

CRYPTO IN, ESG OUT, AND PRIVATE EQUITY ASCENDANT: FEDERAL GUIDANCE AND A CIRCUIT COURT DECISION REVEAL CHANGING LANDSCAPE FOR 401(k) PLANS AND ERISA FIDUCIARIES

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Over the last decade, “alternative investments” (including cryptocurrency and private equity) have attracted increased interest from ERISA¹ investors. But these investments have not been available to 401(k) plans except in select instances. That may be changing.

In late May, the Ninth Circuit Court of Appeals issued an opinion affirming the dismissal of claims alleging that the decision to allow 401(k) plan participants to invest in private equity and hedge funds violated ERISA. The decision coincided with actions taken by the Department of Labor (the “DOL”) to rescind existing guidance disfavoring the inclusion of cryptocurrency in 401(k) plans as well as prior guidance that permitted the consideration of “ESG” factors (discussed below) in selecting ERISA plan investments. The DOL has also signaled that it is exploring new guidance broadening the availability of private equity investments in 401(k) plans. Together, these developments reflect a notable change in how investment decisions involving 401(k) plans and other ERISA plans may be scrutinized by regulators and the courts in the near future.

Background

Under ERISA, plan fiduciaries (the individuals responsible for making investment decisions for ERISA plans) are held to among the highest standards of conduct under federal law. In particular, ERISA fiduciaries are required to satisfy a “duty of loyalty” (the duty to act solely in the best interests of plan participants) and a “duty of prudence” (the duty to act with the same care and diligence that a reasonably prudent person would exercise in the same context). Importantly, determining whether a fiduciary has fulfilled these duties requires a careful analysis of the fiduciary’s methods and processes, not simply investment results. Against this backdrop, many alternative investments and digital assets have been less prevalent in 401(k) plans than in the individual investment market.

Rescission of Prior ESG Guidance

In 2022, the DOL promulgated a regulation² permitting ERISA plan fiduciaries to consider environmental, social, and governance (“ESG”)

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factors in investment decisions. The regulation acknowledged that such factors may be relevant to fiduciaries' investment risk-and-return analyses. While the 2022 regulation neither required nor incentivized the consideration of ESG factors in ERISA plan investments, it allowed these factors to be considered when material to enhancing returns or reducing risk and permitted the factors to be used as "tie-breakers" for competing investments that would "equally serve" the interests of ERISA plan participants. The regulation thus linked ESG factors to ERISA's twin duties of prudence and loyalty: if a reasonably diligent and careful person would consider ESG factors to have a material impact on an investment risk-and-return analysis and would not subordinate the economic interests of ERISA plan participants to noneconomic considerations, then ERISA fiduciaries may do the same. However, the current DOL has made clear that it does not hold the same position.

On May 28, 2025, the DOL gave an early indication of where it intends to move. Specifically, the government filed a status report in a protracted lawsuit involving the current ESG regulation, declaring that it will no longer defend the regulation and will rescind and replace it as part of its Spring Regulatory Agenda. Under the Administrative Procedure Act, complete Rescission of the regulation requires notice-and-comment rulemaking, which has not yet occurred. Such proposed rulemaking is likely to prohibit outright—or at least to discourage strongly—the use of

ESG factors in ERISA plan investment risk-and-return analyses, even as "tie-breakers."

Rescission of Prior Crypto Guidance

Also in 2022, the DOL issued guidance regarding ERISA plan investments in cryptocurrency.³ The guidance urged fiduciaries to "exercise extreme care" when considering whether to add cryptocurrency options to 401(k) plan investment menus. The DOL's rationale was based on concerns regarding price volatility, lack of informational transparency, and risk of losing cryptocurrency passwords (locking customers out of their accounts permanently). Historically, ERISA and the DOL gave deference to plan fiduciaries to make investment decisions using a totality-of-the-circumstances approach, and did not issue guidance allowing or prohibiting investments in any particular asset class. However, the 2022 cryptocurrency guidance departed from this investment-neutral stance by suggesting that *any* investment in digital assets by 401(k) plans could violate ERISA fiduciaries' duty of prudence. Though this guidance did not have the force of law or include specific penalties, it made clear that ERISA fiduciaries faced investigative action if they chose to include cryptocurrency investments in 401(k) plans.

The current DOL has rescinded its 2022 "extreme care" guidance,⁴ in another break from existing ERISA guidance. In doing so, the DOL notes that it considers the discourage-

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ment of digital asset investing in 401(k) plans to be a significant and improper regulatory overreach. Thus, rather than steering 401(k) plan fiduciaries away from cryptocurrency and other digital asset investments, the current DOL has returned investment discretion to such fiduciaries by neither prohibiting nor expressly encouraging investments in these products. Importantly, while the DOL's new stance regarding digital assets may signify how it would view such investments, the agency's position will not insulate fiduciaries from employee claims or other private actions under ERISA's fiduciary duty and prohibited transaction provisions.

Additional Ongoing Deregulatory Efforts

In addition to the recent changes noted above, on July 1, 2025, the DOL rescinded a series of regulations that it described as "obsolete," in an effort to streamline the rules applicable to employers and plan fiduciaries. The first final rule⁵ rescinds regulations for insurance policies issued to retirement plans and insurers established on or before December 31, 1998, that outline which assets of an insurance company issuing a "guaranteed benefit policy" are considered plan assets under ERISA. In its Rescission, the DOL said it was "not likely" that any impacted plan contracts remain in place, such that the prior regulation "no longer serves any useful purpose." The second final rule⁶ acts to repeal three interpretive bulletins issued following the original enactment of ERISA in 1974. These bulletins included guidance on certain prohibited transactions, the advancement of funds to plan fiduciaries intended to cover plan expenses, and jurisdiction where parallel regulations exist under both the DOL and the Internal Revenue Service. The DOL stated these bulletins are "no longer needed" due to subsequent guidance and regulations on the same issues. The third final rule⁷ issued by the DOL rescinds a safe harbor rule issued in 2008 for the selection of annuity providers by individual retirement account plans covered by Title I of ERISA. In the final rule, the DOL takes the position that a "more streamlined" but substantially similar safe harbor was put in place under the SECURE Act, enacted by Congress in 2019.

While these three final rules, in and of themselves, do not represent a significant policy shift, they further signal the priority of deregulation at the federal level. In fact, in a

July 1, 2025 news release,⁸ the DOL indicated it will make "aggressive deregulatory efforts" going forward, including 63 specific deregulatory items, with further details forthcoming.

Increased Interest in Private Equity Investment

Even as the prominence of private equity has grown significantly over the last two decades, investment opportunities in these vehicles have remained limited in 401(k) plans due to their more complex fee structure and longer time horizons, among other reasons. Advocates who favor broadening the availability of private equity investments to 401(k) plan participants argue that such private market investments provide greater diversification to a 401(k) plan's investment portfolio and the potential for higher returns than those typically achieved in public markets. Coinciding with the current DOL's more permissive stance on the investment of digital assets in 401(k) plans, there is now an increased push for the DOL to issue guidance that would broaden the opportunity for private equity investments in 401(k) plans.

In 2020, the DOL received an inquiry regarding its views on the inclusion of private equity funds as investment alternatives in 401(k) plans. In response, on June 3, 2020, the DOL issued an Information Letter⁹ intended to clarify its position on the ERISA considerations associated with this issue. The Information Letter noted that fiduciaries could, under certain conditions, offer an asset allocation fund with a private equity component without violating ERISA. But, given what the DOL viewed as potentially higher risks associated with private equity investments (as compared to publicly traded investments), it urged fiduciaries to act cautiously and analyze the risks and rewards of offering private equity investments in 401(k) plans. Further, the Information Letter's guidance was limited to private equity in the context of diversified investment vehicles (such as target date funds) and did not make allowance for private equity as a stand-alone investment option in 401(k) plan investment menus.

The DOL clarified its 2020 Information Letter with a supplementary statement¹⁰ on December 21, 2021, also addressing the inclusion of private equity funds in individual account plans (including 401(k) plans). Expanding on the

2020 Information Letter, the DOL reiterated that ERISA fiduciaries who include private equity investment options must continue to prudently select and monitor these investments made available to participants in individual account plans, taking into account the unique needs of the plan's participants and beneficiaries, and relying on the expertise of qualified asset managers where appropriate. And, like the 2020 Information Letter, the DOL's 2021 supplementary statement limited the inclusion of private equity to target date funds and other similar asset allocation vehicles for 401(k) plans. Taken together with the 2020 Information Letter, the DOL's guidance to date indicates that an ERISA fiduciary who decides to include private equity investments in a 401(k) plan or other individual account plan must possess the requisite expertise to responsibly manage these alternative investments, in order to satisfy the fiduciary's duty of prudence under ERISA. But changes may be coming.

As of June 2025, reporting suggests that there is renewed interest at the federal level to consider avenues to do just that. The Securities and Exchange Commission has also indicated that it may reconsider rules limiting who can invest in private equity funds, writ large. While these reported intentions have not yet resulted in tangible policy changes, they reflect a growing interest in expanding alternative investment options for 401(k) plans and a larger push to allow participants to exercise greater decision-making power in choosing their retirement investments.

The Ninth Circuit Decision in *Anderson v. Intel*

On May 22, 2025, in *Anderson v. Intel Corporation Investment Policy Committee*,¹¹ the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision dismissing allegations that the trustees of Intel Corporation's proprietary retirement funds breached their ERISA fiduciary duties of prudence and loyalty. Specifically, Intel's customized 401(k) plan offered hedge funds and private equity funds as part of its larger menu of investments, along with traditional stocks and bonds. The company disclosed these investments to its participants, explaining that the offerings endeavored to decrease volatility but risked performing less favorably than equity-heavy funds during rising financial markets.

The case was brought by participants in the Intel 401(k)

plan alleging that the plan trustees' decision to include hedge funds and private equity funds in the plan's investment lineup "drastically departed from prevailing standards of professional asset managers." The plaintiffs alleged further that doing so violated the trustees' ERISA duty of prudence by breaking from what a reasonably prudent person would do under the same investment scenario and violated the trustees' ERISA duty of loyalty by steering the plan's assets into companies in which the trustees had conflicts of interest. The Court of Appeals was unconvinced by the plaintiffs' reasoning and affirmed the lower court's dismissal for failure to sufficiently state claims for either breach.

In its opinion, the court emphasized that ERISA's duty of prudence is evaluated prospectively—based on investment methods actually employed by the fiduciary—rather than retrospectively by analyzing the results of the investment. It then held that a plaintiff that asks the court to draw an inference of imprudent methods based on investment results must also provide a sound basis for comparison of investments with similar objectives. The court determined that the plaintiffs failed to provide an adequate comparison in support of their breach of duty of prudence claim. The court also rejected the plaintiffs' per se challenge to including hedge funds and private equity in a 401(k) plan's menu of investment options as inherently too risky to be prudent. The court reasoned that the duty of prudence is not assessed on an investment-by-investment basis but instead by looking at the portfolio as a whole. The court also affirmed dismissal of the plaintiffs' ERISA duty of loyalty claim. In doing so, the court found that the plaintiffs alleged only *potential* conflicts of interest on the part of the plan's trustees and reasoned that such potential conflicts of interest do not, in and of themselves, automatically violate ERISA's duty of loyalty. Specifically, potential or even incidental benefits to fiduciaries as a result of their plan investments do not, without more, establish a plausible claim for breach of the duty of loyalty.

Writing in a separate concurrence, Circuit Judge Berzon wrote that ERISA duty of prudence claims require a comparison between the defendant ERISA fiduciary and the hypothetical "prudent man" contemplated by ERISA, which comparison does not itself require additional facts to survive a motion to dismiss. That is, though fact-to-fact

comparisons of different plans are often considered the strongest method for plaintiffs who wish to state a fiduciary breach claim under ERISA, such factual comparisons are not explicitly required by ERISA's statutory language. The concurrence also suggested that some investment methods simply could be too risky to be prudent under *any* circumstances (using lottery tickets as an example) but did not suggest that private equity and hedge fund investments fall into that category.

Importantly, while the Ninth Circuit's decision addresses only the pleading requirements to state a claim for relief under ERISA, the decision reflects a reluctance to establish a *per se* rule against ERISA fiduciaries including certain investments in private equity funds and hedge funds in a 401(k) plan's investment options. Ultimately, ERISA fiduciaries have discretion to consider a range of relevant facts and circumstances in their investment decisions, including in private equity funds and hedge funds.

Key Takeaways

While the DOL's rollback of prior ERISA guidance (and its exploration of issuing new guidance) is not connected directly to the *Anderson* decision, the combination of these developments may signal a less-restrictive regulatory investment environment for ERISA plan fiduciaries. However, that flexibility may be constrained somewhat by the current DOL's less-ESG friendly outlook. Thus, while the trend appears to be moving in a more permissive direction for ERISA fiduciaries—including plan sponsors, plan administrators, and investment managers—considering new investment approaches in light of these developments, plan fiduciaries and investment professionals must adhere to their ERISA fiduciary obligations in all instances and should continue to monitor new regulatory developments in this area.

ENDNOTES:

¹The Employee Retirement Income Security Act of 1974, as amended.

² <https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

³ <https://www.dol.gov/sites/dolgov/files/ebsa/employer>

[s-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.pdf](https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.pdf).

⁴ <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01>.

⁵ <https://public-inspection.federalregister.gov/2025-11650.pdf>.

⁶ <https://public-inspection.federalregister.gov/2025-11613.pdf>.

⁷ <https://public-inspection.federalregister.gov/2025-11615.pdf>.

⁸ <https://www.dol.gov/newsroom/releases/osec/osec20250701-0>.

⁹ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>.

¹⁰ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement>.

¹¹*Anderson v. Intel Corporation Investment Policy Committee*, 137 F.4th 1015 (9th Cir. 2025) (<https://cdn.ca9.uscourts.gov/datastore/opinions/2025/05/22/22-16268.pdf>).

U.S. ESTABLISHES FIRST FEDERAL REGULATORY FRAMEWORK FOR STABLECOINS

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Executive Summary

- **What is new:** The U.S. Congress has passed the GE-

NIUS Act, establishing the first federal regulatory framework for payment stablecoins, addressing consumer protection, financial stability and AML compliance. President Trump signed the bill into law on July 18, 2025.

- **Why it matters:** The GENIUS Act creates a new licensing regime for payment stablecoin issuers and is the first major crypto-related legislation to be passed by both chambers of Congress.
- **What to do next:** Companies should assess their eligibility as permitted stablecoin issuers.

On July 17, 2025, the U.S. House of Representatives passed the Guiding and Establishing National Innovation for U.S. Stablecoins (“GENIUS”) Act. The landmark legislation, which the U.S. Senate passed in June, introduces the first federal regulatory framework for “payment stablecoins,” addressing consumer protection, financial stability, national security and anti-money laundering (“AML”) compliance. President Donald Trump signed it into law the following day.

The GENIUS Act regulates the issuance and trading of payment stablecoins in the U.S. and applies to payment stablecoin issuers and intermediaries (known as digital asset service providers). Below, we discuss the GENIUS Act’s key provisions and requirements.

Definition of Payment Stablecoins

The GENIUS Act regulates payment stablecoins, which are defined as digital assets that are or are designed to be used as a means of payment or settlement, the issuer of which (1) is obligated to convert, redeem or repurchase them for a fixed amount of monetary value, and (2) represents that they will maintain a stable value relative to a fixed amount of monetary value.

Permitted Payment Stablecoin Issuers

The GENIUS Act prohibits anyone other than a “permitted payment stablecoin issuer” from issuing a payment stablecoin in the U.S.

Entities can become permitted payment stablecoin issuers through dual federal and state licensing pathways.

- **Permitted federal issuers.** Subsidiaries of insured depository institutions (“IDIs”), nonbank entities (*i.e.*, not IDIs or their subsidiaries), federal branches of foreign banks, and uninsured national banks are eligible to be licensed as permitted payment stablecoin issuers. The IDI’s appropriate federal banking agency will serve as the primary regulator for permitted issuers that are subsidiaries of IDIs, and the Office of the Comptroller of the Currency (“OCC”) will serve as the primary regulator for all other permitted federal issuers.
- **Permitted state issuers.** Issuers with \$10 billion or less in consolidated total outstanding stablecoins may opt into a state-only regulatory regime, provided that (1) a state regulatory agency with primary regulatory and supervisory authority over payment stablecoin issuers certifies that its regulatory framework is “substantially similar” to the federal regime, and (2) the Stablecoin Certification Review Committee, comprised of the Secretary of the Treasury, the Chair or Vice Chair for Supervision of the Federal Reserve Board, and the Chair of the Federal Deposit Insurance Corporation, does not deny the certification within 30 days. A state-qualified issuer with more than \$10 billion in consolidated total outstanding stablecoins generally must transition to federal oversight within 360 days of reaching such threshold (or cease issuing new stablecoins until the stablecoin is under such threshold).

Digital asset service providers, including digital asset exchanges and custodians, therefore cannot offer or sell payment stablecoins in the U.S. unless the stablecoin is issued by (1) a permitted payment stablecoin issuer or (2) a comparably regulated foreign payment stablecoin issuer, as discussed below.

Treatment of Foreign Issuers

The GENIUS Act restricts digital asset service providers from offering, selling or otherwise making available in the U.S. a payment stablecoin that is issued by a foreign issuer, unless the foreign issuer:

- Has the technological capability to comply, and will

comply, with lawful orders to seize, freeze, burn, or prevent the transfer of outstanding stablecoins.

- Is subject to a “comparable” regulatory regime, as determined by the Treasury Secretary upon a recommendation by each of the other members of the Stablecoin Certification Review Committee.
- Registers with the OCC and is subject to OCC supervision.
- Holds reserves in U.S. financial institutions sufficient to meet liquidity demands of U.S. customers.
- Is not domiciled and regulated in a jurisdiction subject to comprehensive U.S. economic sanctions or determined by the Treasury Secretary to be a jurisdiction of primary money laundering concern.

There are also significant restrictions on the treatment of foreign payment stablecoins for accounting, margin and use as a settlement asset for banking organizations and payment infrastructures.

Restrictions on Nonfinancial Stablecoin Issuers

A U.S. public company and any non-U.S. company that is not predominantly engaged in one or more financial activities, and any wholly or majority-owned subsidiaries or affiliates of such a company, may not issue a payment stablecoin unless the public company obtains a unanimous vote of the Stablecoin Certification Review Committee finding that:

- It will not pose a material risk to safety and soundness of the U.S. banking system, financial stability or the Deposit Insurance Fund.
- The public company will comply with limitations on use of nonpublic personal information (*e.g.*, not selling such data to third parties).
- The public company and its affiliates will comply with anti-tying requirements, which will be clarified through an interpretive rule issued by the Stablecoin Certification Review Committee within one year of enactment of the GENIUS Act.

Preemption

The GENIUS Act expressly preempts state licensing requirements, such as money transmitter laws, for permitted payment stablecoin issuers that are (1) federal qualified issuers or (2) subsidiaries of IDIs. A subsidiary of a state IDI may engage in money transmission or custodial services if it is subject in its home state to adequate liquidity and capital requirements that take into account changes in its financial condition and risk profile.

The GENIUS Act explicitly does *not* preempt state consumer protection laws.

Prohibition on Interest Payments

The GENIUS Act prohibits permitted payment stablecoin issuers and foreign payment stablecoin issuers from paying payment stablecoin holders yield or interest (whether in cash, tokens or other consideration) solely in connection with the holding, use or retention of such payment stablecoin. This potentially leaves open the possibility that parties other than an issuer itself (such as its affiliates) may pay yield for providing such services.

Activities Limits

Permitted payment stablecoin issuers must limit their activities to issuing and redeeming payment stablecoins, managing related reserves (*i.e.*, purchasing, selling and holding reserve assets or providing custodial services for reserve assets), providing custodial or safekeeping services for payment stablecoins and private keys of payment stablecoins, undertaking other activities that directly support any of the permitted activities, and any other activities authorized by the primary federal or state regulator.

Reserve Requirements

Payment stablecoins must be backed on at least a one-to-one basis, which in effect establishes a 100% reserve requirement. Reserves are limited to the following eligible assets:

- U.S. cash and currency and balances held at a Federal Reserve Bank.
- Funds held as demand deposits (or other deposits that may be withdrawn upon request) at an IDI.

- Short-term Treasury bills, notes or bonds with a remaining maturity or issued with a maturity of 93 days or less.
- Money received under repurchase agreements on short-term Treasuries.
- Reverse repurchase agreements overcollateralized by Treasuries where the issuer is the buyer of securities, subject to certain market terms requirements.
- Securities issued by a registered investment company or government money market fund that invests only in the assets listed above.
- Other similarly liquid U.S. government-issued assets if approved by the issuer's primary regulator.
- Tokenized versions of the above assets.

Issuers are prohibited from pledging, rehypothecating or reusing these reserves except for limited circumstances, such as pledging short-term Treasuries for repurchase agreements.

Capital, Liquidity and Risk Management Requirements

Federal and state payment stablecoin regulators must impose capital, liquidity, operational, compliance and information technology risk management requirements on payment stablecoin issuers, tailored to the business model and risk profile of issuers. These rules must exempt any IDI or IDI holding company that includes a permitted payment stablecoin issuer from risk-based and leverage regulatory capital requirements with respect to the assets and operations of the stablecoin issuer in excess of the operational capital requirement based on the stablecoin issuer's business model and risk profile. Federal regulators will have one year after enactment to promulgate regulations through notice and comment rulemaking.

The GENIUS Act also prohibits the federal banking agencies and the Securities and Exchange Commission ("SEC") from reintroducing requirements to hold custodied digital assets on-balance-sheet akin to those imposed by Staff Accounting Bulletin 121, not only with respect to stablecoins but to all digital assets. It further prohibits the

federal banking agencies from requiring an IDI or any affiliate thereof to hold regulatory capital against digital assets and stablecoin reserves (except with respect to the operational risk capital requirements described above).

Custody of Payment Stablecoins

Only regulated financial institutions supervised by a federal banking agency, the SEC, the Commodity Futures Trading Commission ("CFTC") or a state banking supervisor may engage in custodial or safekeeping services for payment stablecoins reserves, payment stablecoins used as collateral, or the private keys used to issue payment stablecoins. These entities must treat the customer's stablecoins, private keys, cash and other property as the property of the customer, take steps to protect the assets from creditor claims, and avoid commingling of customer assets with custodian assets, subject to certain exceptions.

Consumer Protection

As noted above, the GENIUS Act does not preempt state consumer protection laws. It is unlawful to market a product in the U.S. as a payment stablecoin unless the product is issued pursuant to the GENIUS Act. Additionally, any person convicted of certain felonies, including offenses involving insider trading, embezzlement, cybercrime, money laundering, financing of terrorism or financial fraud, may not serve as an officer or director of a payment stablecoin issuer. The GENIUS Act also prohibits tying—the condition of services on a customer also agreeing to buy other products or services—by a permitted payment stablecoin issuer.

AML and Economic Sanctions

Payment stablecoin issuers are treated as financial institutions under the Bank Secrecy Act and all federal laws applicable to financial institutions in the U.S. relating to economic sanctions and the prevention of money laundering. Issuers must therefore maintain effective AML and sanctions compliance programs, as well as customer identification programs that include Know Your Customer verification procedures and appropriate enhanced due diligence. Issuers must also monitor and report suspicious activities and retain appropriate transaction records. Issuers will need to have the technological capability to comply

with all lawful orders to seize, freeze, burn or prevent the transfer of outstanding stablecoins. Each issuer must submit a certification within 180 days of the approval of an application, and annually thereafter, that it has implemented AML and economic sanctions compliance programs reasonably designed to prevent the issuer from facilitating money laundering and the financing of terrorist activities.

The GENIUS Act also calls for a study and Financial Crimes Enforcement Network (“FinCEN”) guidance no later than three years after the date of enactment regarding (1) novel and innovative methods for detecting illicit finance; (2) standards for payment stablecoin issuers to identify, monitor and report illicit activity involving payment stablecoins; and (3) tailored risk management standards for financial institutions interacting with decentralized finance protocols.

Issuer Solvency and Bankruptcy

Stablecoin holders’ claims in bankruptcy against the issuer’s reserves are given priority—on a ratable basis with the claims of other holders of such payment stablecoins—over other claims in the issuer’s insolvency, much like bank depositors. This priority also applies to all other assets of the permitted payment stablecoin issuer to the extent of any deficiency in stablecoin reserves. The GENIUS Act also applies the Bankruptcy Code’s automatic stay to stablecoin reserves but provides relief under certain conditions to allow permitted payment stablecoin issuers to more quickly satisfy customer redemptions. The primary federal payment stablecoin regulators are required to perform a study of the potential insolvency proceedings of permitted payment stablecoin issues and submit a report and recommendations to Congress not later than three years after the date of enactment of the GENIUS Act.

Access to Federal Banking System

The GENIUS Act does not grant nonbank issuers access to a Federal Reserve master account or the discount window and explicitly provides that nothing in the statute shall expand or contract the legal eligibility to receive services from or make deposits with a Federal Reserve Bank. Moreover, the GENIUS Act does not subject payment stablecoins to a deposit insurance scheme or other similar government backstop, and makes it unlawful to represent otherwise.

Effective Date and Potential for Further Amendments

The GENIUS Act takes effect on the earlier of (1) 18 months after the date of enactment; or (2) 120 days after the date on which the primary federal payment stablecoin regulators issue any final implementing regulations. In general, prohibitions on digital asset service providers offering or selling payment stablecoins that are not issued by a permitted payment stablecoin issuer begin three years after enactment, subject to any safe harbor established by the Treasury Secretary.

Other “Crypto Week” Developments

Passage of the GENIUS Act has capped off what some have dubbed “crypto week.” In addition to the GENIUS Act, the House passed the Digital Asset Market Clarity (“CLARITY”) Act and the Anti-CBDC Surveillance State Act. The CLARITY Act would establish jurisdictional boundaries between the SEC and the CFTC with respect to digital assets and seeks to resolve regulatory ambiguity regarding the meanings of “security” and “commodity.” The Anti-CBDC Surveillance State Act would amend the Federal Reserve Act to prohibit any Federal Reserve Bank from issuing a central bank digital currency. Both pieces of legislation now head to the Senate for consideration.

The GENIUS Act is nothing short of historic. It highlights a bipartisan consensus that digital assets have moved beyond the fringe and are increasingly seen as part of mainstream finance.

PLAIN SPEAKING WINS THE DAY AT THE D.C. CIRCUIT: PROXY ADVISORS ARE NOT SUBJECT TO SEC SECTION 14(a) SOLICITATION PROHIBITION RULE

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The United States Court of Appeals for the District of Columbia Circuit¹ recently held that the Securities and Exchange Commission (“SEC”) and the securities industry were effectively “separated by a common language.” Giving heed to the plain meaning rule when interpreting legislative intent, the Court in *Institutional Shareholder Services, Inc. v. SEC*² affirmed an order of the United States District Court for the District of Columbia (see *Institutional Shareholder Services, Inc. v. SEC*)³ granting summary judgment to plaintiff Institutional Shareholder Services, Inc. (“ISS”),⁴ holding that the SEC’s definition of the term “solicit” went beyond the meaning Congress contemplated when enacting Section 14(a) of the Securities and Exchange Act of 1934 (“Exchange Act”).⁵ The decision analyzed the SEC’s 2020 amendment to its rules regulating proxy advice to define the term “solicit”/“solicitation” to include the provision of client requested proxy voting advice (“2020 Rule”).⁶ The Court struck down the 2020 Rule as unlawful, reasoning that the meaning of “solicit” as Congress intended when it enacted the Exchange Act is to *actively seek* to obtain proxy authority or votes. The Court concluded that “the ordinary meaning of ‘solicit’ does not include entities that provide proxy voting recommendations requested by others, even if those recommendations influence the requestors’ eventual votes.” Proxy advisory firms like ISS were therefore in the clear when it comes to Section 14(a).

Section 14(a) of the Exchange Act—the bedrock for SEC regulations governing proxy solicitations—prohibits “any person” from “solicit[ing] . . . any proxy” regarding registered securities. In creating the statute, the term “solicit”/“solicitation” was not defined by Congress, however prior to the 2020 Rule, the SEC had described the term to include any “communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” Thus, the SEC has long held the view that proxy voting advice generally constitutes a “solicitation” under the Exchange Act requiring compliance with proxy rules and regulations.

In September 2019 the SEC distributed guidance⁷ suggesting that proxy advisory services constituted “solicitation” under the proxy rules. ISS—a proxy advisory firm which provides recommendations to institutional investors

on how to vote on corporate matters at shareholder meetings, and a major player in the proxy advisory market—quickly filed suit disputing whether the SEC could properly classify proxy advisory firms such as ISS as a “solicitation.” The case however was initially stayed pending completion of the SEC’s related rulemaking.

The SEC subsequently issued the final 2020 Rule in September 2020, thus expressly codifying the viewpoint from the 2019 guidance, defining “solicit” and “solicitation” to mean:

Any proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited, and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice, and sells such proxy voting advice for a fee.

The SEC’s codified definition required that proxy advisory firms must file proxy recommendations with the SEC as proxy solicitations unless they could claim an exemption. Following the SEC’s completion of its guidance, the court proceedings were restarted, and the National Association of Manufacturers (“NAM”)—the largest manufacturing industrial trade association in the nation and an advocate for the September 2020 Rule—intervened on behalf of the SEC. The case was stayed again from June 2021 through March 2022 pending the SEC’s decision to revisit the 2020 Rule. However, in 2022 when the SEC adopted new amendments to the proxy advisor rules, only some, and not all of ISS’s claims became moot because the 2022 amendments still included the same definition of the term “solicit”/“solicitation.”

Subsequently, SEC, NAM and ISS each moved for summary judgment. The district court granted ISS’s motion, rejecting the SEC’s expanded regulatory definition of “solicit” that included disinterested proxy voting advice and finding that the September 2020 Rule was invalid.

NAM appealed arguing that the district court defined “solicit” too narrowly, and also that even if the district court defined “solicit” correctly, because “solicit” can mean “endeavor to obtain,” advisory firms like ISS “solicit” proxies by seeking to obtain votes aligned with their recommendations. The Court exercised independent judge-

ment under *Loper Bright Enters. v. Raimondo*⁸ to consider whether the SEC's interpretation of its governing statute was contrary to law. First, looking to the ordinary definition of the word "solicit" at the time the Exchange Act was enacted, the Court found that the term entails "seeking to persuade another to take a specific action." Based upon this interpretation, the Court held that the SEC's definition of the term was inconsistent with Section 14(a) of the Exchange Act. The Court found a proxy advisor is not soliciting a client's vote when the proxy advisor gives advice *that the client solicited*. Even if those recommendations eventually are influential to the voting process, the proxy advisors are not seeking to persuade any particular outcome.

The structure of Section 14(a) reinforced the Court's reasoning which presupposes that proxy solicitation involves parties actively seeking to secure votes or voting authority. Proxy advisors do not themselves seek votes or act on behalf of those who do. Thus, Section 14(a) is not intended to reach proxy advisors, who simply might influence proxy votes or provide recommendations. Therefore, the Court concluded that proxy voting advice does not fall under the legal definition of solicitation and the SEC's attempt to regulate proxy advisory firm's provision of advice as "solicitation" under the proxy rules exceeds its authority.

This decision significantly narrows the SEC's regulatory power under Section 14(a) and has broad implications for the proxy voting process. No longer will proxy advisors be subject to burdensome Section 14(a) requirements when *responding to* requests for advice from their clients. Although Congress could move to enact legislation to clarify the SEC's authority over proxy advisors, the probability is low with the current Washington climate forecasts. At the same time, it is a good bet that NAM and its 14,000 member companies will be looking at ways to challenge the impact of the Court's opinion and limit proxy firm influence in shareholder decision making when votes are tallied at the all-important annual shareholder meeting. However, in the meantime the Court has "blown away the foam" on the SEC's Section 14(a) strained interpretation and proxy advisors can get back to business with their clients knowing they can get to "the real stuff" that matters.⁹

ENDNOTES:

¹ <https://www.cadc.uscourts.gov/>.

² *Institutional Shareholder Services, Inc. v. Securities and Exchange Commission*, 142 F.4th 757 (D.C. Cir. 2025), (<https://media.cadc.uscourts.gov/opinions/docs/2025/07/24-5105-2123183.pdf>).

³ *Institutional Shareholder Services Inc. v. Securities and Exchange Commission*, 718 F. Supp. 3d 7, Fed. Sec. L. Rep. (CCH) P 101808 (D.D.C. 2024), appeal dismissed, 2024 WL 4099897 (D.C. Cir. 2024) and aff'd, 142 F.4th 757 (D.C. Cir. 2025) (<https://www.uschamber.com/assets/documents/Opinion-Institutional-Shareholder-Services-Inc.-v.-SEC-DDC.pdf>).

⁴ <https://www.issgovernance.com/>.

⁵ <https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf>.

⁶ <https://www.sec.gov/files/rules/final/2022/34-95266.pdf>.

⁷ <https://www.sec.gov/files/rules/interp/2019/34-86721.pdf>.

⁸ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832, Fed. Sec. L. Rep. (CCH) P 101887 (2024) (https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf).

⁹ *Telling It Like It Is: Boone Pickens, His Life, His Legacy* (https://boonepickens.com/?page_id=1283).

TEXAS ENACTS NEW LAW TO REGULATE PROXY ADVISORY FIRMS

By Ferrell M. Keel, Randi C. Lesnick, Joel T. May, Sidney Smith McClung, David Peavler, Mark W. Rasmussen, Evan P. Singer and Peter C. Zwick

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In Short

The Situation: On June 20, 2025, Texas Governor Greg

Abbott signed Senate Bill 2337 (“SB 2337”) to impose first-of-its-kind regulation and significant disclosure obligations on proxy advisors, such as ISS and Glass Lewis. SB 2337 aims to limit proxy advice based on “nonfinancial” factors such as ESG and DEI and requires proxy advisors to provide a “specific financial analysis” for any recommendation in opposition to management’s position.

The Result: SB 2337 seeks to tie proxy advice to shareholder value by requiring proxy advisors to support their recommendations with financial analysis. It will be meaningfully more expensive for proxy advisors to provide this advice, and to the extent proxy advisor clients are unwilling to bear this additional cost, we may see fewer recommendations against companies headquartered or organized in Texas.

Looking Ahead: The bill will go into effect on September 1, 2025. We expect SB 2337 to fundamentally change the role of proxy advisors in Texas and have ripple effects on the broader corporate governance landscape.

Criticism of proxy advisors is at an all-time high as public companies grow increasingly frustrated with proxy advisors’ lack of transparency, error-prone reports, and rampant conflicts of interest. In response, the Texas Legislature recently adopted SB 2337 to regulate proxy advice that relates to companies that are organized or have their principal place of business in Texas, as well as companies that have sought, but not yet received, shareholder approval to reorganize in Texas. Jones Day partner Ferrell Keel testified to the Texas State Senate Committee on State Affairs on SB 2337 and the need for regulation.¹

SB 2337 imposes significant disclosure obligations on proxy advisors to provide investors with the financial rationale for voting advice. If a proxy advisor makes “nonfinancial” recommendations that are “not solely in the financial interest of the shareholders,” SB 2337 requires proxy advisors to clearly explain “with particularity, the basis of [their] advice . . . and that the advice subordinates the financial interests of shareholders to other objectives, including sacrificing investment returns or undertaking additional investment risk.” SB 2337 broadly defines “nonfinancial” recommendations to include, among other things, advice based on ESG or DEI goals and sustainability scores, as

well as advice to vote in opposition to a company’s recommendation on a shareholder proposal if such advice is not accompanied by a Written Economic Analysis, as described below.

Notably, if a proxy advisor provides voting advice in opposition to a company’s recommendation on *any* proposal or nominee—even if it is “solely in the financial interest of the shareholders”—the bill requires proxy advisors to disclose, among other things, “any specific financial analysis” that supports its recommendation (unless the client expressly requests services for a nonfinancial purpose). *See* SB 2337, Sec. 6A.102(a)(3) and the discussion of “Materially Different Disclosure Requirements” below. Although SB 2337 does not define or explain how detailed a “specific financial analysis” needs to be, one can imagine that the degree of specificity required will be a topic of debate next proxy season.

We expect SB 2337 to have broad ramifications. For one, these disclosure obligations significantly increase proxy advisors’ costs with respect to advice relating to Texas companies, and proxy advisors will need to navigate the challenges that arise from formulating their advice on a state-by-state basis. Companies and investors outside of Texas will have additional insight into proxy advisors’ methodologies and be able to more closely scrutinize and challenge the soundness of proxy advisors’ methodologies and recommendations. Retirement plan fiduciaries and institutional investors may grapple with whether and how to rely on this type of advice in light of their fiduciary duties and any express or implied contractual obligations to maximize investment returns. For companies headquartered or incorporated in Texas, SB 2337 will rewrite the playbook for obtaining votes.

For companies seeking to reorganize in Texas next proxy season, this is welcome news since proxy advisors will not be able to recommend against a move to Texas unless they comply with the bill’s significant disclosure obligations and provide a specific financial analysis supporting their recommendation.

Notable elements of SB 2337 are outlined in further detail below.

Financial Interest Disclosure Requirements

Proxy advisors have the following obligations if they provide advice that is not solely in the financial interest of shareholders:

- Explain, with “particularity,” the basis of the proxy advisor’s advice and that the advice “subordinates the financial interests of shareholders to other objectives, including sacrificing investment returns or undertaking additional investment risk to promote one or more nonfinancial factors”;
- “Conspicuously” state that advice is not being provided solely in the financial interest of shareholders because it is based on one or more nonfinancial factors;
- “Immediately” provide a copy of the notice to the subject company; and
- “Publicly and conspicuously” disclose on the proxy advisor’s website that its services are not based solely on the financial interests of shareholders (collectively, the “Financial Interest Disclosure Requirements”).

Note that there are a number of categories of advice that SB 2337 considers “not provided solely in the financial interest of the shareholders,” including: (i) advice wholly or partly based on ESG or DEI goals, sustainability scores, or membership in or commitments to organizations advancing such initiatives; and (ii) a shareholder proposal recommendation in opposition to a company’s recommendation if not accompanied by a Written Economic Analysis.

“Materially Different” Disclosure Requirements

Unless a client has “expressly requested proxy services for a nonfinancial purpose,” a proxy advisor’s advice that is in opposition to a company’s recommendation on any proposal or nominee will be considered “materially different” advice that must:

- Comply with the Financial Interest Disclosure Requirements, as applicable;
- Notify all recipients of the advice, the subject com-

pany, and the Texas Attorney General of such recommendation;

- Disclose whether the recommendation is based solely on financial interests; and
- Disclose “any specific financial analysis” that supports the recommendation (collectively, the “Materially Different Disclosure Requirements”).

A proxy advisor must also comply with the Materially Different Disclosure Requirements if it makes different recommendations to different clients—*i.e.*, conflicting advice—and the clients have not “expressly requested proxy services for nonfinancial purpose.”

Shareholder Proposal Disclosure Requirements

If a proxy advisor gives voting advice in opposition to a company’s recommendation on a shareholder proposal, the advice will not be considered as “provided solely in the financial interest” of shareholders unless it provides a written economic analysis that includes:

- The short-term and long-term economic benefits and costs of implementing the proposal;
- An analysis of whether the proposal is consistent with the client’s investment objectives and policies;
- The projected quantifiable impacts of the proposal, if adopted, on the client’s investment returns; and
- An explanation of the methods and processes used to prepare the economic analysis (collectively, the “Written Economic Analysis”).

Any such recommendation would also need to comply with the Materially Different Disclosure Requirements.

Enforcement

“Affected parties”—including companies that are the subject of the proxy advice and their shareholders and recipients of proxy advice—may seek declaratory or injunctive relief for violations of SB 2337. The Texas Attorney General may intervene in any such action.

Violations of SB 2337 will also be deemed a “deceptive

trade practice” under Texas law that are actionable by the consumer protection division of the Texas Attorney General’s office.

On July 24, 2025, ISS and Glass Lewis filed separate suits in federal court against Texas Attorney General Ken Paxton, in his capacity as the head of Texas’ Consumer Protection Division, to challenge SB 2337, arguing that the bill is unconstitutional due to First Amendment, vagueness, and preemption concerns. ISS and Glass Lewis are seeking declaratory and injunctive relief to prevent Attorney General Paxton from enforcing the law in advance of the bill’s September 1 effective date.

Three Key Takeaways

1. SB 2337 imposes significant additional disclosure obligations in connection with advice relating to companies organized, seeking to organize, or headquartered in Texas. For the first time, proxy advisors will be required to provide investors with a financial analysis supporting their advice. This will meaningfully increase the cost of compliance for proxy advisors and expose proxy advisors’ advice to a higher level of scrutiny. Therefore, we expect SB 2337 may decrease the frequency with which proxy advisors make voting recommendations in opposition to management.
2. SB 2337 makes clear that the Texas Attorney General is tasked with keeping a close eye on proxy advisors’ compliance with SB 2337. For example, proxy advisors must notify the Texas Attorney General every time they make a recommendation in opposition to management (unless a client has “expressly requested proxy services for a nonfinancial purpose”). As another example, if a company seeks injunctive or declaratory relief as permitted under SB 2337, it must notify the Texas Attorney General within seven days, and the Texas Attorney General may intervene.
3. SB 2337 will be in effect next proxy season. Affected companies—especially those who have historically experienced frustrations with proxy advisors—should familiarize themselves with SB 2337 to monitor for violations. Preparing now will enable compa-

nies to act quickly should they want to seek declaratory or injunctive relief.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

¹See <https://trendingnowinesg.jonesday.com/post/102k9v9/holding-proxy-advisors-feet-to-the-fire>.

FINDERS, KEEPERS? THE SEC DEBATES

Commissioners of the Securities and Exchange Commission are debating whether the SEC should revive a proposal from five years earlier (the “2020 Proposal”) that would provide an exemption from broker-dealer requirements for “finders” that operate in the private markets.

Individuals who introduce companies to potential investors for a fee typically have to register as a broker with the SEC. The 2020 Proposal¹ had aimed to exempt a narrow category of “finders” from this requirement, with the intention of making it easier for small businesses to raise early-stage capital. It remains unclear if the SEC’s Republican majority will consider a revised “finder” exemption, nor what the details of what such an exemption might look like.

As Commissioner Hester Peirce said at a July 22 Small Business Capital Formation Advisory Committee meeting (the “Committee”), “finders play a crucial role, particularly for small businesses, by connecting entrepreneurs and investors. Finders often are engaged just as much in social behavior as they are in economic behavior. As a result, well-intentioned friends, colleagues, and industry acquaintances may find themselves unwittingly acting as broker-dealers and therefore subject to an onerous regulatory framework ill-suited for the connections and introductions these individuals facilitate.”²

“Companies, on the other hand, also face uncertainty in knowing when they can engage a finder that is not registered as a broker-dealer to help locate investors,” she added,

claiming that “the Commission has failed to provide clarity in this area, which has forced finders and companies to rely on highly fact-specific no-action letters from Commission staff.” She noted that this “lack of clarity has persisted for so long it transcends committees; this Committee’s predecessor, the Advisory Committee on Small and Emerging Companies, lamented that, “[t]here is significant uncertainty in the marketplace about what activities require broker-dealer registration.”³ And this Committee too has asked for years for the Commission to adopt a framework to permit finders to engage in limited capital raising activities involving accredited investors.”

SEC Chairman Paul Atkins described finders as filling “an essential void in the entrepreneurial ecosystem by identifying, and in certain circumstances soliciting, potential investors.”⁴ Finders cater to small businesses which seek to raise less than \$5 million in capital, businesses that typically struggle to get financing from VC firms and large financial institutions, he said. “After exhausting their own network of family members and friends, businesses in the earliest stage of growth sometimes engage a finder to identify angel investors who target smaller, higher-risk investment opportunities. These finders may provide valuable introductions and facilitate access to much-needed capital. But the regulatory approach to this limited activity, when done outside of a registered broker-dealer, is quite opaque,” Atkins said.

While “Commission staff have issued no-action letters over the years addressing very narrow circumstances under which persons have sought to act as finders without registering as a broker-dealer, gray areas remain,” he added. “And a lack of regulatory certainty can deter conscientious participants from helping small businesses to secure financing at a formative stage.”

Atkins noted that “many have called on the Commission to provide greater clarity over the years.” This includes the Department of Treasury’s 2017 recommendation that the SEC work with the Financial Industry Regulatory Authority and the states to formulate a new regulatory structure, as well as the 2020 Proposal.

“The legal gray area that lingers can deprive small businesses of essential resources at a time when thirty-three

percent of them launch with less than \$5,000 in funding—and nearly forty percent fail due to lack of capital,” Atkins said. “Ultimately, companies that would benefit from a finder are seeking early-round seed funding, not the heavy capital infusion that an IPO can provide. Nevertheless, it is important that any recommendations that this Committee makes regarding finders do not risk further cannibalizing the public markets. And I encourage this Committee to keep that objective in mind as it explores regulatory solutions.”

Absorbing Feedback

Peirce said the 2020 Proposal, “which would have permitted natural persons to engage in certain limited activities on behalf of issuers without registering as brokers,” got “helpful feedback” at the time. “Commenters caused me to question the proposed approach, which had involved two tiers of finders. Peirce said one commenter said, with respect to proposed Tier 1 finders, that “limiting them to one transaction annually and prohibiting them from having **any** contact with an investor makes the category virtually useless.”⁵

She said some questions to consider about the potential revival of the 2020 Proposal would include:

- Is the 2020 Proposal a good starting point for exemptive relief, or would a different approach be more effective? Have market practices changed since 2020 in a way that would warrant changes to the 2020 Proposal?
- Would the 2020 Proposal, or any action related to providing clarity for finders, benefit from a full rulemaking process, as some commenters suggested at the time?⁶
- Does the Committee still support a blanket exemption for finders for offerings under a certain size?
- Should any exemption for finders cover activities related to secondary offerings?
- In 2020 commenters were divided on whether an exemption should be provided only to natural persons.⁷ Does this committee favor one approach over the other?

Concerns

Commissioner Caroline Crenshaw noted that she'd opposed the 2020 Proposal (along with then-Commissioner Allison Herren Lee) at the time, fearing that it would "effectively create[] . . . new categories of unregistered, unsupervised financial professionals, who could engage in traditional brokerage solicitation activities without having to satisfy the regulatory requirements imposed on brokers."⁸

She claimed the 2020 Proposal failed to give the finder exemption provision "effective guardrails," noting that it "would have allowed finders to: Contact potential investors; distribute offering materials; pitch those materials in meetings with issuers and investors; and effectively praise the benefits of that issuer (without expressly "advising" on the investment)—all in exchange for compensation premised on whether they make the sale. This is traditional broker activity."⁹

Further, she said, the 2020 Proposal "eschewed broker requirements under Regulation Best Interest (even though the Commission had just made clear in 2019 that Regulation Best Interest applies to accredited investors); it also sidelined books and records, basic sales practice, and examination requirements, among other things. The proposal did not even require finders to notify the Commission of their intent to utilize the exemption. Finders were essentially carved out of our registration regime without any mechanism for us to review whether they were complying with the requirements of the safe harbor, or to evaluate the success of the program."

There is a pertinent need for protections in the finders' space, Crenshaw argued, because it's an area "that has proven itself susceptible to microcap fraud, pump-and-dumps, front-end-fee scams, and other manipulative activity. Indeed, experts have noted that the enforcement actions and litigations exposing finder-related fraud likely represent only "the tip of the iceberg."¹⁰

"Further, any effort to limit oversight to anti-fraud provisions—as was proposed in 2020—would be a mistake. We cannot strip ourselves of the tools required to detect fraud in the first place, such as examination or books and records requirements. Without these protections, I fear

fraud will either go undiscovered or only exposed when investor funds are too far gone to be recovered."

She also said "any Commission action in this arena should be done through notice-and-comment rulemaking—including an economic analysis that explores the impact that any proposal will have on efficiency, competition and capital formation based on empirical data. It should also include a fulsome historical perspective on the success and usefulness of finders to date. Empirical, data-driven analysis will allow for more nuanced policy-making that—to the first point—allows us to better tailor any potential expansion in finder activity with appropriately calibrated investor and market protections. Third, and relatedly, the data we look at as part of any rulemaking should reflect the difference between mere capital raising and actual capital formation."

Commissioner Mark Uyeda countered that while "any activity, whether in the form of an exemption or a dramatically scaled down regulatory structure, remains subject to the antifraud provisions of the securities laws," a person "who merely provides a name and contact information to a company seeking capital in exchange for modest transaction-based compensation does not need to be regulated in the same manner as the largest Wall Street brokerage firms."¹¹

Thus, he claimed, "finders should be subject to an appropriately tailored set of guardrails that reflect their limited involvement in smaller scale private capital market activities. The 2020 Proposal included a number of exemptive conditions; perhaps there are others that should be considered. The objective is to minimize burdens on legitimate intermediaries while decreasing the likelihood that illegitimate actors will engage in bad acts."

Uyeda quoted former Commissioner Stephen J. Friedman's observation that "all regulation-deregulation decisions involve a trade-off between the abuse-prevention of a prophylactic rule and that rule's interference with the activities of non-abusers."¹² In this instance, Uyeda said, "any framework should open doors to finders who serve as legitimate conduits for investment information flows without imposing disproportionately draconian broker-dealer regulatory standards."

ENDNOTES:

¹Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders, Rel. No. 34-90112 (Oct. 7, 2020) (“2020 Proposal”).

² <https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sbcfac-072225>.

³U.S. Securities and Exchange Commission, Advisory Committee on Small and Emerging Companies, Recommendation Regarding the Regulation of Finders and Other Intermediaries in Small Business Capital Formation Transactions (May 15, 2017), <https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-finders.pdf>.

⁴ <https://www.sec.gov/newsroom/speeches-statements/remarks-atkins-small-business-capital-formation-advisory-committee-meeting-072225>.

⁵The Heritage Foundation, Letter to Vanessa A. Countryman, Re: S7-13-20 (Nov. 12, 2020), at 8, <https://www.sec.gov/comments/s7-13-20/s71320-8011714-225387.pdf>.

⁶Securities Industry and Financial Markets Association, Letter to Vanessa A. Countryman, Re: S7-13-20 (Nov. 12, 2020), at 6-7, <https://www.sec.gov/comments/s7-13-20/s71320-8011715-225372.pdf>; CompliGlobe Ltd., Letter to Vanessa A. Countryman, Re: S7-13-20 (Nov. 13, 2020), at 3, 6, <https://www.sec.gov/comments/s7-13-20/s71320-8048443-225747.pdf>.

⁷*Compare, e.g.,* CrowdCheck, Inc., Letter to Vanessa A. Countryman, Re: S7-13-20 (Nov. 30, 2020), at 2, <https://www.sec.gov/comments/s7-13-20/s71320-8065248-225954.pdf>; with CompliGlobe Ltd., Letter, *supra* note 5, at 4.

⁸ <https://www.sec.gov/newsroom/speeches-statements/crenshaw-remarks-sbcfac-072225>.

⁹*See* 2020 Proposal at 11-12 (stating that the courts and the Commission have identified “actively soliciting or recruiting investors” and “receiving commissions, transaction-based compensation or payment other than a salary for selling the investments” as indicators of broker status); NASAA, Legislative Agenda for the 116th Congress (Mar. 5, 2010) at 5 (“The securities laws correctly recognize that individuals who receive compensation directly tied to the sale of securities are functioning as securities brokers, regardless of any actual or apparent differences in the services or functions performed by particular securities salespersons and promoters.”).

¹⁰*See, e.g.,* Advisory Committee on Small and Emerging Business, Notable by Their Absence: Finders and Other Financial Intermediaries in Small Business Capital Formation, (June 3, 2015) (stating that, in many cases, “persons acting as finders represent ‘the dark side’ of the securities business: purveyors of fraudulent shell corporations; front-end fee con artists; purported Regulation S specialists who send stock off-shore and wait to dump it back into the U.S.

through unscrupulous brokerage firms or representatives who are receiving under-the-table payments for promoting stocks and micro-cap manipulators.”); American Bar Association, Report and Recommendations of the Task Force on Private Placement Broker-Dealers at 13 (June 20, 2005) (“ABA Report”) (noting that the SEC brings “dozens” of cases annually involving fraudulent activity by finders, that state regulators bring “well over 100,” and that these cases are likely “the tip of the iceberg”); see also Jean Eaglesham and Coulter Jones, Firms With Troubled Brokers Are Often Behind Sales of Private Stakes, Wall Street Journal (June 24, 2018); Eaglesham and Jones, Regulators Step Up Scrutiny of Sales of Private Stakes, Wall Street Journal (Jul. 2, 2018); Eaglesham and Jones, A Private-Market Deal Gone Bad: Sketchy Brokers, Bilked Seniors and a Cosmetologist, Wall Street Journal (May 7, 2018). *See generally* SEC v. Raymon Pirrello, Jr., et al., 23-cv-8953 (E.D.N.Y. 2023) (alleging scheme by 5 unregistered broker and four companies resulting in more than \$525 million in unregistered offerings); SEC v. Brook Church-Koegel, et al., No. 1:20-cv-21001 at 2 (S.D. Fla. 2020) (as part of a Ponzi scheme, three unregistered brokers were “responsible for raising . . . approximately \$444 million between June 2014 and December 2017, from thousands of investors in more than 40 states . . . in unregistered transactions”).

¹¹ <https://www.sec.gov/newsroom/speeches-statements/remarks-uyeda-small-business-capital-formation-advisory-committee-meeting-072225>.

¹²Remarks to National Association of Manufacturers, Government Regulation and Competition Committee, The Tides Inn, Irvington, VA (Sept. 8, 1980).

AI AND CYBER RISKS: THE FUTURE OF FINANCE

By Kristin Johnson

Kristin Johnson is a Commissioner at the Commodities Futures Trading Commission. The following is adapted from remarks that she gave at the Regulators Roundtable on Financial Markets Innovation and Supervision of Emergent Technology on July 14, 2025.

Our discussion this afternoon will focus on forces that are rapidly transforming the financial services sector of the global economy with particular emphasis on two elements of the increasingly digitized financial services sector—the integration of artificial intelligence and the threat of cyber risks.

For each of us—whether we’re shaping monetary policy, evaluating compliance with current regulatory guidelines, enforcing transparency and accountability in banking, capital markets, derivatives markets or digital asset markets,

or supervising the next generation of digital finance platforms—the topics on today’s agenda are top of mind . . . Each of these topics have only become more important in the year since we last gathered.

Let’s begin with artificial intelligence (“AI”).

AI in Financial Markets and Financial Markets Regulation

AI holds significant promise for making financial services more inclusive, efficient, and accessible. But its deployment must be underpinned by robust governance, ethical design, and global regulatory collaboration. For global regulatory leadership—including this August group convened today—the challenge is to balance innovation with stability, openness with security, and automation with human oversight.

Improving Accuracy, Efficiency, and Operational Resilience

Evidence suggests that AI improves accuracy, efficiency, and operational resilience and that AI-driven systems may outperform traditional approaches. Some potential applications include:

Fraud Detection and Risk Management

- **Anomaly Detection:** AI systems can detect unusual transaction patterns in real-time, flagging potential fraud or cyber threats more effectively than traditional rule-based systems.
- **Behavioral Biometrics:** Advanced models track behavioral traits (typing speed, swipe patterns) to authenticate users and reduce identity theft.

Process Automation

- **Intelligent Document Processing (“IDP”):** AI extracts, classifies, and processes information from unstructured documents (*e.g.*, loan applications, KYC documents), reducing processing time and human error.
- **Trade Surveillance & Market Monitoring:** AI can sift through vast quantities of data to detect signs of market manipulation, insider trading, or compliance breaches with greater precision.

Enhancing Compliance with Regulation and Reducing the Costs of Compliance

AI promises to reduce transaction and compliance costs by dynamically routing orders to the best venues, reducing slippage and lowering transaction costs. Evidence suggests that AI improves accuracy, efficiency, and operational resilience. AI-driven systems may outperform traditional approaches for detecting fraud, managing risks, executing back-office services, verifying identity, surveilling markets for evidence of market manipulation, insider trading, and compliance breaches.

AI also promises to enhance supervisory technology for regulators—automating data collection, analysis, and reporting, reducing frictions with regulatory compliance, and enabling more dynamic regulation at reduced costs. AI may facilitate efficient, faster-paced updating and modernization of regulation. AI may also offer continuous monitoring and enhanced real-time confirmation of compliance, reducing reliance on less frequent, periodic audits, and facilitating market participants and regulators’ ability to identify regulatory breaches earlier and potentially reducing the number and size of regulatory breaches.

Reducing Transaction and Compliance Costs

Transaction Costs

- **Smart Routing and Algorithmic Trading:** AI optimizes trade execution by dynamically routing orders to the best venues, reducing slippage and transaction costs.

Compliance and Regulatory Reporting

- **RegTech Solutions:** AI-powered regulatory technology automates data collection, analysis, and reporting, easing the burden of compliance with dynamic regulations.
- **Continuous Monitoring:** AI systems can provide real-time compliance checks rather than periodic audits, leading to faster resolution and fewer regulatory breaches.

Industry Use Cases

While the financial services industry has integrated

predictive technologies in risk assessment and predictive analytics for decades, over the last several years, we have witnessed a transformational shift in the diversity of use cases. In 2017, JPMorgan Chase launched a contract intelligence platform that automates review of commercial credit agreements, reducing by hundreds of thousands of hours the human resources annually required to complete credit agreement reviews.¹ HSBC, and a number of other financial institutions, have integrated AI in their transaction monitoring and anti-money laundering (“AML”) platforms to detect anomalies across millions of transactions in real-time, increasing accuracy in their assessment of suspicious activity reports.² Similar to other financial services firms, Mastercard has launched cyber risk and fraud detection software that relies on AI to analyze 75 billion transactions per year to block fraud in milliseconds.³

Risks and Considerations for Policymakers

In testimony before Congress, published academic literature, and a series of speeches during my tenure as a Commissioner at the CFTC, I have outlined and encouraged regulators to explore a number of risks and considerations.

For example, we face real concerns around bias in AI models, especially when it comes to lending and underwriting. There is a need for greater transparency and explainability, so that AI driven decisions are subject to the rigorous accountability standards that we typically apply in our supervisory oversight. And as AI becomes more embedded in core infrastructure, cyber resilience becomes a systemic concern, not just an operational one. There is also the matter of concentration risk. As more institutions rely on a handful of foundational AI models or platforms, we must ask: what happens when those systems fail or are compromised? I outline a few additional risks below.

Bias and Fairness

- **Model Transparency:** AI decisions, especially in lending or insurance, must be explainable to ensure non-discriminatory practices.
- **Data Integrity:** Models are only as good as the data they are trained on—bad data can perpetuate historical inequalities.

Cybersecurity and Resilience

- **Adversarial AI:** As AI becomes embedded in core infrastructure, it’s also a target for manipulation—highlighting the need for robust, secure design.
- **Systemic Concentration:** Overreliance on a few AI platforms or vendors could increase systemic vulnerabilities.

Governance and Accountability

- **Model Risk Management:** Institutions must manage the full lifecycle of AI models—development, validation, deployment, and monitoring—with strong oversight.
- **Cross-Border Coordination:** Global consistency in AI governance frameworks will be crucial to avoid regulatory arbitrage and ensure responsible innovation.

Next Steps in Governing AI

Governance—at the firm level and the system level—matters more than ever. Fintechs must invest in model risk management, ethical design, and responsible data practices. Supervisory approaches must evolve to keep pace with the changes occurring in the markets subject to our supervision.

Regulatory agencies in the US are increasingly deploying AI to review large volumes of data and detect emerging risks by identifying outliers. Using AI in this capacity, often referred to as “suptech,” may offer regulators more effective tools to combat fraud, market manipulation, illicit finance, money-laundering and other long-standing threats to the integrity of our markets.

Cyber Risks

I have encouraged diverse stakeholders to be mindful of potential cyber risks that may impact individual firms or the broader financial markets ecosystem.⁴ We continue to discuss these risks. As we consider them, let’s think about the potential implications of interdependence and the possibility of contagion—the threat that a domino effect of risks may occur at an accelerated speed.

Operational Resilience

Over the past few years, we have made progress in preparing ourselves to take on these challenges. The Commission issued a proposed rule, unanimously supported, to create an operational resilience framework for futures commission merchants, swap dealers, and major swap participants to “identify, monitor, manage, and assess risks relating to information and technology security, third-party relationships, and emergencies or other significant disruptions to normal business operations” in December 2023.⁵

Cyber resilience is a critical gateway issue for protecting market integrity, and an area where we need to be “all hands on deck” on both sides of the pond. Cyber resilience is only as strong as its weakest link. As most cyber threats may be launched against financial institutions in many nations, it is important to stay vigilant and collaborate closely on best practices and lessons learned.

Third-Party Risk Management

As I discussed in recent remarks, the Market Risk Advisory Committee that I sponsor at the CFTC has been actively focused on cyber resilience and third-party risk management issues.⁶ When the Commission released its proposed operational resilience framework, a subcommittee workstream of the MRAC recognized that there may have been some important gaps in operational resilience with respect to other market participants, such as central counterparties regulated by the CFTC, and took up the mantle to continue to examine areas not fully addressed by the Commission. The CCP Risk & Governance Committee organized recommendations that were presented to the commission that “would improve upon the existing framework and require that derivatives clearing organizations establish, implement, and maintain a third-party relationship management program.”⁷

Many aspects of the recommendations were informed by internationally recognized best practices and international standard setting bodies, such as the Bank for International Settlements Principles for Financial Market Infrastructure. Once again, this highlights the importance of international collaboration, in setting the standard for best practices, and for developing policies that are familiar to global market participants.

I look forward to discussing today the latest developments in third party risk management, such as new principles on third-party risk supervision issued by the European Securities and Markets Authority (“ESMA”) in June.⁸

International Coordination and Cooperation

As we move across the landscape of emerging technologies and the attendant risks, it is increasingly clear that international cooperation is not optional—it is essential. Innovative technologies and the risks that may arise as a result of digitization are not bound by jurisdictional, territorial, or national boundaries. The threats or risks born in one nation may quickly ripple across continents.

A vulnerability in a third-party service provider can contemporaneously compromise multiple financial institutions. A sophisticated actor can launch a cyber-attack from anywhere in the world, orchestrating the consequences such that they impact any one nation or group of nations simultaneously. Let me highlight a few ways we are already working together on these issues, and where we must go further.

First, harmonizing regulatory expectations. We need to align our supervisory approaches across jurisdictions to ensure that cyber risk is being addressed consistently. The Financial Stability Board, CPMI-IOSCO, and other international standard setting bodies have already announced important principles—but implementation must be global, not fragmented.

Standards like NIST, ISO 27001, and the FSB’s cyber incident response guidance should form the backbone of our shared expectations. It is worth exploring mutual recognition of cyber audits and certifications for third-party providers, especially cloud platforms.

Second, information sharing. Timely, secure, and actionable intelligence must flow across borders—not just between regulators, but also with the private sector. There are institutions that are helping to build these bridges, but we need to enhance real-time alert systems and threat-sharing protocols. Silence, in the cyber domain, is a vulnerability.

Third, we must strengthen crisis response and recovery. Too often, we focus on prevention. But in today’s

threat landscape, we must assume that breaches will occur—and focus on how we respond. That means building interoperable incident response plans. Conducting joint cyber drills and tabletop exercises simulations and establishing trusted communications channels that can activate instantly in the event of a cross-border incident.

Fourth, we must tackle concentration risk and supply chain vulnerabilities. Many of our institutions rely on the same cloud providers, fintech APIs, and software stacks. We need a coordinated approach to supervising these critical third parties—through shared resilience testing, pooled audits, and transparent incident reporting. And finally, we must invest in cyber capacity building, especially in emerging and developing economies. Because in a globally interconnected system, our resilience is only as strong as the weakest link. Let us support these markets with the tools, training, and frameworks they need—not just to defend themselves, but to contribute to the global cyber defense ecosystem.

Looking Ahead

The cyber threat landscape is evolving quickly—AI-powered attacks, deepfakes, quantum computing threats, and vulnerabilities in decentralized finance are no longer theoretical. To meet these challenges, we must act together—with speed, with coordination, and with trust. This is no small ask, and we can't do it alone.

Let us make cybersecurity a shared responsibility. Let us foster the partnerships—public and private, domestic and international—that are essential to securing our financial future. Because in today's world, cyber resilience is not just a technology issue—it is a financial stability imperative.

Finally, our convenings and conversations must continue. Trust can be a competitive advantage if we let it—a most potent tool in our toolbox to help us unlock the potential of new technology while also maintaining effective

governance structures that give us the confidence and stability to keep moving forward. I am hopeful as we continue to convene, as regulators, and with the broader communities we serve, that we can develop standards and best practices that can be relied on around the globe.

ENDNOTES:

¹JP Morgan COIN: A Banks Side Project Spells Disruption for the Legal Industry, Harvard Business School Digital Initiative (Nov 13, 2018), <https://d3.harvard.edu/platform-rcotom/submission/jp-morgan-coin-a-banks-side-project-spells-disruption-for-the-legal-industry/>.

²Jennifer Calvery, Harnessing the power of AI to fight financial crime, HSBC (June 10, 2024), <https://www.hsbc.com/news-and-views/views/hsbc-views/harnessing-the-power-of-ai-to-fight-financial-crime>.

³Mastercard accelerates card fraud detection with generative AI technology, Mastercard (May 22, 2024), <https://www.mastercard.com/us/en/news-and-trends/press/2024/may/mastercard-accelerates-card-fraud-detection-with-generative-ai-technology.html>.

⁴*See, e.g.*, Keynote Remarks of Commissioner Johnson for Governing Data at Iowa Innovation and Business Law Center and Yale Law Journal of Law & Technology at Yale Law School: Twin Peaks—Emerging Technologies (AI) and Critical Third Parties (Apr. 4, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson16>; Opening Remarks of Commissioner Kristin N. Johnson at GAIM Ops AI Summit: Using AI To Combat Cybersecurity and Fraud Risks (Apr. 7, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson17>.

⁵CFTC, Operational Resilience Framework for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 89 Fed. Reg. 4706 (proposed Jan. 24, 2024).

⁶Commissioner Kristin N. Johnson's Keynote Remarks at the CCP AGM 2025: Addressing Cyber-Risks, Managing Critical Third-Party Relationships, and Reinforcing CCP Resilience (June 19, 2025), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson21>.

⁷*Id.*

⁸Principles on third-party risks supervision, ESMA (June 12, 2025), <https://www.esma.europa.eu/sites/default/>

[files/2025-06/ESMA42-1710566791-6103_Principles_on_third-party_risks.pdf](https://www.sec.gov/files/2025-06/ESMA42-1710566791-6103_Principles_on_third-party_risks.pdf).

SEC/SRO UPDATE: SEC CHARGES GEORGIA LENDER AND OWNER WITH OPERATING A \$140M PONZI SCHEME; DELAWARE SUPREME COURT REVERSES \$200M AIDING-AND-ABETTING JUDGMENT IN COLUMBIA PIPELINE MERGER LITIGATION; NYSE PROPOSES TO ALLOW CERTAIN CLOSED-END FUNDS TO ELIMINATE ANNUAL MEETINGS; FINCEN ANNOUNCES POSTPONEMENT AND REOPENING OF INVESTMENT ADVISER ANTI-MONEY LAUNDERING RULE

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SEC Charges Georgia Lender and Its Owner with Operating a \$140 Million Ponzi Scheme

On July 10, 2025, the SEC announced that it had filed charges and sought emergency relief against First Liberty Building & Loan, LLC and its founder and owner, Edwin Brant Frost IV, in connection with an alleged Ponzi scheme that defrauded approximately 300 investors out of at least \$140 million.¹ According to the SEC's complaint, from 2014 through June 2025, First Liberty and Frost offered and sold promissory notes and loan participation agreements to retail investors, promising annual returns of up to 18%.² The defendants represented that investor funds

would be used to make short-term, high-interest bridge loans to small businesses, but in fact, according to the SEC, First Liberty acted as a Ponzi scheme from at least 2021 on.

According to the SEC, Frost and First Liberty began raising capital in 2014 by offering loan participation agreements to friends and family of Frost and later began offering promissory notes to the same group. Frost told investors that the funds raised would be used to provide bridge loans to First Liberty customers who were in the process of obtaining long-term loans from the Small Business Administration (the "SBA"). The investments generally had a 12-month term and paid interest, at rates between 8% and 18%, on a monthly basis. In 2024, the defendants expanded their sales efforts, marking promissory notes to the public via radio advertisements and the internet.

The SEC alleged that, while some investor funds were used to make bridge loans, those loans did not perform as represented. In 2025, for example, Frost represented to investors that only one bridge loan had ever defaulted, when in fact defaults were common. Despite this, the defendants continued to make interest payments to investors, using funds raised from new investors to pay existing ones—a classic Ponzi scheme structure. As of 2021, approximately 80% of interest and principal payments to investors were sourced from new investor funds rather than from loan repayments.

According to the complaint, when soliciting additional investments from existing investors, Frost made false reassurances about the status of their prior investments. For example, after a borrower who had received multiple bridge loans from First Liberty filed for bankruptcy and ceased making payments, Frost told an investor that the loan was scheduled to pay off soon and that he was "very confident that it will," despite knowing that the borrower was in bankruptcy.

The complaint further alleges that Frost misappropriated substantial investor funds for personal and affiliated company expenses. Examples include over \$2.4 million in credit card payments, more than \$335,000 to a rare coin dealer, \$230,000 for family vacations, \$140,000 for jewelry, and \$20,800 for a luxury watch. Frost also transferred more than \$5 million to himself and family members and used

investor funds to support several affiliated entities, which were named as relief defendants.

The SEC charged First Liberty and Frost with violations of the antifraud provisions of the federal securities laws, including Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks an asset freeze, appointment of a receiver, disgorgement, permanent injunctions and civil penalties. Without admitting or denying the allegations, the defendants and relief defendants consented to the SEC's requested emergency and permanent relief, with monetary remedies to be determined by the court at a later date.

SEC Associate Director of Enforcement Justin C. Jeffries commented, "The promise of a high rate of return on an investment is a red flag that should make all potential investors think twice or maybe even three times before investing their money. Unfortunately, we've seen this movie before—bad actors luring investors with promises of seemingly over-generous returns—and it does not end well."

Delaware Supreme Court Reverses \$200 Million Aiding-and-Abetting Judgment in Columbia Pipeline Merger Litigation

On June 17, 2025, the Delaware Supreme Court reversed a \$200 million judgment of the Chancery Court against TC Energy Corp. (formerly TransCanada) in a high-profile merger lawsuit arising from its 2016 acquisition of Columbia Pipeline Group, Inc.³ The case centered on allegations that Columbia's top executives breached their fiduciary duties by timing and structuring the sale to benefit themselves through lucrative change-in-control payments, and that TC Energy aided and abetted these breaches.

According to the Delaware Court of Chancery's findings, Columbia's CEO Robert Skaggs Jr., CFO Stephen Smith, and another executive orchestrated Columbia's spinoff from NiSource, Inc. in 2015, securing change-in-control agreements that would vest upon a sale of Columbia. Following the spinoff, Columbia commenced a process to sell the company. According to the Chancery Court, the executives, described as "ageing" and eyeing retirement, steered the process to maximize their personal payouts,

including by favoring a transaction with TransCanada and providing it with confidential information beyond what the Columbia board had authorized. The Chancery Court found that TransCanada, through its lead negotiator François Poirier, constructively knew of the executives' self-interested conduct and participated in breaches of fiduciary duty, including by violating the standstill agreement between the parties and failing to correct material omissions from the proxy statement issued to Columbia stockholders.

The Chancery Court awarded approximately \$200 million in damages on the plaintiffs' aiding and abetting claim, finding that but for the breaches, Columbia stockholders would have received a higher price in the transaction. The Chancery Court also found TransCanada liable for aiding and abetting disclosure violations in the proxy statement.

On appeal, the Delaware Supreme Court applied a stricter standard than that used by the Chancery Court to assess aiding and abetting liability. The Supreme Court held that, in order to be liable, a third-party acquiror must have actual knowledge of both the underlying fiduciary breach and the wrongfulness of its own conduct. The Supreme Court explained that circumstantial evidence, such as possession of documents or presence during relevant conversations, may suffice to establish actual knowledge, but the knowledge must be real and not imputed. Constructive knowledge—what a party should have known through reasonable care or diligence—is insufficient.

Applying this standard, the Supreme Court found that the record did not support a finding that TransCanada had actual knowledge of the fiduciary breaches of the Columbia executives or board. The Supreme Court emphasized that arm's-length negotiations, even if aggressive, do not give rise to aiding and abetting liability absent actual knowledge of, and substantial assistance in relation to, the breach. The Supreme Court also reversed the finding of liability for aiding and abetting disclosure violations, holding that a buyer's failure to correct a seller's proxy statement, without more, does not constitute knowing participation in a fiduciary breach.

As a result, the Supreme Court reversed the Chancery Court's judgment in its entirety, eliminating the \$200 million award against TC Energy. The decision clarifies Del-

aware's high bar for imposing aiding and abetting liability on third-party acquirors in M&A transactions.

NYSE Proposes to Allow Certain Closed-End Funds to Eliminate Annual Meetings

On June 6, 2025, the New York Stock Exchange LLC ("NYSE") proposed to amend Section 302.00 of the NYSE Listed Company Manual (the "NYSE Manual") to exempt certain closed-end funds ("CEFs") registered under the Investment Company Act of 1940 (the "1940 Act") from the requirement to hold annual shareholder meetings (the "Proposal").⁴

Section 302.00 of the NYSE Manual ("Section 302.00") requires companies listing common stock or voting preferred stock and their equivalents to hold annual shareholders meetings. Section 302.00 currently includes a list of types of company to which Section 302.00 does not apply, including, for example, companies whose only securities listed on NYSE are non-voting preferred and debt securities, passive business organizations, or issuers of securities listed pursuant to certain NYSE rules.⁵ The Proposal would amend Section 302.00 to include that newly listed CEFs would also be exempt from the annual shareholder meeting requirements (CEFs listed prior to the approval of the Proposal would remain subject to the annual shareholder meeting requirement). Newly-listed CEFs could still voluntarily include annual shareholder meeting requirements in their bylaws if they choose to do so. Business development companies or "BDCs," which are closed-end management investment companies registered under the Exchange Act and have elected to be treated as a BDC under the 1940 Act, would not be exempted under the Proposal and would remain subject to the annual shareholder meeting requirement.

The NYSE previously proposed amendments to Section 302.00 in July 2024 (the "2024 Proposal"). The 2024 Proposal, which would have exempted all CEFs from the annual shareholder meeting requirement, was later withdrawn by NYSE.⁶ The current Proposal indicates that the NYSE "believes that providing an exemption to the annual shareholder meeting requirement exclusively to newly-listed CEFs achieves a balance by maintaining existing voting rights for shareholders in established funds while giving

new funds an option to avoid the potentially costly and detrimental outcomes often associated with annual shareholder meetings for listed CEFs."⁷

FinCEN Announces Postponement and Reopening of Investment Adviser Anti-Money Laundering Rule

On July 21, 2025, the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") announced its intention to postpone the effective date of the final rule establishing Anti-Money Laundering/Countering the Financing of Terrorism Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers and Exempt Reporting Advisers (the "Adviser AML Rule") and to revisit the scope of the Adviser AML Rule in the future.⁸ The press release accompanying the announcement noted that extending the effective date of the Adviser AML Rule may help ease compliance costs for industry and reduce uncertainty while FinCEN undertakes a review of the Adviser AML Rule.⁹ The current effective date of the Adviser AML Rule is January 1, 2026, which FinCEN anticipates delaying to January 1, 2028.

ENDNOTES:

¹See <https://www.sec.gov/newsroom/press-releases/2025-98-sec-charges-georgia-based-first-liberty-building-loan-its-owner-operating-140-million-ponzi-scheme>.

²See <https://www.sec.gov/files/litigation/complaints/2025/comp-pr-2025-98.pdf>.

³See *In re Columbia Pipeline Group, Inc. Merger Litigation*, 2025 WL 1693491 (Del. 2025), <https://courts.delaware.gov/Opinions/Download.aspx?id=381090>.

⁴See [https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_\(2\).pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_(2).pdf).

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⁶See [https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_\(2\).pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_(2).pdf).

⁷See [https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_\(2\).pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2025/NYSE-2025-20_(2).pdf).

⁸See <https://home.treasury.gov/news/press-releases/sb0201>.

⁹See <https://home.treasury.gov/news/press-releases/sb0201>.

FROM THE EDITOR

Constant Revisions

So far in 2025, one of the major storylines for the Securities and Exchange Commission has been the dismantling of the work of the previous regime, under Chairman Gary Gensler. The SEC is a far more crypto-friendly venue when compared to the previous regime, and some of the Gensler era's most notable accomplishments are now foundering in court.

For an example of the latter, in late July, a federal appeals court vacated the SEC's 2023 Funding Order for its Consolidated Audit Trail ("CAT"), which was intended to fund a comprehensive market surveillance system. The court found that the Commission had provided insufficient basis for allowing self-regulatory organizations like FINRA the ability to pass on 100% of the costs of building the CAT to broker-dealers.

In 2023, over objections of its then-minority of Republican members, the SEC split the operating costs of the surveillance system among buyers, sellers, and exchanges. The intention was to divide costs evenly but at the time there were objections from the investment industry, which claimed it could be left paying an unfairly large share of the costs.

In a unanimous opinion for a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit, Circuit Judge Andrew Brasher said that because the SEC had failed

to advance a sufficient justification in deciding how the system's cost would fall on different actors in the marketplace, "we conclude that the 2023 Funding Order is arbitrary and capricious" and in violation of federal laws that govern the making of regulations. The court sent the rule back to the SEC for processing in line with the court's decision.

The American Securities Association and Citadel Securities, which had brought the lawsuit, claimed that the ruling "prevents a tax hike on every American investor who buys or sells a share of stock," as ASA President Chris Iacovella said in a statement.

The decision is also considered to be a challenge to the future of the CAT, a repository of investor and transaction data intended to give regulators heightened visibility into U.S. market operations. The CAT was created in 2012 as a response to the "flash crash" of 2010 when many Wall Street indexes temporarily erased nearly \$1 trillion in market value. An SEC spokesperson told Reuters that Chairman Paul Atkins has ordered SEC staff "to undertake a comprehensive review of the CAT" even before the recent court ruling.

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