Statements

Chairman Clayton Statement Regarding SEC Staff Views (September 2018)

“The Commission’s longstanding position is that all staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties.”

Chairman Clayton Statement on TM Staff Guidance (June 2019)

“As the TM Staff Guidance states, it is a staff document that reflects the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission, and the Commission has neither approved nor disapproved the TM Staff Guidance.”
The SEC Leadership Statements include the following remarks:

**Chairman Clayton Remarks at the Economic Club of New York (July 2017)**

“It is incumbent on the Commission to *write rules*[emphasis added] so that those subject to them can ascertain how to comply and – now more than ever – how to demonstrate that compliance.”

**Commissioner Peirce SECret Garden: Remarks at SEC Speaks (April 2018)**

“due to a lack of transparency and accountability,” staff guidance may have turned into a body of secret law” that “as a practical matter, binds market participants like law does but is immune from judicial – and even Commission – review.”

**Commissioner Peirce Reasonableness Pants (May 2019)**

“…when we see a widespread problem that is affecting investors, we—the Commission—should issue our own guidance or promulgate a rule and put an end to the problem before it hurts investors further. Doing this is better for investors than waiting many years to bring a large enforcement initiative. It is also respectful of the due process of the firms we regulate by giving them notice of what the SEC expects from them…Sadly, that is not what happened here.”
## Concerns with the SEC’s Approach

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<th>No rules and no prior regulatory guidance</th>
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<td>Industry-wide practice</td>
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<td>Not covered during prior exams</td>
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<td>Ignored implications of DOL rule change in 2011</td>
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<td>Use of the word “may”</td>
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<td>“Caused” or “selected” shares v.</td>
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<td>• client discretion</td>
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<td>• shares transferred in</td>
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<td>• third party advisor selected shares</td>
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<tr>
<td>FAQ 14 re: fee offsets (and possible additional disclosure requirements)</td>
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<td>Language in orders do not provide clarity going forward</td>
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Practical Implications

Assumptions about what is “available”

Ignore prospectus limitations

Disclosures that discussed share classes weren’t enough

Self-reporting under the SCSDI didn’t buy peace—further investigations into revenue sharing

Demands for tolling agreement and evisceration of statute of limitations
Collateral Consequences

Statutory disqualification

Section 9

Ineligible issuers/WKSI waiver

Solicitor rule
FINRA’s 529 Self-Reporting Initiative

What it’s about

• January 2019: encouraged broker-dealers to review supervisory systems and procedures governing 529 plan share-class recommendations and self-report violations

Compare and contrast with SCSDI
Recent Actions

30 September 2019 second group of settlements

In addition, to date, there have been two subsequent actions, expanding beyond 12b-1 fees into revenue sharing and other arrangements:

- SEC v. Commonwealth Financial Network (1 Aug 2019)
- SEC v. Cetera Advisors LLC (29 Aug 2019)

Why did the SEC file the complaints?

What are the new issues?
What We May See in the Future

✔ Other revenue sharing issues
✔ More SEC complaints
✔ Lowest cost share class across the board
✔ Shareholder service fees
✔ Bank deposit sweep programs
✔ More self-reporting initiatives
Impact to Firms

Reputational impact - many well meaning firms who had disclosed the conflict of interest had to notify clients of the settlement

• Lack of guidance from the SEC on mailings

Regulatory clarity - firms have said they still do not know what the proper disclosure looks like

Breakdown of trust in and respect for regulatory process and rule of law
Washington Landscape

Using guidance, enforcement actions, speeches, and other informal means to essentially create new regulation

- Part of a broader trend in Washington that is receiving increased attention and scrutiny
- Agency and Administration statements
- Congressional focus
Agency Clarifications

Jay Clayton Statement Regarding Staff Views (September 2018)

Hester Peirce SECrete Garden Speech (April 2018)

Prudential Banking Regulators Interagency Statement Clarifying the Role of Supervisory Guidance (September 2018):

“Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance.”

Department of Justice Memo (January 2018), the Associate Attorney General emphasized:

“Guidance documents cannot create binding requirements that do not already exist by statute or regulation” and “Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law…”
Congressional Oversight Focus

The Constitution vests Federal legislative power in Congress; agencies may prescribe rules only insofar as they have statutory authority delegated by Congress.

Congressional Review Act (1996), Congress has an expedited process to disapprove agency rules. “Rules” are defined broadly under the CRA.

In recent years, Congress has used the CRA to overturn not only rules, but also a CFPB “guidance” document.

In April, Acting OMB Director Russell Vought issued a memo reinforcing agencies’ obligations under the CRA, emphasizing the CRA’s broad scope to include independent agencies like the SEC:

- “The CRA applies to all Federal agencies, including the historically independent agencies.”
- “The CRA applies to more than just notice-and-comment rules; it also encompasses a wide range of other regulatory actions, including, inter alia, guidance documents, general statements of policy, and interpretive rules.”
There appears to be a number of situations where the banking agencies have enacted guidance or other policy statements that are being enforced as rules and therefore do not comply with notice-and-comment rulemaking processes and do not comply with the Congressional Review Act (CRA).

Chairman Mike Crapo (R-ID)
Outlook

Continued congressional scrutiny

- Senator Tillis letter to GAO requesting evaluation of whether Federal Reserve guidance letters constitute a rule under the CRA (Feb 2019)

Ongoing and continued litigation

2020 election
Additional Resources

To learn more…

SEC:
- Share Class Selection Disclosure Initiative
- SCSD FAQs
- SCSD Settlement

FSI:
- Regulating without Rules
Paul Atkins, JD, CEO, Patomak Global Partners, SEC Commissioner*

Paul Atkins is chief executive of Patomak Global Partners, LLC, a financial services consultancy that provides industry and regulatory expertise. He founded the company in 2009.

At Patomak, Mr. Atkins leads client work for financial services firms regarding an array of issues, including regulatory requirements, investigating and improving the effectiveness of compliance systems, and designing and implementing compliance policies and procedures. His work spans Dodd-Frank compliance, domestic regulatory advocacy, European regulatory advice, and corporate governance issues. Mr. Atkins regularly serves as an independent compliance consultant and a court-appointed monitor in settlements involving the Department of Justice, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Financial Industry Regulatory Authority. His expert witness engagements include federal, state, and foreign litigation, as well as SEC matters.

Prior to founding Patomak, from July 2002 to August 2008, Mr. Atkins served as a Commissioner of the U.S. Securities and Exchange Commission. During his two terms, he advocated better transparency and consistency in the SEC’s decision-making and enforcement activities and smarter regulation that considers costs and benefits. He represented the SEC at various meetings of the US–EU Transatlantic Economic Council, the President’s Working Group on Financial Markets, the World Economic Forum, and the Transatlantic Business Dialogue.

From 2009 to 2010, he was appointed by Congress to serve as a member of the Congressional Oversight Panel for the Troubled Asset Relief Program (TARP). He started his public service work in 1990, serving on the staffs of SEC chairmen Richard C. Breeden and Arthur Levitt as chief of staff and counsellor, respectively, until 1994.

Mr. Atkins received his A.B., summa cum laude, Phi Beta Kappa, from Wofford College and his J.D. from Vanderbilt University School of Law, where he was Senior Student Writing Editor of the Vanderbilt Law Review. He is a frequent speaker and television commentator on regulatory and capital markets issues. His writings have appeared in The Wall Street Journal, Financial Times, Forbes, USA Today, and Politico, as well as scholarly journals such as the Harvard Business Law Review and the Fordham Journal of Corporate & Financial Law.

*Former
Brian Rubin, JD, Partner, Eversheds-Sutherland

Brian Rubin is the Washington office leader of the Eversheds Sutherland (US) Litigation group and the head of the firm’s Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA) and state securities enforcement practice.

With more than 20 years of experience in federal securities law, first prosecuting and now defending, Brian represents clients being examined, investigated and prosecuted by the SEC, FINRA, other self-regulatory organizations and states.

As former NASD (now FINRA) Deputy Chief Counsel of Enforcement and Senior Enforcement Counsel at the SEC, he brings an insider’s perspective to defending broker-dealers, investment advisers, investment companies, public companies and individuals in examinations, investigations, enforcement proceedings, litigation, arbitrations and in counseling.
David Bellaire, JD, Executive VP & General Counsel, Financial Services Institute (FSI)

David Bellaire works to prevent unintended consequences. As the Financial Services Institute’s executive vice president & general counsel, David leads FSI’s team of lawyers and lobbyists in pursuit of a business environment that frees its member broker-dealers and financial advisors from the unintended consequences of federal and state legislation and regulation.

David has more than 25 years of broker-dealer advocacy, compliance, legal, and operations experience. Prior to joining FSI, he served as vice president of operations and general counsel at Securities Service Network, Inc. He also previously served as special investigations attorney and regional compliance manager with InterSecurities, Inc. (now known as Transamerica Financial Advisors), assistant director of compliance at Commonwealth Financial Network, Inc., and assistant to the executive director at the Institute of Certified Financial Planners (ICFP).

David earned a B.S. in business management from Providence College and a J.D. from the University of Denver, Sturm College of Law. He is admitted to practice law in the states of Massachusetts and Tennessee.
Thank you!
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