# Securities Regulation Daily Wrap Up, TOP STORY—Biden's pick for SEC will get the chance to shape own team, (Jan. 13, 2021)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

Once President-elect Biden's as yet to be determined pick for SEC chair is confirmed by the Senate, that person will begin shaping policy by filling the many open jobs left by staff departing the Clayton-era SEC.

Although President-elect Joe Biden has not formally announced his nominee to be SEC chair (media reports suggest it may be former CFTC Chair Gary Gensler), whomever the new president nominates will have a chance to shape policy going forward by making a number of high-level staff picks to fill jobs left vacant by Clayton-era SEC staff. At least one of the vacancies may suggest the future direction of the SEC's interim leadership pending Senate confirmation of whomever Biden nominates for SEC chair. Almost all of the departing SEC staffers had roles in crafting the SEC's rapid response to the COVID-19 pandemic, which included lengthening filing deadlines, much as the Commission has done following natural disasters, and allowing exceptions to statutory and regulatory requirements that certain firms hold in-person board meetings. But the flurry of rulemakings adopted during the later half of the Clayton-era SEC did not occur without some criticism.

**Accounting departures.** One of the more intriguing vacancies will be that left by the PCAOB's J. Robert Brown, Jr., who has announced that he plans to leave the Board by the end of January 2021. If Biden were to replace Acting SEC Chair Elad Roisman with someone more aligned to Biden's policy goals pending confirmation of a permanent SEC chair, that person could be the SEC's most senior Democrat, Commissioner Allison Herron Lee, who is married to the PCAOB's Brown. Brown's departure from the PCAOB could reduce the likelihood of potential conflicts of interest between Lee's and Brown's work, especially since the SEC oversees the PCAOB.

James (Jim) G. Kaiser also has departed the PCAOB. Kaiser has been replaced by Megan Zietsman, whose term expires October 24, 2025.

Also in the accounting sphere, SEC Chief Accountant Sagar Teotia has announced his departure, which is expected by the end of February. As chief accountant, Teotia had a prime role in overseeing both the Financial Accounting Standards Board (FASB) and the PCAOB. "Sagar's judgment and expertise – developed with significant credibility and experience in both the public and private sectors – has been critical in allowing the Commission and OCA to advance a number of very consequential improvements to financial reporting and the auditing standards," said Roisman.

Of the numerous measures Teotia pursued as chief accountant, changes to the auditor independence standards are likely to stand out; scholars will continue to debate whether these changes modernized or weakened the SEC's accounting rules. Teotia also was a signatory to several public statements by Commission staff regarding audit quality, especially with respect to Chinese companies from whom the PCAOB often cannot obtain audit work papers. Those public statements have to some extent been eclipsed by Congressional action to enact the Holding Foreign Companies Accountable Act (S. 945), which President Trump signed into law on December 18, 2020.

**Enforcement.** The SEC's Division of Enforcement, sometimes with the help of the DOJ and the Solicitor General, withstood challenges to the agency's administrative law judges and to its ability to seek disgorgement during the Clayton-era SEC. Some of these issues were inherited from prior Commissions, but the Trump Administration shaped these litigations as they proceeded to the Supreme Court. With the enactment of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA) (H.R. 6395) over President Trump's veto, the SEC's disgorgement authority would appear to be on firmer statutory ground, with

the inclusion in this legislation of a new 10-year limitations period for scienter-based violations, five years longer than the federal general limitations period addressed by the Supreme Court in cases challenging the SEC's disgorgement authority.

Aside from the several constitutional issues regarding the SEC's enforcement program, the agency's Enforcement Division, under the leadership of Stephanie Avakian Steven Peikin who, for much of their time were co-directors, will likely be remembered for record-breaking whistleblower awards and the need to take on the novel issue of initial coin offerings (ICOs). Avakian, who remained for nearly the entire four-year Clayton-era SEC oversaw numerous enforcement matters, including those against Tesla's Elon Musk, Theranos and Elizabeth Holmes, former Congressman Christopher Collins, and Wells Fargo. The Telegram case involving an ICO perhaps set the biggest precedent that digital assets issued in a certain manner can be investment contracts subject to registration under federal securities laws.

Avakian had planned to leave the SEC by the end of 2020. Peikin departed the SEC in mid-August of 2020. Acting Enforcement Director Marc Berger also plans to leave the SEC in January 2021.

**CorpFin.** The tenure of Bill Hinman, former director of the SEC's Division of Corporation Finance will, like the Enforcement Division, will be remembered for having addressed the novel issues associated with digital assets, including publishing a detailed SEC staff framework for the evaluation of digital assets to determine if they may be securities subject to the registration requirement. Hinman also will be remembered for facilitating rulemakings to increase the requirements for submitting shareholder proposals, to regulate proxy advisers, and to harmonize the SEC's diffuse exempt offerings framework. Hinman also followed up on efforts begun during the SEC's Mary Jo White era regarding disclosure effectiveness. Hinman departed the SEC in late 2020.

**Investment companies and advisers.** Dalia Blass, Director of the Division of Investment Management, also will be leaving the SEC in January 2021. Blass's tenure included significant rulemakings and other actions regarding exchange-traded funds, fund of funds arrangements, business development companies, derivatives, fund fair valuation practices, and investment adviser marketing. The SEC has announced that Sarah ten Siethoff will become the acting director of the Investment Management Division upon Blass's departure.

**DERA.** S.P. Kothari, Chief Economist and Director of the SEC's Division of Economic and Risk Analysis, has announced plans to leave the SEC by the end of January 2021. DERA analysis, for example, played a key role in the adoption of rules raising the eligibility requirements to submit shareholder proposals and increasing the shareholder proposal resubmission thresholds. DERA often gets little public notice despite its influence over the economic analyses that are included in the SEC's rulemaking proposals and in its final regulations. However, the shareholder proposal rulemaking drew criticism from investor groups, such as the Council of Institutional Investors, who alleged that DERA was slow to release data showing that the actual impact of the shareholder proposal rules could be to exclude all but a small number of shareholder proposals from ever being heard by public companies.

**Trading and Markets.** Brett Redfearn, former director of the SEC's Division of Trading and Markets, had announced plans to leave the SEC by the end of 2020. Redfearn's division was a key player in creating the framework to enforce Regulation Best Interest, one of former SEC Chair Clayton's signature rulemakings. Regulation BI set a standard for broker-dealers dealing with retail investors that is higher than the suitability standard previously employed but not as high as a true fiduciary standard, although Regulation BI incorporates some aspects of a fiduciary standard. Thus far, the SEC has set expectations for examinations of firms subject to Regulation BI and the future success of the standard will likely depend on a combination of SEC enforcement and investor education.

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