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2023 investment  
management  
regulatory outlook

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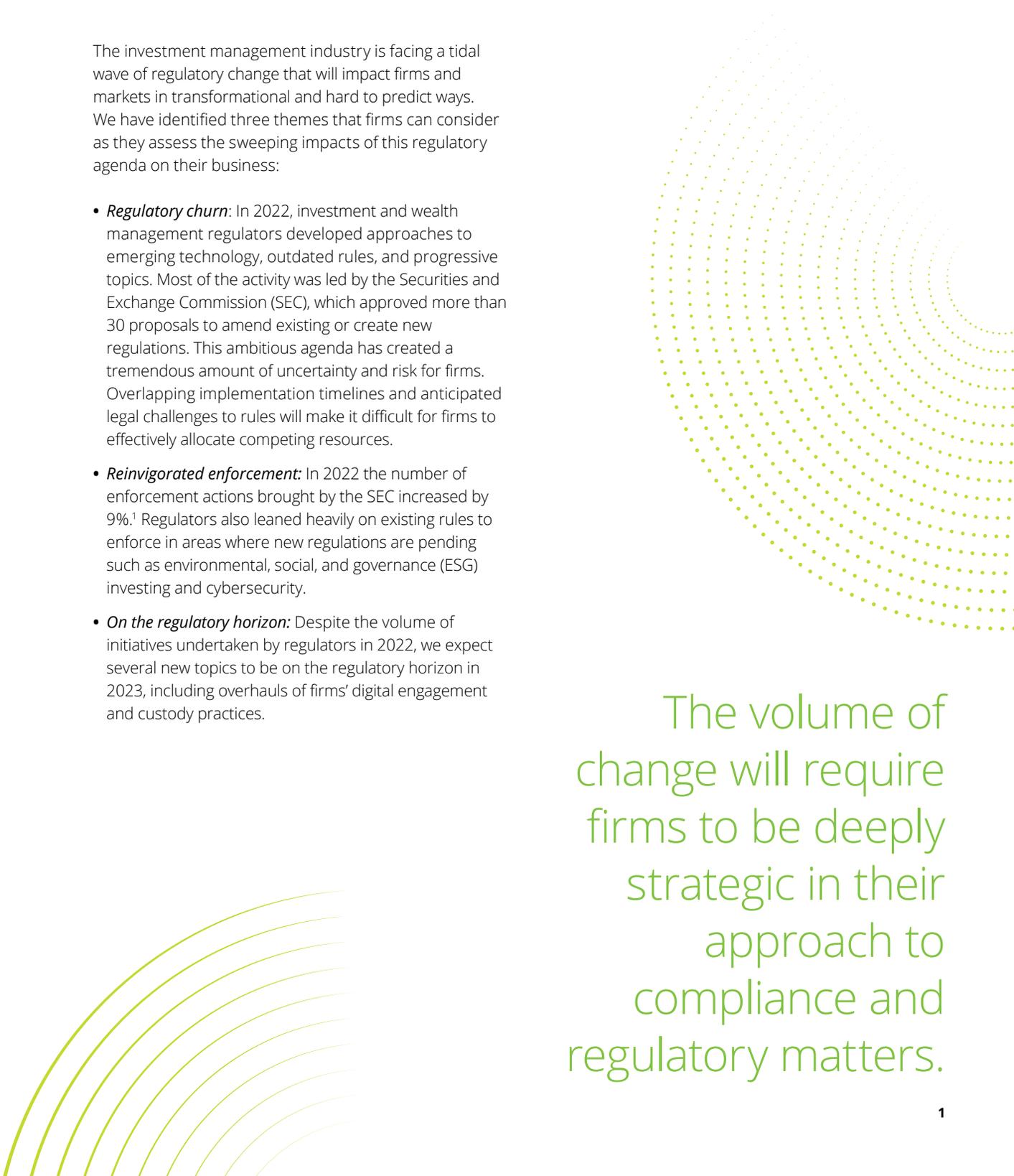
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# A packed agenda for 2023: Gearing up for massive changes

The investment management industry is facing a tidal wave of regulatory change that will impact firms and markets in transformational and hard to predict ways. We have identified three themes that firms can consider as they assess the sweeping impacts of this regulatory agenda on their business:

- **Regulatory churn:** In 2022, investment and wealth management regulators developed approaches to emerging technology, outdated rules, and progressive topics. Most of the activity was led by the Securities and Exchange Commission (SEC), which approved more than 30 proposals to amend existing or create new regulations. This ambitious agenda has created a tremendous amount of uncertainty and risk for firms. Overlapping implementation timelines and anticipated legal challenges to rules will make it difficult for firms to effectively allocate competing resources.
- **Reinvigorated enforcement:** In 2022 the number of enforcement actions brought by the SEC increased by 9%.<sup>1</sup> Regulators also leaned heavily on existing rules to enforce in areas where new regulations are pending such as environmental, social, and governance (ESG) investing and cybersecurity.
- **On the regulatory horizon:** Despite the volume of initiatives undertaken by regulators in 2022, we expect several new topics to be on the regulatory horizon in 2023, including overhauls of firms' digital engagement and custody practices.



The volume of change will require firms to be deeply strategic in their approach to compliance and regulatory matters.



# Regulatory churn

The massive number of rule proposals in 2022 casts a long shadow of uncertainty over the regulatory agenda in 2023. How many of the proposals ultimately will translate into final rules that the industry must implement? Two big factors that likely will determine this are (1) SEC leadership and oversight and (2) legal challenges to the agenda. Since the SEC has led the market regulators' new rulemaking activity, the approach of its leadership (and specifically of the Chair) is paramount. Chair Gensler identified a sweeping agenda of regulatory change and likely intends to follow through on his vision. While it is possible that external pressures on the Commission and the realities of effectuating, rather than proposing, change could force prioritization. The Investment Company Act of 1940 (Investment Company Act) provides the SEC with broad authority to regulate the industry.<sup>2</sup>

Nevertheless, oversight of the SEC likely will intensify with the new Congress, particularly since control of the House flipped narrowly in the midterm elections. Given its new leadership, we expect the House Financial Services Committee (HFSC) to scrutinize Chair Gensler's agenda, and ESG likely will be an especially hot-button issue. Legal challenges, which are all but inevitable for the most controversial proposals, are potentially strengthened by recent Supreme Court rulings.<sup>3</sup> Nevertheless, firms should plan as though the proposed agenda will be enacted because even if only a fraction of it is finalized, the changes will be impactful, and significant implementation efforts will be required. Further, the uncertainty brought on by legal challenges to final rules could linger for years, potentially placing firms in an untenable position if they do not prepare for an outcome that favors the regulators.

Despite the uncertainty, firms should be aware of the agenda that likely will be finalized in 2023. We identify two categories of proposals impacting investment management firms: (a) transformative proposals and (b) overlapping requirements. Transformative proposals are those that expand the regulatory perimeter or compel seismic shifts in industry practice such as requiring certain funds to implement swing pricing. Overlapping requirements refers to the reality that the heavy volume of rulemaking has resulted in multiple proposals related

to the same topic. Firms could have overlapping rules and requirements for high-priority topics like ESG and cybersecurity from a single regulator.

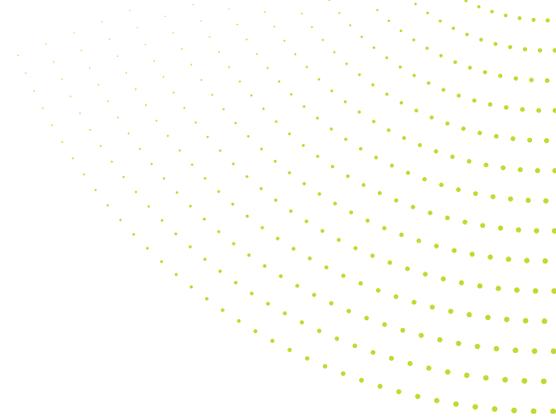
## Transformative proposals

### Swing pricing

The SEC has approved two rule proposals to bring swing pricing to US funds.<sup>4</sup> The first proposal, issued at the end of 2021, applies to certain money market funds (MMFs).<sup>5</sup> The second proposal would bring swing pricing to many open-end funds.<sup>6</sup> The proposals are designed to reduce shareholder dilution and intended to help prevent runs in times of stress.

**Table 1. The SEC has approved two rule proposals**

Money market fund proposal	Open-end fund proposal
Increases liquidity requirements for funds	Amends rule 22e-4 ("the Liquidity Rule") to require funds to assume the sale of a "stressed trade" size in their liquidity requirements and removes the "less liquid" investment category, treating these investments as illiquid
Prevents them from imposing liquidity fees or halting redemptions	Prevents them from imposing liquidity fees or halting redemptions
Requires that institutional prime and institutional tax-exempt funds implement swing pricing	Requires open-end funds to implement swing pricing
Creates additional disclosure and record-keeping requirements related to a negative interest rate scenario	Requires these funds to institute a hard close



Implementing swing pricing would create operational complexities for firms and require capabilities to aggregate and analyze significant amounts of data within a short implementation period.<sup>7</sup> The open-end fund proposal states that the hard close would require intermediaries “to submit orders for fund shares earlier than they currently do [and]...may affect all market participants sending orders to relevant funds, including broker-dealers, registered investment advisers, retirement plan recordkeepers and administrators, banks, insurance companies, and other registered investment companies.”<sup>8</sup> The SEC estimates that the liquidity requirements could result in as much as 15% of funds increasing their daily liquid assets and 50% increasing their weekly liquid assets, thereby increasing their demand for repos.<sup>9</sup>

Another important part of the proposed rule for money market funds relates to how those with stable net asset values (NAVs) might handle a negative interest rate environment. In this scenario, funds may need to convert to a floating share price, which would also result in operational complexities and likely necessitate coordination with service providers. The rule proposal would require funds to maintain records identifying the funds’ intermediaries that have the capacity to adapt to non-stable share prices and those that do not. The proposal increases barriers to entry and may limit the availability of these products, particularly institutional prime and institutional tax-exempt funds.

### Proposed reforms for private funds

In 2022, the SEC approved a proposal to enhance the regulatory compliance obligations of private fund advisers (PFAs). The proposal would:

- Require registered private fund advisers to provide their clients with quarterly statements providing details of fund performance, fees, and expenses.
- Require registered private fund advisers to obtain annual audits for each private fund.

- Require private fund advisers to obtain and disseminate a fairness opinion for adviser-led secondary transactions as well as a written summary of any material business relationships between the adviser and opinion provider.
- Prohibit all private fund advisers (including unregistered PFAs) from engaging in certain activities that the SEC has deemed not to be in the public interest, including charging fees or expenses on portfolio investments on a non-pro rata basis and borrowing or receiving an extension of credit from a private fund client.
- Prohibiting private fund advisers from engaging in preferential treatment with limited exceptions.

The SEC is proposing a one-year compliance period for firms to implement these changes. Thus, firms should begin to evaluate the proposal’s impacts on their business as soon as possible.

### Amendments to the definition of dealer and government securities dealer

Two “definitional” proposals expand the scope of entities required to register with the SEC. In effect, these proposals would stretch the regulatory perimeter to new entities.<sup>10</sup> The second of the two proposals extends the broker-dealer regulatory regime to market makers not typically under its umbrella by creating two new rules that define qualitative and quantitative standards for determining what constitutes liquidity provision “as part of regular business” under the Exchange Act of 1933 (Exchange Act).<sup>11</sup> The proposal further defines “as part of regular business” in the Exchange Act. In effect, the proposal would require certain principal trading firms, private funds, and other market participants to register as dealers. This would entail registering with the SEC and the Financial Industry Regulatory Authority (FINRA) and complying with federal securities laws, including reporting and capital requirements.

Some initial actions that firms potentially affected by the proposal can take include:

- Work with firms' counsel to interpret and understand the proposal.
- Conduct a strategic assessment of opportunities and trade-offs presented by regulation.
- Identify the current or future entity that would register and perform a pro forma capital computation.
- Conduct a gap assessment of the technology and systems design and implementation capabilities required.
- Conduct a gap assessment of the compliance program against leading practices and regulatory expectations.

If finalized, firms would have one year to come into compliance following the rule's effective date. This places significant urgency on firms to assess their alternatives and develop a plan before the rule is finalized.

## Overlapping regulatory requirements

### Environmental, social, and governance (ESG)

In 2022, the SEC approved three separate ESG-related proposals: one for public company issuers<sup>12</sup> and two specifically for the investment management industry.<sup>13</sup> "The Enhancement and Standardization of Climate-Related Disclosures for Investors" established disclosure and reporting requirements for all 10-K filers. The proposal presents both a reporting obligation to public firms and an opportunity for enhanced data and market transparency for investing purposes, making it both a burden and a boon. In fact, the potential for the rule to redirect capital flows is at the heart of its controversial nature. In 2023, we expect the SEC to approve a final rule that does not include reporting of Scope 3 emissions and for that final rule to be challenged in court. This creates a lot of uncertainty for firms trying to determine

where to make investments and is the essence of our theme of "regulatory churn." Despite its uncertain future, it is important for firms to understand the contents and objectives of the proposal.

Since the SEC has additional statutory authority over investment advisers (IAs) and investment companies (ICs), it proposed two additional prescriptive rules related to ESG for these entities: (1) amendments to the fund names rule and (2) ESG disclosure standards for IAs and ICs. Thus, investment management firms could have as many as three separate ESG-related rule proposals to implement from a single regulator. This complexity will require a great deal of coordination to implement effectively. As a first step, firms should assess whether they have an adequate internal structure to manage the current volume of regulatory transformation.

### ESG disclosure for investment advisers and investment companies<sup>14</sup>

This proposal, approved in May 2022, amends rule 497 under the Securities Act of 1933 and rule 402 of Regulation S-T under the Securities Exchange Act of 1934 and a series of reporting forms to require specific disclosures about ESG strategies in fund prospectuses, annual reports, and adviser brochures. The proposed amendments would apply to registered investment advisers, certain unregistered advisers, registered investment companies, and business development companies.

The proposal defines three types of ESG funds and requires varying levels of disclosure in accordance with how central ESG factors are to the fund's investing strategy. As defined in the proposal, the three types of ESG funds are:

- 1. Integration funds:** Under the proposal, integration funds are those that consider one or more ESG factors alongside non-ESG factors in investment decisions, but where such ESG factors are generally not more significant than other factors in the investment selection process. These funds would be required to describe how ESG factors are considered in the investment process in the fund prospectus.



**2. ESG-focused funds:** The proposal defines ESG-focused funds as those that focus on one or more ESG factors and use such factors as a significant consideration in selecting investments or in their engagement strategy with companies in which it invests. Such factors could include screens for carbon emissions, board or workforce diversity and inclusion, or industry specific issues. These funds would be required to provide more detailed disclosures, including a standardized ESG strategy overview table. If an ESG-focused fund considers environmental factors, the fund would be required to disclose two different greenhouse gas emission metrics in the fund’s annual report.

**3. Impact funds:** As the name suggests, impact funds seek to achieve specific ESG impacts or generate specific ESG related benefits. These funds would have the same requirements as other “ESG-focused funds” but would also be required to disclose the fund’s methodology for measuring progress toward its impact objective.

The proposal specifies that disclosure requirements for unit investment trusts (UITs) will not distinguish between integration and ESG-focused models due to the stagnant nature of UIT portfolios.



Firms can consider several actions when preparing for a final rule, including:

- Evaluating the proposal and existing funds to identify affected funds and classify each as either an integration, ESG-focused, or impact fund. In cases where the distinction is not clear, it may be useful to obtain a legal opinion as to the classification of each fund.
- Assessing the marketability of various fund types to determine whether the additional disclosure burden is cost-effective.
- Documenting each fund’s strategy, investment factors, and classification under the rule.
- Evaluating and identifying reliable sources of ESG data; planning to integrate data sources as needed.
- Creating or enhancing processes and controls to ensure that the funds’ assets are invested in a manner that is consistent with its classification.
- Establishing internal controls and governance to ensure these funds are managed in accordance with the fund type classification.

The proposal recommends a compliance date of one year following the effective date of a final rule for most of the new requirements and an 18-month implementation period for those disclosures required in the annual shareholder report and on Form N-CSR.<sup>15</sup>

**Amendments to the fund ‘Names Rule’<sup>16</sup>**

On the same day that it approved the ESG disclosure proposal, the Commission also approved a proposal to amend the fund “Names Rule.” The proposed amendments to Rule 35d-1 under the Investment Company Act includes the following changes:

- Expand the 80% investment policy requirement to fund names that suggest that the fund focuses on investments or issuers with certain characteristics, including by using the term “ESG.”

- Prohibit funds that consider ESG factors “alongside but not more centrally” than non-ESG factors from using ESG terminology in their name.
- Incorporate business development companies (BDCs) in the definition of “fund” under the rule.
- Require the fund to use the notional amount (rather than market value) of derivatives in the portfolio for determining compliance with the 80% rule.
- Detail the specific circumstances and timing under which a fund is permitted to depart from its 80% investment policy.
- Prohibit registered closed-end funds and BDCs that are not listed on a national exchange from changing the 80% investment policy without a shareholder vote.
- Require fund prospectus disclosures that define the terms used in a fund’s name.
- Require additional record-keeping and reporting related to how the fund complies with the 80% investment policy.

The proposal recommends a one-year compliance period for the final rule. To prepare for a final rule, firms can consider several actions, including conducting:

- A gap assessment for existing funds and BDCs to determine those that comply with the amendments as proposed and those that do not.
- Conduct business case evaluations for any funds whose current investment strategies do not comply with the rule as proposed to recommend either changes to the fund’s name or to the underlying investment strategy.
- Conduct scenario analyses for any funds that rely (or occasionally rely) on the market value of derivatives in their portfolio to comply with the 80% rule.
- Develop definitions for terms used in fund names for inclusion in fund prospectuses.

## Cybersecurity

In February 2022, the SEC approved two cybersecurity rule proposals: one for public company issuers and another tailored to investment advisers and investment companies.<sup>17</sup> Advisers that are also public company issuers will need to comply with the requirements in both rules assuming each becomes effective.

### Cybersecurity risk management What should investment advisers, registered investment companies, and BDCs anticipate?

In February 2022, the SEC proposed new rules and amendments under both the Advisers Act of 1940 (the Advisers Act) and the Investment Company Act. Under the Advisers Act, the SEC proposed: (a) new rules 206(4)-9 and 204-6, (b) amendments to rules 204-2 and 204-3(b), and (c) new Form ADV-C and amendments to Form ADV. Under the Investment Company Act, the SEC proposed new rule 38a-2 and amendments to Forms N-2, N-3, N-4, N-6, N-8B-2, and S-6.

In total, the proposal has four major components:

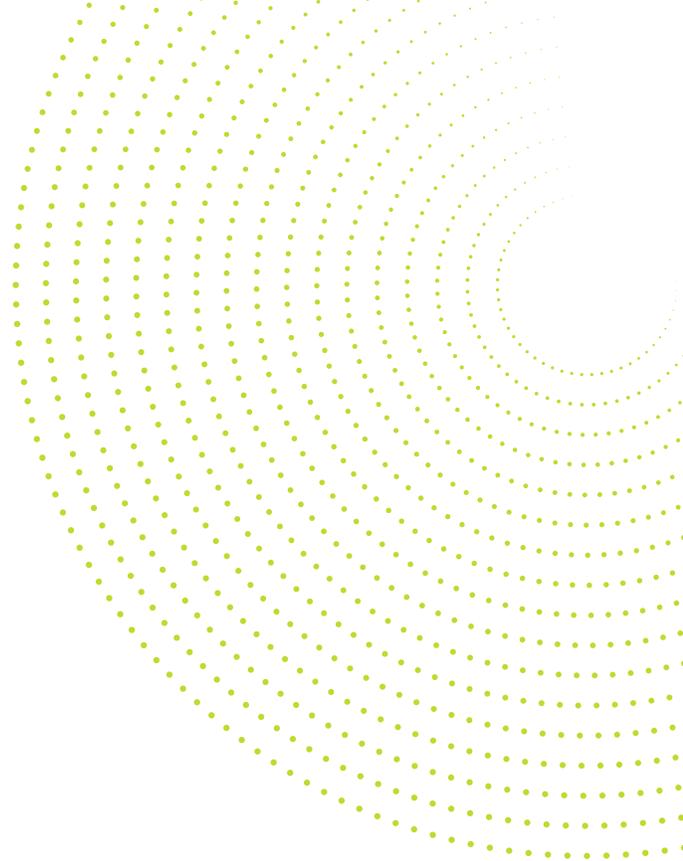
1. Funds and advisers would be required to implement cyber risk management policies and procedures.
2. Advisers would be required to report significant cyber incidents to the Commission within 48 hours on new Form ADV-C.
3. Advisers and funds would be required to disclose cybersecurity risks and incidents to their investors and other market participants.
4. Advisers and funds would be required to maintain cybersecurity-related books and records.

The rule would also require registrants to consider the cybersecurity risks caused by their reliance on third-party service providers, including how advisers and funds currently consider cybersecurity risks when choosing third-party service providers. The rule would also require registrants to consider the cybersecurity risks caused by their reliance on third-party service providers, including how advisers and funds currently consider cybersecurity risks when choosing third-party service providers. The requirements of the proposal mirror the leading practices identified in the SEC's 2020 "Cybersecurity and Resiliency Observations" report, and the SEC potentially has enough law on the books already to enforce many of the requirements.<sup>18</sup>

The proposal raises a host of considerations for advisers and funds regarding their cybersecurity practices.<sup>19</sup> Some actions firms can take to prepare for a final rule include:

- **Elevate the governance of cyber risk management:** The rule proposal will necessitate closer collaboration between CISOs and CCOs. For firms that don't have a corporate board subcommittee dedicated to cybersecurity, now may be a good time to organize one or add to the responsibilities of an existing subcommittee.
- **Conduct a gap assessment of cyber program capabilities against leading practices and regulatory expectations:** This can help firms baseline their cybersecurity program maturity and identify improvement areas. Firms that have not already done so should review the areas highlighted in the 2020 Examinations Report, which identifies seven areas of focus for firms, all of which are implicated in the Proposing Release. The gap assessment should also incorporate a mapping of current practices to the existing legal and regulatory framework as described by the SEC staff in the Proposing Release.
- **Adopt and implement written policies and procedures** that are reasonably designed to address cybersecurity risks.

- **Accelerate the timeline for enhancing your cybersecurity posture:** A minimum baseline of cybersecurity program maturity is essential to manage risks. The specter of regulatory imperative can be a powerful motivator to make investments that mature cyber capabilities.
- **Determine a mechanism for the adviser's board of directors to approve** cybersecurity policies and procedures and review the written report on cybersecurity incidents and material changes to the adviser's cybersecurity policies and procedures that would be prepared at least annually.
- **Identify a team with primary responsibility for cyber compliance:** Firms are increasingly adopting specialized and deeply skilled groups to manage cyber risks. The proposal affirmatively states that advisers will have the flexibility to self-identify the group responsible for cybersecurity oversight as it pertains to the rule, which may be a combination of compliance and IT professionals as well as third-party service providers.
- **Conduct tabletop exercises:** Firms should have the ability to handle critical incidents, quickly return to normal operations, and repair damage to the business. To this effect, firms need to review their incident response preparedness by engaging in cyber wargaming and other tabletop exercises to measure the efficacy of their incident and crisis response capabilities.





# Reinvigorated enforcement

After years of light policing, the SEC is increasing its enforcement headcount and redoubling its efforts to police registrants. Record fines have been imposed and rigid compliance with existing standards has been required in areas where new rulemaking is forthcoming.<sup>20</sup> Paired with the onslaught of new rulemaking activity, compliance expectations for firms have never been so high.

## IA marketing rule<sup>21</sup>

In December 2020, the SEC finalized a new rule governing investment adviser marketing that replaced two existing rules—for advertising and cash solicitation—with modernized, principles-based requirements. The new rule, which became effective on May 4, 2021, standardizes practices since the industry had become heavily reliant on various no-action letters issued by the SEC to adapt its old rules, which had not been updated in 40 years, to new technologies and practices.

In 2023, the SEC will be examining for full compliance with this rule. To minimize the risk of enforcement action, there are several steps that firms can take, including:

- Creating an SEC presentation deck discussing enhancements made because of the rule change
- Conducting a readiness assessment to identify any gaps vs. leading industry practices in the enhancements made to comply with the rule
- Reviewing the SEC risk alert to ensure that any focus areas are properly addressed in enhancements and preparations for SEC inspection<sup>22</sup>

November 4, 2022, marked the compliance date for the rule and the end of an 18-month transition period. In September 2022, the SEC announced an exam sweep focused on the rule.<sup>23</sup> When the SEC releases its findings from the sweep, firms will be able to compare the findings with their practices to determine whether further alignment with the rule is needed. In 2023, the SEC may bring enforcement actions in cases of severe noncompliance. Thus, firms that have not completed their preparations for compliance face great urgency to do so.

## Electronic communications<sup>24</sup>

In September 2022, the SEC and Commodity Futures Trading Commission (CFTC) levied fines against 11 financial institutions for record-keeping, monitoring, and supervisory failures associated with business communications conducted outside of permissible channels. The charges primarily stemmed from employee use of personal devices to discuss business matters, a practice that in many cases violated the SEC's and CFTC's record-keeping and compliance requirements.

While some of the alleged behavior may have been egregious or reflective of a culture of a general disregard for these record-keeping policies, regulators' expectations place firms in a challenging position. Firms have, in effect, been designated to supervise their employees' use of personal devices in part so that their communications are available to support future regulatory investigations. As the dust settles from this most recent round of fines, many firms are looking to assess their electronic communications and record-keeping programs considering regulatory expectations. As part of these efforts, firms should consider the following steps:

- Assess electronic communications policies, procedures, and practices by (a) Identifying gaps and opportunities for enhancement; (b) Assessing the feasibility of firm-issued devices (as opposed to bring-your-own-device policies); (c) Polling employees about their communication practices to establish a sense of the firm's risk profile; (d) Enhancing monitoring and surveillance capabilities; and (e) Evaluating the existing governance model, including escalation protocols and disciplinary processes.
- Conduct analyses on historical electronic communications via lookback data collections that capture historical mobile messages and running enhanced analytics on available data, such as natural language processing (NLP) and artificial intelligence (AI) models. If these tools already exist, determine whether new alerts or surveillance patterns are needed.

- Evaluate and identify enhancement opportunities in the current technology infrastructure for electronic communications record-keeping and monitoring, including 1) enhanced solutions to capture communications from mobile applications; and 2) automated surveillance modules that leverage AI, machine learning, and analytics capabilities to detect issues and instances of noncompliance.

## Section 15(c) and Section 36(b) compliance<sup>25</sup>

The SEC has signaled increased interest in the enforcement of Section 15(c) and Section 36(b) of the Investment Company Act. Section 36(b) establishes a fiduciary duty for registered investment advisers with respect to the receipt of compensation for services and other material payments from its registered fund clients (or its security holders) to the registered adviser or its affiliates. The section also provides that fund shareholders or the SEC may sue a registered adviser for breach of fiduciary duty relating to alleged “excessive” advisory fees being charged by a registered fund’s investment adviser. To date, no plaintiff has ever brought a successful Section 36(b) case, leading William Birdthistle, director of the Division of Investment Management, to publicly state, “if no adviser can ever lose one—and none has, so far—one wonders whether the duty enacted in the statute is truly being honored.”<sup>26</sup>

After so many years of unsuccessful claims, it is not surprising that the SEC appears to be eyeing advisory fees. It is important for registered fund advisers to consider areas where changes may need to be made to align with current regulatory thinking and to expect continued regulatory scrutiny. Fund managers should consider conducting a comprehensive review of their 15(c) processes, including identifying revenue constituting fallout benefits, tracking of allocation of expenses, and reviewing board reporting materials to determine if enhancements need to be made.

Depending on the size and complexity of fund complexes, assessing for the following potential shortcomings may be appropriate:

- Lack of appropriate industry knowledge or conflicts of interest in employees or representatives with duties and/or responsibilities related to contractual relationships and fee negotiation
- Lack of transparency among sub-adviser, sub-transfer agents, and intermediary payments (e.g., fees for little or no services)
- Lack of transparency or complete capture of fallout benefits and their source
- Lack of cadence or depth in fund board self-evaluations and processes related to 15(c) process
- Inadequate memorialization in minutes of discussions and/or actions taken
- Descriptions of services by adviser and sub-adviser provided to the fund board that are unclear and/or inadequate
- Unclear, ambiguous, or contradictory policies and procedures
- Practices not aligned with policies and procedures
- Inconsistencies with documented allocation methodologies (e.g., expense misallocations)
- Fee schedules and allocations not administrated properly according to contracts, agreements, and disclosures
- Misalignment in understanding of fee terms, fee splits, or allocations from internal to external entities
- Discrepancies in waivers, fee expense cap limits, reimbursements, and recaptures
- General and administrative expenses accrued and booked improperly from an accounting, books and records, and financial reporting perspective
- Unintentional disclosure omissions (e.g., offering documents)



# On the regulatory horizon

The SEC is still working on several highly significant proposals, including rules to govern firms' digital engagement practices and a recommendation related to diversity, equity, and inclusion (DEI).

## Outsourcing by investment advisers<sup>27</sup>

In October 2022, the SEC approved a proposal to establish minimum requirements for investment advisers that outsource certain functions, including those "necessary to provide advisory services in compliance with the federal securities laws." The proposal would require firms to conduct due diligence of outsourced activities and third-party service providers, including periodic monitoring of the service provider's performance, periodic reassessment of the selected service provider, and record-keeping requirements associated with the required due diligence.

Proposals that intentionally or unintentionally transform capital flows are likely to be challenged, casting an air of uncertainty over the ultimate volume and pace of change.



# Looking to stay ahead of uncertainty

Taken in aggregate, the volume and intensity of proposed change to the regulatory framework are astounding both in the number and significance of rulemaking (see Figures 1 and 2). The weight of the regulatory agenda will impact firms and potentially financial markets themselves as firm and fund strategies are reshaped in the coming year against a backdrop of challenging macroeconomic conditions. Proposals that intentionally or unintentionally transform capital flows are likely to be challenged, casting an air of uncertainty over the ultimate volume and pace of change. This is a key consideration for the regulators themselves in 2023 as they seek to finalize key tenets of the proposed agenda.

For their part, firms should make investments in the systems and teams that support regulatory requirements despite the massive amount of uncertainty they face. Having a detailed and coherent regulatory strategy likely has not been so important since the passage of Dodd-Frank. The volume of change will require firms to be deeply strategic in their approach to compliance and regulatory matters more generally. The impacts of the proposed agenda could be sweeping when implemented. Firms also should assess their readiness for managing multiple complex regulatory implementations simultaneously as this will likely be required in 2023 and into 2024. Now is the time for firms to evaluate the proposed rules, evaluate their capabilities, and determine a strategy.

While regulatory change should be atop the C-suite and board agenda in 2023, what could be viewed as a tumultuous period from a regulatory perspective could also be an opportunity to evaluate strategy more broadly. Regulatory change creates new trade-offs but might present new opportunities as well. An informed debate about the implications of the massive regulatory agenda on the individual firm is likely helpful for determining an optimal approach. Recognition by leadership that regulation is a core business issue in 2023 will be essential.



Firms should plan as though the proposed agenda will be enacted. When finalized, the changes will be impactful, and significant implementation efforts likely will be required.



# Endnotes

1. SEC, "[SEC Announces Enforcement Results for FY22](#)," November 15, 2022.
2. "Commission" refers to the group of five political appointees that head the agency, whereas SEC broadly refers to the agency or its staff.
3. US Supreme Court, [West Virginia vs. Environmental Protection Agency](#), June 30, 2022.
4. SEC, "[Open-End Fund Liquidity Risk Management Programs and Swing Pricing: Form N-PORT Reporting](#)," November 2, 2022; SEC, "[Money Market Fund Reforms](#)," December 15, 2021.
5. The proposal would impose swing pricing on institutional prime and institutional tax-exempt money market funds; government and retail money market funds would be excluded from the swing pricing requirement.
6. The proposal excludes money market funds, some of which are captured by the other swing pricing proposal, and exchange-traded funds (ETFs) and money market funds.
7. The SEC presently allows funds to leverage swing pricing and the industry generally does not exercise this option due to the operational complexities associated with implementing swing pricing.
8. SEC, "[Open-End Fund Liquidity Risk Management Programs and Swing Pricing: Form N-PORT Reporting](#)," November 2, 2022.
9. Ibid.
10. SEC, "[Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer](#)," March 28, 2022; SEC, "[Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems \(ATSs\) That Trade U.S. Treasury and Agency Securities, National Market System \(NMS\) Stocks, and Other Securities](#)," January 26, 2022.
11. The first proposal, issued in January 2022, expands Reg ATS to government securities dealers and amends the definition of an exchange to include "communication protocol systems".
12. SEC, "[The Enhancement and Standardization of Climate-Related Disclosures for Investors](#)," March 21, 2022.
13. SEC, "[Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices](#)," May 25, 2022; SEC, "[Investment Company Names](#)," May 25, 2022.
14. SEC, "[Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices](#)," May 25, 2022.
15. These are: (i1) disclosures required in prospectuses on Form N1-A and N-2, (ii2) disclosures required on Form N-8B2 for unit investment trusts (UITs), and (iii3) disclosure and reporting requirements on Form ADV Parts 1 and 2.
16. SEC, "[Investment Company Names](#)," May 25, 2022.
17. SEC, "[Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure](#)," March 9, 2022; SEC, "[Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies](#)," February 9, 2022.
18. SEC Office of Compliance Inspections and Examinations (OCIE), "[Cybersecurity and resiliency observations](#)," January 27, 2020 (the "2020 Examinations Report").
19. For more information on this topic, see our publication, "[SEC issuers cyber rule proposal for advisers and funds](#)".
20. SEC, "[Enforcement](#)," accessed December 18, 2022.
21. SEC, "[Investment Adviser Marketing](#)," December 22, 2020.
22. SEC, "[Examinations Focused on the New Investment Adviser Marketing Rule](#)," September 19, 2022.
23. SEC, "[Examinations Focused on the New Investment Adviser Marketing Rule](#)," September 19, 2022.
24. For more information on this topic, see our publication, "[Meeting Regulatory Expectations for Preserving and Monitoring Electronic Communications](#)".
25. For more information on this topic, see our publication, "[Fund Managers: Prepare for the next wave of Section 36\(b\) litigations and 15\(c\) enforcement](#)".
26. William Birdthistle, "[Remarks at the ICI Investment Management Conference. William Birdthistle, Director, Division of Investment Management](#)Remarks at the ICI Investment Management Conference," March 28, 2022.
27. SEC, "[Outsourcing by Investment Advisers](#)," October 26, 2022.

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