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Cleaning House: Sweeping Changes Flowing from New SEC Leadership

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On April 21, 2025, Paul Atkins, a Trump appointee, took the helm of the US Securities and Exchange Commission (SEC or Commission) following the tumultuous tenure of Gary Gensler, a Biden appointee who resigned effective January 20, 2025. To their credit, both chairmen expressed at the outset of their terms a commitment to the SEC’s mission, which, as mandated by Congress, is to: (1) protect investors; (2) maintain fair, orderly, and efficient markets; and (3) facilitate capital formation.¹ The actions of the SEC under their respective terms, however, reflect starkly different approaches to fulfilling that mission.

The Gensler Agenda

During his term, Chairman Gensler pursued an agenda that has been described as “progressive,”² “aggressive,”³ and “interventionist.”⁴

Under his leadership, the SEC, among other things, undertook initiatives aimed at enhancing climate change risk disclosures⁵ and standardizing environmental, social, and governance (ESG) disclosures and requiring greenhouse gas emissions reporting⁶—both key progressive issues.⁷ An unusual number of these rulemakings were highly controversial, with

nine of them being the subject of litigation, compared with only three under Chairman Gensler’s predecessor, Jay Clayton, and two under Clayton’s predecessor, Mary Jo White.⁸

The SEC also engaged in aggressive enforcement activity, filing more than 2,700 enforcement actions and obtaining approximately \$21 billion in penalties and disgorgement orders.⁹ The most prominent of these enforcement efforts related to crypto assets,¹⁰ the majority of which Chairman Gensler argued were securities under the decades-old *Howey* test.¹¹

During Chairman Gensler’s term, the SEC was the object of significant criticism from the business community, Congress, and even his own fellow commissioners, with complaints ranging from accusations of regulatory overreach,¹² and the stifling of innovation,¹³ to inattention to capital formation,¹⁴ among other criticisms.

The Atkins Agenda

By contrast, during the first months of Chairman Atkins’ tenure, the SEC has acted decisively to effectuate his goal of restoring the SEC to “regular order.”

Among other things, the SEC has formally withdrawn 14 controversial proposed rules,

including rules that would have imposed onerous burdens on SEC-registered investment advisers, broker-dealers, and/or mutual funds in areas such as ESG, predictive analytics, custody, and more. At the same time, the Atkins SEC has undertaken several efforts to facilitate private and public capital formation.

Under Chairman Atkins, the SEC has moved quickly to end enforcement actions and litigation against participants in the crypto assets industry and require SEC approval for all formal orders of investigation in order to better align the Enforcement Division's efforts with the Commission's priorities.¹⁵

These actions, which we discuss further below, are consistent with one media outlet's characterization of Chairman Atkins as the "anti-Gensler" for the SEC.¹⁶

Clearing the Regulatory Underbrush

On June 12, 2025, the SEC announced its withdrawal of 14 proposed rules issued for comment during Chairman Gensler's tenure.¹⁷ These proposed rules, almost all of which were aimed at SEC-regulated entities, appeared designed to enhance compliance with already existing obligations to investors by imposing additional regulatory requirements for the entities to follow. In many instances, the proposals provided interested parties little time to comment, either through short comment periods¹⁸ or comment deadlines set at,¹⁹ or close to,²⁰ the same deadlines as other proposals. In all instances, the proposed rules were strenuously challenged by commenters, largely from the industry, for various perceived deficiencies. The most common challenges alleged that the proposed rules:

- Exceeded the SEC's statutory authority and/or went beyond the core mission of the SEC;
- Were unnecessary or poorly tailored to the problem the SEC sought to address, resulting in directives to the industry that were overbroad, potentially ineffective, or otherwise impractical; and/or

- Were inconsistent with other rules proposed by the SEC or other regulators.

Several of the more controversial withdrawn proposed rules are discussed below.

Exceeding Statutory Authority and/or Beyond the SEC's Core Mission

Prime examples of proposed rules whose statutory authority was challenged are: (1) the rule extending an investment adviser's custody obligations to, among other things, cover all of a client's assets under an adviser's custodial authority (Safeguarding Rule);²¹ and (2) the rule requiring mitigation of potential conflicts in the use of myriad technologies to facilitate trading (Predictive Data Analytics Rule).²²

The Safeguarding Rule premised its proposed expansion to cover assets other than funds and securities (for example, to include crypto assets) on language in the Dodd Frank Act mandating advisers to "take such steps to safeguard client assets over which such adviser has custody ... as the [SEC] may, by rule, prescribe." Yet the co-sponsor of the Dodd Frank Act, Chairman of the Senate Banking Committee Christopher Dodd, strongly suggested that no new authority was intended, noting that the SEC had recently amended its custody rules and that "it would be appropriate to give [those amended] rules a chance to work ... before we direct the SEC to write new ones."²³

Next, the Predictive Data Analytics Rule would have required broker-dealers and investment advisers to assess technologies, which the rule broadly defined, that they use in connection with investor interactions to ensure that those technologies do not result in conflicts in those investor interactions. The rule would have required extensive research in-house and with technology service vendors as to the inner workings of technologies used in any interaction with investors. But the purported statutory basis for the rule, Section 913(g) of the Dodd Frank Act, authorizes the SEC, in its discretion and after

study, to adopt rules establishing a uniform fiduciary standard of care for broker-dealers and investment advisers. It does not expressly require broker-dealers and investment advisers to undertake comprehensive assessments of myriad technologies that could impact any investor interactions, particularly where the use of such technologies did not relate to any specific advice or recommendation. In addition, nothing in Section 913(g) or its legislative history suggests that Congress intended to impose such far-reaching requirements as part of any standard of care.

Others of the withdrawn proposed rules arguably exceeded the SEC's statutory authority or at least went beyond its core mission. For example, the requirements in the proposed rule for investment advisers and investment companies to disclose ESG investment practices²⁴ were unrelated to the investment focus of those funds and advisers or unrelated to the prevention of the kinds of abuses against which the Investment Company Act of 1940 (the 1940 Act) and the Investment Advisers Act of 1940 (Advisers Act) were designed to protect. For another example, the proposed rule to regulate investment advisers' use of service providers²⁵ arguably provided for the indirect regulation of entities outside of the SEC's remit. Moreover, it created the potential for rule violations where there was no suggestion of conduct amounting to fraud, notwithstanding that the rule was proposed under the anti-fraud provisions of the Advisers Act.

Unnecessary, Overbroad, and/or Impractical

In several instances, the withdrawn proposed rules would have imposed regulatory burdens that were arguably unreasonable, either because there was no demonstrated need for the regulation, or the regulation itself was impractical or overbroad in addressing the stated problem. For example, a proposed rule that would have required next day reporting of large security-based swap positions²⁶ cited little evidence as to why the current transaction-based

reporting regime for security-based swap information (Regulation SBSR)²⁷ was insufficient. Moreover, the proposed rule required public identification of the entities taking positions reportable under the rule, without demonstrating that such disclosure was necessary to effectively manage counterparty risk.

As an example of impracticality, the proposed amendments to the SEC's Regulation Systems and Compliance Integrity (Regulation SCI Amendments)²⁸ would have expanded the regulation's reporting and mitigation obligations to a number of additional market participants that support securities market functions. But the amendments would have required entities covered by the regulation to submit essentially next-day reports to the SEC regarding certain events affecting the operating systems of those entities, even though simply understanding the nature of such events in many cases would take more than 24 hours.

Inconsistent with Other SEC Proposed Rules

Many of the withdrawn rule proposals appeared to work at cross purposes with other proposals, raising a general concern that the interplay among the multiple proposals may not have been given due consideration. For example, a proposed rule that sought to promote competition among certain customer orders by exposing those orders to competition in a qualified auction²⁹ had the potential to create a conflict with a proposed rule on broker-dealer obligations in executing customer orders, Regulation Best Execution,³⁰ because the trading center offering the auction might not offer the most liquidity. For another example, the releases proposing rules on cybersecurity risk management directed at investment companies, investment advisers, and certain intermediaries³¹ did not discuss how the cybersecurity event reporting mandated by the rules might work with, or conflict with, systems event reporting proposed by the Regulation SCI Amendments.

These withdrawn rules underscore the contrasting views of rulemaking between the Biden and

Trump administrations. Considering the foregoing, it would be reasonable to expect SEC rulemaking for the next several years to be far more restrained than in the past.

Regulatory Actions Fostering Capital Formation

Providing Capital for Private Issuers

Under the Trump administration, the Commission and its Staff are concertedly making it easier for private companies to raise capital, either directly from investors or from investment funds.

For example, the Staff has issued new “no-action” guidance that expands the extent to which private companies or funds can rely on investors’ own certifications that they meet standards required for them to be “accredited investors” and thus are eligible to participate in private offerings of a company’s or fund’s securities in reliance on 506(c) of SEC Regulation D.³²

Closed-end funds (CEFs)³³ frequently invest in private assets and many CEFs’ shares are traded in public markets where everyday non-accredited investors can purchase them. Moreover, to facilitate broader access to CEFs, since President Trump took office:

- the Staff has withdrawn its historic position that, if a CEF invested 15 percent or more of its assets in private funds,³⁴ all of the CEF’s investors had to be accredited investors, each of whom was required to make a minimum initial investment of at least \$25,000 in the CEF;³⁵ and
- the SEC has loosened somewhat the conditions it imposes when it grants exemptive relief to permit a CEF to “co-invest” in an investment in which certain parties related to the CEF also have an interest.³⁶

These actions substantially increase both the amount and selection of private investments in which everyday non-accredited investors may

indirectly participate through their investment in a CEF.

In taking actions that increase the flow of capital to private issuers, however, the SEC must weigh multiple types of potential risks to investors. In its recent annual reports to Congress, the SEC’s Office of the Investor Advocate, for one, has discussed its plans to evaluate such risks.³⁷

Encouraging Greater Use of SEC Regulation A

Public offerings of securities that qualify under Regulation A are exempt from registration with the SEC. Such qualification can be substantially less costly than SEC registration, thereby promoting capital formation. For various reasons, however, Regulation A has never proven very attractive to issuers, despite significant attempts over the years to increase its appeal.

Now, however, the SEC’s Small Business Capital Formation Advisory Committee is actively considering ways to remedy this problem. Chairman Atkins, for one, appears well invested in this project, as extensive remarks he made to the committee on May 6, 2025, were devoted entirely to various aspects of this problem.³⁸

SEC Cost/Benefit Analyses

Although the SEC has for many years performed cost/benefit analyses (CBAs) in support of much of its regulatory activity, commentators complain that the SEC frequently underestimates costs and overestimates benefits. Spurred in considerable part by certain executive orders issued by President Trump, the SEC is attempting to improve the quality of its CBAs as to new regulations or regulatory positions, as well as to existing regulations or positions that it may be appropriate to withdraw or revise.³⁹

It is probable that this increased attention to CBAs will result in reduced regulatory costs for most companies that are subject to SEC regulations, as compared to what those costs otherwise would have been. Such reductions may well be large enough to

have a significant positive impact on overall capital formation.

Atkins SEC Engages with Stakeholders and Reaches Out to Business Community

The Gensler-era approach to rulemaking was renowned for its rapid pace, abbreviated public comment periods (as short as 30 days), and muted engagement with stakeholders.⁴⁰ This aggressive tenor and lack of dialogue stirred criticisms both inside and outside of the SEC.⁴¹ One Commissioner commented that “thirty days is typically not enough” to analyze a complex “multi-hundred page rulemaking” and also noted that public commentators help the SEC “see things we otherwise would not.”⁴²

Against this backdrop, Chairman Atkins articulated early in his tenure that the new SEC’s approach would be different from the prior one. In Senate testimony, he stated that the “SEC is returning rulemaking to regular order [and] the public will have ample time to provide feedback.”⁴³ Beyond a more deliberate rulemaking pace, the SEC’s renewed engagement with stakeholders has been reflected in recent roundtables addressing a range of regulatory issues. The most notable example of this outreach is the Crypto Task Force. As of May 2025, the Task Force has hosted multiple roundtables, received more than a hundred written submissions in response to the SEC’s extensive request for public input and has held “over one hundred meetings with market participants and other members of the public.”⁴⁴ In addition, certain offices and Divisions within the SEC have issued new crypto guidance and rescinded some prior guidance. In the view of one Commissioner, the prior crypto asset guidance was “so complicated that nobody could follow it.”⁴⁵

Market participants can reasonably expect to continue to have a seat at the table as the SEC shifts from a “regulation by enforcement” model to a regulatory framework that actively solicits stakeholder input with the goal of providing clear rules of the road. This rulemaking model will extend beyond

crypto assets into other areas within the SEC’s remit including broader access to private assets by retail clients, tokenization of securities, and decentralized finance.

A New Era of Crypto Regulation

The Commission has embraced a revolutionary new approach to crypto regulation in the United States, taking concrete steps to erase years of regulatory uncertainty that has had a pronounced chilling effect on innovation. To date, the SEC has launched the Crypto Task Force headed by Commissioner Hester Peirce dedicated to developing a comprehensive and clear framework for crypto assets.⁴⁶ Chairman Atkins, in response to a report released by the President’s Working Group on Digital Assets with recommendations for making the United States the “crypto capital of the world,”⁴⁷ announced on July 31, 2025, the launch of “Project Crypto”—an SEC-wide initiative to modernize the securities rules and regulations to enable the US financial markets to move “on-chain.”⁴⁸ Based on Chairman Atkins’ July 31 speech, we anticipate that, as the SEC moves forward with its crypto asset initiatives, practitioners, crypto asset businesses, and entrepreneurs can expect the following types of initiatives and related significant practical implications:

- The SEC will work to bring crypto asset distributions back to the United States. Crypto asset market participants will have clear guidelines for determining which crypto assets are securities that might need to be registered, whether a non-security asset is being offered pursuant to an “investment contract” that nonetheless might need to be registered, and when that offering could come to rest.
- The SEC will adopt rules and issue guidance to ensure that crypto asset market participants have maximum choice when deciding where to custody and trade crypto assets. These regulatory initiatives will reinforce the ability of crypto asset investors to decide whether to self-custody

digital assets using digital wallets or place their assets with a third-party custodian. In addition, Chairman Atkins has directed the SEC Staff to consider how best to adapt the existing custody regulatory regime to facilitate the custody of crypto assets, including possible exemptive or other relief, in addition to changes to existing custody rules as well. Chairman Atkins cited the report by the President’s Working Group on Digital Assets in noting that market participants should be afforded the freedom to choose the most efficient regulatory framework for their custody business, provided that the framework adequately protects investors.

- Similarly, the SEC will adopt new rules to allow market participants to innovate with “super-apps.” A super-app is a platform that permits financial intermediaries to offer a broad range of services and products. For example, a broker-dealer would be able to offer investors the ability to trade non-security crypto assets alongside security crypto assets. Moreover, Chairman Atkins has directed the Staff to evaluate whether non-crypto assets that are nonetheless offered in a manner such that the offering itself rises to the level of an “investment contract” that meets the definition of a security subject to registration should be permitted to trade on trading venues that are not registered with the SEC, such as state-licensed platforms and Commodity Futures Trading Commission (CFTC)-regulated platforms. The SEC also will work with other regulators to implement more efficient licensing systems that eliminate redundant requirements.
- The SEC expects to update outdated rules to permit “on-chain software systems.” Such systems will permit, among other things, decentralized software systems where “tokenized” securities are transferred without intermediaries as well as automated market making.
- The SEC will encourage innovation by cutting red tape and one-size-fits-all rules to permit innovation. For example, the SEC is considering an

“innovation exemption” that will allow firms to experiment with innovative financial technologies, such as tokenized securities and distributed ledger technology, under a temporary, conditional exemption. Commissioner Peirce regularly advocates for such an exemption, which she believes would create a “regulatory sandbox” for fostering new technologies and services.⁴⁹

While there is much work to be done, the SEC’s Crypto Task Force, Project Crypto, the President’s Working Group on Digital Assets, the CLARITY Act crypto legislation recently passed by the US House of Representatives, ongoing consideration of crypto legislation by the Senate, and the recent passage of the GENIUS Act to govern stablecoin systems all presage a new era of crypto asset regulation and the development of new crypto asset-based financial products.⁵⁰

Draft Registration Statements

In March 2025, the SEC’s Division of Corporation Finance announced that it expanded the accommodations allowing companies to submit draft registration statements for nonpublic review.⁵¹ These expanded accommodations will provide companies with greater flexibility to continue to raise money after their initial public offering (IPO) by permitting the submission of draft registration statements for follow-on offerings regardless of how much time has passed since the initial offering. Under the Division’s prior policy, draft registration statements for follow-on offerings could only be submitted within 12 months of a company’s IPO.

The expanded accommodations will further promote capital formation because the many companies that are not eligible to file immediately-effective automatic shelf registration statements may hesitate or avoid follow-on offerings if registration statements could be subject to a lengthy public review process. Through a confidential submission on Form DRS on the SEC’s EDGAR system, companies can start the SEC review process earlier and confidentially.

In addition, follow-on registration statements filed publicly can attract publicity and speculation before an offering begins. Follow-on offerings also can be extremely sensitive to changing market conditions and submitting a follow-on registration statement for nonpublic review may help companies and their underwriters assess whether to expect a lengthy Staff review process that can make it hard for them to time the market without the market reacting prematurely to a public filing.

Importantly, registrants contemplating submitting a confidential registration statement under the expanded accommodations should be aware that the procedural requirements for submitting draft registration statements remain unchanged.⁵²

Fostering Capital Formation by Aligning Enforcement with Business Expectations

The SEC reported to Congress in May 2025, that it is “a new day” at the SEC and that it is returning to the agency’s “core mission.”⁵³ The SEC already has made several efforts to foster capital formation and align the agency’s enforcement philosophy with business expectations.

Commission Withdraws Delegation of Authority to Issue Formal Orders of Investigation

In the aftermath of the 2008 financial crisis, the Commission delegated its formal order authority to the Director of the Division of Enforcement.⁵⁴ The delegation of authority was intended to expedite investigations by dispensing with the requirement that Staff formal order requests receive approval by the Commission. This delegation allowed the Director of Enforcement to independently issue formal orders of investigation, which authorized enforcement Staff to “exercise the SEC’s statutory power” to subpoena witness testimony, documents, and other material. The original delegation of authority was effective for a one-year period but at the end of that year the Commission amended its

rules “to extend the Director’s delegated authority to issue formal orders of investigation beyond the one-year period.”⁵⁵

Fast forward 15 years and the Commission is reverting to its pre-crisis process related to formal orders. On March 10, 2025, the Commission amended its rules to once again require its approval for all formal orders of investigations.⁵⁶ In the release announcing the change, the Commission stated that its action was “intended to increase effectiveness by more closely aligning the SEC’s use of its investigative resources with SEC priorities.”⁵⁷ As a practical matter, the elimination of delegated authority restores the Commission’s authority to control the types of formal investigations that the Staff opens and also provides it with early visibility into the allocation of SEC resources.

Post-Gensler SEC Drops Gensler-Era Crypto Litigation and Crypto Asset Investigations

Under Chairman Gensler, the SEC brought at least 33 enforcement actions in 2024, and 46 enforcement actions in 2023, related to crypto assets.⁵⁸ The SEC did not, however, engage in any rulemaking or issue new Staff guidance clarifying what type of crypto assets were securities. The SEC instead set forth its position in filed SEC enforcement actions, in which it argued that most crypto assets were securities pursuant to the *SEC v. W.J. Howey & Co.* investment contract test.⁵⁹

On July 21, 2022, Coinbase Global, Inc. (CGI)⁶⁰ filed with the SEC a petition for rulemaking seeking clarity on whether crypto assets are securities.⁶¹ The SEC delayed responding to CGI’s rulemaking petition until ordered to do so by a court.⁶² But prior to denying CGI’s rulemaking petition, and without issuing rules or guidance on the securities status of crypto assets, on June 6, 2023, the SEC filed an enforcement action in the US District Court for the Southern District of New York against Coinbase Inc. (Coinbase) and CGI alleging that Coinbase and CGI engaged in an unregistered

securities offering.⁶³ The Coinbase enforcement action is a classic example of regulation by enforcement, a practice Commissioner Peirce has called out as not a “fair way of regulating.”⁶⁴

In contrast, the post-Gensler SEC has not taken an enforcement first approach to crypto asset regulation. On January 21, 2025, the day after President Trump was inaugurated for his second term, then-acting SEC Chairman Mark Uyeda established a new Crypto Task Force dedicated to helping the SEC develop a regulatory framework for crypto assets.⁶⁵ Commissioner Peirce, the head of the Crypto Task Force, announced that the SEC will work to develop a “sensible regulatory path” for the offering and administration of crypto assets.

As a first step, on January 30, 2025, the SEC rescinded accounting guidance that required financial institutions to reflect as balance sheet liabilities the full value of client crypto assets.⁶⁶ The rescinded guidance had made it impractical for financial institutions to have custody of their customers’ crypto assets. The Staff’s new accounting guidance requires financial institutions to recognize a liability related to the risk of loss under these assets calculated using the institution’s own data and risk assessments consistent with existing Financial Accounting Standards Board (FASB) and International Accounting Standards (IAS) guidance.⁶⁷

Following the establishment of the Crypto Task Force, the SEC dismissed a number of filed crypto asset enforcement actions and closed active crypto asset enforcement investigations brought under Chairman Gensler, citing the “Commission’s ongoing efforts to reform and renew its regulatory approach to the crypto industry” as one reason for dismissal.⁶⁸ The joint stipulations filed in connection with the dismissals of the pending SEC crypto asset enforcement actions noted that the work of the Crypto Task Force might impact the litigation.⁶⁹ Notwithstanding these dismissals, the SEC continues to investigate and file crypto asset cases that involve alleged

fraudulent offerings through false and misleading statements.⁷⁰

As for Coinbase, on February 27, 2025, the SEC filed a joint stipulation with Coinbase and CGI dismissing the ongoing civil enforcement action against Coinbase and CGI.⁷¹ In a related SEC press release, then-acting Chairman Uyeda announced that the SEC’s views on crypto had to date been expressed through enforcement actions without engaging the general public, however, the SEC will now “develop crypto policy in a more transparent manner.”⁷²

Accordingly, instead of regulation by enforcement, the post-Gensler SEC, through the Crypto Task Force, will work to develop “sensible” crypto asset policy and regulation in an open manner.

Conclusion

The current SEC appears to be squarely aimed at promoting capital formation by shifting course away from sclerotic regulatory initiatives, regulation by enforcement, and limited engagement with the business community, and moving towards sensible rulemaking, traditional enforcement of the federal securities laws, and meaningful engagement with market participants. These actions bode well for returning the SEC to regular order, spurring innovation through capital formation, and improving confidence in the securities markets.

Mr. Choi, Mr. Chretien, Mr. Conner, Mr. Conway, Mr. Eisenstein, and Ms. Furman are shareholders of Carlton Fields, P.A., in Washington, DC. **Mr. Lauerman** is Of Counsel at the firm. Mr. Choi serves as the firm’s Washington, DC office managing shareholder. Messrs. Chretien and Conway served on the Staff of the SEC’s Enforcement Division. Messrs. Conner, Eisenstein, and Lauerman served on the Staff of the SEC’s Investment Management Division. Ms. Furman co-chairs the firm’s financial services regulatory practice

and serves on *The Investment Lawyer's* Editorial Board. The authors have many years of experience advising investment companies, investment advisers, broker-dealers, and life insurance companies on federal and state securities and insurance compliance and regulatory matters, enforcement matters, and litigation. The views expressed are those of the authors and do not necessarily reflect the views of the firm, its other lawyers, or its clients.

NOTES

- ¹ SEC Chairman Gary Gensler, Remarks at 2021 FINRA Annual Conference (May 20, 2021) (“I’m also thinking every day about the SEC’s three-part mission to protect investors, facilitate capital formation, and what links the two: fair, orderly, and efficient markets.”); *see also*, SEC Chairman Gary Gensler, Testimony Before the House Financial Services Committee (May 6, 2021) (“As we work to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. . . .”); SEC Chairman Paul Atkins, Remarks at The White House (April 22, 2025) (“It is time for the SEC to end its waywardness and return to its core mission that Congress set for it: investor protection; fair, orderly, and efficient markets; and capital formation.”).
- ² E. Terrett and C. Gasparino, “SEC Chief Faces Scrutiny from GOP over Progressive Agenda,” *Fox Business News* (July 21, 2022), available at <https://www.foxbusiness.com/markets/sec-chief-faces-scrutiny-gop-progressive-agenda>.
- ³ C. Matthews, “Gensler’s Aggressive Agenda Continues as SEC Proposes Shortening Settlement Times in Wake of GameStop Saga,” *MarketWatch* (Feb. 9, 2022), available at <https://www.marketwatch.com/story/genslers-aggressive-agenda-continues-as-sec-proposes-shortening-settlement-times-in-wake-of-game-stop-saga-11644439740>. *See also infra* n.12.
- ⁴ *Financial Times* Editorial Board, “An Interventionist SEC Risks a Courtroom Backlash” (Sep. 10, 2023) available at <https://www.ft.com/content/630a9923-6d63-4cf4-af0d-9668d2404bcb> (“There is little question that Gensler has unleashed the most interventionist regulatory agenda the US financial sector has seen since right after the global financial crisis, stretching from cryptocurrencies to carbon emissions and from asset custody to the Treasuries market.”).
- ⁵ *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities Act Release No. 11275 (Mar. 6, 2024), 89 Fed. Reg. 21668 (Mar. 28, 2024) (adopting release).
- ⁶ *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices*, Advisers Act Release No. 6034 (May 25, 2022), 87 Fed. Reg. 36654 (June 17, 2022) (proposing release).
- ⁷ At the same time, Chairman Gensler was not immune from criticism by progressives, who objected to his appointment of an experienced corporate attorney to be the Director of the SEC’s Division of Enforcement. *See, e.g.*, Z. Warmbrodt, “Biden’s Wall Street Cop Feels Progressive’s Heat After Hiring Blunder,” *POLITICO* (Apr. 30, 2021), available at <https://www.politico.com/news/2021/04/30/progressives-sec-wall-street-485146> (“The honeymoon between Gensler and his long-time champions on the left came to a stunning end in recent days after he rattled progressives by naming a veteran corporate defense lawyer, Alex Oh, to lead the agency’s policing of financial wrongdoing. In a twist, Oh abruptly resigned less than a week later after a federal judge reprimanded her and others defending ExxonMobil Corp. in a lawsuit brought by Indonesian villagers.”).
- ⁸ *See* Committee on Capital Markets Regulation, *Rapid Pace of SEC Rulemakings Continues & Litigation Ramps up to Historic Highs* (Oct. 30, 2024), available at <https://capmksreg.org/wp-content/uploads/2024/10/CCMR-Pace-of-SEC-Rulemaking-Unprecedented-Litigation-10-30-24-FINAL.pdf>.
- ⁹ SEC Press Release, *SEC Chair Gensler to Depart Agency on January 20* (Nov. 21, 2024), available at <https://www.sec.gov/newsroom/press-releases/2024-182>.
- ¹⁰ According to one source, the SEC under Chairman Gensler initiated almost 80 percent more crypto assets-related enforcement actions than under prior

SEC Chairman Jay Clayton (125 vs. 70 enforcement actions), resulting in total monetary penalties of over \$6 billion. Cornerstone Research, *SEC Cryptocurrency Enforcement* (2024 Update), available at <https://www.cornerstone.com/wp-content/uploads/2025/01/SEC-Cryptocurrency-Enforcement-2024-Update.pdf>.

¹¹ SEC Chairman Gary Gensler, *Kennedy and Crypto* (Sep. 8, 2022), available at <https://www.sec.gov/newsroom/speeches-statements/gensler-sec-speaks-090822>.

¹² US Sen. Comm. On Banking, Housing and Urban Affairs, *Scott Slams SEC's Climate Disclosure Rule: "Federal Overreach at its Worst"* (Mar. 6, 2024), available at <https://www.banking.senate.gov/newsroom/minority/scott-slams-secs-climate-disclosure-rule-federal-overreach-at-its-worst> (“Ranking Member Tim Scott (R-S.C.), the top Republican on the Senate Committee on Banking, Housing, and Urban Affairs, today slammed the Securities and Exchange Commission’s ... long-awaited climate disclosure rule—which exceeds the SEC’s scope of authority and will bury public companies in paperwork, raise costs for consumers, and stifle economic opportunity. . . . Under Chair Gensler, the SEC has pursued one of the most aggressive regulatory agendas in the agency’s history – with the agency on track to propose and finalize over 60 rules with limited public comment periods and supported by inadequate cost-benefit analysis.”).

¹³ SEC Commissioner Hester Peirce, *At the SEC: Nothing but Crickets*, Remarks at SEC Speaks (Apr. 2, 2024), available at <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sec-speaks-040224> (“The stilted communication, half-hearted engagement, quick-draw of enforcement guns, and limited transparency that characterize the Commission’s current relationship with the industry we regulate should concern anyone who cares about this great institution and the amazing markets we regulate. The increasing chasm that has emerged between the regulator and the regulated undermines industry’s ability to serve investors and companies trying to raise capital. Given how regulated the securities markets are, developing new products or improving

existing ones often requires conversations with, and sometimes regulatory action from, the SEC. By not engaging in nuanced analysis of legal questions, we create an environment in which overcompliance is the standard. Even if it does not technically make innovation impossible, smaller entities, which tend to be more innovative, cannot afford defensive overcompliance.”).

¹⁴ A. Wagner, Chairman, Subcomm. on Capital Markets of the House Comm. on Financial Services, Letter to SEC Chairman Gensler on Capital Formation (Apr. 13, 2023), available at https://financialservices.house.gov/uploadedfiles/2023-04-13_wagner_letter_to_chair_gensler_-_corporate_governance_final.pdf (“We write to express our deep concern regarding the Securities and Exchange Commission’s ... inattention to capital formation issues. The Commission’s failure to promote capital formation has weakened public markets, hurt small businesses and entrepreneurs, and decreased opportunities for investors.”)

¹⁵ The Gensler-era’s aggressive enforcement posture—characterized by novel legal theories and expansive interpretations of materiality—has been replaced by a renewed emphasis on “core” areas of the enforcement program. The SEC recently stated that areas of focus include “insider trading, accounting and financial disclosure fraud, offering fraud, market manipulation, [and] breaches of fiduciary duty by investment advisers.” Acting Director of the Division of Enforcement Samuel J. Waldon, Remarks at The SEC Speaks in 2025 (May 20, 2025). *See also* Commissioner Hester Peirce, “Sheep in the Steep,” Remarks before the Northwestern Securities Regulation Institute (Jan. 27, 2025) (“The best course is for all of us to retreat to a place where materiality from the perspective of the reasonable investor is the sine qua non for disclosures.”).

¹⁶ *Wall Street Journal* Editorial Board, “Paul Atkins Is the Anti-Gensler for the SEC (Trump makes a first-rate choice to run the securities regulator)” (Dec. 4, 2024), available at <https://www.wsj.com/opinion/paul-atkins-sec-nominee-donald-trump-gary-gensler-fd050cd3> (“Mr. Atkins is the opposite of Mr. Gensler

in temperament and regulatory ambition. That means he's exactly what the SEC needs.”).

- ¹⁷ *Withdrawal of Proposed Regulatory Actions*, Securities Act Release No. 11377 (June 12, 2025), 90 Fed. Reg. 25531 (June 17, 2025).
- ¹⁸ See, e.g., *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, Advisers Act Release No. 5956 (Feb. 9, 2022), 87 Fed. Reg. 13524 (Mar. 9, 2022) (33 days); *Outsourcing by Investment Advisers*, Advisers Act Release No. 6176 (Oct. 26, 2022), 87 Fed. Reg. 68816 (Nov. 16, 2022) (IA Outsourcing Rule) (41 days); *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, Exchange Act Release No. 95267 (July 13, 2022), 87 Fed. Reg. 45052 (July 27, 2022) (48 days).
- ¹⁹ See, e.g., *Safeguarding Advisory Client Assets*, Advisers Act Release No. 6240 (Feb. 15, 2023), 88 Fed. Reg. 14672 (Mar. 9, 2023) (comment period closed May 6, 2023, and reopened August 23, 2023 through October 30, 2023) (proposed rule) (*Safeguarding Rule*) and *Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents*, Exchange Act Release No. 103247 (Mar. 15, 2023), 88 Fed. Reg. 20212 (Apr. 5, 2023) (comment period closed June 5, 2023) (proposed rule).
- ²⁰ See *Regulation Best Execution*, Exchange Act Release No. 96496 (Dec. 14, 2022), 88 Fed. Reg. 5440 (Jan. 27, 2023) (proposed rule) and *Order Competition Rule*, Exchange Act Release No. 96495 (Dec. 14, 2022), 88 Fed. Reg. 128 (Jan. 3, 2023) (proposed rule) (comment periods for both proposals closed on March 31, 2023).
- ²¹ *Safeguarding Rule*, *supra* n.19.
- ²² *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*, Exchange Act Release No. 97990 (July 26, 2023), 88 Fed. Reg. 53960 (Aug. 9, 2023) (proposed rule).
- ²³ Senator Dodd Comments, Conference on Financial Regulations Bill, Day 2, 3:42:32 – 3:43:45, CSPAN (June 15, 2010), available at <https://www.c-span.org/video/?294065-1/conference-financial-regulations-bill-day-2>.
- ²⁴ *Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social and Governance Investment Practices*, Exchange Act Release No. 94985 (May 25, 2022), 87 Fed. Reg. 36654 (June 17, 2022) (proposed rule).
- ²⁵ IA Outsourcing Rule, *supra* n.18.
- ²⁶ *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Exchange Act Release No. 93784 (June 7, 2023), 87 Fed. Reg. 6652 (Feb. 4, 2022) (proposed rule). The specific rule withdrawn by the SEC was proposed Rule 10B-1 under the Securities Exchange Act of 1934.
- ²⁷ Regulation SBSR, 17 CFR 22.900-909.
- ²⁸ *Regulation Systems Compliance and Integrity*, Exchange Act Release No. 97143 (Mar. 15, 2024), 88 Fed. Reg. 23146 (April 14, 2023) (proposed rule).
- ²⁹ Order Competition Rule, *supra* n.20.
- ³⁰ Regulation Best Execution, *supra* n.20.
- ³¹ *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, *supra* n.18, and *Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, National Securities Exchanges, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents*, *supra* n.19.
- ³² A private offering that complies with Rule 506(c) can avoid SEC registration notwithstanding that prospective investors are solicited more actively than Regulation D otherwise would permit.
- ³³ CEFs are SEC-registered investment companies that are similar to mutual funds, except that investors

- cannot freely redeem their shares in a CEF for the shares' net asset value at any time.
- ³⁴ Private funds invest in securities but (a) do not publicly offer their own securities and (b) limit the number or qualifications of their security holders so as to qualify for an exemption from registration under the Investment Company Act. Private funds include private equity, private credit, and hedge funds.
- ³⁵ See SEC Division of Investment Management, *Registered Closed-End Funds of Private Funds*, ADI 2025-15 (Aug. 15, 2025), available at <https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds>. This ADI includes information on the Staff's expectations about the substance of, and filing procedures for, additional disclosures that affected funds will be making. These considerations, of course, will differ, often substantially, depending upon, among other things, whether the CEF has previously advised its investors that it would not invest more than 15% of its assets in private funds.
- ³⁶ See FS Credit Opportunities Corp., *et al.* (File No. 812-15706), Investment Company Act Release Nos. 35520 (Apr. 3, 2025) (Notice) and 35561 (Apr. 29, 2025) (Order).
- ³⁷ See SEC Office of the Investor Advocate, Fiscal Year 2026 Report on Objectives (filed June 25, 2025), available at <https://www.sec.gov/files/fy26-oiad-sar-objectives-report.pdf> and Fiscal Year 2025 Report on Objectives (filed June 27, 2024), available at <https://www.sec.gov/files/fy25-oiad-sar-objectives-report.pdf>.
- ³⁸ SEC Chairman Paul Atkins, Remarks at the Small Business Capital Formation Advisory Committee Meeting (May 6, 2025).
- ³⁹ See T. Lauerman, "SEC Cost-Benefit Analysis: A New Face and a New Role" (July 29, 2025), posted on the Executive Order Watch at CarltonFields.com.
- ⁴⁰ See, e.g., J. Schulp and N. Anthony, "The SEC Short-Changes Public Comment," Cato at Liberty Blog (Jan 14, 2022), available at <https://www.sec.gov/newsroom/press-releases/2025-47>.
- ⁴¹ See, e.g., S. Ho, "SEC Chairman Gensler Defends Fast-Paced Rulemaking," Thomson Reuters (Oct. 5, 2022), available at <https://tax.thomsonreuters.com/news/sec-chair-gensler-defends-fast-paced-rulemaking/#:~:text=Gensler%27s%20remarks%20come%20amid%20criticisms,be%20outside%20the%20agency%27s%20jurisdiction>.
- ⁴² Commissioner Hester Peirce, *Rat Farms and Rule Comments - Statement on Comment Period Lengths* (Dec. 10, 2021), available at <https://www.sec.gov/newsroom/speeches-statements/peirce-rat-farms-rule-comments-121021>.
- ⁴³ SEC Chairman Paul Atkins, Testimony Before the United States House Appropriations Subcommittee on Financial Services and General Government (May 20, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-testimony-fsgg-052025>.
- ⁴⁴ SEC Commissioner Hester Peirce, *New Paradigm: Remarks at SEC Speaks* (May 19, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sec-speaks-051925-new-paradigm-remarks-sec-speaks>.
- ⁴⁵ *Id.* See also Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019; last updated July 5, 2024).
- ⁴⁶ The Task Force is further discussed *infra* n.67-69 and accompanying text.
- ⁴⁷ White House, "Strengthening American Leadership in Digital Financial Technology" (July 30, 2025).
- ⁴⁸ See SEC Chairman Paul Atkins, *American Leadership in the Digital Finance Revolution* (July 31, 2025).
- ⁴⁹ See, e.g., SEC Commissioner Hester Peirce, *A Creative and Cooperative Balancing Act* (May 8, 2025).
- ⁵⁰ See Digital Market Clarity Act of 2025, H.R. 3633, 119th Cong. (2025) (CLARITY Act); Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025, Pub. L. No. 119-27, S. 1582, 119th Cong. (2025) (GENIUS Act).
- ⁵¹ SEC Division of Corporation Finance, *Enhanced Accommodations for Issuers Submitting Draft Registration Statements* (March 3, 2025). To the authors' knowledge, the SEC's Division of Investment

Management has not issued similar guidance applicable to registered investment companies.

- ⁵² A confidential draft registration statement will be filed on “Form DRS” on the SEC’s EDGAR system (but will not be publicly available like other EDGAR filings). The draft registration statement must be marked as confidential and accompanied by a written request for confidential treatment. 17 C.F.R. § 200.83(c) (2025). Each page of the draft registration statement must be clearly marked with the words “Confidential Treatment Requested by [the filer’s name]” and have an identifying number and code. *Id.* The written request must refer to the registration statement by number and code, include the words “FOIA Confidential Treatment Request” on top of the first page, and contain the name, address, and telephone number of the person requesting confidential treatment. *Id.* The written request letter must be filed with the registration statement on Form DRSLTR and mailed or emailed to the SEC’s Office of Freedom of Information and Privacy Act Operations. *Id.*
- ⁵³ SEC, “Fiscal Year 2026 Congressional Budget Justification Annual Performance Plan,” Executive Summary (May 30, 2025).
- ⁵⁴ *Delegation of Authority to Director of Division of Enforcement*, Exchange Act Release No. 60448 (Aug. 5, 2009), 74 Fed. Reg. 40068-01 (Aug. 11, 2009), available at <https://www.federalregister.gov/documents/2009/08/11/E9-19116/delegation-of-authority-to-director-of-division-of-enforcement>.
- ⁵⁵ *Delegation of Authority to the Director of Its Division of Enforcement*, Exchange Act Release No. 62690 (Aug. 11, 2010), 75 Fed. Reg. 49820-01 (Aug. 16, 2010), available at <https://www.federalregister.gov/documents/2010/08/16/2010-20197/delegation-of-authority-to-the-director-of-its-division-of-enforcement>.
- ⁵⁶ *Delegation of Authority to Director of the Division of Enforcement*, Exchange Act Release No. 102552 (Mar. 10, 2025), 90 Fed. Reg. 12105 (Mar. 14, 2025), available at <https://www.sec.gov/files/rules/final/2025/33-11366.pdf>.
- ⁵⁷ *Id.*

- ⁵⁸ See Cornerstone Research, *SEC Cryptocurrency Enforcement* (2024 Update), *supra* n.10, and Cornerstone Research, *SEC Cryptocurrency Enforcement* (2023 Update), available at <https://www.cornerstone.com/wp-content/uploads/2024/01/SEC-Cryptocurrency-Enforcement-2023-Update.pdf>, for 2023 and 2024 updates citing number of SEC crypto-related enforcement actions commenced in each year.
- ⁵⁹ SEC v. W.J. Howey & Co., 328 U.S. 293, 299 (1946) (“The test [for an investment contract] is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.”).
- ⁶⁰ Coinbase states in its answer to the SEC’s complaint as follows: “Coinbase is the largest U.S. digital asset exchange. It operates a secondary market in certain digital assets known as “tokens” or “crypto assets” or “cryptocurrencies.” It is not, and has never been, a securities exchange, or a broker, or a clearing agency under the federal securities laws.” SEC v. Coinbase Inc. *et al.*, SDNY Case No. 23 Civ. 4738 (KPF), Answer to Plaintiff’s Complaint filed on June 28, 2023, available at https://assets.ctfassets.net/o10es7wu5gm1/4lclNmYTKUp3JT8Yt7Zp0F/6267964c9a0de70a0da306bc02e4992c/2023.06.28_-_Dkt._022_-_Answer_to_Complaint.pdf.
- ⁶¹ Petition for Rulemaking—Digital Asset Securities Regulation submitted by Coinbase Global (July 21, 2022), available at <https://www.sec.gov/files/rules/petitions/2022/petn4-789.pdf>.
- ⁶² Order, *In re* Coinbase, Inc., No. 23-1779 (3d Cir. June 20, 2023); see also Coinbase Inc.’s Petition for Writ of Mandamus, *In re* Coinbase, Inc., No. 23-1779, ECF No. 1 at 5 (3d Cir. Apr. 26, 2023).
- ⁶³ Complaint, SEC v. Coinbase, Inc. *et al.*, 23 Civ. 4738 (S.D.N.Y. June 6, 2023). In addition to Coinbase, the SEC initiated 78 other civil crypto-related enforcement actions during 2023 and 2024. See *supra* n.58.
- ⁶⁴ SEC Commissioner Hester Peirce, *Kraken Down: Statement on SEC v. Payward Ventures, Inc., et al.* (Feb. 9, 2023) (Commissioner Peirce noted that “Using

enforcement actions to tell people what the law is in an emerging industry,” and admonishing that “one-off enforcement actions and cookie-cutter analysis does not cut it.” “Kraken” is the name of a cryptocurrency firm.), available at <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-kraken-020923>.

⁶⁵ Crypto Task Force Designation Letter signed by Acting SEC Chairman Mark T. Uyeda (Feb. 4, 2025) (“The task force will help the Commission draw clear regulatory lines, provide realistic paths to registration, craft sensible disclosure frameworks, and deploy enforcement resources judiciously.”), available at <https://www.sec.gov/files/crypto-task-force-designation-letter.pdf>.

⁶⁶ SEC Staff Accounting Bulletin (SAB) No. 121 was rescinded and replaced by SAB No. 122 (Jan. 23, 2025), available at <https://www.sec.gov/rules-regulations/staff-guidance/staff-accounting-bulletins/staff-accounting-bulletin-122>.

⁶⁷ *Id.* Citing Financial Accounting Standards Board Accounting Standards Codification (FASB ASC) Subtopic 450-20, Loss Contingencies, or International Accounting Standard (IAS) 37, Provisions, Contingent Liabilities and Contingent Assets, under US Generally Accepted Accounting Principles and IFRS Accounting Standards.

⁶⁸ The 2025 SEC crypto enforcement action dismissals include, among others, *Binance*, *Coinbase*, and *Ripple*. According to 10-K filings and company press releases, the SEC closed crypto enforcement investigations without taking enforcement action against several companies, including among others, Robinhood (<https://newsroom.aboutrobinhood.com/sec-closes-investigation-into-robinhood-crypto-with-no-action/>); Uniswap Labs (<https://blog.uniswap.org/a-win-for-defi>); and *Crypto.com* (<https://crypto.com/us/company-news/sec-closes-crypto-com-investigation-with-no-action>).

⁶⁹ Joint Stipulation to Dismiss and Releases, SEC v. Binance Holdings Limited, et al. (D. D.C. May 29, 2025) (dismissing litigation with prejudice), available at <https://www.sec.gov/files/litigation/litreleases/2025/stipulation-dismissal-26316.pdf>.

⁷⁰ See, e.g., Complaint, SEC v. Unicorn, Inc., et al., No. 1:25-cv-4245 (S.D.N.Y. May 20, 2025).

⁷¹ See Joint Stipulation to Dismiss, and Releases (S.D.N.Y. Feb. 27, 2025), available at <https://www.sec.gov/files/litigation/complaints/2025/stipulation-pr2025-47.pdf>.

⁷² SEC Press Release, *SEC Announces Dismissal of Civil Action Against Coinbase* (Feb. 27, 2025), available at <https://www.sec.gov/newsroom/press-releases/2025-47>.

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