

## MEMORANDUM

To: Members of the Committee on Financial Services

From: Committee on Financial Services Staff

Date: September 19, 2024

Subject: September 24, 2024, Full Committee Hearing on “Oversight of the Securities and Exchange Commission”

---

On Wednesday, September 24, 2024, the Committee on Financial Services will hold a hearing entitled “Oversight of the Securities and Exchange Commission.” Testifying at the hearing will be:

- The Honorable Gary Gensler, Chairman, U.S. Securities and Exchange Commission
- Hester Peirce, Commissioner, U.S. Securities and Exchange Commission
- Caroline Crenshaw, Commissioner, U.S. Securities and Exchange Commission
- Mark Uyeda, Commissioner, U.S. Securities and Exchange Commission
- Jaime Lizárraga, Commissioner, U.S. Securities and Exchange Commission

### Background

During the peak of the Great Depression, Congress passed the Securities Act of 1933 and the Securities and Exchange Act of 1934, which created the Securities and Exchange Commission (SEC). The SEC’s tripartite mission is to: (1) protect investors; (2) maintain fair, orderly, and efficient markets; and (3) facilitate capital formation. Pursuant to its statutory mandate, 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.<sup>1</sup>

Under Chair Gensler, the SEC has made the digital asset ecosystem a primary focus. The SEC continues to pursue an aggressive enforcement and regulatory agenda to extend the SEC’s authority over the entire digital asset ecosystem. In particular, under Chair Gensler, the SEC has failed to release guidance explaining how the SEC determines whether a digital asset meets the definition of a security. Rather, Chair Gensler and the SEC have publicly opined, including before Congress, that the “vast majority” of digital assets are securities. The SEC’s lack of clear

---

<sup>1</sup> See 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](https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf).

guidance or regulatory framework has left the digital asset ecosystem in a state of regulatory and legal uncertainty, threatening the ecosystem’s existence in the United States.

## **Consequential Rulemaking**

### *Climate Risk Disclosures*

On March 6, 2024, the SEC finalized its climate rule voting 3-2 in favor of an 886-page rule titled “The Enhancement and Standardization of Climate-Related Disclosures for Investors” (Climate Rule).<sup>2</sup> The Climate Rule requires certain public companies to disclose Scope 1 and Scope 2 GHG emissions, if such emissions are considered material, in their annual reports and registration statements.<sup>3</sup>

In response to litigation filed by Liberty Energy and Nomad Proppant Services, the Fifth Circuit Court of Appeals granted a request for an administrative stay on March 15, 2024.<sup>4</sup> The Court eventually lifted the stay and, following the SEC’s request to consolidate at least nine of the pending lawsuits, the Eighth Circuit Court of Appeals was selected via a lottery to consider the rule’s legal challenges.<sup>5</sup> On April 4, 2024, the SEC voluntarily stayed the Climate Rule, pausing any implementation, pending judicial review.<sup>6</sup>

### *Cybersecurity Disclosure*

On July 26, 2023, the SEC adopted by a 3-2 vote rules requiring expansive new disclosures by public companies regarding cybersecurity matters.<sup>7</sup> The final rules, entitled “Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure” (Cybersecurity Rule), include an amendment to Form 8-K that requires issuers to publicly disclose a cybersecurity incident within four business days following the company’s determination that the incident is material to the company.<sup>8</sup> On December 18, 2023, the Cybersecurity Rule became effective.

---

<sup>2</sup> See SEC Adopting Release, “The Enhancement and Standardization of Climate-Related Disclosures for Investors” (Mar. 6, 2024), available at <https://www.sec.gov/rules/2022/03/enhancement-and-standardization-climate-related-disclosures-investors#33-11275>.

<sup>3</sup> Although the SEC includes a materiality qualifier, companies must establish the systems and infrastructure to prove whether emissions should be disclosed. If they choose not to disclose, they risk being second-guessed by the SEC and other potential litigants.

<sup>4</sup> Perry Cleveland-Peck and Dylan Tokar, U.S. Appeals Court Temporarily Halts SEC Climate-Disclosure Rule, Wall Street Journal (Mar. 18, 2024), available at <https://www.wsj.com/articles/u-s-appeals-court-temporarily-halts-sec-climate-disclosure-rules-456f2f4c>.

<sup>5</sup> See, e.g., Clark Mindock, Challenges to SEC’s climate rules sent to conservative-leaning US appeals court, Reuters (Mar. 22, 2024), available at <https://www.reuters.com/legal/challenges-secs-climate-rules-sent-conservative-leaning-us-appeals-court-2024-03-21/>; Andrew Levine, Ulysses Smith and Isabelle Glimcher, The Challenges SEC’s Climate Disclosure Rule May Face, Law360 (Mar. 19, 2024), available at <https://www.law360.com/articles/1814872>.

<sup>6</sup> Isla Binnie, “US SEC stays climate disclosure rule amid legal challenges,” Reuters (April 4, 2024) available at <https://www.reuters.com/legal/us-sec-stays-climate-disclosure-rule-amid-legal-challenges-2024-04-04/>.

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

<sup>8</sup> *Id.*

### *Rule 14a-8 Amendments*

On July 13, 2022, the SEC proposed amendments to Rule 14a-8(i)(12) that would impose additional restrictions on companies seeking to exclude proposals addressing substantially the same subject matter as prior proposals that received minimal support.<sup>9</sup>

### *Private Fund Adviser Rule*

On August 23, 2023, the SEC adopted new rules and rule amendments adding regulatory requirements on private fund advisers and updating the existing compliance rule applicable to all investment advisers. On June 5, 2024, the Fifth Circuit vacated the rule, noting that the SEC exceeded its statutory authority and violated the Administrative Procedure Act.<sup>10</sup>

### *Equity Market Structure Reforms*

On December 14, 2022, the SEC released four proposed rules that cumulatively account for more than 1,600 pages and make significant changes to the U.S. equity market structure: (1) Disclosure of Order Execution Information; (2) Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders; (3) Order Competition Rule; and (4) Regulation Best Execution.<sup>11</sup> A year later, on October 18, 2023, the SEC proposed a fifth rule affecting U.S. equities markets: Volume-Based Exchange Transaction Pricing for NMS Stocks (Volume-Based Pricing Rule).<sup>12</sup>

On March 6, 2024, the SEC adopted amendments to update the disclosure required under Rule 605 of Regulation NMS for order execution in national market system stocks (NMS stocks).

### **Recent Court Decisions**

The Supreme Court's recent ruling in *West Virginia v. EPA* reaffirmed the position that a government agency's rulemaking authority is not unlimited.<sup>13</sup> In that case, the Court ruled that the major questions doctrine requires a government agency to point to clear congressional authorization for its actions.<sup>14</sup> The Court also held that an agency cannot make up new interpretations of laws to justify far-reaching policy changes that Congress never intended.<sup>15</sup>

---

<sup>9</sup> 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>.

<sup>10</sup> *National Association of Private Funds Managers, et al. v. Securities and Exchange Commission*, 5<sup>th</sup> Cir. No. 23-60471 available at <https://www.ca5.uscourts.gov/opinions/pub/23/23-60471CV0.pdf>.

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

<sup>12</sup> See SEC, Proposed Rule, "Volume-Based Exchange Transaction Pricing for NMS Stocks," available at <https://www.sec.gov/files/rules/proposed/2023/34-98766.pdf>

<sup>13</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_\_ (2022).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Moreover, on June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned *Chevron v. Natural Resources Defense Council* ending the long-standing Chevron doctrine, which instructed courts to defer to administrative agencies' interpretations of statutes.<sup>16</sup> By overturning *Chevron*, the Court dramatically reduced the authority of federal agencies, including the SEC, when interpreting statutes.<sup>17</sup>

## Legislative Proposals

**H.R. 9477, the *SEC Review Act (Meuser)*.** This bill increases accountability at the SEC by ensuring that no division of the SEC or the SEC Chair can provide no-action relief on shareholder proposals or issue staff guidance with the force of a rule without full Commission approval if requested by another Commissioner.

**H.R. 7092, the *Protecting Private Job Creators Act (Mooney)*.** The bill will exempt certain fixed income Securities from compliance with the requirements of Rule 15c2-11.

**H.R. 6695, the *Due Process Restoration Act of 2023 (Davidson)*.** The bill will authorize private parties to compel the Securities and Exchange Commission to seek sanctions by filing civil actions, and for other purposes.

**H.R. 9342, the *Securities Enforcement Clarity Act of 2024 (Sessions)*.** The bill clarifies what constitutes a violation of the federal securities laws for purposes of determining penalty amounts.

**H.R. 9148, the *Tailoring for Main Street Investors Act (Garbarino)*.** The bill amends the Investment Advisers Act of 1940 to provide an exemption from the registration requirements under that Act to certain advisers of private funds. Under the bill, advisers of funds with less than \$5 billion AUM would be required to report Form ADV every other year, while funds with less than \$1 billion AUM would be able to report a short form ADV, which the bill requires the SEC to create, every other year.

**H.R. 6623, the *Main Street Growth Act (Emmer)*.** This bill allows for the registration of national venture securities exchanges for the purpose of trading the securities of certain small companies, such as startups and emerging growth companies.

**H.R. 5741, the *Uniform Treatment of Custodial Assets Act (Flood)*** – The bill would prohibit Federal banking agencies, the National Credit Union Administration, and the SEC from requiring banks to include assets held in custody or safekeeping as a liability on the institution's balance sheet.

**H.R. 9578, the *Bridging Regulation and Innovation for Digital Global and Electronic (BRIDGE) Digital Assets Act (Rose)*** – This bill establishes a Joint CFTC-SEC Advisory Committee on Digital Assets composed of digital asset marketplace stakeholders.

---

<sup>16</sup> See *Loper Bright Enterprises v. Raimondo*, 603 U.S. \_\_ (2024).

<sup>17</sup> *Id.*

**H.R. \_\_\_, the *Securing Innovation in Financial Regulation Act (Lucas)*** – This discussion draft establishes the SEC Strategic Hub for Innovation and Financial Technology (FinHub), which will assist the SEC with its approach to technological advancements, examine the impact that financial technology (FinTech) innovations have on capital markets, market participants, and investors, and coordinate the SEC’s response to emerging technologies in financial, regulatory, and supervisory systems.

**H.R. \_\_\_, *To require the Commodity Futures Trading Commission and the Securities and Exchange Commission to conduct a study to assess whether additional guidance or rules are necessary to facilitate the development of tokenized securities and derivatives products, and for other purposes (TBD)*** – This discussion draft requires the Securities and Exchange Commission and the Commodity Futures Trading Commission to jointly conduct a study to assess whether additional guidance or rules are necessary to facilitate the development of tokenized securities and derivatives products, and to the extent such guidance or rules would foster the development of fair and orderly financial markets, be necessary or appropriate in the public interest, and be consistent with the protection of investors and customers. This study would be reported to Congress no later than one year after enactment.

**H.R. \_\_\_, *To codify the special purpose broker dealer, and for other purposes (TBD)*** – This discussion draft extends the SEC’s 2020 policy statement that created a framework for broker dealers to offer custody services for tokenized securities for an additional five years.

**H.R. \_\_\_, the *New Frontiers in Technology (NFT) Act (Timmons)*** – This discussion draft clarifies that a covered non-fungible token (NFT) is not an investment contract or a transaction in a security.

**H.R. \_\_\_, *To require the Securities and Exchange Commission, Commodity Futures Trading Commission, and the Secretary of the Treasury to jointly carry out a study on decentralized finance (Davidson)*** – This discussion draft would require the CFTC, the SEC, and the Secretary of the Treasury to conduct a joint study on DeFi, which would analyze the size, scope, role, nature, and use of DeFi protocols, the benefits and risks of DeFi, how DeFi has integrated into the traditional financial markets, including the risks of DeFi integration, and the levels and types of illicit activities in DeFi compared to traditional financial markets and how to address such illicit activities.

**H.R. \_\_\_, *To amend the Securities Exchange Act of 1934 to exclude decentralized finance activities from that Act, and for other purposes (TBD)*** – This discussion draft exempts certain decentralized finance (DeFi) activities related to the operations and maintenance of blockchain networks from the Securities Exchange Act of 1934. Such exempt activities would include compiling network transactions, providing computational work, distributing software, distributing a blockchain system, providing a user-interface, among others.