

[Securities Regulation Daily Wrap Up, TOP STORY—SEC, CFTC publish Spring 2021 rulemaking agendas, \(Jun. 14, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Lene Powell, J.D.](#)

The agencies outline an ambitious rulemaking agenda for the next six months, including some controversial areas such as increased climate and human capital disclosures.

The SEC and CFTC have released their Spring 2021 agendas, providing insight into the agencies' rulemaking priorities in the months to come. "To meet our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, the SEC has a lot of regulatory work ahead of us," [said](#) SEC Chair Gary Gensler. "I look forward collaborating with my fellow commissioners and the dedicated staff to propose and finalize rules that will strengthen our markets, increase transparency, and safeguard investors."

SEC. Significant to-do items for the [SEC](#) include:

- Disclosure relating to [climate risk](#), [human capital](#), including workforce diversity and corporate board diversity, and cybersecurity risk. Democrat regulators and legislators have been pushing for increased disclosure in these areas, and Gensler announced in May that proposing new requirements for disclosures about climate risk and human capital metrics is one of his top priorities. In her former capacity as acting chair, Commissioner Allison Herren Lee [announced in February](#) that she had directed staff in the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. In March, Lee [requested public input](#) on climate change disclosure. Regarding human capital, Regulation S-K amendments requiring new disclosure on human capital were adopted last August, but the requirements are principles-based
- [Special purpose acquisition companies \(SPACs\)](#). SPACs have experienced a tremendous spike over the last several years compared to traditional IPOs, but dropped precipitously earlier this year following SEC investor bulletins and guidance that SPACs may need to undertake financial restatements due to certain accounting rules. While some have asserted that SPACs enjoy a more robust safe harbor for forward-looking statements than traditional IPOs, this is not entirely clear legally and many are seeking better clarity on this point.
- [10b5-1 affirmative defense provisions](#). Gensler has asserted that loopholes in the 20-year-old rule have "led to real cracks in our insider trading regime." He highlighted specific areas of possible reform including waiting periods, limits on cancellation, mandatory disclosure, and limits on the number of plans.
- Transparency around [stock buybacks](#), [short sale disclosure](#), [securities-based swaps ownership](#), and the [stock loan market](#). Gensler has expressed the need for

Other items on the SEC spring agenda include:

- Market structure modernization within equity markets, treasury markets, and other fixed income markets;
- Investment fund rules, including money market funds, private funds, and ESG funds
- Enhancing shareholder democracy;
- Mandated electronic filings and transfer agents; and
- Unfinished work directed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including, among other things, securities-based swaps and related rules, incentive-based compensation arrangements, and conflicts of interest in securitizations.

Criticism by Peirce and Roisman. Commissioners Hester Peirce and Elad Roisman released a [statement](#) questioning the makeup of the agenda. The commissioners acknowledged the inclusion of "important and timely

items" including rules related to transfer agents and government securities alternative trading systems, but noted the absence of certain items including rules to provide clarity for digital assets, allowing companies to compensate gig workers with equity, and revisiting proxy plumbing.

The commissioners also questioned the wisdom of considering revising recently adopted rules including amended Rule 14a-8 and Rule 14a-2(b) under the Exchange Act ("Proxy Updates"); Rule 13q-1 (the "Resource Extraction Payments Rule"); rules pertaining to the accredited investor definition and the integration framework; and whistleblower rules.

"Past Commissions have generally refrained from engaging in a game of seesaw with our rulebook," wrote the commissioners. "The inclusion of these rules in the Agenda undermines the Commission's reputation as a steady regulatory hand."

CFTC. Notable items on the [CFTC rule agenda](#) include:

- Substituted compliance for foreign swap execution facilities (SEFs). The Commission is considering new rules to [create a registration exemption](#) for SEFs that are subject to comparable, comprehensive supervision and regulation on a consolidated basis by an appropriate governmental authority in the facility's home country.
- Trading on exchanges. Staff has recommended that the Commission consider rulemaking on all aspects of [centralized market trading on designated contract markets \(DCMs\)](#), including the amount of block trading in futures and options and exchange of derivatives for related position transactions.
- Portfolio margining. Following a [joint request for comment with the SEC](#) in November 2020, the agencies are looking at potential ways to [implement portfolio margining](#) of uncleared swaps and non-cleared security-based swaps in accounts carried by broker-dealers, security-based swap dealers, swap dealers, and futures commission merchants.
- Custody of digital assets. In a holdover item from Fall 2020, the Commission expects to propose regulations providing for [segregation of customer collateral](#) involved in futures and options on digital assets that provide for physical delivery, and to make related changes to CFTC bankruptcy regulations.
- [Made Available to Trade \(MAT\) process](#). Currently, SEFs determine that a particular swap has been "made available to trade," triggering the trade execution requirement mandating that the swap must be traded on-exchange. According to proposed recommendations put forward at a [February 2021 meeting](#) of the Market Risk Advisory Committee (MRAC), concerns have arisen that no SEFs have made any new MAT determinations since 2013, raising questions about the suitability and future viability of the process. There are also concerns about potential conflicts of interest and inconsistency between the U.S. and international regimes.

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