

MEMORANDUM

To: Members of the Committee on Financial Services
From: Republican Staff
Date: April 13, 2023
Re: April 18, 2023, Full Committee Hearing

On Tuesday, April 18, 2023, the Committee on Financial Services will hold a hearing entitled “Oversight of the Securities and Exchange Commission.”

Witnesses:

- The Honorable Gary Gensler, Chair, 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 together created the Securities and Exchange Commission (the SEC). The SEC’s tripartite 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 (PCAOB), the Financial Industry Regulatory Authority (FINRA), the Municipal Securities Rulemaking Board (MSRB), the Securities Investor Protection Corporation (SIPC), and the Financial Accounting Standards Board (FASB). The SEC also oversees over \$125 trillion in securities trading annually and 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 the last hearing on October 5, 2021.² Examples of the types of regulatory and policy developments that may be examined are noted below.

Staff Legal Bulletin No. 14L

On November 3, 2021, the SEC’s Division of Corporation Finance issued Staff Legal Bulletin 14L, which outlines new guidance on shareholder proposals submitted to public

¹ See Congressional Budget Justification and Annual Performance Plan; Fiscal Year 2022, Annual Performance Report, U.S. SECURITIES AND EXCHANGE COMMISSION (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).

companies pursuant to Rule 14a-8 under the Securities Exchange Act of 1934.³ This new guidance reverses four years of staff precedent and raises the burden for public companies seeking to exclude shareholder proposals, particularly those related to environmental and social issues.

Cybersecurity Disclosure

On March 9, 2022, the SEC proposed expansive new disclosures by public companies regarding cybersecurity matters.⁴ The proposed rules include an amendment to Form 8-K that would require issuers to publicly disclose a cybersecurity incident within four business days following the company's determination that the incident is material. The proposed 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 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," potentially expanding the SEC's authority over digital asset trading platforms.⁵

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 require certain publicly traded firms to disclose direct and indirect greenhouse gas emissions that emanate from their supply chains.

Staff Accounting Bulletin 121

On March 24, 2022, SEC staff issued Staff Accounting Bulletin (SAB) No. 121 to require 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.⁷

Amendments to Rule 14a-8

On July 13, 2022, the SEC proposed amendments to Rule 14a-8 under the Securities Exchange Act of 1934. Rule 14a-8 governs shareholder proposals included in a company's proxy

³ See Staff Legal Bulletin No. 14L (Nov. 3, 2021), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>.

⁴ See SEC, Proposed Rule, "Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure," available at <https://www.sec.gov/rules/proposed/2022/33-11038.pdf>.

⁵ See 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>.

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

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, 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.

Amendments Regarding Proxy Rules' Applicability to Proxy Advisory Firms

On July 13, 2022, the SEC adopted final amendments regarding the applicability of the proxy rules to proxy advisory firms, such as ISS and Glass Lewis.⁹ The amendments reverse some of the key provisions governing proxy voting advice that were adopted in July 2020, leaving no regulatory impetus for proxy advisory firms to engage with companies to ensure that company responses to voting advisories are received by shareholder clients. The amendments also rescind a note to Rule 14a-9, also adopted as part of the 2020 final rules, which provided examples of situations in which the failure to disclose certain information in proxy voting advice may be considered misleading.

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.¹⁰ The proposal would also tighten liquidity requirements on all open-end funds by including a new ‘bucketing’ system.

Equity Market Structure

On December 14, 2022, the SEC released four proposals that would overhaul the regulations governing equity markets.¹¹ 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.

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

⁸ See 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>.

⁹ See SEC Release, SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice (Jul. 13, 2022), available at <https://www.sec.gov/news/press-release/2022-120>.

¹⁰ See 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>.

¹¹ Securities and Exchange Commission, *SEC Proposals: Market Structure* (Dec. 2022) available at <https://www.sec.gov/newsroom/market-structure-proposals-december-2022>.

custodians.¹² The proposal would also require a written agreement between custodians and advisers, expand the “surprise examination” requirements, and enhance recordkeeping rules.

¹² See SEC Release No. IA-6240, *Safeguarding Advisory Client Assets*, available at <https://www.sec.gov/rules/proposed/2023/ia-6240.pdf>.