

MEMORANDUM

To: Members of the Committee on Financial Services
From: Republican Staff
Date: September 22, 2023
Re: September 27, 2023, Full Committee Hearing

On Wednesday, September 27, 2023, the Committee on Financial Services will hold a hearing titled “Oversight of the Securities and Exchange Commission.” Testifying at the hearing will be:

- The Honorable Gary Gensler, Chairman, Securities and Exchange Commission

Background

During the peak of the Great Depression, Congress passed the Securities Act of 1933 (“Securities Act”) and the Securities and Exchange Act of 1934 (“Exchange Act”), which created the Securities and Exchange Commission (“SEC”). The SEC’s mission is to: (1) protect investors; (2) maintain fair, orderly, and efficient markets; and (3) facilitate capital formation. The SEC oversees more than 30,000 registered entities, including investment advisers, mutual funds and exchange traded funds, broker-dealers, national securities exchanges, credit rating agencies, clearing agencies, the Public Company Accounting Oversight Board, the Financial Industry Regulatory Authority, the Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, and the Financial Accounting Standards Board. The SEC oversees over \$125 trillion in securities trading annually. Additionally, it reviews the disclosures of approximately 8,700 reporting companies.¹

This hearing will examine the regulatory developments, rulemakings, and activities that the SEC has undertaken in the period since October 5, 2021.² Examples of the types of regulatory and policy developments that may be examined are noted below.

Staff Accounting Bulletin 121

On March 24, 2022, SEC staff issued Staff Accounting Bulletin No. 121, requiring a reporting entity that performs digital asset custodial activities, whether directly or through an agent acting on its behalf, to record a liability with a corresponding asset.³

¹ Congressional Budget Justification and Annual Performance Plan; Fiscal Year 2022, Annual Performance Report, (Mar. 13, 2023) available at https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf.

² Hearing before H. Comm. on Financial Services, *Oversight of the U.S. Securities and Exchange Commission: Wall Street’s Cop Is Finally Back on the Beat*, 117th Cong. (Oct. 5, 2021).

³ SEC, Staff Accounting Bulletin No. 121 (Apr. 11, 2022), available at <https://www.sec.gov/oca/staff-accounting-bulletin-121>.

Amendments Regarding the Definition of Exchange

On March 18, 2022, the SEC proposed a rulemaking to modify the definition of “exchange” to include “communication protocol systems,” which would expand the SEC’s authority over digital asset trading platforms.⁴

Safeguarding Advisory Client Assets

On February 15, 2023, the SEC proposed changes to require SEC-registered investment advisers to put all their clients’ assets, including all digital assets like Bitcoin, with “qualified custodians.”⁵ The proposal would also require a written agreement between custodians and advisers, expand the “surprise examination” requirements, and enhance recordkeeping rules.

Climate-Related Disclosures

On March 21, 2022, the SEC proposed a 500-page climate disclosure rule that would require publicly traded firms to disclose detailed emissions data and climate risk management strategies.⁶ Among other details, the rule would also mandate certain publicly traded firms to disclose direct and indirect greenhouse gas emissions emanating from their supply chains.

Cybersecurity Disclosure

On July 26, 2023, the SEC adopted final rules requiring expansive new disclosures by public companies regarding cybersecurity matters.⁷ The final rules include an amendment to Form 8-K that mandates issuers to publicly disclose a cybersecurity incident within four business days following the company’s determination that the incident is material. The final rules also include a series of new disclosure obligations regarding risk management and governance, including a company’s policies and procedures for identifying and managing cybersecurity risks and the board members’ cybersecurity expertise.

Amendments to Rule 14a-8

On July 13, 2022, the SEC proposed amendments to Rule 14a-8 under the Exchange Act. Rule 14a-8 governs shareholder proposals included in a company’s proxy statement to be presented for a shareholder vote.⁸ The proposed amendments would amend several of the bases on which a company may rely to exclude a shareholder proposal from its proxy statement,

⁴ SEC, Release No. 34-94062, *Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems that Trade U.S. Treasury and Agency Securities, National Market System Stocks, and Other Securities*, <https://www.sec.gov/rules/proposed/2022/34-94062.pdf>.

⁵ SEC, Release No. IA-6240, *Safeguarding Advisory Client Assets*, available at <https://www.sec.gov/rules/proposed/2023/ia-6240.pdf>.

⁶ SEC, Press Release “SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors” (Mar. 21, 2022), available at <https://www.sec.gov/news/press-release/2022-46>.

⁷ SEC, Final Rule, “Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure,” available at <https://www.sec.gov/files/rules/final/2023/33-11216.pdf>.

⁸ Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-95267 (Jul. 13, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-95267.pdf>.

meaningfully altering the rate at which these requests are granted and reducing options for a company to exclude a shareholder proposal from its proxy statement.

Equity Market Structure

On December 14, 2022, the SEC released four proposals that would overhaul the regulations governing equity markets.⁹ These proposals make sweeping changes to how national market system stock orders are priced, executed, and reported, and cumulatively span more than 1,600 pages.

Further Define “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer

On March 28, 2022, the SEC proposed two rules that would require certain market participants, including proprietary trading firms that perform dealer functions—specifically those engaging in liquidity-providing activities in the markets—to register with the SEC.¹⁰ The rules would establish qualitative standards intended to identify market participants that act as liquidity providers. The rules also establish quantitative standards by which a participant engaging in specific levels of activity would be considered to be buying and selling government securities “as a part of a regular business” under Sections 3(a)(5) and 3(a)(44) of the Exchange Act.¹¹

Position Disclosure Proposals: Short Selling and Security-Based Swap Large Positions

On February 15, 2022, the SEC proposed amendments to existing rules that regulate, limit, and require disclosure of short sales, short positions, and related activity impacting short positions, including a new requirement for daily tracking and disclosure of trading activity contributing to reported short positions.¹²

Open-End Fund Liquidity Risk Management Programs and Swing Pricing

On November 2, 2022, the SEC proposed amendments to Rule 22c-1 that would significantly alter the liquidity risk management requirements for open-end funds (i.e., mutual funds and ETFs). The proposal would impose a “hard close” on mutual fund orders at 4:00 PM ET, and mandate that mutual funds use swing pricing.¹³ The proposal would also tighten liquidity requirements on all open-end funds by including a new “bucketing” system.

⁹ SEC, *SEC Proposals: Market Structure* (Dec. 2022) available at <https://www.sec.gov/newsroom/market-structure-proposals-december-2022>.

¹⁰ SEC, Press Release 2022-54, SEC Proposes Rules to Include Certain Significant Market Participants as “Dealers” or “Government Securities Dealers” (Mar. 28, 2022), available at <https://www.sec.gov/news/press-release/2022-54>.

¹¹ *Id.*

¹² SEC, Press Release 2022-32, SEC Proposes Short Sale Disclosure Rule, Order Marking Requirement, and CAT Amendments (Feb. 25, 2022), available at <https://www.sec.gov/news/press-release/2022-32>.

¹³ SEC, Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, SEC Release No. 33-11130, 87 Fed. Reg. 77172 (Dec. 16, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-12-16/pdf/2022-24376.pdf>.

Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisors

On July 26, 2023, the SEC proposed a new rule that requires broker-dealers and investment advisors, irrespective of their size, to confront challenges posed by predictive data analytics and related technologies like artificial intelligence.¹⁴

Investment Company Names

On May 25, 2022, the SEC proposed a new rule to amend the “Names Rule.” The current rule mandates that funds with certain names, such as those implying a focus on a specific type of investment, industry, or region, must invest at least 80 percent of their assets in line with what their name suggests.¹⁵ The proposed rule seeks to expand these regulations to cover new terms and names, including fund names that mention concepts like “growth,” “value,” and “ESG factors.”¹⁶ Additionally, it suggests changes such as using a derivative investment’s notional value instead of market value to assess compliance with the 80 percent investment policy and requiring funds to clearly define the terms used in their names in their prospectuses.¹⁷ Furthermore, the proposal aims to label the names of “integration funds” as deceptive or misleading if they use Environmental, Social, and Governance (“ESG”) terminology without prioritizing ESG investments over non-ESG ones.¹⁸

Money Market Fund Reforms

On July 12, 2023, the SEC adopted new regulations governing money market funds. Under the new rules, money market funds are obligated to increase their minimum liquidity requirements.¹⁹ A minimum of 25 percent of a fund’s total assets must consist of daily liquid assets, and at least 50 percent of the fund’s total assets must be composed of weekly liquid assets.²⁰ These rules also prohibit money market funds from temporarily suspending redemptions through a gate, as well as eliminating the weekly liquid asset-linked thresholds framework.²¹ Furthermore, the rule mandates that prime and institutional tax-exempt money market funds impose mandatory liquidity fees when a fund experiences daily net redemptions exceeding 5 percent of net assets.²²

¹⁴ SEC, Release No. 34-97990, *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisors* (Jul. 26, 2023), available at <https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf>.

¹⁵ SEC, Release No. 33-11067, *Investment Company Names* (May 25, 2022), available at <https://www.sec.gov/files/rules/proposed/2022/33-11067.pdf>. See also SEC Press Release, *SEC Proposes Rule Changes to Prevent Misleading or Deceptive Fund Names* (May 25, 2022), available at <https://www.sec.gov/news/press-release/2022-91>.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 18.

¹⁹ SEC, Release No. 33-11211, *Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A* (Jul. 12, 2023), <https://www.sec.gov/files/rules/final/2023/33-11211.pdf>.

²⁰ *Id.* at 1.

²¹ *Id.* at 23.

²² *Id.* at 35.

Enhanced Disclosures by Certain Investment Advisors and Investment Companies about Environmental, Social, and Governance Investment Practices

On May 25, 2022, the SEC proposed rules that mandate additional disclosures for funds incorporating or contemplating ESG factors in their investment strategies.²³ The extent of these additional disclosures varies depending on the degree to which a fund has incorporated ESG factors into its investment strategy. The proposed rule delineates three tiers of disclosure for funds with varying levels of ESG focus.

²³ SEC, Release No. 33-11068, Enhanced Disclosures by Certain Investment Advisors and Investment Companies about Environmental, Social, and Governance Investment Practices (May 25, 2022), <https://www.sec.gov/files/rules/proposed/2022/33-11068.pdf>.