

Gensler's SEC Agenda: Commitment to ESG and Increased Disclosures

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On June 11, the Biden administration's Office of Information and Regulatory Affairs (OIRA) released the Securities and Exchange Commission's (SEC or Commission) rulemaking agenda (Rulemaking Agenda) as part of the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions. The Rulemaking Agenda outlines a panoply of items that, taken together, summarize the SEC's plan for near- and long-term regulatory action for the upcoming year. This is, of course, not the industry's first glimpse into what we can expect from the SEC's new leadership. Although he was confirmed to the role of SEC chair only two months ago, Gary Gensler has been outspoken about his goals for the SEC, and unflagging in his intent to usher in an "active policy agenda" and "ensure ... that the rules are enforced aggressively and consistently."^[1] Recently, in his remarks at the May 2021 *FINRA Annual Conference*, Gensler highlighted his focus on issues, such as climate risk disclosure, market transparency, gamification, and equity in market structure.

As expected, the Rulemaking Agenda includes multiple items related to environmental, social, and governance (ESG) matters. As explained in our previous client alert, while Gensler's nomination was still pending, the SEC began affirming its capabilities in the ESG space. Under the leadership of then-Acting Chair Allison Lee, the Commission appointed an inaugural senior policy advisor for ESG matters and established a new Climate and ESG Task Force within the Division of Enforcement. Further to our expectations, the Rulemaking Agenda includes recommendations concerning ESG-related requirements for investment companies and investment advisers, with a notice of proposed rulemaking planned for April 2022. In the meantime, the SEC plans to take action by October 2021 to address disclosure requirements for all SEC registrants relating to: (1) climate-related risks and opportunities and (2) diversity of board members and nominees.

As the SEC noted in its press release, the Rulemaking Agenda includes "[u]nfinished work directed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including, among other things, securities-based swaps and related rules, incentive-based compensation arrangements, and conflicts of interest in securitizations."^[2] Individual rulemakings on each of these issues — as well as a separate rulemaking for market structure modernization within equity, treasury, and other fixed income markets — are slated for April 2022.

With Gensler now at the helm, the SEC further intends to reform Rule 10b5-1 trading plans, which provide safe harbor for companies and corporate insiders to buy and sell stock if they adopted trading plans in good-faith prior to becoming aware of any material nonpublic information. This comes as no surprise. Earlier this month, in his speech at the *CFO Network Summit*, Gensler focused his remarks around insider trading and honed in on Rule 10b5-1 — noting that, in his view, "these plans have led to real cracks in our insider trading regime."^[3] Gensler

stated that he “asked staff to make recommendations for the Commission’s consideration on how we might freshen up Rule 10b5-1.” The Rulemaking Agenda has proposed amendments scheduled for October 2021.

The SEC’s longer-term plan under Gensler’s leadership includes four “prerule” requests for public comment concerning the following issues: (1) potential rules to prevent fraud, manipulation, and deception in connection with security-based swaps; (2) the role of third-party service providers (such as index providers and model providers) and their impact on the asset management industry; (3) possible rules related to gamification, behavioral prompts, predictive analytics, and differential marketing; and (4) a prohibition against fraud, manipulation, and deception in connection with security-based swaps. The SEC intends to issue advanced notice of proposed rulemaking (ANPR) on the first two of these items in October and November 2021, respectively, while ANPRs for the last two are scheduled for April 2022.

We expect that many of the components of the Rulemaking Agenda will face opposition and come under robust and contentious debate. On June 14, just three days after the SEC announced the Rulemaking Agenda, the two Republicans on the Commission — Commissioners Hester Peirce and Elad Roisman — issued a joint statement expressing their disappointment with Gensler’s plan.^[4] In their view, Gensler’s administration has abandoned normal practice by seeking to “reopen[] large swathes of work that was just completed without new evidence to warrant reopening.” Peirce and Roisman caution that this “game of seesaw ... undermines the Commission’s reputation as a steady regulatory hand.”

We will continue to closely follow developments regarding the Rulemaking Agenda (including the forthcoming ANPRs) and will continue to provide updates and related guidance.

[1] See [SEC.gov | Remarks at 2021 FINRA Annual Conference](#).

[2] See [SEC.gov | SEC Announces Annual Regulatory Agenda](#).

[3] See [SEC.gov | Prepared Remarks CFO Network Summit](#).

[4] See [SEC.gov | Moving Forward or Falling Back? Statement on Chair Gensler’s Regulatory Agenda](#).

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