

SEC chair nominee Gensler and SEC's 2021 examination priorities highlight ESG and climate risk

March 3, 2021 | Client Update | 3-minute read

SEC Chair Hearing. Yesterday, the U.S. Senate Committee on Banking, Housing, and Urban Affairs held a [nomination hearing](#) to consider Gary Gensler's candidacy for Chair of the Securities and Exchange Commission, or SEC. Throughout the hearing, Gensler fielded numerous questions on environmental, social and corporate governance and disclosure matters. This post synthesizes the most salient points from his testimony. The post also provides information on the SEC's 2021 examination priorities and legislative bill activity occurring in parallel.

Climate Risk Disclosure

Gensler affirmed that as SEC Chair, he may pursue further climate-related disclosure requirements. He explained that in his view not only do investors want this information, but also that issuers would benefit from "such guidance."

Political Contributions Disclosure

Gensler showed an interest in examining additional requirements related to political contributions, especially in light of investor attention, which he saw manifested in the nearly 80 shareholder proposals on this topic during last year's proxy season. Rather than look at the financial significance of a single donation, he reiterated that his assessment would be grounded both in the legal test of materiality, defined as what reasonable investors want in the total mix of information, and in economic analysis.

Diversity

Gensler indicated that he will consider the board diversity proposal that Nasdaq submitted to the SEC to adopt new listing rules, which we discuss [here](#) and [here](#). He also suggested that he is open to expanding human capital disclosure requirements, including in regards to workforce diversity.

Proxy Advisory Firm 2020 Regulation

While acknowledging questions raised about the lack of competition in the market for proxy advisory services and potential conflicts of interest, Gensler noted that proxy advisors play an important role during proxy season. He indicated his willingness to revisit recent rulemaking with a special eye toward assessing potential conflicts of interest, which he believes is an important part of the SEC's mission.

Disclosures Generally

Gensler agreed that cost-benefit analysis is an important component of rulemaking, and he would conduct such analysis if confirmed.

What's Next?

If this follows a similar timeline to the confirmation of his predecessor, Jay Clayton, expect Gensler to be confirmed in May.

SEC 2021 Examination Priorities

Today, the SEC's Division of Examinations (Division) [announced](#) its [2021 examination priorities](#). The SEC's examination priorities focus on the areas that it believes present potential risks to investors and the integrity of the U.S. capital markets.

Issuers

The Division will review whether firms are considering effective practices to help improve responses to large-scale climate related events. The Division notes that the scope of the exams will be similar to its work after Hurricane Sandy in 2012, with a focus on the maturation and improvements to these plans over the intervening years. In particular, the Division notes that it will review "whether systemically important registrants are considering effective practices to help improve responses to large-scale events."

So-called "ESG" Funds

The Division also notes the recent proliferation of ESG products and services being offered by registered investment advisers. These include strategies that are referred to as sustainable, socially responsible, impact and ESG conscious. Among its 2021 Examination Priorities, the Division will focus on products in these areas that are "widely available to investors" such as open-ended funds and ETFs, and those offered to accredited investors such as qualified opportunity funds.

Specifically, the Division will:

- Review the consistency and adequacy of the **disclosures** registered investment advisers and funds provide to clients;
- determine whether the firms' **processes and practices** match their disclosures;
- review **fund advertising** for false and misleading statements; and
- review **proxy voting policies and procedures**, as well as votes, for alignment with these strategies.

Climate-Risk Legislative Activity

Yesterday, congressional Democrats [introduced](#) the CLEAN Future Act, which, if enacted, would direct the SEC to require public companies to disclose information on climate-related risk in public filings, such as direct and indirect greenhouse emissions and risk management strategies.

The proposed legislation (and accompanying [fact sheet](#)) is consistent with the segmented approach outlined during President Biden's campaign, which we summarized previously [here](#).

Notably, it includes a clean energy standard for the power sector, mandating 80 percent and 100 percent clean energy by 2030 and 2035, respectively, as well as incentives, spending and mandates relating to transportation, buildings and industry.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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