

SEC in Focus

Quarterly summary of current SEC activities

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Gensler's priorities at the SEC

Gary Gensler was sworn in as a member of the Securities and Exchange Commission (SEC or Commission) in April and took over as Chair after being confirmed by the U.S. Senate for a term expiring at the end of 2026.

Mr. Gensler's priorities have been reflected in the semi-annual regulatory agenda the SEC **released** recently that lists short- and long-term regulatory actions it plans to take.

Topics include rulemaking about disclosures related to climate change and other environmental, social and governance (ESG) matters, such as board diversity, human capital and cybersecurity risk. The SEC further plans to propose rules related to special purpose acquisition company (SPAC) mergers and addressing unfinished rulemaking mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, including finalizing pay versus performance rules and reproposing listing standards to clawback compensation upon a financial statement restatement. The SEC also intends to reconsider and further evaluate proxy rulemaking and several other recently amended rules, including the disclosure of payments by resource extraction issuers and shareholder proposals. The complete SEC rulemaking agenda can be found [here](#).

Focus on climate change and ESG

The SEC has received more than 500 letters from individuals and entities (e.g., investor groups, corporations, accounting professional organizations) in response to its **request** for public comment on how it can best regulate climate change disclosures. While the comment letters include diverse perspectives, frequent areas of focus include:

- ▶ Whether there should be a global set of ESG disclosure standards
- ▶ The use of existing frameworks to leverage in developing disclosure requirements



- ▶ Implications for securities liability depending on whether the required disclosures are furnished or filed
- ▶ The placement, timing and transition of required disclosures

In addition, registrants have expressed concerns about including sustainability information in SEC filings and providing it on an accelerated timeline (e.g., in an annual report).

Mr. Gensler noted in recent [testimony](#) before a House subcommittee, and reiterated in a recent [speech](#), that he has requested that the SEC staff make recommendations on proposed rules regarding disclosures about climate risks and human capital, and he expects this to be an initial step in the SEC's broader efforts to update the disclosure regime.

How we see it

In our [comment letter](#) to the SEC in response to its request for input, we support the effort to seek input as a critical first step in considering whether and how to adopt ESG disclosure requirements that meet investors' needs in a cost-effective manner.

We note that while the request for input is focused on climate-related disclosures as a first regulatory step, we believe that the Commission should take this opportunity to consider investors' need for information about ESG matters more broadly rather than limited to climate change. We provide observations on how the SEC could evaluate and leverage existing disclosure frameworks in any rulemaking related to ESG information while supporting the SEC's engagement with global standard setting over the long term. We also encourage the SEC to provide a transition method that is practical for companies of different sizes with different filing deadlines.

EY resources

- ▶ Technical Line, [Navigating the requirements for merging with a special purpose acquisition company](#)

Focus on SPAC transactions

Mr. Gensler said in his [testimony](#) that the SEC staff has been devoting significant resources to developing new rules or guidelines to protect investors in SPACs.

The staffs of the [Division of Corporation Finance](#) (DCF) and the [Office of the Chief Accountant](#) have already issued separate statements on the risks related to the increase in transactions that allow private companies to go public by merging with SPACs rather than conducting traditional initial public offerings.

Separately, the SEC staff said in a [statement](#) that certain warrants issued by SPACs should be classified as liabilities rather than equity. As a result, these warrants need to be measured at fair value, with changes in fair value reported in net income each period. This statement was made based on the staff's evaluation of fact patterns relating to the accounting for warrants issued in connection with the formation and initial registered offering of a SPAC.

The statement prompted some SPACs and companies formed in mergers with SPACs to restate previously filed financial statements. While this resulted in a slight pause pending the restatement, we have not observed a significant decrease in the volume of SPAC transactions as a result of this issue.

Revisiting the proxy adviser rule

Mr. Gensler [directed](#) the SEC staff to consider whether to recommend changes to the Commission's [2020 amendments](#) to its proxy solicitation rules. Mr. Gensler plans to work with his fellow commissioners and the SEC staff to better understand the rules for proxy voting advice, evaluate whether they address the potential conflicts of interest in a low-cost manner for stakeholders and determine whether they achieve the SEC's mission, according to his [responses to Questions for the Record](#) (QFR) following the confirmation hearing.

The amendments are scheduled to become effective 1 December 2021 and add conditions for relying on Securities Exchange Act of 1934 Rules 14a-2(b)(1) and (b)(3), which provide exemptions from the information and filing requirements of the proxy rules and are typically relied upon by proxy advisory firms. The conditions require proxy advisory firms to:

- ▶ Disclose specified conflicts of interest to shareholders in or along with their proxy voting advice
- ▶ Develop and publicly disclose policies and procedures such that:
 - ▶ Any company that is the subject of voting advice by the proxy advisory firm has that advice made available to them before or at the same time it is made available to shareholders
 - ▶ Shareholders can reasonably expect to be provided with a company's written response to the proxy advisory firm's voting advice in a timely manner before the shareholders' meeting

The DCF **announced** that it would not recommend enforcement action to the Commission based on either the **2019 interpretive guidance** on proxy adviser rules or the 2020 amendments while the Commission is considering further regulatory action in this area.

In addition, the SEC **reopened the comment period** on the **proposed rules** that would require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections of directors. The proposal would require, among other things, that universal proxy cards include the names of both registrant and dissident nominees and thus allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting. The additional comment period ended on 7 June 2021 and was intended to allow stakeholders an additional opportunity to analyze and comment on the proposed rules in light of developments in various areas (e.g., proxy contests, corporate governance, shareholder activism).

Jones named Director of DCF, Coates named General Counsel

Renee Jones was **named** Director of the SEC's DCF. Ms. Jones has been a professor of law and associate dean for academic affairs at Boston College Law School, where she taught courses in corporations, securities regulation, startup company governance and financial regulation. She previously represented private and public companies on corporate and securities matters at Hill & Barlow. She is a member of the American Law Institute and served as the co-Chair of the Securities Law Committee of the Boston Bar Association.

John Coates, who has been serving as the Acting Director of the DCF since February 2021, was named SEC General Counsel.

Grewal named Director of Enforcement

Gurbir Grewal was **named** Director of the SEC's Division of Enforcement, effective 26 July 2021. Mr. Grewal has been the Attorney General for the State of New Jersey since January 2018. He previously served as Bergen County Prosecutor and as an Assistant US Attorney in the Criminal Division of the US Attorney's Offices for the District of New Jersey and the Eastern District of New York.

SEC removes Duhnke as PCAOB chair, seeks nominations for all PCAOB seats

The SEC removed William D. Duhnke III from the Public Company Accounting Oversight Board (PCAOB or Board) and designated Duane M. DesParte to serve as Acting Chair. The SEC also solicited candidates for all five of the Board seats, including the Chair. Mr. Duhnke had been the PCAOB chair since 2018.

The SEC staff is considering whether to recommend changes to its proxy solicitations rules, which are scheduled to become effective 1 December 2021.

Mr. Gensler said in a **statement** that he looks forward to working with his fellow SEC commissioners, Acting Chair DesParte and the staff of the PCAOB, “to set it on a path to better protect investors by ensuring that public company audits are informative, accurate and independent.”

Other SEC rulemaking and current practice matters

Focus on mutual funds with exposure to Bitcoin futures

The staff of the SEC’s Division of Investment Management issued a **public statement** encouraging investors to consider the risks of investing in mutual funds with exposure to the Bitcoin futures market. The statement said investors should consider the volatility of these speculative investments as well as the lack of regulation and potential for fraud or manipulation in the Bitcoin market.

The staff also said it will closely monitor the impact of mutual funds’ investments in Bitcoin futures on investor protection, capital formation, and the fairness and efficiency of markets by, among other things:

- ▶ Analyzing the liquidity and depth (e.g., number of participants) of the Bitcoin futures market
- ▶ Analyzing mutual funds’ ability to liquidate Bitcoin futures positions, as necessary, to meet daily redemption demands and mutual funds’ efficacy of derivatives risk management
- ▶ Monitoring funds’ valuations of holdings in the Bitcoin futures market, including the impact on valuation of any disruptions in the underlying Bitcoin markets
- ▶ Considering mutual funds’ liquidity classification of any position in the Bitcoin futures market, the basis for such classification and the overall construction of a fund’s liquidity risk management program
- ▶ Assessing the potential for fraud or manipulation in the underlying Bitcoin markets and its possible influence on the Bitcoin futures market

The staff said it will consider whether the Bitcoin futures market could accommodate exchange-traded funds. The staff said open-end funds should only pursue investment in the Bitcoin futures market if they have strategies supporting this type of investment and provide full disclosure of material risks. The staff recommended that while closed-end funds do not face the same types of liquidity challenges as open-end funds, they should consult with the staff before filing a registration statement if they seek to invest in the Bitcoin futures market. The staff said it will also be transparent about its approach to registered funds’ investments in other cryptocurrencies and digital assets.

Enforcement activities

SEC requests information about SolarWinds cyber attack

The SEC Division of Enforcement staff reportedly has requested information from a number of registrants about the impact of the well-publicized cyberattack involving SolarWinds Corporation. The SEC “sweep” seeks information regarding whether and how registrants were impacted by the cyber attack, and any actions taken in response, including those relating to disclosures or internal controls.

We understand the SEC has offered amnesty to companies that provide responsive information and has warned that those that don’t participate might face heightened sanctions in the future for any misconduct the SEC identifies. The SEC clarified that the scope of its amnesty offer is limited, and it does not extend to other securities violations such as any insider trading violations relating to the cyber attack.

Eight companies charged for failing to disclose information on Form NT

The SEC said eight companies settled charges for allegedly failing to disclose in Form 12b-25, Notification of Late Filing (Form NT), why they could not file their quarterly or annual reports timely and failing to disclose anticipated restatements or corrections of prior financial reporting.

Public companies are required to file a Form NT when they are not able to file a Form 10-Q or Form 10-K timely and are seeking additional days to file these reports. Companies must disclose on the Form NT why their quarterly or annual report could not be filed on time and any anticipated significant changes in results of operations from the corresponding period for the last fiscal year.

The SEC orders state that the companies announced restatements or corrections to financial reporting within four to 14 days of their Form NT filings but failed to disclose that anticipated restatements or corrections were among the principal reasons for their late filings. The orders also state that the companies failed to disclose on Form NT that management anticipated a significant change in quarterly income or revenue.

The SEC stated that the alleged violations were uncovered by an SEC staff initiative focused on Form NT filings by companies that quickly thereafter announced financial restatements or corrections. Without admitting or denying the findings, each of the companies agreed to cease-and-desist orders and to pay civil penalties as part of the settlements.

Sports apparel manufacturer charged with disclosure failures

The SEC said a sports apparel manufacturer settled charges of misleading investors about its revenue growth and failing to disclose known uncertainties concerning its future revenue.

According to the SEC's order, the company's internal revenue and revenue growth forecasts for the third and fourth quarters of 2015 indicated that revenue would fall short of analysts' estimates. For six consecutive quarters beginning in the third quarter of 2015, the company allegedly responded by accelerating more than \$400 million in existing orders that customers had requested be shipped in future quarters. The order further states that the company misled investors by attributing its revenue growth during this period to various factors without disclosing material information related to the acceleration of these existing orders.

The order states that the company violated certain antifraud provisions of the Securities Act of 1933, as well as certain reporting provisions of the federal securities laws. Without admitting or denying the findings in the SEC's order, the company agreed to cease and desist from further violations and to pay a \$9 million penalty.

What's next at the SEC?

We expect the SEC under Mr. Gensler to take action on rules that would require disclosures of climate change and other ESG matters and address SPAC mergers, among other topics. We also expect the SEC to appoint various key positions, including the Chief Accountant and new members of the PCAOB.

“
We will continue to use data analytics to uncover difficult to detect disclosure violations.

— SEC Division of Enforcement Acting Director
Melissa R. Hodgman

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