

Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE —House FSC reports securities bills on ESG and diversity and inclusion, (Apr. 21, 2021)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [Mark S. Nelson, J.D.](#)

In addition to reporting four securities-related bills, the House FSC adopted budget views and reauthorized committee task forces on fintech and artificial intelligence.

The House Financial Services Committee reported four securities bills, including bills on environmental, social, and governance (ESG) metrics, diversity and inclusion, and corporate political spending disclosure. The committee also [marked up](#) its budget views and reauthorized committee task forces on fintech and artificial intelligence. With the exception of one of the diversity and inclusion bills dealing with boardroom diversity, votes on the four securities bills and four additional banking bills were along party lines. In early reaction to the markup, the North American Securities Administrators Association, Inc. [expressed support](#) for the ESG, board diversity, and diversity data bills.

Budget views. With respect to securities regulation, the House FSC's [budget views](#) call for "robust funding" of the SEC in FY22 and for the SEC to finish its Dodd-Frank Act rulemakings. Perhaps with GameStop's January 2021 trading volatility in mind, the committee majority specifically cited Dodd-Frank Act Section 929X(a) as a provision on which the Commission should act. That provision directs the Commission to adopt rules mandating public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of securities.

Although the committee majority also sees room for the SEC to address proxies, especially in light of the Clayton-era SEC's imposition of new requirements on proxy advisers and increased shareholder proposal eligibility requirements, the majority called on the Commission to deal with personnel cuts imposed by the Trump Administration. The majority said the SEC should hire new employee with expertise in climate change and cybersecurity and seek to expand the role of the SEC's Office of Minority and Women Inclusion (OMWI). Representative Joyce Beatty (D-Ohio) offered the Diversity and Inclusion Data Accountability and Transparency Act of 2021 ([H.R. 2123](#)), which would require entities with 100 or more employees to provide needed diversity data to agency OMWIs. The bill was reported by the House FSC by a vote of 30-23.

Moreover, the majority cited a need to protect investors from the "gap between regulation and innovation" and urged the SEC to hire persons with "specialized expertise" to foster an environment conducive to "responsible innovation."

The committee approved the budget views by a vote of 30-23, but only after rejecting all but two of eight Republican amendments. An amendment offered by Rep. Blaine Luetkemeyer (R-Mo) was agreed to by voice vote and would have the committee continue its oversight of safety and soundness regarding consumers and businesses affected by the COVID-19 pandemic; the committee, however, rejected another amendment by Rep. Andy Barr (R-Ky) that would have had the committee conduct the same oversight of the Biden Administration's American Recovery Plan Act as it did over the Trump-era Coronavirus Aid, Relief, and Economic Security (CARES) Act.

With respect to climate change, the committee also approved an amendment offered by Delegate Michael San Nicolas (D-Guam) to an amendment originally offered by Ranking Member Patrick McHenry (R-NC). The McHenry amendment would have commended the Biden Administration for supporting nuclear energy, but Democrats objected to the original language and instead substituted the word "acknowledge" for "commend."

Ranking Member McHenry said he believes climate change is "real" and that the U.S. can balance its climate goals with economic growth, but he worried that the Democrat amendment left the door open to the Green New Deal sponsored by, for example, Rep. Alexandria Ocasio-Cortez (D-NY). Representative Ocasio-Cortez and Sen. Bernie Sanders (I-Vt) recently [announced](#) legislation advocating a Green New Deal for public housing.

Meanwhile, the committee majority rejected, among other things, Republican amendments to: (1) seek curbs on funding for the Consumer Financial Protection Bureau (Rep. Barr); (2) expand the SEC's definition of accredited investor to allow more retail investors to participate in private, exempt offerings (Rep. Bill Huizenga (R-Mich)) (Rep. Anthony Gonzalez (R-Ohio) had argued in support of the amendment that many people were now excluded from recent growth in private markets); (3) oppose legislation that would impose a financial transaction tax (FTT) (Rep. McHenry) (Rep. Peter DeFazio (D-Ore) has introduced the Wall Street Tax Act of 2021 ([H.R. 328](#)), which would impose an FTT).

Fintech/AI task forces reauthorized. The House FSC also [reauthorized](#) two task forces that were well-received by members when they were originally created during the 116th Congress. The [Task Force on Artificial Intelligence](#) will again be led by Rep. Bill Foster (D-Ill); Rep. Gonzalez will lead the Republican contingent. The [Task Force on Financial Technology](#) likewise will be led again by Rep. Stephen Lynch (D-Mass), while Rep. Tom Emmer (R-Minn), who has previously sponsored numerous blockchain bills, will lead the Republican members on the task force.

ESG disclosure. Under the amended ESG Disclosure Simplification Act of 2021 ([H.R. 1187](#)), sponsored by Rep. Juan Vargas (D-Calif), the Commission would be directed to adopt rules to implement an ESG disclosure regime for public companies. Specifically, any company with securities registered under Exchange Act Section 12 or which reports to the Commission under Exchange Act Section 15(d) would have to disclose in its proxy statement or solicitation: (1) a clear description of the company's views regarding the link between ESG metrics and long-term business strategy; and (2) a description of the process the company used to determine the impact of ESG metrics on long-term business strategy.

A sense of Congress included in the bill would state that ESG disclosures are de facto material. This is significant because, under existing the SEC's disclosure regime, materiality is the key touchpoint for disclosures of all types and ESG disclosures may or may not always be material. The bill would clarify how ESG disclosures are treated in the context of materiality. ESG disclosures may be located in the notes section of a filing.

Speaking in support of the bill, Rep. Vargas reminded committee members that newly sworn-in SEC Chair Gary Gensler had testified at his confirmation hearing that materiality of disclosures is ultimately up to investors. The representative reiterated that the SEC can require disclosure in the public interest and that, in his view, ESG disclosures are material.

The bill also would define "ESG metrics" by reference to rules the Commission will develop if the bill becomes law. The Commission would have discretion to incorporate international ESG standards. The Commission also would have discretion to delay the disclosure requirement for small issuers.

The Vargas bill also would create the Sustainable Finance Advisory Committee within the SEC to make recommendations about ESG disclosure to the Commission. "Sustainable finance" would mean "the provision of finance with respect to investments taking into account environmental, social, and governance considerations." The Commission would have to respond to a report issued by the committee within six months.

The bill, which was first introduced in the last Congress, won committee approval by a vote of 28-22. Democrats turned away Republican amendments to: (1) reiterate the need for ESG disclosures to follow the SEC's materiality framework (Rep. Bryan Steil (R-Wis)); (2) strike the Congressional findings, which purportedly denied that materiality was already part of the SEC's disclosure regime (Rep. Huizenga); and (3) replace the operative text of the bill with a study (Rep. French Hill (R-Ark)).

Diversity and inclusion. The amended Improving Corporate Governance Through Diversity Act of 2021 ([H.R. 1277](#)), sponsored by Rep. Gregory Meeks (D-NY), would mandate that public companies make disclosures about the racial, ethnic, gender, and veteran status of their directors, director nominees, and executives. A

version of the bill passed the House in the 116th Congress by a vote of [281-135](#). The bill was the only one garnering significant bipartisan support on the House FSC and was reported by voice vote.

Representative Meeks said the SEC's lack of a definition of diversity has become a hindrance to better disclosure by companies. According to Rep. Meeks, the bill tracks an earlier recommendation by an SEC advisory committee, which the SEC never adopted. Representative Meeks also said the bill could address a larger conversation in the U.S. regarding racial justice and the lack of opportunity for persons of color.

Under the latest version of the bill, companies would have to disclose in a proxy statement:

- Data regarding the voluntary, self-identified racial, ethnic, and gender composition of the board of directors, board nominees, and executives;
- The voluntary, self-identified status of directors, director nominees, and executives as veterans; and
- Whether the board or a board committee of the company has, as of the date of the disclosure, adopted any policy to promote racial, ethnic, and gender diversity among directors, director nominees, and executives.

If a company has not filed a proxy statement in a one-year period, the company would make the disclosure in its first annual report after that period. The SEC would have to report to Congress annually regarding an analysis of the information disclosed by companies and any trends suggested by that information.

The bill also would require the director of the SEC's OMWI, within three of enactment, to publish best practices for complying with the disclosure requirement. The director may ask for public comments regarding best practices.

Lastly, the bill would establish within the SEC the Diversity Advisory Group to study issues related to diversity and inclusion and report to the SEC and Congress on its recommendations for increasing gender, racial, and ethnic diversity among public company directors. The SEC also would have to report to Congress annually on the status of gender, racial, and ethnic diversity on public company boards.

Political donations. The amended Shareholder Political Transparency Act of 2021 ([H.R. 1087](#)), sponsored by Rep. Foster, would require quarterly and annual reporting by companies of their political donations. The SEC would have to adopt rules to implement the bill within 180 days of enactment. The bill has been previously introduced in various forms, but this time, with a Democrat White House and Congress, it is possible that an appropriations policy rider will be dropped from FY22 appropriations legislation thereby freeing the SEC to implement a political spending disclosure regime should Congress enact one. The Foster bill was reported out of committee by a vote of 28-23.

According to Rep. Foster, the January 6, 2021 Capitol insurrection and the recent passage in some states of restrictive voting laws had made it clear that many companies consider political spending to be a material disclosure item. In the wake of these events, some companies suspended campaign contributions to members of Congress and some have spoken out publicly against voter suppression.

Under the Foster bill, quarterly reports would be mandatory for any company with securities registered under Exchange Act Section 12. Specifically, such reports would have to disclose:

- A description of expenditures on political activities in the prior quarter;
- The date of each expenditure;
- The amount of each expenditure;
- If an expenditure was made to support/oppose a candidate, the name of the candidate, office sought, and the candidate's political party affiliation; and
- The name of any trade association or other organization exempt under Internal Revenue Code Sections 501(a) and 501(c) which received dues that are or could be reasonably anticipated to be transferred to another association or organization for political expenditures or electioneering communications.

With respect to exempt organizations, the disclosure requirement would not apply to direct lobbying via registered lobbyists hired by a company, communications by an issuer to shareholders or executives and

administrative staff and their families, or the creation and funding of a separate segregated fund used for corporate political purposes. Quarterly reports would be publicly available on the SEC's website and via EDGAR. The term "issuer" would not include registered investment companies.

In the case of annual reports, a company would have to disclose: (1) a summary of the prior year's expenditures that were over \$10,000 and expenditures for a particular election that were over \$10,000; (2) a description of the specific nature of expenditures planned for the next fiscal year; and (3) the total expenditures planned for the next fiscal year.

The SEC would have to report to Congress annually regarding the implementation of the bill and the GAO would have to periodically report to Congress on the SEC's oversight of the bill.

Representative Steil, as he had regarding the ESG bill, offered an amendment to clarify that the SEC's materiality framework still applies to political spending disclosures. Representative Steil also cited what he described as First Amendment right of corporations to speak via political donations. Democrats rejected the amendment.

LegislativeActivity: Blockchain CorporateFinance CorporateGovernance DoddFrankAct
ExchangesMarketRegulation FedTracker Securities FinancialIntermediaries GCNNews
PublicCompanyReportingDisclosure RiskManagement SecuritiesOfferings