Simpson Thacher

Registered Funds Regulatory Update

July 8, 2025

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SEC Rulemaking

SEC Rescinds Fourteen Pending Rules From Prior Administration

On June 12, 2025, the SEC formally withdrew fourteen proposed rules issued between March 2022 and November 2025 by former SEC Chair Gary Gensler under the Biden administration. The rescinded rule proposals span multiple areas of securities regulation.

Among the most significant of the withdrawals are the AI and ESG rule proposals that had been under development for several years. The AI rule proposal, which was proposed two years ago, would have created new rules requiring broker-dealers and investment advisers to eliminate or neutralize conflicts-of-interest related to predictive data analytics and similar technologies used to interact with investors. The ESG rule proposal, which was first proposed three years ago, would have imposed enhanced ESG disclosure requirements for funds, BDCs and investment advisers. Other proposed rules withdrawn include (i) cybersecurity guidelines for investment advisers and funds requiring the adoption and implementation of cybersecurity policies and procedures and mandatory reporting of significant cybersecurity incidents; (ii) mandated due diligence requirements for advisers outsourcing fund services to third-party service providers; and (iii) proposed updates to the Advisers Act custody rule. Additional rescinded rule proposals include (i) requiring broker-dealers to establish written policies and procedures designed to comply with best-execution standards; (ii) a new auction system for retail trade orders; (iii) narrowing standards for excluding shareholder proposals on proxy statements; (iv) data security amendments related to the National Market System Plan Governing the Consolidated Audit Trail; (v) new swap trade protections; (vi) protections against undue influence over chief compliance officers; (vii) volume-based exchange transaction pricing for National Market System stocks; (viii) an expansion of firms subject to Regulation Systems Compliance and Integrity; and (ix) updating the statutory definition of "exchange" to accommodate trading systems that trade crypto assets.

The SEC notice stated that if it determines to pursue future regulatory action in any of these areas, it will issue new proposed rules. The SEC did not elaborate on the reasons for the withdrawals, and it did not issue any statements in connection with the withdrawal of the proposed rules. The withdrawals follow an executive order issued by President Trump in January that paused all federal regulations not yet effective for the purpose of reviewing any questions of fact, law, and policy that the rules may raise. Industry groups had lobbied the SEC to revoke or rework many of these rules, seizing on the freeze on the pending rules ordered by the White House following Trump's inauguration.

SEC Rulemaking Activity (June 12, 2025), available at:
https://www.sec.gov/rules-regulations/rulemaking-activity.

SEC Grants Extension for Portfolio Disclosure Timelines

The SEC recently announced an extension of the compliance dates for Form N-PORT reporting requirements adopted in August 2024. Under the extension, registered funds with $1 billion or more in assets must begin disclosing fund portfolio holdings information on a monthly rather than quarterly basis starting November 17, 2027, instead of November 17, 2025. Smaller funds must begin disclosing on May 18, 2028, instead of May 18, 2026.

The extension allows the SEC to review the Form N-PORT amendments in accordance with an Executive Order issued by President Trump in January 2025, directing agencies to postpone the effective dates of rules that had been issued but had not yet taken effect. This action also comes after the Registered Funds Association filed a petition in the Fifth Circuit Court of Appeals seeking review of the final amendments to Form N-PORT. In February 2025, the Court granted the SEC's motion to stay the proceedings while the SEC conducts its review. Also in February 2025, the ICI expressed concerns about the potential negative impacts of more frequent public disclosure of fund holdings.

In its release announcing the Form N-PORT compliance date extensions, the SEC indicated it will consider the costs and benefits identified in its 2024 Adopting Release. The SEC also noted that if it determines no further amendments to Form N-PORT are needed after completing its review, the delayed compliance dates will provide funds with sufficient time to comply with the new requirements. Alternatively, if the SEC decides to rescind the amendments or propose new amendments following its review, the delayed dates will reduce costs that funds would have incurred to comply with the newly adopted amendments.

Notably, following a review by the SEC, the effective date for amendments to Form N-CEN (which requires open-end funds to report information about service providers used to comply with liquidity risk management program requirements) was not extended and will remain as November 17, 2025.

Form N-PORT and Form N-CEN Reporting; Guidance on Open-End Fund Liquidity Risk Management Programs; Delay of Effective and Compliance Dates, Release No. IC-35538 (Apr. 16, 2025), available at: https://www.sec.gov/files/rules/final/2025/ic-35538.pdf.

Industry Developments

House Committee Approves Bills Increasing Retail Access to Private Markets and Expanding Access to Capital

The U.S. House of Representatives Financial Services Committee recently approved a number of bills, many of which reduce capital markets and banking regulations and could scale back the SEC's oversight of capital markets. U.S. Representative and Committee Chairman French Hill (R-AR) stated "[the] Committee has been hard at work examining solutions to improve the quality and condition of financial regulation to empower access to capital for American businesses—large and small. These bills strengthen community banking in America, relieve small businesses from the strain of harmful overregulation, expand access to capital, and more."

Several bills propose to increase retail access to private markets by removing investment limitations or expanding the scope of the definition of "accredited investors" to include individuals that qualify based on education, professional experience, or other certifications, designations, and credentials, rather than primarily focusing on financial status as the SEC's current definition does, as well as expand access to capital. For example, the following bills were approved:

- The Increasing Investor Opportunities Act proposes to remove the SEC's 15% limit on closed-end funds', including business development companies', investments in private securities to increase retail access into the private markets. Introduced by U.S. Representative Ann Wagner (R-MO) with four co-sponsors, three of which are Democrats, the Committee passed the bill by a vote of 41 to 10.
- The Equal Opportunity for All Investors Act of 2025 proposes to allow individuals to qualify as "accredited investors" if they pass an SEC-administered exam demonstrating "financial sophistication" by assessing competency with respect to different types of securities, disclosure requirements under the securities laws, corporate governance, financial statements, conflicts of interest, and aspects of unregistered securities, including risks, among others, related to liquidity, disclosure, valuation, leverage, and concentration. Introduced by U.S. Representative Mike Flood (R-NE) with four co-sponsors, three of which are Democrats, the Committee passed the bill by a vote of 49 to 2.
- The Accredited Investor Definition Review Act mandates the SEC to review and potentially expand the list of certifications, designations, and credentials that would qualify individuals as "accredited investors." The bill mandates that the SEC recognize certain existing licenses and grants the SEC authority to add similar credentials over time. The SEC may also add new certifications that are similar in terms of measuring financial sophistication and adjust the existing list based on what it deems necessary for investor protection. Introduced by U.S. Representative Bill Huizenga (R-MI), the Committee passed the bill by a vote of 34 to 16.

- The Fair Investment Opportunities for Professional Experts Act seeks to expand the definition of "accredited investors" to include individuals with "education, professional experience, or other similar credentials" who can demonstrate the requisite knowledge to make informed investment decisions regardless of their income or net worth. Such individuals would include persons who are currently licensed or registered as brokers or investment advisers with good standing with the SEC, an SRO, or a state securities division. It would also include persons that the SEC determines, by regulation, to have demonstrable education or work experience to qualify as having professional knowledge of a subject related to a particular investment, and whose education or work experience is verified by an SRO. Introduced by Hill with three co-sponsors, one of which is a Democrat, the Committee passed the bill by a vote of 45 to 1. On June 23, 2025, the House passed the bill by a bipartisan vote of 397-12, which has now been referred to the Senate Banking, Housing, and Urban Affairs Committee.
- The Access to Small Business Investor Capital Act proposes to exempt funds that invest in BDCs from including the "acquired fund fees and expenses" calculation in the prospectus fee table, providing more accurate information for investors. Introduced by U.S. Representative Brad Sherman (D-CA) with twenty-four co-sponsors, sixteen of which are Democrats, the Committee passed the bill by voice vote. On June 23, 2025, the House unanimously passed the bill, which has now been referred to the Senate Banking, Housing, and Urban Affairs Committee.

Press Release, *Financial Services Committee Advances 25 Bills to Strengthen Community Banking, Scale Back Overregulation, and Expand Access to Capital* (May 21, 2025), available at: https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409738.

Press Release, *Ten Financial Services Committee Bills Pass the House* (June 23, 2025), available at: https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=410775.

Brian Daly Named Director of the SEC's Division of Investment Management

On June 13, 2025, the SEC announced the appointment of Brian T. Daly as the new SEC Director of the Division of Investment Management, effective July 8, 2025. Daly, a Partner in the Investment Management practice specializing in cryptocurrencies and alternatives at Akin Gump Strauss Hauer & Feld LLP, will replace Natasha Vij Greiner following her departure from the SEC on July 4, 2025.

"Brian has deep familiarity with all levels of the investment management industry…I am looking forward to working with Brian on common-sense regulation that does not impose unnecessary burdens and genuinely embraces the public comment process," said SEC Chair Paul Atkins. Atkins recently announced that he was directing SEC Staff to reconsider longstanding guidance that prohibits many retail investors from accessing BDCs, interval funds, and other closed-end funds. Daly's appointment makes clear that Atkins' efforts to prioritize cryptocurrency, as well as expand access to private market strategies to retail investors, will be an area of focus for the Division going forward.

Press Release, *Brian Daly Named Director of Division of Investment Management* (June 13, 2025), available at: https://www.sec.gov/newsroom/press-releases/2025-88-brian-daly-named-director-division-investment-management.

Press Release, *Natasha Vij Greiner Will Conclude Her Tenure as Director of Investment Management* (June 10, 2025), available at: https://www.sec.gov/newsroom/press-releases/2025-84-natasha-vij-greiner-will-conclude-her-tenure-director-investment-management.

SEC Inadvertently Exposes N-PORT Data

On May 14, 2025, the SEC reported that certain nonpublic data in Form N-PORT submissions made between February 3, 2025 and May 8, 2025 were inadvertently made public on EDGAR due to a software update. The SEC confirmed that the error was corrected, the error did not affect Form N-PORT filings made after May 8, 2025, and all affected filers had been notified and the exposed data removed.

Open-end funds, closed-end funds, and exchange-traded funds organized as unit investment trusts (excluding money market funds) are required to file Form N-PORT to report portfolio holdings information on a monthly basis. Nonpublic data in Form N-PORT filings include, among other things, a fund's first and second months' portfolio holdings information and other non-public data, such as a fund's derivatives transactions information and liquidity classifications for portfolio investments. The SEC did not specify the types of data compromised.

In response, SEC Chair Paul Atkins ordered a comprehensive review of EDGAR to ensure its data integrity. On June 3, 2024, in testimony before the U.S. Senate Appropriations Subcommittee on Financial Services and General

Government, he stated that the error was unacceptable and that the SEC is working to optimize efficiency and prevent redundancy.

SEC Statement, *Statement on Certain Form N-PORT Data* (May 14, 2025), available at: https://www.sec.gov/newsroom/speeches-statements/statement-form-n-port-051425.

Paul S. Atkins, SEC Chair, Speech, *Testimony Before the United States Senate Appropriations Subcommittee on Financial Services and General Government* (June 3, 2025), available at https://www.sec.gov/newsroom/speeches-statements/testimony-atkins-060325.

ICI Recommends SEC Rulemaking, Staff Action, and Exemptive Relief Priorities

On April 11, 2025, the ICI sent a letter to then newly-confirmed SEC Chair Paul Atkins detailing policy recommendations and priorities that the ICI believes would both advance the SEC's mission and have the "greatest positive impact for investors."

Previously in January 2025, the ICI had requested an extension for the compliance dates related to the September 2023 amendments to Rule 35d-1 under the 1940 Act, the so-called "Names Rule," and further guidance on compliance with the amendments. In response, the SEC published FAQs to provide additional information to industry members and delayed the compliance dates by six months.

Then in April, after receiving continued member feedback on the challenges in implementing the Names Rule amendments, the ICI requested that the SEC "reconsider and repeal some or all of the Names Rule amendments to avoid imposing . . . unnecessary costs and ongoing compliance burdens on funds, and ultimately, investors" with the belief that Chair Atkins would be more receptive to doing so than his predecessor.

The ICI also requested that the SEC: (i) restore the ability of funds to cross-trade fixed income securities by amending Rule 17a-7 under the 1940 Act; (ii) reform the fund proxy system, including to amend certain fund board requirements; (iii) update the requirements for in-person voting by fund directors by granting permanent relief to allow fund boards discretion to hold meetings and vote either in person or remotely through videoconference; (iv) make electronic delivery of information the default delivery option for funds; (v) approve dual share class applications to enable funds to offer both mutual fund and ETF share classes; (vi) allow closed-end funds more flexibility to invest in private funds by removing the 15 percent cap on net assets invested in privately offered funds and reviewing Rule 12d1-4 under the 1940 Act and exempting certain fund structures, such as CLOs, from the 10 percent limit under the rule; (vii) update the framework for co-investments; and (viii) exempt listed closed-end funds from annual shareholder meeting requirements imposed by stock exchange rules and not the 1940 Act or other federal securities laws or state laws applicable to such funds.

ICI Letter, *Recommendations for Innovation and Investor Protection* (Apr. 11, 2025), available at: https://www.ici.org/system/files/2025-04/25-cl-chair-atkins-investor-priorities.pdf.

NASAA Proposes 10% Cap on Investor BDC and REIT Holdings

The North American Securities Administrators Association recently proposed revisions to its Statement of Policy Regarding Real Estate Investment Trusts, which includes a proposal to limit investments in non-traded REITs and other non-traded direct participation programs (such as BDCs) to 10% of an investor's liquid net worth.

Under the proposed concentration limit structure, individual investors would be restricted to investing no more than 10% of their liquid net worth in non-traded REITs, BDCs, and other direct participation programs on a combined basis. However, state securities administrators retain discretionary authority to exempt "accredited investors" from these "default" concentration limits. Individual states would also maintain authority to require higher or lower concentration limits based on specific program risks.

NASAA's rationale for the concentration limits centers on liquidity constraints and investor protection concerns. According to the proposal, most non-traded REITs maintain voluntary repurchase plans that are capped at 5% of net asset value per quarter, but these plans have faced significant stress in recent years. NASAA argues that the concentration limits are necessary given the complexity and risks of these investments. NASAA notes that non-traded REITs have generated disproportionate investor complaints, ranking third among all security types in FINRA arbitration cases over the past three years despite representing a relatively small portion of total market capitalization of offered securities.

Should the concentration limits be implemented, they would represent the most significant change to non-traded REIT regulation since 2007. Industry observers suggest the practical effect may accelerate the existing trend toward private placements, potentially reshaping the entire market structure for alternative investment products while raising questions about the ultimate impact on investor access and market development.

NASAA's proposed revisions follow a previous request for public comment on proposed revisions to the REIT Guidelines issued by NASAA in 2022. Other proposed revisions include (i) updating the conduct standards for brokers that sell non-traded REITs to incorporate Regulation Best Interest; and (ii) increasing investor qualifying requirements to $100,000 (from $70,000) in annual income and net worth or at least $350,000 (from $250,000) in net worth to account for inflation since they were last updated in 2007.

The proposed revisions were subject to comment until May 28, 2025.

NASAA Request for Public Comment, *Proposed Amendments to the NASAA Statement of Policy Regarding Real Estate Investment Trusts* (Mar. 25, 2025), available at: https://www.nasaa.org/wp-content/uploads/2025/03/NASAA-Request-for-Public-Comment-REIT-Guidelines-Amendments-3-25-2025.pdf.

SEC Enforcement

SEC Denies Motions Challenging Settlement Terms for Off-Channel Communications

The SEC recently denied motions to modify the settlement terms of 16 financial firms for record-keeping violations related to their use of messaging apps.

Since late 2021, the SEC has been investigating and charging financial firms for failing to properly maintain records of business communications sent through personal messaging apps, such as WhatsApp. In August 2024, the SEC announced that twenty-six broker-dealers and investment advisers would pay over $390 million to settle charges related to these recordkeeping failures, the largest of which was $50 million. To date, more than 50 firms have paid nearly $3 billion in penalties for similar violations.

The 16 petitioning firms did not ask to reduce their financial penalties. Instead, they asked the SEC to remove certain ongoing obligations they had agreed to as part of their settlements that were not required in more recent settlements with other firms. Among other things, they asked to be excused from hiring an outside compliance consultant for two years, reporting employee disciplinary actions regarding off-channel communications to the SEC for two years, and submitting to heightened oversight by FINRA for six years.

These firms argued that firms that settled more recently with the SEC received better settlement terms, including less burdensome obligations. One firm, for example, only had to conduct an internal audit rather than hire an outside consultant. On April 14, 2025, the SEC firmly rejected their requests, stating that "settlor's remorse…does not justify upsetting a final, agreed-upon settled order." The SEC emphasized that the firms had voluntarily agreed to their terms and that different terms in later settlements did not make the original settlement agreements unfair. Furthermore, unlike the petitioning firms, the firm that only had to conduct an internal audit had self-reported its violations prior to the SEC initiating its investigation, which was noted as a factor in it receiving more favorable terms according to the firm's settlement order.

SEC Commissioner Hester Peirce disagreed with the SEC's decision, arguing that the SEC should have granted the firms' requests in light of the undisputed result that firms that settled earlier faced more stringent oversight requirements than firms that settled later, despite similar violations.

On June 30, 2025, the SEC again denied motions to modify the settlement terms of five financial firms for record-keeping violations related to their use of messaging apps. The petitioning firms raised primarily the same arguments previously rejected by the SEC, with four of the five firms asking the SEC to stay their undertakings while it considered their motions to modify. The SEC denied their motions for the same prior reasons and stated

that "a party's belief that subsequent parties negotiated better settlement terms is not a compelling circumstance that justifies altering the terms of a prior settlement."

These cases highlight the SEC's position on the finality of settlement agreements reflecting that once a firm agrees to settlement terms, it should expect to fulfill those obligations even if later settlements in similar cases contain different terms. The SEC's decision also underscores the potential benefits of self-reporting violations. The split decision, with Commissioner Peirce dissenting, suggests there may be ongoing debate within the SEC about consistency in enforcement remedies, particularly as the SEC transitions under the leadership of newly-appointed SEC Chair Paul Atkins.

In the Matter of Certain Off-Channel Communications Settled Orders, Release No. 6874 (Apr. 14, 2025), available at:
https://www.sec.gov/files/litigation/opinions/2025/34-102860.pdf.

In the Matter of Certain Off-Channel Communications Settled Orders, Release No. 6890 (June 26, 2025), available at:
https://www.sec.gov/files/litigation/opinions/2025/34-103330.pdf.

SEC Remarks

SEC Reconsiders 15% Limit on Closed-End Fund Retail Restrictions

At a recent "SEC Speaks" conference held on May 19, 2025, SEC Chair Paul Atkins stated that he is directing the SEC to reconsider the 15% private fund limit rules that prohibit retail investors from investing in closed-end funds, such as interval funds and business development companies.

Since 2002, SEC Staff has held the position that closed-end funds that invest more than 15% of their net assets in underlying private funds must limit sales to investors who are "accredited investors." Accredited Investors with respect to natural persons generally include individuals who have earned income exceeding $200,000 (or $300,000 with a spouse) in each of the past two years and have a minimum net worth (or joint net worth with a spouse) of $1 million (excluding the individual's primary residence). Although this 15% limit is codified in rulemaking for open-end funds, it has only been an informal Staff position for closed-end funds. Atkins noted that since the SEC informally capped closed-end fund investments in 2002, assets in private markets have nearly tripled from $11.6 trillion to $30.9 trillion, leading many retail investors to miss out on investment opportunities and the ancillary benefits related to private market growth over the course of the last 20+ years. During the same period, however, there has been "increased oversight and enhanced reporting by both private fund advisers and registered funds"—meaning that over this period of exponential growth, institutional and high-net-worth investors eligible to participate gained the benefit of both access and increased regulatory oversight and protections, while retail investor participation and access has been curtailed. A "common-sense approach," as advocated by Chair Atkins, "will give all investors the ability to seek exposure to a growing and important asset class, while still providing the investor protections afforded to registered funds." Atkins noted, however, that the SEC must address and reconsider disclosure issues for these closed-end funds, particularly those that trade on an exchange, including conflicts of interest, liquidity, and fees.

SEC Commissioner Caroline Crenshaw, however, expressed concerns about lifting the 15% limit, noting that "[t]he distinction between public and private markets exists for a reason." She noted that putting private fund assets in registered closed-end funds would not change the nature of the assets but rather expose retail investors to private market risks, including, among others, less disclosure and liquidity and more volatility.

Consistent with Atkins' remarks, then Director of the SEC's Division of Investment Management Natasha Vij Greiner stated, on May 20, 2025, that the SEC Staff will no longer provide comments during the registration statement review process seeking to limit the ability of retail investors to invest in registered closed-end funds that invest in private funds.

Paul S. Atkins, SEC Chair, Speech, *Prepared Remarks Before SEC Speaks* (May 19, 2025), available at https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925.

Caroline A. Crenshaw, SEC Commissioner, Speech, *A Reckless Game of Regulatory Jenga - Remarks at "SEC Speaks,"* (May 19, 2025), available at https://www.sec.gov/newsroom/speeches-statements/crenshaw-remarks-sec-speaks-051925.

Natasha Vij Greiner, Director of the SEC's Division of Investment Management, Speech, *The SEC Speaks in 2025: Day 2* (May 20, 2025), available at: https://www.pli.edu/offers/sec-speaks-2025.

Atkins Discusses Crypto Regulation in First Townhall and Crypto Task Force Roundtable

At his first SEC townhall meeting on May 6, 2025, SEC Chair Paul Atkins criticized the SEC under his predecessor, Gary Gensler, for its "ambiguous and nonexistent regulations" in the cryptocurrency space. Atkins stated this lack of regulatory framework created uncertainty and invoked distrust in the SEC, while also foregoing innovation. He noted also that the lack of regulation invited fraud and underscored the need for "a rational, coherent, principled approach" in regulation. He praised the efforts of the Crypto Task Force and its roundtables held to gain industry feedback, applauding further cooperation with industry participants.

As part of the Crypto Task Force Roundtable discussion series on May 12, 2025, Atkins again spoke about crypto asset regulation. Atkins stated that "securities are increasingly migrating from traditional (or 'off-chain') databases to blockchain-based (or 'on-chain') ledger systems[,]" and compared this innovation to the "transition of audio recordings from analog vinyl records to cassette tapes to digital software decades ago." Atkins emphasized how crypto ad hoc regulations must be stopped, and urged the SEC Staff to utilize its existing rulemaking, interpretive, and exemptive authorities to set "clear and sensible guidelines" for market participants. He highlighted three areas of focus for crypto regulation—issuance, custody, and trading.

On the issuance of crypto assets that are securities, Atkins stated that he has asked the Staff to consider additional guidance, registration exemptions, and safe harbors "to create pathways for crypto asset issuances." Atkins referred to the SEC's approach to crypto regulation over the past few years as a "'head-in-the-sand" approach—perhaps hoping that crypto would go away," followed by "a shoot-first-and-ask-questions-later approach of regulation through enforcement." Atkins noted that while the SEC has "previously adapted its forms for offerings," such as for asset-based securities and REITs, "it has not done so for crypto assets despite increased investor interest in this space over the past few years." He added that "[w]e cannot encourage innovation by trying to fit a square peg into a round hole" and reiterated his commitment to a new approach, recognizing that "rules and regulations designed for off-chain securities," generally more traditional securities, "…may be incompatible with or unnecessary for on-chain assets and stifle the growth of blockchain technology." Atkins pointed to a number of clarifications already provided, such as with respect to "the view that certain distributions and crypto assets do not implicate the federal securities laws", and confirmed his expectation that such clarifications will continue. He confirmed that the SEC

has broad discretion under the Securities Acts to accommodate the crypto industry, and that he "intend[s] to get it done."

With respect to custody, Atkins recognized the importance of providing registrants with greater optionality in determining how to custody crypto assets and addressed (i) the special purpose broker-dealer framework; (ii) the types of custodians that may qualify as "qualified custodians" for 1940 Act and Advisers Act purposes; and (iii) self-custody solutions for crypto assets.

On the trading of crypto products, Atkins noted that he is in favor of allowing registrants to trade a broader variety of products on their platforms and confirmed that he has asked the Staff to look into the Alternative Trading System regulatory regime to identify opportunities for modernization "to better accommodate crypto assets" and explore whether there are opportunities for guidance or rulemaking that may enable the listing and trading of crypto assets on national securities exchanges. Further, Atkins noted his interest in exploring the availability of conditional exemptive relief for registrants and non-registrants seeking to bring new products and services into the financial marketplace, which may not otherwise be compatible with the SEC's existing regulatory framework. Atkins emphasized that he is eager to work with President Trump's administration to make the United States "the best place in the world to participate in crypto asset markets."

Paul S. Atkins, SEC Chair, Speech, *Opening Remarks at the SEC Town Hall* (May 6, 2025), available at: https://www.sec.gov/newsroom/speeches-statements/atkins-townhall-05062025.

Paul S. Atkins, SEC Chair, Speech, *Keynote Address at the Crypto Task Force Roundtable on Tokenization* (May 12, 2025), available at: https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-crypto-roundtable-tokenization-051225-keynote-address-crypto-task-force-roundtable-tokenization.

Litigation

Supreme Court Agrees to Hear Activist Investor Suit

On June 30, 2025, the U.S. Supreme Court granted four closed-end funds' petition for a writ of certiorari, asking the Supreme Court to address whether Section 47(b) of the 1940 Act gives shareholders of registered investment companies a private right of action to bring lawsuits to rescind contracts that violate the 1940 Act. The Supreme Court's decision could have far-reaching consequences on the registered fund industry, as Section 47(b) addresses the enforceability of contracts made in contravention of the 1940 Act and the rules thereunder and remedies related thereto. Specifically, under Section 47(b), a contract violating the 1940 Act or whose performance violates the 1940 Act is "unenforceable" and, to the extent such contract has been performed, the remedy is to rescind the contract subject to certain limitations.

Saba's Lawsuit

By way of background, in 2023, Saba Capital, a well-known activist investor, filed a lawsuit against the four Petitioners, including FS Credit Opportunities Corp., in the U.S. District Court for the Southern District of New York, claiming that each Petitioner's adoption of a Maryland law "designed to make it more difficult for outside investors to gain control of the fund through shareholder voting rights" violated the 1940 Act. Under the Maryland Control Share Acquisition Act, if the board of a closed-end fund registered under the 1940 Act, like each Petitioner, adopts a resolution to become subject to the Act, then a person otherwise controlling at least 10% of shareholder voting power in such Maryland fund would not have voting rights "'with respect to the control shares' *unless* approved by a two-thirds vote of other shareholders" (emphasis added).

Saba is well-known in the market for its investment strategy targeting funds, such as Petitioners, "…that trade at prices below … current per-share net asset values, and then … pressur[ing] the funds to make changes that will cause share prices to rise." Consistent with this strategy, Saba began acquiring significant stakes in Petitioners, each of which were trading at prices below their respective NAVs, prior to filing the lawsuit at issue in 2023. Noting their increasing ownership, each of Petitioner's boards voted to opt into the Act, thereby subjecting Petitioner's shareholders to the Act's 10% voting limitation trigger, subject to override only by a vote of two-thirds of the other shareholders. Pointing to this, Saba argued that the resolutions approving the change and the bylaws reflecting such change violated Section 18(i) of the 1940 Act, which requires, in relevant part, that "every share of…a registered management company…be a voting stock and have equal voting rights with every other outstanding voting stock…", and sought rescission of the resolutions in reliance upon a purported private right of action granted to them under Section 47(b) of the 1940 Act.

The District Court granted summary judgment for Saba, ordering that the resolutions be rescinded. In deciding for Saba, the Court concluded that (i) Section 47(b) creates a private right of action with respect to contractual

obligations alleged to violate the 1940 Act and parties to such contracts may therefore "seek rescission of that violative contract"; (ii) the resolutions approved by Petitioners' boards had the effect of amending the respective Petitioner's bylaws (as discussed further below), and such bylaws "constitute a contract between the corporation and its shareholders"; and (iii) therefore, the resolutions at issue (and the amended bylaws), which Saba argued were in violation of Section 18(i) (as discussed further below), were subject to rescission and were "rescinded forthwith."

Upon appeal, the Second Circuit Court of Appeals affirmed the District Court decision, albeit in an unpublished summary order, meaning that while the Court of Appeals agreed with Saba's arguments regarding the Section 18(i) violation and determined the District Court had not "abuse[d] its discretion by granting rescission" under Section 47(b), it "did not otherwise address whether Section 47(b) confers a private right of action." However, in a 2019 decision, the Second Circuit had previously held that Section 47(b) "creates an implied private right of action for a party to a contract that violated the [1940 Act] to seek rescission of that violative contract", reasoning, for example, that, while Section 47(b) may not explicitly confer such a private right, the statutory language of the section is "effectively equivalent to providing an express cause of action."[1]

The Second Circuit's holding in *Oxford University Bank* and decision at issue for Petitioners created a circuit split amongst the Second Circuit Court of Appeals and the Third, Fourth, and Ninth Circuit Courts of Appeals,[2] which reached the opposite conclusion with respect to Section 47(b)—that it does not create an implied private right of action. The Third and Ninth Circuits reasoned, for example, that neither the language nor structure of the 1940 Act indicate Congressional intent to create such a right and that Section 47(b) merely establishes that contracts formed in violation of the 1940 Act are usually unenforceable. Petitioners argued that this Circuit split and the issues identified at the District Court level raise an important question of federal law warranting the Supreme Court's review.

United States Amicus Brief

On May 22, 2025, the Solicitor General of the United States' office filed a brief urging the Court to hear Petitioners' case and settle the question as to whether Section 47(b) creates a private right of action, such that private investors can sue funds directly for contractual rescission. The government's brief contends that Section 47(b) lacks rights-creating language in contrast to other 1940 Act provisions, which expressly create private rights of action (thereby evidencing Congressional intent to do so), including, for example, Section 36(b), added to the 1940 Act in 1970, relating to breach of fiduciary duty claims (e.g., "[a]n action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company…"). The government's brief goes on to note a relevant shift in case law, also beginning in the 1970s, whereby the Supreme Court "'adopted a far more cautious' approach to implied rights of action," shifting to "stress[] that Congress should

[1] *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019).

[2] *See, e.g., Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co.*, 677 F.3d 178 (3d Cir.), cert. denied, 568 U.S. 978, and 568 U.S. 979 (2012); UFCW Local 1500 Pension Fund v. Mayer, 895 F.3d 695 (9th Cir. 2018); Steinberg v. Janus Capital Mgmt., LLC, 457 Fed. Appx. 261 (4th Cir. 2011).

speak in 'explicit terms' if it wishes to authorize private suits",[3] a point reiterated in 2023 when the Supreme Court emphasized that Congress must speak "'*unambiguously*' if it wishes to create such judicially enforceable rights."[4] Pointing to Section 47(b) itself, the brief goes on to highlight a 1980 amendment to the Section, which updated the provision to replace an affirmative assertion that violative contracts "shall be void"—a phrase which the Supreme Court previously determined in a 1979 Advisers Act case[5] creates a private right of action—with "unenforceable". Looking at this intentional change, the government argues it is inappropriate to imply a private right of action for Section 47(b) because, among other things, (i) Congress was not explicit in its language creating that right and thereby Congressional intent is unclear at best, and (ii) the 1980 amendment to Section 47(b) eliminated any basis for applying the Supreme Court's holding and reasoning from the 1979 Advisers Act case, which would otherwise create an implied private right of action based on the Supreme Court's construction of the "shall be void" language at issue in that case. The government's brief goes on to argue that reading in an implied private right of action for Section 47(b) suits could interfere with SEC enforcement discretion, cause confusion in the industry, and, overall, have untold impact on investment fund operations.

Supreme Court Grants Certiorari

Having granted certiorari on June 30, 2025, the Supreme Court will prepare to hear the case in the 2025-2026 term and address the question of whether private investors can continue using Section 47(b) to challenge fund governance decisions.

FS Credit Opportunities Corp. et al. v. Saba Capital Master Fund, Ltd., et. al., No. 24-345 (U.S. June 30, 2025).

Brief for the U.S. as Amicus Curiae, *FS Credit Opportunities Corp. et al. v. Saba Capital Master Fund, Ltd., et al.*, No.24-345 (May 22, 2025).

[3] *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 132-133 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 288-289 (2001); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 535-36 (1984); *Cort v. Ash*, 422 U.S. 66, 79-85 (1975).

[4] *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 180 (2023); cf. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (requiring "clear and unambiguous terms").

[5] *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

SDNY Upholds Poison Pills but Limits Successive Poison Pills for Closed-End Funds in Fight Against Activists

On March 28, 2025, the U.S. District Court for the Southern District of New York ruled that shareholder rights plans (commonly known as "poison pills") are legal for closed-end funds under the 1940 Act, thereby affirming the important role that shareholder rights plans can play for closed-end funds when faced with hostile threats by well-funded activist arbitrageurs. Nonetheless, the Court granted summary judgement to Plaintiffs because the Court found that the shareholder rights plans had been "unlawfully" extended beyond the 120-day limit contained in Section 18(d) of the 1940 Act.

The case was initiated when well-known activist Saba Capital Management, L.P. and certain of its affiliates filed suit in January 2024 to challenge a fund's adoption of a series of rights plans in response to Saba's attempt to gain "creeping control" of the fund. In 2023, Saba began increasing its aggregate ownership of the fund, ultimately accumulating 16.87% of the outstanding shares, and submitted notice to the fund of its intent to nominate a full slate to the fund's board of directors. In response, on December 31, 2023, the fund announced its intent to adopt a shareholder rights plan. Shareholder rights plans are designed to make a hostile takeover more difficult by granting existing shareholders the right to purchase additional shares at a discounted price. A rights plan is triggered when an acquiring person surpasses a certain ownership threshold, which then allows all of the shareholders except for the acquiring person that triggered the plan to purchase additional shares thereby diluting the acquiring person's shares.

In this case, the rights plan gave each shareholder the right to purchase the fund's common shares at a price of $1.00 per share (such shares' par value) upon the event of: (i) a person acquiring 15% or more beneficial ownership of the fund, or (ii) a current shareholder with a pre-existing holding in excess of 15% acquiring an additional 0.25% or more of the fund's outstanding shares. The plan was set to expire 120 days after its adoption; however, prior to its expiration, a board committee of the fund adopted a substantively identical shareholder rights plan. The committee then proceeded to review and approve, in each instance prior to the expiration of the previous plan, two successive, substantively identical rights plans, which remained in place through April 18, 2025, thereby effectively barring Saba from purchasing any new shares of the fund without triggering the "poison pill" from the initial rights plan's adoption on December 31, 2023.

In its Complaint, Saba alleged that the rights plans violated Sections 18(d) and 23(b) of the 1940 Act. Section 18(d) requires that subscription rights (i) be issued ratably, and (ii) expire no later than 120 days after their issuance, whereas Section 23(b) generally prohibits a closed-end fund from selling its shares at a price below NAV unless a statutory exception applies. Section 23(b)(4) provides one such exception in connection with the exercise of a warrant issued in accordance with Section 18(d). Addressing Saba's arguments in turn, the Court first concluded that the shareholder rights plans were issued "ratably" in accordance with the 1940 Act because each shareholder was proportionally issued subscription rights under the plans based on the number of shares owned, including Saba. The Court specifically rejected Saba's arguments seeking to analogize a rights plan to the control share statute

at issue in *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*,[6] and Saba's attempt to focus the Court's analysis on the exercise of the rights rather than the issuance of the rights. Since the Court found that there was no violation of Section 18(d), the Court also held that there was no violation of Section 23(b). Next, the Court considered the 120-day expiration requirement and found that the initial rights plan adopted in December 2023, together with the subsequent rights plans adopted during the pendency of the applicable predecessor plan, never truly expired and thus, violated Section 18(d). The Court reasoned that a different finding "would render the expiration requirement meaningless" and concluded that Section 18(d) was intended to limit the actual durational existence of a subscription right, rather than just the terms of such a plan. The Court ordered that the rights plans be voided and granted rescission to Saba.

The Court explicitly did not reach the question of whether successive shareholder rights plans, adopted *after* the prior plan expired, would violate Section 18(d). Following the Court's ruling on Friday, March 28, 2025, which terminated the existing rights plan, and before market hours on Monday, March 31, 2025, the fund adopted a substantively similar shareholder rights plan to which Saba filed an instant motion to sanction the fund, arguing that the plan violated the Court's Order. However, given that the Court did not address whether successive rights plans issued after the expiration of a prior rights plan on nearly identical terms was a Section 18(d) violation, the Court dismissed Saba's request to sanction and indicated that Saba needed to challenge the new rights plan by a means other than a motion to enforce the prior Order. Thereafter, on April 18, 2025, Saba filed a new lawsuit seeking to void the most recently adopted rights plan and an injunction preventing the fund from implementing or adopting any rights plans. The fund also filed suit challenging the District Court's initial ruling.

Importantly, this is the second time a court has determined that closed-end funds may use rights plans consistent with Sections 18(d) and 23(b)(4).[7] What now remains to be settled is under what circumstances a closed-end fund may adopt successive rights plan in a manner consistent with Section 18(d)'s 120-day limitation.

Saba Cap. Master Fund, Ltd., et al. v. ASA Gold & Precious Metals, Ltd., et al., No. 24-CV-690 (JGLC) (S.D.N.Y. Mar. 28, 2025).

Saba Cap. Master Fund, Ltd., et al. v. ASA Gold & Precious Metals, Ltd., et al., No. 24-CV-690 (JGLC) (S.D.N.Y. Apr. 15, 2025).

Complaint, *Saba Cap. Master Fund, Ltd., et al. v. ASA Gold & Precious Metals, Ltd., et al.*, No. 25-3265 (S.D.N.Y. Apr. 18, 2025).

[6] 88 F.4th 103 (2d Cir. 2023).

[7] See *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 342 F. Supp. 2d 371 (D. Md. 2004); *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 485 F. Supp. 2d 631 (D. Md. 2007).

Shareholders File Suit Against BDC, Adviser, and Directors for Valuation Fraud

On February 28, 2025, shareholders of Firsthand Technology Value Fund, a business development company, filed a class action lawsuit against, among others, the fund, its investment adviser and board of directors for valuation fraud and breach of fiduciary duties.

The Complaint alleges that from at least January 2021, the fund's investment adviser, Firsthand Capital Management, Inc., under the board's oversight, knowingly inflated the value of the fund's investments while receiving management fees based on such values and concealed from investors that the fund's portfolio was worthless due to its investments in failing companies.

According to the Complaint, Wrightspeed, an electric vehicle company, whose CEO was also the fund's and Firsthand Capital's CEO, received approximately $46 million in investments from the fund despite never generating any revenue in over a decade of operations. Similarly, IntraOp Medical, a radiation cancer therapy device manufacturer, received over $51 million in fund investments while reportedly facing significant financial difficulties. Over the fund's life, approximately $30 million in management fees were paid to Firsthand Capital while the fund's share price declined dramatically, ultimately resulting in nearly a complete loss for shareholders. The Complaint alleged that Firsthand Capital continued to calculate its management fee based on the fund's inflated NAV, creating a conflict of interest that incentivized maintaining the artificial valuations. The Complaint further alleged that even as evidence mounted that these investments were failing, the fund knowingly issued false and materially misleading public statements and the board approved changes to the fund's valuation methodologies to maintain the inflated valuations.

In November 2023, the fund finally acknowledged that its investments in Wrightspeed and IntraOp Medical were essentially worthless, writing down Wrightspeed's and IntraOp Medical's values to $0 and $168,000, respectively. As a result, the fund's share price declined from $7.25/share in 2021 to $0.30/share in 2023. Thereafter, the board announced that the fund would liquidate. Plaintiffs claimed that basic due diligence would have revealed the true condition of these companies earlier, but instead Firsthand Capital inflated the investments' asset valuations that the directors repeatedly approved.

In 2021, a concerned shareholder submitted a non-binding proposal for the board to "seek and pursue any and all measures to enhance shareholder value" including: (i) the fund's termination; (ii) liquidation of fund assets with distribution of available cash to shareholders; (iii) tender offers for fund shares using available cash from any and all investment exits; (iv) merger of the fund into an entity offering shareholder exits near NAV; or (v) other measures likely to allow shareholders to exit the fund near its NAV. Firsthand and the board opposed the proposal stating it was not in the best interest of the fund and its shareholders. The board claimed that it was continuously evaluating opportunities to enhance shareholder value and the proposal was unnecessary, which was untrue based on internal board materials. In early 2021 and for 2022 and 2023 shareholder meetings, a shareholder submitted

proposals to terminate the investment advisory and management agreements with Firsthand Capital but the board opposed these proposals, stating that removing Firsthand Capital "would likely severely impair the short-term and long-term value of the [fund's] investment portfolio." Moreover, Firsthand Capital and the board, through its approval, used illegal defensive mechanisms to avoid losing their positions and salaries by amending and restating the fund's Bylaws to state that the Maryland Control Share Acquisition Act applied to any acquisition or proposed acquisition of shares, thereby barring any unaffiliated shareholder from voting more than 10% of the fund's outstanding shares in order to limit their ability to influence the management of the fund. As a result, Plaintiffs asserted that these restrictions violated Section 18(i) of the 1940 Act, which provides that each share issued by a registered investment company must have "equal voting rights" with every other outstanding voting share. The board also carved out an exemption for the fund's CEO, who also served as Firsthand Capital's CEO, to permit him to continue to purchase, hold, and vote shares greater than 10%.

The Complaint seeks damages, the appointment of an independent receiver to value the fund and liquidate its remaining assets, an audit of profits realized by Defendants' alleged misconduct, and attorney costs.

Complaint, *Star Equity Fund, LP v. Firsthand Capital Management, Inc., et al.*, No. 1:25-CV-00677-SAG (D. Md. Feb. 28, 2025).

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Memoranda

New Guidance From the SEC's Division of Trading and Markets Signals a Welcome Shift on the SEC's Approach to Crypto Asset Activities and Distributed Ledger Technology

May 20, 2025

Introduction

In a major development, the Staff of the Division of Trading and Markets of the U.S. Securities and Exchange Commission (the "**SEC**" or the "**Commission**") released a new set of Frequently Asked Questions (the "**FAQs**") designed to provide further guidance concerning the application of the federal securities laws to crypto asset activities involving broker-dealers and transfer agents.[8] The SEC Staff and FINRA Staff also withdrew their 2019 Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities (the "**2019 Joint Staff Letter**"), which outlined several regulatory considerations, mostly unworkable, for broker-dealers operating in the crypto asset markets.[9] The FAQs indicate fresh thinking at the SEC and FINRA, and serve as a major step forward in opening the crypto asset markets to traditional financial services intermediaries.

For context, Commissioner Hester Peirce issued a statement earlier this year seeking crypto market participants' views on a range of topics, including several issues affecting broker-dealers and other market intermediaries.[10] Since that time, numerous market participants have submitted written responses to Commissioner Peirce's questions, and the SEC's Crypto Task Force has hosted roundtable events focused on a range of key issues impacting the crypto asset markets, including issues related to broker-dealer custody and the crypto asset markets generally. Indeed, in recent remarks, SEC Chair Atkins recognized the existence of unresolved issues and explained how he has "directed Commission staff" to begin drafting rule proposals for the crypto industry.[11]

The SEC and FINRA previously issued several pronouncements related to the application of the federal securities laws and FINRA rules to broker-dealer activities, including the 2019 Joint Staff Letter, a Staff no-action letter, and the Commission's 2020 statement entitled "Custody of Digital Asset Securities by Special Purpose Broker-Dealers"

[8] SEC, Staff Guidance, *Division of Trading and Markets: Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technology*, (May 15, 2025), available here.

[9] Commissioner Peirce recently stated in public remarks that "[n]othing in the federal securities laws or regulations currently restricts broker-dealers with an alternative trading system from offering trading in non-securities alongside securities, but further clarification from the Commission staff on this topic may be helpful to market participants as well." *See*, Commissioner Hester M. Peirce, Speech, *New Paradigm: Remarks at SEC Speaks*, (May 19, 2025), available here.

[10] Commissioner Hester M. Peirce, Statement, *There Must Be Some Way Out of Here*, (Feb 21, 2025), available here.

[11] Chairman Paul S. Atkins, Speech, *Prepared Remarks Before SEC Speaks*, (May 19, 2025), available here.

(the "**SPBD Statement**").[12] In practice, very few broker-dealers have sought to operate in the crypto markets in reliance on the regulatory positions set forth in those pronouncements because they largely have been impracticable to follow. The new FAQs appear to be better informed, and much more realistic. Following is a description of the new guidance.

Broker-Dealer Financial Responsibility

The FAQs clarify the application of Rule 15c3-3 under the Securities Exchange Act of 1934 (the "**Exchange Act**" and Rule 15c3-3 thereunder, the "**Customer Protection Rule**" or the "**Rule**") to certain crypto asset activities, as summarized below:

- Broker-Dealers Can Custody Customers' Non-Security Crypto Assets: The Staff confirmed that paragraph (b) of the Customer Protection Rule, which requires broker-dealers to obtain and maintain physical possession or control of all fully-paid securities and excess margin securities carried by a broker-dealer, does not apply to non-security crypto assets. By clarifying that a broker-dealer that maintains custody of both securities and non-security crypto assets need only comply with the paragraph (b) with respect to the securities it holds for customer accounts, the FAQs indirectly confirm that broker-dealers can engage in both securities and non-security crypto asset activities within the same broker-dealer registrant. This represents a significant departure from the SPBD Statement, which provided that a broker-dealer that engages in crypto asset securities activities in reliance on the SPBD Statement could not be also engaged in non-securities activities, including activities relating to non-security crypto assets, such as bitcoin, ether, and others.
- Broker-Dealers Can Establish Control of a Crypto Asset That Is a Security: The FAQs also confirmed that a broker-dealer can establish control of a crypto asset security, for purposes of the Customer Protection Rule, by complying with paragraph (c) of the Rule.[13] The Staff noted that, although certain control locations in paragraph (c) of the Rule reference a security being in certificated form to establish control under that provision, the Staff would not object if crypto asset securities are not in certificated form when held at an otherwise qualifying control location under paragraph (c). This too represents a significant change in regulatory posture. The 2019 Joint Staff Letter, for example, raised significant doubts about a broker-dealer's ability to determine that it, or its third-party custodian, maintains custody of a crypto asset security given that a custodian may not be able to demonstrate that no other party has a copy of the private key related to the security.
- Compliance With the Special Purpose Broker-Dealer Statement is Not Mandatory: The Staff noted that compliance with the SPBD Statement is not mandatory for broker-dealers seeking to custody customer crypto assets securities. This also acts to confirm indirectly that a broker-dealer can engage in both

[12] *See*, *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, Exchange Act Release No. 34-90788 (Dec. 23, 2020), 86 FR 11627 (Feb. 21, 2021), available here.

[13] Paragraph (c) of the Customer Protection Rule specifies the methods by which securities will be deemed to be securities that are under the control of a broker-dealer.

traditional securities and crypto asset securities business activities within the same broker-dealer registrant given the restrictions imposed by the SPBD Statement.

- Spot Activities Permitted; Bitcoin and Ether Are Readily Marketable (20% Haircut): The FAQs further explain that custody and capital requirements do not prohibit a broker-dealer from facilitating in-kind creations and redemptions in connection with spot crypto exchange-traded products ("**ETPs**"). The FAQs go on to note that broker-dealers holding proprietary positions in the assets underlying an ETP would need to account for those assets as part of their net capital calculations but could treat proprietary positions in bitcoin and ether as being readily marketable for purposes of determining whether the 20% haircut applicable to commodities applies to such crypto assets. Previously, crypto assets were generally regarded as non-allowable assets under the net capital rules that would be subject to a 100% haircut resulting in significant and burdensome carrying costs for broker-dealers. Although only bitcoin and ether were explicitly mentioned in the FAQs, Commissioner Peirce, in her corresponding statement to the FAQs, suggested that other crypto assets may also be considered readily marketable.[14] Since this response was issued in the context of ETPs, however, it remains unclear whether bitcoin and ether (and any other crypto assets) would be viewed as readily marketable when not held as proprietary positions in connection with ETP creation and redemption activities.
- Unregistered Investment Contracts Not Protected by SIPC; Only Securities Covered by SIPC: In line with the definition of "security" under the Securities Investor Protection Act of 1970 ("**SIPA**"), the FAQs confirm that investment contracts that are not the subject of a registration statement filed under the Securities Act of 1933, as amended, are not protected under SIPA. Additionally, the FAQs clarify that non-security crypto assets similarly are not protected under SIPA since SIPA protection only extends to securities.

Transfer Agents

The FAQs also provide helpful guidance on the application of transfer agent registration and recordkeeping requirements to crypto asset activities. We outline the key points below:

- Transfer Agent Registration Remains a Facts/Circumstances Test: The Exchange Act defines a transfer agent to mean "any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical

[14] Commissioner Hester M. Peirce, Statement, *An Incremental Step Along the Journey: The Division of Trading Markets' Frequently Asked Questions Relating to Crypto Asset Activities and Distributed Ledger Technologies*, (May 15, 2025), available here. ("The [FAQ's] limitation to the capital treatment of bitcoin and ether does not mean that broker-dealers may hold only those crypto assets or that only those crypto assets may be readily marketable for purposes of the net capital rules.").

issuance of securities certificates" (such activities, "**Transfer Agent Activities**").[15] In considering whether a person acting as a transfer agent for an issuer of a crypto asset security is required to register with the SEC as a transfer agent, the FAQs confirm that transfer agent registration remains a facts and circumstances test. The FAQs nonetheless note that to determine whether transfer agent registration is necessary when providing services for crypto asset securities, persons should (i) determine whether those securities are securities registered under the Exchange Act (or are those securities that are exempt from registration) and (ii) analyze the services, functions, or activities they are performing with respect to those securities and determine whether any of those services, functions, or activities qualify as Transfer Agent Activities. In turn, the FAQs provide that if a person is not providing services for Exchange Act registered securities (or those securities that are exempt from registration) or is only providing services for such securities that do not qualify as Transfer Agent Activities, such a person would not be required to register as a transfer agent. Therefore, the FAQs provide much needed clarity around transfer agent registration activities for crypto industry participants.

- A Blockchain Can Serve as the Master Securityholder File: The FAQs make clear that a registered transfer agent can utilize distributed ledger technology (e.g., a blockchain network) as its official Master Securityholder File. The FAQs also recognize that, so long as a transfer agent ensures that its records are at all times secure, accurate, up-to-date, produceable to the Commission and the Staff in an easily-readable format, and maintained for the required time periods under applicable rules, the specific technology, systems, or files that comprise the records would generally be within a transfer agent's discretion.

Conclusion

The FAQs represent the latest effort by the Staff to provide clarity to the crypto asset industry regarding the application of the federal securities laws and are further evidence of a major shift in regulatory posture toward crypto assets generally. Although there remain numerous unresolved issues under the federal securities laws for broker-dealers, investment advisers, and funds operating, or seeking to operate, in these markets, the FAQs provide significant clarity to market participants that may have been unwilling to provide crypto asset services based on prior regulatory positions. More broadly, the SEC's much-publicized retreat from aggressive enforcement in the crypto sector should give registrants comfort that good faith efforts to comply with emerging guidance will not later be second-guessed by the Staff, at least in the current Administration.

We will continue to monitor crypto-related developments and are available to assist asset managers and other financial services clients in navigating this evolving regulatory landscape.

[15] 15 U.S.C. § 78c(a)(25).

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Up Next From the SEC: Increased Co-Investment Flexibility

April 21, 2025

Overview

The U.S. Securities and Exchange Commission ("SEC") is beginning to move forward on expressed agenda items to improve retail investor access to alternative investments and private markets. This is one manifestation of a more general trend of the SEC's receptivity to ideas for modernizing and streamlining the regulatory framework of the Investment Company Act of 1940 ("1940 Act") and for permitting greater innovation by, and more efficient operation of, 1940 Act-regulated funds ("1940 Act Funds").

Several projects would further this agenda, including allowing privately-offered business development companies ("BDCs") to issue multiple classes of shares, removing staff guidance that restricts retail funds from investing more than 15% of their assets in private funds, and restoring the ability of 1940 Act Funds to cross trade fixed income securities. At the top of the modernization wish list, however, has been a more principles-based version of exemptive relief that allows 1940 Act Funds to co-invest with affiliated entities. To that end, on April 3, 2025, the SEC published a notice of its intent to grant a co-investment exemptive order on terms that are substantially more flexible than existing co-investment exemptive relief. This new relief, when granted, will permit sponsors to establish more flexible, principles-based, and commercial co-investment programs for 1940 Act Funds that are registered closed-end investment companies ("CEFs") or BDCs (together with CEFs, "Regulated Funds") and should provide many benefits to investors in Regulated Funds and the issuers that raise capital from these fund complexes. The SEC granted this notice in connection with an application submitted by FS Credit Opportunities Corp., and several other sponsors have submitted applications mimicking the same terms and conditions. The SEC has begun publishing notices in respect of these "copycat" applications as well.

Background

At the core of the 1940 Act are broad and stringent rules regulating transactions with affiliates. A 1940 Act Fund's affiliates under the 1940 Act generally include, among others, other 1940 Act Funds managed by the same sponsor, the sponsor's private funds, the sponsor's proprietary accounts, companies controlled by the sponsor or its private funds and/or 1940 Act Funds (which could include, among others, insurance companies, other asset managers, real estate investment trusts, and other retail-oriented investment products), and, with respect to some 1940 Act Funds, companies in which the sponsor or its private funds and/or 1940 Act Funds own as little as 5% of the voting securities. When a sponsor has both a material pecuniary incentive and the ability to cause a 1940 Act fund to participate in a transaction, the 1940 Act generally prohibits the 1940 Act Fund from investing in a privately placed security alongside its affiliates where terms in addition to the price of the security are negotiated; however, the SEC has developed exemptive relief that generally permits such "co-investments" for Regulated Funds. This co-investment exemptive relief has historically been complex, prescriptive and highly technical in application, resulting in undesirable commercial dynamics.

Key Improvements and Simplifications

Streamlined Investment Allocations:

- **Current Practice**: Under existing co-investment relief, all potential co-investment transactions that align with a Regulated Fund's investment objectives and strategies, and that are within a Regulated Fund's "board-established criteria" for co-investment opportunities, must be offered to the Regulated Fund. This often requires investment advisers to deviate from their standard investment allocation processes, creating unnecessary administrative burden and constraining an adviser's ability to allocate investment opportunities in the manner most beneficial to all of its clients.
- **New Relief**: The new relief will require investment advisers (and any direct or indirect, wholly- or majority-owned subsidiary of an Adviser or its affiliates, such as proprietary accounts) to adopt allocation policies that are reasonably designed to ensure that the Adviser negotiating a co-investment transaction considers the interest in the transaction of any participating Regulated Fund and that opportunities to participate in co-investment transactions are allocated in a manner that is fair and equitable to every Regulated Fund participating in the co-investment program. This revised standard should allow an investment adviser to adopt a more principles-based approach to determine how to allocate potential co-investment opportunities in an equitable manner across all clients without imposing the prescriptive process contained in existing co-investment relief.

Modernizing the "Propping Up" Condition:

- **Current Practice**: Under existing co-investment relief, a Regulated Fund cannot participate in an initial co-investment transaction if any affiliates have a pre-existing investment in the issuer and the Regulated Fund does not. This prohibition is based on the concern that a later-in-time investment by a Registered Fund could be used to "prop up" earlier investments by affiliated entities, but in practice it often has prevented Regulated Funds, particularly new products, from investing in attractive opportunities with issuers that are well known by the sponsor. Moreover, the prohibition, without even a de minimis exception, fails to recognize that many large asset managers have business units that invest in different types of investments, and thus can unduly preclude a Regulated Fund from investing in many portfolio companies where its affiliate's pre-existing investment does not present the risks of overreaching that the prohibition on joint transactions is intended to address.

  The existing co-investment relief also limits the ability of Regulated Funds, private funds, and other affiliated entities to participate in follow-on transactions. Among other issues, (i) new Regulated Funds cannot be added to an older deal, and (ii) entities that acquired a position in the issuer outside of the co-investment order (e.g., through a season and sell process or other subsequent secondary transaction) arguably cannot participate in follow-ons. This has meaningfully constrained the ability of complexes that include Regulated Funds from participating fully, or participating at all, in attractive follow-on opportunities where their sponsor's other clients are an incumbent investor.

- **New Relief**: The new relief permits a Regulated Fund's independent board members to approve participation in investments where an affiliate has an existing position in the issuer, even if the Regulated Fund does not. Relatedly, the new relief eliminates entirely the concept of a "follow-on investment" and simply treats all co-investment transactions as individual transactions that need to meet the requirements of the co-investment relief. The new relief applies a simple rule that independent board member approval is required for a Regulated Fund's participation in each co-investment transaction in an issuer in which an affiliate has an interest unless (i) the Regulated Fund already holds the same security as its affiliates, and (ii) all participants participate on a basis that is in approximate proportion to each participant's then-current holdings.

  Specifically, if board approval is required under the new relief, a majority of the Regulated Fund's board members who have no financial interest in the co-investment transaction and a majority of the board members who are not interested persons of the Regulated Fund must find that:

  - the terms of the co-investment transaction are reasonable and fair to the shareholders or partners of the Regulated Fund and do not involve overreaching of the Regulated Fund or its shareholders or partners on the part of any person concerned; and
  - the proposed transaction is consistent with the interests of the shareholders or partners of the Regulated Fund and is consistent with the policy of the Regulated Fund as recited in its public filings and shareholder reports.

  The board members must record in their meeting minutes and preserve in their records a description of the co-investment transaction, their findings, the information or materials upon which their findings were based, and the basis therefor.

  This new provision for board member approval of co-investments where an affiliate has an existing position in the issuer should allow Regulated Funds and their affiliates to access a significantly broader array of investment opportunities, including attractive deals where a sponsor has the benefit of extensive experience with the operations of the issuer. It will also greatly improve the ability of newly launched Regulated Funds to access attractive investment opportunities, provide a smooth ramp period into core alternatives strategies, and allow fund complexes that include Regulated Funds to more readily pursue attractive deal opportunities without artificial constraints.

Reduced Frequency of Board Approval:

- **Current Practice**: Independent board member approval is required for (i) every new co-investment involving a Regulated Fund, and (ii) every follow-on investment or disposition involving a Regulated Fund, unless the transaction is allocated pro rata among the participants or involves tradeable securities. For asset management groups that have an active alternative investment strategy, this requirement can impose a significant burden on boards of participating Regulated Funds, with board members frequently called upon to review and consider the approval of many time sensitive co-investment opportunities between regularly scheduled meetings.

- **New Relief**: As described above, independent board member approval will only be necessary for acquisitions or dispositions made in reliance on the relief if an affiliate has an existing investment in an issuer and the Regulated Fund either does not have an investment in the same securities of the issuer or is not participating pro rata. This change should serve to focus a Regulated Fund board's attention on transactions with more significant potential for conflicts.

More Categories of Affiliates Can Benefit:

- **Current Practice**: Existing co-investment orders typically cover BDCs, CEFs, and private funds or other pooled investment vehicles relying on Section 3(c)(1), 3(c)(7), 3(c)(5)(C) or Rule 3a-7 under the 1940 Act advised by the Adviser or an affiliate, along with certain controlled fund vehicles and proprietary accounts.
- **New Relief**: The new order extends eligibility to several important categories of entities:
  - An Adviser and its affiliates (including, for instance, operating company conglomerates and employees' securities companies, but not including open-end investment companies) and including any direct or indirect, wholly- or majority-owned subsidiary of an Adviser or its affiliates.
  - BDCs and CEFs sub-advised by a sponsor where the primary adviser is unaffiliated with the sponsor.
  - Unconsolidated joint venture subsidiaries of BDCs and CEFs.
  - Any entity that would be an investment company but for Section 3(c) under the Investment Company Act of 1940 or Rule 3a-7 thereunder (i.e., not only entities relying on Sections 3(c)(1), 3(c)(5)(C), and 3(c)(7)).

Notably, the new relief does not extend to 1940 Act Funds that are open-end investment companies (*i.e.*, mutual funds or ETFs); therefore, these types of 1940 Act Funds still cannot participate in negotiated co-investments with affiliates in reliance on the co-investment order.

Principles-Based Reporting and Compliance Regime

- **Current Practice**: Quarterly reports to the board are required, with technical, prescriptive requirements that detail, among other things, all co-investments not offered to a Regulated Fund, follow-ons, dispositions, and declined investments.
- **New Relief**: The new order instead allows a Regulated Fund's board to determine the format and content of quarterly reports regarding the co-investment program. In addition, each Regulated Fund's investment adviser and chief compliance officer ("CCO") must also provide a summary of significant compliance matters, and the adviser and CCO must also supply an annual report covering the Regulated Fund's participation in the co-investment program and any material changes in the investment adviser's policies or affiliate participation.

Unresolved Issues

While the new relief is a welcome step forward, there are several remaining issues that would benefit from further engagement with the SEC:

Same Terms and Classes of Securities:

- **Current Requirement**: Affiliates must invest on the same terms and in the same classes of securities.
- **Potential Improvement**: Greater flexibility could allow affiliates to participate in different parts of the capital structure. To mitigate potential conflicts, co-investments in different parts of the capital structure could require supplementary board approval and reporting.

Compensation Restrictions:

- **Current Requirement**: Affiliates must share transaction fees pro rata (including fees received in connection with the right of one or more Regulated Funds or affiliates to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company) and cannot accept other compensation related to participation in a co-investment transaction, except (1) brokerage or underwriting compensation permitted by Section 17(e) or 57(k) of the 1940 Act or (2), in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund or affiliate and its Adviser.
- **Potential Improvement**: Co-investment transactions can be financially complex, particularly when a transaction is designed to provide financial support in a specific part of an issuer's capital structure or during a particular stage of an issuer's business cycle. Different types of entities can provide value when they source and manage complicated investments, so co-investment relief could be revised to reflect these market realities and allow for compensation for these valuable services while still preventing conflicts of interest and protecting investors.

Limited Relief for Principal Transactions:

- **Current Requirement**: The principal transaction prohibitions of the 1940 Act frequently prevent affiliates in a co-investment program from entering into follow-on investments in issuers that become affiliated due to the initial co-investment transaction. For example, if affiliates in a co-investment program make a substantial equity investment in an issuer, the issuer may become an affiliate of the Regulated Funds in the co-investment program by virtue of their equity ownership stake from the initial co-investment transaction. Accordingly, the 1940 Act restrictions on principal transactions prevent Regulated Funds in the co-investment program from making follow-on investments in the now-affiliated issuer when an exemption from the principal transaction prohibitions is not available.

- **Potential Improvement**: The current principal transaction framework is a major constraint to retail investors' access to certain investment strategies, such as private equity or infrastructure, that seek to make control investments or exert technical control over portfolio companies. Future relief could provide targeted exemptions from the 1940 Act prohibition on principal transactions to facilitate follow-on investments in issuers that become affiliates of the Regulated Funds.

Conclusion

The SEC's new co-investment exemptive order represents a significant step forward, simplifying processes and reducing barriers for Regulated Funds and affiliated entities. However, ongoing engagement with the SEC will be crucial to ensure that any co-investment rulemaking evolves further to allow individual investors to benefit from access to additional investment opportunities that the new co-investment relief continues to limit to institutional investors.

For further information regarding this memorandum, please contact one of the Registered Funds Partners or Counsel.

Regulatory and Enforcement Alert

SEC and CFTC Further Extend Compliance Date for Form PF Amendments

June 12, 2025

On June 11, 2025, the Securities and Exchange Commission (the "SEC"), together with the Commodity Futures Trading Commission ("CFTC"), voted to further extend the compliance date for the amendments to Form PF adopted on February 8, 2024 (the "Amendments").[16] The original compliance date for the Amendments was March 12, 2025, and in January 2025, the SEC extended the compliance date to June 12, 2025.[17] As a result of yesterday's extension, the new compliance date for the Amendments is **October 1, 2025**.

The Amendments increase the amount of information required to be reported on Form PF, and in particular, expand the amount of trading data private fund advisers are required to report. The Amendments also significantly limit an adviser's ability to consolidate reporting for private funds. Notwithstanding the previous extension of the compliance date for the Amendments, certain challenges in the implementation of the Amendments and interpretive questions regarding the Amendments remain. For instance, in extending the compliance date, the SEC cited comments from industry participants that an extension is needed to provide filers and their third-party service providers who offer Form PF reporting system software more time to develop and test their required reporting systems, which will help improve the quality of the data reported on Form PF.[18]

In his statement accompanying the extension and in the open meeting, SEC Chairman Paul Atkins noted that the extension of the compliance date for the Amendments is intended to address interpretive questions as well as the concern that private fund advisers have sufficient opportunity to interpret, implement and test their systems to ensure accurate and consistent reporting.[19] He also questioned whether the government's use of the data required to be reported by Form PF justifies the burdens that it imposes on fund managers (a point also reiterated by

[16] *See* SEC Press Release, Extension of Form PF Amendments Compliance Date (June 11, 2025), *available* here. The SEC previously adopted amendments to Form PF in May 2023, February 2024, and April 2025. *See* Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting, Advisers Act Release No. 6297 (May 3, 2023), *available* here. *See* Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, Advisers Act Release No. 6546 (Feb. 8, 2024), *available* here. *See* Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, Advisers Act Release No. 6865 (April 11, 2025), *available* here.

[17] *See* SEC Press Release, Extension of Form PF Amendments Compliance Date (Jan. 9, 2025), *available* here.

[18] *See* Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers; Further Extension of Compliance Date, Advisers Act Release No. 6883 at 4 (June 11, 2025) ("Current Compliance Date Extension Release"), *available* here.

[19] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Paul S. Atkins, Chairman (June 11, 2025), *available* here.

Commissioners Uyeda and Peirce),[20] noting the importance of weighing the benefits to the SEC in receiving the information against the costs for private fund advisers to provide such information.[21] Chairman Atkins further emphasized the importance of minimizing gaps in the data currently required to be reported by the form.

Chairman Atkins also stated that the SEC staff plans to conduct a comprehensive review of Form PF, raising the possibility that certain components of current Form PF or the Amendments may be reassessed altogether.[22] Commissioner Peirce expressed support for the Chairman's directive to review Form PF to "determine whether [Form PF] serves its intended systemic risk mitigation purposes."[23] In contrast, Commissioner Crenshaw cautioned that the extension of the compliance date comes amid broader efforts to reassess existing regulation and its effect on capital formation, and she warned that a reduction in information available to the SEC may undermine the regulator's ability to do "data-driven" rulemaking in the future and to mitigate systemic risk.[24]

While the prior extension of the Amendments was a welcome reprieve to many managers, this week's extension offers further relief to quarterly Form PF filers (i.e., large hedge fund advisers to qualifying hedge funds). Given the October 2025 compliance date, we expect large hedge fund advisers will be required to file the updated Form PF beginning with their **Q3 2025 filings** (relevant for quarterly filers), subject to any further guidance from the SEC. In light of the significant operational complexity posed by some of the changes to Form PF in the Amendments, advisers would be well-served by continuing their preparatory efforts.

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[20] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Commissioner Mark T. Uyeda (June 11, 2025), *available* here. *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Commissioner Hester M. Peirce (June 11, 2025), *available* here.

[21] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Paul S. Atkins, Chairman (June 11, 2025), *available* here.

[22] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Paul S. Atkins, Chairman (June 11, 2025), *available* here. *See also* Current Compliance Date Extension Release at n.12 ("During the interim period prior to the compliance date of October 1, 2025, the [SEC and CFTC] may continue to review whether…Form PF raises substantial questions of fact, law, or policy.")

[23] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Commissioner Hester M. Peirce (June 11, 2025), *available* here.

[24] *See* Statement at Open Meeting on Further Extension of the Form PF Compliance Date, Commissioner Caroline A. Crenshaw (June 11, 2025), *available* here.

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SEC Watch

July 2, 2025

The SEC Clears the Decks

Summary: Chairman Atkins announced that "Policymaking will be done through notice and comment rulemaking, not through regulation-by-enforcement." Since January, the SEC has fundamentally recalibrated its enforcement program.

- Most notably for investment advisers, the SEC withdrew the Safeguarding Rule (the proposed replacement for the Custody Rule), rules requiring disclosure of ESG practices, rules on outsourcing to service providers, cybersecurity risk and breach rules, and rules concerning predictive data analytics that covered AI-related conflicts.
- On June 11, the SEC extended the compliance date for the new Form PF, ending speculation on what the Atkins Commission would do with the highly criticized amendments. Most importantly, the Commission signaled that it would consider further changes to the Form, with Commissioners questioning whether the burdens of compliance with the new Form are worth any potential benefits.

Takeaway: The Commission is executing its stated pivot toward streamlining capital formation and away from the intense regulation of the Gensler era. We expect the Commission to continue with its red tape cutting initiatives, and will be closely following where the Commission lands on Form PF.

Best Practice Tip: Revisit any disclosures included to address the proposed rules. Maintain efforts to comply with the new Form PF by the new compliance date but expect that recent amendments to Form PF will not survive in their current form.

Setting the Stage for Asset Managers

Summary: On June 13, Brian Daly was named the new Director of Investment Management and Jamie Selway was named Director of Trading and Markets. Daly is a veteran of private practice in the investment management space, formerly a partner at both Akin Gump and Schulte Roth law firms. Daly replaces Natasha Vij Greiner, who executed the Chair's mission under both Gensler and Atkins. Selway is experienced in market structure and institutional trading across multiple asset classes. Selway commented that he looks forward to "enable[ing] innovation, to the benefit of our nation's investors."

Takeaway: Both Daly and Selway are new to the Commission and bring a market-driven perspective shaped by years in the industry, including in the digital assets and cybersecurity areas. As the Commission works to expand

retail access to alternative assets, Daly's experience advising private fund managers and Selway's FinTech experience will likely shape expected changes to the regulatory framework. These personnel changes set the stage for a Commission that favors industry flexibility and more modest oversight.

Best Practice Tip: Daly and Selway will assume their roles in a matter of days so gear up for important speeches and industry engagement that will provide clues to specific priorities for registered entities. To the extent there is uncertainty under the rules during this transition period, consider erring on the side of seeking no-action guidance to protect against a potential enforcement action down the line.

Signs of Life on the Enforcement Front

Summary: As reported in June, Enforcement Staff levels have been cut to historic lows with no plans of increasing. Instead, the SEC's 2026 budget proposal indicates an intent to further cull the agency's headcount. Not only this, the proposed budget reflects an Enforcement headcount that dips to levels not seen since 2010.

- That said, dormant investigations have rumbled back to life and a flurry of enforcement actions were announced. Notably those involving asset managers, such as Nagler/New Line Capital and North East Asset Management, reflect bread and butter actions. Both involve allegations that these managers defrauded investors resulting in direct monetary harm to their clients.

Takeaway: Despite the uptick in activity, the industry continues to wait for the announcement of a new Director of Enforcement. Until one is named, it will be hard to definitively know where the Enforcement Division's specific priorities will lie, although the next few years will unquestionably be a period of restraint (fewer sweeps, lower penalties) relative to the prior Commission.

Best Practice Tip: As Enforcement begins to re-engage, stalled investigations that remain quiet may warrant some cautious optimism that they are potential candidates for termination. Prep now to position open regulatory matters for closure if the Staff resurfaces and keep an eye out for the next SEC Watch.

SCOTUS Leaves Disgorgement Question to the Circuits—For Now

Summary: In *SEC v. Navellier & Associates*, the defendant asked the Supreme Court to consider whether the SEC may seek and federal courts award monetary disgorgement for investors who have not suffered any pecuniary harm. The petition arose out of a 2024 1st Circuit decision holding that the SEC and the courts may. Defendant argued this creates a circuit split with the 2nd Circuit which held the opposite. SCOTUS declined to take up the case, denying Navellier's cert petition on June 6.

Takeaway: As case law develops across the circuits—or until SCOTUS decides to weigh in—the forum in which the Commission brings enforcement actions where it cannot show pecuniary harm to investors will take on an outsized importance.

Best Practice Tip: When considering settlement options in ongoing enforcement investigations, take stock of the existing precedent in your jurisdiction and whether courts have opined on the permissibility of awarding monetary disgorgement in cases that lack an investor harm element.

Inaugural Edition | June 5, 2025

The Elephant in the Room: The SEC Retreats From Regulation by Enforcement

Summary: Chairman Atkins announced that "Policymaking will be done through notice and comment rulemaking, not through regulation-by-enforcement." Since January, the SEC has fundamentally recalibrated its enforcement program.

- The Commission proactively closed out an extraordinary number of filed enforcement actions and ongoing investigations:
    - Signaling a shift in the regulatory approach to the crypto industry, the Commission dismissed with prejudice prominent bellwether enforcement actions against several crypto players.
    - The shift also touched asset managers with the voluntary dismissal of a litigated dealer registration and a litigated MNPI policies case. The era of aggressive enforcement of minor record-keeping infractions is likewise over.

Takeaway: The Commission's willingness to walk away from enforcement actions authorized by the prior administration at such a late stage goes to show new leadership's commitment to shifting away from governing by subpoena, as well as the complete collapse of deference to the prior Commission. Read more about that agenda as described by Atkins to the House Appropriations Subcommittee, here.

Best Practice Tip: Enforcement is recalibrating and awaiting a signal for priorities in the asset management industry—with new Enforcement Division leadership still an open question, take advantage of the quiet, address nascent regulatory issues and generally aim for a clean house.

Material Personnel Changes

Summary: With over 600 SEC staff departures in 2025 (approximately 15% of headcount), coupled with a slate of new faces in leadership, the SEC phone directories are in need of a reprint.

- Paul Atkins was confirmed by the Senate and sworn in on April 21, 2025 as the 34th Chairman of the Commission. The Commission now has three Republican members and one Democratic member.
- The Enforcement and Exams divisions specifically underwent a targeted reorganization that eliminated the regional director role in favor of just four deputy directors of enforcement, with Jason Burt in Denver being elevated to supervise the specialized units that focus on asset management enforcement.

Takeaway: The unprecedented staff departures, DOGE's continued presence on the scene, and the ongoing federal hiring freeze will contribute to the existing slowdown in enforcement activity as the Division tries to do more with less. Will the talent drain make for less market-savvy, slower exam and enforcement programs—time will tell.

Best Practice Tip: Expect some fits and starts in any ongoing enforcement actions involving your business and keep an eye out for additional changes to the structure and operations of the Commission as the administration doubles down on its efforts to improve efficiency and oversight. As new leadership within Enforcement is installed, the time could be ripe to proactively educate new staff or leadership about your arguments in any ongoing matter.

Back to Basics & a Pivot to Prioritizing the Protection of Retail Investors

Summary: "It is a new day at the SEC," says Atkins at SEC Speaks where he emphasized the Commission's decision to prioritize, among other things, "allowing all investors to gain the benefits of our robust markets." Specifically, Atkins announced his intent to reverse the Commission's historical choice to prevent closed-end funds that invest in private funds from selling to retail investors in an effort to afford retail investors increased investment opportunities.

- In case there was any doubt, Jason Burt instructs to ask yourself two questions to determine if something is an enforcement priority: "what could impact retail investors the most and what has the possibility of creating investor harm?"

Takeaway: The Gensler-era weaponization of securities enforcement has come to a screeching stop. It's unlikely that the industry will see similarly creative theories of liability, scorching penalty amounts, and an ever-increasing focus on private funds. Instead, rhetoric out of SEC leadership previews a return to the agency's roots; that is, a focus on Congress's "original intent" to protect investors resulting in a turn to cases involving retail investor fraud, disclosure fraud, and accountability for individual wrongdoing.

Best Practice Tip: As private fund managers expand into retail products, expect the Commission's focus on retail to follow the flows. Many SEC staff in Exams and Enforcement have spent careers investigating private funds; we should expect them to be eager to find retail-centric ways to stay focused on those firms.

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