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SEC Expected To Introduce Host of New Rules in 2022, Enhance Enforcement

Contributing Partners

Brian V. Breheny / Washington, D.C.

Raquel Fox / Washington, D.C.

Andrew M. Lawrence / Washington, D.C.

Daniel Michael / New York

Associate

Andrew Hanson / Washington, D.C.

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One Manhattan West
New York, NY 10001
212.735.3000

Takeaways

- In 2022, the SEC is likely to mandate ESG disclosures, and it intends to revise rules governing executive preplanned stock sales and corporate share buybacks.
- SPACs will face more regulation and also be targeted with enforcement actions.
- The commission is expected to continue asserting its jurisdiction over cryptocurrency activity that it deems to be securities-related.
- Undisclosed executive perks will continue resulting in enforcement actions.

The Securities and Exchange Commission (SEC) had an active 2021 as new leadership sought to reshape the commission's priorities. Chair Gary Gensler, who took over in April, and Enforcement Director Gurbir Grewal, who joined in July, have espoused an ambitious agenda for both rulemaking and enforcement.

Most leadership positions have been filled, with a higher proportion from academia and the public sector than has been typical in recent administrations. For example, Division of Corporation Finance Director Renee Jones and Division of Investment Management Director William Birdthistle were law professors. Enforcement Director Grewal came from the New Jersey Attorney General's Office. And the new general counsel, Dan Berkovitz, served as a commissioner of the Commodity Futures Trading Commission since 2018.

Republican Commissioner Elad Roisman announced his intention to resign at the end of January 2022.

Priorities for 2022

Based on statements by Chair Gensler, other commissioners and staff, and according to regulatory agendas issued by the agency, the SEC will likely concentrate primarily on the following issues.

Regulatory

ESG disclosures. The SEC is increasingly focused on disclosures related to environmental, social and governance (ESG) issues, including climate change, board diversity, human capital management and cybersecurity risk governance. Climate change will be a particular priority, as evidenced recently by the staff's detailed, stand-alone comment letters on climate-related disclosures in SEC filings. The commission is expected to propose mandatory ESG-related disclosure rules in early 2022, but even without specific requirements, any ESG-related material impacts should be disclosed under existing SEC rules. (See "Investors Press for Progress on ESG Matters, and SEC Prepares To Join the Fray.")

Rule 10b5-1 sales/share repurchases. In response to increasing scrutiny of insider trading practices by executives and issuers, the SEC issued proposed amendments affecting Rule 10b5-1 plans, which allow executives to establish predetermined trading plans. The changes would include mandatory cooling-off periods, director and officer certifications, limits on multiple/overlapping plans, enhanced "good faith" requirements and new disclosure and reporting obligations. Legislation that may require further amendments to Rule 10b5-1 passed in the House and is pending in the Senate.

The commission also issued proposed amendments to modernize share repurchase rules, including a requirement that repurchases be disclosed by the end of the first business day after they are executed.

SPACs. The SEC plans to increase disclosure requirements for special purpose acquisition companies (SPACs), which have been the subject of recent staff guidance and statements, as well as recommendations by the SEC's Investor Advisory Committee. Areas to be covered likely include fees, projections, dilution and potential conflicts of interest between sponsors and investors, marketing practices and gatekeeper obligations.

Foreign issuers. On December 2, 2021, the SEC adopted final amendments implementing the disclosure and submission requirements of the Holding Foreign Companies Accountable Act (HFCAA). The legislation directs the SEC to delist registrants if, for three consecutive years, the Public Company Accounting Oversight Board (PCAOB) is unable to inspect the auditor of the registrant's financial statements. On December 16, 2021, the PCAOB made its first HFCAA determinations regarding accounting firms in mainland China and Hong Kong.

The HFCAA also requires a foreign registrant to provide disclosures if it files an annual report incorporating an audit report from an auditor that was not subject to PCAOB inspection. The final amendments went into effect January 10, 2022. The earliest year any trading prohibitions would apply is 2024.

Clawbacks. The SEC also reopened for comment long-shelved proposed rules that would require companies to implement policies allowing them to recoup executive compensation if the company is forced to restate financials. (See "SEC Revives Proposal for Executive Comp Clawback Rules.")

Enforcement

SPACs. SPACs are likely to be a focal point for enforcement, as evidenced by the relatively speedy actions brought against Stable Road and its target Momentus and the Nikola and Akazoo SPACs, and other widely reported ongoing investigations. The actions so far have a wide sweep: The SEC has brought charges against SPACs, a SPAC sponsor, merger targets and senior executives at various of these entities. The proposed disclosure obligations may provide the basis for further enforcement actions.

Cryptocurrency/decentralized finance. Cryptocurrency and other digital assets will be an area of ongoing scrutiny as the SEC attempts to grasp the fast-growing industry. The SEC brought multiple actions during the last fiscal year charging issuers of various digital assets with selling unregistered securities and a cryptocurrency trading platform with operating unregistered digital asset exchanges.

Cybersecurity. Enforcement in 2021 suggested that actions growing out of cybersecurity breaches may no longer be reserved for extreme cases. Recent examples involved fairly familiar types of disclosure violations, such as equivocal statements that a breach may have occurred when one was known to have occurred, or allegations that a company unreasonably delayed revealing a cyber incident.

Executive perks. The recent trend of enforcement actions stemming from a failure to properly disclose executive perks shows no signs of slowing, with the most recent action being settled in November 2021. With the Enforcement Division using risk-based analytics to uncover potential violations, continued focus on perks is likely. The precise alleged violations appear to be unique to each case. They involved personal use of corporate aircraft, automobiles and credit cards, as well as car, club and concierge services, housing and travel costs, and related-party transactions.

While commission activity in 2021 was quick to pivot to the priorities of new leadership, 2022 may prove to be even more instructive. The commission has staked out an ambitious rulemaking agenda through a set of varied and significant rule proposals issued in December 2021. And, on the enforcement front, Director Grewal has signaled a more hawkish approach in determining penalties and has suggested in speeches and a recent action that the SEC would require that defendants admit to misconduct as a condition of settlement.