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SEC Continues Focus on Climate and ESG Related Issues, Announces New Climate and ESG Task Force

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By: Kerry E. Berchem, Lucas F. Torres, Stacey H. Mitchell, Kenneth J. Markowitz

2021 Examination Priorities

Enhanced focus on climate-related risks headlined the March 3 announcement of the Division of Examination's 2021 examination priorities. In the press release, Acting Chair Lee stated the SEC's intention to "integrat[e] climate and ESG considerations into the agency's broader regulatory framework." According to Lee, the SEC will achieve this goal through various efforts, including examining "proxy voting policies and practices to ensure voting aligns with investors' best interests and expectations" and "firms' business continuity plans in light of intensifying physical risks associated with climate change."

The Division of Examinations Director Pete Driscoll added that the 2021 examination priorities "reflect the complicated, diverse, and evolving nature of the risks to investors and the markets, including climate and ESG." Director Driscoll noted that "the Division is committed to continuing to adapt examination processes and find innovative ways to enhance the effectiveness of examinations and our risk-based approach."

Creation of a Climate and ESG Task Force

On March 4, the SEC announced the creation of a Climate and ESG Task Force (the "Task Force") in the Division of Enforcement, which is intended to "develop initiatives to proactively identify ESG-related misconduct" and "coordinate the effective use of Division resources, including through the use of sophisticated data analysis to mine and assess information across registrants, to identify potential violations." The Task Force will consist of 22 members, led by Kelly L. Gibson, the Acting Deputy Director of Enforcement, and will work closely with other

SEC divisions and offices, including the Divisions of Corporation Finance, Investment Management and Examinations.

The Task Force's initial focus will be to identify instances of material gaps and misstatements in issuers' climate risk disclosures under existing SEC rules. The Task Force also plans to "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."

Acting Chair Lee called climate risk and sustainability "critical issues for the investing public and our capital markets" and stated that the Task Force "will play an important role in enhancing and coordinating the efforts of the Division of Enforcement, the Office of the Whistleblower and other parts of the agency to bolster the efforts of the Commission as a whole on these vital matters."

"Time Will Tell"

The SEC's two Republican commissioners, Hester M. Peirce and Elad L. Roisman, also issued a statement on March 4 responding to the recent flurry of climate and ESG-related announcements. While the tone of the SEC's recent announcements may suggest a shift in the SEC's approach to climate and ESG issues, the Republican commissioners felt that the recent announcements "raise more questions than they answer," stating "it's not yet clear" what "this 'enhanced focus' on climate-related matters" means. They questioned whether "these announcements represent a change from current Commission practices or a continuation of the status quo with a new public relations twist?" concluding only "[t]ime will tell." Commissioners Peirce and Roisman went on to say that they "assume that the new initiative is simply a *continuation* of the work the staff has been doing for more than a decade and not a program to assess public filers' disclosure against any *new* standards or expectations."

In a cautionary note, they also stressed that "the new announcement cannot foreshadow a plan for the staff to issue guidance that would elicit more specific line items or otherwise convert the Commission's generally principles-based approach to a prescriptive one. Such a change, of course, would require a new Commission vote."

Consistent with the announcements since January 20, the identification and understanding of climate risks for disclosure purposes is evolving. In his March 2 confirmation hearing, President Biden's SEC chair nominee, Gary Gensler, said that "investors really want to see climate risk disclosures." The SEC appears to be falling in line with the President's climate-focused agenda. As the Republican commissioners note, the SEC "must continue to review any alleged securities violations in light of the regulations and guidance in existence at the time of the conduct in question," so companies that were properly following the SEC's 2010 guidance on climate-related disclosures should not fear ramifications for their past disclosures. However, the recent announcements suggest that companies that have not thoroughly reviewed their disclosure for alignment with the SEC's 2010 guidance should get ready for a more rigorous application and would be wise to start preparing for potential changes ahead.

For greater detail on ESG issues that boards of directors should consider at this time, please see Akin Gump's Top 10 Topics for Directors in 2021 and for more information on climate and ESG issues in the news and in the law, follow our Speaking Sustainably blog.

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