

MEMO# 35768

July 10, 2024

SEC and CFTC Rulemaking Agendas

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TO: ICI Members
ICI Global Members
Derivatives Markets Advisory Committee
Equity Markets Advisory Committee
ESG Advisory Group
ESG Fund Disclosure Working Group
Fixed-Income Advisory Committee
Investment Advisers Committee
SEC Rules Committee SUBJECTS: Alternative Investments
Compliance
CPO/CTA
Derivatives
Disclosure
ESG
Fund Accounting & Financial Reporting
Fund Governance
International/Global
Investment Advisers
Operations
Trading and Markets RE: SEC and CFTC Rulemaking Agendas

The Office of Information and Regulatory Affairs released the Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions on July 8, 2024. The agenda includes regulatory actions that the Securities and Exchange Commission and Commodity Futures Trading Commission expect to take between now and April 2025.[\[1\]](#) SEC Chair Gensler's agenda that potentially would affect investment companies or investment advisers is voluminous with five proposals and eleven final rules expected by October 2024 and eight proposals and three final rules expected by April 2025. According to the agenda, the SEC will be focused on finalizing many of its outstanding proposals in the second half of 2024. Of note, the agenda identifies four rulemakings which are expected to be re-proposed.[\[2\]](#) CFTC Chair Behnam's agenda notes one proposal and seven 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 and Re-proposals Expected by October 2024

[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.

[Incentive-Based Compensation Arrangements](#). The Division of Corporation Finance 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.

[Safeguarding Advisory Client Assets](#). The Division of Investment Management is considering recommending that the Commission repropose amendments to existing rules and/or adopt new rules under the Investment Advisers Act of 1940 to improve and modernize the regulations around the custody of funds or investments of clients by Investment Advisers.

[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 re-propose 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.

Rule Proposals and Re-proposals Expected by April 2025

[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.

[Revisions to 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").

[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.

[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.

[Open-End Fund Liquidity Risk Management Programs](#). The Division of Investment Management is considering recommending that the Commission re-propose changes to regulatory requirements relating to open-end fund's liquidity and dilution management.

[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 October 2024

[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 Investment Advisers Act of 1940 and the Investment Company Act of 1940 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.

[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.

[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 Investment Advisers Act of 1940 to prohibit registered investment 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.

[Order Competition Rule](#). The Division of Trading and Markets is considering recommending that the Commission amend the regulation governing the national market system ("NMS") 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 an NMS. The rule would prohibit a restricted competition trading center from internally executing certain orders of individual investors at a 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 also include limited exceptions to this general prohibition. In addition, the Division is considering recommending that the Commission amend the regulation governing the NMS to add new defined terms included in the rule.

[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 of Trading and Markets is considering recommending that the Commission 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.

[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 NMS Plan Governing the Consolidated Audit Trail regarding data security.

[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.

[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 Exchange Act 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.

[Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders](#). The Division is considering recommending that the Commission amend certain rules of Regulation NMS 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 April 2025

[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.

[Volume-Based Exchange Transaction Pricing for NMS Stocks](#). The Division of Trading and Markets is considering recommending that the Commission adopt a new rule under the

Exchange Act to address concerns with national securities exchange volume-based transaction pricing in NMS stocks. The Commission proposed a new rule to prohibit national securities exchanges from offering volume-based transaction pricing in connection with the execution of agency-related orders in certain stocks. Additionally, the proposal would require the exchanges to disclose, on a monthly basis, certain information including the total number of members that qualified for each volume tier during the month.

[Form N-PORT Reporting](#). The Division is considering recommending that the Commission adopt amendments to reporting and disclosure requirements on Forms N-PORT and N-CEN that apply to registered investment companies that report on those forms.

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 Proposal Expected by March 2025

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

Final Rule Expected by July 2024

[Amendments to Certain Provisions in Part 4 Applicable to Commodity Pool Operators and Commodity Trading Advisors](#). The Commodity Futures Trading Commission proposed a rule amending certain requirements for commodity pool operators and commodity trading advisors, including increasing the threshold in the portfolio requirement to be a Qualified Eligible Person, imposing minimal disclosure requirements addressing principal risk factors, fees/breakeven table, and conflicts of interest, and extending the deadline for providing quarterly account statements to pool participants from 30 to 45 days.

Final Rules Expected by September 2024

[Recovery and Wind-down Plans for Derivative Clearing Organizations; Information Necessary for Resolution Planning](#). The Commodity Futures Trading Commission proposed 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 DCOs 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.

[Operational Resilience Program for Certain Commission Registrants](#). The Commodity Futures Trading Commission proposed a rule requiring certain Commission registrants to establish and maintain a framework 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' frameworks should include areas such as: information security, capacity and performance planning, systems operations, systems

development and quality assurance, and physical security.

[Investment of Customer Funds, Cleared Swap Customer Funds, and 30.7 Customer Funds.](#)

The Commodity Futures Trading Commission proposed amendments to the regulations governing the investments that futures commission merchants (FCMs) and DCOs may make with funds deposited by customers to margin futures, cleared swaps, and foreign futures transactions, as applicable.

[Conflicts of Interest and Governance Requirements for Swap Execution Facilities.](#) The Commodity Futures Trading Commission proposed to adopt new rules and amendments to existing rules related to SEF Core Principles 2, 12 and 15 in part 37 of the Commission's regulations, to better align with existing requirements for DCMs. The rulemaking also proposes to adopt new rules related to DCM Core Principles 15 and 16 in part 38 of the Commission's regulations, to codify previously published Acceptable Practices, to provide regulatory certainty and to reflect industry best-practice standards.

[Protection of Clearing Member Funds Held by Derivatives Clearing Organizations.](#) The Commodity Futures Trading Commission proposed amendments to part 39 of the Commission's regulations, to require DCOs to hold 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. The Commission also proposed 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. In addition, the Commission proposed to permit DCOs to hold customer and clearing member funds at foreign central banks subject to certain requirements. Finally, the Commission proposed to require DCOs to conduct a daily calculation and reconciliation of the amount of funds owed to customers and clearing members and the amount actually held for customers and clearing members.

Final Rule Expected by November 2024

[Treatment of Separate Accounts by Futures Commission Merchants.](#) The Commodity Futures Trading Commission proposed a rule to codify a no-action position currently applicable to DCOs with respect to the treatment by clearing member FCMs of margin requirements for separate accounts of certain beneficial owners. The proposed rule will be codified under 17 CFR part 1, and will apply the underlying requirement, along with the associated conditional exception, directly to all FCMs, with supporting amendments in 17 CFR parts 1, 22, 30, and 39, and additional amendments to ensure Commission regulations accurately describe current Commission requirements, in parts 1, 22, and 30. The proposed rule also withdraws the Commission's prior proposal, published in the Federal Register on April 14, 2023, to codify the no-action position, as applicable only directly to DCOs, in part 39.

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Notes

[1] [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&csrf_token=C80882BE5D394EF8D0F3F177210313F5AAF6CCB701826C3DB73394088809A52AB988EC0C5BB570C105C0ADBBD6958BF3C951. 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=202404&showStage=longterm&agencyCd=3235&csrf_token=3E007E104771538FC9F482BF62751D8F50A0AEA675F36DB235AB595DFAD0EC8C6F46F6C4C0DBF2FF705D59512805DDBBE5E4.

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=E4E702284B1334A085C958F578E755336CDBDFACB4E22620CF9F55543F38874A7982EF6315F2596C9615A4D7F95370D042CE.

The SEC already has issued one rule proposal that appears on the agenda: Customer Identification Programs for Registered Investment Advisers and Exempt Reporting Advisers.

[2] These include the proposals regarding Safeguarding Advisory Client Assets; Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers; Open-End Fund Liquidity Risk Management Programs; and Rule 144 Holding Period.