
SEC and CFTC Rulemaking Priorities under the New Administration

The Biden Administration has moved quickly to nominate new leadership at the Securities and Exchange Commission (“SEC” or “Commission”). As with any new administration, this changing of the guard presages a new set of priorities for the SEC. President Biden, in a move that provides some insight into his priorities and the approach his administration will pursue with regard to securities regulation, has nominated former Commodity Futures Trading Commission (“CFTC”) Chairman Gary Gensler for SEC Chairman. It is expected that Mr. Gensler will be confirmed and that, under his leadership, the SEC will enact rules reflecting the preferred policies of a Democratic-majority Commission. President Biden has yet to announce a nominee for Chairman of the CFTC, so discussion of that agency’s rulemaking priorities under the new administration necessarily is more speculative.

This memorandum discusses the anticipated rulemaking priorities of the new administration’s SEC and CFTC. The following list represents only predictions regarding possible areas of focus, and the list undoubtedly will change as the administration takes shape. Regulated entities should monitor rulemaking developments, SEC and CFTC announcements, and anticipate new rules in the areas described herein. We are publishing a separate memorandum addressing the anticipated enforcement priorities of both the SEC and the CFTC.

Environmental, Social, and Governance (“ESG”) Disclosures

The SEC is expected to focus on ESG disclosures, particularly those related to public companies’ carbon footprint and the impact of climate change on business operations. Such disclosures could include mandatory “forward-looking disclosures, and backward-looking measures . . . by which corporate issuers disclose material ESG risks.”¹ The ESG Subcommittee of the SEC’s Asset Management Advisory Committee recently released a draft version of its potential recommendations to the Commission. In the current draft, the ESG Subcommittee recommends that the SEC:

- i. require the adoption of standards by which corporate issuers disclose material ESG risks;
- ii. utilize standard setters’ frameworks to require disclosure of material ESG risks in a manner consistent with the presentation of other financial disclosures; and
- iii. suggest best practices to enhance ESG investment product disclosure.

¹ SEC Asset Management and Advisory Committee (AMAC), *Discussion Draft: Potential Recommendations of ESG Subcommittee* (Dec. 1, 2020) <https://www.sec.gov/files/potential-recommendations-of-the-esg-subcommittee-12012020.pdf>.

Acting Chair (then Commissioner) Allison Herren Lee and Commissioner Caroline Crenshaw and both have called for such expanded ESG disclosures in earlier public dissents.² During his confirmation hearing, Mr. Gensler endorsed the idea of expanded ESG disclosures without committing to specifics, saying “I think that increasingly, investors really want to see climate risk disclosures . . . I think issuers would benefit from such guidance.”³ The form and scope of such disclosure requirements remains in flux, but public companies should expect increased attention to environmentally-focused guidance and disclosure requirements under the new leadership.

Workforce Diversity and Inclusion / Human Capital

The SEC is likely to require additional disclosures regarding the racial, ethnic, and gender makeup of public companies’ boards and workforces, as well as disclosures regarding pay equity. The SEC’s August 2020 amendments to Regulation S-K require a description of the registrant’s “human capital resources to the extent such disclosures would be material to an understanding of the registrant’s business.”⁴ In their respective dissents from the adoption of these amendments, Commissioners Lee and Crenshaw voiced concern that such a “vague and generic principles-based” approach did not go far enough. Commissioner Lee’s dissent in particular discussed the importance of workplace diversity to investors and to the public at large.⁵ Responding to questions during his confirmation hearing about his support for diversity disclosures, Mr. Gensler stated that company policies promoting diversity are “a very important part of the value proposition in so many companies.”⁶ The Commission under the expected leadership of Mr. Gensler likely will promulgate guidance and rules requiring more specific, metrics-based disclosures regarding workplace composition.

Special Purpose Acquisition Companies

Special purpose acquisition companies (“SPACs”), exploded in popularity during 2020, with a record \$83 billion raised across 248 SPAC initial public offerings (“IPOs”), representing a 320% increase in number and a 511% increase in dollars raised from the year prior.⁷ SPACs are a seemingly easier and more efficient way for private companies to become publicly traded, as compared to the traditional IPO process. These entities initially are not operating companies but are formed to raise money with the purpose of acquiring a private company. The ultimate acquisition (referred to as a “de-SPAC transaction”) results in the combination of the SPAC and the target company into a publicly-traded company.

SPACs have received a great deal of attention from the SEC. In December 2020, the SEC’s Division of Corporation Finance released disclosure guidance regarding SPACs, and the Office of Investor Education and Advocacy released an investor bulletin discussing SPACs for retail investors.⁸ In October 2020, Commissioner Lee

² See Comm’r Caroline Crenshaw, *Statement on the ‘Modernization’ of Regulation S-K Items 101, 103, and 105* (Aug. 26, 2020) <https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k>; Comm’r Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020) <https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26>.

³ See Dean Seal, *GameStop, Diversity Policies Dominate Gensler Hearing*, Law360 (Mar. 2, 2021), https://www.law360.com/compliance/articles/1357940/gamestop-diversity-policies-dominate-gensler-s-sec-hearing?nl_pk=44cf18ed-1c30-4431-adc0-3ec703a794bb&utm_source=newsletter&utm_medium=email&utm_campaign=compliance

⁴ Text of the final rule available at <https://www.sec.gov/rules/final/2020/33-10825.pdf>

⁵ See Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (citing numerous investor calls for information regarding workplace gender and racial diversity and pay equity).

⁶ See Seal, *GameStop, Diversity Policies Dominate Gensler Hearing*.

⁷ SpacInsider, *SPAC IPO Transactions: Summary by Year*, <https://spacinsider.com/stats/>.

⁸ See SEC Division of Corporation Finance, *Disclosure Guidance: Topic No. 11 – Special Purpose Acquisition Companies* (Dec. 22, 2020), <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies>; “What You Need to Know About SPACs

remarked that “[the SEC] should focus on how SPACs disclose the relevant risks and sponsor compensation. As a special purpose vehicle, initial investors in a SPAC rely heavily on the sponsor’s experience and expertise in identifying a target that will provide meaningful investment returns. In the short term, a SPAC investment acts largely as a blank check, so it is critical that the offering documents clearly disclose the material risks involved, as well as the ways in which the sponsor will be compensated for its services.”⁹ Commissioner Lee continued, “the Commission should consider whether there are ways to further align the interests of sponsors and investors to ensure that sponsors are incentivized by the quality of any potential target,” stating that she “hope[s] to hear from investors about whether the Commission should consider additional protections for investors in this space,” indicating that regulatory guidance and new rules may be imminent under the new leadership.

Although there have been few enforcement actions related to SPACs, the SEC reached a settlement with the former CEO of a SPAC in June 2019 on charges that the CEO “negligently failed to take reasonable steps and conduct appropriate due diligence to ensure that . . . shareholders voting on the [SPAC] merger were provided with material and accurate information.”¹⁰ Public companies should expect to see significantly more regulatory attention paid to SPACs as they continue to grow in number and as the SEC continues to scrutinize new SPAC registrations.

Proxies

The SEC might ease its recent amendments regarding shareholder proposals, making it easier for more shareholders to nominate board candidates and to make proposals. Commissioners Crenshaw and Lee dissented with regard to the SEC’s September 2020 amendments to the procedures governing shareholder proposals, which changed the ownership and time requirements for shareholder proposals from \$2,000 worth of stock for one year to either (i) \$25,000 worth of stock for one year, or (ii) \$2,000 worth of stock for three years – thus limiting the shareholders who can make a proposal.¹¹ Given both Democratic Commissioners’ expressed lack of support for the amendments, it is possible that the SEC either will undo its recent proxy amendments or propose new thresholds for shareholder proposals.

Cryptocurrencies

The SEC is expected to issue clarifying guidance, and perhaps new rules, pertaining to digital assets (also known as “Cryptocurrencies”). In 2019, the SEC published a framework for analyzing whether a digital asset is an investment contract¹² and whether offers and sales of digital assets are securities transactions subject to the federal securities laws.¹³ Mr. Gensler, who is recognized as an expert on financial technology, has expressed publicly a positive opinion of Bitcoin and provided insight on whether he thinks certain Cryptocurrencies are securities under the

– Investor Bulletin” SEC: Office of Investor Education and Advocacy (Dec. 10, 2020) <https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin>

⁹ Comm’r Allison Herren Lee, *Investing in the Public Option: Promoting Growth in Our Public Markets – Remarks at The SEC Speaks in 2020* (Oct. 8, 2020) <https://www.sec.gov/news/speech/lee-investing-public-option-sec-speaks-100820>

¹⁰ See “SEC Settles Charges Against Former CEO of a Special Purpose Acquisition Company” SEC (Jun. 20, 2019) <https://www.sec.gov/enforce/33-10651-s>

¹¹ See Comm’r Caroline Crenshaw, *Statement on Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8* (Sept. 23, 2020) <https://www.sec.gov/news/public-statement/crenshaw-14a8-2020-09-23-0>; Comm’r Allison Herren Lee, “Statement on the Amendments to Rule 14a-8” (Sept. 23, 2020) <https://www.sec.gov/news/public-statement/lee-14a8-2020-09-23>

¹² The critical inquiry for the SEC has been whether tokens and other digital assets are “securities” under the *Howey Test*, promulgated over 70 years by the Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946).

¹³ SEC, *Framework for “Investment Contract” Analysis of Digital Assets* (Apr. 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1.

federal securities laws.¹⁴ Mr. Gensler likely will seek to clarify the rules and regulations surrounding digital assets. SEC Commissioner Hester Peirce, who has spoken in favor of regulatory coordination on digital assets, could be the most likely commissioner to work with Mr. Gensler regarding the development of such clarifications.¹⁵

Whistleblowers

Last year set new records in terms of the number and amount of SEC whistleblower awards. The Commission issued approximately \$175 million in total awards to 39 individuals, representing a 200% increase in the number of awards over the next highest year.¹⁶ The Commission recently amended the whistleblower program rules,¹⁷ which may reduce in the short term the number of awards.

We expect the new SEC leadership to consider rolling back some of the recent amendments. When the amendments were adopted in September 2020, Commissioners Lee and Crenshaw voiced concern over several provisions that weakened whistleblower protection and reduced monetary awards.¹⁸ Given the Democratic Commissioners' dissents, as well as Mr. Gensler's support for the whistleblower program during his tenure as head of the CFTC,¹⁹ we expect this to be an area of focus under the new leadership.

Miscellaneous CFTC Rules

Although a nominee has yet to be announced for CFTC Chairman, the yet-to-be-determined composition of the CFTC leaves open the possibility that it will be Democrat-controlled. In that instance, a number of rules that were finalized under then-Chairman Heath Tarbert and decided along party lines may be rolled back. Some examples of rules that may be addressed include:

- the *cross-border swaps rule*, which “pares back [the] extraterritorial application of [the CFTC's] swap dealer regime” and, as described by dissenting Democratic Commissioner Dan Berkowitz, “permit[s] U.S. swap dealers to book their swaps with non-U.S. persons in offshore affiliates, thereby avoiding the CFTC's swap regulations, even when they conduct those swap activities from within the United States and the U.S. parent retains the risks from those swap activities”;²⁰
- the *swap dealer capital rule*, which imposes new capital and financial reporting requirements for swap dealers. Democratic Commissioner Rostin Benham dissented on the grounds that the final rule “set the multiplier for the uncleared swaps of FCM-SDs at 2%, rather than the 8% originally

¹⁴ See Zach Church, *Biden SEC pick Gary Gensler on fintech, regulation, and blockchain*, MIT Sloan School of Management (Jan. 21, 2021) <https://mitsloan.mit.edu/ideas-made-to-matter/biden-sec-pick-gary-gensler-fintech-regulation-and-blockchain>

¹⁵ See Comm'r Hester M. Peirce, *Regulation: A View from Inside the Machine* (Feb. 8, 2019) <https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine>.

¹⁶ SEC, *2020 Annual Report to Congress: Whistleblower Program*, at 5, https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

¹⁷ See Press Release 2020-219, *SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program* (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-219>; *Whistleblower Program Rules*, Release No. 34-89963 (Sept. 23, 2020), <https://www.sec.gov/rules/final/2020/34-89963.pdf>.

¹⁸ See Comm'r Caroline Crenshaw, *Statement of Commissioner Caroline Crenshaw on Whistleblower Program Rule Amendments* (Sept. 23, 2020) <https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23>; Comm'r Allison Herren Lee, “June Bug vs. Hurricane: * [sic] Whistleblowers Fight Tremendous Odds and Deserve Better” (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23>.

¹⁹ See CFTC Chairman Gary Gensler, *Testimony before the U.S. Senate Committee on Agriculture, Nutrition & Forestry* (Dec. 1, 2011), https://www.agriculture.senate.gov/imo/media/doc/Testimony_Gensler1.pdf.

²⁰ Comm'r Dan Berkowitz, *Dissenting Statement on the Final Rule for Cross-Border Swap Activity of Swap Dealers and Major Swap Participants*, (Jul. 23, 2020) <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkowitzstatement072320>; see also Comm'r Rostin Benham, *Dissenting Statement Regarding the Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to SDs and MSPs – Final Rules* (Jul. 23, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement072320>.

proposed” and “remove[d] security-based swaps, proprietary futures, foreign futures, and cleared swaps from the risk margin amount calculation”;²¹ and

- the *position limits rule*, which amended regulations on speculative position limits to conform to Dodd-Frank amendments to the CEA, and on which Commissioners Berkovitz and Benham again dissented.²²

Conclusion

The SEC and the CFTC under the Biden Administration are expected to roll back rules and regulations that recently were adopted by party-line votes. Those recent rules likely will be replaced with new rules and guidance that reflect the new administration’s stated policy goals. Although the priorities of these agencies may change as a result of shifting trends or political realities, companies and regulated entities should monitor regulatory changes and ensure that their compliance and supervisory programs are up-to-date and operating smoothly.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Bradley J. Bondi (partner) at 202.862.8910 or bbondi@cahill.com; Peter J. Linken (counsel) at 212.701.3715 or plinken@cahill.com; or Connor Shea (associate) at 212.701.3756 or cshea@cahill.com; or email publications@cahill.com

²¹ Comm’r Rostin Benham, *Dissenting Statement on Capital Requirements of Swap Dealers and Major Swap Participants*, CFTC (Jul. 22, 2020) <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement072220b>; see also Comm’r Dan Berkowitz, *Dissenting Statement Regarding Final Rule: Capital Requirements for Swap Dealers and Major Swap Participants* (Jul. 22, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement072220b>.

²² See Comm’r Dan Berkowitz, *Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Final Rule on Position Limits for Derivatives* (Oct. 15, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatementb101520b>; Comm’r Rostin Benham, *Statement of Dissent of Commissioner Rostin Behnam Regarding Position Limits for Derivatives* (Oct. 15, 2020) <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement101520c>.

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