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SEC Rulemaking State-of-Play
August 8, 2023

OVERVIEW	With Congress officially out of town for the August recess, all eyes are on the Securities and Exchange Commission (SEC) as the rulemaking process is full speed ahead with a packed agenda. Since being sworn in, Chair Gary Gensler and the rest of the agency have taken a very active approach to rulemaking. The SEC has finalized a total of 13 rules, has another 33 proposed rules awaiting finalization, and has 13 more rules on the agenda that have not yet been proposed. Through this extensive rulemaking effort, the current SEC leadership has a chance to dramatically overhaul the existing regulatory regime and to impose new frameworks to address emerging trends and products in the U.S. capital markets. While the pace and volume of the SEC's rulemaking has received attention, the SEC has also faced criticism from Capitol Hill and the financial services industry suggesting that the SEC lacks the legal authority to pursue certain rules, is ignoring Congressional intent, and is hindering capital formation and innovation. That said, many Democrats on Capitol Hill continue to support the SEC's efforts — especially after years of limited legislative progress on major items related to the environment, private funds disclosure, diversity initiatives, and much more. The below includes an analysis of many of the rules currently on the SEC's agenda and provides our projected timeline for each. The projected finalization timelines are based on RFA's calculation of the historical pace of rulemaking, as well as RFA's judgment about SEC priorities. **Rules Covered** • Private Fund Advisers • Definition of "Exchange" and Reg ATS • Dealer Definition • Climate Disclosure • Investment Company Names • ESG Disclosure for Investment Advisers • Mutual Fund Swing Pricing and Hard Close • Equity Market Structure Reform • Conflicts of Interest in Securitizations • Safeguarding Rule • Cybersecurity Rules • Shareholder Proposals (Rule 14a-8) • Amend Form PF — All Filers and Large Hedge Funds • Treasury Clearing • Reg SCI Expansion • Predictive Data Analytics • Human Capital Management Disclosure • Reg D Reform

Our View	The pace and significance of many proposed rules will inevitably lead to delays. As we will discuss, many of these rules have seen their deadlines extended and some comment periods reopened. That said, Chair Gensler has priorities that he would like to ensure are finalized ahead of the 2024 election. As a result, we anticipate that the SEC will continue to prioritize major proposals like the Climate Disclosure rule, the Private Fund Advisers rule, and the Treasury Market Reform rules — all of which would leave a significant stamp on the SEC's regulatory framework. That said, many of these rules will result in legal challenges when they are finalized. Additionally, Congress will continue to pay close attention to each of these rulemaking proposals, with Republicans remaining critical of the pace and volume of regulatory action, as well as the details of individual rules. An opportunity to question Chair Gensler directly will come on September 12th when he is expected to testify in front of the Senate Banking Committee (SBC). In the background, many Democrats who have seen their proposals stalled on Capitol Hill will continue to press Chair Gensler and the other Democratic Commissioners to finalize as many of these proposals as possible.
Private Fund Advisers	**Overview** In February 2022, the SEC proposed a rule that would significantly increase regulations for private fund advisers. At a high level, the proposed changes are designed to provide private fund investors with increased transparency and prohibit private fund advisers from engaging in certain practices that the SEC has identified as particularly susceptible to conflicts of interest and areas of enhanced investor risk. Key elements of the proposed rule include: • Requiring registered private funds to provide investors with quarterly statements detailing fund performance, fees, and expenses. • Annual audits of each private fund, with automatic SEC notification events. • Prohibition of charging fees for underperformed services (e.g., charging accelerated monitoring fees). • Distribution of a fairness opinion and summary of material business relationships between the adviser and opinion provider for adviser-led secondary transactions. • Prohibition on certain types of preferential treatment ("side letters") that are commonplace in the industry (e.g., preferential liquidity terms), while allowing other side letters to proceed if they are disclosed to all clients at time of agreement and annually. **Commentary** There has been significant pushback on this rule from the private funds industry, most notably from the American Investment Council (AIC), which represents the private equity (PE) industry, and which has submitted multiple comment letters on the proposal. AIC's first comment letter highlighted the continuing shift of capital by sophisticated institutional investors to the PE industry, arguing that these investors would not be increasing their exposure if they "lacked sufficient information to make responsible remunerative investment decisions." The AIC also argued that the SEC lacks the statutory authority to implement the rule. Additionally, in recent appearances on the Hill, Chair Gensler has heard frequent — and even bipartisan — criticism of this proposal. Rep. Barr (R-KY) pushed back on assertions from the SEC that this rule is necessary due to a lack of competition in the private funds market. Additionally, Rep. Torres (D-NY) suggested that the SEC may be "trying to fix something that isn't broken." Rep. Kim (R-CA) specifically focused her criticism on the rule's prohibition on side letters. The rule is strongly supported by progressives in Congress — led by Sen. Warren (D-MA) — who have long been critical of the PE industry. Those supporting the rule view this as an opportunity to increase transparency and oversight of the private funds industry through the rulemaking process. SBC Chair Brown (D-OH) and seven other Senate Democrats sent a letter to the SEC supporting the rule, as proposed, stating that it "marks an important step in

	increasing oversight by requiring current reports from large hedge fund and large PE fund advisers upon the occurrence of certain sharp losses, demands for margin or capital, operational disruptions, and significant withdrawals or redemptions." Additionally, the Institutional Limited Partners Association (ILPA) commented in support of the intent of the rule as a way to "level the playing field in the bargaining process" with private funds, while also recognizing the important role PE has played in their members' investment portfolios to achieve return targets. Their support for the proposal endorses the increased transparency provisions for the funds they invest in to "enhance the ability of ILPA's members, as fiduciaries, to meet their obligations to beneficiaries." ILPA also released a report entitled "*The Future of Private Equity Regulation*" that incorporated survey data from their membership to support the SEC's proposed rule. **What to Watch** This rule will almost certainly be challenged in court when it is finalized, and the litigation will likely focus on the perceived shortcomings in the SEC's economic analysis. When the rule is finalized, it will be important to examine the sufficiency of the economic analysis, and any changes that were made to this analysis in the final rule. The FY2023 Consolidated Appropriations Act included report language directing the SEC to conduct a new economic analysis of the rule; to date, the SEC has declined to conduct a new economic analysis. **Projected Finalization Timeline** We expect this rule to be finalized by the SEC the week of August 14, 2023.
DEFINITION OF "EXCHANGE" AND REG ALTERNATIVE TRADING SYSTEMS (ATS)	**Overview** Rule 3b-16 was initially adopted in 1998, and the SEC cites changes in the types of platforms used today to facilitate trading as the impetus for expanding the requirement to register as an exchange or a broker-dealer. The proposed rule would: • Amend Rule 3b-16 by expanding the definition of an "exchange" from a system that brings together "orders" to bringing together "trading interests." This represents an expansion to include non-firm indications of willingness to buy or sell a security. • Expand how "established, non-discretionary methods" can be demonstrated to include "communication protocols" — a standard that would subject many more systems to Reg ATS. • Extend Regulation Systems Compliance and Integrity (SCI) to certain ATSs that trade government securities. **Commentary** In April 2022, then-Ranking Member McHenry (R-NC) and Rep. Huizenga (R-MI) sent a letter to the SEC criticizing the impact that the proposed rule would have on the digital asset markets. In June 2023, HFSC Republicans sent a letter to the SEC, arguing that the rule exceeds the "statutory authority" granted to the SEC, while suggesting that the proposed rule would "stifle innovation and harm digital asset market participants." Additionally, industry participants have submitted comments to the SEC, encouraging them not to apply a "one-size-fits-all" approach across platforms engaging in different trades. **What to Watch** Neither Reg ATS nor the current exchange rules are well-tailored to the new entities that this proposed rule would capture. The key for the SEC will be whether to either: (1) narrow the scope of the entities captured by the rule; or (2) keep the broad scope of the rule, but better tailor Reg ATS and the exchange rules for the new entities the rule would capture. **Projected Finalization Timeline** 2023-Q4 or 2024-Q1

DEALER DEFINITION	**Overview** The SEC proposed new rules that are intended to clarify when an entity trading securities for its own account is required to register as a "dealer" or a "government securities dealer" under the Securities Exchange Act of 1934. Specifically, the rule attempts to further define the phrase "as part of a regular business" contained in the definitions of "dealer" and "government securities dealer" in order to increase the number of entities that are required to register as dealers. These new rules would capture market participants that have not previously registered as dealers, including proprietary (or principal) trading firms, based on the following standards: • Qualitative Standards: The rule proposes three new qualitative standards to identify dealer-like activity: 1. Routinely making roughly comparable purchases and sales of the same or substantially similar securities in a day; 2. Routinely expressing interest to other market participants in trading securities near the best available prices on both sides of the market; or 3. Earning revenue primarily from bid-ask spreads or from capturing any incentives offered by trading venues to liquidity-supplying trading interests. • Quantitative Standard: The rule proposes a bright-line test that would be triggered if an entity "engaged in buying and selling more than $25 billion of trading volume of government securities, during four of the last six months." • Exclusions: The proposed rule would exclude entities with under $50mm in assets, as well as Registered Investment Companies. **Commentary** In an April 2023 HFSC hearing, Rep. Hill (R-AR) raised concerns about the proposal improperly classifying funds that are "buyers of Treasuries" as dealers. The proposal's expansion of the definitions of a "dealer" and a "government securities dealer" and the proposed quantitative and qualitative tests have received opposition from financial industry trade groups, including SIFMA, the Investment Adviser Association, and the Managed Funds Association. Notably, these organizations raise concerns about the use of the quantitative and qualitative tests for determining who is a dealer and overly broad standards triggering registration as a result of "ordinary asset management activity." Then-Ranking Member McHenry and Rep. Huizenga also expressed concerns with this proposal and how it could impact the digital asset ecosystem in their April 2022 letter to the SEC. McHenry and Huizenga highlight the overly broad standard under the proposal subjecting more persons to SEC registration. Additionally, they expressed concern that the SEC indicates in a footnote, "but nowhere else in the rule," that the proposed rule would also encompass digital assets deemed to be securities without any additional information or related cost-benefit analysis. The concerns raised by Huizenga and McHenry in regards to the proposal's inclusion of digital assets were echoed in comment letters from digital asset and blockchain trade organizations, including the Blockchain Association and the Association for Digital Asset Markets (ADAM). ADAM highlighted that they are concerned about the overarching application of the dealer and government securities dealer regulatory framework to digital assets, noting this would be "premature and imprudent" as the SEC should consider that not all digital assets are securities — and some digital assets that may be considered securities today, may not be in the future. **What to Watch** The key issues to watch in the final rule are: (1) whether and how much the SEC scales back the broad qualitative standards; and (2) whether and how much the SEC raises the $25 billion quantitative threshold.

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<tr><td></td><td>If the final rule sweeps in too many principal trading firms that provide significant liquidity to the Treasury markets and causes those firms to withdraw from those markets, then we could conceivably see significant disruption in the Treasury markets — which would impact the U.S. government's ability to issue debt.

Projected Finalization Timeline
2023-Q4 or 2024-Q1</td></tr>
<tr><td>CLIMATE DISCLOSURE</td><td>Overview
This is arguably the most high-profile and controversial rule that the SEC has proposed. The proposed rule would require companies to report on climate-related risks and their actual or likely impact on the business, strategy, and overall outlook. Additionally, companies would have to report how they are governing these risks, their greenhouse gas (GHG) emissions, and any climate-related targets, goals, and transition plans the company has adopted. Finally, the proposal would require the inclusion of certain climate-related financial metrics and related disclosures in its audited financial statements.

When proposing the rule, the SEC cited investor appetite for "information about the effects of climate-related risks on a company's business to inform their investment decision-making." The SEC has focused on the need to require disclosure of more consistent, comparable, and reliable information, given the significant variance in what information is reported, what metrics are used, and how different impacts are determined.

Commentary
Each time that the SEC has been represented before Congress since this rule's proposal, there has been commentary on this proposed rule. Republicans are largely unified in their opposition and have pointed to the compliance and legal burdens on businesses. Additionally, they have questioned the SEC's legal authority to enforce climate-focused regulations. The SEC has received many letters from Republicans on this issue, including SBC Republicans who sent a letter identifying this rule as outside of the SEC's mission. As a sign of the Republican's unified opposition, SBC Ranking Member Scott (R-SC) and HFSC Chair McHenry (R-NC) and Subcommittee Chair Huizenga (R-MI) sent a letter echoing the claim that this "sweeping rule exceeds the SEC's mission, expertise, and authority," while highlighting the Supreme Court's recent ruling in West Virginia v. EPA, where the major questions doctrine was cited. This doctrine requires a government agency to point to clear Congressional authorization for its actions, which Republicans continue to argue has never occurred with respect to disclosure of climate-related information.

On the Democratic side, the opinion is much more nuanced, with most members largely supporting the goals of the rule, because it represents a way to advance environmental initiatives within the business community through a financial regulator. That said, the nuance comes in when it comes to potential changes to the proposal, with the clear dividing line being Scope 3 emissions. Some, like Sen. Warren (D-MA), have lobbied the SEC to advance the rulemaking process and not weaken the proposal in any way. Others have raised concerns about the impact that Scope 3 emissions reporting will have down the supply chain, particularly for smaller businesses. Sen. Manchin (D-WV) referenced Scope 3 emissions as a significant concern as he believes that "the proposed rule could hinder the 'all-the-above' energy policy the country desperately needs" and "that reporting requirements could extend to small businesses down the supply chain indirectly contributing to emissions." Just yesterday, 75 House Democrats sent another letter to Chair Gensler urging the prompt finalization of the rule and arguing that the current SEC proposal is "grounded in financial materiality, aligns with the demands of investors and market participants, and is clearly within the SEC's mission, authorities, long-standing norms, and responsibilities."</td></tr>
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	What to Watch The key issues to watch in the final rule include: • Whether the rule continues to require disclosure of Scope 3 emissions; • The threshold at which companies must disclose the impact that climate change will have on financial line-items; • The type of information that can be "furnished" rather than "filed"; and • How the SEC incorporates the concept of "materiality" into climate disclosures. **Projected Finalization Timeline** 2023-Q4, but could slip to 2024-Q1
INVESTMENT COMPANY NAMES	**Overview** With the increased prevalence of "theme" focused funds, the SEC has proposed an update to the fund "Names Rule" to ensure that fund names are not materially deceptive or misleading. Among other reasons for the changes, the SEC cited a recent uptick in ESG funds or "thematic areas" like artificial intelligence or blockchain. The proposed changes would: • Require new covered funds to comply with the "80% rule" — investing at least 80% of their assets in accordance with the investment focus the fund's name suggests; • Add issuers with "particular characteristics" to the existing list of "focus" category options (type of investment, industry, region); • Could include ESG, value, growth; • Require disclosure and reporting to define any term used in its name and the criteria the fund uses to select these investments; and • Update the current notice requirements and establish recordkeeping requirements. **Commentary** This rule is focused on "greenwashing" as the SEC works to address concerns with funds advertising ESG products and investing strategies, while misleading investors about the underlying ESG factors. There have been some concerns around the inclusion of words like "growth" and "value" alongside ESG, while the SEC explicitly excluded "duration," "balanced," "long/short," and "real return" in their proposal release. Multiple industry participants have commented on this clear distinction made by the SEC, so it is worth watching to see if "growth" and "value" remain explicitly listed in a final rule. **Projected Finalization Timeline** 2024-Q1 or 2024-Q2
ESG DISCLOSURES FOR INVESTMENT ADVISERS	**Overview** This is another rule targeting the expanded market and investor appetite for ESG investing. The SEC has stated that this proposal is "designed to create a consistent, comparable, and decision-useful regulatory framework…to inform and protect investors while facilitating further innovation." As the SEC has often highlighted in the development of the Climate Disclosure rule, the environmental and broader ESG space has a variety of different standards, which allows for significant variety in ESG investment strategies. This proposal focuses on the variation in how different investment advisers define ESG, as well as the data and criteria they focus on for investment decisions. It would apply to Registered Investment Companies (RICs, BDCs) and Registered Investment Advisers (RIAs) who incorporate ESG into their investment process and the depth of reporting would depend on how central ESG is to their investment strategy. Specific provisions include: • ESG-specific disclosures in fund prospectuses, annual reports, and adviser brochures;

	• An "ESG Strategy Overview" — a layered, tabular disclosure approach that allows investors to compare ESG funds at a glance; and • For environmentally focused funds, mandatory disclosure of the Greenhouse Gas (GHG) emissions associated with their portfolio investments. **Commentary** In the House, Rep. Barr (R-KY) reintroduced legislation, the Ensuring Sound Guidance Act, which would require investment advisers and ERISA retirement plan sponsors to prioritize financial returns over "non-pecuniary factors" when making investment decisions on behalf of their clients. Additionally, the bill would not prohibit investing in ESG funds, but according to Rep. Barr, "would ensure that investors are given proper information and informed that the ESG fund is not designed to maximize profits." A similar bill was introduced in the Senate by Sen. Cotton (R-AR). Though, given the partisan nature of the bills, it is unlikely these make significant advancements through a Democratic-controlled Senate. Industry participants submitted comments to the SEC supporting the intent of the rule as a way to address broad definitions that can create investor confusion by defining "ESG-focused funds" too broadly. Along these same lines, the Investment Adviser Association submitted comments supporting the overall intent of the letter, but expressing concern that many of these disclosures already exist and that the rule's "broad scope" may "obscure rather than clarify salient information for investors," along with additional technical concerns. **What to Watch** Requiring disclosure of the GHG emissions associated with a fund's portfolio investments would be extremely difficult, and if the final rule keeps this requirement for environmentally focused funds, then we will likely see the number of environmentally focused funds decrease substantially. **Projected Finalization Timeline** 2024-Q1 or 2024-Q2

Mutual Fund Swing Pricing and Hard Close	**Overview**
	Similar to the proposal focused on addressing Treasury market stress experienced during the onset of the pandemic, the SEC is again working to incorporate lessons learned from the same time period, but this time with respect to open-end funds. This proposal is intended to "better prepare open-end funds for stressed conditions and mitigate dilution of shareholders' interests." However, some of the changes would significantly impact how open-end funds conduct their daily settlements with investors. The proposed changes include:
	• Requiring open-end funds, other than MMFs and ETFs, to use swing pricing and implement a "hard close" to operationalize this pricing and to improve order processing more generally;
	  o Swing Pricing: Adjusting the open-end fund's price above or below its net asset value (NAV) based on the level of transaction activity that day (derived by calculating a "swing factor"). This is intended to force redeeming investors to internalize the costs that their redemptions impose on the rest of the fund investors.
	  o Hard Close: Would require an investor's buy or sell order to be received from the transfer agent or a registered clearing agency before the time the open-ended fund calculates the NAV (typically 4:00 PM ET) to receive that day's price. Currently, the investor receives the daily pricing as long as the intermediary receives the order before the time the open-ended fund calculates the NAV and can deliver it later that evening or the next day.
	• Changing how open-end funds, other than MMFs and ETFs, classify the liquidity of their investments and require a minimum amount of highly liquid assets of at least 10% of net assets; and

	• Requiring more frequent and detailed public reporting of fund information, including information about funds' liquidity and use of swing pricing. **Commentary** This proposal has received significant concern from Capitol Hill with members of both parties weighing in on the proposal. The primary focus has been on the implementation of swing pricing and implementation of a hard close. This includes a joint letter from the Senate Finance Committee Chair Wyden (D-OR) and Ranking Member Crapo (R-ID), along with House Ways and Means Committee Chair Smith (R-MO) and Ranking Member Neal (D-MA), expressing concerns about "the impact the proposed hard close requirements to implement swing pricing will have on millions of retirement savers who invest in mutual funds through their employer-sponsored retirement plans." This issue has been raised by many other members, including recently by HFSC Subcommittee on Capital Markets Chair Wagner (R-MO) and Ranking Member Sherman (D-CA). Additionally, during a hearing, Sen. Coons (D-DE) addressed the fact that swing pricing has been authorized by the SEC since 2016 but has remained very rarely used, as a point on the market impact of such a proposal. **Projected Finalization Timeline** 2024-Q2
EQUITY MARKET STRUCTURE REFORM	**Overview** Equity market structure reform is a package of four proposed rules that could dramatically change the way equity securities are bought and sold. At a high level, the SEC seems to be advancing this package with the belief that increased competition and transparency will lead to better pricing and a more efficient market for investors. **Order Competition** The most controversial of the four rules, this proposal is intended to increase competition for the execution of marketable orders for individual investors. Specifically, the proposed rule would require marketable orders of individual investors to be exposed to competition in an open auction before those orders could be executed internally. The rule would also exempt a number of orders, including orders that are executed at prices better than the National Best Bid and Offer (NBBO), and orders for which no qualified auction is being operated. The SEC cites market developments since the adoption of Reg National Market System (NMS) in 2005 that have given rise to concerns about concentration, transparency, and competition, as the primary impetus for the new rule. Specially, the SEC claims that, "broker-dealers route more than 90% of marketable orders of individual investors in NMS stocks to a small group of six off-exchange dealers, often referred to as wholesalers." **Reg Best Execution** This would represent the SEC's first formal adoption of a rule defining broker-dealers' "best execution" obligation. The rule would require broker-dealers to achieve the "most-favorable price" for customers in securities transactions. While there are similarities to the existing FINRA rule, this proposal pivots from FINRA's traditional principles-based approach to a more prescribed written policy and procedure standard that will require heightened compliance by broker-dealers, with some exceptions. There are additional provisions to address mitigation and disclosure of "conflicted transactions." The rule is intended to supplement, not replace, FINRA's best execution rules, and as a result FINRA's best execution rules would be unaffected by the SEC's Reg Best Execution. **Order Execution Information (Rule 605)** This proposed rule updates Rule 605 of Regulation NMS for order executions in NMS stocks (i.e., exchange-listed equities and exchange-traded funds). Specifically, the proposed rule would expand the scope of entities that are subject to Rule 605 to include: (1) large broker-dealers with at least 100,000 customer accounts; (2) single-dealer platforms; and (3) entities that would operate

	the qualified auctions being proposed in the Order Competition Rule. Additionally, the rule would amend the *type* of information required to be reported to include a number of more granular metrics and new metrics that the SEC believes will better measure execution quality, such as "effective over quoted spread." Finally, the rule would require entities to make easy-to-understand summary reports on execution quality available monthly. **Reg NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders** This rule would establish four new minimum tick sizes (or "pricing increments") for NMS stocks, which would vary based on the time-weighted average quoted spread of the stock. The rule would apply to both quoting and trading, and would apply to trading on exchanges, ATSs, and over-the-counter. In addition, the rule would reduce the access fee caps under Rule 610. Currently, access fees are capped at 30 mils (i.e., $0.003). Under the proposal, for stocks priced over $1 per share, the access fee would be capped at either 5 mils or 10 mils, depending on the stock's minimum tick size. For stocks priced under $1 per share, the access fee would be capped at 5 basis points, which is down from 30 basis points currently. The rule would require that all fees and rebates be determinable at the time of execution and would accelerate the compliance date for the 2020 Market Infrastructure rule. **Commentary** Given the scale of this multi-rule proposal, the SEC has received significant input from and criticism from Congress. Specific to the Reg Best Execution proposal, members including Rep. Wagner (R-MO) have questioned why the SEC needs to have a best execution rule when FINRA already has one, particularly given the SEC has the authority to amend FINRA's rule. While many Democrats are supportive of the underlying goals of equity market structure reform, there are still concerns about individual provisions. During Chair Gensler's recent appearance before the HFSC in April 2023, Rep. Foster (D-IL) and Rep. Nickel (D-NC) both raised concerns that it wasn't obvious the proposal would ensure better pricing for investors or that there may be unforeseen consequences. Rep. Foster suggested a pilot of reforms should be considered before full implementation. There has also been significant industry feedback. A common theme of the industry comment letters is that the proposed rules do not adequately consider the far-reaching impact the rules would have on markets and market participants, especially if finalized all together. **Projected Finalization Timeline** 2024-Q3 or 2024-Q4
CONFLICTS OF INTEREST IN SECURITIZATIONS	**Overview** This rule is intended to "prevent the sale of asset-backed securities (ABS) that are tainted by material conflicts of interest," and is required by section 621 of the Dodd-Frank Act. The rule is intended to prohibit "securitization participants" from engaging in a transaction that could incentivize a securitization participant to structure an ABS in a way that prioritizes the securitization participant's interests ahead of ABS investors' interests — referred to as creating a "material conflict of interest" between the two parties in the proposal. If enacted the rule would regulate collateralized loan obligations (CLOs), as well as ABS vehicle managers and their affiliates, including private fund managers, acting as sponsors or affiliates. The rule identifies a set of "conflicted transactions" that would be deemed to result in a "material conflict of interest": • Short sale of the relevant ABS; • The purchase of credit default swaps (CDS) or other credit derivatives pursuant to which the securitization participant would be entitled to receive payments upon the occurrence of a specified adverse event with respect to the ABS;

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- The purchase or sale of any financial instrument (other than the relevant ABS) or entry into a transaction through which the securitization participant would benefit from the actual, anticipated, or potential:
  - Adverse performance of the asset pool supporting the ABS;
  - Loss of principal, default, or early amortization event on the ABS; or
  - Decline in market value of the ABS.

The proposal also contains a general anti-evasion clause scoping in any other form of transaction that is not included in the list above, but that is economically equivalent. Finally, the proposed rule would provide exceptions for risk-mitigating hedging activities, bona fide market-making activities, and liquidity commitments.

Commentary
There is bipartisan concern about this broad proposal. Rep. Luetkemeyer (R-MO) and Rep. Cleaver (D-MO) sent a letter to Chairman Gensler urging the SEC to clarify the language in the final regulation release, specifically concerning mortgage insurance-linked notes. Rep. Sherman (D-CA) also wrote a letter to the SEC emphasizing the need for the rule to strike a balance between preventing bad actors from profiting off security designed to collapse and allowing market participants to hedge investments properly. During a July 18, 2023 HFSC Subcommittee on Capital Markets hearing, several members from both parties, including Reps. Sherman, Nickel (D-NC), and Cleaver, raised concerns about the SEC's conflict of interest in securitization proposal. They focused on the proposal's impact on markets, housing, and real estate, as well as concerns that certain types of hedging, such as interest rate risk hedges, could be prohibited.

During an April 2023 HFSC hearing with Chair Gensler, several Republican members, including Reps. Luetkemeyer, Fitzgerald (R-WI), Kim (R-CA), and Norman (R-SC) raised concerns about the SEC's re-proposed conflicts of interest rule. They discussed how the rule may unintentionally restrict the ability of private mortgage insurers to utilize mortgage insurance linked notes as a risk management tool because the rule does not define the term synthetic ABS. They asked Chair Gensler if he can ensure the final rule does not cause unintended harm to the residential mortgage market, to which Chair Gensler acknowledged that he would take their concerns and comments on the rule into account.

There has been notable industry feedback on the proposed rule as well, with numerous comment letters from groups including the American Securities Association, Structured Finance Association, Commercial Real Estate Finance Council, and Alternative Investment Management Association. In their respective letters, the groups highlight concerns surrounding the scope and definitions of securitization participants; the scope of the exceptions; scope of the prohibition; and the definitions of material conflicts of interest or conflicted transactions.

Projected Finalization Timeline
2024-Q2 or 2024-Q3

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SAFEGUARDING RULE

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Overview
This proposed rule would overhaul the so-called "custody rule," which requires investment advisers to safeguard client funds and securities in their possession, and is "designed to protect these assets from the adviser's insolvency or bankruptcy, and from assets being lost, misused, stolen, or misappropriated."

The proposed rule would:

- Expand the current custody rule for investment advisers to include a broader array of client assets — including all crypto assets, whether or not they are securities;
- Allow state-chartered trust companies to serve as qualified custodians, as long as they hold client assets in an account that protects the customer in the event of the trust

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	company's insolvency, and otherwise comply with the rule's heightened requirements for qualified custodians; • Require the custodial contract to be between the investment adviser and the custodian — a significant change from the current practice, where the contract is between the customer and the custodian; • Enhance custodial protections that client assets receive under the rule; and • Update related recordkeeping and reporting requirements for advisers. **Commentary** At a July 2023 Senate Appropriations Subcommittee on Financial Services and General Government hearing, Sen. Boozman (R-AR) raised concerns about the SEC's proposed safeguarding rule, arguing that it undermines CFTC customer protection rules, conflicts with global margin treatment, and adds complexity to institutional investment advisors and qualified custodians. He strongly urged Chair Gensler to withdraw the proposal or rework it. In addition, on July 20, 2023, the Chairs and Ranking Members of the Senate and House Agriculture Committees sent a letter to the SEC raising concerns about the impact that the proposed safeguarding rule would have on CFTC-registered entities, and asking the SEC to withdraw the proposed rule entirely. Industry participants have raised concerns about the extent to which investment advisers are expected to go to protect client assets under the proposal, as well as the charge that the proposal goes beyond the core purpose of the "Custody Rule" to a boundless scope of assets and markets that would be covered. There have also been concerns about the compliance burden that such an expansion of the rule would have on smaller investment advisors. **Projected Finalization Timeline** 2024-Q2 or 2024-Q3
CYBERSECURITY RULES	**Overview** The SEC proposed two rules intended to address cybersecurity risk and breach disclosure for market participants: (1) a rule for Registered Investment Advisers and Registered Investment Companies (RIA Proposal); and (2) a rule for Broker-Dealers and many other entities (Market Entities Proposal). The SEC has cited the Cybersecurity and Infrastructure Security Agency's (CISA) view that organizations should "approach cyber as business risk," in the same way that companies treat market, credit, or liquidity risk. At a high level, both rules include provisions for their respective covered entities requiring: • The adoption of "cybersecurity policies and procedures reasonably designed to address cybersecurity risks," as well as testing of these policies and reporting on these results annually; • Safeguarding customer information and required notification of affected individuals whose "sensitive customer information" was or was reasonably likely to have been "accessed or used without authorization;" and • Immediate notification to the SEC of a "significant cybersecurity incident" once confirmed by the entity. **Commentary** In an April 2023 HFSC hearing, Rep. Garbarino (R-NY) asked Chair Gensler if the SEC has worked with CISA on the development of their cyber proposals. Chair Gensler said they have had good conversations with CISA Director Easterly and are in coordination with the agency. **Projected Finalization Timeline** 2024-Q1

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| SHAREHOLDER PROPOSALS (14A-8) | **Overview**
The SEC proposed amendments to Rule 14a-8, also known as the shareholder proposal rule, that governs the process for inclusion and exclusion of shareholder proposals in a company's proxy statement. The proposed amendments would revise three of the thirteen substantive bases for exclusion of shareholder proposals: (1) substantial implementation; (2) duplication; and (3) resubmission bases for exclusion. If finalized, these changes would make it more difficult for companies to exclude shareholder proposals based on these three substantive bases for exclusion.
• Substantial Implementation Exclusion: The proposed amendment would add to the current standard that allows a proposal to be excluded if the company has already "substantially implemented" the proposal, by requiring that the company must have already implemented "the essential elements of the proposal."
• Duplication Exclusion: The proposal heightens the standard for exclusion by substantial duplication to require that it addresses the same subject matter and "seeks the same objective by the same means."
• Resubmission Exclusion: The amendment would use a similar methodology for excluding a provision based on substantial duplication by inserting the requirement that it addresses the same subject matter and seeks the same objective by the same means. This new standard would have to be met, in addition to the current requirements that the proposal(s) was previously included in the company's proxy materials within the preceding five years, was voted on at least once in the last three years, and did not receive sufficient shareholder support.

Commentary
Rule 14a-8 has been the subject of extensive revisions, SEC staff no-action letters, and numerous Staff Legal Bulletins (SLB) attempting to define the scope of the exclusions. Most recently, in November 2021, the SEC's Division of Corporation Finance issued interpretive guidance through SLB 14L, which rolled back relatively recent expansions of a company's' ability to exclude shareholder proposals involving significant social issues on the grounds that the proposals dealt with a matter relating to the company's ordinary business operations or lacked economic relevance for the company. Considering the prominence of social policy issues, the SEC staff makes it clear in SLB 14L that it is not inclined to permit the exclusion of certain ESG-related proposals, such as those regarding climate and human capital, consistent with the SEC's recent prioritization of those issues under Chair Gensler's leadership.

There has been increased attention on the topic of shareholder proposals, given the rise of total shareholder proposal submissions in the last three years, including a significant increase in ESG proposals that have caught the attention of Republican lawmakers. In the 118th Congress, HFSC Chair Patrick McHenry established a Republican ESG Working Group, which has identified reforming the Rule 14a-8 no-action request process as a key priority of the Working Group's focus on reforming the proxy voting system for retail investors. The Republican-led HFSC held a number of hearings in June and July on ESG-related issues, oversight of the SEC and the proxy advisory industry, during which there was a significant partisan divide on the topic of shareholder proposals, Rule 14a-8, SLB 14L, and the SEC's proposed rule on shareholder proposals. Republicans harshly criticized the shareholder proposal reforms coming out of the SEC, SLB 14L, and Rule 14a-8 and Democratic members sought to defend the SEC's actions, frequently stating the SEC under Chair Gensler has prioritized ensuring investors have adequate information about the companies in which they invest.

Republican members of HFSC, including Capital Markets Subcommittee Chair Ann Wagner (R-MO) and Rep. Bryan Steil (R-WI) have introduced bills that aim to reform the shareholder proposal and proxy voting advice process by prioritizing retail investors' financial interests over "partisan political issues." Rep. Steil's bill, the *Protecting Americans' Retirement Savings from Politics Act*, which included Rep. Wagner's legislation, the *Corporate Governance Examination Act*, was marked up and passed on a party-line vote (all Republicans supported and all Democrats |

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<tr><td></td><td>opposed) by the HFSC in late July. Even if this legislation passes the full House, given the lack of Democratic support, it would not advance in the Senate.

Industry participants have also raised concerns about the current proposal, notably the Business Roundtable, the U.S. Chamber of Commerce (USCC), and the Investment Company Institute (ICI). These groups highlighted their concerns with the SEC's proposed amendments to Rule 14a-8 in comment letters. A common criticism made by most is that adopting the proposed amendments would increase the quantity of shareholder proposals, but not necessarily the overall quality of proposals.

What to Watch
Whether the SEC will be able to finalize the rule before the start of the 2024 proxy season. Additionally, HFSC is likely to hold additional hearings on the shareholder proposal and proxy advisory process as part of their anti-ESG initiative.

Projected Finalization Timeline
2023-Q4</td></tr>
<tr><td>AMEND FORM PF — ALL FILERS AND LARGE HEDGE FUNDS</td><td>Overview
This proposal represents a second round of amendments to Form PF — the confidential reporting form for certain advisers to private funds — following the most recent proposal that was adopted in May 2023. This rule was proposed jointly by the SEC and CFTC, as it would amend the SEC and CFTC's joint portions of Form PF. This proposal is largely focused on increasing the amount of information that is regularly reported by private funds and their advisers, as the agencies look to increase their understanding and supervision of the industry as the private funds space continues to take share in the market. The enhanced reporting requirements include:
Reporting by large hedge fund advisers on qualifying hedge funds, investment exposures, borrowing and counterparty exposure, portfolio liquidity, and many other details intended to detail operations and strategies of these funds.
Basic information about advisers and the private funds they advise, including assets under management, NAV, inflows and outflows, and other information intended to assist in identifying trends that could create systemic risk.
Reporting concerning hedge funds, including details regarding investment strategies, counterparty exposures, and trading and clearing mechanisms.
Amendments to how advisers report complex structures.
Elimination of aggregate reporting for large hedge fund advisers.
Commentary
In the SEC's release for this proposal, they cited the "vital insights gained" since the adoption of form PF in 2011, while stating the need for additional visibility into the private funds space to better understand if these funds pose systemic risks and help to preserve "fair, orderly, and efficient markets." Generally, this revision is viewed by the private funds industry as another attempt by the SEC to gain further oversight over private funds investing.

Projected Finalization Timeline
2023-Q3 or 2023-Q4</td></tr>
<tr><td>TREASURY CLEARING</td><td>Overview
This proposal is in response to concerns about Treasury market liquidity during times of stress following the liquidity crunches at the onset of the COVID-19 pandemic, when the Federal Reserve had to intervene in the market, and again with the recent market turmoil surrounding the health of global banks. In order to boost resiliency in the Treasury markets, the SEC has</td></tr>
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The proposed rule would:
Expand the set of Treasury transactions that are required to be centrally cleared, including the requirement that big banks and trading firms, push their client's trades (dealers, hedge funds, and broker dealers) through a clearinghouse.
Require clearing agencies to adopt policies that calculate, collect, and hold margin for their direct participants' proprietary transactions separately from those submitted on behalf of indirect participants.
Commentary
This proposal, published in October 2022 with the support of all five commissioners, followed a report issued in November 2021 entitled, Recent Disruptions and Potential Reforms in the U.S. Treasury Market, reflecting the views of the Inter-Agency Working Group for Treasury Market Surveillance (IAWG), which includes staff from the Department of Treasury, Federal Reserve, SEC, and CFTC. This report references "several recent episodes of abrupt and disruptive deterioration in the functioning of some segments of the market," while making policy suggestions to boost resiliency. This report also highlights that just 13% of Treasury cash transactions are centrally cleared today, while 68% are cleared between firms.

Projected Finalization Timeline
2024-Q1</td></tr>
<tr><td>REG SCI EXPANSION</td><td>Overview
Regulation Systems Compliance and Integrity (Reg SCI) was initially adopted in 2014 to strengthen the technology infrastructure of the U.S. capital markets. In March 2023, the SEC proposed amendments to "expand and update" Reg SCI to cover a broader range of entities and address new technology concerns. The proposed rule would:
Expand Reg SCI to cover a wider range of entities, including: large broker-dealers that exceed total assets or transaction activity thresholds, registered security-based swap data repositories, and all clearing agencies currently exempt from registration.
Strengthen Reg SCI by updating and expanding required policies and procedures related to inventory, classification, and lifecycle management for SCI systems; oversight of third party providers (including cloud services); and business continuity and disaster recovery (BC/DR) plans.
Amend the definition of "systems intrusion" to include additional events.
Additional provisions related to cybersecurity testing and recordkeeping for SCI entities and third parties.
Commentary
The proposed Reg SCI changes have been met with criticism from industry stakeholders, including SIFMA and the Financial Information Forum (FIF). Industry stakeholders have criticized the proposed rule's thresholds to define large broker-dealers subject to Reg SCI; new trading requirements; compliance costs; and requirements regarding third-party providers. Additionally, SIFMA criticized the proposal for expanding Reg SCI from systems facilitating trading to cover those that do the trading itself. SIFMA's comments argue that such a change would create the first ever requirement that broker-dealers engage in trading by committing capital and taking on principal risk, for which the SEC "offers no rationale for this fundamental change and fails to analyze its consequences."
<u>Thresholds to define SCI broker-dealers</u>: FIF recommended the SEC or FINRA should be responsible for calculating whether a broker-dealer has exceeded one or more of the applicable monthly transaction activity thresholds, instead of the broker-dealers as</td></tr>
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	currently proposed. Similarly, SIFMA argued that the proposed thresholds are "anticompetitive and burdensome," and not the appropriate means by which to impose Reg SCI's requirements in the securities market. • Third-party providers: FIF raised concern about the SEC's proposal to expand the BC/DR testing requirements for SCI entities to include third-party providers. Instead, FIF recommended that the SEC include the promotion of uniform test scripts across SCI entities where appropriate. SIFMA argued that the Commission should take a more principles- and risk-based approach to the proposed third-party provider requirements. SIFMA suggested that such an approach would be more beneficial than the "prescriptive approach" the SEC has taken, which could disincentivize the use of third-party providers or limit the provision of certain critical services. The groups expressed concerns that the current approach could increase reliance on less sophisticated and less resilient in-house systems, rather than the superior services offered by third-party services providers. **Projected Finalization Timeline** 2024-Q3
PREDICTIVE DATA ANALYTICS	**Overview** This proposed rule is intended to address certain conflicts of interest associated with the use of predictive data analytics by broker-dealers and investment advisers in investor transactions. The technologies that are covered by the proposed rule are surprisingly broad, and the rule will likely cover a wide range of common interactions with investors. Specifically, the proposed rule would: • Require broker-dealers and investment advisers to eliminate or neutralize the effect of conflicts of interest associated with the firm's use of predictive data analytics — which the rule terms "covered technology" — in investor transactions. • Define "covered technology" as "an analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes in an investor interaction." • The rule would apply whenever a firm uses a covered technology in connection with its engagement or communication with an investor — including providing information to an investor, soliciting an investor, and exercising discretion with respect to an investor's account. **Commentary** The SEC initially requested comment on the issue in August 2021 in an effort to understand the market practices associated with the use of digital engagement practices, which had become much more prevalent following the increase in online advisers, robo-advisers, and mobile investment apps. The SEC also referenced artificial intelligence's (AI's) role in this space. Chair Gensler has also expressed concerns about AI and the fact that the underlying data used in "these analytic models could be based upon data that reflects historical biases, affecting fair access and prices in the markets" — additional coverage of AI regulation can be found in our Fintech State-of-Play. In the recent open meeting to consider proposing the rule, the vote was 3-2 in favor of proposing. Commissioner Uyeda opposed the proposal, which he described as "breathtakingly broad in its reach," adding that technologies as simple as electronic calculators or tools that calculate an investor's future retirement assets could be covered." Commissioner Peirce also objected to the proposal, claiming it was unnecessary considering brokerages' disclosure requirements and could stifle the use of new technologies. **Projected Finalization Timeline** 2024-Q4

HUMAN CAPITAL MANAGEMENT DISCLOSURE	**Overview** This rule has not been proposed yet, but it is expected that the SEC will soon be proposing an amendment to the Human Capital disclosure provisions adopted in 2020. When speaking on this issue, Chair Gensler has suggested that such a proposal could include metrics such as "workforce turnover, skills and development training, compensation, benefits, and workforce demographics that include diversity and health and safety." The 2020 rule that was adopted under former SEC Chair Clayton utilized what was referred to as a "principles-based approach" to human capital disclosure. This was a more moderate approach than many progressive advocates would have liked. The SEC sought to improve investor access to human capital information by adopting a rule requiring companies to disclose the human capital management measures and objectives they focus on in managing their businesses — provided those measures or policies are material to the company's business as a whole. **Commentary** The 2020 rule received criticism from opponents who said that the "principles-based methodology" didn't effectively provide investors with all of the information they were looking for and that it left too much of the disclosure up to the discretion of the companies. In June 2022, the Working Group for Human Capital Accounting Disclosure submitted a petition for rulemaking, requesting that the SEC "develop rules to require public companies to disclose significant information to allow investors to assess the extent to which firms invest in their workforce." Their petition included support for disclosure of what portion of workforce costs should be considered an investment in the firm's future growth in the MD&A section of Form 20-K, treating workforce costs as pari-passu with research and development costs, and greater disaggregation of the income statement for further insight into workforce costs. **What to Watch** While we are far from a final proposal here, the odds of any more prescriptive rule on human capital disclosure being published without legal challenges are low. It is likely that if and when the SEC adopts a new rule in this space, it will be challenged in court. The line of attack could be similar to that of the Climate Disclosure rule, but instead of saying this is out of the SEC's jurisdiction and should be done by the EPA, opponents will say it belongs at the DOL. **Projected Proposed Rule Timeline** 2023-Q4 or 2024-Q1
REG D REFORM	**Overview** The SEC has listed reforms to Regulation D (Reg D) on its regulatory agenda, but this rule has not been proposed yet. The recent explosive growth of the private markets and the decline in U.S. companies entering the public markets has been a topic of intense discussion by regulators and lawmakers over several years. When considering how a potential proposal might look, it is instructive to study a January 2023 speech on Reg D reform by SEC Commissioner Caroline Crenshaw, who has frequently criticized the rapid growth and opacity of the private securities markets relative to public markets. In her speech, Commissioner Crenshaw made the following recommendations: Form D Revisions: • Require issuers to file Form D prior to any solicitation under Reg D (rather than within 15 days after initial sale). • Require executive officers, rather than authorized representatives, to sign and certify Form D so executives would be accountable for the contents. • Require an amendment or closing statement of amounts actually raised under the offering.

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Mandate disclosure of "useful, substantive" information about the issuer and offering; while not quite as detailed, this would include many items in an IPO prospectus.

<u>Two-Tiered Disclosure Framework</u>:

Impose heightened disclosure requirements on larger private issuers and offerings, based on market cap, value, or the size of the investor base.
Require larger private issuers to engage independent auditors and provide investors with audited financial statements and auditor opinion letters certifying their internal controls.

What to Watch
We anticipate more HFSC hearings on the topic of private vs. public markets, as well as the SEC rulemaking agenda's impact on capital formation and IPOs in the U.S.

Projected Proposed Rule Timeline
2024-Q2

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