SEC & OTHER DEVELOPMENTS FOR PUBLIC COMPANIES & INVESTMENT ADVISERS

January 21, 2026
California MCLE Blitz

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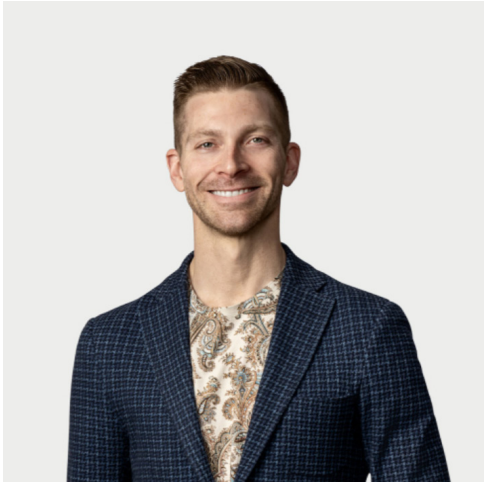

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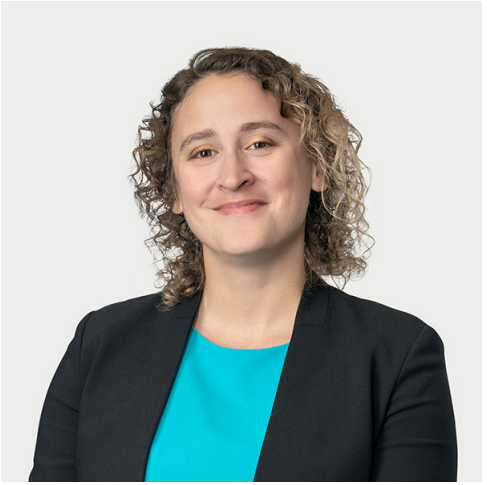

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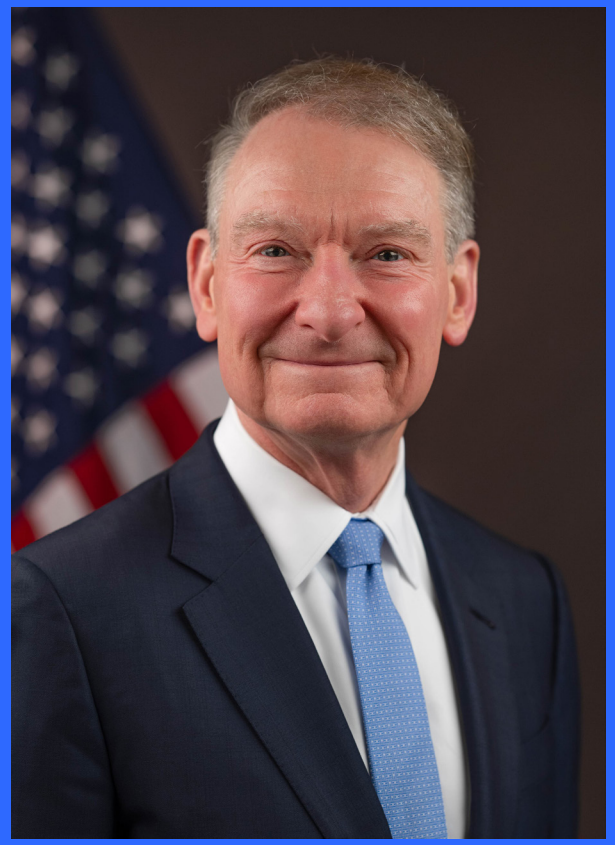
Agenda

New SEC Leadership

01

New SEC Chair: Paul Atkins



Paul Atkins confirmed in April 2025, will serve until June 2026

- Previously served as SEC commissioner from 2002 to 2008 and as Founder & CEO of a financial and cryptocurrency consulting firm
- Atkins is the third Republican member of the SEC, joining Hester Peirce and Mark Uyeda, who previously worked as legal counsel for Atkins and are expected to align with Atkins on goals & actions
- Currently only the Chair and two Republican commissioners
  - Caroline Crenshaw left the SEC on January 2, 2026, when Senate Banking Committee did not confirm her second term due to crypto industry opposition, leaving no Democratic commissioners

Chair Atkins' Expected Priorities

1. Compliance cost-cutting: deregulation via disclosure simplification initiatives (e.g., recent industry roundtables on exec comp disclosures), potential rollback of recent rulemaking and shift in enforcement priorities, and no longer defending climate change regulations
2. Capital formation: focus on small businesses' access to capital, increasing accommodations for capital raising and M&A transactions, regulating proxy advisors, and reforming stockholder proposal regime
3. Cryptocurrency: create a fit-for-purpose regulatory framework around crypto, leveraging the Crypto Task Force, and move away from the "regulation by enforcement" model of prior SEC administration

New Corporation Finance Director: James J. Moloney

James J. Moloney appointed Director of SEC's Division of Corporation Finance in September 2025

- Mr. Moloney previously served at the SEC for six years from 1994 to 2000 as an attorney-advisor and later a special counsel in the Office of Mergers & Acquisitions in the Division of Corporation Finance
  - Notably, Mr. Moloney was the primary author of the proposing and adopting releases for Regulation M-A, a comprehensive set of rules governing mergers & acquisitions, tender offers, and proxy solicitations
- Mr. Moloney joined Gibson Dunn & Cutcher after leaving his SEC role, where he has worked for the past 25 years
  - He was the Co-Chair of the firm's Securities Regulation and Corporate Governance Practice Group
  - In his role, he advised a wide base of clients on corporate governance matters, disclosure rules, mergers & acquisitions, tender offers, proxy contests, and going-private transactions among other areas

Recent SEC Rulemaking & Guidance Updates

02

Focus on Compliance Cost Cutting and Capital Formation

Key updates include rule proposals (expected April 2026) to **further support capital formation**, simplify disclosure practices, and reduce compliance costs, including:

- "Updating the Exempt Offering Pathways" to facilitate and streamline businesses' access to the market
- "Shelf Registration Modernization" to reduce compliance burdens and facilitate access to capital
- "Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies" to expand accommodations available to emerging growth companies, simplify categorization of registrants, and reduce compliance burdens
- "Rationalization of Disclosure Practices" to focus on amendments to disclosure practices and the identification of "material" disclosures
    - Goal is to facilitate material disclosure by companies and shareholders' access to that information
- In January 2026, the SEC announced it is soliciting comments on Regulation S-K with the goal of "revising the requirements to focus on eliciting disclosure of material information and avoid compelling the disclosure of immaterial information"

Focus on Compliance Cost Cutting and Capital Formation

Shift from Quarterly to Semi-annual Reporting

- **President Trump's announcement**: in September, President Trump announced intent to end quarterly financial reporting for public companies and move towards semi-annual reporting
  - This mirrors a related 2018 proposal from President Trump's first term, which the SEC solicited comments on but did not end up moving forward with any changes
  - Most other jurisdictions, like the UK and EU, already permit semi-annual instead of quarterly reporting
- **SEC's next steps**: Chair Atkins has indicated his support for this shift and said that the SEC could release a proposal for public comment in early 2026
- **LTSE petition**: the Long-Term Stock Exchange submitted a formal petition to the SEC for a rule-making to allow companies to choose between semi-annual and quarterly reporting
  - Supporters of the move to semi-annual reporting generally argue that it will reduce short-term pressures that discourage companies from prioritizing long-term value creation

Crypto Task Force

Crypto Task Force Launched in January 2025

- Formation of Crypto Task Force that is dedicated to developing a comprehensive and clear regulatory framework for crypto assets
  - Request for input on crypto security status, offerings, trading, custody, etc.
- Scope includes:
  - Digital assets
  - Crypto assets
  - Cryptocurrencies
  - Digital coins and tokens
  - Protocols
- Goals
  - Draw clear regulatory lines
  - Distinguish securities from non-securities
  - Disclosure framework
  - Paths to registration for both crypto assets and market intermediaries
  - Investors have the information necessary to make investment decisions
  - Enforcement resources are deployed judiciously

Staff Accounting Bulletin No. 121: Accounting for Obligations to Safeguard Crypto Assets

Staff Accounting Bulletin No. 122: Recission of SAB 121

Staff Accounting Bulletin No. 122 issued in January 2025

- Rescinds SAB 121
  - Required entities to recognize a liability and corresponding asset for their obligations to safeguard crypto assets
- Full retrospective application is required for annual periods beginning after December 15, 2024
- Early adoption permitted in any interim or annual financial statement period included in filings with the SEC on or after January 30, 2025

Staff Statement: Crypto Offering Disclosures

Issuers in the crypto asset markets are expected to tailor their disclosures to their specific business circumstances, avoiding technical jargon and focusing on material aspects of their operations. Key areas of disclosure include:

- Description of Business
  - Business operations, including the current stage of development and future plans
  - Business activities, such as network or application development, and how these activities relate to crypto assets
  - How they generate revenue and the role of any crypto assets in their business model
- Risk Factors
  - Business and securities, including technological, cybersecurity, and regulatory risks
  - The security's characteristics, such as price volatility and liquidity
  - Compliance with other applicable laws and regulations
- Directors, Executive Officers, and Significant Employees
  - Information about key management personnel, including their roles and contributions to the business
  - Relevant details about a third party that performs executive functions
- Financial Statements
  - Financial statements that comply with SEC requirements
  - Assistance from the CF-OCA is available
- Exhibits
  - Relevant smart contracts or code
  - These exhibits should accurately represent the rights and obligations of security holders as programmed into the network or application

Changed Guidance: Mandatory Arbitration Provisions

SEC Staff Will No Longer Block Registration Statements Solely due to Mandatory Arbitration Provisions

- Ends decade-long informal practice of refusing to accelerate effectiveness on this basis
- Shifts from substantive review to disclosure-based approach
  - Staff will focus on whether arbitration provisions are **clearly and adequately disclosed**
  - Will no longer play the role of "arbitration cop" – will not take position on whether such provisions are consistent with investor protection or public policy
- Reflects **limits on SEC Staff authority**
  - Staff emphasized it lacks a clear statutory mandate to prohibit arbitration provisions
  - Validity and enforcement of arbitration provisions left to judicial review
    - Potential issue for Delaware corporations that adopt investor arbitration provisions under Section 115(c) of the DGCL
    - **Potential litigation** over whether investor arbitration provisions are enforceable contracts under state law and whether adoption, to the extent they eliminate the ability of stockholders to bring class actions under federal securities laws, implicates the anti-waiver provisions of the Securities Act and Exchange Act
  - Consistent with reduced Staff intervention in other areas such as Rule 14a-8 process and ESG-related rulemaking

Proxy Season Developments

03

Changing Role in 14a-8 Shareholder Proposals

Shareholder Proposal Modernization

- **SEC Staff's Mid-Season Surprise.** In February, the SEC Staff issued Staff Legal Bulletin No. 14M, which rescinded 2021's Staff Legal Bulletin No. 14L, revitalized the "economic relevance" exclusion, and expanded the ordinary business exception
- **SEC, Congress, and Others Signal Continued Scrutiny of Rule 14a-8 Process.** Chair Atkins has previously voiced concerns about the shareholder process under Rule 14a-8, and U.S. House Republics appear poised to revisit prior legislation to reform Rule 14a-8. And now, state lawmakers are jumping on the bandwagon
- **Rule 14a-8 "Modernization" On the Horizon.** On the heels of Staff Legal Bulletin No. 14M, the SEC remains focused on further changes to Rule 14a-8. The 2025 Reg-Flex Agenda includes "Shareholder Proposal Modernization" as a new item, indicating further changes are ahead that are intended to "modernize the requirements of Exchange Act Rule 14a-8 to reduce compliance burdens for registrants and account for developments since the rule was last amended"

Changing Role in 14a-8 Shareholder Proposals

SEC Staff Will Not Respond to Most No-Action Requests or Express a View on Whether Proposals are Excludable

- Corp Fin will generally not respond to no-action requests or express views on exclusion arguments under Rule 14a-8 due to resource constraints and their view that there is already sufficient existing guidance. Applies during the current proxy season (October 1, 2025, through September 30, 2026)
- **Key Exception for Rule 14a-8(i)(1).** Staff will continue to review and respond to i(1) no-action requests due to unresolved questions under Delaware law regarding whether precatory proposals are proper subjects for shareholder action
- **Responsibility shifts squarely to companies.** Companies may exclude proposals without Staff concurrence but **must still provide Rule 14a-8(j) notice to the SEC and proponents** explaining the basis for exclusion. Notice is informational only – staff approval no longer required
- **No objection letters available based on company representations, but do not validate merits of exclusion.** If a company supplements its no-action request with a notice that includes an unqualified representation that the company has a reasonable basis to exclude the proposal, Staff will issue a non-substantive "no objection" response
- **Practical impact for companies**: increased legal risk and scrutiny around exclusion decisions, and increased likelihood of litigation

Chair Atkins Speech on Precatory Shareholder Proposals

- In October, Chair Atkins gave a dinner **speech signaling the SEC's willingness** to take a step that could significantly alter the landscape for shareholder proposals submitted under Exchange Act Rule 14a-8, by **allowing companies to exclude precatory shareholder proposals**
  - SEC Staff likely to defer to Delaware law legal opinion or Delaware court proceeding to decide whether precatory proposals are proper under Delaware law
    - If the determination is that they are not proper subjects under state corporate law, the proposals would be excludable from companies' proxy statements under Rule 14a-8(i)(1)
  - In essence, Chair Atkins has invited a Delaware incorporated company to initiate a challenge on this issue
  - Preview of the November SEC statement on Rule 14a-8
  - Chair Atkins also expressed disappointment with recent Delaware amendments prohibiting mandatory arbitration and fee shifting for federal securities law claims, describing them as "steps backwards" in Delaware's efforts to stem the potential exodus of Delaware companies reincorporating to another state

SEC Rulemaking Developments

Executive Compensation Roundtable

On June 26, 2025, the SEC hosted a roundtable of executive compensation disclosure requirements to help the SEC evaluate the effectiveness of current disclosure requirements and discuss opportunities for future rulemaking

The roundtable focused on two main topics:

1. How companies set compensation and informing investment and voting decisions and how investors consider executive compensation in making investment and voting decisions
2. The evolution of executive compensation disclosure, including the 2006 amendments and the compensation-related rules mandated by the Dodd-Frank Act

Call for Comments on Reg S-K Reform

In addition to the roundtable discussion, in January 2026 Chairman Atkins issued a statement soliciting public comments on all Reg S-K disclosure requirements, with an emphasis on reforming S-K to focus on eliciting disclosure of material info and not compelling disclosure of immaterial info – comments are due by April 13, 2026

Updated SEC Guidance Impacting Investor Engagement

SEC Views Investor Engagement on E&S Issues as Potentially Influencing Control

New Staff Interpretation issued in February 2025

- New CD&I guidance revised Schedule 13G eligibility standards
  - Clarified that investors exerting pressure to adopt governance measures (including ESG) can be viewed as influencing control, **particularly when tied to director votes**
    - Pressure can be direct or indirect, express or implied
  - Staff withdrew prior guidance that engagement on executive compensation, ESG, or other public interest issues, or on corporate governance topics unrelated to a specific change of control, without more, would generally not cause a loss of 13G eligibility
  - Bottom Line: large shareholders who discuss with management their views on a particular topic and how it may inform their voting decisions, without more, generally would not be disqualified from reporting on a 13G

Updated SEC Guidance Impacting Investor Engagement

SEC Views Investor Engagement on E&S Issues as Potentially Influencing Control

Implications

- Will likely influence the actions of large institutional investors seeking to address ESG matters through their “board accountability” voting policy standards
- Companies engaged in a proxy contest may find it more difficult to engage with their largest institutional investors
    - Companies and investors should foster productive discussions that avoid creating a misimpression that an investor is seeking to apply pressure
    - Some investors canceled meetings last proxy season with companies as they assessed the implications of the Staff’s guidance
- Discussions around non-binding proposals, such as votes on management’s say-on-pay proposals and discussions with non-proponents regarding shareholder proposals, should present less risk of being viewed as applying pressure on management or attempting to influence control of the company
- Off-season engagements may present less risk of losing 13G eligibility

Regulation of Proxy Advisors

Implication for Companies:
Changes may make voting behavior less predictable in the 2026 proxy season, increasing the importance of companies clearly communicating their perspectives on matters being put to a vote, both through their proxy statements and on-going shareholder engagement

President Trump Signed Executive Order

On December 11, 2025, President Trump directed the SEC, FTC, and Department of Labor to take various actions to "**end the outsized influence of proxy advisors that prioritize radical political agendas over investor returns**"

- EO directs the SEC to:
  - review/revise rules, regulations, and bulletins related to proxy advisors inconsistent with the Executive Order, especially if they **implicate DEI or ESG policies**
  - Enforce material misstatements or omissions for proxy advisors' proxy voting recommendations
  - Analyze whether proxy advisors **form a group** for purposes of Sections 13(d)(3) and 13(g)(3) of the Exchange Act
- In response to recent enhanced scrutiny, proxy advisors recently announced changes to their benchmark policies and proxy voting recommendations
  - Glass Lewis **moving away from its standard voting guidelines** to instead offer more customized voting frameworks for institutional clients
  - ISS updated its proxy voting guidelines for meetings after February 1, 2026, to move away from generally recommending votes "for" ESG shareholder proposals to a **case-by-case assessment**
  - Likely that proxy advisors will continue to strategically and preemptively evolve their business models in response to the rulemaking actions that emerge from the Executive Order

Board Diversity Developments

Evolving Litigation & Regulatory Landscape

- Nasdaq board diversity rules struck down: Fifth Circuit struck down rules in December on grounds that SEC exceeded its authority; rules had required annual disclosure of board diversity matrix and compliance with minimum diversity targets; Nasdaq has indicated it will not appeal the decision and listed companies no longer need to comply
- Executive Orders: with the change in the U.S. administration, anti-DEI sentiment has increased, largely due to executive orders targeting DEI programs and initiatives (e.g., January EO seeking to end illegal DEI discrimination and directing agency heads to identify corporate targets for investigation), which have increased litigation and reputation risks around DEI disclosures
- State AG litigation: State Attorney Generals have filed, or threatened to file, lawsuits relating to alleged unlawful conduct by corporations in connection with their DEI programs, including a Missouri AG lawsuit in February against Starbucks challenging, among other things, its Rooney Rule process for director candidate searches

How Investment Community Responded

- Many in the investment community softened expectations around board diversity: removed numerical targets and no longer will vote against directors for failure to meet these targets, instead will evaluate boards more holistically

- One prominent hold-out: Glass Lewis still expects 30%+ gender diversity +1 racially/ethnically diverse director, but now issues two alternate voting recommendations (one taking into account, one not)

How Corporate Community Responded

- Re-thinking proxy disclosures: many companies updated disclosures to mitigate potential risk, for example:
  - eliminating the diversity matrix (but retaining narrative)
  - broadening definition of diversity
  - eliminating or providing more context around Rooney Rule
  - removing prominent graphics

ESG Developments

Not available for download.

Please reach out to Lauren Assaf-Holmes to discuss.

Investment Advisor Regulatory Update

05

Rule 506(c) – SEC No-Action Letter

Key Update (March 12, 2025)

- SEC issued a no-action letter establishing a **bright-line test** for verifying accredited investor status under Rule 506(c)

Verification Conditions

- Written representation that investor is accredited and **not financing** the investment
- Minimum investment thresholds:
  - **$200K** for natural persons
  - **$1M** for legal entities (including capital commitments)
    - If an AI solely on the basis that its beneficial owners are accredited investors, the minimum investment amount is at least $1,000,000, or $200,000 for each beneficial owner if owned by fewer than five natural persons
- Sponsor must have **no actual knowledge** of contrary facts

Rule 506(c) – SEC No-Action Letter

Benefits

- Eliminates need for intrusive documentation (e.g., tax returns, CPA letters)
- Facilitates broader use of **general solicitation** under Rule 506(c)
- Expected to increase adoption of 506(c) offerings, especially by private fund sponsors

Limitations & Risks

- Cannot "unring the bell": use of general solicitation may **preclude reliance on Section 4(a)(2)**
- Does **not affect** Investment Company Act limits (e.g., 100 non-qualified purchasers)
- Sponsors must still comply with **Marketing Rule** and **performance-based fee restrictions** under Advisers Act
- Non-U.S. offering restrictions still apply

Marketing Rule FAQ – Gross Performance for Individual Deals

Key Update (March 19, 2025)

- SEC Staff revised FAQ to **permit gross-only performance** for individual investments and other extracted performance

Conditions for Use

- Must be **clearly labeled** as gross
- Must be accompanied by **total portfolio gross and net performance**:
  - Presented with **equal prominence**
  - Over the **same time period** as extracted performance

Marketing Rule FAQ – Gross Performance for Individual Deals

Clarifications

- Gross/net portfolio performance **need not appear on the same page** as extracted performance if comparison is facilitated
- Does not apply to **pre-fund investments or hypothetical performance of investments across multiple funds**

Portfolio Characteristics

- Metrics like **yield, attribution, volatility, and Sharpe ratio** may be shown gross-only if:
  - Clearly labeled
  - Accompanied by total portfolio gross/net returns

Cautions

- Sponsors must avoid **cherry-picking** and ensure **fair and balanced** presentation
- Hypothetical or aggregated pre-fund performance must be **clearly disclosed** and labeled

FinCEN AML Rule – Postponement and Reopening

Key Update (July 21, 2025)

- FinCEN postponed AML rule for investment advisers to **January 1, 2028**
- Reopened rulemaking process to reassess scope and substance

Original Rule Requirements

- Applies to **SEC-registered and exempt reporting advisers**
- Requires:
  - Risk-based AML/CFT program
  - Suspicious Activity Report (SAR) filing
  - Risk-based due diligence of investors
  - Independent testing
  - Ongoing AML/CFT training
  - Designated compliance officer

FinCEN AML Rule – Postponement and Reopening

Impact of Postponement

- Provides **regulatory certainty** via exemptive relief
- Advisers temporarily **not subject** to Bank Secrecy Act obligations
- FinCEN and SEC to reconsider **joint Customer Identification Program rule**

Adviser Considerations

- Most advisers already maintain AML programs, but **new rule would expand obligations**
- Advisers should prepare for **future compliance** and monitor rule developments

SEC Rule Rescission – Investment Adviser Proposals Withdrawn

Key Update (June 12, 2025)

- SEC formally **withdrew multiple proposed rules** applicable to investment advisers

Withdrawn Proposals

- Cybersecurity Risk Management
- Safeguarding Advisory Client Assets
- Conflicts from use of Predictive Data Analytics
- ESG Disclosure Requirements
- Outsourcing by Investment Advisers

SEC Rule Rescission – Investment Adviser Proposals Withdrawn

Impact

- SEC does **not intend to finalize** these proposals
- Future action would require **new proposals and public comment**
- Regulatory reset for private fund advisers

Retailization of Private Funds

Overview

- Private funds are becoming increasingly accessible to **retail investors** through structural innovations and regulatory changes

Access Channels

- **Semi-liquid structures**: Interval funds, tender offer funds, and BDCs
- Lower investment minimums **through HNW feeders**
- **Defined contribution plans**: Inclusion of private funds in 401(k) platforms

Retailization of Private Funds

SEC Removes 15% Limit on Registered Funds Investing in Private Funds

- **Previous Practice**: SEC staff informally required retail closed-end funds to cap investments in private funds (under Sections 3(c)(1) or 3(c)(7)) at **15% of net assets**. Funds exceeding the cap had to:
  - Limit sales to **accredited investors**
  - Impose a **$25,000 minimum investment**
- **May 2025 Change**: SEC staff announced they will **no longer enforce** this cap
  - Applies to **registered closed-end funds** offered to retail investors
  - Removes barriers to investing in **private equity, credit, and hedge funds**

Retailization of Private Funds

Implications

- Retail investors can now access **diversified exposure** to private markets via registered vehicles
- Sponsors may launch **new fund products** targeting broader investor bases
- Advisers impacted should enhance **disclosures** around:
  - Illiquidity
  - Valuation opacity
  - Layered fees
  - Conflicts of interest

Executive Order – 401(k) Access to Private Funds

Key Update

- Executive Order (August 2025) directs DOL and SEC to expand **retirement access to alternatives**

Policy Goals

- Broaden investment options for retirement savers
- Encourage safe harbor frameworks for fiduciaries

Agency Directives

- DOL to revise ERISA guidance
- SEC to revisit accredited investor definitions

Executive Order – 401(k) Access to Private Funds

Eligible Asset Classes

- Private equity, private credit
- Real estate, infrastructure
- Digital assets and commodities

Impact

- Potential for **mainstream adoption** of private funds in retirement plans
- Legal and operational hurdles remain for plan sponsors

Form PF Amendments – Compliance Deadline Extended

Key Update (September 2025)

- The SEC and CFTC have **extended the compliance deadline** for the **second phase** of Form PF amendments to **October 1, 2026**
- This phase includes **granular reporting requirements** for large hedge fund advisers and additional disclosures for private equity fund advisers, particularly around master-feeder and parallel fund structures