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Registered Funds Regulatory Roundup – Anticipating New Priorities

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What's Going on with the Regulatory Agenda?

- Flurry of proposed new rules and rule amendments over the last few years, particularly 2022 and 2023, impacting registered funds, including:
  - T+1 settlement cycle (adopted)
  - Names rule amendments (adopted)
  - Enhanced reporting obligations on Forms N-PORT and N-CEN (adopted)
  - Regulation S-P amendments (adopted)
  - Beneficial ownership reporting amendments (adopted)

What's Going on with the Regulatory Agenda?

- Flurry of proposed new rules and rule amendments over the last few years, particularly 2022 and 2023, impacting registered funds, also included:
  - Proposed enhanced disclosures relating to ESG (still on agenda)
  - Cybersecurity risk management (still on agenda)
  - Conflicts of interest in connection with advisers' use of AI (still on agenda)
  - Swing pricing and hard close (not adopted when Forms N-PORT and N-CEN amendments were approved)
    - Proposal required covered open-end funds to establish and implement swing pricing policies and procedures that adjust the fund's current NAV per share by a swing factor if the fund has net redemptions or if it has net purchases that exceed an identified threshold
    - Proposal would amend Rule 22c-1 to require that purchase and redemption orders be received by an established cut-off time to receive a given day's price

What's Going on with the Regulatory Agenda?

- Outside of the formal "SEC RegFlex agenda," the SEC and its staff are impacting how registered funds operate
  - Enforcement activity
    - ESG-related actions
      - In one such action, SEC claimed that funds invested in certain companies that prospectuses indicated would be prohibited investments
  - Risk Alert for registered funds
    - Deficient disclosures (arrangements with affiliates, inaccurate fee information)
    - Deficient advisory agreement approval process
    - Unsatisfactory fund governance practices
  - Disclosure review and comment process for registration statement updates or in connection with new fund formations
  - Exemptive relief
    - Multi-share class structure applications not yet approved

REPORTING AMENDMENTS AND LIQUIDITY GUIDANCE

Amendments to Reporting Requirements

- Effective November 17, 2025
- Form N-PORT
  - Required to be filed monthly, 30 days after month-end (rather than filing 60 days after quarter-end) and data will be publicly available with a 60-day delay
  - SEC asserts that more frequent and timely reporting of fund portfolio holdings data will allow the SEC to:
    - "conduct more targeted and timely monitoring efforts;
    - analyze risks and trends more accurately; and
    - better assess the breadth and magnitude of potential impacts of market events and stress affecting particular issuers, asset classes, counterparties, or market participants."

Amendments to Reporting Requirements

- Form N-CEN
  - Open-end funds with liquidity risk management programs (LRMP) are required to identify and provide information about third-party service providers that such funds use to comply with Rule 22e-4 (the Liquidity Rule)
- Imposes additional operational and cost burdens on funds, as funds will need to compile, prepare, and file Form N-PORT data on an accelerated schedule

Liquidity Guidance

- SEC did not adopt amendments to the Liquidity Rule - "swing pricing" or a "hard close," for now
- SEC did provide guidance related to open-end fund LRMP requirements
  - Frequency of classifying the liquidity of fund investments
    - policies and procedures should be reasonably designed to perform any required intra-month review of liquidity classifications
  - Meaning of "cash"
    - clarifies that the term "cash," as used in the Liquidity Rule, means U.S. dollars and does not include foreign currencies or cash equivalents
  - Determining and reviewing highly liquid investment minimums
    - when considering a fund's investment strategy and portfolio liquidity, a fund that invests significantly in less liquid or illiquid investments, such as a bank loan fund, generally should consider establishing a highly liquid investment minimum that is higher than that of a fund that is more liquid
    - position also applies to funds with investment strategies that have had greater volatility of flows than other investment strategies

CYBERSECURITY RISK MANAGEMENT

Proposed Cybersecurity Risk Management Rules

- **Proposed**: Originally February 9, 2022 for Investment Advisers/Investment Companies; reopened for comment in March 2023
- **Primary Components**:
  - **Policies and Procedures**: Advisers and registered funds to adopt and implement written policies and procedures, including specific enumerated elements, reasonably designed to address cybersecurity risks
    - As proposed, "cybersecurity risk" is defined as the "financial, operational, legal, reputational, and other adverse consequences that could stem from cybersecurity incidents, threats, and vulnerabilities"
  - **Reporting**: Advisers to report certain cybersecurity incidents to the SEC on new Form ADV-C within 48 hours, including on behalf of any registered funds or private funds that experience such incidents
  - **Disclosure**: Advisers and registered funds to disclose cybersecurity risks and incidents in their disclosure documents
  - Amendments to certain recordkeeping rules would obligate registered funds to maintain for five years copies of policies, reports of annual reviews, incident records, and risk assessments

What Has Changed?

- **March 2023**: Similar requirements proposed for Broker-Dealers, Transfer Agents, Clearing Agencies, and other industry participants
- **October 2023**: The proposed rules were scheduled on the SEC Reg Flex agenda for final action in October
- **July 2023**: The SEC approved a series of similar cybersecurity requirements for public companies
  - Similarities between the original proposals
  - Summary of the final requirements applicable to public companies
  - Outlook for possible final rules applicable to investment advisers, investment companies, and other industry participants
- **May 2024**: The SEC approved amendments to Regulation S-P
- **October 2024**: The proposed rules were again scheduled on the SEC Reg Flex agenda for final action in October
  - To date, the SEC has not scheduled an Open Meeting to discuss these proposals

FUND NAMES

Fund Names – Regulatory Context

- ***Names Rule Amendments***
  - On September 20, 2023, the SEC adopted amendments to Rule 35d-1 – the "Names Rule"
  - Compliance Date with the amendments to the Names Rule is December 11, 2025
- ***Current Names Rule***
  - Does not apply to investment strategies (value investing, growth investing, ESG strategies, etc.)
- ***Amended Names Rule***
  - Expands scope of rule to include names with "particular characteristics"
  - Requires terms to be defined with specific criteria
  - Requires notional valuation of derivatives instruments, generally
  - 90 day correction period

Names Rule Amendments – Scope Expansion

- ***Expansion of Scope*** – Amendments expand the Names Rule's 80% investment policy requirement beyond its current scope to apply to any fund name with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, "particular characteristics"
- What are "particular characteristics"?
  - Growth, value, ESG, etc.
  - "Certain" thematic investments
- What are not "particular characteristics"?
  - Names that suggest a portfolio-wide result or characteristic
  - Names that reference a particular investment technique
  - Names that suggest asset allocation determinations that evolve over time
- ***ESG Integration Funds*** – The SEC did not take action on so-called "integration funds" – funds that include ESG terms in their names but consider ESG factors alongside other non-ESG factors

Names Rule Amendments – Other Changes

- ***Enhanced Prospectus Disclosure*** – Amendments require a fund to define in its summary and statutory prospectuses the terms used in its name, including the criteria used to select investments that the term describes.
- ***Changes to Notice Requirements*** – Amendments change the notice requirements to be more prescriptive. Change notices must include, as applicable, (1) a description of the fund's 80% policy; (2) the nature of the change to the 80% policy; (3) the fund's old and new names; and (4) the effective date of any investment policy or name changes. Other aspects of the notice requirements remain similar to the current Names Rule with some modification for electronic delivery.
- ***Form N-PORT Reporting Requirements*** – Amendments require funds to report the value of the fund's 80% basket, and whether an investment is included in the fund's 80% basket, in each case for the third month of every quarter. Also must include the definition(s) of terms used in the fund's name.
- ***Recordkeeping*** – Final rules include detailed recordkeeping provisions related to a fund's compliance with the Names Rule's requirements.

Names Rule Amendments – Compliance

- ***What stays the same:***
  - Time of purchase test – sort of
  - "Under normal circumstances"
- ***What is new:***
  - "Meaningful nexus between the given investment and the investment focus"
  - Real time recordkeeping
  - Quarterly review
  - 90 Day Correction Period
  - "Antithetical investments"

Names Rule Amendments – Where are We Now

- ***Timeline of Making Changes***
  - Compliance date a year away
  - 60 days' notice for changes to 80% policies
  - Board approval of changes
- ***Reviewing Fund Names***
  - Cataloging and Classifying Fund Names in Fund Complex
  - Creating Definitions for 80% policies in light of quarterly review and real time recordkeeping
  - Identifying Disclosure Changes
  - Considering how "antithetical investments" works

BOARD CONSIDERATIONS

Considerations for Fund Boards

- *Notification and education regarding rule proposals and adoptions*
- *Adviser gap analysis*
- *Board involvement in comment process*
- *Timeline for implementation*
- *Board reporting pre-implementation*
- *Board approvals versus informational updates*
- *Board reporting post-implementation*
- *SEC examinations*

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Registered Fund Product Trends and Developments

Speakers: Mark Amorosi – Practice Area Leader - Asset Management and Investment Funds, K&L Gates
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Kevin Gustafson – Partner, K&L Gates
Cheryl Isaac – Partner, K&L Gates
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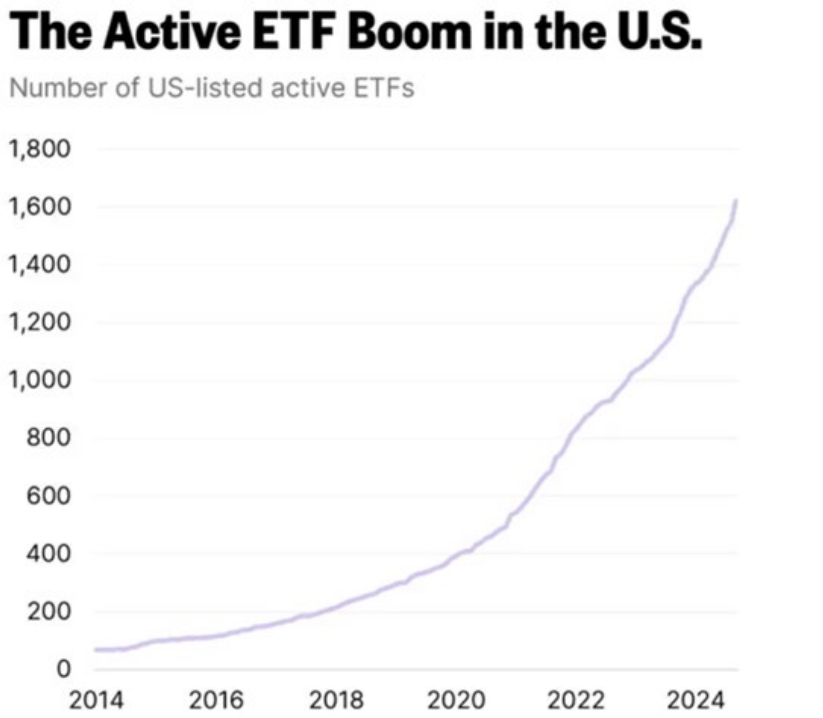
ETFS: MUTUAL FUND TO ETF CONVERSIONS AND ETF SHARE CLASSES

Exchange-Traded Funds: By the Numbers

New Records:

- Global ETF inflows surpassed $1.5 Trillion USD by 10/31/24 for the year.
- For US, 2024 YTD should surpass $1 Trillion as of Nov 21st..
- Single day record of US ETF inflows at $22.2 Billion on Nov 6th (prior one-day record $4.9 Billion).
- There are ~3,800 US listed ETFs, and only about 4,300 listed companies.
- Active ETF surge continues to be the story



- Active ETFs now account for almost 40% of all US-listed ETF, and a majority of those new ETFs listed in 2024.
- While smaller in relative AUM, active ETFs account for almost 30% of inflows.

Comparisons of ETFs to Mutual Funds

	Mutual Funds	ETFs
Cost	Operating expenses $200-500k+	Operating expenses $200-500k+
Structure	Stand-alone or Series Trust format	Stand-alone or Series Trust format
Exemptive Relief Filing	No	No
Share Creation + Redemption	Investors purchase and redeem directly from the fund in cash	Primary Market: Authorized Participants create/ redeem shares through an in-kind cash transfer to funds
Market	No Primary Market. Focus on building brand awareness and scale in the Secondary Market through RIAs and broker-dealers	Focus on tactical solution products and brand awareness in both Primary (APs) and Secondary Market
Secondary Market Trading	Offered through a variety of distribution channels End of day share purchases and redemptions at NAV on Secondary Market	Offered through an exchange. Intraday trading on Secondary Market Typically end of day price at NAV but can deviate
Transparency	Portfolio holdings typically disclosed quarterly	Portfolio holdings disclosed daily
Tax-Efficiency	All shareholders realize capital gains distributed in fund; mutual funds required to pay out dividends and capital gains on an annual basis	Investors only realize capital gains with sale of own shares; in-kind creation and redemption result in fewer taxable gains
Platform Considerations	Fees vary by platform, platform fees for on-boarding (due diligence, operational, sales and marketing (12b-1, NTF, revenue share, and partnership fees), and data transparency	Fees vary by platform, platform fees for sales and marketing (commission fee platforms) and data transparency

ETFs: Mutual Fund to ETF Conversions

- The first conversion of a mutual fund into an ETF was in 2022.
- There have been dozens of successful mutual fund conversions into ETFs.
- Depending on the structure of the mutual fund and the target (either an existing or shell ETF), a proxy vote of shareholders may not be necessary to convert.
  - In advance, it is important to also review the prospectuses, as well as the mutual fund's trust document and bylaws for any other restrictions.
- Other pooled investment structures, such as a private fund or SMA, have also been participants in a conversion into an ETF.

ETFs: Mutual Fund to ETF Conversions

Key Considerations

In order to effectuate a conversion, advisers will need board approval and in connection with seeking such approval should be prepared to explain the business rationale for the conversion, the effect of the conversion on the fund's shareholders, fees and adviser services, anticipated governance changes, and related disclosures.

Why – Tax efficiency, distribution?

How – Reorganization or change to governing documents? Shareholder vote?

Fees – Any change? Rule 17a-8 implications? Rule 12b-1 fees?

Services – Will the adviser's services change? What will happen to shareholders not holding through a brokerage account?

Disclosure – How informing shareholders?

ETF Share Classes on a Mutual Fund

Potential tax efficiencies may drive mutual fund sponsors to seek to add an ETF share class.

Background on ETF Shares Classes on a Mutual Fund

There can be only one: Vanguard

- Vanguard has offered ETFs as share classes of index mutual funds for 20 years with apparent benefits to all of the share classes, including from economies of scale.
- In connection with its initial SEC approval, Vanguard sought and received a registered patent with the USPTO on the share class structure.
- Vanguard's patent on the ETF share class structure expired in the summer of 2023, leading others to seek exemptive relief from the SEC to implement the structure.

Potential ETF Share Class Benefits

Potential Benefits May Include:	
At the fund operational or product level	Tax benefits for an ETF share class within the fund (e.g., via in-kind transacting/redemptions)
	Reduced or shared costs across the classes and the trust
	Potential speed to market and speed to scale in AUM
At the fund investor level	Greater cost and tax efficiencies can be passed on to the investors
	Can move from MF class to ETF class without cash redemption of shares and resulting tax impact
	More investor options and places of access
At the distribution level	Leverage historical investment performance (if desirable)
	Potential for continuity and ongoing access with existing distribution partners and channels
	Continuity with investment team / PMs
	Leveraging the existing brand

SEC Review – ETF Share Classes

The SEC's 2019 ETF Rule explicitly stated that a mutual fund share class listed as an ETF would **not** automatically fit within the scope of the rule.

This means that any fund complex seeking to utilize that structure would need to file an exemptive application with the SEC to obtain approval, and with it, a listing exchange would also need to file its own 19b-4 application with the SEC for approval of the share class as a separate, listing-eligible ETF.

SEC Focus Primarily On:

- Rule 6c-11 (ETF Rule) – provisions to apply
- Section 18(f) – share class determinations
- Matters of Concern
  - Limit of Prior Vanguard Orders
    Unique considerations: index only (active denied), VGI orders "Best interest of investors" standard
  - Cross-subsidization
    Brokerage commissions, cash drag, capital gains
    Custodial fees

ETFs: ETF Share Class Applications

- Beginning in February 2023, numerous fund sponsors have filed exemptive applications with the SEC requesting approval add a share class to an existing mutual fund, and in some instances to add a mutual fund share class to an ETF.
- In addition, one listing exchange (Cboe) has filed a corresponding application to amend its listing standards to include an ETF share class of an applicant as an eligible 'ETF' for listing purposes
- Certain applicants have received comment letters and requests for more information, but to date no amendments to these applications have been filed, and no formal action has been taken by the SEC on the applications.
- There is no required timeline by which the SEC must act to approve or request a withdrawal.

ETF Share Class Applicants

	Share Class Applicant	Add ETF Class to MF	Add MF Class to ETF
1	Perpetual US	Yes; *withdrawn*	
2	Dimensional	Yes	
3	FM Investments (RBB)		Yes
4	Fidelity	Yes	
5	First Trust	Yes	
6	Morgan Stanley	Yes	
7	Guiness Atkinson	Yes	
8	TCW	Yes	Yes
9	PGIM	Yes	Yes
10	AllianceBernstein	Yes	
11	Neuberger Berman	Yes	
12	Northern Trust	Yes	
13	GMO	Yes	
14	Touchstone	Yes	
15	Franklin Templeton	Yes	Yes
16	Schwab	Yes	Yes
17	Allspring	Yes	
18	Principal	Yes	
19	AMG	Yes	Yes
20	Janus Henderson	Yes	Yes
21	T. Rowe Price	Yes	
22	Virtus	Yes	
23	Thrivent	Yes	Yes
24	Nuveen	Yes	Yes
25	Shelton	Yes	Yes
26	Natixis	Yes	Yes
27	Impax	Yes	Yes
28	Hartford Funds	Yes	Yes
29	Potomac	Yes	
30	John Hancock	Yes	
31	Segall Bryant & Hamill	Yes	Yes
32	Tidal	Yes	Yes
33	BlackRock	Yes	Yes
34	State Street	Yes	

- *As of November 15, 2024*

ETFs: 2025 Expectations/Wish List

- Inflows Will Continue To Trend Upward
- Conversions and In-Kind ETF ‘Stand-Ups’ Will Increase
  - Private funds
  - SMAs/Sec. 351
- SEC Action More Likely
  - Cryptocurrency and Digital Asset Investments in ETFs
  - ETF Share Class
- Product Innovation Will Continue
  - Derivatives-based profiles
  - Private Credit – public/private security profiles
  - ETFs as Solutions for Retirement Savings and Income Crisis
    - SECURE 2.0 Act of 2022

DIGITAL ASSET AND CRYPTOCURRENCY FUNDS AND ETFS

Digital Asset Product Developments – History And Background

- Brief Background on Bitcoin and Other Digital Assets:
  - Bitcoin was created in 2009 as the first decentralized “crypto” currency.
  - Bitcoin transactions are verified through cryptography and recorded on a public “blockchain”.
  - Since its creation in 2009, the price or value of a single bitcoin has risen from a zero to a peak of $68,789 in 2021 and now sits at $64,045.30 (as of 09/28/24)
  - Bitcoin is primarily used as a store of value – as opposed to a method of exchange (largely due to infrastructure issues)
  - Numerous other cryptocurrencies also have been introduced, including Ethereum, Tether, BNB and Solana, among many others.
- Recognizing its potential, the exchange traded product industry had attempted to launch regulated products that invest in Bitcoin since 2013.
- Until early 2024, the SEC had denied the listing rule applications for each such product on grounds that, among other things, the Bitcoin market is susceptible to market manipulation and includes market participants that are bad actors. The SEC has also noted concerns regarding custody, liquidity and pricing.

What Changed?

- In Fall 2021, the NYSE Arca filed a proposed listing rule on behalf of the Grayscale Bitcoin Trust (GBTC).
- The SEC denied the application in June 2022, as it had all others stating that:
  - The listing rule was not "designed to prevent fraudulent and manipulative acts and practices", and failed to satisfy the SEC's significant market test, which requires the listing exchange to have a surveillance sharing agreement ("SSA") in place with a regulated market of significant size."
- However, in Spring 2022, the SEC had approved listing rules for two exchange traded products that would invest primarily in Bitcoin futures (derivatives-based ETFs).
  - SEC based its approvals of these futures products on the basis that the listing exchange had an SSA in place with the Chicago Mercantile Exchange which the SEC determined to be a market of significant size with respect to Bitcoin Futures.
- Grayscale sued arguing that the denial of its application by the SEC was "arbitrary and capricious" under the Administrative Procedure Act.
- On August 29, 2023, the D.C. Circuit Court of Appeals issued its decision agreeing with Grayscale, vacating the SEC's denial and issuing a mandate for the SEC to take action consistent with its decision.

SEC Approvals of Spot Bitcoin ETPs

- At the time of the court's decision in August 2023, there were 11 issuers that had pending listing rule applications and registration statements for spot Bitcoin ETPs. The SEC had delayed consideration of each application pending the outcome of the Grayscale litigation; however, one application had a final deadline for the SEC to act of January 11, 2024 – as such that became a potential target date for resolution.
- On January 11, 2024, the SEC issued a joint decision approving the listing rule with respect to all 11 products that were pending, and on January 12 (10 of the 11) registration statements went effective allowing shares to commence trading.
- SEC Chair Gary Gensler Statement Excerpt on Order of Approval:

  "Importantly, today's Commission action is cabined to ETPs holding one non-security commodity, bitcoin. It should in no way signal the Commission's willingness to approve listing standards for crypto asset securities. Nor does the approval signal anything about the Commission's views as to the status of other crypto assets under the federal securities laws or about the current state of non-compliance of certain crypto asset market participants with the federal securities laws. As I've said in the past, and without prejudging any one crypto asset, the vast majority of crypto assets are investment contracts and thus subject to the federal securities laws."

Further Developments and What's Next?

- Ethereum ETPs:
  - On May 23, 2024, the SEC approved the listing of 8 spot Ether ETPs, and on July 23, 2024 declared their registration statements on Form S-1 effective.
  - The approvals make Ether only the second digital asset available to be traded on a spot basis in an ETP wrapper.
- Listing rule applications have been filed for multi-coin products but it takes time to work through the administrative process
- Industry expectation is that assets in these initial and other funds will continue to grow – particularly as asset allocators and other model providers begin to add the exposure in their allocation models.
- These actions do not widely open the door to registered products based on other crypto-currencies, as the SEC remains skeptical.
- A broad array of sophisticated traditional financial services firms that had previously avoided digital assets entirely have become engaged.

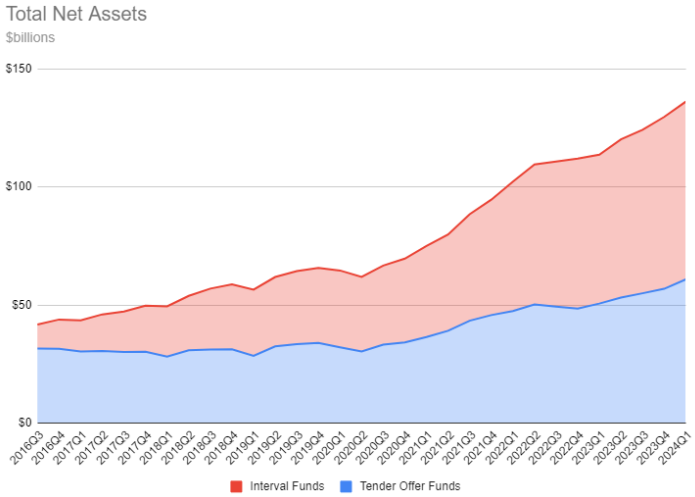
Other Crypto / Digital Developments

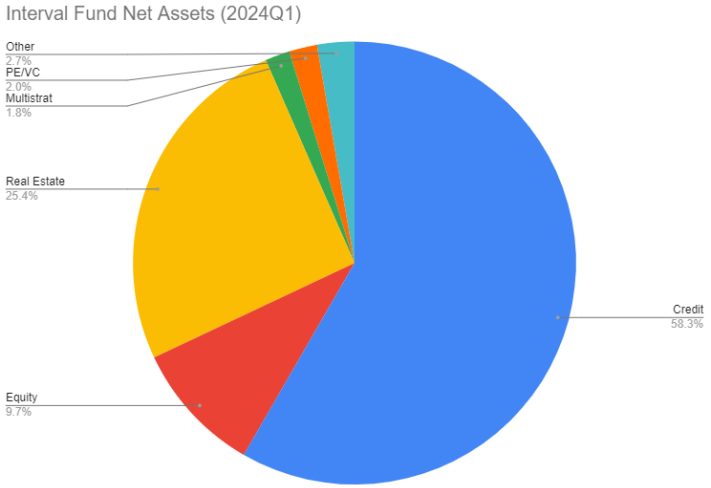
- New product development is not the only use for these new technologies. Fund shops, custodians, transfer agents, and other service providers are exploring and implementing blockchain technologies in a number of ways.
- Tokenization – including of private funds and mutual funds
- Business and Operational Opportunities
  - Recordkeeping, including transfer agency, on the blockchain
  - Reduce settlement and clearance times and shorten the trading cycle
  - Improve liquidity
  - Custody
- Market infrastructure
  - Lower intermediary costs by bypassing traditional intermediaries
  - Increase automation of business logic and workflows and
  - Reduce the need for reconciliation
- Potential for Risk Reduction
  - Enable simpler regulatory reporting and provide an immutable audit trail
  - Enable faster risk management

ALTERNATIVE INVESTMENT FUNDS: INTERVAL AND TENDER OFFER FUNDS

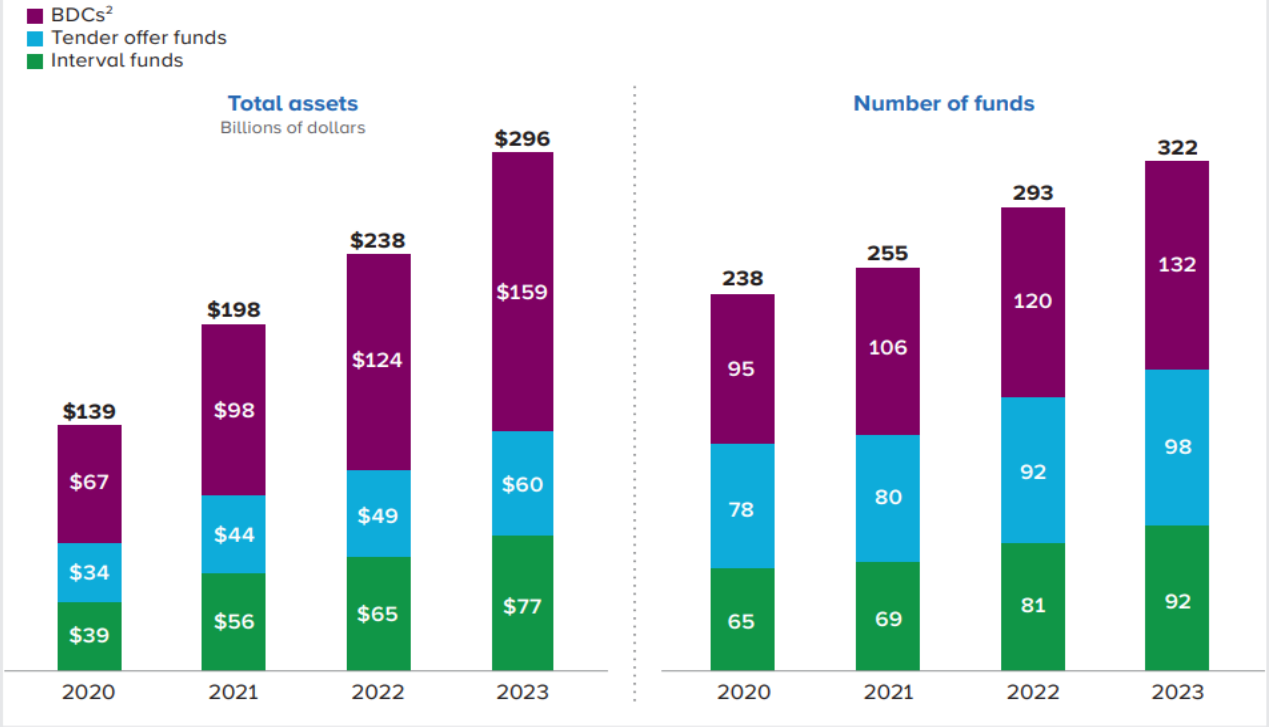
Product Benefits and Investor Interest

- Many advisers recommend alternative assets, strategies and/or structures as part of an investor's diversified investment portfolio
- Interval funds and tender offer funds provide access to alternative strategies and less liquid investments, with potentially higher yields, without the requirement for daily redemptions
  - Private credit, private equity, real estate, real assets, venture investing
- However, they also implement the regulatory safeguards of a registered fund





Source: Interval Fund Tracker. https://intervalfundtracker.com/2024/04/23/unlisted-cefs-key-asset-growth-and-fund-launch-trends-continue-in-2024/

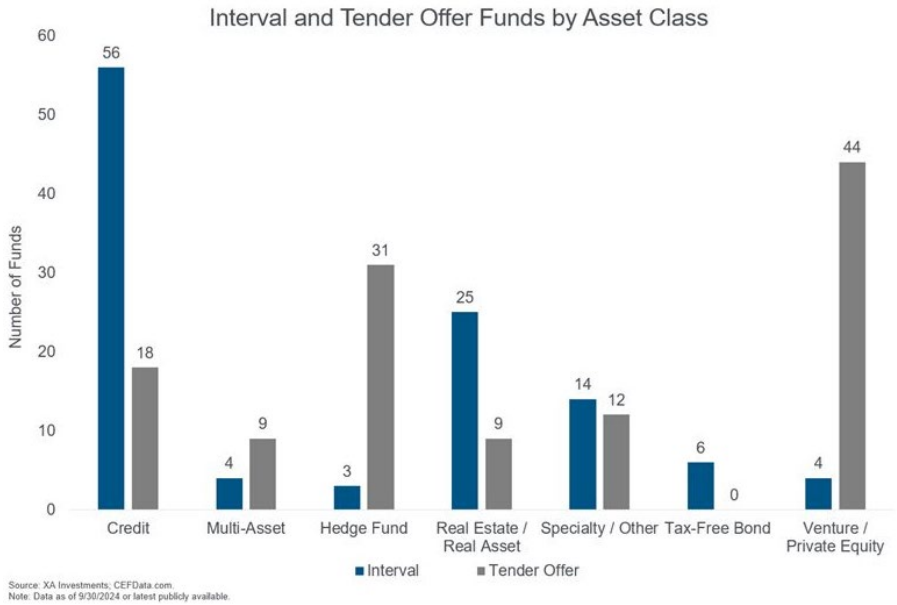


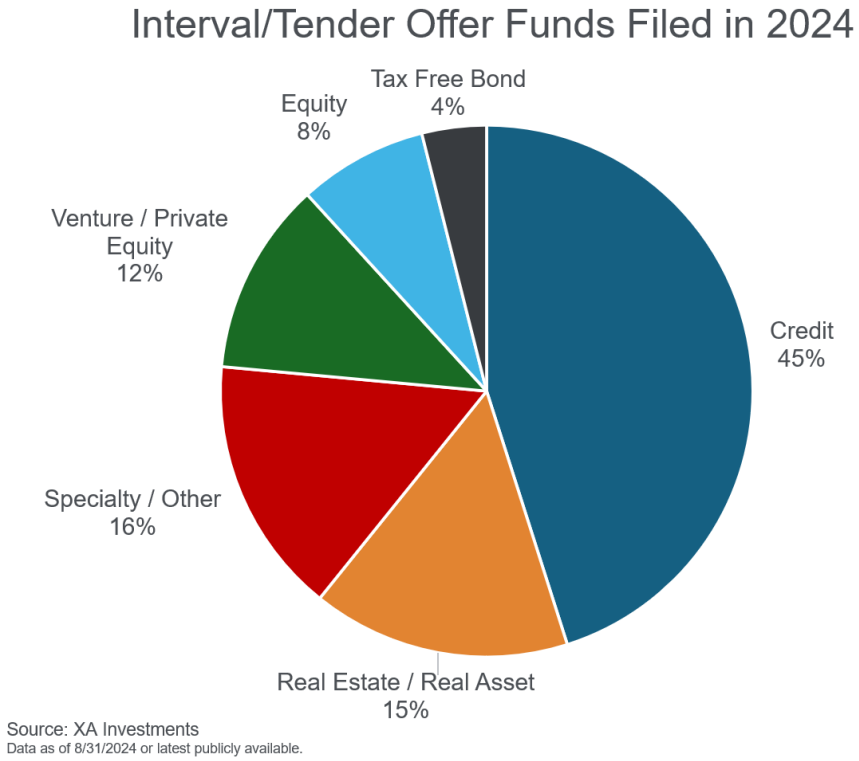
[1] Data are based on quarterly public filings between November and January.

[2] Total assets of BDCs are total net assets.

Note: Data for number of funds exclude feeder funds. Data include funds that do not report statistical information to the Investment Company Institute.

Source: Investment Company Institute calculations of data from publicly available SEC Form N-PORT, N-CEN, 10-Q, and 10-K filings





https://xainvestments.com/knowledge-bank/insights/?url=commentary-20241115

Product Benefits and Investor Interest, Continued

- Combine attractive features of closed-end funds and open-end funds
  - Can be publicly or privately offered
  - If publicly offered, generally open to all investors
  - Continuous offering permits fund to grow over time as compared to IPO (although illiquid structure can create difficulties in attracting early shareholders)
  - Offer shares and periodic liquidity at NAV, as opposed to market price, which may be a premium or discount to NAV
  - With exemptive relief, can offer multiple classes of shares with a variety of sales and distribution charges

Open-End and Closed-End Fund Basics

- Open-End Funds
  - Redeemable by investor daily
  - Limited to investing no more than 15% of assets in illiquid investments
- Closed-End Funds
  - Not redeemable by investor
  - May invest up to 100% in illiquid assets
  - Variations
    - Listed closed-end funds: initial public offering, traded on an exchange
    - Interval funds: continuously-offered, periodically offer to repurchase shares
    - Tender offer funds: continuously-offered, periodically make tender offers for shares

Interval Funds

Conduct repurchase offers pursuant to fundamental policy adopted by board pursuant to Rule 23c-3 under Investment Company Act of 1940

- Frequency, amount and timing set by Rule 23c-3 and fundamental policy
  - Every 3, 6, or 12 months, or more frequently with exemptive relief
  - 5-25% of the shares outstanding
- No SEC filing fees, limited documentation for repurchase offer
- Typically cheaper than tender offer
- Portfolio liquidity requirements during repurchase offer period
- Senior securities must provide for redemption without penalty if necessary for repurchase offer

Tender Offer Funds

Conduct tender offers at discretion of board pursuant to Rule 13e-4 under Securities Exchange Act of 1934

- Greater flexibility with respect to frequency, amount and timing, as approved by the board
- Require filing fees and more documentation than repurchase offers
- Typically more expensive than repurchase offers
- No liquidity requirements during tender offers
- Permitted to increase repurchase amount after commencing tender offer to avoid the need to repurchase shares *pro rata*
- One repurchase offer complying with Rule 23c-3 is permissible every two years

Recent Developments

- Names Rule Amendments adopted in 2023 includes additional requirements for unlisted closed-end funds
  - Any policy to invest at least 80% of its assets in securities suggested by its name can be changed only by a majority of the outstanding voting securities unless the fund conducts a tender or repurchase offer in advance of the change and complies with certain other conditions
- New Administration and Potential Changes at the SEC
  - Could mean that SEC seeks to increase investor (including potentially retail) access to alternative investments, including through closed-end funds

Other Characteristics

	Listed Closed-End Funds	Interval Closed-End Funds	Tender Offer Closed-End Funds	Open-End Funds
Registration Form Type	N-2	N-2	N-2	N-1A
Share Registration and Annual Updates	Initial registration of shares; thereafter must register additional shares prior to sale and pay filing fees	Registration fees based on net sales; reliance on Rule 486	Initial registration of shares; thereafter must register additional shares prior to sale and pay filing fees; reliance on Rule 486	Registration fees based on net sales; reliance on Rule 485
Offering Period	One Time (IPO) or Secondary Offerings	Continuous		
Exchange-Listed?	Yes	Generally no	Generally no	ETFs only
Share Price Determination	Market price on exchange (Secondary Offerings may differ)	NAV		
Share Classes	Single class only, unless exemptive relief	Single class only, unless exemptive relief	Single class only, unless exemptive relief	Yes, Rule 18f-3
NAV Calculation	Daily	At least weekly, often daily	Varies, can be daily	Daily
Leverage – 1940 Act Requirements	Leverage is subject to requirements of Section 18 of the Investment Company Act of 1940: 300% asset coverage for debt; 200% asset coverage for equity.	Leverage is subject to asset coverage requirements of Section 18 of the Investment Company Act of 1940: 300% asset coverage for debt; 200% asset coverage for equity. Senior securities must be callable or redeemable by the next repurchase pricing date if needed for fund to repurchase shares and still comply with asset coverage requirements.	Leverage is subject to requirements of Section 18 of the Investment Company Act of 1940: 300% asset coverage for debt; 200% asset coverage for equity.	Leverage is subject to asset coverage requirements of Section 18 of the Investment Company Act of 1940. Borrowing only permitted from banks (unless exemptive relief, e.g., for interfund lending).

LISTED CLOSED-END FUND DEVELOPMENTS AND LITIGATION UPDATE

Listed Closed-End Fund Developments

- NYSE Proposal to Exempt Registered Closed-End Funds from Annual Shareholder Meeting Requirement
  - Significant Interest: Many comment letters submitted in support and against the proposal (including more than 1,000 letters the SEC grouped as Letter Type A); multiple meetings with SEC Commissioners
  - Extended Comment Period: Initial comment period closed this summer and was later reopened. SEC issued an order pursuant to the Securities Exchange Act to request additional input from the industry to determine whether to approve or disapprove the proposed rule (known as “instituting proceedings”)

Listed Closed-End Fund Developments, Continued

- Proceedings Issues: As required to institute proceedings, the SEC identified factors it was considering that could potentially lead it to reject the proposal, which included:
  - Whether NYSE's proposal "is designed to protect investors and the public interest" as required by the Securities Exchange Act
  - Whether the NYSE provided sufficient analysis, including regarding (1) the extent to which closed end-fund investors participate in and benefit from annual shareholder meetings; and (2) the relevance and impact of closed-end fund shares potentially to trade at larger discounts to net asset value

Closed-End Fund Litigation Update

- Litigation: Increased litigation regarding anti-takeover matters, including control shares, and voting standards
- Supreme Court Appeal: Cert Petition Pending
  - Listed closed-end funds involved in litigation relating to a Maryland control share statute appealed to SCOTUS to resolve a dispute over whether there is a private right of action under the 1940 Act
  - Section 47(b) permits parties to rescind contracts that violate the 1940 Act, but does not explicitly grant a private right of action to shareholders to bring claims for rescission
  - US Federal Circuit Courts split over whether a private right of action exists under Section 47(b)
  - Broader impact: not limited to listed closed-end funds

K&L GATES

Enforcement and Examinations Developments Impacting Funds and Investment Advisers

Speakers

- Cheryl Isaac – Partner, K&L Gates
- Theodore Kornobis – Partner, K&L Gates
- Stephen Topetzes – Partner, K&L Gates

Agenda

- SEC Enforcement Statistics and Trends
- SEC Exam Priorities and Risk Alerts
- SEC Enforcement Updates
- CFTC Enforcement Updates
- Digital Asset and Crypto Enforcement Update
- Fund Litigation and Supreme Court Update

SEC ENFORCEMENT STATISTICS AND TRENDS

SEC Enforcement Statistics

- FY 2023
  - 784 total actions filed, including:
    - 501 new enforcement actions (8 percent increase from FY 2022)
      - More than two-thirds involved at least one individual defendant or respondent
    - 121 actions against issuers delinquent in required SEC filings
    - 162 “follow-on” administrative proceedings seeking individual bars based on criminal convictions, civil injunctions, or other orders
  - Judgments and orders totaled over $5 billion
  - Over $930 million distributed to harmed investors

SEC Enforcement Statistics

- FY 2024 enforcement statistics are expected to be released by the SEC very soon. Acting Director Wadhwa offered a preview:
  - SEC highlighted three areas:
    - (1) off-channel communications;
    - (2) whistleblower protection cases; and
    - (3) cases where parties cooperated with Division of Enforcement
  - Recordkeeping cases against more than 70 firms have resulted in over $600 million in civil penalties
  - Largest penalty for standalone violation of whistleblower protection rule
  - Increased market participant self-policing, self-reporting, remediation, and cooperation resulting in lower civil penalties

SEC Enforcement Statistics (FY 2023)

Enforcement Summary Chart for FY 2023 by Primary Classification							
Primary Classification	Civil Actions	Standalone APs	Follow-On APs	Delinquent Filings	Total	% of Total Actions	% of Civil and Standalone APs
Broker Dealer	17 (35)	43 (57)	80 (81)	0 (0)	140 (173)	18%	12%
Delinquent Filings	0 (0)	0 (0)	0 (0)	121 (121)	121 (121)	15%	0%
Foreign Corrupt Practices Act	0 (0)	11 (12)	0 (0)	0 (0)	11 (12)	1%	2%
Insider Trading	23 (52)	9 (9)	0 (0)	0 (0)	32 (61)	4%	6%
Investment Advisers / Investment Companies	24 (54)	62 (81)	53 (54)	0 (0)	139 (189)	18%	17%
Issuer Reporting / Audit & Accounting	18 (34)	68 (83)	21 (21)	0 (0)	107 (138)	14%	17%
Market Manipulation	19 (62)	3 (4)	2 (2)	0 (0)	24 (68)	3%	4%
Miscellaneous	3 (8)	19 (20)	1 (1)	0 (0)	23 (29)	3%	4%
NRSRO	0 (0)	4 (4)	0 (0)	0 (0)	4 (4)	1%	1%
Public Finance Abuse	1 (2)	5 (6)	0 (0)	0 (0)	6 (8)	1%	1%
Securities Offering	123 (463)	41 (51)	3 (3)	0 (0)	167 (517)	21%	33%
SRO / Exchange	3 (9)	2 (2)	0 (0)	0 (0)	5 (11)	1%	1%
Transfer Agent	0 (0)	3 (3)	2 (2)	0 (0)	5 (5)	1%	1%
Total	**231 (719)**	**270 (332)**	**162 (164)**	**121 (121)**	**784 (1,336)**	**100%**	**100%**

Each action initiated has been included in only one category listed above, even though many actions may fall under more than one category. Party counts are noted in parentheses.

SEC Enforcement Statistics (FY 2023)

- Categories of enforcement actions highlighted by the SEC in its year-end summary:
  - Crypto asset securities & cyber security
  - Whistleblower protections
  - Recordkeeping requirements
  - Misleading investors about compliance programs
  - Marketing rule
  - Pursuing gatekeepers (accountants, lawyers, and auditors)
  - ESG
  - Investment professionals and service providers
  - Failures to timely file required SEC forms
  - Market abuse
  - Public finance abuse

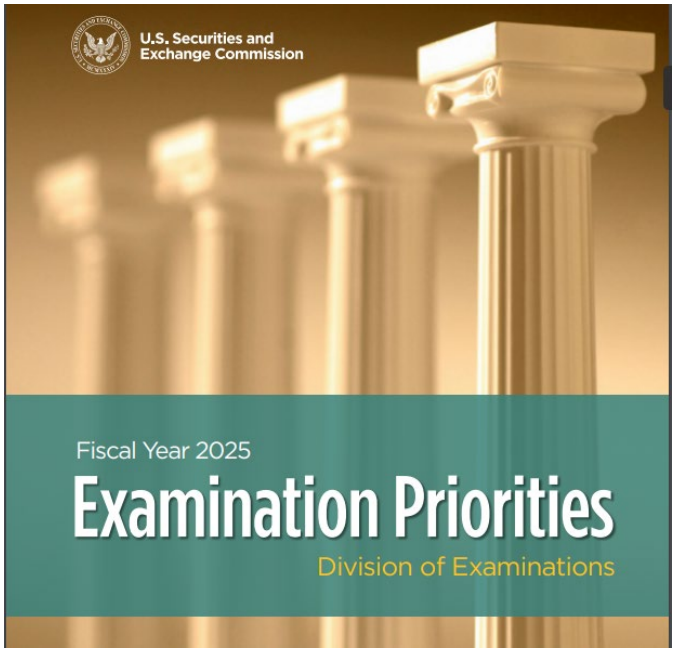
SEC Enforcement Trends

- Whistleblower trends
  - Continued high trends for SEC Whistleblower Program
  - Issued $600 million awarded, with a single whistleblower receiving $279 million
  - Charged individuals and companies with violating whistleblower protection rules relating to retaliation and impeding whistleblowers from communicating with the SEC
- Rewarding meaningful cooperation
  - Increased focus on encouraging self-reporting, cooperation, and remediation

2024 - 2025 EXPECTED EXAM PRIORITIES

SEC Examination Priorities

- Examination Priorities for FY 2025 Announced 21 Oct. 2024
- Provides examination focus areas for specific market participants and particular “risk areas,” with overall focus on strong compliance processes and examinations concerning new SEC rules.
- ESG issues had been dropped from FY 2024 Examination Priorities.



SEC Examination Priorities

- *Investment Advisers*
  - Adherence to fiduciary standards of conduct
  - Effectiveness of compliance programs (including marketing, valuation, trading, portfolio management, disclosure, custody)
  - Investment advisers to private funds
- *Investment Companies*
  - Compliance programs
  - Disclosures, including on portfolio management practices
  - Governance
  - Fund fees and expenses, service provider oversight, market volatility
- *Broker-Dealers*
  - Reg BI compliance
  - Form CRS, Net Capital Rule, Customer Protection Rule
  - Trading practices

SEC Examination Priorities

- *Information Security & Operational Resiliency*
  - Review of cybersecurity policies and procedures, internal controls, oversight of vendors, and responses to cyber-related incidents.
  - Employee training programs concerning identity theft prevention and the protection of customer information.
  - Compliance with recently adopted rules shortening settlement cycle to one business day after trade date (May 28, 2024)

SEC Examination Priorities

- *Crypto and Fin Tech*
  - Examination of automated tools and AI used in investment services space
  - Procedures governing recommendations of crypto products and related discussions with retail customers
- *AML*
  - Examination with AML procedures and compliance with Bank Secrecy Act and whether programs are tailored to the unique AML risks associated with business model
  - Focus on independent testing, customer identification program, SAR filing obligations, and OFAC compliance

SEC ENFORCEMENT UPDATES

Enforcement Priorities - 2024

The SEC's priorities in enforcement actions have included:

- Continued focus on valuation
  - Concerns that:
    - inconsistent marking of hard-to-value securities can lead to inflated positions, which in turn misleads investors and leads to inflated fees
    - the valuation process is "opaque to investors typically"
  - Focus on board compliance, record-keeping and reporting
- **Continued focus on Conflicts**
- Gatekeeper and compliance officer liability
  - Not seeking to "second-guess[] good faith judgment calls"
  - Three contingencies for when to hold a CCO liable:
    - Whether the CCO mislead regulators
    - Whether the CCO utterly failed to perform responsibilities
    - Whether the CCO "affirmatively participated" in misconduct

Enforcement Priorities - 2024

- Emphasis on cooperation, self-reporting, and remediation
  - Self-report before regulators come knocking
  - Preemptively remediate and cease unlawful behavior
  - Proactively provide compensation
  - Identify key documents and witnesses
  - Provide analyses, explanations, summaries
- Recordkeeping failures associated with off-channel communications on employee devices
  - Dozens of new firms charged this past fiscal year
  - Over 100 firms and $2.5 billion in penalties in total for this initiative
- Whistleblower protections and impediments
  - Several new cases against firms that imposed restrictions or terms that the SEC asserted impeded a person's ability to file whistleblower complaints

Enforcement Priorities – Looking Ahead

- Awaiting selections of SEC Chair and Enforcement Director
- Likely developments:
  - Reduced or discontinued enforcement in areas of ESG, crypto, off-channel communications
- Potential developments
  - Reduced aggressiveness in some areas (e.g., Reg FD, subpoena enforcement)
- Likely unchanged:
  - Emphasis on cooperation, self-reporting, remediation
  - “Bread-and-butter” fraud, manipulation, disclosure violations, financial reporting fraud
  - AML and suspicious activity reporting
  - Artificial Intelligence
  - Cybersecurity

Selected Enforcement Actions: Misstatements and Omissions

- *JP Morgan Affiliates (October 31, 2024)*
  - Five separate enforcement actions, including allegations of:
    - Failure to fully and fairly disclose incentives received in connection with proprietary portfolio management; and
    - Recommending "clone mutual funds" when materially less expensive ETF products offering the same investment portfolios were available, without considering cost differences or having a reasonable basis to believe the products were in investors' best interest. (Reg BI)
  - Without admitting or denying, the two affiliates agreed to pay more than $151 million in civil penalties and voluntary investor payments.
  - No penalties for one action because of cooperation and remedial measures taken.
- *SEC Charges Two Investment Advisers with Making False and Misleading Statements About AI Use (March 18, 2024)*
  - Both advisers claimed to use AI tools in making investment decisions when they were not using AI to inform decision making (purported "AI washing")
  - Without admitting or denying, both consented to the entry of cease-and-desist orders finding that they violated the Advisers Act and ordering civil penalties of $225,000 and $1750,000.

Selected Enforcement Actions: ESG Disclosures and Procedure

- *SEC Disbands ESG Task Force (Fall 2024)*
  - SEC quietly disbanded ESG task force formed in 2021 to litigate misleading ESG disclosures
  - SEC stated that ESG enforcement "expertise… now resides across the Division [of Enforcement]"

- *SEC Charges Advisory Firm for Making Misleading Statements About Supposed Investment Considerations (November 8, 2024)*
  - Alleged violations of the Investment Advisers Act of 1940 for making misleading statements about the percentage of company-wide assets under management that integrated ESG factors in investment decisions, by improperly counting assets held in passive ETFs that did not consider ESG factors.
  - The SEC's order also asserted an absence of any written policy defining "ESG integration" for purposes of classifying assets.
  - Respondent agreed, without admitting or denying the findings, to pay a $17.5 million civil penalty to settle the charges.

Selected Enforcement Actions: ICA Compliance

- *Macquarie Inv. Mgmt. Business Trust (September 19, 2024)*
  - Alleged that RIA of retail mutual funds overvalued nearly 5,000 largely illiquid collateralized mortgage obligations, by valuing "odd lots" with quotes obtained from a pricing service intended for institutional lots. Also involved allegations of cross trades to favor certain clients and minimize losses.
  - Investment adviser paid $79.8 million to settle charges without admitting or denying the findings
- *Catalyst Capital Advisors LLC (April 29, 2024)*
  - Alleged that an RIA of an open-end registered investment company arranged for the trust to pay, at least initially, all legal fees related to an SEC investigation and private litigation, including those associated with representation of the adviser.
  - SEC asserted violations of Section 17(d) and Rule 17d-1 of the ICA and Section 206(2) of the Advisers Act.
  - Investment adviser paid a $300,000 civil money penalty, without admitting or denying the findings.

Selected Enforcement Actions: Compliance and Reporting

- *Marketing Rule Violation Sweep (September 9, 2024).*
  - Nine investment advisers alleged to have violated Marketing Rule by disseminating untrue statements about third-party ratings, membership in non-existent organizations, and testimonials of non-existent clients, among others.
  - Without admitting or denying the findings, the firms consented to cease-and-desist orders and agreed to pay $1,240,000 in combined civil penalties.
- *FPA Real Estate Advisers Group (August 19, 2024).*
  - Alleged that an RIA with custody over assets of pooled investment vehicle clients failed to have client funds and securities verified by actual examination or audits, in violation of the custody rule (Rule 206(4)-2).
  - Also alleged to have failed to implement custody rule-related policies and procedures.
  - Without admitting or denying the findings, consented to cease-and-desist order with $300,000 civil money penalty.

Section 9 Disqualifications

- Historical SEC position: disqualifications are not enforcement remedies/tools and are not meant to be used for punishment or deterrence.
- SEC approaches to waiver requests vary by administration.
  - Chair Clayton: waiver requests considered with offers of settlement
  - Chair Gensler: waiver requests are handled separately, after consideration of settlement
- Recent examples where the SEC did not grant waivers
  - Two recent occasions where the SEC has declined to grant waivers of disqualifications under Section 9
  - Triggered by guilty pleas or consent orders involving misconduct by certain investments advisers and/or their affiliates that triggered the disqualifications of Section 9
  - Effectively required the affected firms to exit the business of providing advisory and/or principal underwriting services

CFTC ENFORCEMENT UPDATES

CFTC Enforcement Trends

- Dodd-Frank Reporting and Recordkeeping
  - Key message: the CFTC continued cracking down on off-channel communications and recordkeeping violations, but the end is in sight
- New Division of Enforcement Task Forces
  - Environmental Fraud Task Force
  - Cybersecurity and Emerging Technologies Task Force
- Whistleblowers
  - Over $42 million awarded to whistleblowers in past fiscal year
- Unprecedented Dissents
  - Commissioners Pham and Mersinger issued a new record of dissents in response to CFTC enforcement actions and settlement orders

CFTC Enforcement Update

Mankad, et al.: On August 21, 2024, the CFTC moved to revoke registrations for broker Mankad, commodity pool operator CTAX, and introducing broker CTAX for CEA antifraud provision violations:

- Mankad and the two entities fraudulently solicited funds, misappropriated money, and concealed near-total losses in the CTAX commodity pool:
  - Mankad and an investment advisor solicited approximately $2 million in CTAX pool investments
  - Mankad and CTAX represented that only CTAs would trade CTAX pool funds and failed to disclose Mankad's unauthorized trading
  - Mankad's trading resulted in a loss of almost all pool participants' contributions
  - Mankad then concealed those losses by intentionally withholding information from a third-party compliance advisor providing monthly updates to contributors and the NFA
  - Mankad and CTAX partners received "excessive, unjustified, and unlawful commissions" from Mankad's trades
- Defendants ordered to pay ~$1,631,073 restitution and ~$727,589 civil penalty, and their registrations are in the process of being revoked

CFTC Enforcement Update

In re Hendershott: On August 26, 2024, CFTC entered an order requiring Mark Hendershott to pay a civil monetary penalty for acting as an unregistered commodity trading advisor:

- Hendershott violated Sections 4m(1) and 6m(1) of the Commodity Exchange Act by using the mail or instrumentality of interstate commerce in connection with unregistered CTA business:
  - Hendershott was a consultant to farmers, and provided these farmers with "hedging advice relating to their crop production using commodity futures"
  - Provided tailored advice for using futures contracts to hedge wheat, soybean, oat, corn and lean hog crop production in exchange for a flat fee
  - Facilitated clients opening accounts with a CFTC-registered futures commission merchant; traded on many of his clients' behalf; and transferred funds to and from client accounts without power of attorney or other authorizing agreement
  - Conducted these actions without being registered, and utilized email, telephone, and the internet in the business transactions
- Ordered to pay a $75,000 civil monetary penalty

CFTC Enforcement Update

CFTC v. Landgarten: On August 29, 2024, federal court ordered a commodity trading fund operator to pay restitution and penalties for defrauding fund participants and commingling pool funds:

- Operated commodity pool with three participants investing $150,000
- Incurred "purported pool expenses," withdrew pool assets to reimburse himself, and misrepresented this on pool statements by not including the reimbursement deductions
- Commingled personal and pool funds by withdrawing more pool funds (~$10,000) than he had incurred in claimed expenses
- Ordered to pay $91,000 in restitution and $91,000 in civil monetary penalty, and received permanent trade and registration bans
- U.S. Attorney's Office filed a related criminal action; Landgarten pled guilty to attempting to obstruct an official proceeding; and received 10 months imprisonment, 100 hours community service, and supervised release

CFTC Enforcement Actions, Year To Date

Category	Oct	Nov	Dec	Jan	Feb	March	April	May	June	July	Aug	Sep	Total
Fraud	5	3	2	2	1	1	3	2	5	4	11	9	48
Registration violations	1	1	0	0	2	1	0	2	2	0	5	5	19
Failure to make required disclosures	0	3	1	1	0	0	0	2	0	0	2	1	10
Recordkeeping violations	1	0	0	0	0	0	1	0	0	1	3	3	9
Disclosure of confidential information	0	1	0	0	1	0	0	0	0	0	0	2	4
Spoofing	0	0	0	0	0	0	2	0	0	1	0	0	3
Failure to supervise	0	0	0	0	0	0	0	1	0	0	6	4	11
Other	0	0	2	1	0	0	1	0	2	0	0	0	6
Total	7	8	5	4	4	2	7	7	9	6	27	24	110

CME and ICE Annual Enforcement Statistic

Category	2020	2021	2022	2023	2024 YTD
Disruptive Trading	42	34	32	31	23
Block Trades	28	7	40	11	21
Wash Trades	18	20	22	39	33
Position Limits	13	14	9	19	8
Trade Practice (Other)	11	13	19	10	6
Failure to Supervise (Primary Offense)	5	10	16	7	10
Other Offenses	56	30	45	41	28
Total	173	128	183	158	129

CME and ICE Enforcement Statistics

- Average Fine YTD: $75,187
- Average Disgorgement YTD: $303,739
- 43 permanent suspensions delivered
- Average non-permanent suspension days 269
- Number of enforcements
  - ICE: 51
  - CME: 49
  - NYMEX: 32
  - CBOT: 23
  - COMEX: 22

CME MRAN on Supervision

On July 1, 2024, CME issued an MRAN providing additional guidance about the preexisting duty to supervise employees and agents:

- Supersedes the prior August 30, 2021, CME MRAN, and provides FAQ
- Describes factors considered when determining whether a party failed to diligently supervise, including the use of reasonable measures to:
  - Prevent rule violations from occurring; detect violative conduct should it occur; take corrective action to address identified instances of noncompliance; and implement supervisory programs to match the size and nature of a party's Exchange-related business
- Provides list of examples where CME Market Regulation has taken disciplinary actions for failure to supervise
- Provides non-comprehensive list of activities that constitute "reasonable supervisory measures to prevent rule violations" inclusive of:
  - Training employees and agents on Exchange-specific rules, amendments, notices, reports, and disciplinary actions; maintaining attendance records for trainings and communications about such trainings; specific Exchange-related activity training beyond general standing policies requiring compliance with exchange rules; and additional trainings based on party's own compliance monitoring and regulatory inquiries
- Details different responsibilities for parties operating ATSs; using more sophisticated technology; serving as intermediaries for client who is subject to a disciplinary action; providing access to CME Group Markets; receiving an inquiry letter; and who grant employee access to the CME trading floor

Supervision

- Duty to Supervise Employees and Agents
  - CFTC Regulation 166.3
  - NFA Compliance Rule 2-9
  - CME Rule 432.W
  - ICE Rule 4.01

DIGITAL ASSET / CRYPTO ENFORCEMENT UPDATE

Digital Asset Enforcement - Overview

- Continued trend of regulation by enforcement
- Until Congress or the regulators provide clarity on the classification of digital assets as commodities vs. securities, U.S. traders, platforms and other market participants face regulatory uncertainty and potential enforcement
- CFTC: garden variety fraud cases continue to be prevalent
- SEC: BTC and ETH recognized as commodities, all other digital assets at risk of being classified as securities
- At both agencies, “failure to register” enforcement actions related to digital assets have also been noteworthy in the past year, including in DeFi markets
    - Despite this, neither regulator has created a path forward for DeFi market participants to register

Digital Asset Enforcement – Litigated Cases

Friel v. Dapper Labs (S.D.N.Y.):

- Dapper sold NBA-endorsed NFTs depicting key moments in games
- A class action was filed, alleging that the NFTs were securities under the Supreme Court's *Howey* analysis
- Dapper filed motion to dismiss, arguing that the NFTs do not meet the definition of an "investment contract" or security under *Howey*
- The court denied Dapper's motion to dismiss because while it was a "close call" plaintiffs' allegations were plausible enough to find the NFT was a security under the *Howey* test
- Despite being the first case where an NFT was plausibly a security, the parties settled and agreed the NFTs would not qualify as securities under certain circumstances, including Dapper decentralizing the blockchain on which the NFTs are traded

Digital Asset Enforcement – Litigated Cases

SEC v. Coinbase, Inc. (S.D.N.Y Mar. 27, 2024):

- District court denied Coinbase's motion for judgment on the pleadings, finding the SEC plausibly pled that Coinbase operated as an unregistered exchange, clearing agency, and offered unregistered securities through its staking program
- However, the claim that Coinbase's wallet application made it an unregistered broker were dismissed because the SEC conceded that tokens "in and of themselves, are not securities"
- Court found the remaining named tokens were plausibly pled securities, in part because:
  - Token issuers represented the pooling of assets to improve or develop the token;
  - Coinbase made online representations about technical and entrepreneurial efforts to improve the value of the assets or efforts to reduce supply
  - Secondary market transactions (resale after initial offerings) may still be securities
- Finally, the court found the staking program was plausibly a security because Coinbase customers invested their assets and earned financial returns based on Coinbase's managerial efforts

Digital Asset Enforcement – Litigated Cases

SEC v. Mango Labs, Mango DAO, and Blockworks (S.D.N.Y 2024):

- SEC charged Mango's developers and DAO for offering Mango Market's governance token (MNGO) as an unregistered security
- SEC argued the MNGO token was a security because:
  - The MNGO price made MNGO holders/purchasers' fortunes rise and fall together
  - MNGO sale funds were used to develop and maintain the Mango platform
  - Mango made public statements about the MNGO tokens such as "being an interest-bearing asset" that portrayed them as having investment value
  - While the Mango DAO allowed MNGO holders to vote on governance proposals, that process was restrictive and practically relied on the Mango Markets creators
- SEC further claimed that Blockworks Foundation and Mango Labs operated as brokers with respect to MNGO tokens because they: held themselves out as brokers; provided advice or valuations on securities; and facilitated transactions in securities through the Mango Markets website
- Mango consented to a final judgment without admitting or denying the SEC's allegations requiring them to:
  - Pay a civil monetary penalty of $111,614
  - Destroy or make unavailable for sale, trade, or purchasing all MNGO tokens in their possession
  - Publish the final judgment on Mango Market's social media and website
  - Issue requests to remove MNGO tokens from all crypto exchanges and trading platforms

CFTC Digital Asset Enforcement

In re Universal Navigation Inc d/b/a Uniswap Labs: On September 4, 2024, the CFTC issued an order filing and settling charges against Uniswap labs for illegally offering leveraged or margined retail commodity transactions in digital assets:

- Uniswap developed and deployed a blockchain-based digital asset allowing non-eligible contract participants to create and trade with hundreds of liquidity pools consisting of matched digital asset pairs valued against each other
- Among the digital assets were a limited number of leveraged tokens that provided users “leveraged exposure to digital assets such as Ether and Bitcoin”
- These limited tokens were determined to be leveraged or margined commodity transactions because they were not actually delivered within 28 days
- Found to be illegal derivative trading because leveraged or margined transactions can only be offered to non-eligible contract participants on a board trade designated or registered by the CFTC as a contract market, which Uniswap was not
- Ordered to pay $175,000 civil monetary penalty and to cease and desist activity violating the CEA

LITIGATION UPDATE

Selected Asset Management Litigation

- *Infinity Q* litigation
  - Class action litigation settled
  - Fund's Special Litigation Committee is pursuing claims against the fund's auditor and its fund services provider for breach of contract, negligent misrepresentation, and indemnification.
  - DOJ criminal charges against portfolio manager
  - SEC litigation against the adviser, portfolio manager, and compliance officer
  - SEC litigation against the mutual fund and private fund, seeking orderly dissolution and appointment of monitors / special masters
- *Mosaic Financial, Ltd. v. Mutual Shareholder Services, LLC*
  - Allegations that mutual fund administrator ignored red flags regarding fraud by the investment manager, who later pled guilty to fraud
  - Motion to dismiss pending

Other Fund-Related Litigation

- ’33 Act and ’34 Act claims based upon allegedly false and misleading representations in prospectuses, public filings, and marketing materials
  - Broad range of asserted misrepresentations, including as to fund investment objectives, misrepresentation of investment risks, and failures to disclose events adversely affecting operations.
- Breach of fiduciary duty claims
  - Typically brought in state court against fund board members, although the adviser may also be named as an “aider and abettor” of asserted breaches of fiduciary duty.
- End of recent wave of litigation under Section 36(b) of the ’40 Act following rulings universally in favor of defendants

Impacts From Recent Supreme Court Administrative Law Rulings

- The U.S. Supreme Court's most recent term included a number of significant administrative law rulings.
  - *Loper Bright Enters. v. Raimondo* – overruling *Chevron* deference, instead requiring courts to exercise "independent judgment" to resolve statutory ambiguities and find the best meaning of statutes
  - *SEC v. Jarkesy* – holding that defendants are entitled to a jury trial for securities fraud claims seeking civil penalties
  - *Corner Post, Inc. v. Board of Governors* – agency action challenges under the APA accrue only when the particular plaintiff is injured
- Impacts on SEC enforcement:
  - Fewer administrative proceedings
  - No deference owed to the agency for cases asserting violations of ambiguous laws
- We expect an increase in challenges to agency rules, including potentially long-settled rules.

K&L GATES

Trade Association Panel Discussion

Speakers

Daniel Austin, Head of U.S. Markets Policy and Regulation, AIMA

Paul Cellupica – General Counsel, ICI

Kevin Ehrlich – Managing Director, SIFMA AMG

K&L GATES

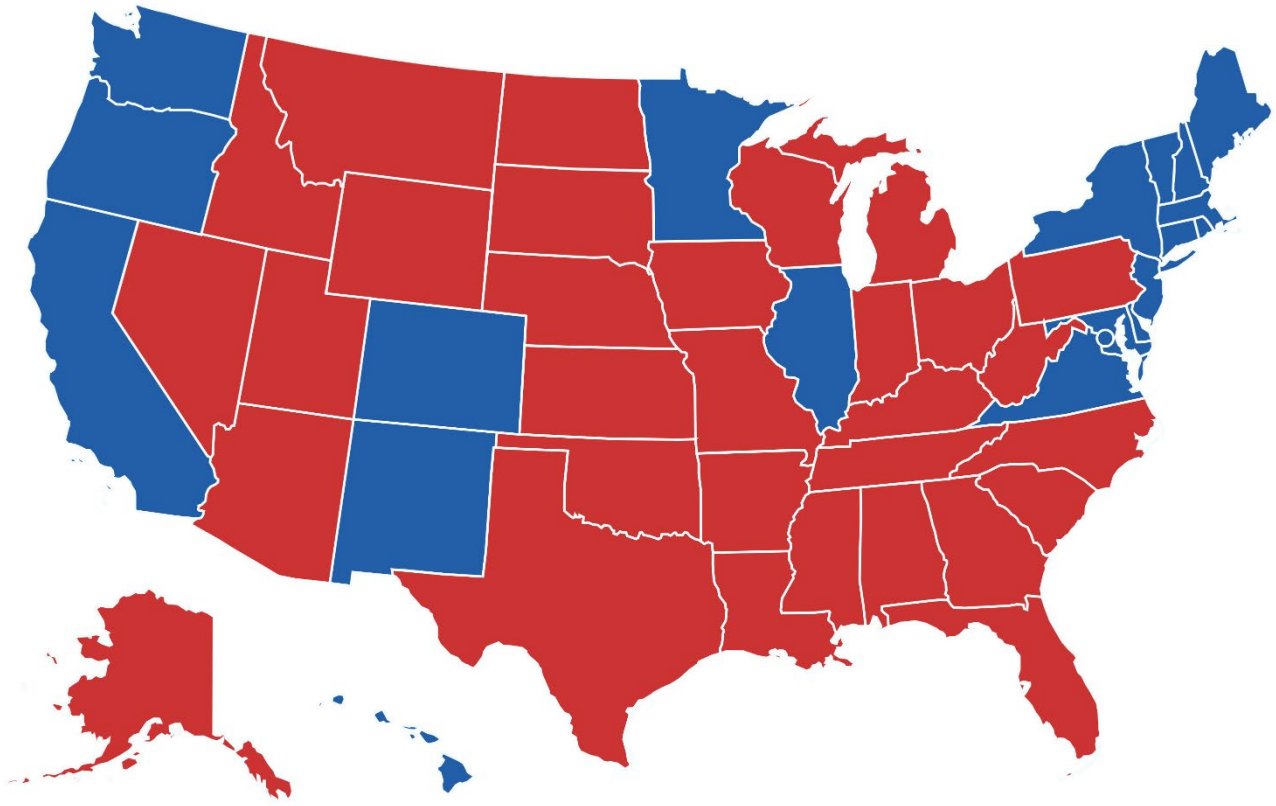
Post-Election Policy Presentation - Washington Update

Speakers

Ryan Carney – Partner, K&L Gates

Joe Trahern – Of Counsel, K&L Gates

White House: President-elect Trump Wins Decisively

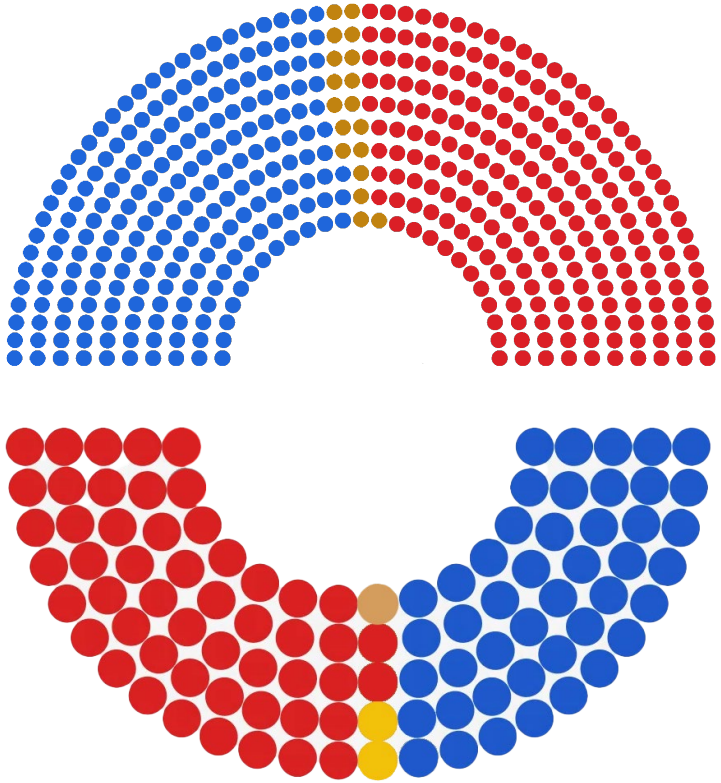


312
74,834,277
(50.4%)

226
71,239,855
(48.0%)

119th Congress

- Republican
- Democrat
- Independent
- Too close to call/Recount



HOUSE OF REPRESENTATIVES

Republican: 218
Democrat: 212
Too Close To Call: 5

SENATE

Republican: 53
Democrat: 44
Independent: 2*
Too Close To Call/Recount: 1

**Caucus with Democrats*

Source: AP News

The Red Wave

- President Trump and Congressional Republicans have a perceived **mandate**
  - Vote for candidates v. context
  - Election will have **consequential policy impacts**
- Immediate reversal of Biden-era policies (EOs/CRA), fast legislative push, executive/ regulatory/compliance action, oversight, powerful social/traditional media leverage, DOGE
- **But also, a moment in time:** political pendulum swing continues to accelerate; political physics could easily result in a flip in House control in 2026 midterms

The Trump Agenda

- Trump won on two primary issues:
  - **Inflation** – appointees will be committed to a pro-economic growth agenda, including “DRILL BABY DRILL” to lower energy costs
  - **Immigration** – focus is on securing the boarder and deportation of documented criminals.
- Trade negotiations will revolve around:
  - **Tariffs** - goal is to address trade imbalances
  - **Energy** - goal is U.S. industry dominance
  - **China** – goal is economic and military isolation

What's Next

- Lame Duck Session Priorities
  - Must pass legislation
    - FY2025 federal funding
      - Timing unclear
    - FY2025 NDAA
    - Farm Bill
    - Debt ceiling
  - Senate judicial nominations
  - Leadership elections and conference rules

Committee Leadership Changes - HFSC

Patrick McHenry (R-NC), **Financial Services**

- GOP contenders (clockwise from top left): Andy Barr (R-KY), French Hill (R-AR), Frank Lucas (R-OK), and Bill Huizenga (R-MI)

Maxine Waters (D-CA), **Ranking Member, Financial Services**

- Key Priorities:
  - Racial equity and D&I-related efforts
  - Oversight of big banks and “bad actors”
  - Consumer protection
  - Housing affordability and access
  - Digital assets

Committee Leadership Changes - Banking

Tim Scott (R-SC), **Chair, Banking, Housing & Urban Affairs**

- Also likely NRSC Chair
- Key Priorities:
  - Capital formation
  - Reducing regulatory burdens
  - Housing
  - Digital assets

Sherrod Brown (D-OH), **Banking, Housing, & Urban Affairs**

- Defeated in reelection race
- Next most senior member without an existing role as top Democrat on another committee is Sen. Elizabeth Warren (D-MA)

Looking Ahead: Financial Services Policy

- Changes in committee leadership may have changes in policy priorities
- Republicans have signaled that a key aspect of their political platform is to undo certain “woke” financial policies implemented by the Biden administration and Democrats, as well as the Basel III Endgame proposal
- Top oversight priorities will likely include:
  - ESG-related regulations, including countering the “Green New Scam,” proxy voting issues, corporate governance, etc.
  - D&I-related regulations and agency initiatives, including human capital disclosures
  - International regulatory frameworks affecting U.S. companies (e.g., EU Corporate Sustainability Due Diligence Directive)
  - Regulations from the CFPB, SEC, and other financial regulators

However, Slim Margins Remain

- Despite Republicans having control of the White House and Congress, slim majority margins will continue to play a role in lawmaking and will necessitate bipartisanship
- Some areas of potential bipartisan agreement will likely include:
  - China investments
  - Digital assets
  - Regulation of AI in financial services
  - Need for substituted compliance with EU regulatory regime

Impact On ESG Policy

- Congress and Trump administration will work together to undo Biden-era regulations on climate, “equity,” etc.
  - CRA resolutions, EOs, and rulemaking
- EU Sustainability Reporting Regimes
  - Will push back on extraterritorial impact of CSRD and CSDDD on US companies
- State Laws
  - Will seek to preempt state laws (e.g., CA climate laws) if not vacated in court

Trump Administration – Potential Regulatory Impacts

- SEC
  - Trump has promised to remove current Chair Gensler “on day one.” It is unclear at this point who will be Chairman
  - Focus on rolling back Biden administration regs, particularly related to:
    - Climate risk disclosure
    - Proxy advisors
    - Shareholder proposals
    - Digital assets
- CFPB
  - Unclear at this point who will be Director. Trump plans to remove current Director Chopra expeditiously
  - Focus on reducing regulatory framework

Tax Reform And Related Priorities

- 2025 Tax Reform
  - 2017 Tax Cuts and Jobs Act temporary provisions expire
  - Trump Administration/GOP Congress want to incentivize US manufacturing, bolster US supply chains and competitiveness
  - Big tax bills are few and far between – pent-up Member appetite to consider their pet policies
  - Interest in rolling back Biden-era policies, like clean energy
- Budget Reconciliation
  - Requires only 51 votes in the Senate, not the usual 60 (GOP expected to hold 53 seats in the Senate)
  - Budget reconciliation is an arcane process that limits what can be included in the package
  - **Even with only a majority vote requirement, intra-party disagreements, especially over the deficit, could snag the process**

What's Expected In A Tax Package

- What *won't* be included: Big tax increases on large corporations and the wealthy, e.g., no "billionaire's tax"
- Expect policies to grow the economy, create jobs, bolster US supply chains and competitiveness, deter outsourcing and imports
- Chair Smith priorities are small business, family farms, individuals; will need to meld with more traditional GOP priorities supported by the White House
- **Keep corporate tax rate low, or reduce further**
- **TCJA extensions**
  - Extend individual tax cuts
  - Extend 199A pass-through deduction
  - Restore full expensing, EBITDA base for interest expense, full R&E deductibility
  - Extend larger estate tax exemption
  - Raising the SALT cap
- **IRA**
  - Repeal corporate alternative minimum tax
  - Repeal stock buy-back excise tax

What's Expected In A Tax Package

- Foreign entity of concern (FEOC)
- GILTI, FDII, BEAT reforms
- Disaster relief (if not in lame duck)
- Taiwan "tax treaty"
- Affordable housing
- Child tax credit
- Retaliation against Pillar 2? Digital services taxes?
- **Offsets**
  - Expect tension on what needs to be paid for, how much cost needs to be paid for, and adding to the deficit
  - Tariffs?
  - Proxies for tariffs?
  - Repeal or clawing back of IRA clean energy provisions
  - Excise tax on endowments
  - Build Back Better cutting room floor
  - Expect creative surprises
  - **Don't underestimate the give and take of policies v. pay-fors**

Legislation Is Not The Only Tool In The Box

- **Congressional Review Act**
  - Expect the Biden Administration to finalize as many regulations as possible before Jan. 20
  - CRA can be used to rescind regulations finalized by a prior administration; majority votes
  - CRA window is roughly August 1, 2024 through end of March, 2025
  - THE CATCH: Cannot issue "substantially similar" regulations once rescinded. Substantially similar is not defined. Republicans will need to use this tool strategically so they are not throwing the baby out with the bathwater.
- **Executive Branch**
  - Trump Administration can reopen regulatory projects
  - Can issue sub-regulatory guidance
  - Can pause open regulatory and guidance projects
  - Can issue executive orders
  - Agency appointees
    - Policy priorities, resource allocation
- **The Courts**
  - Challenges to regulations pursuant to *Loper Bright* and *Chevron* deference
  - Challenges pursuant to *Corner Post*

When Do We Expect Tax Legislation?

- Republicans are formulating their tax packages **now**
- We may see report-outs from the HWMC Tax Teams on public comments very soon
- Republicans will kick-off the budget resolution/budget reconciliation process in January
- We may see legislative proposals even before a budget resolution containing budget reconciliation instructions is passed – a marker for policies
- GOP hopes to move legislation within first 100 days
  - That may be optimistic, depending on tensions between policies and offsets, tolerance for adding to the deficit
- Despite optimistic projections, this could drag out

It's Happening!

- Tax reform is real
- Republicans want to deliver for President Trump
- Everything potentially is in play
- DO NOT ASSUME ANY TAX DEDUCTION, CREDIT, OR ATTRIBUTE IS SAFE
- On the other hand, don't assume an issue is a lost cause and do nothing
- **Businesses should be modeling the risks and opportunities and engaging**
- Messaging should be couched in context of the economy, jobs, national security