

MEMO# 35534

December 8, 2023

SEC and CFTC Rulemaking Agendas

[35534]

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TO: ICI Members
Investment Company Directors
Derivatives Markets Advisory Committee
Disclosure Working Group
Equity Markets Advisory Committee
ESG Advisory Group
ESG Fund Disclosure Working Group
ESG Public Company Disclosure Working Group
Fixed-Income Advisory Committee
Investment Adviser and Broker-Dealer Standards of Conduct Working Group
SEC Rules Committee SUBJECTS: Abandoned Property and Escheatment
Alternative Investments
Compliance
Disclosure
ESG
Fund Accounting & Financial Reporting
Fund Governance
Investment Advisers
Operations
Trading and Markets
Transfer Agency RE: SEC and CFTC Rulemaking Agendas

The Office of Information and Regulatory Affairs released the Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions on December 6, 2023. The agenda includes regulatory actions that the Securities and Exchange Commission and Commodity Futures Trading Commission expect to take between now and October 2024. [\[1\]](#) SEC Chair Gensler's agenda that potentially would affect investment companies or investment advisers is quite voluminous with five proposals and twenty final rules expected by April 2024 with an additional five proposals and one final rule expected by October 2024. According to the agenda, the SEC will be focused on finalizing many of its outstanding proposals in the first half of 2024. CFTC Chair Behnam's agenda notes seven proposals and two final rules that potentially would affect investment companies or investment advisers.

Elements of the SEC's and CFTC's agenda that may affect investment companies or

investment advisers are summarized below.

Securities and Exchange Commission

Rule Proposals Expected by April 2024

[Incentive-Based Compensation Arrangements](#). The Division of Trading and Markets is considering recommending that the Commission, together with the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Housing Finance Agency and the National Credit Union Administration repropose regulations and guidelines with respect to incentive-based compensation practices at certain financial institutions that have \$1 billion or more in total assets as required by the Dodd-Frank Act.

[Human Capital Management Disclosure](#). The Division of Corporation Finance is considering recommending that the Commission propose rule amendments to enhance registrant disclosures regarding human capital management.

[Regulation D and Form D Improvements](#). The Division of Corporation Finance is considering recommending that the Commission propose amendments to Regulation D, including updates to the accredited investor definition, and Form D to improve protections for investors.

[Revisions to the Definition of Securities Held of Record](#). The Division of Corporation Finance is considering recommending that the Commission propose amendments to the "held of record" definition for purposes of section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act").

[Financial Data Transparency Act Joint Rulemaking](#). The SEC, jointly with the Department of the Treasury, Federal Reserve Board, OCC, CFPB, FDIC, FHFA, and the NCUA are coordinating efforts on a proposed rule establishing data standards for the collections of information reported to each agency by financial entities under their jurisdiction, and the data collected from the agencies on behalf of the Financial Stability Oversight Council (FSOC). If finalized, the proposed rule would implement the requirements of section 124 to the Financial Stability Act of 2010 (12 U.S.C. 5321 et seq.), which was added by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA). The NDAA requires the agencies to jointly issue proposed rules within 18 months of the NDAA's enactment, and final rules within two years of enactment.

Rule Proposals Expected by October 2024

[Corporate Board Diversity](#). The Division of Corporation Finance is considering recommending that the Commission propose rule amendments to enhance registrant disclosures about the diversity of board members and nominees.

[Rule 144 Holding Period](#). The Division of Corporation Finance is considering recommending that the Commission repropose amendments to Rule 144, a non-exclusive safe harbor that permits the public resale of restricted or control securities if the conditions of the rule are met.

[Fund Fee Disclosure and Reform](#). The Division of Investment Management is considering recommending that the Commission propose changes to regulatory requirements relating to registered investment companies' fees and fee disclosure.

[Exchange-Traded Products](#). The Commission sought public input to evaluate the listing and trading of Exchange-Traded Products (ETPs) in the marketplace, assess the risks posed by ETPs with certain characteristics, and explore areas of focus in reviewing exchange proposals to list and trade new ETPs for consistency with the Exchange Act. The Division of Trading and Markets is considering appropriate next steps with respect to these issues.

[Regulation ATS Modernization](#). The Division of Trading and Markets is considering recommending that the Commission propose amendments to Regulation ATS to modernize the conditions to the ATS exemption for all ATSs. This includes considering recommending that the Commission propose requirements to promote pre-trade price transparency across asset classes.

Final Rules Expected by April 2024

[Climate Change Disclosure](#). The Division of Corporation Finance is considering recommending that the Commission adopt rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities. The proposed rules would require information about a registrant's climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition. The proposed rules would also require disclosure of a registrant's greenhouse gas emissions and certain climate-related financial metrics in a registrant's audited financial statements.

[Rule 14a-8 Amendments](#). The Division of Corporation Finance is considering recommending that the Commission adopt rule amendments regarding shareholder proposals under Rule 14a-8. The Commission proposed to, among other things, update certain substantive bases for exclusion of shareholder proposals under the Commission's shareholder proposal rule. The proposed amendments would amend the substantial implementation exclusion, the duplication exclusion, and the resubmission exclusion.

[Safeguarding Advisory Client Assets](#). The Division of Investment Management is considering recommending that the Commission adopt amendments to existing rules and/or adopt new rules under the Advisers Act to improve and modernize the regulations around the custody of funds or investments of clients by investment advisers.

[Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices](#). The Division of Investment Management is considering recommending that the Commission adopt requirements for investment companies and investment advisers related to environmental, social and governance (ESG) factors, including ESG claims and related disclosures. Among other things, the Commission proposed to amend rules and forms under both the Advisers Act and the Investment Company Act to require registered investment advisers, certain advisers that are exempt from registration, registered investment companies, and business development companies, to provide additional information regarding their ESG investment practices. The proposed amendments to these forms and associated rules seek to facilitate enhanced disclosure of ESG issues to clients and shareholders. The proposed rules and form amendments are designed to create a consistent, comparable, and decision-useful regulatory framework for ESG advisory services and investment companies to inform and protect investors while facilitating further innovation in this evolving area of the asset management industry.

[Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT](#)

[Reporting](#). The Division of Investment Management is considering recommending that the Commission adopt changes to regulatory requirements relating to open-end fund's liquidity and dilution management. The Commission proposed amendments to its current rules for open-end management investment companies ("open-end funds") regarding liquidity risk management programs and swing pricing. The proposed amendments are designed to improve liquidity risk management programs to better prepare funds for stressed conditions and improve transparency in liquidity classifications. The amendments are also designed to mitigate dilution of shareholders' interests in a fund by requiring any open-end fund, other than a money market fund or exchange-traded fund, to use swing pricing to adjust a fund's net asset value (NAV) per share to pass on costs stemming from shareholder purchase or redemption activity to the shareholders engaged in that activity. In addition, to help operationalize the proposed swing pricing requirement, and to improve order processing more generally, the Commission proposed a "hard close" requirement for these funds. Finally, the Commission proposed amendments to reporting and disclosure requirements on Forms N-PORT, N-1A, and N-CEN that apply to certain registered investment companies, including registered open-end funds (other than money market funds), registered closed-end funds, and unit investment trusts. The proposed amendments would require more frequent reporting of monthly portfolio holdings and related information to the Commission and the public, amend certain reported identifiers, and make other amendments to require additional information about funds' liquidity risk management and use of swing pricing.

[Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies](#). The Division of Investment Management is considering recommending that the Commission adopt rules to enhance fund and investment adviser disclosures and governance relating to cybersecurity risks. The Commission proposed new rules to require registered investment advisers and investment companies to adopt and implement written cybersecurity policies and procedures reasonably designed to address cybersecurity risks. The Commission also proposed a new rule and form under the Advisers Act to require advisers to report significant cybersecurity incidents affecting the adviser, or its fund or private fund clients, to the Commission. With respect to disclosure, the Commission proposed amendments to various forms regarding the disclosure related to significant cybersecurity risks and cybersecurity incidents that affect advisers and funds and their clients and shareholders. Finally, the Commission proposed new recordkeeping requirements under the Advisers Act and Investment Company Act.

[Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers](#). The Division of Trading and Markets and the Division of Investment Management are considering recommending that the Commission adopt rules related to broker-dealer and investment adviser conflicts in the use of predictive data analytics, artificial intelligence, machine learning, and similar technologies in connection with certain investor interactions. The Commission proposed new rules under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to eliminate, or neutralize the effect of, certain conflicts of interest associated with broker-dealers' or investment advisers' interactions with investors through these firms' use of technologies that optimize for, predict, guide, forecast, or direct investment-related behaviors or outcomes. The Commission also proposed amendments to rules under the Exchange Act and Advisers Act that would require firms to make and maintain certain records in accordance with the proposed conflicts rules.

[Outsourcing by Investment Advisers](#). The Division of Investment Management is considering recommending that the Commission adopt rules related to the oversight of third-party service providers. The Commission proposed a new rule under the Advisers Act to prohibit registered advisers from outsourcing certain services or functions without first meeting minimum requirements. The proposed rule would require advisers to conduct due diligence prior to engaging a service provider to perform certain services or functions. It would further require advisers to periodically monitor the performance and reassess the retention of the service provider in accordance with due diligence requirements to reasonably determine that it is appropriate to continue to outsource those services or functions to that service provider. The Commission also proposed corresponding amendments to the investment adviser registration form to collect census-type information about the service providers defined in the proposed rule. In addition, the Commission proposed related amendments to the Advisers Act books and records rule, including a new provision requiring advisers that rely on a third party to make and/or keep books and records to conduct due diligence and monitoring of that third party and obtain certain reasonable assurances that the third party will meet certain standards.

[Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information](#). The Division of Investment Management and Division of Trading and Markets are considering recommending that the Commission adopt amendments to Regulation S-P. The Commission proposed rule amendments that would require brokers and dealers, investment companies and investment advisers registered with the Commission to adopt written policies and procedures for incident response programs to address unauthorized access to or use of customer information, including procedures for providing timely notification to individuals affected by an incident involving sensitive customer information with details about the incident and information designed to help affected individuals respond appropriately. The Commission also proposed to broaden the scope of information covered by amending requirements for safeguarding customer records and information, and for properly disposing of consumer report information. In addition, the proposed amendments would extend the application of the safeguards provisions to transfer agents. The proposed amendments would also include requirements to maintain written records documenting compliance with the proposed amended rules. Finally, the proposed amendments would conform annual privacy notice delivery provisions to the terms of an exception provided by a statutory amendment to the Gramm-Leach-Bliley Act.

[Amendments to Exchange Act Rule 3b-16 Re: Definition of "Exchange"; Regulation ATS and Regulation SCI for ATSS That Trade U.S. Government Securities, NMS Stocks and Other Securities](#). The Division of Trading and Markets is considering recommending that the Commission adopt proposed amendments to Exchange Act Rule 3b-16 to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. The Division is considering recommending that the Commission also adopt proposed amendments to Regulation ATS and Regulation SCI for ATSS that trade U.S. Government Securities, NMS stock, and other types of securities and to require the electronic filing of a modernized version of Form ATS and Form ATS-R.

[Order Competition Rule](#). The Division of Trading and Markets is considering recommending that the Commission amend the regulation governing the National Market System under the Exchange Act to add a new rule designed to promote competition as a means to protect the interests of individual investors and to further the objectives of a National Market System. The rule would prohibit a restricted competition trading center from internally executing certain orders of individual investors at a given price unless the orders are first

exposed to competition at that price in a qualified auction operated by an open competition trading center. The rule would include limited exceptions to this general prohibition. In addition, the Division is considering recommending that the Commission amend the regulation governing the National Market System to add new defined terms to the rule.

[Amendments to NMS Plan for the Consolidated Audit Trail-Data Security](#). The Division of Trading and Markets is considering recommending that the Commission adopt amendments to the National Market System Plan Governing the Consolidated Audit Trail regarding data security.

[Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities](#). The Division of Trading and Markets is considering recommending that the Commission adopt requirements for registered clearing agencies for government securities regarding the clearance of certain trades and repo transactions involving government securities. The Commission proposed to amend the standards applicable to covered clearing agencies for U.S. Treasury securities to require that such covered clearing agencies have written policies and procedures reasonably designed to require that every direct participant of the covered clearing agency submit for clearance and settlement all eligible secondary market transactions in U.S. Treasury securities to which it is a counterparty. In addition, the Commission proposed additional amendments to the Covered Clearing Agency Standards, with respect to risk management. These requirements are designed to protect investors, reduce risk, and increase operational efficiency. Finally, the Commission proposed to amend the broker-dealer customer protection rule to permit margin required and on deposit with covered clearing agencies for U.S. Treasury securities to be included as a debit in the reserve formulas for accounts of customers and proprietary accounts of broker-dealers, subject to certain conditions.

[Further Definition of Dealers](#). The Division of Trading and Markets is considering recommending that the Commission adopt amendments to address the definition of dealer.

[Cybersecurity Risk Management Rules for Broker-Dealers, Clearing Agencies, MSBSPs, the MSRB, National Securities Associations, National Securities Exchanges, SBSDRs, SBS Dealers, and Transfer Agents](#). The Division of Trading and Markets is considering recommending that the Commission adopt amendments to require that market entities address cybersecurity risks, to improve the Commission's ability to obtain information about significant cybersecurity incidents impacting market entities, and to improve transparency about cybersecurity risk in the U.S. securities markets. The Commission proposed a new rule and form and amendments to existing recordkeeping rules to require broker-dealers, clearing agencies, major security-based swap participants, the Municipal Securities Rulemaking Board, national securities associations, national securities exchanges, security-based swap data repositories, security-based swap dealers, and transfer agents to address cybersecurity risks through policies and procedures, immediate notification to the Commission of the occurrence of a significant cybersecurity incident and, as applicable, reporting detailed information to the Commission about a significant cybersecurity incident, and public disclosures that would improve transparency with respect to cybersecurity risks and significant cybersecurity incidents. In addition, the Commission proposed amendments to existing clearing agency exemption orders to require the retention of records that would need to be made under the proposed cybersecurity requirements. Finally, the Commission proposed amendments to address the potential availability to security-based swap dealers and major security-based swap participants of substituted compliance in connection with those requirements.

[Disclosure of Order Execution Information](#). The Division of Trading and Markets is considering recommending that the Commission amend existing requirements under the Exchange Act to update the disclosure required for order executions in NMS stocks. The Commission proposed to expand the scope of reporting entities subject to the rule that requires market centers to make available to the public monthly execution quality reports to encompass broker-dealers with a larger number of customers. The Commission also proposed to modify the definition of "covered order" to include certain orders submitted outside of regular trading hours and certain orders submitted with stop prices. In addition, the Commission proposed modifications to the information required to be reported under the rule, including changing how orders are categorized by order size as well as how they are categorized by order type. Finally, the Commission proposed to enhance the accessibility of the required reports by requiring all reporting entities to make a summary report available.

[Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders](#). The Division of Trading and Markets is considering recommending that the Commission amend certain rules of Regulation National Market System under the Exchange Act to adopt variable minimum pricing increments for the quoting and trading of NMS stocks, reduce the access fee caps, and enhance the transparency of better priced orders.

[Regulation Best Execution](#). The Division of Trading and Markets is considering recommending that the Commission adopt new rules under the Exchange Act relating to a broker-dealer's duty of best execution. Proposed Regulation Best Execution would enhance the existing regulatory framework concerning the duty of best execution by requiring detailed policies and procedures for all broker-dealers and more robust policies and procedures for broker-dealers engaging in certain conflicted transactions with retail customers, as well as related review and documentation requirements.

[Reporting of Security-Based Swap Positions](#). The Division of Trading and Markets is considering recommending that the Commission adopt rules under section 10B of the Exchange Act to require certain disclosures in connection with security-based swap positions.

Final Rules Expected by October 2024

[Covered Clearing Agency Resiliency and Recovery and Wind-Down Plans](#). The Division of Trading and Markets is considering recommending that the Commission adopt rules to expand requirements regarding recovery and wind-down plans and to revise certain risk management requirements for clearing agencies. The Commission proposed to amend certain portions of the Covered Clearing Agency Standards under the Securities Exchange Act of 1934 to strengthen the existing rules regarding margin with respect to intraday margin and the use of substantive inputs to a covered clearing agency's risk-based margin system. The Commission also proposed a new rule to establish requirements for the contents of a covered clearing agency's recovery and wind-down plan.

Commodity Futures Trading Commission

Prerule Stage Matters

[Reducing Regulatory Burden: Retrospective Review Under Executive Order 13563](#). In accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," the CFTC intends to continue its review of existing regulations to evaluate their continued effectiveness in achieving the objectives for which they were adopted. In this regard, the

CFTC expects to identify these regulations and to provide interested persons an opportunity to submit their views with respect to such regulations.

Rule Proposals Expected

[Amendment to the Made Available to Trade Process](#). Staff expects to recommend that the CFTC propose amendments to the Made Available to Trade (MAT) process to determine swaps that have been made available to trade and are therefore subject to the trade execution requirement.

[Operational Resilience Program for Certain Commission Registrants](#).^[2] The CFTC expects to propose a rule requiring certain CFTC registrants to establish and maintain a program of system safeguards and risk analysis with respect to its operations and information systems to ensure such systems are reliable, secure, and have adequate scalable capacity. Registrants' programs should include areas such as: information security, capacity and performance planning, systems operations, systems development and quality assurance, and physical security.

[Conflicts of Interest and Governance Requirements for Swap Execution Facilities](#). In 2010 and 2011, the CFTC proposed requirements to implement the following sections of the Dodd-Frank Act, insofar as they pertain to conflicts of interest for DCOs, designated contract markets (DCMs) and swap execution facilities (SEFs): section 726 (Rulemaking on Conflict of Interest); sections 725(c) and (d) (DCO Core Principles and Conflicts of Interest); section 735(b) (DCM Core Principles); and section 733 (SEF Core Principles). The CFTC did not adopt these proposals. The CFTC will issue a new notice of proposed rulemaking, which will: (1) apply to SEFs; and (2) take into account market and industry developments since the publication of the previous notices of proposed rulemaking. The proposed rulemaking will amend SEF Core Principles 12 and 15 in part 37 of the CFTC's regulations, to better align with existing requirements for DCMs. The rulemaking will also amend DCM Core Principles 15 and 16 in part 38 of the CFTC's regulations, to codify previously published acceptable practices, to provide regulatory certainty and to reflect industry best practice standards.

[DCO Member Property Requirements](#).^[3] Staff expects to recommend that the Commission propose amendments to part 39 of the Commission's regulations, in order to require DCOs to hold money, security, or property (funds) belonging to their clearing members separate from the DCO's funds and in an account clearly labeled as holding funds belonging to clearing members. Staff also expects to recommend the Commission propose to require DCOs to obtain a letter from any custodian of clearing member funds that acknowledges that the funds belong to clearing members and cannot be used by the DCO for other purposes. Staff also expects to recommend additional protections for clearing member funds and to require a DCOs to implement an anti-money laundering (AML) program.

Final Rules Expected

[Recovery and Wind-down Plans for Derivative Clearing Organizations; Information Necessary for Resolution Planning](#). The Commodity Futures Trading Commission is proposing amendments to the recovery and wind-down plan requirements applicable to derivatives clearing organizations (DCO) that would codify the staff guidance set forth in CFTC Staff Letter No. 16-61, require all derivatives clearing organizations to maintain wind-down plans, and clarify the information required for resolution planning. The proposal would also amend reporting requirements and make technical corrections to part 190, Form

DCO and the subpart C Election form.

[Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants.](#)

In July, 2023, the Commodity Futures Trading Commission (Commission) approved a notice of proposed rulemaking (NPRM) that would propose amendments to the regulations governing uncleared swaps for swap dealers and major swap participants for which there is not a prudential regulator. The proposed amendments would revise the definition of margin affiliate to provide that certain collective investment vehicles that receive a portion or all of their initial equity investment from a sponsoring entity would be deemed not to have any margin affiliates for the purposes of calculating certain thresholds that trigger the requirements to exchange initial margin (IM), effectively relieving swap dealers and major swap participants from posting and collecting IM with certain eligible seeded funds for a limited, three year period. The amendments would also include a proposal to eliminate a provision disqualifying the securities issued by certain pooled investment funds that transfer their assets through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, and similar arrangements from being used as eligible IM collateral. Finally, the Commission included a proposed technical amendment to the haircut schedule set forth in Regulation 23.156(a)(3)(i)(B) to add a footnote that was inadvertently omitted when the rule was originally promulgated.

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Notes

[1] The SEC's short-term regulatory agenda can be accessed at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235. While the agenda indicates anticipated timeframes for action, the timing of the publication of any proposals or final rule releases may vary.

There are six proposals that may affect investment companies or investment advisers on the long-term agenda with no date for expected next action provided. Those proposals are with respect to Transfer Agents, Certain Information Providers Acting as Investment Advisers, Proxy Process Amendments, Portfolio Margining of Uncleared Swaps and Non-Cleared Security Based Swaps, Amendments to Rules 17a-25 and 13h-1 Following Creation of the Consolidated Audit Trail, and Credit Rating Agencies - Conflicts of Interest and Transparency.

The SEC's long-term regulatory agenda can be accessed at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=202310&showStage=longterm&agencyCd=3235&csrf_token=849FA1D26A65C7EB68B533FD32852531346CED2C8A19B4DB61EEDDE6941AF2E066D8260BCA89334E8269B0425CA9831FD20A.

The CFTC's short-term regulatory agenda can be accessed at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3038&csrf_token=0ED2E284F8A854EF8211E7BDEA9A50D611FE8EDAB723A1FBC1CD8782844A0E5A232D

[DA5F5165967BB505B78A86840AAC2122](#).

Five rule proposals and three final rules that appear on the agenda have already been issued. From the SEC these include proposals with respect to: Registration for Index-Linked Annuities, Amendments to Form N-4 for Index-Linked and Variable Annuities; and Volume-Based Exchange Transaction Pricing for NMS Stocks; and adoptions of: Prohibition Against Conflicts of Interest in Certain Securitizations; Clearing Agency Governance; and Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities.

From the CFTC, these include proposals with respect to: Treatment of Separate Accounts by Futures Commission Merchants; Investment of Customer Funds, Cleared Swap Customer Funds, and 30.7 Customer Funds; and Amendments to Certain Provisions in Part 4 Applicable to Commodity Pool Operators and Commodity Trading Advisors.

[\[2\]](#) Scheduled to be considered on December 13, 2023.

[\[3\]](#) Scheduled to be considered on December 13, 2023.

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