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# Annual SEC and PCAOB update for public companies

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## From the authors

Entering 2022, it might have been challenging to predict precisely what would change, but it was relatively easy to forecast change would be coming. During 2022, the U.S. Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB) published updated rulemaking agendas, and those show additional change is coming.

Of the more than 50 items on the SEC's most recently updated agenda, these seem to garner the most interest:

Potential proposed rules (estimated timing):

- Human capital (April 2023)
- Cybersecurity (April 2023)
- Securities held of record (April 2023)
- Corporate board diversity (October 2023)

Potential final rules (estimated timing):

- Climate change disclosure (April 2023)
- Cybersecurity risk governance (April 2023)
- Share repurchase disclosure modernization (April 2023)
- Special purpose acquisition companies (SPAC) (April 2023)

Of course, estimated timing is always subject to change, but it seems the first half of 2023 will be very eventful.

The PCAOB continues its work on various agenda items including attestation standards, confirmations, and noncompliance with laws and regulations, to name a few.

We will not try to predict what 2023 will ultimately hold, but we will keep you informed as events develop.

We are grateful for the contributions by our colleague Alissa Doherty.

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## From the Securities and Exchange Commission (SEC)

### Strategic plan

The SEC on Nov. 23, 2022, published its [Strategic Plan for fiscal years 2022 to 2026](#). The plan details the SEC's mission, vision, values, strategic goals, and planned initiatives.

The plan establishes three key goals:

- “Protecting working families against fraud, manipulation, and misconduct;
- “Developing and implementing a robust regulatory framework that keeps pace with evolving markets, business models, and technologies; and
- “Supporting a skilled workforce that is diverse, equitable, inclusive, and is fully equipped to advance agency objectives.”

Among the initiatives to meet these goals, the SEC intends to:

- “Pursue enforcement and examination initiatives focused on identifying and addressing risks and misconduct that affects individual investors”
- “Enhance the use of market and industry data, particularly to prevent, detect, and enforce against improper behavior”
- “Modernize design, delivery, and content of disclosures”
- “Update existing SEC rules and approaches to reflect evolving technologies, business models, and capital markets”
- “Focus on the workforce to increase capabilities, leverage shared commitment to investors, and promote diversity, equity, inclusion, accessibility, and equality of opportunity”
- “Modernize the SEC's technology to enable the mission in a cost-effective, secure, and resilient manner”

### Messages from SEC leadership

The American Institute of CPAs (AICPA) and the Chartered Institute of Management Accountants (CIMA) held the annual Conference on Current SEC and PCAOB Developments in Washington, D.C., Dec. 12-14, 2022. Topics of the conference included:

- Investor information should be a key focus of all stakeholders.
- High-quality financial reporting requires the cooperation and engagement of all stakeholders.
- Trust is foundational to high-quality financial reporting and is fostered through high-quality audits.

Various stakeholders including preparers, regulators, standard-setters, auditors, users, and others presented the audience with wide-ranging perspectives and insights.

Crowe issued on Jan. 4, 2023, a document summarizing the [highlights from the 2022 AICPA-CIMA conference](#).

#### **Focus of the Office of the Chief Accountant (OCA)**

Setting the tone for his remarks at the AICPA-CIMA conference with an observation that while compliance is an important part of financial reporting, accounting is at its core a communication activity, SEC then-acting Chief Accountant Paul Munter (subsequently named chief accountant on Jan. 11, 2023) talked about information investors and other stakeholders have requested, including:

- Disaggregation of financial information (for example, income statement, tax disclosures)
- Segments, including whether segments are appropriately aggregated
- Improved cash flow information (for example, direct method)

Munter observed that while the Financial Accounting Standards Board (FASB) is considering many of these requests in its current standard-setting agenda, nothing prevents SEC registrants from providing

additional disaggregated disclosures or a direct method cash flow statement in their current filings if registrants believe such information is more useful to investors.

Munter also remarked on the staff's work on digital assets, including Staff Accounting Bulletin (SAB) 121 on the accounting for obligations to safeguard crypto assets and recent digital asset consultations. Munter concluded his remarks with observations on the potential for fraud. Despite the current environment, preparers should carefully prepare well-thought-out judgments and estimates. Trust in the financial reporting environment requires the involvement of all stakeholders, and Munter pointed out that the recent release "[IOSCO Statement on Financial Reporting and Disclosure During Economic Uncertainty](#)" includes useful perspectives as it "reminds issuers, external auditors[,] and audit committees [or those charged with governance] of the important role each plays in providing investors with high-quality, reliable, timely, and transparent financial information, especially in times of heightened uncertainty."

### **Importance of audit committees and auditor independence**

#### Statement on auditor independence and ethical responsibility

Munter released on Aug. 29, 2022, a [statement](#) addressing auditor independence and ethical responsibility considerations when contemplating audit firm restructuring transactions. In relation to auditor independence considerations, Munter discussed the SEC OCA's staff observations related to audit firm restructuring transactions, challenges from private equity investments, and divestitures of a portion of a business. Munter warned, "In these complex practice structures and divestitures, it is paramount that the accounting firm fully understands its responsibility for maintaining auditor independence and it discloses such requirements to the non-accounting firm investors involved in the transaction so that the accounting firm can obtain the information necessary to fulfill its responsibilities."

Further, Munter said, "When an accounting firm is considering obtaining an investment from a private equity or other investment structure, each entity within such structure would need to be carefully evaluated to determine if the entity is an 'associated entity' and is therefore part of the accounting firm for purposes of assessing potential impacts on, among other things, compliance with the Commission's auditor independence requirements."

In conclusion, Munter reminded accountants of the requirement to be independent in both fact and appearance, and he said when auditor independence is a close-to-the-line call, accounting firms need to have a strong culture and tone at the top that prioritizes independence and ethical responsibilities above all else.

#### Statement on importance of independence

On June 8, 2022, Munter issued a [statement](#) focusing on the importance of auditor independence and an ethical culture for the accounting profession. In the statement, he identifies the SEC's auditor independence rule, Rule 2-01 of Regulation S-X, as integral to the SEC's mandate to protect investors and notes it is fundamental for promoting investor confidence in the quality of financial disclosures. In addition, Munter discusses:

- **The importance of the auditor independence framework under Rule 2-01(b) of Regulation S-X.** Munter says not to overlook the importance of Rule 2-01(b) when determining whether an accountant is independent and that all relevant circumstances should be considered. The independence evaluation is not just a checklist exercise under Rule 2-01(c), and the general standard requires an evaluation of auditor independence, including an assessment of independence both in fact and appearance from the perspective of a reasonable investor.
- **The OCA's approach to auditor independence consultations.** Munter notes that an important part of consultations is that all relevant circumstances and facts for the specific question are provided to the OCA. Also, Munter warns that relying on previous staff positions might not be appropriate as specific risks, facts, and circumstances might be different even if they appear similar and the OCA will independently access all circumstances.
- **Recurring issues on auditor independence consultations.** Munter identifies recurring issues in recent independence consultations, including treating independence considerations as a



checklist in place of a careful analysis, providing nonaudit services without considering the extent and magnitude of the nonaudit services and business relationships, and initiating complex business arrangements through restructurings and the use of alternative practice structures.

Finally, Munter notes the importance of accounting firms fostering an ethical culture with respect to auditor independence and leading by example.

### **Additional discussion of the focus of the OCA**

On Dec. 12, 2022, OCA staff members Anita Doutt, senior associate chief accountant; Nigel James, senior associate chief accountant; Shehzad (“Shaz”) Niazi, deputy chief counsel; Diana Stoltzfus, deputy chief accountant; and Jonathan Wiggins, senior associate chief accountant, covered various topics the staff has addressed in the past year, including:

- Consultation themes such as business combinations, consolidation, digital assets, segment reporting, and revenue recognition
- Crypto asset accounting and auditing complexities
- Global climate proposals and related interaction with SEC rulemaking efforts
- Independence matters
- International activities, including monitoring of international standard-setting bodies
- Stakeholder engagement

As a reminder of the emerging significance of global climate proposals, the OCA staff panel discussion closed with that topic, highlighting the possibility of a company having to comply with both SEC and international standards for entities operating in foreign jurisdictions.

### **Focus of the Division of Corporation Finance**

At the AICPA-CIMA conference on Dec. 13, 2022, SEC Division of Corporation Finance (Corp Fin) staff members Cicely Lamothe, acting deputy director of disclosure operations; Lindsay McCord, chief accountant; Craig Olinger, senior adviser to the chief accountant; and Melissa Rocha, deputy chief accountant, provided an overview of Corp Fin’s recent activities that affect 2022 year-end accounting and financial reporting. Topics included:

- Consideration of the disclosure impact of current events (for example, inflation, interest rates, supply chain issues, geopolitical events), including whether:
  - The registrant should provide the schedule of valuation and qualifying accounts under Rule 12-09 of Regulation S-X in its Form 10-K
  - Current events are characterized as having a current impact versus being described as a hypothetical future event
- Segment reporting and interaction with information presented to the chief operating decision-maker
- Crypto asset accounting and disclosure considerations, including reminders to understand the rights and obligations of both the issuer and the holder of the crypto asset and to evaluate the disclosure impact of recent crypto market events
- Views on non-GAAP measures
- Climate change disclosures under current interpretive guidance
- Critical accounting estimates and the need for quantitative and qualitative analyses
- Implementation questions related to significance tests for acquired businesses

McCord noted that the staff issued revised non-GAAP Compliance & Disclosure Interpretations (C&DIs) on Dec. 13, 2022, concurrent with her remarks. The revised C&DIs address the staff’s most recent thoughts on misleading non-GAAP presentations, prominence issues, and tailored accounting principles.

McCord also provided perspectives during the end-of-day Q&A session with implementation question observations on recent final rules including “Pay Versus Performance” and “Listing Standards for Recovery of Erroneously Awarded Compensation.”

## From the chair

### Chair remarks on enforcement

SEC Chair Gary Gensler on Nov. 2, 2022, spoke before the Practising Law Institute's 54th Annual Institute on Securities Regulation. His [speech](#) focused on enforcement as part of effective administration. For the fiscal year ended Sept. 30, 2022, the SEC filed more than 700 actions and obtained judgments and orders totaling \$6.4 billion, including \$4 billion in civil penalties. He identified and explored five themes of effective administration of enforcement: economic realities, accountability, high-impact cases, process, and positions of trust.

### Chair remarks on competition

Gensler on Oct. 24, 2022, presented [remarks](#) on competition to the annual meeting of the Securities Industry and Financial Markets Association. He noted how competition runs through each part of the SEC's mission to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets. Gensler said that the whole economy benefits when competition is greater among investors, issuers, and intermediaries. He explained that competition increases returns for investors, lowers the cost of capital for issuers, promotes innovation and efficiency in the middle of the markets, and helps capital markets more effectively price and allocate money and risk. His remarks focused on how to promote greater competition among the intermediaries in the middle of the U.S. markets while concentrating on the themes of centralization and concentration. To address competition, Gensler identified three tools – transparency, access, and fair dealing – and how to apply these tools across the fixed income, equity, and private markets. Further, he identified several SEC projects that are designed to lower the cost to issuers and raise the returns for investors, using transparency, access, and fair dealing to promote greater competition. He concluded, "I hope that competition is something we all can stand behind."

### Investor Advisory Committee meetings

Gensler provided [opening remarks](#) at the SEC Investor Advisory Committee (IAC) meeting held June 9, 2022. The meeting included two panel discussions – one regarding accounting of nontraditional financial information and one addressing climate disclosures. The panel discussion on accounting of nontraditional financial information began with a general overview of the U.S. accounting and auditing infrastructure presented by speakers from the SEC and the PCAOB; then, three experts addressed whether the accounting and auditing infrastructure is providing investors with the information they need to make informed decisions and provided their suggestions and strategies to make sure the U.S. capital markets remain the most competitive in the world. The panel discussion on climate disclosures focused on the SEC's March 2022 proposed rules to enhance and standardize climate-related disclosures.

Gensler also provided [opening remarks](#) at the Sept. 21, 2022, IAC [meeting](#) where the panel discussions addressed human capital management and labor, proposed Rule 10B-1 position reporting of large security-based swap positions/asset-based swap positions, schedules 13D and 13G beneficial ownership reports, and environmental, social, and governance (ESG) fund disclosure. The panel on human capital management and labor considered the demand for labor-related performance data from the investor perspective, including investors' views on the quality and decision-usefulness of currently available data, and which information investors would use should it become available and why. Additionally, the committee discussed recommendations it has issued on the cybersecurity disclosure proposal, climate-related disclosure proposal, and accounting modernization project.

Finally, Gensler provided [comments](#) at the IAC's Dec. 8, 2022, meeting where the committee discussed various topics including account statements, income tax disclosure, and complex investment products.

### PCAOB agreement with China

On Aug. 26, 2022, the PCAOB [announced](#) that it had signed an agreement with Chinese authorities on audit inspections and investigations. The agreement establishes a specific and accountable framework for the PCAOB to inspect and investigate PCAOB-registered public accounting firms in China and Hong Kong. In response to this agreement, Gensler issued a [statement](#), saying the framework is important,

but it is just a step in the process and will be meaningful only if the PCAOB actually can inspect and investigate completely audit firms in China. Gensler said that this agreement brings specificity and accountability to effectuate Congress's intent with the *Holding Foreign Companies Accountable Act* (HFCAA) and provides the standards against which to judge whether auditors of Chinese issuers have complied with the requirements of U.S. law, including PCAOB auditing standards.

Also on Aug. 26, 2022, SEC Commissioner Jaime Lizárraga released a [statement](#) describing the new PCAOB agreement as a "step forward in holding China- and Hong Kong-based public companies to the same accountability standards as all other issuers that access U.S. capital markets." He said these companies have experienced an unfair advantage by evading U.S. regulations and that they now need to fully comply or lose the privilege of raising capital in the U.S. financial markets.

In a related [statement](#), then-acting Chief Accountant Munter, on Sept. 6, 2022, provided his thoughts on audit quality and investor protection under the HFCAA. Munter offered his views on the PCAOB's fundamental role in improving audit quality, engaging new lead audit firms in response to the HFCAA, audit engagement structures of multinational issuers, engaging new accounting firms to remediate noncompliance, and other important considerations for accounting firms and issuers.

On Dec. 15, 2022, Gensler provided [remarks](#) on current developments related to the PCAOB's agreement with China.

### **Remarks on the 20th anniversary of SOX**

On July 27, 2022, before the Center for Audit Quality, Gensler delivered [remarks](#) recognizing the 20th anniversary of the *Sarbanes-Oxley Act* (SOX). He said that finance ultimately is about trust and a fundamental goal of SOX was to restore trust in the U.S. financial system after several crises revealed weaknesses. Gensler noted the impact of SOX on the quality of auditing standards; auditing inspections, investigations, and enforcement; auditor independence; accounting standards; corporate governance; and coverage of foreign issuers in the U.S. He said that although SOX has had a profound effect on auditing standards with the establishment of the PCAOB, and the PCAOB initially adopted the auditing standards of the AICPA, there is still much work to be done to update and enhance the standards.

Gensler identified the PCAOB's responsibility for inspecting and investigating auditing firms for compliance with auditing standards and bringing enforcement actions as critical factors in imparting trust in the U.S. capital markets. He said that under the current leadership, the PCAOB has an opportunity to reinvigorate its enforcement program. He then addressed auditor independence and concerns over the growth and complexity of advisory businesses within auditing firms, stressing the importance of maintaining a culture of ethics, integrity, and independence.

Additionally, Gensler noted that SOX created requirements for corporate governance and accountability to help ensure that the incentives of executives, boards, accountants, and investors were better aligned. However, cases still are brought today regarding these matters. Lastly, Gensler touched on coverage of foreign issuers in the U.S. and said that they need to play by the same rules as everyone else or lose access to the U.S. markets. He specifically mentioned China and Hong Kong.

In conclusion, Gensler noted that although we have gained a lot from SOX and the quality of public company audits has improved, much more work is still to be done for SOX to reach its full potential.

### **Testimony before Congress**

On May 17, 2022, Gensler provided [testimony](#) before the Subcommittee on Financial Services and General Government of the U.S. House Appropriations Committee on necessary increases in SEC resources.

Gensler noted that it takes constant vigilance to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation, and he said U.S. securities laws are the gold standard for capital markets around the world. He said that we cannot take U.S. leadership in capital markets for granted as new financial technologies and business models continue to change the face of finance for investors and issuers, more retail investors than ever are accessing our markets, and other countries are developing competitive capital markets. To meet the challenges of maintaining the gold standard, the SEC needs to be adequately resourced. However, in the past few years, while market participation,



responsibilities, technologies, and competition have increased, the funding for the SEC has not, and the agency has shrunk in size.

Gensler detailed his budget request for enforcement and examinations, corporate finance, trading and markets, and investment management, among other areas. He shared that the expansive growth and added complexity in the capital markets continue to necessitate increased resources for the SEC. He said, “Markets don’t stand still. The world isn’t standing still. Our resources can’t stand still, either.”

### **Dynamic regulations**

Before the Exchequer Club of Washington, D.C., on Jan. 19, 2022, Gensler presented prepared [remarks](#) on dynamic regulations for a dynamic society specifically highlighting a 1963 report saying that “no regulation can be static in a dynamic society.” He described two guiding principles over dynamic regulations:

- Continuing to drive efficiency in the U.S. capital markets
- Modernizing the SEC rules for today’s economy and technologies

He said that efficiency is about lower costs for both issuers and investors and stated that he has requested recommendations from SEC staff about how to move toward increased efficiency in the capital markets through competition and transparency. Gensler then discussed modernizing SEC rules for the current economy and technologies and the importance of innovation in the U.S. markets. He said that the “most dramatic change to our markets is the use of predictive data analytics and artificial intelligence” and that while these developments increase access and choice, they also create significant public policy considerations, including conflicts of interest, bias, and systemic risks.

## **Policy matters**

### **SEC fall 2022 regulatory agenda**

On Jan. 4, 2023, the Office of Information and Regulatory Affairs released the SEC’s fall 2022 [regulatory agenda](#), which lists 23 proposed rules and 29 rules in the final stage. They address the SEC’s three-part mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation. The agenda reflects the SEC’s near- and long-term priorities, and it also provides the SEC’s forecasted next action date for each rule.

### **Key capital formation and financial reporting issues**

At the 2022 AICPA-CIMA conference, Commissioner Hester Peirce engaged in a fireside chat addressing a number of issues. During the chat, Peirce:

- Remarked on the importance of the SEC’s role in supporting capital formation and wondered whether the SEC’s recent rulemaking activities were creating an inhospitable landscape for public companies
- Questioned whether the SEC’s climate-related disclosure rule proposal is sufficiently flexible to meet investor needs
- Cautioned preparers and auditors not to let any estimation uncertainty inherent in certain climate information leak into financial statement estimates
- Suggested stakeholders consider applying traditional financial reporting and auditing lessons to crypto assets even if no specific regulations apply, though she also remarked that any coming crypto asset regulations should not be so stringent that only large entities could comply
- Reminded participants to remain vigilant to fraud considering the current economic environment

Peirce also addressed the future of the profession and encouraged all stakeholders to foster the accounting talent pipeline, including telling more young people about the profession.

### **High-quality financial reporting and current rulemaking activities**

On Sept. 8 and 9, 2022, SEC commissioners and staff provided insights into current SEC initiatives and

priorities at the Practising Law Institute's "The SEC Speaks in 2022" program. One of the key topics addressed was high-quality financial reporting and current rulemaking activities.

Then-acting Chief Accountant Munter, Corp Fin Division Chief Accountant Lindsay McCord, and Investment Management Division (IM) Chief Accountant Jenson Wayne spoke on various matters in their panel presentation, including:

- The SEC OCA's focus on high-quality accounting standards, the application of those accounting standards including in specific issuer facts and circumstances, and high-quality audits, including auditor independence
- Materiality considerations
- HFCAA
- SAB 74 disclosures and the importance of transparent communication to users
- Corp Fin's waiver process

Corp Fin staff addressed a number of financial reporting issues including Item 407 of Regulation S-K governance disclosure, the impact of current events (for example, changes in interest rates, inflation, supply chain issues, and geopolitical conflict) on management's discussion and analysis, non-GAAP measures (for example, prominence, mislabeling, and certain specific adjustments), segment disclosure, disclosure considerations for China-based issuers, and certain disclosure issues in registration statements following a de-SPAC transaction.

Enforcement Division (ENF) staff reminded the audience of ENF's current approach and addressed a number of issues related to high-quality financial reporting, among other ENF matters.

Multiple panels addressed current rulemakings including the Economic and Risk Analysis Division, Office of the Whistleblower, IM, and Corp Fin. Corp Fin's remarks included summaries of recent rule proposals (for example, [cybersecurity](#), [10b5-1 plans](#), and [shareholder proposals](#)) and the newly effective [universal proxy](#) final rule, which is effective for shareholder meetings held after Aug. 31, 2022.

### **Small-business capital committee**

The SEC's Small Business Capital Formation Advisory Committee held a videoconference [meeting](#) on Aug. 2, 2022, to discuss matters relating to rules and regulations affecting small and emerging businesses and their investors under federal securities laws. Committee members provided their outlooks on what is ahead for small-business capital formation. Additionally, the committee discussed secondary market liquidity for investors in Regulation A and Regulation Crowdfunding companies and for smaller public companies. They discussed exit opportunities for these investors, secondary market liquidity challenges for the private and smaller public companies and their investors, and what changes could help facilitate secondary market liquidity for these investors.

SEC Chair Gensler shared [remarks](#) at the meeting, noting that he looks forward to the committee's discussion on promoting investor protection and facilitating capital formation. New SEC Commissioner Mark Uyeda presented [remarks](#), acknowledging the importance of the committee's work and its recommendations, which provide helpful ideas for capital formation that are considered and used by policymakers and also are relevant to financial regulators. New SEC Commissioner Lizárraga also shared [remarks](#), in which he highlighted unique challenges in addressing liquidity in the secondary markets for private offerings. Lastly, SEC Commissioner Peirce presented [remarks](#), asking several questions about improving secondary market liquidity.

### **Single-stock ETFs risks**

On July 11, 2022, SEC Commissioner Caroline Crenshaw released a [statement](#) on single-stock exchange-traded funds (ETFs) expressing her concerns over these complex, leveraged, and inverse ETFs that might create greater risks for investors and calling for consideration of rulemaking over these risky investments. She noted that the current regulatory framework, including Rule 6c-11 of the *Investment Company Act of 1940*, allows ETFs meeting certain criteria to come directly to market without first obtaining permission, through an exemptive order, from the SEC. She said single-stock

ETFs are coming directly to market even though they were never contemplated by this rule. She warned that the daily rebalancing and effects of compounding might cause returns to deviate significantly from the performance of the one underlying stock, and that the effects are likely to be especially evident in volatile markets. Such leveraged and inverse products can perform in unexpected ways and potentially contribute to broader systemic risks.

She reiterated her position that a comprehensive and consistent approach to the review of complex exchange-traded products is long overdue and that the regulatory framework needs to be updated to better address the risks these products pose to investors and the markets.

Lori Schock, director of the SEC's Office of Investor Education and Advocacy, also released a [statement](#) on July 11, 2022, highlighting the risks of single-stock ETFs. Schock noted that these are meant to be held for very short periods of time, often only a single day, and holding them for longer periods might result in returns significantly different from returns if an investor held the underlying stock directly. Additionally, these single-stock ETFs do not provide the diversification of traditional ETFs or other leveraged or inverse products.

### **Key matters at the SEC and Financial Reporting Institute conference**

On June 2, 2022, the 40th Annual SEC and Financial Reporting Institute Conference was held and included speakers and presentations from the SEC, the FASB, and the PCAOB among others. The opening keynote session with representatives from the FASB and the SEC OCA focused primarily on the FASB agenda consultation and highlighted the 500-plus letters written by investors and stakeholders to the FASB with feedback on recent standards updates. Some of the key areas of feedback centered around the need for further disaggregation of the income statement (additional information about expenses), disclosures on climate regulations and environmental credits, policies related to digital assets, and a review of the income tax provision disclosure requirements (better understanding of complex tax positions). The session also touched on what projects the FASB, the SEC, and the PCAOB are planning to work on in the coming year including standardizing key performance indicators, reorganizing consolidation guidance, and the climate disclosure proposal.

Speakers also discussed ESG matters throughout the conference, including implementation of new ESG policies and regulations and what the future holds for companies disclosing information related to ESG policies. One presenter emphasized that while ESG disclosure requirements are not fully instituted yet, companies need to be proactive about instituting policies and controls related to ESG disclosures now. Management should consider using the help of specialists, regulators, auditors, and researchers to identify how the ESG disclosure requirements will affect companies.

Other sessions focused on the remote work environment, high employee turnover and the labor shortage and its effect on auditing and accounting, the Russia-Ukraine war and how it is affecting each of the agencies, the recent increase in companies using non-GAAP adjustments and how there is a plan to release further guidance about when a company can and can't use a non-GAAP adjustment, and PCAOB inspection focus areas.

### **Market structure**

In his [speech](#) on June 8, 2022, before the Piper Sandler Global Exchange Conference, SEC Chair Gensler discussed market structure and how the playing field is not level among different parts of the market. He concentrated on trading in dark pools and through wholesalers, noting that key aspects of the U.S. national market system rules, including rules related to order handling and execution, have not been updated in almost seven years. Gensler described the requests he has made of staff for recommendations on how to update the rules, specifically in the following six areas:

- Minimum pricing increment
- National best bid and offer
- Disclosure of order execution quality
- Best execution
- Order-by-order competition
- Payment for order flow, exchange rebates, and related access fees

## Security-based swaps

On May 11, 2022, SEC Chair Gensler delivered prepared [remarks](#) before the International Swaps and Derivatives Association Annual Meeting. Gensler noted that the U.S. economy benefits from a well-functioning swaps market as it is important that companies have the ability to manage their risks. He addressed security-based swaps, which are under the SEC's jurisdiction. Related to the security-based swap markets, he concentrated his remarks on reducing risk, increasing transparency, and enhancing market integrity. He described recent actions taken by the SEC including rule implementations and proposals to reduce risk, enhance pre-trade and post-trade transparency, and improve market integrity. He added that there is still more work to do.

Gensler closed his speech by discussing crypto assets with derivatives and the use of derivatives within structured and so-called complex products. He described actions that can be taken to improve guidance and regulations over these products.

## Financial markets

Both Chair Gensler and Commissioner Crenshaw spoke about regulating various aspects of the financial markets:

- On May 6, 2022, Gensler presented a [speech](#) on enhancing the efficiency, resiliency, and transparency of the U.S. markets, including consideration of disclosures. He highlighted the importance of new rules to meet the needs of the current and future markets and to help the U.S. maintain its competitiveness in the world market.
- On April 26, 2022, Gensler [spoke](#) virtually about the fixed income markets, noting their importance to individuals, companies, and governments in the U.S. and around the world. He discussed some of the policy work at the SEC with respect to strengthening and increasing transparency, modernizing rule sets for electronic platforms, and enhancing financial resiliency.
- On April 28, 2022, Crenshaw presented a [speech](#) discussing SPACs and SPAC IPOs. She noted that the SEC has identified several areas of concern with SPACs, including misaligned incentives, several points of dilution that might disproportionately affect retail investors, and a lack of liability that could create an unjustified advantage in this path to the public markets over the traditional IPO. She encouraged all “to think about the ever-growing divide between the public and private markets and how the paths to public markets can be improved and made more efficient while preserving key investor and market integrity protections.”
- On April 14, 2022, Crenshaw presented a [speech](#) addressing private markets and their important role in the economy. She said that private markets are growing at record rates and companies are staying private for longer periods of time, and she discussed whether adequate protection exists for investors in private markets. She noted the debate on the balance between public and private markets and posed multiple questions to help define recommendations from the SEC.

## SEC commissioner remarks on regulating lawyers

At a Practicing Law Institute program on March 4, 2022, SEC Commissioner Allison Herren Lee gave a [speech](#) addressing Section 307 from the *Sarbanes-Oxley Act*, which mandates the adoption of minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of issuers. Section 307 addresses the concern that lawyers were acting in the interests of the executives who hired them and not in the interests of those to whom they owed that responsibility. Lee highlighted that to date the SEC has adopted only one standard that requires lawyers to report certain potential violations up the chain of management inside a corporate client, and the SEC has never enforced any actions against lawyers under this standard. She said this mandate calls for a broader set of rules to address the accountability of lawyers and that a set of standards should be established to better protect investors and markets. Lee focused on several areas that need to be addressed including the gate-keeping role of lawyers, lawyers who provide the answers that management desires when there are not supporting facts, the impacts of bad advice related to corporate disclosures, and the inadequacy of current standards.

Among other suggestions, Lee offered a few thoughts on areas that minimum rules should address, including:

- A lawyer's obligation to a corporate client, including how advice should reflect the interests of the corporation and its shareholders rather than the executives who hire the lawyer
- The impact of the advice on the corporation and its shareholders, including the impact if the disclosure decision ultimately proves incorrect
- Advice on materiality
- Competence and expertise requirements
- Firm oversight including a system of quality control
- Independence requirements when providing advice

In closing, Lee stated "That is the goal of standards in this space – to support securities lawyers in giving clients their best advice while living up to the promise of public service that our profession embraces."

### **SEC commissioner remarks on the PCAOB**

On Feb. 15, 2022, before the Stanford Law School Federalist Society, SEC Commissioner Peirce presented [remarks](#) on the PCAOB. She said the PCAOB is not working alone and has a small but very important role to play in the broader economy. Peirce noted that the economy is all about working with other people to enable all participants to survive and prosper and that auditors have a part in the cooperation and collaboration as high-quality financial statements enable investors to determine whether to invest money in a company. As auditors play a role in producing high-quality financial reporting, so too do audit regulators and accounting and audit standard-setters. On this point, Peirce highlighted the role of the PCAOB by first touching on its history and then describing certain obstacles and challenges the PCAOB has faced and will face in the current marketplace and in the future. She described the unusual structure of the PCAOB where the SEC has responsibility for overseeing the PCAOB's activities and approving its budget. This structure also creates duplication in setting standards, enforcement actions, and independence requirements.

Finally, she warned of the PCAOB's potential involvement in ESG issues and said that its involvement in the ESG area could "undermine the ability of the PCAOB to play its role as neutral arbiter of audit quality."

### **SEC chair remarks on money market, open-end bond, hedge funds**

On Feb. 4, 2022, SEC Chair Gensler presented a statement before the Financial Stability Oversight Council (FSOC) regarding financial resiliency of money market funds, open-end bond funds, and hedge funds. His statement highlighted how the nature, scale, and interconnectedness of these funds could create financial stability issues.

Gensler said that he believes the SEC has a responsibility to help protect for financial stability. To meet that responsibility, he and the SEC have taken several actions including:

- Requesting staff to make recommendations for strengthening the resiliency of these fund segments
- Proposing amendments to the rules that govern money market funds
- Considering improvements to the fund liquidity rule or considering other reforms to enhance fund liquidity, pricing, and resiliency in possible future stress events for open-end bond funds
- Proposing amendments to Form PF for hedge funds
- Proposing a rule to require public reporting of large security-based swap positions
- Reproposing a new rule to prevent fraud, manipulation, and deception in connection with security-based swap transactions

In closing, Gensler noted that he welcomes the FSOC's input on the SEC's ongoing consideration of how to improve resiliency for money market funds, open-end bond funds, and hedge funds.



On Dec. 16, 2022, Chair Gensler provided updated observations on money market and open end funds and offered new thoughts on the Treasury markets and crypto assets in [comments](#) on the FSOC's annual report.

## LIBOR transition

### Statement on LIBOR transition

The SEC on Dec. 7, 2021, published "[SEC Staff Statement on LIBOR Transition – Key Considerations for Market Participants](#)" to remind investment professionals of their obligations when recommending LIBOR-linked securities and to remind companies and issuers of asset-backed securities of their disclosure obligations related to the LIBOR transition. This statement follows previous staff statements addressing other aspects of the approaching LIBOR transition. This statement addresses:

- Background and general considerations for market participants
- Broker-dealer registrants: recommendations to retail customers
- Broker-dealer registrants: municipal securities underwriting and sales to customers
- Registered investment advisers and funds
- Disclosure considerations for public companies and asset-backed securities issuers

### SEC chair LIBOR transition remarks

On Sept. 20, 2021, Chair Gensler spoke on LIBOR to the "SOFR Symposium" hosted by the Fed's Alternative Reference Rates Committee. He gave a short history of LIBOR transition and reiterated his June 11, 2021, [message](#) that the Bloomberg Short-Term Bank Yield Index (BSBY), championed by certain commercial banks as an alternative to LIBOR, might have the same conceptual perils as LIBOR. In conclusion, he shared that he agreed with the committee that the Secured Overnight Financing Rate (SOFR) is a preferable alternative rate.

### Omnibus statement on LIBOR transition and potential risks

On July 12, 2019, SEC staff from multiple divisions and offices [published](#) a statement on LIBOR transition that encourages market participants to proactively manage their transition away from LIBOR. The statement identifies several areas that warrant increased attention during the transition period and provides guidance on certain items. Areas addressed in the statement include:

- Identification of existing contracts that extend past the LIBOR cessation date to determine an entity's exposure to LIBOR
- Consideration of whether future contracts should reference an alternative rate to LIBOR or include effective fallback language
- Guidance for how registrants might respond to other business risks associated with the discontinuation of LIBOR such as those related to strategy, products, processes, and information systems
- Questions to consider that will assist an entity in understanding and mitigating the risks related to LIBOR transition
- Potential alternative reference rates
- Guidance from several SEC divisions on responding to risks from the impact of LIBOR discontinuation

The SEC staff warns, "For many market participants, waiting until all open questions have been answered to begin this important work likely could prove to be too late to accomplish the challenging task required." Then-Chair Jay Clayton also remarked at the 2019 AICPA conference that "[h]ope is not a strategy" with respect to LIBOR transition. Corp Fin staff mentioned at the 2020 AICPA conference that where material, disclosure related to LIBOR transition will be a staff focus area.

### SEC chair address on LIBOR

Chair Gensler discussed LIBOR transition in his June 11, 2021, [remarks](#) to the FSOC. He encouraged the FSOC to consider his concerns regarding the robustness of the BSBY, which is a rate that "a

number of commercial banks are advocating as a replacement for LIBOR.” He remarked that he believed BSBY has many of the same flaws as LIBOR and cautioned against the pitfalls of allowing BSBY as a replacement rate. Gensler supports as a preferable alternative to LIBOR the SOFR, which is based on a nearly trillion-dollar market.

Chair Gensler provided additional LIBOR [remarks](#) at the Dec. 16, 2022, FSOC meeting.

### **SEC commissioner address on LIBOR**

On April 28, 2021, SEC Commissioner Peirce provided [remarks](#) before the International Swaps and Derivatives Association Derivatives Trading Forum on Regulatory Change. Among other topics, Peirce spoke about upcoming changes related to the discontinued use of LIBOR.

Peirce shared her thoughts on the importance of embracing changes and warned of consequences of not addressing changes. As LIBOR is set to be discontinued, Peirce, referencing others’ statements, warned that LIBOR discontinuation “could have a significant impact on the municipal securities market and may present a material risk for many issuers of municipal securities and other obligated persons.” She said that trillions of dollars of contracts still reference LIBOR, that many of these contracts lack fallback language, and that changing to alternative reference rates creates a diverse mix of significant challenges. She noted that the SEC is continuing to closely follow developments in this area and is working with other regulators and entities to help ensure steps are being taken to address this challenge. She mentioned the SEC risk alert covering LIBOR transition readiness and the work that the SEC, in conjunction with other regulators, has been doing to address the transition from LIBOR. Peirce also discussed proposed legislation that would insert a fallback into contracts that do not include one, and the concern that such legislation would override private contracts.

## **From the Office of the Chief Accountant**

### **Statement on auditor’s responsibility for fraud detection**

On Oct. 11, 2022, SEC then-acting Chief Accountant Munter issued a [statement](#) addressing the auditor’s responsibilities with respect to fraud detection. He included observations of shortcomings in detecting fraud; described how the auditor’s responsibilities are addressed in the PCAOB standards, including the quality control standards; and provided examples of good practices. Under PCAOB auditing standards, auditors have a responsibility to consider fraud and to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by fraud or error. Munter noted that the importance of the auditors’ responsibilities should not be underestimated and warned that changes to the macroeconomic and geopolitical environment in which companies operate might result in new pressures, opportunities, or rationalizations for fraud.

He said fraud risks should be continually reassessed throughout the audit and noted auditors should avoid using the examples of fraud risk considerations and related responses included within the auditing standards as a comprehensive checklist. Munter emphasized that audit responses should be tailored to the identified fraud risk and responsive to changing business environments if auditors are to fulfill their professional responsibilities.

Munter concluded by reiterating that auditors serve an important gatekeeping and investor protection function by helping to verify that issues are promptly identified and addressed so that the auditor has obtained reasonable assurance about whether financial statements are free of material misstatement, whether due to error or fraud.

### **Statement on materiality and financial statement errors**

On March 9, 2022, Munter, the SEC’s then-acting chief accountant, [released](#) a public statement outlining views on assessing the materiality of financial statement errors from the perspective of a reasonable investor. Munter provided reminders on the concept of materiality, thoughts on the importance of objectivity when assessing materiality, and observations from recent fact patterns SEC staff has addressed. Munter also reminded practitioners of SEC staff availability for consultation.

## Statement on FASB agenda consultation

On Feb. 22, 2022, SEC then-acting Chief Accountant Munter issued a [“Statement on the FASB’s Agenda Consultation: Engagement With Investors and Other Stakeholders Vital to Development of High Quality Accounting Standards.”](#) In the statement, he noted that in response to the FASB’s June 2021 Invitation to Comment, “Agenda Consultation,” approximately one-third of the more than 500 responses received were from investors or other financial statement users. Munter said, “It is critically important that the FASB, and the Trustees of the Financial Accounting Foundation (the ‘FAF’) in its important oversight role over the FASB, continue to improve processes for obtaining and considering investor and other stakeholder feedback, and for clearly communicating with those stakeholders regarding how that feedback has impacted the standard-setting process.” Munter encouraged all stakeholders to continuously engage with the FASB in the standard-setting process and encouraged investors to share perspectives on what information is useful to them and how they could use that information. He noted that it is important for investors and other stakeholders to understand how their feedback is considered by the FASB, so the FASB should continue to focus on improving transparency in its communications of the types of investors the FASB engages with, the diverse extent and nature of investor feedback, and how the FASB considers investor feedback.

In addition, because the objective of financial reporting is to provide decision-useful information to investors and other users of financial reports, Munter noted that the FASB should be transparent about how projects would benefit investors and other financial statement users to meet this objective. In its decisions to add projects to its agenda or make changes to its standards, the FASB should make a clear case for change and should consider the expected costs for preparers and users as well as benefits of a change. Munter highlighted a few examples of current projects where there is diversity in views, including intangibles and subsequent accounting for goodwill, disaggregation of financial reporting information, climate-related transactions and disclosures, and digital assets.

As the FASB considers feedback, Munter said he believes it should keep in mind “the importance of: 1) making the case for change; 2) appropriately scoping projects to make timely, meaningful, and achievable changes while ensuring appropriate due process is used throughout the standard-setting life cycle; and 3) continuing to seek investor and other stakeholder input.” In conclusion, Munter reiterated the importance of the FAF and FASB’s focus on improvement and their efforts to better address the significant and evolving needs of investors. Munter said he looks forward to the continued progress and improvements in incorporating investors’ feedback into the standard-setting process.

## From the Division of Corporation Finance

### Capital formation, investor protection, and rulemaking

#### Rule proposals

##### Proposed Regulation Best Execution

The SEC on Dec. 14, 2022, proposed Regulation Best Execution, which would establish through SEC rules a best execution regulatory framework for brokers, dealers, government securities brokers, government securities dealers, and municipal securities dealers.

Among other things, the proposed regulation would require brokers, dealers, government securities brokers, government securities dealers, and municipal securities dealers to:

- Establish, maintain, and enforce written policies and procedures reasonably designed to comply with the standard
- Require detailed policies and procedures for such entities that engage in certain conflicted transactions for or with a retail customer
- Review the execution quality of their customer transactions at least quarterly

- Review their best execution policies and procedures at least annually and present a report detailing the results of such review to their boards of directors or equivalent governing bodies

Under the proposed regulation, broker-dealers that qualify as introducing brokers would be exempt from many of the operative provisions of the proposed rules if they establish, maintain, and enforce specific policies and procedures. Resulting from the same meeting, the SEC proposed rules and amendments related to disclosure of order execution information; Regulation National Market System (NMS) rules on minimum pricing increments, access fees, and transparency of better priced orders; and an order competition rule.

Comments on the disclosure of order execution information proposed rule are due March 31, 2023, or 60 days after the date of publication of the proposing release in the Federal Register, whichever is later.

Already published in the Federal Register, comments on the Regulation NMS rule proposal and the order competition rule proposal are due March 31, 2023.

### **Proposed changes to open-end fund liquidity framework**

On Nov. 2, 2022, the SEC proposed rule and form amendments to better prepare open-end funds for stressed conditions and to mitigate dilution of shareholders' interests. The amendments would change the existing framework by:

- Enhancing how open-end funds other than money market funds (MMFs) and certain ETFs classify the liquidity of their investments and requiring a minimum of at least 10% of net assets be highly liquid assets
- Requiring any open-end fund, other than a MMF or ETF, to use swing pricing and implementing a "hard close" to operationalize this pricing and to improve order processing
- Providing for more frequent, timelier, and more detailed public reporting of fund information, including information about funds' liquidity and use of swing pricing

Comments are due Feb. 14, 2023.

### **Proposed new oversight requirements for outsourced services by investment advisors**

The SEC on Oct. 26, 2022, proposed a new rule and rule amendments under the *Investment Advisers Act of 1940* to prohibit registered investment advisers from outsourcing certain services and functions without meeting certain minimum requirements such as conducting due diligence and monitoring the service providers.

The proposal includes requirements for advisers:

- To conduct due diligence before outsourcing and to periodically monitor service providers' performance and reassess whether to retain them
- To make and/or keep books and records related to the due diligence and monitoring requirements
- To conduct due diligence and monitoring for third-party recordkeepers and to obtain reasonable assurances that the third party will meet certain standards

Comments were due Dec. 27, 2022.

### **Reopened rulemaking comment periods**

On Oct. 7, 2022, the SEC announced that, due to a technological glitch known to have occurred as early as June 2021, the comment period for certain proposed rulemakings and a request for comment would be reopened. The SEC indicates it did not receive certain comments previously submitted and suggests interested stakeholders should confirm that their original comment submission appears on the

SEC's website. The 12 affected releases include, among others, proposals on climate-related disclosures, cybersecurity risk governance disclosures, and special purpose acquisition companies.

The comment period for each affected release was reopened until Nov. 1, 2022.

### **Proposed private fund reporting enhancements**

On Aug. 10, 2022, the SEC proposed, jointly with the Commodity Futures Trading Commission, amendments to Form PF. The amendments increase disclosure granularity of private funds' operations and strategies.

Comments were due Oct. 11, 2022.

### **Proposed amendments to shareholder proposal rule**

The SEC on July 13, 2022, proposed amendments to Rule 14a-8, which governs the process for including shareholder proposals in a company's proxy statement. It provides bases for exclusion, with substantive requirements. The proposed amendments would revise three of the bases for exclusion:

- "Substantial Implementation. The proposed amendments would specify that a proposal may be excluded under this provision if the company has already implemented the 'essential elements' of the proposal.
- "Duplication. The proposed amendments would specify that a proposal 'substantially duplicates' another proposal previously submitted for the same shareholder meeting if it addresses the same subject matter and seeks the same objective by the same means.
- "Resubmission. The proposed amendments would provide that a proposal constitutes a resubmission if it substantially duplicates another proposal that was previously submitted for the same company's prior shareholder meetings."

Comments were due Sept. 12, 2022.

### **Proposed changes to funds' Names Rule**

On April 6, 2022, the SEC proposed new Regulation SE under the *Securities Exchange Act of 1934* (Exchange Act) to create a framework for the registration and regulation of security-based swap execution facilities (SBSEFs), as mandated under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). To address changes in the fund industry and compliance practices that have developed since the rule was adopted almost 20 years ago, the SEC, on May 25, 2022, proposed amendments to improve and modernize the *Investment Company Act* "Names Rule" to prevent misleading and deceptive fund names. This proposal addresses public feedback on potential rule reforms received as part of a March 2020 request for comment.

Under the current Names Rule, registered investment companies whose fund names suggest a focus in a particular type of investment (among other areas) must adopt a policy to invest at least 80% of the value of their assets in those investments. The proposed amendments would require more funds to adopt an 80% investment policy by extending the requirement to any fund name with terms suggesting that the fund focuses in investments that have (or whose issuers have) particular characteristics including fund names with terms such as "growth" or "value" or terms indicating that the fund's investment decisions include one or more environmental, social, or governance factors. The proposed amendments would limit temporary departures from the 80% investment requirement and clarify the rule's treatment of derivative investments. The proposal also provides new enhanced disclosure and reporting requirements, updates notice requirements, and establishes recordkeeping requirements.

Comments were due Aug. 16, 2022.

Chair Gensler and Commissioners Peirce, Lee, and Crenshaw issued statements on the proposed amendments to the Names Rule.

### **Proposed security-based swap execution facilities rules**

On April 6, 2022, the SEC proposed new Regulation SE under the Exchange Act to create a framework for the registration and regulation of SBSEFs, as mandated under the Dodd-Frank Act.



The proposal would implement the Exchange Act's trade execution requirement for security-based swaps and address the cross-border application of that requirement, implement Section 765 of the Dodd-Frank Act to mitigate conflicts of interest at security-based swap execution facilities and national securities exchanges that trade security-based swaps, and promote consistency between the proposed Regulation SE and the existing rules under the Exchange Act. Among other requirements, the proposed rules would require an entity meeting the definition of an SBSEF to register with the SEC as an SBSEF on Form SBSEF or register as a national securities exchange.

Comments were due June 10, 2022.

### **Proposed SPAC disclosures**

On March 30, 2022, the SEC proposed rules related to SPACs that would:

- Increase disclosures and provide more investor protections in initial public offerings by SPACs and de-SPAC transactions (business combination transactions between SPACs and private operating companies)
- Determine the treatment of business combination transactions involving a reporting shell company under the *Securities Act of 1933* and revise the financial statement requirements applicable to transactions involving shell companies, including SPACs
- Expand the guidance on the presentation of projections in SEC filings to address concerns about reliability and reasonableness
- Provide that a SPAC that complies with the conditions in the rule would not need to register as an investment company under the *Investment Company Act of 1940*

Comments were due June 13, 2022.

On May 6, 2022, the SEC's Small Business Capital Formation Advisory Committee discussed the SEC's proposed rules on SPACs, shell companies, and projections. Gensler provided remarks to the committee in which he observed that the SPACs proposal would strengthen the disclosures, marketing practices, and gatekeeper and issuer obligations for SPACs. Peirce also provided remarks on the proposal's potential effects on small businesses. She noted that the proposal would require significant changes to the operations, economics, and timeline of SPACs.

### **Proposed cybersecurity disclosures**

On March 9, 2022, the SEC proposed new cybersecurity incident and risk management, strategy, and governance disclosures, which would:

- Require disclosure in Form 8-K within four business days of the determination of a material cybersecurity breach
- Require periodic disclosures about, among other items:
  - The entity's policies and procedures to identify and manage cybersecurity risks, including whether the entity considers cybersecurity to be part of its business strategy, financial planning, and capital allocation
  - Management's experience in assessing and managing cybersecurity risk and its role in implementing the entity's policies, procedures, and strategies
  - The entity's board of directors' cybersecurity expertise and its oversight of cybersecurity risk
  - Updates about previously reported material cybersecurity incidents
  - A series of previously undisclosed individually immaterial cybersecurity incidents that has become material in the aggregate

The proposal would require cybersecurity disclosures to be filed using inline extensible business reporting language (inline XBRL).

Comments were due May 9, 2022.

### **Proposed changes to short sale disclosures rule, order marking requirement, and CAT amendments**

The SEC on Feb. 25, 2022, proposed rule changes that would provide greater transparency to investors and regulators by increasing the public availability of data related to short sales. New Exchange Act

Rule 13f-2 would require institutional investment managers who exercise investment discretion over short positions meeting specified thresholds to report on the proposed Form SHO information relating to end-of-the-month short positions and certain daily activity affecting such short positions. Under the proposed rule, the SEC would aggregate the data by security and publicly distribute the aggregate data to all investors. This aggregate data would supplement the short sale data currently available from the Financial Industry Regulatory Authority and stock exchanges.

Additionally, the SEC proposed a new provision of Regulation SHO, Rule 205, to create a new “buy to cover” order marking requirement for broker-dealers. Regulation SHO requires a broker-dealer to identify each sale order that it effects as either “long,” “short,” or “short-exempt”; however, it does not include such a requirement for purchase orders. This proposed rule would require a broker-dealer to mark a purchase order as “buy to cover” if the purchaser has any short position in the same security at the time the purchase order is entered.

The SEC also proposed to amend the national market system plan governing the consolidated audit trail (CAT) to require CAT reporting firms to report “buy to cover” information. The proposed amendments include a provision that would require each CAT reporting firm to indicate where it is asserting use of the bona fide market making exception under Regulation SHO.

Comments were due April 26, 2022.

### **Proposed amendments to private fund investor protection**

On Feb. 9, 2022, the SEC proposed new rules and amendments to enhance private fund investor protection. These new rules and amendments would require private funds to provide quarterly reporting of fees and performance, obtain an annual audit, and document annual compliance reviews. Additionally, the proposed rules would prohibit private fund advisers from providing certain types of preferential treatment to investors in their funds unless it is disclosed to investors and would prohibit all private fund advisers from engaging in certain activities.

Comments were due April 25, 2022. On May 9, 2022, the SEC announced the reopening of the comment periods for 30 days on the proposed rulemaking to enhance private fund investor protection. The comment periods reopened following publication in the Federal Register and closed on June 13, 2022.

### **Proposed rules for cybersecurity risk management rules for investment advisers and funds**

The SEC on Feb. 9, 2022, issued a cybersecurity risk management for investment advisers and funds proposal, under which investment advisers and funds would be required to adopt written cybersecurity policies, report significant cybersecurity events to the SEC on a new confidential form, publicly disclose certain cybersecurity events, and implement certain record-keeping policies.

Comments were due April 11, 2022.

### **Proposed amendments to shorten the securities transaction settlement cycle**

The SEC on Feb. 9, 2022, issued a proposal on reducing risk in clearance and settlement that would shorten the standard securities trade settlement cycle from two business days after trade date to one business day after trade date. The proposal also addresses shortening the process of confirming and affirming the trade information necessary to prepare a transaction for settlement so that it can be completed by the end of trade date and the proposal would require clearing agencies that provide central matching services to facilitate fully automated transaction processing and to provide annual reports on progress.

Comments were due April 11, 2022.

### **Proposed amendments to beneficial ownership reporting**

On Feb. 10, 2022, the SEC issued a proposal to modernize beneficial ownership reporting requirements to provide more timely information. The proposed amendments would accelerate filing deadlines for beneficial ownership reports under Exchange Act Sections 13(d) and 13(g) and require Schedule 13D

and Schedule 13G filings to be filed using machine readable structured language, among other amendments.

The proposed amendments would accelerate the filing deadlines for Schedule 13D beneficial ownership reports from 10 days to five days and require that amendments be filed within one business day. For Schedule 13G, the filing deadlines which differ based on type of filer would also be accelerated. The amendments, among other changes, would also extend the application of 13D and 13G to certain derivative securities and provide new exemptions to permit certain persons to communicate and consult with one another, jointly engage issuers, and execute certain transactions without being subject to regulation as a group under the regulations.

Comments were due April 11, 2022.

### **Proposed amendments to Regulation ATS, Regulation SCI**

Building on a 2020 proposal to enhance transparency and oversight over alternative trading systems (ATS) that trade government securities, the SEC on Jan. 26, 2022, proposed amendments to:

- Expand Regulation ATS to include ATSS that trade government securities, National Market System stock, and other securities
- Extend Regulation Systems Compliance Integrity (SCI) to ATSS that trade government securities
- Expand the definition of “exchange” to include communication protocol systems so that communication protocol systems that operate as ATSS would need to adhere to Regulation ATS

Under the proposed amendments, ATSS that limit securities activities to government securities or repurchase agreements or reverse repurchase agreements on government securities and register as broker-dealers, or are banks, would no longer be exempt from Regulation ATS. The goal is to expand investor protections and enhance cybersecurity by covering more ATSS that trade Treasuries and other government securities under the regulatory framework.

Comments were due April 18, 2022.

Commissioner Crenshaw issued a statement supporting the proposal and saying that the proposed amendments advance the objective of fair competition. She said that as part of this proposal, the SEC is “soliciting comment on the possibility of extending the operational transparency requirements of Rule 304 to all categories of ATSS, including ATSS that trade corporate debt securities, municipal securities, and equity securities other than NMS stocks.”

In a dissenting statement on the proposed amendments to Regulation ATS, Commissioner Peirce described the proposal as “too wide-ranging and, given its length, too unwieldy to facilitate careful consideration. . . . And the release goes well beyond government securities, or even fixed-income securities; key parts of the proposal affect trading venues that make any type of security available for trading.” She also criticized the length of the comment period as too short to fully evaluate and analyze the proposal. She concluded her statement with “a final message to those who operate any service that is designed to facilitate any communication between potential buyers and sellers of any type of security: Read this release. Even if you have nothing to do with government securities or even fixed-income, or with traditional securities, read this release. Preferably as soon as it is published on the Commission’s website. It covers a lot of ground, and you should not assume that it has nothing to do with you, because it probably does.”

On May 9, 2022, the SEC announced the reopening of the comment periods for 30 days on the proposed rulemaking to include significant Treasury markets platforms within Regulation ATS. The comment periods reopened following publication in the Federal Register and closed on June 13, 2022.

### **Proposed amendments to share repurchase disclosures and reporting**

On Dec. 15, 2021, the SEC issued proposed amendments to its rules covering disclosure about an issuer’s repurchases of its equity securities, commonly known as share buybacks. The proposed rules would apply to issuers that repurchase securities registered under Section 12 of the Exchange Act, including foreign private issuers and certain registered closed-end funds. Under the proposed amendments, issuers would be required to complete and provide a new Form SR before the end of the

first business day following the day the issuer executes a share repurchase. This new form would include disclosure of the class of securities purchased, total amount purchased, average price paid, and the aggregate total amount purchased on the open market in reliance on the safe harbor in Exchange Act Rule 10b-18 or pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).

Additionally, the proposed rules would require an issuer to disclose:

- The objective or rationale for the share repurchases and the process or criteria used to determine the amounts of repurchases
- Any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction
- Whether the issuer is making its repurchases pursuant to a plan that it intends to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and/or the conditions of the Exchange Act Rule 10b-18 nonexclusive safe harbor

Comments were due April 1, 2022.

To allow for the consideration of a newly enacted law, the SEC, on Dec. 7, 2022, reopened the comment period on the proposed amendments to modernize the required disclosure about an issuer's repurchases of its equity securities, commonly referred to as buybacks.

After the proposed amendments were originally published for public comment, the *Inflation Reduction Act of 2022* was enacted, which imposes on certain corporations a nondeductible excise tax equal to 1% of the fair market value of any stock of the corporation repurchased by such corporation during the taxable year. To consider this new law, the SEC staff prepared a memorandum discussing potential economic effects of the new excise tax that may be helpful in evaluating the proposed amendments.

Comments were due Jan. 11, 2023.

### **Proposed amendments to money market fund rules**

On Dec. 15, 2021, the SEC proposed amendments to certain rules governing money market funds under the *Investment Company Act of 1940*. As the concerns over the economic impact of the pandemic escalated in March 2020, many investors reallocated their assets, resulting in large outflows from prime and tax-exempt money market funds and creating stress on short-term funding markets. The proposed amendments address concerns about such money market funds, including concerns about redemption costs and liquidity, and are intended to decrease the chances of runs on such funds in times of stress.

The proposed amendments would:

- Increase liquidity requirements for money market funds to provide a more substantial liquidity buffer in the event of rapid redemptions
- Remove provisions permitting or requiring a money market fund to impose liquidity fees or to suspend redemptions through a gate when a fund's liquidity drops below an identified threshold
- Require institutional prime and institutional tax-exempt money market funds to implement swing pricing policies and procedures that would require redeeming investors to bear the liquidity costs of their redemptions under certain circumstances
- Change certain reporting requirements to improve the availability of information about money market funds

Comments were due April 11, 2022.

### **Proposed rules over security-based swaps transactions and positions**

The SEC on Dec. 15, 2021, proposed rules related to security-based swap transactions and positions. The proposal includes the following new rules:

- Rule 9j-1 would prohibit fraudulent, deceptive, or manipulative conduct in connection with all transactions in security-based swaps.

- Rule 15Fh-4(c) would prohibit personnel of a security-based swap entity from taking any action to coerce, mislead, or otherwise interfere with the security-based swap entity's chief compliance officer.
- Rule 10B-1 would require any person, or group of persons, who owns a security-based swap position that exceeds the threshold amount included in the rule to publicly report to the SEC information required by Schedule 10B on the SEC's EDGAR filing system.

Comments were due March 21, 2022.

### **Proposed changes to increase securities lending market transparency**

The SEC on Nov. 18, 2021, published a proposed rule on the reporting of securities loans. The rule is intended to strengthen the transparency and efficiency of the securities lending market. It would require lenders of securities to provide the material terms of securities lending transactions to a registered national securities association. That association would then make available to the public certain information concerning each transaction and aggregate information on securities on loan and available to loan.

Concurrent with the release of this proposal, Chair Gensler released a [statement](#) noting that securities lending and borrowing is an important part of the U.S. market structure and that the public benefits from transparency and competition. Gensler stated, "it's important that market participants have access to fair, accurate, and timely information," and he said, "this proposal would bring securities lending out of the dark."

Comments were due Jan. 7, 2022.

On Feb. 25, 2022, the SEC [reopened](#) the comment period for its proposed rule on reporting securities loans. In reopening the comment period, the SEC requested comment on any potential effects of the proposed Exchange Act Rule 13f-2 regarding short sale disclosure that the SEC should consider in determining whether to adopt the proposed Exchange Act rule regarding the reporting of securities loans.

Comments were due April 1, 2022.

## **Final rules and interpretive guidance: Broadly applicable**

### **Insider trading rules**

On Dec. 14, 2022, the SEC held an open meeting where it discussed insider trading arrangements and related disclosures. As a result of the meeting, the SEC [adopted](#) amendments to Rule 10b5-1 under the Exchange Act, new disclosures regarding Rule 10b5-1 trading arrangements and insider trading policies and procedures, and amendments regarding the disclosure of the timing of certain equity compensation awards and reporting of gifts on Form 4.

The amendments update the requirements for the affirmative defense by imposing a cooling-off period before trading could commence under a trading plan, prohibiting overlapping trading plans, and limiting single trade plans to one trading plan in any 12-month period. Additionally, the amendments require directors and officers to furnish written certifications that they are not aware of any material nonpublic information when they enter into the plans. New disclosures about an issuer's policies and procedures related to insider trading and practices around the timing of options grants and the release of material nonpublic information also are required.

The final rules will be effective on Feb. 27, 2023.

### **Compensation recovery listing standards and disclosure rules**

The SEC on Oct. 26, 2022, [adopted](#) rules requiring securities exchanges to adopt listing standards that make issuers develop and implement a policy providing for the recovery of incentive-based compensation that was erroneously awarded to current or former executive officers. In accordance with the final rules, a listed issuer must file the policy as an exhibit to its annual report and include disclosures related to its recovery policy and recovery analysis where a recovery is triggered.



Implementing Section 10D of the Exchange Act, a provision added by the Dodd-Frank Act, new Exchange Act Rule 10D-1 also requires national securities exchanges and associations to establish listing standards that require disclosure of those compensation recovery policies in accordance with SEC rules, including providing the information in tagged data format. Additionally, the new rules require specific disclosure of information about actions taken pursuant to the issuer's recovery policy.

The final rules are effective Jan. 27, 2023. Securities exchanges will be required to file proposed listing standards no later than 90 days following publication in the Federal Register, and the listing standards must be effective no later than one year following such publication. Issuers subject to such listing standards will be required to adopt a recovery policy no later than 60 days following the effective date.

### **JOBs Act inflation adjustments**

On Sept. 9, 2022, the SEC amended its rules to implement inflation adjustments mandated by the *Jumpstart Our Business Startups Act* (JOBS Act), which requires the SEC to make inflation adjustments to certain JOBS Act rules at least once every five years. These newly adopted amendments increase the annual gross revenue threshold in the definition of emerging growth company from \$1,070 million to \$1,235 million. They also increase certain financial thresholds in Regulation Crowdfunding.

The final rules and thresholds became effective on Sept. 20, 2022.

### **Whistleblower rules**

The SEC on Aug. 26, 2022, adopted two amendments to the rules governing its whistleblower program, which was established in 2010 to encourage individuals to report high-quality tips to the SEC and help the agency detect wrongdoing and better protect investors and the marketplace.

Rule 21F-3 is amended to allow the SEC to pay whistleblower awards for certain actions brought by other entities, including designated federal agencies, in cases where those awards might otherwise be paid under the other entity's whistleblower program. The changes allow for such awards when the other entity's program is not comparable to the SEC's program or if the maximum award that the SEC could pay on the related action would not exceed \$5 million.

Additionally, the amendments affirm the SEC's authority under Rule 21F-6 to consider the dollar amount of a potential award for the limited purpose of increasing the award amount, and the SEC's authority to consider the dollar amount for the purpose of decreasing an award is eliminated.

The final rules were effective Oct. 3, 2022.

### **Pay-versus-performance disclosure rules**

On Aug. 25, 2022, the SEC voted to finalize pay-versus-performance disclosure rules mandated by the Dodd-Frank Act. The rules require more transparent information about how executive compensation links to company performance. While the final rules are effective Oct. 11, 2022, registrants must comply with the new requirements in proxy and information statements that include Regulation S-K Item 402 executive compensation disclosure for fiscal years ending on or after Dec. 16, 2022.

A summary of the final rules, originally proposed in 2015 and then subject to additional public comment in 2022, and additional observations follows.

Registrants must provide pay-versus-performance disclosure in their annual proxy or information statement that includes executive compensation disclosure under Item 402 of Regulation S-K. Smaller reporting companies (SRCs) can use scaled disclosure. Emerging growth companies, foreign private issuers, and registered investment companies are exempt.

Registrants must provide tabular disclosure for the most recent five years (three years for SRCs) of:

- Principal executive officer (PEO) and named executive officer (NEO) compensation:

- Total compensation, which is the same amounts as in the summary compensation table, of the PEO and the average total compensation of other NEOs
- Compensation actually paid to the PEO and the average actual compensation paid to the other NEOs
- Financial performance measures:
  - Total shareholder return (TSR)
  - TSR of the entity's peer group (not required for SRCs)
  - Net income
  - The entity-specific, company-selected financial performance measure (company-selected measure) that is most important to the link between compensation actually paid and company performance for the most recently completed fiscal year (not required for SRCs)

In addition to the tabular disclosure, an entity must provide:

- A clear description (graphically, narratively, or both) of the relationship between the executive compensation actually paid to the PEO and NEOs and the tabular financial performance metrics for the five most recently completed fiscal years (three years for SRCs).
- A description of the relationship between the entity's cumulative TSR and cumulative peer group TSR (not required for SRCs).
- A list of up to seven most important financial performance measures used to link compensation to performance (not required for SRCs). A registrant also may elect to include nonfinancial measures in the list.

To learn more about the SEC pay-versus-performance disclosure rules for executive compensation and what board directors and company management should consider, see the Sept. 22, 2022, Crowe article ["SEC Finalizes Pay-Versus-Performance Disclosure."](#)

### **Electronic filing requirements**

To modernize how information is filed or submitted to the SEC and disclosed to the public, on June 23, 2022, the agency adopted amendments to require certain documents filed by investment advisers, institutional investment managers, and certain other entities, which previously were submitted on paper, to be filed or submitted electronically. The rule includes technical amendments to modernize Form 13F and enhance the information provided.

The new rule, except the amendments to Form 13F, were effective Aug. 29, 2022. The amendments to Form 13F were effective Jan. 3, 2023.

### **Proxy voting advice rules**

On July 13, 2022, the SEC adopted amendments to its rules governing proxy voting advice originally proposed in November 2021. The purpose of the amendments is to reduce burdens on proxy voting advice businesses that might impair the timeliness and independence of their advice. The amendments rescind two rules, adopted by the SEC in 2020, applicable to proxy voting advice businesses, specifically conditions to the availability of two exemptions from the proxy rules' information and filing requirements on which these businesses often rely. The rescinded conditions required that:

- "Registrants that are the subject of proxy voting advice have such advice made available to them in a timely manner"
- "Clients of proxy voting advice businesses are provided with a means of becoming aware of any written responses by registrants to proxy voting advice"

Additionally, the amendments delete the 2020 changes made to the proxy rules' liability provision, and the adopting release rescinds guidance that the SEC issued in 2020 to investment advisers regarding their proxy voting obligations.

The amendments and rescission of the guidance were effective Sept. 19, 2022.

### **Geopolitical risk considerations**

The staff in Corp Fin published "[Sample Letter to Companies Regarding Disclosures Pertaining to Russia's Invasion of Ukraine and Related Supply Chain Issues](#)" to provide guidance on disclosures. While the letter was created to specifically address the current conflict, the comments could be applied more broadly across similar situations. The letter indicates that Corp Fin believes that companies should provide detailed disclosure, to the extent material or otherwise required, regarding:

- "Direct or indirect exposure to Russia, Belarus, or Ukraine through their operations, employee base, investments in Russia, Belarus, or Ukraine, securities traded in Russia, sanctions against Russian or Belarusian individuals or entities, or legal or regulatory uncertainty associated with operating in or exiting Russia or Belarus"
- "Direct or indirect reliance on goods or services sourced in Russia or Ukraine or, in some cases, in countries supportive of Russia"
- "Actual or potential disruptions in the company's supply chain"
- "Business relationships, connections to, or assets in, Russia, Belarus, or Ukraine"

The financial statements also might need to reflect and disclose:

- Impairment of assets
- Changes in inventory valuation
- Deferred tax asset valuation allowance
- Disposal or exiting of a business
- Deconsolidation
- Changes in exchange rates
- Changes in contracts with customers or the ability to collect contract considerations

Additionally, Corp Fin notes that "many companies have experienced heightened cybersecurity risks, increased or ongoing supply chain challenges, and volatility related to the trading prices of commodities regardless of whether they have operations in Russia, Belarus, or Ukraine that warrant disclosure." Also, Corp Fin requests that companies should "consider how these matters affect management's evaluation of disclosure controls and procedures, management's assessment of the effectiveness of internal control over financial reporting, and the role of the board of directors in risk oversight of any action or inaction related to Russia's invasion of Ukraine, including consideration of whether to continue or to halt operations or investments in Russia and/or Belarus."

### **Crypto assets guidance**

On March 31, 2022, the SEC issued [SAB 121](#), providing guidance for entities filing financial statements with the SEC that provide crypto asset custody services for platform users. It answers three questions:

- How should an entity account for its obligations to safeguard crypto assets held for platform users?
- What disclosure would the staff expect an entity to provide regarding its safeguarding obligations for crypto assets held for its platform users?
- How and when should an entity initially apply the guidance in this topic in its financial statements?

Crowe released on April 22, 2022, an [article](#) taking an in-depth look at SAB 121. As significant judgment might be required to determine the applicability of SAB 121, the article provides a decision tree to help entities decide if the SAB's accounting and disclosure guidance applies to them.

### ***Holding Foreign Companies Accountable Act* disclosure**

On Dec. 2, 2021, the SEC [approved new rules](#) under the *Holding Foreign Companies Accountable Act*. Effective Jan. 10, 2022, the rule requires submission of certain documentation and certain disclosures

when an entity files an annual report using an auditor that the PCAOB identifies as located in a jurisdiction not subject to its inspection.

### **Sample letter to China-based companies**

In response to the increased risks of investing in China-based companies or companies that have the majority of their operations in China, Corp Fin staff [published](#) on Dec. 20, 2021, a sample letter to China-based companies that details the need for more prominent, specific, and tailored disclosure about these risks. The letter includes sample comments that Corp Fin may issue to China-based companies and highlights the need for detailed disclosures about the legal and operational risks associated with China-based companies and specific details regarding the structure of the entity. The letter also focuses on additional legal, regulatory, and enforcement risks that might exist.

### **Nasdaq board diversity rule**

On Aug. 6, 2021, the SEC [approved](#) Nasdaq's new board diversity rule, which requires Nasdaq-listed entities to:

- Provide standardized annual public disclosure of board-level diversity statistics
- Maintain two directors, one female and the other of an under-represented minority or LGBTQ, or explain why it does not

The rule provides additional flexibility for smaller reporting companies, foreign issuers, and entities with five or fewer directors. It also specifies Nasdaq will provide one year of complimentary board recruiting services to eligible companies, which will facilitate identifying and evaluating diverse board candidates.

An entity must have complied with the annual board-level diversity disclosure requirements by the later of Aug. 8, 2022, or the date the entity filed its proxy or information statement for its annual shareholder meeting during 2022. The entity may provide the disclosure either in its SEC filings or on its website.

Entities must meet the requirement to have two diverse directors or explain why not, using a phased-in approach based on the Nasdaq tier on which the entity's securities trade. Nasdaq has [provided](#) a summary of the rule and transition requirements.

## **Final rules and interpretive guidance: Industry focused**

### **Broker-dealer rule on securities-based swaps**

On Oct. 12, 2022, the SEC [adopted](#) amendments to the requirements for electronic recordkeeping, prompt production of records, and third-party recordkeeping service applicable to broker-dealers, security-based swap dealers (SBSDs), and major security-based swap participants (MSBSPs). These amendments are intended to modernize recordkeeping requirements in light of new technologies in electronic recordkeeping.

The current broker-dealer electronic recordkeeping rule requires firms to preserve electronic records solely in a nonrewritable, nonerasable format. Among other requirements, the amendments add an audit trail alternative under which electronic records can be preserved in a manner that permits the re-creation of an original record if it is altered, overwritten, or erased; requires broker-dealers and all types of SBSDs and MSBSPs to produce electronic records to securities regulators in a reasonably usable electronic format; and eliminates the requirement that a broker-dealer notify its designated examining authority before employing an electronic recordkeeping system.

The amendments were effective Jan. 3, 2023. Broker-dealers must comply with the new requirements six months after the effective date. SBSDs and MSBSPs must comply 12 months after the effective date.

## Final rules and interpretive guidance: Market related

### New C&DIs on proxy rules

On Dec. 6, 2022, the SEC issued three new compliance and disclosure interpretations (C&DIs). The matters addressed in the new guidance include:

- A registrant does not need to include the names of dissident shareholder's nominees on its proxy card pursuant to Rule 14a-19(e)(1) when a registrant receives director nominations from a dissident shareholder purporting to nominate candidates for election to the registrant's board of directors at an upcoming annual meeting and the registrant, determines that the nominations are invalid due to the dissident shareholder's failure to comply with its advance notice bylaw requirements. (Question 139.04)
- The registrant's obligations with respect to its proxy statement disclosures and solicitation efforts, when a registrant determines that a dissident shareholder's director nominations do not comply with its advance notice bylaw requirements and excludes the dissident shareholder's nominees from its proxy card and the dissident shareholder then initiates litigation challenging the registrant's determination regarding the validity of the director nominations. (Question 139.05)
- A dissident shareholder conducting a non-exempt solicitation in support of its own director nominees cannot simply file a proxy statement on EDGAR, avoid providing its own proxy card, and instead rely exclusively on the registrant's proxy card to seek to have its director nominees elected. (Question 139.06).

### Fund shareholder report and advertising rules

On Oct. 26, 2022, the SEC adopted rule and form amendments requiring mutual funds and ETFs to transmit concise and visually engaging shareholder reports. In addition, the amendments promote transparent and balanced presentations of fees and expenses in investment company advertisements.

Regarding fund shareholder reports, the amendments require funds to highlight key information, such as fund expenses, performance, and portfolio holdings. The use of graphic and text features is encouraged to make reports more effective. Also, funds will be required to tag the information in their reports in a structured data format and to make certain more in-depth information available online and available for delivery free of charge to investors on request.

The advertising rules require fee and expense presentations in registered investment company and business development company advertisements and sales literature to be consistent with relevant prospectus fee table presentations and to be reasonably current.

The amendments were effective Jan. 24, 2023. The SEC is providing an 18-month transition period to adjust shareholder reports and transmission practices and to comply with the advertising amendments. The amendments addressing representations of fees and expenses that could be materially misleading apply on the effective date.

### Proxy voting records transparency

On Nov. 2, 2022, the SEC adopted amendments to Form N-PX to enhance the information that mutual funds, ETFs, and certain other registered funds report about their proxy votes. The amendments will make these funds' proxy voting records easier to analyze, improving investors' ability to monitor and compare different funds' voting records. Additionally, the adopted rule will require institutional investment managers to disclose how they voted on executive compensation, or "say-on-pay" matters, meeting one of the rulemaking mandates of the Dodd-Frank Act.

SEC Chair Gensler said, "I am pleased to support these amendments because they will allow investors to better understand and analyze how their funds and managers are voting on shares held on their behalf."



The new rules and form amendments will be effective for votes occurring on or after July 1, 2023, with the first filings subject to the amendments due in 2024.

### **New proxy rules**

On Nov. 17, 2021, the SEC [adopted](#) final rules that require parties in a contested election to use universal proxy cards that include all director nominees presented for election at a shareholder meeting. The rule changes will allow shareholders to vote by proxy for their preferred combination of board candidates – similar to the rules for in-person voting. Additionally, to further facilitate shareholder voting in director elections, the SEC adopted amendments to make sure that proxy cards clearly specify the applicable shareholder voting options in all director elections and to require proxy statements to disclose the effect of a shareholder's election to withhold its vote. Compliance with the rules, which will be applicable to all nonexempt solicitations for contested elections other than those involving registered investment companies and business development companies, will be required for any shareholder meeting involving contested director election held after Aug. 31, 2022.

In response to the final rules, Commissioners [Crenshaw](#), [Lee](#), [Elad Roisman](#), and [Peirce](#) all issued statements.

### **Quotations for OTC securities**

The SEC [adopted](#), on Sept. 16, 2020, amendments to Exchange Act Rule 15c2-11. The amendments enhance disclosure and investor protection in the over-the-counter (OTC) market by requiring that broker-dealers do not publish quotations for an issuer's security when current issuer information is not publicly available, subject to certain exceptions.

The SEC says the amendments:

- Provide greater transparency to investors and other market participants by requiring that information about the issuer and its security be current and publicly available before a broker-dealer can begin quoting that security
- Limit broker-dealers' reliance on certain exceptions when issuer information is not available
- Provide exceptions to reduce unnecessary burdens on broker-dealers to quote certain OTC securities that may be less susceptible to fraud and manipulation

The [final rule](#) was effective Dec. 28, 2020, but it has a general compliance date nine months after the effective date and a compliance date two years after the effective date for certain financial information requirements.

## **Offerings**

### **Exempt offering framework improvements**

The SEC [voted](#), on Nov. 2, 2020, to amend its rules to address gaps and complexities in the exempt offering framework. The amendments are designed to promote capital formation and expand investment opportunities while preserving or improving investor protections as well as increasing access to capital for issuers.

In general, the amendments:

- Establish – in one broadly applicable rule – the ability of issuers to move from one exemption to another
- Expand the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504 offerings, and adjust certain individual investment limits
- Provide specific rules governing certain offering communications, including permitting some “test-the-waters” and “demo day” activities
- Standardize certain disclosure and eligibility requirements and bad actor disqualification provisions

The final rules were effective March 15, 2021, except for certain rules and the amendments to the introductory paragraph in the “Optional Question and Answer Format for an Offering Statement” section of Form C, which are effective from Jan. 14, 2021, until March 1, 2023.

## Focus on ESG matters

### Remarks on ESG

On Dec. 7, 2022, before the American Enterprise Institute, SEC Commissioner Peirce presented a [speech](#) addressing the SEC's proposed climate change disclosure rule for public companies. She noted that the proposed rule has received thousands of comment letters with a wide variety of perspectives; however, the commenters seem to agree that if the rule is adopted it will greatly expand public company disclosure. She also noted that the recently updated cost assumptions indicate that the proposal would almost quadruple the external costs of preparing the Form S-1 and the Form 10-K. Peirce pointed out that the rule proposes many requirements, which could be extremely challenging from a compliance perspective and of limited or negative value to investors. Throughout her speech she highlighted concerns and potential pitfalls of the proposal.

She said that some aspects of the climate proposal, rather than simply discovering information about what companies are doing with regard to climate, might end up interfering with corporate decision-making and might do so in an inflexible way that does not take into consideration differences across companies. Specific to this, she touched on the mandated disclosure about board oversight of climate-related risks and the corresponding set of disclosures related to management. She said these requirements will affect the substance of what companies do and might lead to undesirable effects on boards.

She said that in contrast to principles-based mandates, which enable companies to present information about risks and opportunities that are material to them and omit information that is not financially material, the climate proposal encompasses numerous specific disclosure mandates and could produce granular, immaterial information. Peirce added that the required disclosures would be significant in every company's filings and might overemphasize climate issues and obscure differences across companies. Additionally, she said designing the systems to collect and categorize the voluminous information likely will be difficult for most entities. Lastly, she stated, "the proposal, much of which is rooted in conjecture," may produce investor confusion and the requirements could create unreliable, speculative disclosures.

### Demand for quality ESG and climate-related data

SEC Commissioner Lizárraga [spoke](#) on Oct. 17, 2022, at the Future of ESG Data conference in London, on the demand for high-quality ESG data and actions of the SEC. Lizárraga highlighted the following three SEC rule proposals designed to facilitate comparable ESG disclosures and focus on ensuring statements made to investors are not false or misleading:

- Enhanced climate risk disclosures by issuers
- Enhanced ESG disclosures by registered funds and investment advisers
- Modernized rules governing ESG-related fund names

Noting that the underlying principle to these proposals is ensuring investors receive the information they need to make the most informed investment decisions, Lizárraga said, "the SEC's disclosure framework is most effective when investors benefit from objective, quantitative metrics that provide the highest degree of comparability. I believe the proposed rules are a significant step forward in getting investors this information. I look forward to working to ensure that the final rules are as robust as possible."

He said that the data that investors want, and that is available, is always evolving and as a result of advances in technology such as emissions modeling, artificial intelligence, and big data analytics, this information is now both in demand and available. Therefore, the timing is right for the SEC to step in to ensure that investors have the most relevant information for their investment decisions.

He added that markets change, driven by technology or other factors, and investor needs and practices evolve. Challenges exist in keeping up with rapid change and updating the SEC regulatory framework so that it continues to meet investor needs without compromising protections and in ensuring that claims made to investors are supported by verifiable information and disclosures are not misleading. He

concluded by noting, “The best way to get there is with meaningful disclosures that incorporate the highest quality, reliable, and verifiable data in a standardized and investor-useful format.”

On Oct. 21, 2022, at the inaugural European Corporate Governance Institute Responsible Capitalism Summit in Brussels, SEC Commissioner Crenshaw gave a [speech](#) discussing the SEC’s proposed climate-related disclosure rule. She highlighted that the proposal includes both qualitative and quantitative disclosure about climate-related risks and disaggregated climate-related risk impacts to existing line items in audited financial statements. She noted that investors are demanding and using climate-related information, which emphasizes the importance of reliable and comparable data. She said that markets already have evolved and are disclosing this climate-related information; however, the disclosures are made with varying degrees of specificity, standardization, and, sometimes, unreliability, which must be addressed to protect investors and help provide decision-useful information.

### **Commissioner remarks on DE&I**

In response to the 2021 Asset Management Advisory Committee’s (AMAC) report and recommendations to the SEC on diversity, equity, and inclusion (DE&I) and the lack of gender and racial diversity in the asset management industry, on Oct. 13, 2022, the SEC issued a [staff FAQ](#) addressing an adviser’s fiduciary duty when considering factors relating to DE&I in the selection or recommendation of other investment advisers. Commissioners Crenshaw and Lizárraga issued a [statement](#) supporting the FAQ, saying they believe all of the recommendations in the AMAC report warrant timely consideration. Both commissioners noted that they are committed to working with the chair and other commissioners in considering ideas or actions that would help provide transparency on diversity practices, potential biases, and other DE&I matters that are important to investors.

Related to DE&I, on Oct. 13, 2022, Lizárraga gave a [speech](#) at the Investment Company Institute Securities Development Conference on raising the bar on DE&I. He highlighted some startling statistics from the AMAC report on the lack of diversity in the asset management industry and said that DE&I can be challenging and controversial. He noted that progress can take time and that meaningful advances in DE&I require a combination of commitment, leadership, and constructive engagement. Lizárraga described the recommendations to the SEC from the AMAC and noted that the SEC’s spring rulemaking agenda includes planned rules relating to enhanced board diversity and human capital management disclosures. In closing, he stated, “There are many benefits that result from a long-term commitment to advancing diversity, equity, and inclusion.”

### **Remarks on ESG matters**

On Sept. 8 and 9, 2022, SEC commissioners and staff provided insights into current SEC initiatives and priorities at the Practising Law Institute’s “The SEC Speaks in 2022” program. One of the key topics discussed was ESG matters.

Various panels highlighted the SEC’s significant pending ESG rule proposals. For example, Corp Fin Division Director Renee Jones highlighted the objectives and feedback themes from the SEC’s recent [climate-related disclosure rule proposal](#). SEC staff also addressed activities related to current rules and regulations. For example, Corp Fin staff members discussed how they evaluate registrants’ current climate disclosure using [2010 SEC guidance](#) and the staff’s [September 2021 sample letter](#) on climate change disclosure, and Corp Fin Chief Counsel Michael Seaman addressed climate-related shareholder proposal no-action requests. ENF, IM, and Examination Division staff also mentioned ESG as a significant focus area in their activities.

### **Remarks on climate-related financial risks proposals**

At the FSOC meeting on July 28, 2022, SEC Chair Gensler [shared](#) an update on the SEC’s proposals on climate-related financial risks, including the proposals on climate-related disclosures, the Names Rule for funds, and disclosure requirements for advisers and investment companies marketing themselves with labels related to ESG issues. He said that the climate-related disclosures proposal is about adding consistency, comparability, and decision-usefulness to this information and said the SEC has received more than 14,500 comments, which are available on the SEC website. He said that the Names Rule proposal will help ensure investors are provided with the information that conforms with

climate-related naming conventions. Gensler noted that the SEC is focused on making sure statements that companies present to investors are not materially false or misleading.

The comment periods closed on Aug. 16, 2022, for the proposals on the Names Rule and the disclosure requirements for advisers and investment companies. The comment period for the climate-related disclosure proposal ended on June 17, 2022.

### **Proposed ESG disclosures for certain investment advisers and investment companies**

On May 25, 2022, the SEC [proposed](#) amendments to rules and reporting forms to promote consistent and reliable information for investors about funds' and advisers' incorporation of ESG factors. Those affected by the changes would include certain registered investment advisers, advisers exempt from registration, registered investment companies, and business development companies.

Funds and advisers would be required to provide more specific disclosures in prospectuses, annual reports, and brochures based on the ESG strategies they pursue. Funds that focus on the environmental factors generally would be required to disclose the greenhouse gas (GHG) emissions associated with their portfolio investments. Funds that claim to achieve specific ESG impacts would have to describe the specific impacts and summarize their progress on achieving those impacts. Funds that use proxy voting or other engagement with issuers as a significant means of implementing their ESG strategy would be required to disclose information about their voting of proxies on particular ESG-related voting matters and information concerning their ESG engagement meetings. The proposed amendments also include implementing a layered, tabular disclosure approach for ESG funds to allow investors to compare ESG funds at a glance. Additionally, the proposal would require certain ESG reporting on Forms N-CEN and ADV Part 1A.

Comments were due Aug. 16, 2022.

Also on May 25, Chair Gensler issued a statement in support of the proposal, and Commissioners [Lee](#), [Crenshaw](#), and [Peirce](#) all issued statements sharing their positions on the proposed amendments.

### **Chair remarks on proposed climate-related disclosures**

On April 12, 2022, at the Ceres investor briefing, SEC Chair Gensler delivered [remarks](#) on the recently proposed climate-related disclosure rules. He began with some background on the tradition of disclosures, noting that the SEC has provided guidance and requirements when needed for disclosure of information relevant to investors and has played a role in standardizing disclosures. He said that the proposed climate-related disclosures would provide investors with consistent, comparable, and decision-useful information and would provide consistent and clear reporting obligations for issuers.

Gensler added that climate-related disclosures already are being made by hundreds of companies and that investors already are making decisions based on climate risks, which can create significant financial risks to companies. He said, "It makes sense to build on what so many companies are already doing to enhance the consistency, comparability, and decision-usefulness of these disclosures for investors." He described the importance of including the disclosures in filings, specifically Form 10-K, so that investors can find useful information in one place rather than having to piece together information from different locations.

Gensler encouraged issuers and investors of all sizes to comment, noting that the SEC will benefit from wide and diverse input, including how the proposal approaches disclosure of strategy, governance, risk management, targets, financial statement metrics, and GHG emissions.

### **SEC proposes climate risk disclosure rules**

On March 21, 2022, the [SEC voted](#) to propose [climate risk disclosure](#) rules slightly more than one year after then-acting Chair Lee requested public input. The SEC received more than 5,000 comment letters, including approximately 600 unique comment letters, in response to Lee's request.

After current Chair Gensler made his [agenda priorities known](#), stakeholder interest and speculation about the content of the rule proposal grew. In his [July 2021](#) remarks and [October 2021](#) testimony

before the House Committee on Financial Services, Gensler provided further transparency into what he asked the staff to consider for the proposal. On March 10, 2022, [Gensler previewed](#) what he sees as the proposal's benefits, which he believes will include benefits to the economy, capital formation, and investment decisions. Stakeholders now have a full view into what the proposal would require.

The SEC seeks public comment on all aspects of the climate-related disclosure proposal, much of which is broadly based on currently available disclosure frameworks such as those developed by the [Task Force on Climate-Related Financial Disclosures](#) and the [Greenhouse Gas Protocol](#). Specifically, a domestic or foreign registrant would be required to include in registration statements and periodic reports disclosure addressing:

- How an entity's board and management govern and manage climate-related risks
- Actual or likely material impacts of climate-related risks on the registrant's business, strategy, and outlook
- Quantitative measures of the entity's GHG emissions, which, for Scope 1 and 2 emissions of accelerated and large accelerated filers, would be subject to assurance
- In the notes to audited financial statements, certain climate-related financial statement metrics and disclosures, including:
- Disaggregated information on a financial statement line-item basis about transition activities and the impact of climate-related events
- Information about estimates and assumptions used in the financial statements
- The entity's climate-related targets and goals, scenario analysis performed, and transition plan, if any

Some of the proposed disclosures and related assurance requirements would be phased in over time based on filer status and the type of GHG emission disclosure (for example, Scope 3). A smaller reporting company, as defined in Item 10(f)(1) of Regulation S-K, would be exempt from disclosure of Scope 3 GHG emissions and from attestation on Scope 1 and 2 GHG emissions.

Peirce was the lone dissenter in the 3-1 proposal vote. Each commissioner ([Crenshaw](#), [Gensler](#), [Lee](#), and [Peirce](#)) released a public statement explaining their individual views on the proposal.

Comments were due [May 20, 2022](#). However on May 9, 2022, the SEC [announced](#) that it extended the public comment period from May 20, 2022, until June 17, 2022, on the proposed rulemaking to enhance and standardize climate-related disclosures for investors.

A report from Crowe, "[SEC Proposes Climate-Related Disclosures: A Closer Look](#)," provides considerations for management and boards and for those who choose to comment on the proposal.

On May 6, 2022, the SEC's Small Business Capital Formation Advisory Committee [discussed](#) the SEC's proposed rules on climate-related disclosures. Gensler provided [remarks](#) to the committee and said he believes the climate-related disclosures proposal will help ensure that investors receive consistent, comparable, and decision-useful information and will establish clear and consistent reporting obligations for issuers. Peirce also provided [remarks](#) on the proposal's potential effects on small businesses and noted that the climate change proposal would vastly expand the disclosure requirements and compliance burdens for all public companies, and she shared concerns that she provided when the rules were proposed. She posed several questions about the unique challenges that small companies might face.

### **Sample comment letter on climate change disclosures**

On Sept. 22, 2021, Corp Fin issued a [sample comment letter](#) addressing the types of comments staff might offer related to an issuer's climate-related disclosures or lack thereof. While not an exhaustive list, the letter can help registrants consider how current disclosure rules apply to climate-related disclosure.



## SEC climate and ESG resource page

The SEC maintains a [page](#) addressing the SEC's response to climate and ESG risks and opportunities. The page brings together all of the recent climate- and ESG-related actions in one location.

### Crowe ESG resources

Crowe provides a resource page, "[Resources for Your ESG Strategy](#)," to bring together various sources and articles and provide knowledge regarding understanding ESG and ESG strategy considerations.

## Technology and innovation

### Sample letter on crypto assets

On Dec. 8, 2022, Corp Fin released a [sample comment letter](#) to companies reminding them of their disclosure obligations under federal securities laws. The focus of the sample comment letter is on how recent crypto asset market events might have affected – either directly or indirectly – a company's business. Corp Fin encourages companies to evaluate their existing disclosures to determine if updates are warranted. Companies should consider the sample letter comments and determine what, if any changes, are needed to disclosures to adequately address the impact of recent crypto asset market developments in their filings.

### Statement on digital asset financial stability risks and regulation

On Oct. 3, 2022, before the FSOC, SEC Chair Gensler delivered a [statement](#) on the FSOC's report on digital asset financial stability risks and regulation. Starting with a clear statement that he supports the report, he described the current crypto market as highly volatile, speculative, and decentralized and noted that crypto markets cannot exist outside of public policy frameworks, regardless of what the crypto industry initially expected or what certain market participants might say. Gensler believes that the majority of tokens in the crypto market are securities and therefore are covered by the securities laws; as such, the many crypto intermediaries are transacting in securities and have to register with the SEC in some capacity.

He noted that all market participants benefit from widespread compliance with the rules, which increases investor confidence in the U.S. markets. However, a lot of noncompliance exists with the securities laws in the crypto market. He shared that the SEC staff is working to help ensure that investors in the crypto market get time-tested protections and a fair playing field. Gensler additionally looks forward to working with Congress to achieve the public policy goals, consistent with maintaining the regulation of crypto security tokens and related intermediaries at the SEC.

### Remarks on crypto assets

On Sept. 8 and 9, 2022, SEC commissioners and staff provided insights into current SEC initiatives and priorities at the Practising Law Institute's "The SEC Speaks in 2022" program. One of the key topics addressed was crypto assets.

Chair Gensler's [program-opening keynote](#) set the tone for crypto assets. He noted, "Of the nearly 10,000 tokens in the crypto market, I believe the vast majority are securities." He also remarked that crypto securities are subject to the same requirements under the federal securities laws as other securities, and thus offers and sales of crypto securities must be registered. Gensler also addressed the registration of intermediaries that transact in crypto securities, stablecoins, and nonsecurity crypto tokens.

ENF Director Gurbir Grewal opened the second day of the conference with [remarks](#) addressing crypto, including how ENF approaches the crypto security ecosystem. Crypto assets were also mentioned during various other presentations. Commissioner Uyeda [addressed perspectives](#) on crypto, SEC then-acting Chief Accountant Munter remarked on [SAB 121](#), Corp Fin Chief Accountant Lindsay McCord discussed SAB 121 disclosure issues and crypto related non-GAAP measures, and other Corp Fin staff members stated they have a new industry office focused on disclosure review of registrants involved in crypto assets. Trading and Markets Division staff and various ENF staff also remarked on their crypto initiatives and focus.

### Chair remarks on cybersecurity

Gensler on April 14, 2022, gave a [speech](#) before the joint meeting of the Financial and Banking Information Infrastructure Committee and the Financial Services Sector Coordinating Council, addressing the SEC's important roles as part of "Team Cyber" and as a regulator.

Gensler said he thinks about the evolving cybersecurity risk landscape in three ways: cyberhygiene and preparedness, cyber incident reporting to the government, and disclosure to the public. He discussed the SEC's cybersecurity policy work related to financial sector registrants, public companies, service providers, and the SEC itself.

Related to financial sector SEC registrants, Gensler discussed proposed changes to and expansion of Regulation SCI and said that he believes additional opportunities exist to expand Regulation SCI to further strengthen the cyberhygiene of important financial entities, including and beyond the Treasury market. He highlighted the rules proposed in February 2022 that would require registered investment advisers, registered investment companies, and business development companies to bolster their cybersecurity practices focusing on adopting written plans to address cybersecurity risks, disclosing certain cybersecurity incidents to the public, reporting certain cybersecurity incidents to the SEC, and meeting specific recordkeeping obligations. He said such reforms could reduce the risk that these registrants would not be able to maintain critical operational capability during a significant cybersecurity incident.

For public companies, Gensler discussed the March 2022 proposal to enhance cybersecurity disclosures, which would require ongoing disclosures on companies' governance, risk management, and strategy with respect to cybersecurity risks and would mandate material cybersecurity incident reporting.

Gensler noted that the SEC is not immune to cyberattacks and said the staff continues to work to protect SEC data and information technology. He concluded with a reminder that cyber risks have implications across the financial sector, investors, issuers, and the economy and the SEC has a role to play, along with the rest of Team Cyber.

### Chair remarks on cybersecurity

Gensler presented a [speech](#) on cybersecurity at the Annual Securities Regulation Institute at Northwestern Pritzker School of Law on Jan. 24, 2022. After providing a brief look at the history of cyberattacks and noting that the cost may well be in the trillions, Gensler noted that cybersecurity relates to all parts of the SEC's mission and that the SEC has many rules that address cyber risk. These rules relate to business continuity, books and records, compliance, disclosure, market access, and anti-fraud, among others. When considering cybersecurity policy, Gensler focuses on cyberhygiene and preparedness, cyber incident reporting to the government, and disclosure.

To provide insight into the SEC's focus on cyber risks, Gensler indicated he has requested SEC staff recommendations on:

- Updating and expanding Regulation SCI, which is designed to help ensure entities such as stock exchanges, clearinghouses, alternative trading systems, and self-regulatory organizations have sound technology programs, business continuity plans, testing protocols, and data backups
- Strengthening cybersecurity hygiene and incident reporting for financial sector registrants, considering guidance issued by the Cybersecurity and Infrastructure Security Agency and others
- Determining how customers and clients receive notifications about cyber events when their data has been accessed and potentially changing the timing and substance of notifications as required under Regulation S-P
- Disclosing cybersecurity practices, cyber risks, and cyber events for public companies
- Further addressing cybersecurity risk related to service providers to protect investors and make sure key services are not disrupted

## Leadership changes

### SEC names chief accountant

On Jan. 11, 2023, the SEC [announced](#) it had named Paul Munter chief accountant. Munter has served as acting chief accountant since January 2021. The chief accountant leads the SEC's Office of the Chief Accountant and is the primary commission adviser on accounting and auditing matters. Prior to joining the SEC, Munter was a senior accounting instructor at the University of Colorado Boulder and retired as a partner at a public accounting firm.

### New commissioners

On June 16, 2022, the U.S. Senate confirmed [Jaime Lizárraga](#) and [Mark Uyeda](#) as SEC commissioners. Uyeda will serve until June 5, 2023, completing the term of Elad Roisman, who recently resigned. Lizárraga's term will run through June 5, 2027, replacing Allison Lee, whose term ended in June 2022.

Uyeda was [sworn in](#) on June 30, 2022. He joined the SEC in 2006 and has served as senior adviser to Chairman Clayton and acting Chairman Michael Piwowar, as counsel to Commissioner Paul Atkins, and in IM. Most recently, he served on detail to the Senate Committee on Banking, Housing, and Urban Affairs as a securities counsel to the committee's minority staff.

## From the Division of Trading and Markets

### Proposed Treasury security clearing rules

On Sept. 14, 2022, the SEC [proposed](#) U.S. Treasury security clearing reforms to enhance market resilience. Designed to improve risk management and facilitate more central clearing of U.S. Treasury trading, the proposed rules would require covered clearing agencies to:

- Require central clearing for certain transactions
- Set certain margin policies and procedures for direct participants
- Establish policies and procedures for settlement services for all eligible transactions

The proposed rules also amend certain broker-dealer customer protection rules. Comments are due 60 days after publication in the Federal Register.

### Proposed changes to clearing agency governance

The SEC [proposed](#) on Aug. 8, 2022, [rules](#) to improve the governance of clearing agencies. The proposal defines independence and requires certain minimum criteria for clearing agency directors and committee members. The proposal also requires clearing agencies to institute various governance policies and procedures.

Comments were due Oct. 7, 2022.

### Proposed changes to exemptions from FINRA membership requirement

The SEC on July 29, 2022, [re-proposed](#) amendments that would narrow the exemption from Exchange Act Section 15(b)(8), which requires any broker or dealer registered with the SEC to become a member of a national securities association unless the broker or dealer effects transactions in securities solely on an exchange of which it is a member. The Financial Industry Regulatory Authority (FINRA) currently is the only registered national securities association.

Rule 15b9-1 provides an exemption from Section 15(b)(8) under which certain SEC-registered dealers may engage in unlimited proprietary trading of securities on any national securities exchange of which they are not a member or in the over-the-counter market without triggering the Section 15(b)(8)'s FINRA membership requirement. The proposed amendments would replace this exemption with narrow exemptions from Section 15(b)(8)'s FINRA membership requirement. Under the proposed amendments, "a broker-dealer that carries no customer accounts and effects securities transactions other than on a national securities exchange where it is a member would be exempt from Section 15(b)(8) only if those

transactions result from routing for order protection purposes by a national securities exchange where the broker-dealer is a member or constitute the execution of the stock leg of a stock-option order.”

Comments were due Sept. 27, 2022.

### **Broker-Dealer risk**

On March 14, 2022, Division of Trading and Markets staff issued a reminder to broker-dealers and other stakeholders to remain vigilant to market and counterparty risks in light of the current period of volatility and uncertainty.

## **From the Office of Compliance Inspections and Examinations**

### **2022 examination priorities**

On March 30, 2022, the SEC’s Division of Examinations announced its 2022 examination priorities, including several significant areas of focus and many perennial risk areas. Annually, the division publishes its examination priorities to provide transparency into its examination program and insights into its risk-based approach, including the areas that might present risks to investors and U.S. capital market integrity.

The 2022 examination priorities are categorized as follows:

- Private funds
- ESG investing
- Retail investor protections
- Information security and operational resiliency
- Emerging technologies
- Crypto assets

## **From the Division of Enforcement**

### **Testimony before the House committee**

On July 21, 2022, ENF Director Grewal testified on the work of the division before the U.S. House of Representatives Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets. He noted that the work of the Division of Enforcement is central to the SEC’s mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation. He reported that during the fiscal year ended Sept. 30, 2021, the SEC filed 434 new enforcement actions, a 7% increase over the prior year. In addition, the SEC’s whistleblower program awarded \$564 million to 108 whistleblowers, compared to 39 whistleblowers in the prior year. He said a main goal of the division is to restore public trust in the U.S. markets and institutions through robust enforcement, remedies, and compliance.

Grewal identified the division’s priorities as enforcement, remedies, and compliance. He described the ever-changing landscape of enforcement and how the division needs to keep up with newer and emerging areas and risks and more complex schemes of misconduct. He noted that robust enforcement includes a focus not only on the wrongdoers but also on gatekeeper accountability. In addition to punishing wrongdoers for violations of the securities laws, the SEC’s remedies should prevent future violations from happening in the first place and should be viewed as more than the cost of doing business. He added that robust compliance is a responsibility shared by all market participants.

Finally, Grewal noted that the division has been performing its work with fewer employees. He said that the challenges currently faced by the division require it to constantly assess and reassess how best to allocate the division’s limited resources in the most effective manner to address the most significant and pressing risks facing investors and the financial markets. The SEC’s fiscal year 2023 budget seeks additional staff to enable the division to meet these increasing challenges and to maintain an effective investigative capacity and deterrent presence for the benefit of the U.S. markets and investors.

## Remarks on enforcement landscape

Director Grewal presented a [speech](#) on May 12, 2022, at the Securities Enforcement Forum West 2022. Grewal said a goal of enforcement is to increase public confidence in the U.S. markets and government and to offset the waning trust in institutions. Grewal noted that it is in everyone's collective interest to ensure that investigations move quickly and efficiently. He discussed the perception of delayed accountability as investigations seem to take a very long time and examined obstacles that are encountered throughout the enforcement process including document production issues; reputational, financial, psychological, and emotional costs; trust between staff and counsel and staff and witnesses; and questionable privilege claims.

With regard to document production, he noted there are problems with delayed or slow production, too many documents being provided, or too few being provided in response to requests. Highlighting the importance of documents, Grewal described them as "the lifeblood of many investigations." He ended his speech with thoughts on the way forward including discussing cooperation, the ways to cooperate, and the benefits of cooperating.

## Crypto Assets and Cyber Unit expansion

On May 3, 2022, the SEC [announced](#) the addition of 20 positions to the newly renamed Crypto Assets and Cyber Unit in the Division of Enforcement, which will increase the unit to 50 positions. The Crypto Assets and Cyber Unit is responsible for protecting investors in crypto asset markets and from cyber-related threats.

Since 2017, when it was created, "the unit has brought more than 80 enforcement actions related to fraudulent and unregistered crypto asset offerings and platforms, resulting in monetary relief totaling more than \$2 billion." The unit has brought numerous actions against SEC registrants and public companies for failing to maintain adequate cybersecurity controls and for failing to appropriately disclose cyber-related risks and incidents. To continue to address the ever-growing crypto asset markets and ensure investors are protected, the expanded unit will focus on investigating securities law violations related to:

- Crypto asset offerings
- Crypto asset exchanges
- Crypto asset lending and staking products
- Decentralized finance platforms
- Nonfungible tokens
- Stablecoins

# From the Public Company Accounting Oversight Board (PCAOB)

## PCAOB annual report and strategic plan

### PCAOB 2021 annual report

The PCAOB published its ["2021 Annual Report"](#) in March 2022. The report summarizes the PCAOB's operations and financial results for fiscal year 2021 and highlights accomplishments and developments for the year from the PCAOB's 2021 oversight, engagement, and operations. Additionally, the report includes audited financial statements, a financial review, and management's report on internal control over financial reporting.

### PCAOB five-year strategic plan

On Nov. 18, 2022, the PCAOB [approved](#) of its [five-year strategic plan](#) covering 2022 through 2026. Within the plan, the PCAOB notes that the creation of the plan was guided by three priorities: investor protection, engagement, and adaptability. The plan addresses four main goals: to modernize standards, to enhance inspections, to strengthen enforcement, and to improve organizational effectiveness. For each goal, the PCAOB has identified objectives to achieve the goal.

## PCAOB leadership remarks and changes

### Keynote speech at AICPA-CIMA conference

On Dec. 12, 2022, at the AICPA-CIMA conference, PCAOB Chair Erica Williams provided a keynote speech highlighting the significance of high-quality audits in the protection of capital markets and enhancing investor confidence. Williams remarked that audit firms must sharpen audit focus as investor confidence is not inevitable. Williams also covered the following topics:

- Inspection observations
- Enforcement actions
- Audits involving multiple auditors
- Audit confirmations

The session concluded with the PCAOB board joining Williams for a roundtable discussion. The discussion covered various topics including the board's [strategic plan](#), importance of inspections to achieving audit quality, prospective opportunities and challenges, recruiting and retaining talent, and stakeholder engagement.

### SOX anniversary and creation of the PCAOB

On July 28, 2022, Chair Williams presented [remarks](#) celebrating the 20th anniversary of SOX and establishment of the PCAOB. SOX created the PCAOB with the mission of protecting investors by being an independent audit watchdog. The PCAOB's role is to set standards to uphold the integrity of public audits, inspect for compliance with those standards, and enforce them to help restore trust in the U.S capital markets.

According to Williams, since its creation, the PCAOB has:

- “Registered over 3,800 audit firms,
- “Completed more than 4,300 firm inspections in 55 countries – reviewing more than 15,000 audits of public companies and over 1,000 broker-dealer engagements,
- “Issued more than 330 settled orders, and
- “Sanctioned more than 230 firms and 270 individuals.”

Williams noted that continuing to strengthen credibility is a top priority for the PCAOB and identified three key areas where the PCAOB plans to further its investor-protection mission: modernizing its standards, enhancing its inspections, and strengthening its enforcement.

### New PCAOB chair and board members

The SEC on Nov. 8, 2021, [announced](#) the appointments of Erica Williams as the new chair of the PCAOB and Christina Ho, Kara Stein, and Anthony Thompson as new board members. On Nov. 9, 2021, the PCAOB [announced](#) that Ho was sworn in as a board member. Her term will run through Oct. 24, 2025. On Nov. 18, 2021, the PCAOB [swore in](#) Stein as a board member. Her term will run through Oct. 24, 2026. On Jan. 3, 2022, Thompson, whose term will run through Oct. 24, 2022, was [sworn in](#) as a board member. Williams was [sworn in](#) on Jan. 10, 2022, and will serve until Oct. 24, 2024.

## Research and standard-setting

### New advisory groups

On Jan. 31, 2022, the PCAOB announced the creation of two new advisory groups: the Investor Advisory Group (IAG) and the Standards and Emerging Issues Advisory Group (SEIAG). These advisory groups have been created to enhance investor and stakeholder engagement and will help the PCAOB gather input from stakeholders and investors on how to improve audit quality. With this announcement, the PCAOB issued a request for public comment to solicit input on the proposed structures of the two new groups and a request for nominations.

At an open meeting on March 29, 2022, the PCAOB [approved](#) the charters for the two new advisory groups. The charters will govern the membership and the activities of groups.

The PCAOB completed its selection process and [announced](#), on May 9, 2022, the members of its two



new advisory groups. The members' service will begin immediately. Board member Stein will serve as the acting IAG co-chair. Barbara Vanich, acting chief auditor, will serve as the chair of the SEIAG.

The PCAOB held its first meeting of the IAG on June 8, 2022. Topics included the PCAOB strategic plan for 2022 through 2027, the standard-setting agenda, and the IAG going forward.

The first meeting of the SEIAG was held virtually on June 15, 2022. Following a similar format to the IAG meeting, the SEIAG discussed the PCAOB strategic plan and standard-setting agenda.

### **Advisory group meetings**

The PCAOB's two advisory groups, the IAG and the SEIAG, met on Oct. 12 and Nov. 2, 2022, respectively. Discussion topics included a new PCAOB research project on firm and engagement performance metrics as well as auditing considerations and attestation standards related to ESG. The research project on firm and engagement performance metrics focuses on firm- and engagement-level metrics that might be indicative of audit quality. The objective of the project is to assess whether there is a need for guidance, changes to PCAOB standards, or other regulatory actions considering the increased disclosure and demand for firm and engagement metrics. Discussion topics related to ESG included the auditor's consideration of climate-related risks in performance of public company audits and potential updates to the PCAOB's attestation standards to address the requirements within the SEC's proposal on climate-related disclosures.

### **Standards advisory group**

At its meeting on March 29, 2021, the PCAOB unanimously approved the formation of a new standards advisory group (SAG) that will increase stakeholder engagement and provide opportunities for investors and other stakeholders to advise the PCAOB on key initiatives.

As detailed in its charter, the purpose of the SAG is to advise the PCAOB on:

- Existing auditing and related attestation standards as well as quality control, ethics, and independence standards
- Proposed standards
- Potential new or amended standards
- Matters other than standards that are significant to the PCAOB

The SAG will perform specific tasks assigned by the PCAOB, and task forces of the SAG will play a critical role in deliberating, producing deliverables, and sharing information on key issues. The charter establishes an 18-person group of experts, with representatives from the investor community (five), external auditors (four), audit committee members or directors (three), financial reporting oversight personnel (three), and academics and others with specialized knowledge (three).

At an open meeting on March 29, 2022, the PCAOB voted to dissolve the Standards Advisory Group.

### **Research projects on the agenda**

The PCAOB's research agenda includes two projects of note – one on audit evidence and one on data and technology. For the audit evidence project, the staff is assessing whether a need exists for guidance or changes to Auditing Standard (AS) 1105, "Audit Evidence," considering the increasing use of technology-based tools and the increasing availability and use of information from sources external to the company, both in the financial reporting process and as audit evidence.

The research project on data and technology focuses on determining whether a need exists for guidance, changes to PCAOB standards, or other regulatory actions considering the increased use of technology-based tools by auditors and preparers. Advancements in technology affect the nature, timing, preparation, and use of financial information, and auditors are expanding their use of technology-based tools, including data analytics, to plan and perform audits. Innovations in such technologies have the potential to improve the efficiency and effectiveness of both the audit and the financial reporting process.

## Standard-setting and research agenda updates

On May 4, 2022, the Office of the Chief Auditor of the PCAOB [released](#) updated standard-setting and research agendas. The agendas are designed to further the PCAOB's objective of advancing audit quality to protect the interests of investors and to further the public interest in the preparation of informative, accurate, and independent audit reports.

The agendas are the result of the PCAOB's assessment of priorities that support the board's goals. The standard-setting agenda includes six short-term projects where the Office of the Chief Auditor expects PCAOB action during the coming 12 months. These six projects include other auditors, quality control, noncompliance with laws and regulations, an attestation standards update, going concern, and confirmations. The agenda also includes four short midterm projects on substantive analytical procedures, fraud, interim ethics and independence standards, and interim standards. The research agenda includes a project on data and technology and a project on audit evidence.

## Lead auditor's use of other auditors

The PCAOB on June 21, 2022, adopted amendments to its auditing standards to strengthen requirements that apply to audits involving multiple audit firms. The amendments are intended to improve the quality of audits where other accounting firms or individual accountants perform work on the audit. The amendments detail certain procedures for the lead auditor to perform when planning and supervising an audit that involves other auditors, and they apply a risk-based supervisory approach to the lead auditor's oversight of other auditors for whose work the lead auditor assumes responsibility.

The amendments are subject to approval by the SEC and will be effective for audits of financial statements for fiscal years ending on or after Dec. 15, 2024.

## Post-implementation report on estimates and specialists

The PCAOB [released](#) on Dec. 8, 2022, an interim post-implementation review report addressing the initial impact of estimates and specialists requirements on key stakeholders. In addition to the report, "[Interim Analysis Report: Evidence on the Initial Impact of New Requirements for Auditing Accounting Estimates and Auditor's Use of the Work of Specialists](#)," the PCAOB released two staff white papers that provide additional technical information:

- "[Staff White Paper: Stakeholder Outreach on the Initial Implementation of Estimates and Specialists Audit Requirements](#)"
- "[Staff White Paper: Econometric Analysis on the Initial Implementation of the New Specialists Requirements](#)"

The staff findings suggest that the new requirements improved auditing practices in some instances and did not result in significant increases in audit hours or audit fees. Additionally, the staff did not uncover evidence of unintended consequences from auditors' initial implementation of the new requirements. The PCAOB plans to continue to monitor the implementation of the new requirements and their impact on the quality of audit services as well as on audit committees, preparers, and audit firms.

## Post-implementation report on critical audit matters

On Dec. 7, 2022, the PCAOB issued its second interim post-implementation review report, "[Interim Analysis Report: Further Evidence on the Initial Impact of Critical Audit Matter Requirements](#)," addressing the impact of the critical audit matters (CAMs) requirements on investors and other key stakeholders. According to the report, the average number of CAMs per audit report has declined over time; however, investor awareness and use of CAMs continue to develop. Also, the PCAOB has not identified significant unintended consequences from auditors' implementation of the CAMs requirements.

The PCAOB plans to continue to monitor the implementation of CAMs requirements and evaluate the timeline for developing a more comprehensive post-implementation review. The PCAOB does not anticipate publishing the next analysis until after 2023.

## Quality control

The PCAOB on Nov. 18, 2022, [issued](#) for public comment a new quality control (QC) standard that was developed from the comment letters received in response to its December 2019 concept release as well as its own quantitative and qualitative economic analysis. The PCAOB says that this new standard would significantly improve QC systems at registered public accounting firms.

The proposed standard would replace the current QC standards in their entirety and would provide a framework for a firm's QC system that is based on proactively identifying and managing risks to quality, with ongoing monitoring and remediation designed to drive continuous improvement. Among other provisions, the proposal would require a firm to annually evaluate its QC system and report the results of its evaluation on new Form QC.

Comments are due Feb. 1, 2023.

## Inspections and enforcement

### Previews of 2021 inspection observations

On Dec. 8, 2022, the PCAOB [released](#) "Staff Update and Preview of 2021 Inspection Observations." The report finds an increase in the number of audits with deficiencies in 2021 versus the prior year and says the PCAOB expects almost 33% of the audits reviewed will have one or more Part I.A deficiency, an increase from 2020, which was 29%. Additionally, the PCAOB expects approximately 40% of the audits reviewed will have one or more Part I.B deficiency, an increase from 26% in 2020. The PCAOB noted that a significant portion of that Part I.B increase is related to the reporting of CAMs. Commenting on the report, PCAOB Chair Williams stated, "Higher deficiency rates in 2021, coupled with the fact that the PCAOB is also seeing an increase in comment forms for 2022, are a warning signal that the audit profession needs to sharpen its focus on improving audit quality and protecting investors."

### 2021 inspection observations

The PCAOB released on Aug. 31, 2022, a spotlight document, "[Observations From the Target Team's 2021 Inspections](#)." The report provides perspectives on the auditor's responsibilities, observations, and good practices as they relate to the 2021 focus areas of fraud, interim reviews of special purpose acquisition companies, going concern, and cash and cash equivalents.

### Annual broker-dealer inspection report

On Aug. 19, 2022, the PCAOB released its "[Annual Report on the Interim Inspection Program Related to Audits of Broker-Dealers](#)," which includes observations from inspections during 2021, guidance about and examples of effective procedures, and information about the inspection approach. According to the report, the percentage of firms with audit and attestation engagement deficiencies remained high at 78%, which is consistent with 2020.

The PCAOB noted that this report should help broker-dealer owners and audit committees or equivalents as they oversee the work of their auditors and engage on financial reporting.

With the report, the PCAOB released "[Supplementary Information Related to Audits of Brokers and Dealers](#)," which provides comparative data about selected firms and engagements and the results of PCAOB inspections over multiyear periods.

### Staff overview for 2022 inspections

On June 30, 2022, the PCAOB released "[Spotlight: Staff Overview for Planned 2022 Inspections](#)," which includes areas of inspection focus for 2022, plans related to the PCAOB's use of target teams in the inspection process, and plans for audit committee outreach. This spotlight is a reference point for audit committees, auditors, investors, and other stakeholders.

Selected areas of planned 2022 inspections focus include:

- Fraud and other risks

- Initial public offerings and merger and acquisitions activity
- Audit firms' execution challenges
- Considerations specific to broker-dealers
- Independence
- Use of service providers in the confirmation process
- CAMs
- Audit areas with continued deficiencies
- Firms' quality control systems
- Technology

## Other matters of interest

### **Audit committee resource**

The PCAOB on Aug. 17, 2022, released a new publication, "[Spotlight: Audit Committee Resource](#)," which provides auditors, audit committee members, and others questions that audit committees might consider as part of their ongoing engagement and discussion with their auditors. The resource includes questions addressing fraud and other risks, initial public offerings and mergers and acquisitions, audit execution, compliance with auditor independence requirements, firms' quality control systems, auditing digital assets, responding to cyberthreats, and the use of data and technology in the audit.

### **Audit committee insights**

As part of the PCAOB's strategic goal of enhancing transparency and accessibility through proactive stakeholder engagement, the board released, on March 24, 2022, "[2021 Conversations With Audit Committee Chairs](#)," which summarizes feedback received from outreach conducted during 2021. This report provides a summary of perspectives from approximately 240 audit committee chairs at U.S. public companies whose audits the PCAOB inspected. The report covers the following topics:

- Required communications between auditor and audit committee
- Discussions outside of required communications
- Auditor strengths and areas for improvement
- PCAOB inspection reports
- Quality control systems at audit firms
- Auditor's use of technology
- Information outside of the financial statements including ESG and non-GAAP measures

## From the American Institute of Certified Public Accountants and the Chartered Institute of Management Accountants (AICPA and CIMA)

### Digital assets practice aid

During January 2022, the AICPA and CIMA released a [practice aid](#) addressing accounting for and auditing of digital assets. The practice aid provides nonauthoritative guidance that is specific to U.S. generally accepted accounting principles and generally accepted auditing standards and is based on existing professional literature and the experience of members of the Digital Assets Working Group.

Due to continuing questions by entities about the scope and applicability of the guidance within SAB 121, in June 2022 the AICPA and CIMA issued an update to the Practice Aid "[Accounting for and Auditing of Digital Assets](#)," which includes responses to frequently asked questions about SAB 121. The responses provide guidance on what entities should consider in determining whether they have a safeguarding obligation subject to SAB 121 and how safeguarding liabilities are reflected in an entity's financial statements.

## From the Center for Audit Quality (CAQ)

### ESG focus

#### **Analysis of S&P 500 ESG reporting**

On Oct. 18, 2022, the CAQ issued an [analysis](#) of 2020 ESG reports and Carbon Disclosure Project (CDP) Climate Change Questionnaires for S&P 500 companies. The purpose of this analysis was to understand what the companies disclosed about reporting standards and frameworks used, GHG emissions, assurance or verification of ESG information, and net-zero and carbon neutral commitments. Among other findings, the CAQ highlighted that of the S&P 500 companies, 464 issued a stand-alone ESG report and 313 responded to the CDP Climate Change Questionnaire for the 2020 period. Of the 464 ESG reports issued, 43 obtained some type of assurance from public company auditors. Most companies (93%) issued an ESG report using at least one framework or standard, and more than 230 companies used three or more standards and frameworks to help develop their reports.

#### **Analysis of Form 10-K climate-related disclosures**

On Sept. 9, 2022, the CAQ released an [S&P 500 10-K analysis](#) summarizing results of its review of the June 2022 Form 10-Ks from the S&P 500 companies to understand the disclosures regarding climate-related information, GHG emissions, and net-zero and carbon-neutral commitments. The CAQ noted that 453 S&P 500 companies mentioned climate-related information in their 10-Ks, representing an 18% increase from 2020; however, only 104 companies mentioned GHG emissions in their disclosures. The analysis details the types of information included in the disclosures, where the disclosures are included, and where in the financial statements climate-related matters were mentioned.

### 2022 “Audit Partner Pulse Survey”

On July 6, 2022, the CAQ released its first “[Audit Partner Pulse Survey](#),” a compilation of U.S. public company audit partner observations on a range of topics. The CAQ intends to publish it regularly. This first survey is based on responses from 700 audit partners from the eight governing board firms at the CAQ and is from data collected during May 2022. Topics include the overall outlook on the economy, business transformation, and quality of corporate disclosures.

According to the survey results related to economic outlook, continued inflation and rising prices are expected, with 84% of audit partners responding that they are not optimistic about the economic outlook over the next 12 months. Respondents identified inflation, labor shortages, supply shortages and supply chain disruptions, and cybersecurity threats as the top economic risks facing companies. Talent is the most important corporate priority for 2022, according to 53% of respondents, and they identified increasing flexibility and compensation as the top two methods to attract and retain talent.

Partners also said that more progress is needed in cybersecurity specifically related to managing risk, enhancing disclosures, and aligning cybersecurity with company goals; however, the results indicate that significant progress was made in communications on cybersecurity between management and the board. The surveyed audit partners also identified that climate change is both a short- and long-term priority for public companies, although they noted reporting challenges. Lastly, while cryptocurrency was not named as a priority for most industries, the financial services industry was identified as an early adopter of cryptocurrency and was more likely to be considering or preparing to accept crypto as a form of payment.

### Audit committee reports and communications

#### **Survey of audit committee practices**

On Jan. 11, 2023, the CAQ [issued](#) a report on audit committee composition and priorities, which addresses the shifting priorities of audit committees and how audit committee practices and

compositions have evolved in response. The report might be a useful benchmarking tool to assess an entity's audit committee development and maturity.

### **2022 “Audit Committee Transparency Barometer” report**

On Nov. 30, 2022, the CAQ and Audit Analytics issued the [“2022 Audit Committee Transparency Barometer,”](#) which tracks S&P Composite1500 proxy disclosures to evaluate transparency regarding audit committee oversight of the external auditor and other important financial reporting topics. New questions added in 2022 address disclosures over the audit committee's consideration of the length of the auditor tenure, how the audit committee is involved in the selection of audit engagement partner, whether the board of directors has an ESG or sustainability director, and whether the audit committee is responsible for ESG oversight.

In the ninth year of analyzing disclosures of audit committee oversight in proxy statements, the findings of the report note a continued overall uptick in key areas of disclosure. The publication provides a summary of the results of the new questions, highlights of the results, a discussion of the benefits of audit committee disclosures, disclosure examples, and questions to consider when preparing audit committee disclosures.

On the same day, the CAQ also issued [“Audit Committee: The Kitchen Sink of the Board,”](#) which addresses how boards can effectively allocate oversight responsibilities to the audit committee and how audit committee members can keep up with an ever-evolving workload and improve their disclosures related to audit committee oversight responsibilities.

### **Digital assets tool**

On Nov. 9, 2022, the CAQ issued [“Jumpstart Your Digital Assets Journey: A Tool for Audit Committees”](#) to assist audit committees in executing their oversight role. The tool helps audit committees understand why entities might be involved with digital assets, respond to digital asset risks, and engage with management and auditors on digital asset topics.



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