INVESTMENT ADVISER ALERT

Unlicensed third-party digital platforms and held away accounts

3/17/2025

The Oregon Division of Financial Regulation (DFR) is aware that some Oregon state-licensed investment advisers are using the services of unlicensed/unregistered third-party digital platforms to actively manage, trade, and bill on assets in held away accounts.

DFR is concerned that adviser use of these platforms may violate the Oregon Securities Law, Oregon Revised Statutes (ORS) 59.005 to 59.451, 59.991 and 59.995, and Oregon Administrative Rules (OAR) chapter 441.

The purpose of this investment adviser alert is to communicate the bases of DFR's concerns and to reiterate aspects of compliance for advisers to consider in using these platforms.

Data privacy, cybersecurity, and improper use of clients' credentials

At least one unlicensed/unregistered third-party platform being used by some advisers to access held away accounts uses a client's username and password to access held away accounts. It appears that the platform does so without the knowledge or consent of the custodians responsible for safeguarding the held away assets. Impersonating clients in this manner may void client account protections with the custodian and may interfere with or disrupt the custodian's AML (anti-money laundering) and BSA (Bank Secrecy Act) compliance and surveillance systems.

This platform collects a significant amount of private client data (including the client's age, investment time horizon, risk tolerance, net worth, and investment preferences and strategies) to provide its services. As an unlicensed/unregistered entity, there is no financial regulator reviewing the platform's policies, procedures, or practices for compliance with federal and state data privacy, cybersecurity, or safeguarding laws.

A state investment adviser and its investment adviser representatives are fiduciaries and have a duty to act primarily for the benefit of the adviser's clients (OAR 441-205-0145(1)). In Oregon, it may be a deceptive practice, a breach of fiduciary duty, and, accordingly, a dishonest or unethical business practice under OAR 441-205-0145(1-2), for an adviser to use a client's personal login credentials. An investment adviser may be breaching its fiduciary duty when it accesses a client's account by using the client's own unique identifying information, such as username and password.

Also, it is an unethical business practice for a state investment adviser, or an investment adviser representative for a state investment adviser, to engage in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of OAR 441-205-0145 or the Oregon Securities Law (OAR 441-205-0145(1)(o)).

Inadvertent custody

DFR understands that at least one unlicensed/unregistered third-party platform has marketed its service as allowing advisers to manage held away accounts without custody. Please note that marketing statements are not determinative of whether custody in fact exists.

Advisers should independently review and understand their ability and authorization to access client funds. Such a review should examine the powers of attorney, agreements between the client and the third-party platform, and any agreements between the client and the custodian of each held away account that is accessed by or through the third-party platform.

Advisers should ensure that none of the agreements confer upon the adviser or the third-party platform the authority to access or withdraw client funds or securities from a held away account.

In addition, it appears that at least one third-party platform might add the investment adviser or investment adviser representative as a supplemental or authorized user on the client's custodial account to navigate account authentication procedures during login. In that circumstance, it would be important to know what rights the supplemental or authorized users are given by each custodian, most notably whether supplemental or authorized users have the ability (whether used or not) to withdraw funds or securities from the account.

Investment advisers with custody of client assets must affirmatively disclose this and are subject to heightened safeguarding requirements (OAR 441-175-0165(5)(a), OAR 441-175-0100(4), OAR 441-195-0040(2), OAR 441-195-0050, and OAR 441-205-0180).

Fees

At least one unlicensed/unregistered third-party platform that some investment advisers are using to access held away accounts is charging the adviser a fee, believed to be between 25 to 30 basis points, based on the value of the assets in the held away accounts. Some investment advisers are charging their clients a fee for managing these held away assets, ranging from simply passing the platform fees on to clients to charging the full advisory fee that they apply to other managed assets.

In Oregon, investment advisers are prohibited from charging an unreasonable advisory fee (OAR 441-205-0145(1)(j)). It is a an unethical business practice for a state investment adviser or any of its investment adviser representatives to charge a client an unreasonable advisory fee (OAR 441-205-0145(1)(j)).

DFR questions whether it is reasonable for an investment adviser to charge an assets under management (AUM) fee for "managing" a held-away account where the adviser has no authority or control over the securities that are available in the plan and where the account is automatically rebalanced, including for accounts traditionally meant to hold long-term assets.

Advisers should consider the adverse impact that an annual AUM fee has in eroding returns on held away assets to ensure the advisers, as fiduciaries, are acting in the best interests of their clients.

Compliance by third-party platform

DFR is reviewing the services that third-party platforms provide, and their compliance with the Oregon Securities Law. DFR urges state-licensed investment advisers, when engaging the services of third-party platforms, to conduct and adequately document their own due diligence and confirm their own compliance with the aforementioned rules.