

# The LXR Group

## Biweekly Bulletin

Bringing clients and subscribers exclusive policy updates and analysis from the world of capital markets, fintech, investor protection and more.

### In This Volume:

Senate  
Republicans Unveil  
"JOBS Act 4.0"

The White House  
Announces Two  
SEC Nominations

Senate Banking  
Committee  
Examines Insider  
Trading

Plus, the latest Top  
Policy Developments,  
Congressional  
Updates and  
Regulatory News



## State Court Strikes Down Massachusetts Fiduciary Rule for Broker Dealers

On Wednesday, March 30th, Robinhood Financial LLC prevailed in its 2 year-long battle against Massachusetts top securities regulator after a judge [overturned](#) a rule that holds brokerages to the same fiduciary standard as investment advisers. The dispute between the online broker and the Massachusetts Securities Division (MSD) began in December of 2020, when Secretary of Commonwealth William Galvin filed an [enforcement action](#) alleging that Robinhood had “failed to protect novice investors” and “turned investing in securities into a high-stakes game.”

**State Strikes Down Massachusetts Fiduciary Rule for Broker-Dealers Cont.** As a basis for action, the Massachusetts regulator pointed to the state's uniquely robust "fiduciary" rules applicable to broker-dealers. The question of whether the state's fiduciary rules are valid, or federally preempted by NSMIA or other statutes, is one of the questions that the court was asked to address in the case. In response, the online brokerage [filed](#) a suit in Suffolk County Superior Court against Galvin the following April, alleging that the state's fiduciary standard of conduct for broker-dealers effectively violated state and federal law and that Galvin was acting beyond his delegated authority in adopting the rule.

In its [ruling](#), the Court found that the 2020 fiduciary rule, adopted under Galvin's direction, went against state common law from *Patsos v. First Albany Corp.*, a [case](#) that effectively declared "brokers are not fiduciaries when they simply execute trades for a customer and don't make investment decisions."

The basis for the ruling is a conflict with common law that is specific to Massachusetts. As such, the ruling doesn't necessarily have any direct implication on the ability of other states to conduct fiduciary rulemakings – except perhaps to the extent that other states have similar or identical common law to MA. The ruling does not appear to include anything that would preclude MA from enacting a fiduciary duty for BD's – it merely says that it can't be done by rule. On the other hand, a statute could overcome the common law. Finally, the ruling doesn't address the key question of NSMIA preemption. The ruling allows the MSD to file an appeal within 30 days.

## ***Top Policy Developments***

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**Senate Banking Committee Ranking Republican Announces "JOBS Act 4.0."** Coinciding with the [ten year anniversary](#) of the [JOBS Act](#) of 2012 being signed into law, Senate Banking Republicans [unveiled](#) draft legislation on Tuesday, April 5th, entitled the "[JOBS Act 4.0](#)." In announcing the package, Senate Republicans assert that the 2012 law has [created](#) opportunities for "online capital formation and investment crowdfunding," and thus served to "revitalize interest in the public markets and spur economic growth." The Republicans also posted a [section-by-section](#) summary detailing the major components of the bill, which primarily focus on encouraging companies to go public, relaxing regulation to expand the market for private capital, enhancing retail investor access to investment opportunities by encouraging broader investments and improving regulatory oversight.

The actual significance of the "JOBS 4.0" legislation is far from clear. Most of the provisions included in the draft bill are not new, and indeed, Committee Republicans acknowledge that the bill is based on recommendation derived from an [RFI](#) posted by Ranking Member Pat Toomey (R-PA) more than a year ago. Further, despite an effort to frame the bill's announcement as bipartisan progress, only 4 of the 30 provisions listed presently have any degree of bipartisan support

**White House Announces Two SEC Commissioner Nominees.** On Wednesday, April 6th, President Biden [announced](#) the nomination of Mark Uyeda to the Commission seat vacated early this year by former Commissioner Elad Roisman. Uyeda, a long time attorney with the Commission, has been detailed to the Senate Banking Committee's Minority Staff since early 2021. The President also announced the nomination of Jaime Lazarraga, a veteran Congressional aide who currently serves as Senior Advisor to Speaker Nancy Pelosi (D-CA), where he oversees a variety of issues pertaining to the financial services industry, as well as administration legislative initiatives. If confirmed, Lazarraga will succeed outgoing Commissioner Allison Lee.

**Senate Banking Committee Discusses Insider Trading Legislation.** On Tuesday, April 5th, the Senate Banking Committee gathered for a hearing entitled "Keeping Markets Fair: Considering Insider Trading Legislation," where the Committee discussed the potential need for a "statutory definition of insider trading." In his opening statement, Chairman Sherrod Brown (D-OH) began by emphasizing that "the stock market is detached from the reality of most people's lives" and it "disproportionately benefits the wealthy." Due to the overwhelming advantages Wall Street has in terms of asset control, Brown argued that the current definition of insider trading - derived from common law - fails to account for certain abuse and

misconducts, and that Congress must provide clear guidance as to what constitutes illegal insider trading. Ranking Member Toomey [expressed](#) a similar view in saying “it would be preferable for Congress to codify what that law would entail,” but noted that Congress should remain “cautious about legislation that might cause confusion, uncertainty, or unintended consequences in this highly technical area.” Witnesses for the April 5th hearing included [Robert J. Jackson Jr.](#) (NYU Law), [Professor M. Todd Henderson](#) (University of Chicago Law School), [Mr. David R. Burton](#) (Roe Institute for Economic Policy Studies, The Heritage Foundation), and [Professor John C. Coffee Jr](#) (Columbia Law). In addition, the North American Securities Administrators Association sent a letter to the Committee expressing “support [for] swift passage of legislation to combat illegal insider trading,” and “also urg[ing] Congress to pass a package of reforms that will foster greater trust in our capital markets.”

## On The Hill

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**House Education and Labor Committee Holds Markup to Consider Legislation to Aid American Workforce.** On Tuesday, April 5th, the House Education and Labor Committee held a markup of H.R. 7309, “Workforce.” Specifically, H.R. 7309, sponsored by Committee chairman Bobby Scott (D-VA), would “reauthorize the Workforce Innovation and Opportunity Act of 2014,” which expired in 2020. The second bill, H.R. 7310, sponsored by Rep. Lucy McGrath (D-GA) also referred to as PARSA, is comprised of several bipartisan bills that would build on previous improvements to the US retirement system by, among other things, educating participants on fees their paying, boosting financial literacy, expanding opportunities for employees to qualify for their company's retirement plan, and promoting employee ownership programs.

In his opening statement, Chairman Scott (D-VA) noted that “underinvesting in workforce development allows other economies to outcompete us” and that this legislation would undoubtedly meet the needs of American workers and families by expanding the number of individuals receiving training services through readjusted funding. Despite many of the proposals having bipartisan support, the markup became bogged down in political acrimony, with wedge issues like “CRT” and “provisions to protect religious liberties.” After voting to reject a handful of GOP amendments, the Committee voted 29-21, along party lines, to favorably report both bills to the full House

**Van Hollen, Warnock, Brown Lead Senate Battle to End Overdraft Fees; House Subcommittee Holds Hearing on Bills to Limit Overdrafts, Protect Consumers.** In a series of [letters](#) to the nation’s largest banks on Monday, March 28th, Senators Van Hollen (D-MD), Warnock (D-GA) and Brown (D-OH) reiterated the need to reduce or terminate overdraft fees to ensure hardworking families can keep their hard-earned cash. Claiming that these fees “drain bank accounts” and “push consumers out of the banking system and into the arms of unscrupulous lenders,” the Senators have urged banks to follow the paths of Capital One, Citi, Wells Fargo, and Bank of America in eliminating their nonsufficient fund fees and shifting towards a “fairer and more transparent fee structure.” Recipients of the letters included Charles Schwab, JP Morgan Chase, PNC Financial Services Group, TD Group, Truist Financial Corporation, and U.S. Bancorp.

Two days later on March 31st, the House Financial Services Committee’s Subcommittee on Consumer Protection and Financial Institutions held a [hearing](#) entitled “The End of Overdraft Fees? Examining the Movement to Eliminate the Fees Costing Consumers Billions.” The two bills at the forefront of discussion, the “[Main Street Growth Act](#),” and the “[Expanding Access to Affordable Bank Accounts Act](#),” were centered around reducing or eliminating overdraft fees. Witnesses of the hearing included [Jeremie Greer](#) (Co-Founder/Executive Director, Liberation in a Generation), [Elyse Crawford-Hicks](#) (Consumer Policy Counsel, Americans for Financial Reform), [Paul Kundert](#) (President and CEO, UW Credit Union), [Santiago Sueiro](#) (Senior Policy Analyst, UnidosUS), and [Todd Zywicki](#) (George Mason University Professor of Law).

# Regulatory Developments

**SEC Releases Staff Bulletin to Reiterate Standards of Conduct for Broker-Dealers and Investment Advisers.** On March 30th, the U.S. Securities and Exchange Commission released a [staff bulletin](#) to educate and reiterate the appropriate steps broker-dealers and investment advisers should take when making account recommendations to retail advisers. The bulletin summarizes “staff views on how broker-dealers, investment advisers and their associated persons can satisfy their obligations to retail investors when making account recommendations,” and is designed to “assist firms... with considering reasonably available alternatives and cost, addressing conflicts of interest, and adopting and implementing reasonably designed policies and procedures when making account recommendations.”

## SEC Proposed Rules Open for Public Comment

- **April 6th:** *Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities*, The SEC is proposing a set of rules (“Regulation SE”) and forms under Section 3D of the Securities Exchange Act of 1934 (“SEA”) that would create a regime for the registration and regulation of security-based swap execution facilities (“SBSEFs”) and address other issues relating to security-based swaps (“SBS”) execution generally.
- **March 30th:** *Special Purpose Acquisition Companies, Shell Companies and Projections*, The SEC is proposing rules intended to enhance investor protections in initial public offerings by special purpose acquisition companies (SPACS) and in subsequent business combination transactions between SPACS and private operating small companies.
- **March 28th:** *Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer*, the SEC is proposing new rules to further define the phrase “as a part of a regular business” as used in the statutory definitions of “dealer” and “government securities dealer” under Sections 3(a)(5) and 3(a)(44), of the “Exchange Act.”
- **March 23rd:** *Removal of References to Credit Ratings from Regulation M*, The SEC is re-proposing amendments to remove the references to credit ratings included in certain Commission rules.
- **March 21st:** *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, The SEC is proposing for public comment amendments to its rules under the Securities Act and Exchange Act that would require registrants to provide certain climate-related information in their registration statements and annual reports.
- **March 9th:** *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, The SEC is proposing rules to enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance and cybersecurity incident reporting by public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934
- **February 25th:** *Short Position and Short Activity Reporting by Institutional Investment Managers*, The SEC is proposing a new rule and related form which are designed to provide greater transparency through the publication of short sale related data to investors and other market participants.
- **February 10th:** *The Commissioner's Whistleblower Program Rules*. The SEC is proposing for public comment amendments to the Commission's rules implementing its whistleblower program.
- **February 10th:** *Modernization of Beneficial Ownership Program*. Proposing to amend certain rules that govern beneficial ownership reporting.
- **February 9th:** *Shortening the Securities Transaction Settlement Cycle*. Proposing rules to shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade (“T+2”) to one business day after the trade date (“T+1”).
- **February 9th:** *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*. Proposing new rules under the Investment Advisers Act of 1940 and the Investment Company Act of 1940 to require registered investment advisers (“advisers”) and investment companies (“funds”) to adopt and implement written cybersecurity policies and procedures reasonably designed to address cybersecurity risks.
- **February 9th:** *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*. Proposing new rules under the Advisers Act to require registered investment advisers to private funds to provide transparency to their investors regarding the full cost of investing in private funds and the performance of such private funds.
- **January 26th:** *Amendment to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange”; Regulation ATS for ATS's That Trade U.S. Government Securities, NMS stocks, and other securities; Regulation SCI for ATS's That Trade U.S. Treasury Securities and Agency Securities*. Proposing to amend a rule which defines certain terms used in the statutory definition of “exchange” under Section 3(a)(1) of the Exchange Act; Re-proposing amendments to Regulation ATS under the Exchange Act; Re-proposing amendments to Regulation ATS for ATSs that trade government securities as defined under Section (a)(42) of the Exchange Act or repurchase and reverse repurchase agreements on government securities; Amend Form ATS-N for NMS stock ATSs and Regulation ATS fair access rule; Proposing to require electronic filing of and to modernize Form ATS-R and Form ATS; Re-proposing amendments to Regulation Systems Compliance and Integrity to apply it to ATSs that meet certain volume thresholds in US Treasury Securities or Agency Securities.

# Other Significant Policy Developments

**Senate Committee Chairs Ask Treasury to Expedite AML Rules for Investment Advisers.** On Wednesday, March 30th, a group of Senate committee chairs sent a [letter](#) to Treasury Secretary Janet Yellen regarding anti-money laundering (AML) requirements for investment advisers. The letter, which was signed by Senate Banking Committee Chair Sherrod Brown (D-OH), Senate Intelligence Committee Chair Mark Warner (D-VA), and four others, specifically called for the Financial Crimes Enforcement Network (FinCEN) to “revise and reissue [proposed rules from 2015](#) on AML and suspicious activity report filing requirements for investment advisers” and to “use its discretionary authority to include investment advisers in its definition of “financial institution” in the Bank Secrecy Act (BSA).” The letter references the [SEC’s Investment Adviser Information Report](#), showing that assets under management by investment advisers have skyrocketed in the last ten years from \$44 trillion to upwards of \$113 trillion.

**SEC Chairman Gensler Delivers Remarks on Crypto Markets.**

On Monday, April 4th, SEC Chairman Gary Gensler announced several initiatives to expand investor rights when it comes to cryptocurrency in a [speech](#) delivered at the [Penn Law Capital Markets Association Annual Conference](#). In speaking on behalf of the \$2 trillion crypto market, Gensler stated that “crypto platforms play roles similar to those of traditional regulated exchanges” and “investors should be treated in the same way.” Reiterating on the Commission’s desire to remain “technology neutral,” Gensler acknowledged the various responsibilities the SEC has when it comes to platforms, stablecoins and tokens, and he addressed what the agency has done thus far to promote strengthened investor protections.

“You might have noticed Super Bowl ads for several crypto platforms. Seeing these ads reminded me that, in the lead-up to the financial crisis, subprime lender AmeriQuest advertised in the Super Bowl. It went defunct in 2007.”

-SEC Chairman Gensler

**Senate Banking Committee Narrowly Advances Nomination of Economist Lisa Cook to Serve on the Federal Reserve Board of Governors.** On Tuesday, March 29th, the nomination of Lisa Cook to the Federal Reserve Board of Governors was [advanced](#) by Senate Banking Committee following a 50-49 vote on a resolution to break a Banking deadlock. Cook now joins Powell, Brainard and Jefferson in awaiting a final vote on the Senate floor.

**SEC Releases Accounting Guidance for Crypto Exchanges.** On Wednesday, March 30th, the SEC released new [guidance](#) for cryptocurrency exchanges in efforts to communicate risks to investors and shareholders in a more uniform manner. Under the new guidance, the SEC is [urging](#) public trading platforms to “recognize crypto held on the behalf of customers as a liability and asset on their balance sheets” given the risks and uncertainties involved in digital asset exchanges. According to [SEC officials](#), “the lack of regulation in the crypto space, coupled with limited legal precedent for how digital assets held through trading platforms might be treated in fraud or bankruptcy proceedings, poses unusual risks for the operations and finances of SEC-registered trading platforms.” The guidance states that the SEC expects to see a reflection of this guidance in registrants’ financial statements on or after June 15th of this year.

## Professional Opportunities

**The North American Securities Administrators Association is seeking a Policy and Government Affairs Manager/Counsel.** The successful candidate will have strong government affairs skills (with a preference for experience in state government affairs), outstanding writing and analytical skills, a positive attitude, a firm understanding of securities regulation and financial regulation, a strong commitment to investor protection, and a desire to work in an association environment. Additional information is available on NASAA’s [website](#).

**The Center for American Progress (CAP) has an immediate opening for a Policy Analyst for Financial Regulation and Corporate Governance.** The position will be housed within the Business, Government and Workers team. The successful candidate has expertise in banking, capital markets, or corporate governance; is familiar with existing federal regulatory and supervisory approaches; and is committed to

investor protection, market integrity, and the overall competitiveness and inclusiveness of the US economy, Applications are to be submitted via this [webpage](#).

**Public Citizen is seeking a Consumer and Civil Justice Counsel.** The Counsel will coordinate its Congress Watch administrative and legislative advocacy on consumer product safety and civil justice issues; develop and execute associated public education and outreach; and spearhead policy development. The work will focus on protecting the right of victims of corporate violence and wrongdoing to seek redress in court, including through class actions; promoting a strong, fair, and accessible justice system; ensuring safe consumer products; the nexus of racial justice and consumer issues, and encouraging the government to serve the public interest. Interested candidates should send a cover letter, resume, references, and writing sample to Susan Harley [sharley@citizen.org](mailto:sharley@citizen.org). Please include your last name and the position for which you are applying in the subject line of your email and in the filenames of attachments.

**Rep. Joyce Beatty (D-OH) is seeking a candidate to lead the financial services portfolio.** Successful candidates will demonstrate a strong knowledge of public and private housing issues and urban development. A working knowledge of federal financial institution policy including banking, securities, and insurance is also required. Please send a resume, cover letter, and writing sample via email to: [careers.beatty@mail.house.gov](mailto:careers.beatty@mail.house.gov).

**Rep. Josh Gottheimer (D-NJ) is seeking a Financial Service Legislative Assistant.** In addition to handling the Congressman's policy work on the House Financial Services Committee, the LA will be responsible for advising on trade, small business, tax and social security. To apply for the position, please email a cover letter, resume, and list of references to [nj5jobs@mail.house.gov](mailto:nj5jobs@mail.house.gov). Applicants are requested to submit their materials in a single PDF document with a file name of "FSC Legislative Assistant. Last Name, First Name."

**Senator Gary Peters (D-Mich) is seeking multiple highly motivated, resourceful Legislative Correspondents in his Washington, D.C. office.** Primary duties include processing and responding to constituent mail, conducting research, providing legislative assistance, drafting memos, and meeting with constituents and stakeholders. Interested candidates can submit their resume via the following [link](#).

## Upcoming Events

### April 27th at 10:00 a.m.:

The House Financial Services Committee will convene for a [hearing](#) entitled "Consumers First: Semi-Annual Report of the Consumer Financial Protection Bureau"

### April 28th at 2:00 p.m.

The House Financial Services Committee Task Force on Financial Technology will convene for a [hearing](#) entitled "What's in Your Digital Wallet? A Review of Recent Trends to Mobile Banking and Payments"

### May 4th at 2:30 p.m.

NASAA to host [webcast](#) "NASAA's Senior Issues and Diminished Capacity Committee Presents"

## Further Readings & Podcasts

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1. "Direct Indexing is Coming Your Way" - [Morningstar](#)
2. "Crypto, VC Firms Come Together to Bail Out Axie Infinity After \$624M" - [Vice News](#)
3. "How Democrats Evened the Congressional Map" - [Daily News Podcast](#)
4. "Why Congress is dragging its feet on pot legalization" - [FiveThirtyEight](#)