

SEC Creates Climate and ESG Enforcement Task Force

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Background

This year, the SEC has established its focus on disclosure and compliance issues related to environmental, social, and governance (ESG) matters. Recent developments by the SEC concerning ESG issues signal that this will be a significant enforcement priority this year and beyond.

First, on February 1, the SEC named Satyam Khanna as its inaugural senior policy advisor for ESG matters. In this new position, Khanna will advise the SEC on a wide range of ESG issues, including potential new regulations and initiatives. Currently a resident fellow at NYU School of Law, Khanna is no stranger to the SEC. He previously served as counsel to former SEC Commissioner Robert J. Jackson, Jr., and on the SEC's Investor Advisory Committee. Khanna's new role is part of the office of Acting SEC Chair Allison Herren Lee, who has been a vocal advocate for more standardized disclosures for investors on ESG issues. In her announcement of Khanna's new position, Acting Chair Lee stated that ESG matters are "issues of great significance to investors and the capital markets."

Lee is not alone in her advocacy concerning ESG issues. President Biden's nominee for SEC chair — Gary Gensler — also has made clear his support for further rulemaking on corporate disclosures concerning ESG matters. In his March 2 testimony during the Senate Banking Committee confirmation hearing, Gensler signaled that his agenda as the next SEC chair will include consideration of new climate risk disclosure rules, citing investor interest in such disclosures.

Democratic lawmakers and investor interest groups have long sought a rule mandating disclosures regarding climate risk, corporate funding of political interests, board diversity, and other ESG matters. However, some Republican lawmakers have expressed concerns that such rulemaking constitutes inappropriate SEC advancement of social issues. While it remains to be seen whether new disclosure rules will be enacted, it is clear that the SEC is closely considering ESG-related priorities.

Task Force Focus and Initiatives

Second, on March 4, the SEC announced the formation of a new Climate and ESG Task Force in the Division of Enforcement. The primary goal of the SEC's Climate and ESG Task Force is to identify material gaps or misstatements in issuers' disclosure of climate risks under existing rules and develop strategies to identify ESG-related violations. The task force will leverage resources from within the Enforcement Division, including data analysis, to review and evaluate information from registrants to detect potential ESG-related violations. In coordination with the SEC's Office of the Whistleblower and other divisions of the agency, the task force will

evaluate and pursue tips, referrals, and complaints on potential ESG-related misconduct. This task force will also evaluate disclosure and compliance matters concerning investment advisers' and funds' ESG strategies. Accordingly, where advisers and funds have reported that their investments are ESG compliant, the staff may examine those funds to evaluate the merits of their representations. Accordingly, investment advisers' and funds' ESG strategies should be reviewed by counsel for compliance with ESG-related rules and regulations.

Kelly L. Gibson, the acting deputy director of the Division of Enforcement, will lead the task force, which is comprised of 22 selected members from the SEC's headquarters, specialized enforcement units, and regional offices. Following Gibson's announcement regarding the task force, two SEC commissioners — Hester Pierce and Elad Roisman — issued a separate statement noting that the creation of the task force was "premature" given that the SEC has not completed its review of existing disclosure rules. The commissioners noted that the SEC's Division of Corporate Finance is still conducting a review — directed by the acting chair — regarding established guidance on disclosure obligations, and that new enforcement initiatives in this area should be tabled until that review has been completed.

Although no new ESG-related rules or guidance likely will be presented before the new SEC chair is installed, companies should prepare for more ESG disclosure requirements and increased enforcement regarding ESG issues. Given Khanna's new ESG advisory role, and the establishment of the task force, we expect that the SEC will closely review ESG-related disclosures periodic filings and firms' compliance with ESG-related rules and regulations.

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