

# SEC's spring 2021 regulatory agenda signals increased oversight for private funds and investment advisers

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The Office of Information and Regulatory Affairs recently released the SEC's Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions<sup>1</sup> (the "Agenda"), which provides a preview of the SEC's proposals for short- and long-term regulatory actions and rulemakings. In the accompanying press release,<sup>2</sup> SEC Chair Gary Gensler reiterated his intent to ramp-up SEC oversight, saying that he looks forward to collaborating on "rules that will strengthen our markets, increase transparency, and safeguard investors."

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## *Republican Commissioners Hester Peirce and Elad Roisman criticized plans to reopen recently completed rules.*

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The Agenda indicates that Gensler may seek to reopen or even undo some rulemakings made by the SEC under former Chair Jay Clayton, such as the proxy rule voting guidance, among other changes. Like Clayton before him, Gensler appears to be using the formalization of the Agenda to make the regulatory priorities roadmap of the SEC more transparent.

In a joint statement,<sup>3</sup> Republican Commissioners Hester Peirce and Elad Roisman criticized plans to reopen recently completed rules, such as the proxy rule voting guidance, without new evidence or intervening regulatory or market developments to warrant changes, arguing that reexamination of recent rules will undermine the Commission's "reputation as a steady regulatory hand" and is an inefficient use of the Commission's "scarce resources."

Several of the proposed rules may have an (indirect or direct) effect on private funds (and their portfolio company investments) and such funds' registered investment adviser sponsors. Below is an overview of some of the proposals with some key takeaways based on the limited information in the Agenda.

### **ESG (environmental, social and governance)**

The Division of Investment Management ("IM") is considering recommending that the SEC propose new requirements for investment companies and investment advisers related to ESG factors, including ESG claims and related disclosures.

The SEC is also considering additional ESG-related rules that could have an effect on investment adviser sponsors that are public reporting companies (or on such fund sponsors' public reporting portfolio companies), such as corporate board diversity disclosure requirements.

### **Incentive-based compensation**

The Division of Trading and Markets is considering recommending that the SEC, together with other regulatory agencies, re-propose regulations and guidelines concerning incentive-based compensation for certain financial institutions that have \$1 billion or more in total assets. Section 956 of the Dodd-Frank Act prohibits incentive-based compensation arrangements that are determined to encourage inappropriate risk.

Some commentators have speculated that proposed regulations and guidelines could have an effect on carried interest earned, including with respect to private funds. Treatment of carried interest generally has received significant scrutiny from Democratic lawmakers.

### **Custody rule for investment advisers**

IM is considering recommending that the SEC propose amendments to existing rules and/or propose new rules under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), to modernize regulations concerning investment adviser custody of client funds or investments.

The proposed changes may address topics where the SEC staff has previously solicited comments, including custody of digital assets and transactions that are not processed or settled on a delivery-versus-payment basis.

### **Exempt offerings**

IM has also indicated it is in the pre-rule stage of considering certain changes to the exempt offerings framework, including updating financial test thresholds for "accredited investors," enhancing disclosure requirements for Regulation D offerings under the U.S. Securities Act of 1933, as amended, and otherwise considering

amendments related to the framework for registered and exempt offerings.

Any changes to the exempt offerings framework could have a significant effect on capital raising by private funds engaging in private, exempt offerings under Regulation D. During Clayton's tenure, Democratic Commissioners objected<sup>4</sup> to the SEC's failure to raise the financial test thresholds for accredited investor determinations.

### Form PF

IM is considering recommending that the SEC propose amendments to Form PF regarding additional counterparty and counterparty risk disclosure.

### SPACs

As has been well publicized, IM is considering recommending that the SEC propose rule amendments related to SPACs (special purpose acquisition companies).

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These amendments may address enhanced disclosure requirements concerning conflicts of interest, which some stakeholders have questioned when private equity firms sponsor their own SPACs. Currently, the Agenda provides limited information regarding the rulemaking the SEC is considering in this area.

### Climate change disclosure

The Division of Corporation Finance ("Corp Fin") is considering recommending that the SEC propose rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities.

It is worth noting that ESG and "climate change" are treated separately and distinctly in the Agenda, with IM taking the lead on certain ESG matters (as discussed above) and Corp Fin taking the lead on climate change matters.

### Proxy guidance

The SEC has indicated that it will be revising its guidance on the application of proxy rules to proxy advisory firms, consistent with recent statements<sup>5</sup> by Corp Fin indicating that proxy advisory firms are not required to comply with certain portions of the final rule that were set to go into effect at the end of 2021 and that the SEC will not be recommending enforcement based on the existing guidance.

At the time the guidance was adopted, it was seen as a "win" for corporate issuers to the detriment of proxy advisory firms and fund sponsors that relied on such firms' guidance.

### Other changes

Other rulemakings in the final, proposed and pre-rule stage could also have impacts on certain instruments traded by private funds, including changes to substantive and filing requirements for Rule 144 transactions; short sale disclosure changes (which appear to be in response to last year's market volatility involving the short sale market); and transparency regarding stock buybacks/share repurchase programs, stock lending and securities-based swap ownership.

### Notes

<sup>1</sup> <https://bit.ly/3jX8xmh>

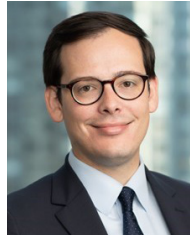
<sup>2</sup> <https://bit.ly/3xSBaG4>

<sup>3</sup> <https://bit.ly/3mcEI3V>

<sup>4</sup> <https://bit.ly/3g3ptXh>

<sup>5</sup> <https://bit.ly/3yVNrLi>

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