



Chair Gensler's Insight on the SEC's New Regulatory Agenda

Posted by Brian V. Breheny, Raquel Fox, and Caroline S. Kim, Skadden, Arps, Slate, Meagher & Flom LLP, on Friday, July 16, 2021

Editor's note: Brian V. Breheny and Raquel Fox are partners and Caroline S. Kim is counsel at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Breheny, Ms. Fox, Ms. Kim, Andrew Brady, Ryan Adams, and Keema Givens.

In [prepared remarks](#) on June 23, 2021, Chair Gary Gensler of the Securities and Exchange Commission (SEC) provided additional insight into the commission's recently announced [regulatory agenda](#) and its shift in priorities. His statement and the agenda show that new public company disclosures will be at the forefront of upcoming and pending rulemakings. In response to the regulatory agenda, the two Republican commissioners, Hester Peirce and Elad Roisman, issued [a joint statement](#) voicing concerns about efforts to undo certain recently adopted rules.

Although the timing and ultimate outcome of the new rulemakings remain to be seen, public companies should expect to see a number of proposals in the coming months, which will be subject to public comments before final adoption by the SEC. Significant proposed and final SEC rulemaking items from both the [short-term agenda](#) and [long-term agenda](#) are summarized below.

Short-Term Agenda

ESG Disclosures. Chair Gensler, then-Acting SEC Chair Allison Herren Lee and senior members of the SEC staff ¹ have made a number of statements this year about environmental, social and governance (ESG) issues. The commission now expects to adopt proposed rules to require enhanced ESG disclosures in the following areas:

- **Corporate Board Diversity.** Proposed rules would require companies to provide enhanced disclosures about the diversity of board members and nominees. These rules could potentially replace or supplement Nasdaq's pending proposal to impose similar requirements, which awaits SEC approval. ²
- **Climate Change.** Proposed rules would require enhanced disclosures regarding issuers' climate-related risks and opportunities. This topic was last formally addressed by the commission through [interpretive guidance](#) in 2010, but has been highlighted in recent months by various commissioners. In particular, Chair Gensler asked the SEC staff to provide updated recommendations with respect to governance, strategy and risk management related to climate risk, as well as specific metrics for items such as

¹ See our client alert "SEC Primed To Act on ESG Disclosure" (April 30, 2021).

² See our client alert "[Nasdaq Proposes New Board Diversity Requirements](#)" (December 4, 2020). See also Nasdaq's notice of extension "[Notice of Designation of a Longer Period for Commission Action on Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt Listing Rules Related to Board Diversity](#)" (June 7, 2021).

greenhouse gas emissions. The staff is also considering whether companies that have made forward-looking climate commitments, such as carbon-neutral goals, should be subject to additional disclosure requirements.

- **Human Capital Management.** Proposed rules could expand the requirements adopted in 2020 to include specific topics, including workforce diversity. Chair Gensler noted in his June 23, 2021 remarks that a rulemaking proposal “could include a number of topics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics, including diversity, and health and safety.”
- **Cybersecurity Risk Governance.** Given the increasing number of high-profile cyber incidents, the proposed rules would require disclosures about cybersecurity risk governance. This topic was addressed in the SEC’s 2018 interpretative guidance,³ but was not codified in SEC rules.
- **Resource Extraction.** The SEC may propose additional amendments following a review of the final rules requiring issuers to disclose certain payments relating to resource extraction. These rules were adopted in December 2020.

Insider Trading and Share Repurchases. The SEC expects to propose amendments in response to increasing scrutiny of insider trading practices by individuals and issuers, including:

- **Rule 10b5-1.** Proposed rules would amend Exchange Act Rule 10b5-1, which provides an affirmative defense against insider trading liability for trades by individuals and share repurchases by issuers if they are made pursuant to a written plan entered into when the individual or issuer did not possess material nonpublic information about the company or securities traded. Most recently, on June 7, 2021, Chair Gensler highlighted a number of potential changes to Rule 10b5-1, including mandatory cooling off periods and new disclosure requirements.⁴
- **Issuer Share Repurchase Disclosures.** In addition, the SEC may consider amendments to modernize the share repurchase disclosure requirements, including Regulation S-K, Item 703, which requires issuers to provide a monthly tabulation of repurchases in their periodic reports. Chair Gensler asked SEC staff to consider whether the SEC “should enhance transparency related to companies buying back their stock.”⁵

Proxy Rules Reform. The SEC is expected to revisit prior rulemaking and consider potential amendments to the proxy rules in the following areas:

- **Universal Proxy.** Final rules would allow a shareholder voting by proxy in a contested election of directors to choose individuals among all duly nominated candidates listed on a single “universal” proxy card, enabling shareholders to select both company and dissident nominees. On May 6, 2021, the SEC reopened the comment period for the amendments initially proposed in 2016.⁶
- **Proxy Voting Advice.** The SEC may propose additional amendments to the proxy rules regulating proxy voting advice, which are under SEC staff review following a June 2021 directive from Chair Gensler. In response to this directive, the commission staff

³ See our client alert “SEC Issues Interpretive Guidance on Cybersecurity Disclosures” (February 23, 2018).

⁴ See our client alert “SEC Chair Gensler Previews Potential Changes for Rule 10b5-1 Plans” (June 10, 2021).

⁵ See Chair Gary Gensler’s public statement “Prepared Remarks at London City Week” (June 23, 2021).

⁶ See our client alert “SEC Proposes Rule Amendments to Require Universal Proxy Cards” (October 27, 2016).

announced that, pending further regulatory action by the SEC, it will not recommend enforcement actions based on the amendments adopted in July 2020 (which codified the definition of solicitation as encompassing proxy voting advice)⁷ and the 2019 interpretive guidance regarding that definition.⁸

- **Shareholder Proposals.** The SEC may propose new amendments to Exchange Act Rule 14a-8, which governs shareholder proposals. This rulemaking is expected to revisit the prior amendments adopted in October 2020,⁹ which were scheduled to go into effect for meetings held in 2022.¹⁰ The prior amendments raised the eligibility criteria for submission of shareholder proposals and resubmission thresholds, limited a person to one proposal per meeting, prohibited the aggregation of holdings to satisfy ownership thresholds, facilitated proponent engagement and updated other procedural requirements.

Executive Compensation. The SEC is expected to re-propose and finalize rules on executive compensation to implement provisions of the Dodd-Frank Act:

- **Clawbacks.** The commission is expected to re-propose rules initially proposed in 2015 that would generally require disclosures about a company's "clawback" policy to recoup incentive-based compensation in certain circumstances.¹¹ Such rules, if adopted by the SEC, will require the securities exchanges, including the New York Stock Exchange and Nasdaq Stock Market, to propose and adopt new listing standards. When those are in place, public companies will be required to adopt clawback policies.
- **Pay Versus Performance.** Final rules would require issuers to disclose information that shows the relationship between executive compensation actually paid and the financial performance of the issuer.¹²

Other Rulemakings. The SEC is expected to propose or adopt new rules on the following topics in the near future:

- **Special Purpose Acquisition Companies (SPACs).** Proposed rules would enhance disclosure requirements for SPACs, which have been the subject of recent SEC staff guidance and statements.¹³
- **Rule 144.** Final rules would amend Rule 144 to revise the holding period determination for securities acquired upon conversion or exchange of certain "market adjustable securities" of unlisted companies so that it does not begin until the securities are acquired upon conversion or exchange.¹⁴ These amendments may include a series of technical amendments related to Form 144 electronic filing requirements.

⁷ See our client alert "[SEC Adopts Proxy Rule Amendments Relating to Proxy Voting Advice Businesses](#)" (July 27, 2020).

⁸ See our client alert "[SEC Provides Guidance on Investment Advisers' Proxy Voting Responsibilities, Proxy Voting Advice Rules](#)" (August 26, 2019).

⁹ See our client alert "[SEC Adopts Amendments to Shareholder Proposal Rules](#)" (September 25, 2020).

¹⁰ The prior amendments also included a transition period that allowed shareholders who met certain conditions to rely on the \$2,000/one-year ownership threshold for proposals submitted for meetings held prior to 2023.

¹¹ See our client alert "[SEC Proposes Long-Awaited Mandatory Compensation Clawback Rules](#)" (July 2, 2015).

¹² See our client alert "[SEC Proposes New Rules for Pay-Versus-Performance Disclosure](#)" (April 30, 2015).

¹³ See, e.g., John Coates' public statement "[SPACs, IPOs and Liability Risk under the Securities Laws](#)" (April 8, 2021). See also [CF Disclosure Guidance: Topic No. 11, "Special Purpose Acquisition Companies"](#) (December 22, 2020).

¹⁴ See our client alert "[SEC Proposes Amendments to Rule 144 and Form 144](#)" (January 7, 2021).

- **Filing Fee Modernization.** Final rules would modernize filing fee disclosure and payment methods by requiring a structured format for the fee calculation and updating the fee payment options.
- **Holding Foreign Companies Accountable Act (HFCAA).** Proposed rules would implement trading prohibitions imposed under the HFCAA ¹⁵ on the securities of issuers whose financial statements are filed and audited by foreign-based public accounting firms that the Public Company Accounting Oversight Board has determined it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. In addition, the SEC may consider amendments to enhance stock exchange listing standards to prohibit the initial and continued listing of issuers that are subject to such trading prohibitions.

Long-Term Agenda

Proxy Plumbing. The SEC may consider proposing amendments to the proxy rules to facilitate improvements with respect to so-called “proxy plumbing” issues, such as the distribution of proxy materials, processing of shareholder votes (including proxy vote confirmation) and shareholder communications.

Modernization of Rule 701 and Form S-8. The SEC may consider adopting final amendments to Securities Act Rule 701, which exempts from registration securities issued by non-reporting companies pursuant to compensatory arrangements, and Form S-8, the registration statement for compensatory offerings by reporting companies. The SEC previously stated that these rules were “designed to modernize the framework for compensatory securities offerings in light of the significant evolution in compensatory offerings and composition of the workforce.”

¹⁵ See our client alert “[Holding Foreign Companies Accountable Act Poised To Be Signed Into Law](#)” (December 3, 2020).