

LXR Group

Financial Regulatory Policy Bulletin

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

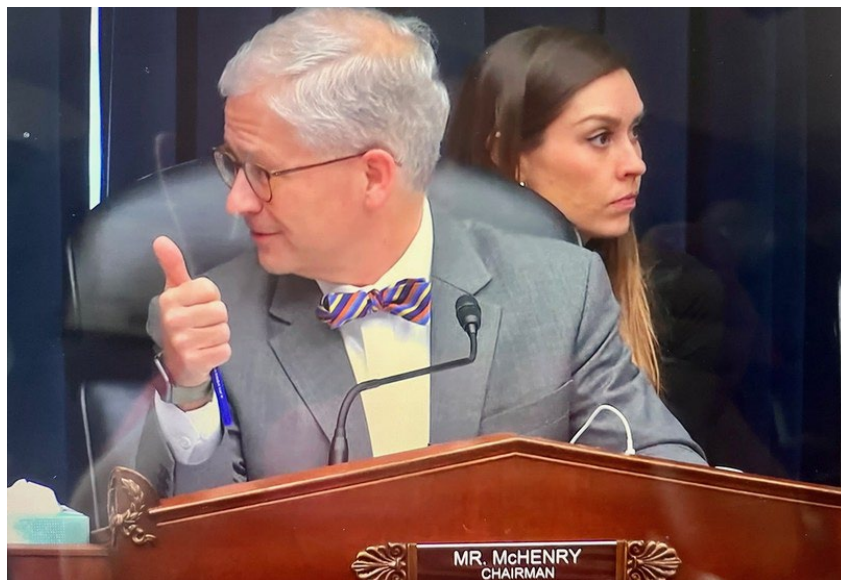
In This Volume:

House Subcommittee Chair Blasts SEC Market Structure Proposals – Again.

Senate Democrats Urge Banking Regulators to Probe EWS, Coordinate with CFPB, on Mobile Payments.

SEC Advisory Committee Scrutinizes Adequacy of RIA Examination Program as IAA endorses for "User Fees."

Better Late than Never: SEC Subpoenas RobinHood Crypto Brokerage



Featured Analysis: *The Key Takeaways from the First HFSC Markup of the 118th Congress*

Analysis: Key Takeaways from the Year's First House Financial Services Committee Markup.

On February 28th, the House Financial Services Committee (HFSC) convened for its first legislative markup of the of the 118th Congress, and its first markup with a Republican majority since Fall of 2018. The bulk of bills selected for markup dealt with Washington's latest bipartisan punching bag: the Peoples Republic of China (PRC). The HFSC is, like other House Committees, looking for ways "to thwart the Chinese Communist Party's aggression." The remaining bills were a motley crew of bipartisan measures, dealing with everything from the World Bank's International Development Association to emergency health supplies for public emergencies to financing for illicit synthetic drugs. Only a single bill, H.R. 1165, The Data Privacy Act of 2023 – lacked any Democratic support. Prior to adjourning, well into the evening, the Committee voted unanimously to report ten bipartisan bills to the House and approved an additional three bills by voice-vote.

Plus:

The latest Policy Developments, Congressional Updates and Regulatory News, Upcoming events, and Recommended Reading & Podcasts

Top Policy Developments:

(Continued from P.1.) Prior to adjourning, well into the evening, the Committee voted unanimously to report [ten bipartisan bills](#) to the House and approved an additional three bills by voice-vote. The Committee also voted along party lines to defeat some half-dozen Democratic amendments to the Data Privacy Act, prior to voting 26-21 to approve the bill along party lines. *For LXR Group's detailed analysis of the February 28th markup click [here](#).*

Senate Banking Continues to Investigate the Crypto Crash, but Next Steps Remain Unclear. On Tuesday, February 14, 2023, the Senate Banking Committee (SBC) held a hearing titled *Why Financial System Safeguards are Needed for Digital Assets*, its second in a series on last year's crypto crash (the first was last December's hearing titled *Why the FTX Bubble Burst and the Harm to Consumers*). The witnesses were Lee Reiners, Policy Director at the Duke Financial Economics Center; Yesha Yadav, Professor at Vanderbilt Law School; and Linda Jeng, General Counsel and Chief Regulatory Officer at the Crypto Council for Innovation.

The decision to hold hearing suggested SBC Chair Sherrod Brown (D-OH) remains interested in exploring crypto legislation and perhaps even enacting crypto legislation. Indeed, in his [opening statement](#), the senator seemed to confirm as much, making clear that he has a vision for crypto regulation that includes disclosures, prohibitions on conflicts of interest, customer protections, governance and risk management rules, provisions to address anti-money laundering and fraud; and government oversight. However, the rest of the hearing seemed to dispel the notion that legislation is feasible as the disagreements between Senators are enormous. *For LXR Group's detailed analysis of the hearing click [here](#).*

House Subcommittee Chair Blasts SEC Market Structure Rule Proposals – Again. On February 17, Rep. Ann Wagner (R-MO), Chairman of the Financial Services subcommittee on Capital Markets, sent a [letter](#) to Securities and Exchange Commission (SEC) Chair Gary Gensler criticizing the SEC for pursuing proposals that would “needlessly overhaul” U.S. equity market structure rules. Referring to [a package of SEC amendments related to market structure that the Commission voted to propose in December 2022](#), Wagner stated that she considers “each of these [market structure] proposals deeply concerning, given the irreparable harm they will likely cause millions of investors, entrepreneurs, and small companies across the country,” and that she is particularly concerned with “the SEC’s proposal to force retail investors’ orders into qualified auctions.” The Congresswoman’s recent letter follows up on an earlier [letter](#) she sent the SEC late last year, prior to formally becoming Subcommittee chair, warning against proposing changes to market structure rules in the absence of “any empirical data showing that there is a problem with the current quality of U.S. equity markets for retail investors.”

SEC Investor Advisory Committee Discussion Presages Renewed Scrutiny of the SEC Oversight of Federal RIAs. At its March 2 meeting, the Investor Advisory Committee (IAC) held a spirited and revealing discussion surrounding the adequacy of the SEC’s present examination program as it relates to SEC registered investment advisers. It was the first time in years that the IAC has looked at this vexing issue, and we believe it is likely that we’ll be hearing much for about it in the coming months. The IAC discussion, which followed a panel presentation entitled “Oversight of Investment Advisers: Can Regulators Keep Up with Growth in the Industry,” saw IAC members quiz SEC Examination Division Co-Director Natasha Vj Greiner about the sufficiency of the agency’s present 15% examination rate, and seven-year examination cycle. Panelist participating in the discussion included [Natasha Greiner](#), Deputy Director, Division of Examinations; and National Associate Director, Investment Adviser/Investment Company (IA/IC) Examination Program, U.S. Securities and Exchange Commission; [Karen Barr](#), President and CEO, Investment Adviser Association ([Written Statement](#) and [Presentation](#)); [Stephen Brey](#), Corporations, Securities, and Commercial Licensing Bureau, State of Michigan ([Written Statement](#), [Presentation](#)); and [Micah Hauptman](#), Director of Investor Protection, Consumer Federation of America ([Written Statement](#)).

The policy question of how to increase RIA examinations is much trickier than it appears. The last time Congress [had this conversation in earnest](#), in 2011-2012, policymakers realized that fixing the problem would require them to choose between [a menu of bad options](#). That, effectively, prevented Congress from passing any legislation, and the problem was never really fixed. Since 2012, the number of RIAs has grown 40 percent. While the IAC discussion did suggest that the examination program is at a point of crisis, or that a policy response is imminent, and CFA’s Micah Hauptman called the status quo “unacceptable.” At the very least, we believe yesterday’s discussion puts stakeholders on notice that this is a conversation they need to be having again, and in serious way.

Congressional Developments:

Congress Invokes Congressional Review Act to Halt DOL Retirement Rule. Lawmakers in the House and Senate this week voted to approve a joint resolution to nullify the Department of Labor's (DOL) new rule permitting retirement plan fiduciaries to consider climate change and other environmental, social and governance factors when selecting investments and exercising shareholder rights. The Joint Resolution ([H.J. Res. 30](#)) – introduced pursuant to the Congressional Review Act, which lets Congress disapprove by a simple majority vote a final rule issued by a federal agency if it has not been in effect for more than 60 legislative days – passed the House 216-204 on Tuesday, with the support of all House Republicans. It then cleared the Senate on Thursday with support from Democrats Jon Tester (D-MT) and Joe Manchin (D-WV).

The DOL rule at issue, which went into effect Jan. 30, allows ERISA fiduciaries to consider ESG factors. It also maintains the Department's position that fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals. The rule is a reversal of two rules promulgated late in the Trump administration that said retirement plan fiduciaries could not invest in "non-pecuniary" vehicles that sacrifice investment returns or take on additional risk and outlined a process a fiduciary must undertake when making decisions about casting a proxy vote. The White House has [announced](#) that President Biden will veto the resolution.

Senate Democrats Urge Banking Regulators to Probe EWS, Coordinate with CFPB, on Mobile Payments. On March 2, Democratic Senators Elizabeth Warren (MA), Sherrod Brown (OH), Mark Warner (VA), Bob Menendez (NJ) and Jack Reed (RI) called on federal regulatory agencies to coordinate their supervisory approach of Zelle and similar apps with the CFPB. In a [letter](#), the Senators urged the bank regulators to “take several specific steps to protect consumers who use the nation’s largest instant payment app from falling victim to scams and fraud.” The Senators also asked regulators “to closely review and examine the customer reimbursement and anti-money laundering (AML) practices of depository institutions that participate in the Zelle network,” and “to examine Early Warning Services, LLC (EWS) on an ongoing basis.” EWS operates the Zelle network and is owned by seven of the Nation’s largest banks.

House Committee approves bill to enhance collaboration between federally-chartered and state-chartered banks. Among the bills to pass the HFSC with unanimous support this week was [H.R. 1109](#), The Bank Service Company Examination Coordination Act. The bill would amend the Bank Service Company Act to permit federal and state banking agencies to share information from examinations of Third-Party Service Providers (TSPs). The bill, sponsored by Congressman Roger Williams (R-TX) and Congressman Gregory Meeks (D-NY), was first introduced in the 114th Congress. The legislation is strongly [supported](#) by the Conference of State Bank Supervisors (CSBS).

HFSC Chairman announces – and then temporarily abandons – interesting changes to the Committee’s operating practices. In his opening statement at the beginning of the markup, McHenry appeared to suggest an end to the HFSC’s longtime practice of postponing or “rolling” recorded votes until the end of a given day or markup. If his pledge holds, the change would mean that the HFSC would take votes on amendments and motions in “real time.” The significance of “real time” voting in a Congressional committee is that it denies members of both parties the ability to leave the hearing room (sometimes for extended periods) and instead requires them to at least stay in proximity to the markup, lest their absence be recorded (or their party lose a vote). The practice of holding “real time” votes in committee is believed [by some](#) to encourage engagement and over time to foster trust and bipartisanship. Late in the day, however, McHenry announced that due to “other markups” occurring concurrently, he would “roll” the vote on one of the bills. So, we’ll need to wait to see if the changes stick. We also noticed that the Chairman seems to have shortened to two days (from five) the amount of time members have to file extended remarks or submit materials for the hearing record.

Rep. Andy Barr (R-KY) Targets CFPB for Credit Card Rulemaking. Rep. Andy Barr (R-Ky.), who chairs the HFSC subcommittee on financial institutions, joined HFSC Chair McHenry this week in sending a [letter](#) to CFPB Director Rohit Chopra requesting information on the CFPB’s proposed rule targeting credit card late fees. The CFPB’s late fee proposal is the most politically high-profile rulemaking to emerge from the CFPB’s [2022 Request for Information](#) on “Junk Fees.”

McHenry, Lummis Send Letter Seeking Clarity on Digital Asset Accounting Regulations.

HFSC Chairman Patrick McHenry and U.S. Senator Cynthia Lummis (R-WY) sent a [letter](#) on Thursday to federal banking regulators seeking “clarification on Staff Accounting Bulletin 121 (SAB 121), which changed the way banks and financial institutions are expected to account for the custody of digital assets.” SAB 121 was issued by the Securities and Exchange Commission (SEC) on April 11, 2022. The letter blames the policy for “having created greater risk in the system and will likely create significant compliance costs for institutions that custody digital assets for customers.” “In sum,” it continues, “the effect of SAB 121 is to deny millions of Americans access to safe and secure custodial arrangements for digital asset

[To continue reading you must be subscribe to LXR’s Biweekly Bulletin on Capital Markets & Financial Services Policy.](#)

The Bulletin is published on a biweekly basis when one or both chambers of Congress are in session. It provides a comprehensive snapshot of the key developments in financial services legislative and regulatory policy; detailed analysis of certain legislative and regulatory proposals; a calendar showing key events, on and off Capitol Hill during the next work period; podcast and reading recommendations; curated job postings; and more. Subscribers to the Bulletin are also entitled to receive certain other LXR Group publications, including Legislative Analysis and Election Analysis.

- To subscribe to the Bulletin, please [click here](#).
- To sign up for a **free** 1-month trial, please [click here](#).