

SEC's Spring 2021 Regulatory Agenda— Gensler's Opening Salvo

June 25, 2021

On June 11, 2021, the Securities and Exchange Commission (the “SEC”) released Chair Gary Gensler’s Spring 2021 regulatory agenda, which sets out the short- and long-term regulatory actions that the SEC plans to take.¹ The agenda includes potential rulemakings specific to private funds and their investment advisers—such as amendments to the Custody Rule under the Investment Advisers Act of 1940 (the “Advisers Act”), amendments to Form PF and a potential new ESG rule applicable to investment companies and investment advisers—and broader rules (and requests for comments on existing rules) that could affect private funds and their advisers, including a new climate disclosure rule, potential amendments to the proxy voting advice rule and a request for comments on the exempt private offering exemptions. The agenda indicates, among other things, Chair Gensler’s intention to revisit a number of rulemakings, including some that occurred within the past two years such as the exempt private offering framework and the proxy rule noted above, which may signal a dramatic swing away from the regulatory landscape created by former Chair Jay Clayton.² Also, notably absent from the agenda was a potential proposed rule to amend the “family office exclusion” of the Advisers Act of 1940, which had previously appeared on earlier rulemaking agendas.

The SEC’s regulatory agenda is divided into three parts: proposed rules, “prerules” (generally, initial request for public comment to help the SEC shape its approach to a potential rulemaking) and final rules (*i.e.*, rules for which a rule proposal has been publicly filed and for which public comments have been received). Below we discuss the potential proposed rules and the “prerules” applicable to private funds and their advisers (the proposed final rules do not apply specifically to private funds).

¹ SEC Announces Annual Regulatory Agenda, SEC Press Release 2021-99 (Jun. 11, 2021), available at <https://www.sec.gov/news/press-release/2021-99>.

² See Commissioner Hester M. Peirce and Commissioner Elad L. Roisman, Moving Forward or Falling Back? Statement on Chair Gensler’s Regulatory Agenda (Jun. 14, 2021), available at <https://www.sec.gov/news/public-statement/moving-forward-or-falling-back-statement-chair-genslers-regulatory-agenda> (stating that the regulatory agenda is missing “other important rulemakings” that “perhaps” may be “attributable to the regrettable decision to spend our scarce resources to undo a number of rules the Commission just adopted”).

Proposed Rule Stage.

- *ESG.* Potential new requirements for investment advisers and investment companies relating to ESG factors including ESG claims and related disclosures. This proposed rule would originate from the SEC's Division of Investment Management and appears to be separate and distinct from a "climate disclosure" rule the SEC is proposing from its Division of Corporation Finance. This dual approach could reflect the SEC's recognition of the distinction between climate issues and ESG issues as well as a "sequenced" approach to climate and ESG disclosure requirements for which the SEC sought public comments earlier this year.
- *Custody Rule.* Potential amendments to Rule 206(4)-2 under the Investment Advisers Act of 1940 regarding the custody of funds or investments of clients of investment advisers. In March of 2019, the SEC staff solicited comments on custody issues relating to (i) transactions that are not processed or settled on a delivery-versus-payment (DVP) basis and (ii) digital assets,³ and the potential proposed rule likely will address these issues in some manner.
- *SPACs.* Potential amendments related to SPACs.
- *Form PF.* Potential amendments to Form PF, which may result in additional disclosures of counterparties and counterparty risk.
- *Incentive-Based Compensation.* The SEC (along with a number of other regulatory agencies) plans to re-propose regulations and guidelines with respect to incentive-based compensation practices as required by Section 956 of the Dodd Frank Act, which may have an effect on private fund carried interest.

Although not generally applicable to private funds or their investment advisers, the SEC is also considering potential new rules and rule amendments relating to (i) a range of public disclosures, including on climate change, human capital management, resource extraction, corporate board diversity and cybersecurity, (ii) proxy voting advice, (iii) rule 17a-7 under the Investment Company Act of 1940 concerning the exemption of certain purchase or sale transactions between an investment company and certain affiliated persons, (iv) the regulation of money market funds, (v) Investment Company Act open-end fund liquidity and dilution management, and (vi) beneficial ownership reporting of security-based swaps.

³ Paul G. Cellupica, Deputy Director and Chief Counsel, SEC Division of Investment Management, Letter to Karen Barr, Investment Adviser Association, Engaging on Non-DVP Custodial Practices and Digital Assets: Investment Advisers Act of 1940: Rule 206(4)-2 (Mar. 12, 2019).

Pre-Rule Stage.

The SEC staff is also considering recommending that the SEC seek public comments on the following areas:

- *Exempt Offerings.* Areas of focus include:
 - *Accredited Investor Definition:* the financial thresholds in the accredited investor definition in Regulation D under the Securities Act of 1933 (the SEC had previously declined to change the financial thresholds in the accredited investor definition when it adopted amendments to such definition in August of 2020⁴), and it appears that the SEC may seek to increase those thresholds;
 - *Regulation D Information:* the information required to be made available regarding Regulation D offerings (the SEC had previously sought comments on a proposed rule regarding Form D and its content, particularly relating to Rule 506(c) offerings, in July 2013⁵), and the SEC may look to require private issuers to provide more information to both potential investors and the SEC⁶; and
 - *Integration of Offerings:* the integration framework for registered and exempt offerings (the SEC had previously addressed the integration framework for exempt offerings in November of 2020);⁷ consistent with the discussion above, this appears to reflect a potential rollback of the “principles-based” integration framework adapted in 2020.
- *Third-Party Service Providers.* The role of certain third-party service providers (e.g., index providers and model providers) in the asset management industry. This follows on earlier public statements by then-Director of the Division of Investment

⁴ Accredited Investor Definition, SEC Release No. 33-10824 (Aug. 26, 2020).

⁵ Amendments to Regulation D, Form D and Rule 156 under the Securities Act, SEC Release No. 33-9416 (Jul. 10, 2013). See also Commissioner Allison Herren Lee, Leveraging Regulatory Cooperation to Protect America’s Investors (May 21, 2021), available at <https://www.sec.gov/news/speech/lee-2021-section-19d-conference> (calling for the SEC to “re-visit the 2013 Regulation D proposal”).

⁶ Commissioner Allison Herren Lee, Statement on Amendments to the Exempt Offering Framework (Nov. 2, 2020), available at <https://www.sec.gov/news/public-statement/lee-harmonization-2020-11-02> (dissenting in part due to concerns about “blurring of lines between public and private markets” and the permission of non-public issuers to have expanded access to investors).

⁷ Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, SEC Release No. 33-10884 (Nov. 2, 2020).

Management, Dalia Blass, indicating the potential for additional regulation of index providers including potentially treating index providers as investment advisers.⁸

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Please do not hesitate to contact us with any questions.

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⁸ Dalia Blass, Director, Division of Investment Management, Keynote Address, ICI 2018 Mutual Funds and Investment Management Conference (May 19, 2018), available at <https://www.sec.gov/news/speech/speech-blass-2018-03-19>.