GIBSON DUNN

Back to the Future: SEC Chair Announces Spring 2021 Reg Flex Agenda

Client Alert | June 21, 2021

On June 11, 2021, the Securities and Exchange Commission released Chair Gary Gensler's Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions (the "Reg Flex Agenda"). This agenda reflects Chair Gensler's willingness to reopen and perhaps even undo certain rulemakings that were completed in the last two years of former Chair Jay Clayton's leadership and adopted by the Commission over the dissent of the Democrat Commissioners. Shortly after the Reg Flex Agenda was issued, Republican Commissioners Hester Peirce and Elad Roisman issued a public statement criticizing Chair Gensler for "reopening large swathes of work that was just completed without new evidence to warrant reopening" and thereby, in their view, "undermin[ing] the Commission's reputation as a steady regulatory hand."[1]

In this Client Alert, we summarize the key and noteworthy aspects of the Reg Flex Agenda that potentially impact public companies. It should be noted that the items listed in the agenda reflect only the priorities of Chair Gensler and do not necessarily reflect the views and priorities of any other Commissioner. In addition, the agenda does not contain much substantive information, only a brief "abstract" describing each rulemaking item. Nevertheless, just the appearance of an item on the agenda can be informative.[2]

As the Gensler Commission begins to appoint senior staff and to implement this agenda, it will be important for public companies and market participants to pay attention to the development and execution of Gensler's agenda. While no one expected the Gensler Commission to continue Clayton's policy initiatives, at the same time, the extent to which Chair Gensler appears willing to undo or unwind the Clayton Commission's previously adopted rulemakings is surprising, in part because, as a general matter, the SEC Staff tasked with doing the actual work of drafting the releases do not change. What Gensler's Reg Flex Agenda makes clear is that rulemakings that were adopted exclusively along party-line votes are particularly vulnerable to being "revisited," and the roadmap for any future actions can be discerned from past dissenting statements the Democrat Commissioners issued when the rules were adopted.[3]

Proxy Reform

On June 1, 2021, Chair Gensler issued a public statement in which he directed the Division of Corporation Finance to revisit the Commission's recent amendments regarding the application of the proxy rules to proxy advisory firms.[4] These amendments, adopted in July 2020, codified the Commission's view (which has also been the Staff's longstanding view) that proxy voting advice generally constitutes a "solicitation" as defined in Exchange Act Rule 14a-1; added new conditions to the exemptions in Rule 14a-2(b)(9) from the proxy rules' information and filing requirements that are used by proxy advisory firms; and amended the Note to Rule 14a-9 to include specific examples of material misstatements or omissions related to proxy voting advice. These rule amendments took effect on November 2, 2020, and the proxy advisory firms are required to comply with the new conditions as of December 1, 2021.

Consistent with Chair Gensler's June 1 statement, the Reg Flex Agenda lists "Proxy

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Voting Advice" as a new item and indicates that it is at the "proposed rule stage" as opposed to the "prerule stage."[5] In addition, also on June 1, 2021, the Division announced that it would not enforce the Commission's 2019 interpretation and guidance or the 2020 rule amendments during the period in which the Commission is considering further regulatory action in this area.[6] This development does not affect the ability of private parties to file suit under the proxy rules, as amended; and the parties subject to the rule amendments technically must continue to comply with the provisions that have become effective.

The agenda also includes "Rule 14a-8 Amendments" as a new item in the "proposed rule stage," thereby putting into question whether the September 2020 amendments to the procedural requirements and resubmission thresholds in Rule 14a-8 will remain in effect by the time of the peak 2021/2022 shareholder proposal season.[7] Although they became effective on January 4, 2021, the September 2020 amendments only apply to proposals submitted for an annual or special meeting to be held on or after January 1, 2022, and there is an even longer transition period for the new share ownership thresholds, which need not be satisfied for meetings held before January 1, 2023.

The Reg Flex Agenda continues to list "Universal Proxy" as a "final rule stage" item, which is the last step in the rulemaking process in which the Commission responds to public comment on the proposed rule and makes appropriate revisions before publishing the final rule in the *Federal Register*. Although the proposing release for this rulemaking was issued in October 2016 under Chair Mary Jo White's leadership, it was first included in Chair Clayton's Reg Flex Agenda in Spring 2020.

Exempt Offerings

One of the last rulemaking projects completed by the Clayton Commission was amending the accredited investor definition in August 2020[8] and simplifying the Securities Act integration framework in November 2020, as part of a larger effort to harmonize the exempt offering framework.[9]

Given the scope of these amendments, it was not generally expected that exempt offerings would be a priority for the Gensler Commission. Nevertheless, the Reg Flex Agenda lists "Exempt Offerings" as a new "prerule stage" item and describes the rulemaking project with greater specificity as compared to other items, as follows:

> "The Division is considering recommending that the Commission seek public comment on ways to further update the Commission's rules related to exempt offerings to more effectively promote investor protection, including updating the financial thresholds in the accredited investor definition, ensuring appropriate access to and enhancing the information available regarding Regulation D offerings, and amendments related to the integration framework for registered and exempt offerings."

ESG Disclosure

As expected, the Reg Flex Agenda lists a number of items relating to Environmental/Social/Governance disclosures, all of which are "proposed rule stage" items:[10]

- "Climate Change Disclosure" – whether to "propose rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities";[11]
- "Human Capital Management Disclosure" – whether to "propose rule amendments to enhance registrant disclosures regarding human capital management";

- "Cybersecurity Risk Governance" – whether to "propose rule amendments to enhance issuer disclosures regarding cybersecurity risk governance"; and
- "Corporate Board Diversity" – whether to "propose rule amendments to enhance registrant disclosures about the diversity of board members and nominees."

On March 15, 2021, then-Acting Chair Allison Herren Lee solicited public input on climate change disclosures by publishing 15 questions for comment.[12] The informal comment period for this solicitation of input ended on June 13, 2021.

Rule 10b5-1 Plans and Share Buybacks

As early as 2007, then-Director of Enforcement Linda Chatman Thomsen gave a speech in which she expressed concern about possible abuse of Rule 10b5-1 plans, which were first authorized in 2000.[13] She noted that "[r]ecent academic studies suggest that Rule 10b5-1 may be being abused. The academic data shows that executives who trade within a 10b5-1 plan outperform their peers who trade outside of a plan by nearly 6%." As a result, "[t]his raises the possibility that plans are being abused essentially to facilitate trading on inside information. So we're looking…. If executives are in fact trading on inside information and using a plan for cover, the plan will provide no defense."

Although the Commission has brought only a handful of enforcement actions involving the alleged abuse of a Rule 10b5-1 plan,[14] Chair Gensler recently stated that, "[i]n my view, these plans have led to real cracks. Thus, I've asked staff to make recommendations for the Commission's consideration on how we might freshen up Rule 10b5-1."[15] Gensler cited four areas of concern. First, there is no cooling off period required before an insider can make his or her first trade under the plan. He noted that cooling-off periods of four to six months have received bipartisan support. Second, he noted that there is currently no limitation on when Rule 10b5-1 plans can be cancelled. In his view, "canceling a plan may be as economically significant as carrying out an actual transaction." Third, there are no mandatory disclosure requirements regarding Rule 10b5-1 plans. Fourth, there are no limits on the number of 10b5-1 plans that insiders can adopt. Finally, Gensler noted that he is interested in Rule 10b5-1's "intersection with share buybacks."

Consistent with these statements, the Reg Flex Agenda lists "Rule 10b5-1" as a new "proposed rule stage" item regarding whether to "propose amendments to address concerns about the use of the affirmative defense provisions of Exchange Act Rule 10b5-1." The agenda also lists "Share Repurchases Disclosure Modernization" as a new "proposed rule stage" item regarding whether to "propose amendments to modernize disclosure of share repurchases, including Item 703 of Regulation S-K." Currently, share repurchase information (total number of shares purchased each month and the average price paid per share for that month) is required to be included in periodic reports, with footnote disclosure indicating whether purchases have been made pursuant to publicly announced plans or programs or outside of any such plans or programs.

Beneficial Ownership Reporting and Swaps

The Reg Flex Agenda notes that the Division is "considering recommending that the Commission propose amendments to enhance market transparency, including disclosure related beneficial ownership or interests in security-based swaps." This new "proposed rule stage" item is likely related to the recent blow-up at Archegos Capital, a family office with extensive security-based swap and derivative positions that resulted in significant losses at several major investment banks.[16] The magnitude of the losses emanating from this unregulated entity attracted much attention among legislators and the Commission, so it comes as no surprise that the Commission is considering whether to propose new rules seeking to enhance the transparency of significant holdings of swaps by market participants. What is surprising is the absence of any mention of rulemaking that would potentially accelerate the current 10-calendar day deadline for filing initial Schedule 13D beneficial ownership reports – a generous filing deadline that has been of

keen interest to public companies, legal practitioners, market participants and academics alike for decades.[17]

SPACs

Given the recent and significant volume of SPAC filings, it is not surprising that the Reg Flex Agenda lists, as a new "proposed rule stage" item, "Special Purpose Acquisition Companies." As the abstract indicates only that the Division is considering whether to recommend that the Commission propose rule amendments "related to special purpose acquisition companies," it is not possible to discern the nature or objective of this rulemaking project based on the Reg Flex Agenda.

Dodd-Frank Items Added Back to the Reg Flex Agenda

The Fall 2020 Reg Flex Agenda, the last one issued under the Clayton Commission, did not include certain Dodd-Frank-mandated rulemakings; these have now been added back to the Spring 2021 Reg Flex Agenda. Specifically, these are "Listing Standards for Recovery of Erroneously Awarded Compensation," which is to implement Section 954 of Dodd-Frank and is now in the "proposed rule stage" (i.e., it is being reproposed); "Incentive-Based Compensation Arrangements," which is to implement Section 956 of Dodd-Frank and is also being reproposed; and "Pay Versus Performance," which is to implement Section 953(a) of Dodd-Frank and is listed (alarmingly, given the critical comments that were submitted on the initial rule proposal) as a "final rule stage" item.

Dropped from the Reg Flex Agenda

In July 2018, the Commission published a concept release on "Compensatory Securities Offerings and Sales," which solicited comment on Securities Act Rule 701, which exempts from registration offers and sales of securities issued by non-reporting companies pursuant to compensatory arrangements, as well as on Form S-8, which is the registration statement for compensatory offerings by reporting companies. Noting that "[s]ignificant evolution has taken place both in the types of compensatory offerings issuers make and the composition of the workforce since the Commission last substantively amended these regulation," the Commission sought comment on "possible ways to modernize the exemption and the relationship between and Form S-8, consistent with investor attention."

This concept release then served as the basis for an item in the Fall 2020 Reg Flex Agenda, "Amendments to Rule 701/Form S-8." Also listed in the Fall 2020 Reg Flex Agenda was a new "proposed rule stage" item, "Temporary Rules to Include Certain 'Platform Workers' in Compensatory Offerings Under Rule 701 and Form S-8," which Commissioners Peirce and Roisman described in their June 14, 2021 statement as "allow[ing] companies to compensate gig workers with equity." Both of these items have been dropped from the Spring 2021 Reg Flex Agenda.

Conclusion

Not unlike what is happening elsewhere in the Executive Branch, it now appears that part of the agenda of the Gensler Commission will be undoing the work of the Trump Administration. In particular, in the last year of the Clayton Commission, many significant rulemakings were adopted over the dissent of the Democrat Commissioners. Rereading now the "Statement on Departure of Chairman Jay Clayton" by Commissioners Allison Herren Lee and Caroline A. Crenshaw, their use of the possessive pronoun takes on more meaning: "In addition to advancing his policy priorities, Chairman Clayton has led the agency through difficult times for the markets and our staff" (emphasis added).[18]

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[1] Commissioner Hester M. Peirce and Commissioner Elad L. Roisman, "Moving

Forward or Falling Back? Statement on Chair Gensler's Regulatory Agenda," June 14, 2021, available at: https://www.sec.gov/news/public-statement/moving-forward-or-falling-back-statement-chair-genslers-regulatory-agenda.

[2] It should also be noted that the requirement to provide a bi-annual reg flex agenda stems from the Regulatory Flexibility Act, which was enacted in 1980 to require agencies to consider the impact of their rules on small entities and to consider less burdensome alternatives. A reg flex agenda provides notice to the public about what future rulemaking is under consideration and is not binding upon an agency in any way.

[3] In a June 17, 2021 newsletter, the Council of Institutional Investors (CII) stated, "The SEC on June 11 released a Spring 2021 rulemaking agenda that closely aligns with most of the priorities that CII set out for this year."

[4] Chair Gary Gensler, "Statement on the application of the proxy rules to proxy voting advice," June 1, 2021, available at: https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-01. Chair Gensler's statement also referred to the Commission's guidance and interpretation issued in 2019 relating to proxy advisory firms, which have effectively been superseded by the 2020 rule amendments. This guidance and interpretation addressed two questions: first, whether proxy voting advice constitutes a "solicitation"; and second, whether proxy voting advice is subject to the antifraud rule, Exchange Act Rule 14a-9. In October 2019, Institutional Shareholder Services, Inc. filed suit in the U.S. District Court for the District of Columbia to challenge the 2019 interpretation and guidance. On June 1, 2021, the Commission filed an unopposed motion to hold the case in abeyance, noting that "[f]urther regulatory action on the items Chair Gensler has directed staff to consider revisiting could substantially narrow or moot some or all of ISS's claims."

[5] A "prerule" means that the Commission will solicit public comment on whether or not, or how best, to initiate a rulemaking. In contrast, a "proposed rule" means that the Commission is at the stage in which it will propose to add to or change its existing regulations and will solicit public comment on a rule proposal.

[6] Division of Corporation Finance, "Statement on Compliance with the Commission's 2019 Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice and Amended Rules 14a-1(1), 14a-2(b), 14a-9," June 1, 2021, available at: https://www.sec.gov/news/public-statement/corp-fin-proxy-rules-2021-06-01.

[7] Release No. 34-89964, *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, Sept. 23, 2020, available at: https://www.sec.gov/rules/final/2020/34-89964.pdf. On June 15, 2021, a group of investors led by the Interfaith Center on Corporate Responsibility filed suit against the Commission in U.S. District Court in the District of Columbia to vacate these rule amendments. *Interfaith Center on Corporate Responsibility et al. v. SEC*, U.S. District Court, District of Columbia, No. 21-01620 (June 15, 2021).

[8] *Accredited Investor Definition*, Release No. 33-10824 (Aug. 26, 2020) [85 FR 63726]

[9] *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Release No. 33-10884 (Nov. 2, 2020) [86 FR 3496].

[10] The first three items are new; the last is a continuation from the Fall 2020 Reg Flex Agenda.

[11] On June 16, 2021, the U.S. House of Representatives passed a bill, the Corporate Governance Improvement and Investor Protection Act, H.R. 1187, that would direct the Commission to issue rules within two years requiring every public company to disclose climate-specific metrics in financial statements.

[12] Acting Chair Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures," March 15, 2021, available at: https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[13] Linda Chatman Thomsen, "Opening Remarks Before the 15th Annual NASPP Conference," Oct. 10, 2007, available at: https://www.sec.gov/news/speech/2007/spch101007lct.htm.the

[14] See, for example, the SEC's Enforcement action in 2010 against Angelo Mozilo, the former head of Countrywide Financial. The SEC's complaint alleged that, "During the course of this fraud, Mozilo engaged in insider trading in Countrywide's securities. Mozilo established four sales plans pursuant to Rule 10b5-1 of the Securities Exchange Act in October, November, and December 2006 while in possession of material, non-public information concerning Countrywide's increasing credit risk and the risk that the poor expected performance of Countrywide-originated loans would prevent Countrywide from continuing its business model of selling the majority of the loans it originated into the secondary mortgage market."

[15] Gary Gensler, "Prepared Remarks at the Meeting of SEC Investor Advisory Committee," June 10, 2021, available at: https://www.sec.gov/news/public-statement/gensler-iac-2021-06-10?utm_medium=email&utm_source=govdelivery.

[16] *See* Alexis Goldstein, *These Invisible Whales Could Sink the Economy*, N.Y. Times, May 18, 2021, available here: https://www.nytimes.com/2021/05/18/opinion/archegos-bill-hwang-gary-gensler.html

[17] *See, e.g.,* Wachtell, Lipton, Rosen & Katz rulemaking petition on Schedule 13D filing deadlines (Mar. 7, 2011) available here: https://www.sec.gov/rules/petitions/2011/petn4-624.pdf.

[18] Commissioners Allison Herren Lee and Caroline A. Crenshaw, "Statement on Departure of Chairman Jay Clayton," Nov. 16, 2020, available at: https://www.sec.gov/news/public-statement/lee-crenshaw-statement-departure-chairman-jay-clayton.

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