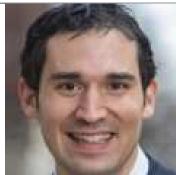
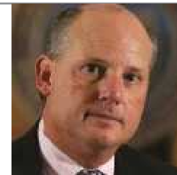

Insider Trading and Strategic Disclosure
By Joshua Mitts

Biden and the SEC: Some Possible Agendas
By John C. Coffee, Jr.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Skadden Discusses SEC and ESG Disclosure

By Brian V. Breheny, Raquel Fox, Marc S. Gerber and Neil P. Stronski May 13, 2021

Comment

During his Senate confirmation hearing for chair of the Securities and Exchange Commission (SEC), Gary Gensler said he would adhere to the U.S. Supreme Court's view of materiality: Information is material (and should therefore be disclosed) if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment or voting decision. He then noted that many shareholders are calling for disclosures on climate risk, human capital and political spending, suggesting that they may be material.

Since the start of the Biden administration, then-Acting Chair Allison Herren Lee and the SEC staff have clearly focused on environmental, social and governance (ESG) in all facets of the SEC's operations. Highlights include:

- In a public statement on February 24, 2021, Acting Chair Lee directed the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. In particular, she asked the staff to consider how companies comply with previously issued SEC guidance and current disclosure requirements. The SEC staff will use the resulting insights to begin updating SEC guidance regarding climate-related disclosures.
- On March 3, 2021, the Division of Examinations, which reviews compliance matters for investment advisers, mutual funds and exchange-traded funds (ETFs), announced its 2021 priorities, including a greater focus on climate-related risks. These examinations would include matters such as disclosures and proxy voting policies of funds marketed as ESG funds.
- On March 4, 2021, the SEC announced the creation of the Climate and ESG Task Force in the Division of Enforcement, whose initial focus will be to identify any material gaps or misstatements in companies' disclosure of climate risks under existing disclosure requirements. The task force also will analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.
- On March 11, 2021, John Coates, acting director of the Division of Corporation Finance, delivered remarks titled "ESG Disclosure — Keeping Pace With Developments Affecting Investors, Public Companies and the Capital Markets." He described considerations for an effective ESG disclosure system, which he believes the SEC should help create, recognized that there are costs to both having and not having ESG disclosure requirements, explained that certain aspects could be mandatory and some voluntary, and outlined the potential virtues of a single global ESG reporting framework.
- On March 15, 2021, the SEC invited public comment on climate change disclosures, noting that Acting Chair Lee asked the staff to evaluate the SEC's disclosure rules "with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change." The request for public comment sets forth 15 questions (many consisting of multiple questions), including on the advantages and disadvantages of drawing on existing third-party, voluntary frameworks such as the Sustainability Accounting Standards Board, or SASB, and the Task Force on Climate-related Financial Disclosures, or TCFD; whether to disclose the connection between executive compensation and climate change risks and impacts; the advantages and disadvantages of developing a single set of global standards applicable to companies around the world; and how to consider climate change within the broader spectrum of ESG disclosure issues.

The level of voluntary ESG disclosure has grown exponentially over the past few years, primarily driven by private ordering and companies responding to investor demand. Based on the initiatives already underway, in the near term we are likely to see a combination of SEC interpretative guidance, SEC staff guidance, comment letters and/or enforcement activity focused on three areas:

- Seeking greater transparency, accuracy and reliability for companies' voluntary ESG disclosures.
- Comparing companies' voluntary ESG disclosures to their disclosures in SEC filings to assess whether there are material omissions from those filings and whether more guidance on complying with existing SEC disclosure requirements is necessary with respect to ESG topics.
- Ensuring that mutual funds and ETFs marketed as ESG funds have accurate disclosures as well as appropriate processes and policies regarding their investment and voting decisions.

In addition, the SEC is likely to propose more prescriptive rules that expand SEC disclosure requirements for material ESG topics. The SEC will have to tackle numerous questions in any proposed rulemaking, such as whether the proposed rules would be limited to climate change risks or cover ESG broadly, and the extent to which they would leverage existing voluntary disclosure frameworks that companies already use. Any proposal could generate hundreds if not thousands of public comments, suggesting that final rules may not be adopted before 2022.

In the meantime, separate and apart from potential SEC actions, companies will continue to engage with investors and other stakeholders regarding ESG matters and likely expand and refine their voluntary ESG disclosures. In the course of doing so, companies should consider their processes and controls relating to their voluntary ESG disclosures to ensure their disclosures are accurate and reliable.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "SEC Primed To Act on ESG Disclosure," dated April 30, 2021.

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