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NIRI OC Virtual Conference
May 20, 2022
James Moloney,
Gibson, Dunn & Crutcher LLP

Current SEC Commissioners



Gary Gensler
Chair since 2021
Term expires 2026



Allison Herren Lee
Served since 2019
Term expires 2022



Hester Peirce
Served since 2018
Term expires 2025



Caroline Crenshaw
Served since 2020
Term expires 2024

Hot Topics in SEC Rulemaking – ESG Disclosures

Climate Change

- **Background:** After increasing focus on climate change, including a round of comment letters last year, SEC proposed rules for climate change disclosure in March 2022
- **Focus areas:** Prescriptive rules to create a new climate change reporting framework (risks, governance, strategy, goals, GHG emissions) based in part on TCFD and the GHG Protocol. Includes amendments to both Reg S-K and Reg S-X
- **Timing:** Comment period ends June 17, 2022. Final rules may be adopted as early as end of 2022, with phase-in based on filer status likely commencing with reports filed in 2024 containing 2023 financials

Human Capital

- **Background:** SEC indicated that it plans to revise Human Capital Management disclosure requirements it adopted in August 2020 with a view towards making them more prescriptive
- **Likely focus areas:** Per Chair Gensler, metrics such as workforce turnover, demographics such as diversity, info on skills and development training, compensation, benefits, health and safety
- **Timing:** SEC may propose rule updates later in 2022, but would go through new comment letter and rule finalization process

Cybersecurity

- **Background:** SEC has for years been increasing its focus on cyber controls & disclosures, and in March 2022 proposed new rules for cybersecurity disclosures
- **Focus areas:** Incident reporting on Form 8-K for material cyber breaches, material updates on Form 10-Q, annual reporting of cyber risk management and strategy and board oversight (including director expertise)
- **Timing:** Comment period ended May 9, 2022. Final rules may be adopted later in 2022; unclear when effective date would be

Hot Topics in SEC Rulemaking –Rule 10b5-1 and Share Repurchases

On December 15, 2021, the SEC proposed 2 amendments with 45-day comment periods

Rule 10b5-1 Trading Plans

- ***New requirements for 10b5-1(c)(1) defense***
 - 120-day cooling off period for Section 16 insiders (30-day for public companies)
 - Section 16 insider certification of no MNPI + plan entered into in good faith
 - No overlapping plans
 - Only 1 single-trade plan every 12 mos.
 - Plans must be operated in good faith
- ***New disclosure requirements***
 - Companies: annual disclosure (ITPs, NEO equity grants w/in 14 days of releasing MNPI) & quarterly disclosure (detailed info on 10b5-1 plans adopted, modified or terminated in quarter)
 - Section 16 Reports: disclose 10b5-1 plans on Forms 4/5; report gifts w/in 2 days

Share Repurchase Disclosures

- ***New daily disclosure*** of detailed info regarding share repurchases
 - What: number of shares, average price, number of purchased on open market, number under 10b-18 safe harbor, number with 10b5-1 plan
 - When: new Form SR to be filed next business day after repurchase
- ***New quarterly (10-Q) disclosure***
 - Mostly benign: e.g., rationale & process for repurchase, insider trading policies, reliance on 10b5-1 & 10b-18
 - Except: new checkbox indicating if insiders purchased/sold w/in 10 days of announcing buyback

Hot Topics in SEC Rulemaking – 14a-8 Shareholder Proposals

- On November 17, 2021, SEC approved amendments to the federal proxy rules to mandate the use of a universal proxy card in public solicitations involving director election contests
- After the rules become effective on August 31, 2022, proxy cards distributed by both public companies and activist shareholders in a contested director election will have to include both sides' director nominees, such that shareholders casting their vote can “mix and match” nominees from the company's and dissident's slates of nominees

What Does Universal Proxy Mean for Public Companies?

- More Contested Director Elections: Shareholders will be more inclined to support one or two dissident nominees when they can do it on a universal proxy card, as opposed to the current system that generally requires shareholders voting by proxy to sign the activist's card if they want to support any member of the activist's slate
- Potential for Cheaper Activist Election Campaigns: When a universal ballot is used by both the company and dissident, activists can avoid the expense of making multiple mailings of a proxy card as every proxy card, regardless of which side mails it, includes the nominees from both the company and dissident

Developments in SEC Division of Enforcement

- **Enforcement Forum West 2022, Speech by Director Gurbir Grewal**
 - Noted a perception among too many that corporate wrongdoers are not being held accountable
 - Public must have confidence that the SEC is moving quickly to investigate and hold wrongdoers accountable
 - Emphasized that cooperation by defense counsel and issuers can yield tangible benefits; Staff is willing to credit cooperation with reduced penalties or no penalties at all
- **Investment in Crypto Assets and Cyber Unit**
 - In May 2022, SEC announced nearly doubling the size of its unit responsible for protecting investors in crypto markets and from cyber-related threats
 - SEC Chair Gary Gensler noted that “[b]y nearly doubling the size of this key unit, the SEC will be better equipped to police wrongdoing in the crypto markets while continuing to identify disclosure and controls issues with respect to cybersecurity”

Recent SEC Enforcement Actions

- **Action against Baxter International Inc. and Two Former Employees** (Feb. 22, 2022)
 - SEC's order against Baxter found that the company engaged in improper intra-company foreign exchange transactions that resulted in the misstatement of the company's net income
 - SEC's order also found that the assistant treasurer was primarily responsible for executing the transactions and that treasurer did not take any steps to investigate how the department generated consistent gains
 - Treasurer consented to pay a \$125,000 civil penalty and assistant treasurer consented to pay a \$100,000 civil penalty, disgorgement of \$76,404 and prejudgment interest of \$12,955
- **Action against NVIDIA Corporation** (May 6, 2022)
 - SEC's order found that company failed to disclose that cryptomining was a significant element of its material revenue growth from the sale of its graphics processing units (GPUs) designed and marketed for gaming (NVIDIA customers increasingly used the GPUs for cryptomining)
 - "NVIDIA's disclosure failures deprived investors of critical information to evaluate the company's business in a key market" – Kristina Littman, Chief of SEC Enforcement Division's Crypto Assets and Cyber Unit
 - NVIDIA agreed to pay a \$5.5 million penalty

SEC Enforcement – Elon Musk and the SEC

- **September 2018** – Musk and Tesla enter into agreement with SEC related to Musk’s tweet regarding taking Tesla private. As part of settlement, Musk agreed to step down as chairman and have Tesla’s lawyers pre-approve written communications about the company, including tweets with material information about the company
- **February 2019** – SEC accuses Musk of violating the settlement by tweeting about Tesla’s production (which was not vetted by company lawyers); Musk’s attorneys argued that the tweet did not contain new information that was material to investors
- **April 2019** – SEC and Musk reach agreement that public statements about Tesla’s finances must be vetted by company lawyers
- **April 4, 2022** – Musk becomes Twitter’s largest shareholder (per Schedule 13G filing)
- **April 14, 2022** – Musk offers to buy Twitter (Twitter agrees to deal on April 25)
- **April 27, 2022** – Federal judge denies terminating 2018 settlement agreement regarding Musk’s Tesla communications
- **May 11, 2022** – Wall Street Journal publishes article stating that SEC is probing Musk’s late filing of Schedule 13G
- **May 13, 2022** – Musk tweets that deal is on hold pending details supporting calculation of spam/fake accounts
- **May 17, 2022** – Musk announces that Twitter deal cannot move forward until more information is disclosed about prevalence of spam accounts; claims in a tweet that Twitter is “20% fake/spam accounts” and suggests Twitter’s previous filings with the SEC were misleading

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