



Morgan Lewis

**ADVANCED TOPICS IN
HEDGE FUND PRACTICES
CONFERENCE**

Manager and Investor Perspectives

WEBINAR SERIES

SESSION 6 | Wednesday, May 27

Regulatory and Examination Priorities for Private Fund Advisers

DOL Audits and ERISA Hot Topics

Fintech Developments Impacting the Hedge Fund Market

www.morganlewis.com/2020hedgefundconference

REGULATORY AND EXAMINATION PRIORITIES FOR PRIVATE FUND ADVISERS

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SEC Reg. BI and Form CRS

- **Focus on recommendations and services to retail investors**
- **Retail investors**
 - Exclusion of regulated professional legal representatives
 - Status of family offices
- **Applicability to hedge fund placement agents and wholesalers**
 - Placement agents
 - Wholesalers and Reg. BI compensation limits
 - Sales to employees
- **SEC and FINRA exams**
 - Good faith efforts honeymoon with sharper focus in 2021



SEC Proposed Rulemaking



- **Accredited Investor Proposal**

- **Would add new categories of accredited investors including:**

- Persons holding a Series 7, 65, or 82 license, or other credentials issued by an accredited educational institution
 - “Knowledgeable Employees” in the case of private fund investments
 - Certain LLCs, RICs, and RBICs
 - “Family Offices” with at least \$5M AUM, and their “Family Clients”
 - “Spousal Equivalents”

- **Would add new categories of Qualified Institutional Buyers including:**

- LLCs, RBICs, and all institutional accredited investors that meet the \$100 million in securities owned and investment threshold

SEC Proposed Rulemaking



- **Advertising and Solicitation Proposals**

- **Advertising Rule**

- Redefine the term “advertisement” to include communications disseminated by any means (including electronic), as well as communications to fund investors
 - Define “testimonials”, “endorsements”, and “third-party ratings” and allow them to be included in advertisements subject to certain restrictions and disclosures
 - Expand the use of performance results and hypothetical performance in advertisements subject to certain disclosures
 - Require pre-use approval of advertisements
 - Differentiate between disclosure standards for advertisements disseminated to QPs and Knowledgeable Employees, and advertisements distributed to any other audiences

- **Solicitation Rule**

- Expand rule to cover solicitors that receive non-cash compensation
 - Expand rule to cover solicitation of private fund investors

SEC Examination Developments

- **COVID-19**
- **Requests of Gatekeepers**
 - Seeking/gathering information from a variety of places
- **Key Topics of Focus**
 - Advertising/Client Communications
 - Valuation
 - Insider Trading/MNPI
 - Allocation of Expenses
 - Business Continuity Planning
 - Custody
 - Cybersecurity



DOL AUDITS AND ERISA HOT TOPICS

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Department of Labor Audits

The Employee Benefits Security Administration (EBSA) is a division of the US Department of Labor (DOL) with civil and criminal investigatory and litigation enforcement authority over the fiduciary provisions of ERISA.

EBSA enforcement activities have been brisk over the past few years.

- In Fiscal Year 2019, EBSA recovered \$2.5 billion in direct payments to plans.
- In Fiscal Year 2018, EBSA recovered \$1.6 billion, including \$1.1 billion in enforcement actions.
- From Fiscal Year 2017 to 2018, total recoveries rose again, this time by 45%, from \$1.1 billion in 2017 to \$1.6 billion in 2018.
- From Fiscal Year 2016 to 2017, total recoveries rose 72%, from \$777.5 million in 2016 to \$1.1 billion in 2017.

There are no signs of them stopping. Not even the global pandemic (and all of the shifts it has required) appears to be slowing the enforcement efforts.

The DOL's investigatory authority is both civil and criminal, and the agency can (and does) refer findings to other agencies including the SEC, FINRA, the IRS, and the DOL.

There a number of areas of enforcement activities. We will focus on those of most potential interest to this audience.

Department of Labor Audits

PROPRIETARY FUNDS AND SERVICE PROVIDERS

- This arise when a financial services firm uses its own products and services in its employee benefit plans.
- The focus appears to be on whether the services and funds were selected and retained after an adequate fiduciary process.
- The DOL has made adverse findings and required corrective payments in a number of these investigations.
 - For example: In April 2019, the Ninth Circuit upheld a \$7.4 million judgment that was based upon a finding of alleged 406(b) self-dealing prohibited transactions due to a bank using its own recordkeeping services for the retirement plan of its employees, and in so doing collecting compensation through revenue sharing.

Department of Labor Audits

FIDUCIARY DUTIES AND PROHIBITED TRANSACTIONS

- **EBSA has been consistently focused on enforcing ERISA's core fiduciary duties and prohibited transaction rules. To that end, the DOL is always considering whether a plan has been involved in any breaches of fiduciary duty or prohibited transactions.**
- For example:
 - Whether plan assets are being used to pay non-plan expenses, such as plan sponsor expenses, which can be a prohibited transaction (including whether the use of plan assets to pay the salaries of plan sponsor employees complies with the prohibited transaction restrictions).
 - Whether there are loans using plan assets that run afoul of the prohibited transaction rules.
 - Circumstances of misrepresentation to plan.
 - For example, in February 2018, the DOL announced a \$7 million settlement involving investments in an investment fund that engaged in fraudulent loans.

Department of Labor Audits

“PLAN INVESTMENT CONFLICTS”

- **This has been identified as a national enforcement priority. The DOL has described the initiative as including:**
 - Review of fiduciary service providers and investment managers that may have conflicts of interest that lead to conflicted decision making on behalf of plans.
 - Fiduciary review of plan investments and services in order to identify and address these types of conflicts.
 - Identifying improper or undisclosed compensation of service providers
 - Ties in with the DOL’s participant level and plan level service provider disclosure requirements, and the focus on comprehensive disclosure about service provider compensation and conflicts of interest.
 - For example, the DOL will cite plan administrators failing to provide adequate 404a-5 disclosures.

Department of Labor Audits

ISSUES PRESENTED BY SPECIFIC ASSET TYPES

- **Recent inquiries in examinations of plan sponsors regarding consideration of Environmental, Social and Governance (“ESG”) factors.**
 - Obama DOL guidance suggested an appropriate role for ESG factors in ERISA fiduciary considerations. Trump DOL guidance sounded a more cautious note.
 - DOL examiners seem to confuse the use of ESG as economic factors in assessing an investment versus using ESG factors as a gate or a screen for investments.
- **Also continuing inquiries on “hard to value” assets in DOL audits.**
 - This was more a focus several years ago after a U.S. Government Accountability Office (GAO) report critical of the DOL’s efforts to regulate retirement plan investments in hedge funds and private equity funds. We then saw an uptick in DOL investigation inquiries about valuation.
 - There have been reports of at least one DOL office alleging plan fiduciaries violated ERISA by relying on unaudited financial statements and capital account balances prepared by the partners of private fund assets.

Department of Labor Audits

KEY TAKEAWAYS FROM AUDITS WE HAVE SEEN

- **If the DOL does conduct an audit, cooperation is generally recommended. The DOL has very broad subpoena/document request powers and can enforce that power by court order.**
 - It can be very difficult to challenge the agency's powers.
 - Another goal should be to move the matter to a closure both to avoid the DOL expanding its inquiry and also because the DOL can refer findings to other agencies.
 - A lawyer can be helpful in navigating the DOL's inquiry.
- **As with most ERISA-related matters, process and documentation is paramount.**
 - It is helpful to be able to show the DOL the basis for your decisionmaking, as specifically as possible.
 - Even a great process does no good if you cannot demonstrate it.

ERISA Hot Topics

Addressing the Economic Downturn

- As public markets increase in volatility, there may be additional interest from plan fiduciaries in alternative investments as other avenues to generate returns.
- Definitely not a scientific sample, but we have seen strong interest by plans in alternative investments since the start of the COVID-19 era.
- ERISA investors may have increasing concern about existing investments becoming impaired or illiquid (from hard lessons learned during the financial crisis).
- Expect additional inquiries from fiduciaries about business continuity plans, key person provisions and other questions about the ability to stay the course during the pandemic.
- Consider application of gating provisions if there are significant withdrawals (for example, due to drops in performance).
- May see increased interest in secondary transactions.



ERISA Hot Topics

Expansion of the Ability to Create Plans Covering Multiple Employers

- The SECURE Act was signed into law in December 2019 (yes, that feels like 74 years ago).
- It included a number of significant ERISA changes. Probably the most significant for the asset management industry is the creation of “pooled employer plans” or “PEPs.”
- ERISA has long allowed “multiple employer plans”, but participating employers were required to have some connection to one another.
- PEPs, however, do not require that connection and thus, may open the market to service providers to offer these types of plans to market them widely.
- PEPs also open the possibility for new asset management opportunities, potentially reaching plans where the economics would not previously had made sense.
- DOL “Request for Information” expected imminently and may offer some clue about what eventual DOL regulations will address.
- PEPs are already garnering asset management industry interest, but questions remain.

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FINTECH DEVELOPMENTS IMPACTING THE HEDGE FUND MARKET

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Financial Technology (Fintech) Landscape

Securities/Investment Management

- Asset Management Technology
- Back-Middle Office Technology
- Data / Analytics / Research
- Infrastructure & Trading Technology
- Liquidity Pools
- Online Brokers / Trading / Custodians
- Robo Advisors / Digital Advice
- Wealth Management

Digital Lending/Banking

- Alternative Lending - Consumer, SME, Real Estate
- Bank Payment Solutions
- Consumer-Oriented Financial Services
- Enterprise Banking Tech
- Peer-to-Peer Lending
- Real Estate Tech / PropTech

Blockchain/Virtual Currency

- ETFs
- Miners
- Exchanges
- Securities Ledgers
- Sidechains
- Security Token Offerings
- Virtual Currency Wallets

Sources

Financial Technology Partners; CB Insights; Morgan Lewis



Payments

- Card-Based Payment Products
- Carrier Billing and NFC Infrastructure (Telecom)
- E-Rewards / Loyalty
- Financial Institutions
- International Money Transfer
- Online / Mobile Payments
- Merchant Services
- Networks / Associations
- Transactions Security
- Wallets

Insurtech

- Core Software (e.g., Claims Management)
- Data and Analytics
- Sales and Distribution

Financial Management Solutions

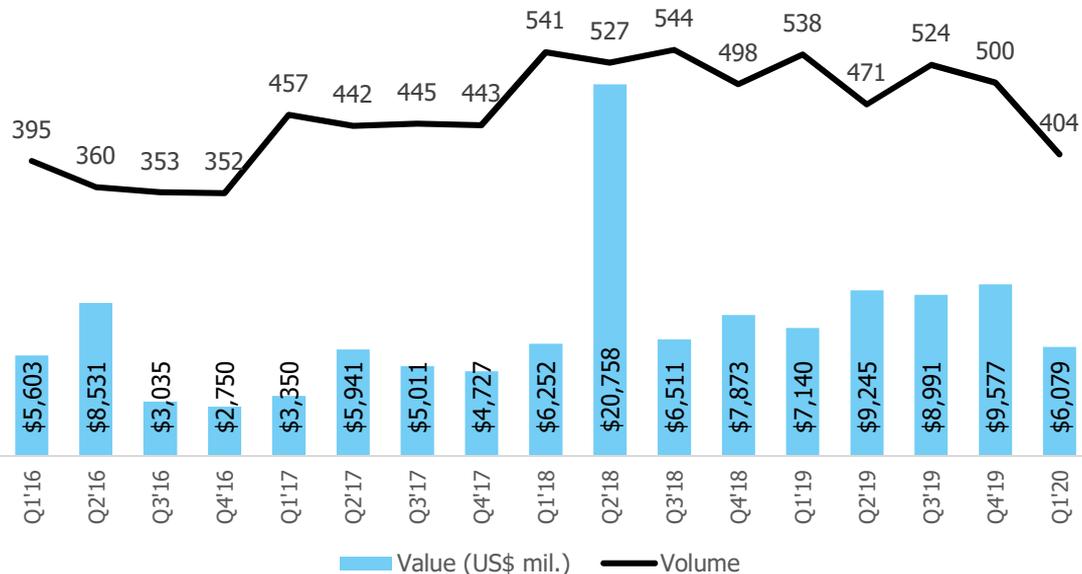
- Accounting Support
- Enterprise Resource Planning
- Financial Planning

Healthcare Fintech

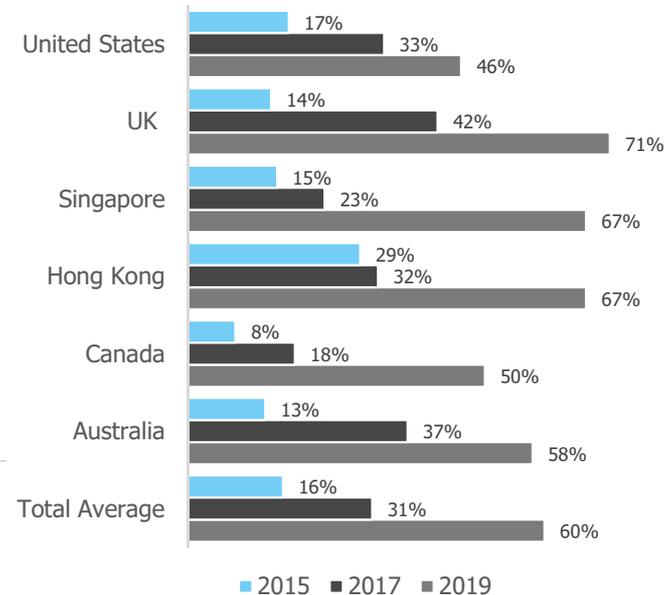
- Benefits Procurement and Management
- Health Insurance Sales & Distribution
- Patient Care Administration (e.g., RCM)

Fintech Investment and Adoption

Global Fintech Funding ¹ (2016 – Q1 2020)



Fintech Adoption ²



Sources

¹ CB Insights State of Fintech Q1'20 Report: Investment & Sector Trends to Watch

² EY Global FinTech Adoption Index 2019 Survey

Trending Technologies in the Capital Markets/ Investment Management Fintech Vertical

- Robotic Process Automation (RPA)
- Machine Learning
- Customer Identity
- Compliance & Fraud
- Lending Processes
- Trading
- Customer Service & Engagement
- Account Opening & Onboarding
- Wealth Management

Sources

CB Insights State of Fintech Q1'20 Report: Investment & Sector Trends to Watch

Five Hot Issues

1. Resiliency and Contingency
2. Security and Data Protection
3. Data Rights
4. Compatibility and Automation
5. Compliance and Auditability

Resiliency and Contingency



Security and Data Protection; Data Rights

Security and Data Protection

- Safeguards and requirements
 - Addressing shift in short and long term operating models, including remote working
- Breach notice and response
- Liability
 - For cause vs. strict liability
 - Insurance coverage (theirs and yours)
 - Caps?

Data Rights

- Content
- Configurations
- Performance and operational data
- **Aggregated data**
- "Suggestions"

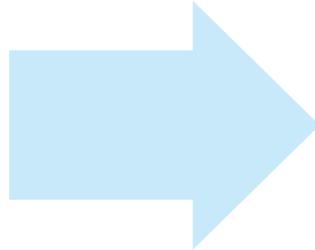
Compatibility and Automation

- **Compatibility**
 - Data transfers
 - APIs, interfaces, integrations
- **Automation**
 - Solutions (processes, chat bots, virtual assistants)
 - IP issues
 - Risks and rewards

Compliance and Auditability

Compliance

- Regs (including guidance?)
- Customer policies
 - Screening requirements
- Monitoring for changes
- Implementing changes
- Liability



Auditability

- Records, processes, systems
- Security reviews and audits
- Regulatory audits
- Audits of “fourth” parties (including cloud providers)
- Reports and certifications

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Craig A. Bitman provides clients with a range of knowledge and skills in all aspects of employee benefits and executive compensation law. Craig leads the firm's employee benefits and executive compensation practice and is co-chair of the firm's institutional investor practice. Craig also practices in the firm's private investment funds practice and has served as a member of the firm's Advisory Board.

Craig brings more than 20 years of experience to his practice, advising clients on all aspects of benefit plan design, implementation, and administration. Specifically, he counsels clients in the context of day-to-day administration, plan investments, mergers and acquisitions (M&A), and ongoing compliance. His advice extends to matters involving qualified and nonqualified deferred compensation plans, health and welfare benefit plans, equity compensation, and other types of arrangements. Craig's representations include both ongoing benefits advice and transactional matters.

His client roster includes a diverse mix of businesses, trusts, and individuals, including financial services companies, public pension plans, life insurance companies, transportation and logistics providers, entertainment companies, and multiemployer trust funds. He spends a significant percentage of his time devoted to assisting these entities and individuals in complying with the Employee Retirement Income Security Act's (ERISA) complex fiduciary duties.

A member of the National Association of Public Pension Attorneys, Craig often speaks and writes on topics affecting plan sponsors and service providers. His experience in the space has earned him recognition by *Chambers USA: America's Leading Lawyers for Business*, *Best Lawyers, PLC*, *Legal 500* and others.

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Timothy W. Levin, leader of the firm's investment management practice, counsels investment advisers and other financial services firms on the design, development, and management of pooled investment vehicles and investment advisory programs. He also advises fund managers in connection with organization, registration, and ongoing regulatory compliance. Additionally, he represents managers and sponsors of unregistered pooled investment vehicles.

Timothy's clients include many types of registered investment companies, such as mutual funds and registered funds of hedge funds, and funds focused on alternative investment strategies, including business development companies (BDCs). His unregistered pooled investment vehicle clients include private funds, bank collective investment trusts (CITs), and companies seeking exemption from investment company status.

Since 2008, *Chambers USA: America's Leading Lawyers for Business* has recognized Timothy for his work.

He speaks frequently at conferences and moderates panels. He also co-chairs the annual Hedge Fund Conference. Timothy is the editor of *Morgan Lewis Hedge Fund Deskbook: Legal and Practical Guide for a New Era* and the *Mutual Fund Regulation and Compliance Handbook*.

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Christine Lombardo advises investment managers and broker-dealers on financial regulatory matters. She concentrates her practice on securities regulation for a broad range of financial firms including retail asset managers, private fund managers, family offices, broker-dealers, other professional traders, and high-net-worth individuals. Christine also counsels legal, compliance, and business personnel on the structure, operation, and distribution of advisory programs, including digital advisory offerings, and investment products, including hedge funds, private equity funds, venture capital funds, real estate funds, and other alternative investment products.

Christine also counsels financial firms through examinations by industry regulators, as well as on enforcement related matters. Before joining Morgan Lewis, she was an associate at an international law firm in New York and worked for the Division of Enforcement at FINRA.

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Barbara Melby has been active in the outsourcing and technology transaction legal market for the last 25 years. As leader of the firm's technology, outsourcing & commercial transactions practice, she represents clients in complex business transactions, such as outsourcing, strategic alliance, technology, service and data-related agreements. She also advises businesses on privacy and security issues that arise in transactions involving sensitive data and technologies.

Barbara is recognized as a leading outsourcing and commercial transactions lawyer, counseling clients in structuring, negotiating, realigning, and terminating a wide range of commercial relationships. This includes IT, human resources, finance and accounting, procurement, research and development, logistics, and facilities outsourcing. She collaborates with clients on transactions for onshore, offshore, managed and co-sourced solutions.

With a diverse client base from the financial services, life sciences, hospitality, energy, health, and retail industries, Barbara assists with technology and data acquisition and implementation and service agreements. Her experience includes enterprise resource planning (ERP) implementation, platform transformation, licensing, software as a service (SaaS), information as a service (IaaS), ecommerce, data acquisition and services, cloud computing, and mobility agreements.

In addition to working with clients on complex outsourcing, technology and data transactions, she helps clients develop contracting and governance strategies for commercial transaction portfolios. She implements a variety of coverage models, including mixes of in-house and Morgan Lewis resources, and tailors them to meet clients' needs. She coordinates support of commercial contracts for direct and indirect spend for the global procurement organizations of several Fortune 500 companies.

Barbara's recent transactions include: transformational IT and business process outsourcing transactions for a major medical technology company; the renegotiation of a subservicing services for a leading financial institution; the termination of a major IT services agreement and the negotiation of multiple successor agreements; and an agreement for the implementation and ongoing management of a data analytics system. Barbara co-authored two seminal works in the outsourcing field, *Information Technology Outsourcing: Process, Strategies, and Contracts*, and *Business Process Outsourcing: Process, Strategies, and Contracts* (both John Wiley).

She also speaks on outsourcing and technology transactions at business, legal, and professional conferences. She spearheaded the launch of, and continues to lead, Morgan Lewis's blog on technology, outsourcing, and commercial transactions—*Tech & Sourcing @ Morgan Lewis*.

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Andrew Ray is the leader of the firm's interdisciplinary corporate practice in Washington, DC, where he represents public and private companies, financial sponsors, and management teams in a broad range of industries, including technology, financial services, life sciences, real estate, and the not-for-profit sector. Various industry publications recognize Andy as a leader in both M&A and in technology, media, and communications law, among other fields. He led the team representing Oculus VR in its \$2 billion sale to Facebook, which was named the *M&A Advisor* M&A Deal of the Year.

Andy writes and speaks frequently on topics that include corporate finance, private equity, technology, M&A, corporate governance, and cross-border deals.

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Julie K. Stapel helps employee benefit plan sponsors and financial service providers with the investment, and management of employee benefit plan assets. She advises clients on ERISA fiduciary and prohibited transaction rules, and their impact on investment products and services, and helps those clients use investment documentation and other tools to manage potential fiduciary risks while providing top-quality benefits and services. She also works with plan sponsors and financial service providers to address ERISA-related compliance issues.

Julie helps clients negotiate investment-related agreements of virtually every type, including investment management, trust, securities lending and transition management agreements, as well as many different types of trading agreements. She represents employee benefit plan investors in all types of private fund investments, negotiating fund documentation and side letters to address ERISA and other risk management issues. She also counsels financial services and investment management clients on ERISA compliance.

Co-leader of the firm's Fiduciary Duty Task Force, Julie also advises on fiduciary governance, including the formation and operation of benefit plan fiduciary committees.

She works with plan fiduciaries to implement ERISA compliance best practices and manage fiduciary risks. She also helps clients remain in compliance with ERISA's ever-changing reporting and disclosure obligations.

Julie speaks frequently on ERISA-related topics. She has spoken before the Committee on the Investment of Employee Benefit Assets (CIEBA), the ERISA Industry Committee (ERIC), the John Marshall School of Law, and at various events sponsored by *Pension and Investments* magazine. In addition to these speaking engagements, she regularly addresses client fiduciary committees and investment staff, performing fiduciary training and presenting updates on changes in the law. She is also president of the Chicago Chapter of Worldwide Employee Benefits Network (WEB).

Prior to joining Morgan Lewis, she was a partner in the employee benefits and executive compensation departments of an international law firm, resident in Chicago. Before that, she served as general counsel to a registered investment adviser, gaining experience with ERISA and its impact on investment managers and collective investment funds.

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Steven W. Stone is a securities lawyer who counsels clients on regulations governing broker-dealers, investment advisers and bank fiduciaries, and pooled investment vehicles. Head of the firm's financial institutions practice, Steve counsels most of the largest and most prominent US broker-dealers, investment banks, investment advisers, and mutual fund organizations. He regularly represents clients before the US Securities and Exchange Commission (SEC), both in seeking regulatory relief and assisting clients in enforcement or examination matters.

Steve advises major US broker-dealers in the private wealth and private client businesses that offer investment advice and brokerage services to high-net-worth clients as well as broker-dealers serving self-directing clients. He also works as counsel on various matters to the Securities Industry and Financial Markets Association's (SIFMA) private client committee and represents most of the best-known US broker-dealers in this area. He also advises broker-dealers and investment advisers in the managed account or wrap fee area, and serves as counsel to the Money Management Institute, the principal trade association focused on managed accounts. Steve also counsels various institutional investment advisers and banks on investment management issues, including conflicts, trading, disclosure, advertising, distribution, and other ongoing regulatory compliance matters.

Steve's practice includes counseling clients on varied regulatory and transactional matters including the development of innovative products and services; regulation and operation of managed account (or wrap fee) programs and hedge funds; trading issues affecting broker-dealers and investment advisers; soft dollar arrangements; interpretive and no-action letter requests; insider trading issues; and related matters. He guides clients through SEC, Financial Industry Regulatory Authority (FINRA), and state investigations and enforcement actions. Additionally, he counsels clients on mergers, acquisitions, and joint ventures involving broker-dealers and investment advisers.

Steve serves as co-leader of the firm's investment funds industry initiative, and previously served on the firm's Advisory Board and was managing partner of the Washington, DC, office.

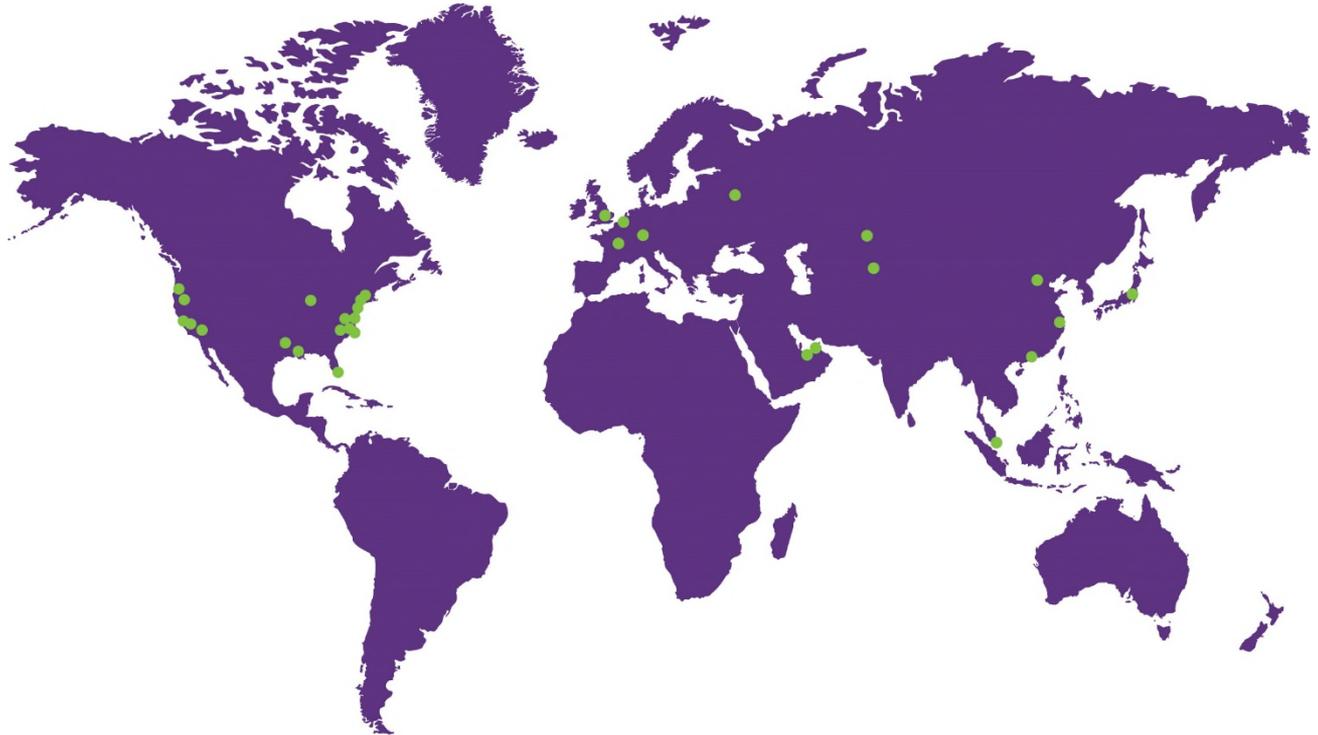
Since 2005, *Chambers USA: America's Leading Lawyers for Business* has recognized Steve as one of the leading US lawyers for investment management and broker-dealer law, calling him as "one of the best in the field." Since 2009, *The US Legal 500* has listed him for his work with mutual fund formation and management.

Our Global Reach

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North America

Our Locations

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