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Investors move ESG to center stage, push regulators to act

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In July of 2021 Securities and Exchange Commission Chair Gary Gensler cited a simple reason for moving to adopt climate change disclosure standards—investor demand. Socially responsible, or 'sustainable' investing is a trend that continued in 2021 to feed billions of new dollars into funds that filtered their portfolios based on ESG (environmental, social, and governance) factors. A growing consciousness of the threats posed by climate change, combined with positive returns for investors who shifted dollars out of fossil fuels to renewable energy funds led to a demand for more, and more easily comparable, environmental impact information from companies. "When it comes to climate risk disclosures, investors are raising their hands and asking regulators for more," Gensler said at the July event sponsored by institutional investor group Principles for Responsible Investment. That's the "E" in ESG, but the same demand for more information to work with when making investment decisions also applies to the "S" and the "G," where investors are aggressively seeking to compare companies and identify market leaders.

Social unrest and a pandemic drove the Black Lives Matters movement, Me Too, and the Great Resignation. Combined with a booming stock market, these developments have increased pressure on corporations to show progress on diversity, equity, and inclusion and driven demand for information on the makeup of their workforce. On the "G," corporate governance, investors have gained more of a voice in the proxy voting process, facilitating more influence over board membership and executive compensation. The pressure for more ESG disclosure is not new but now seems less likely to fade into demands from only niche investors, as has been predicted in years past. Companies now seem very likely to face these calls into 2022 and beyond.

Even the most hardened opponents of new mandatory disclosures know the pressure investor demand puts on the financial services industry, and its regulators, to act. And when new disclosures are mandated, they tend to stick. Chair Gensler cited in his July remarks the SEC's history of adding new disclosures that are now considered essential information for investors. Initially public company disclosures were about financial performance, then investors demanded information on who runs a company, then information about how they were compensated. In 1964 the SEC started to offer guidance about risk factors and in 1980 they added the Management Discussion & Analysis section to Form 10-K. These disclosures came with opposition, but they have become "integral to our regime," he said. "Investors are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs." Those that remember his days at the CFTC during the Dodd-Frank rulemaking process know that Gensler likes to move quickly, but despite the calls from investors for more disclosure, he will face significant obstacles.

In this article our analysts offer a comprehensive review of ESG activity of 2021 at the SEC, CFTC, and Congress, and highlight key issues to watch in 2022. We start with social and governance, where the SEC has already adopted rules and is now proposing modifications, then look at the SEC's ESG enforcement activity and the CFTC's ESG efforts. We summarize myriad ESG bills floating around the 117th Congress, take a deep dive into the formation of sustainability reporting standards, and provide a chronological list of other relevant activity from the SEC.

Social and human capital

In a time of global pandemic and economic dislocation, political polarization, and the rise of social movements, companies have faced workforce challenges beyond everyday recruiting, training, and retention of employees. Institutional investors are increasingly seeking more granular data on pay and turnover, health and safety, and support that companies are providing to help employees cope with broad societal issues. Investors are also seeking more information about diversity, including workforce demographics and strategies to increase diversity at all levels.

Responding to investor demand, last year the SEC adopted a final rule to impose requirements for human capital disclosures. The rule was adopted on August 26, 2020 and became effective November 9, 2020. The rule was adopted by a 3-2 vote as part of amendments to Regulation S-K disclosure requirements to modernize the description of business (Item 101). The rule is codified at §229.101(c)(2)(ii).

The current rule requires registrants to describe their human capital resources, including the number of persons employed and "any human capital measures or objectives that the registrant focuses on in managing the business." Depending on the registrant's business and workforce, this can include "measures or objectives that address the development, attraction and retention of personnel."

Now, with the changeover in administration, the SEC has signaled it plans to revisit the rule with the view of adopting further requirements. The topic was included on the SEC's Regulatory Flexibility Agenda, and SEC Chair Gensler has stated he has asked staff for recommendations for amendments.

Preview of proposed rules. Many industry observers think the new proposal will be released in the first quarter of 2022. It is widely expected to require the disclosure of specific quantitative metrics, in contrast to the more principles-based current rule.

- In remarks at SEC Speaks 2021, CorpFin Associate Director Betsy Murphy said some of the factors the SEC is considering for more tailored disclosure include workforce turnover, skills and development training, compensation benefits, workforce demographics including diversity, and health and safety. In addition, some institutional investors have asked for rule changes that would require companies to present information about their director nominees' gender, race, and ethnicity in a structured format.
- In the view of former CorpFin directors Bill Hinman and John White at Northwestern Pritzker School of Law's Garrett Institute and Corporate Counsel Virtual Institute, a good idea of what will be in the new proposal can be gleaned from the Democratic commissioner dissents to the

2020 final rules. The metrics mentioned in the dissents include part time vs. full time workers, workforce expenses, turnover, and diversity (Commissioner Allison Herren Lee) and workplace flexibility and safety, and employee turnover rates (Commissioner Caroline Crenshaw).

- Marc Siegel, EY Americas Corporate and ESG Reporting Leader, noted in remarks at a recent conference that Chair Gensler has tweeted that he is looking at workforce turnover and skills and development training. For example, this might require disclosure of percentage of turnover, dollars and hours invested in training, and compensation benefits. In addition, large institutional investors including State Street are looking for more disclosure of workforce demographics, including the disclosure of EEO-1 reports, which are currently only filed with the Department of Labor. Another human capital interest of high interest is health and safety, particularly given experiences with the pandemic over the last year and a half.

The human capital proposal will likely see vociferous debate. However, industry observers point out that Chair Gensler currently has the three votes needed for the rule to be adopted. Assuming the three Democrats on the Commission remain, it is likely the forthcoming proposal would be adopted in 2022.

Nasdaq board diversity rule. Alongside the SEC human capital rules, Nasdaq has adopted its own rule imposing board diversity requirements. In August 2021, the SEC approved new Nasdaq Rule 5606. The rule requires Nasdaq-listed companies to:

- Have, or disclose why they do not have, a minimum of two diverse board members;
- Publicly disclose board-level diversity statistics on an annual basis using a standardized matrix template called a Board Diversity Matrix.

The director diversity requirement will be phased in between 2022 and 2026, while disclosure of the Board Diversity Matrix will begin in 2022.

Governance

The SEC had an active year in the area of corporate governance, with more to come next year. As in other areas, political lines are sharply drawn, and some Clayton-era rules and policies are on the chopping block.

Proxies. Final rules adopted in November establish new requirements for all director elections, including uncontested elections. According to Chair Gensler, the rules fulfill an important aspect of shareholder democracy by putting investors voting in person and by proxy on equal footing.

The new universal proxy rules:

- Require the use of universal proxy cards by management and shareholders soliciting proxy votes for their candidates in director election contests;
- Specify formatting and presentation requirements for universal proxy cards;
- Establish new notice and filing requirements for all soliciting parties;

- Require shareholders presenting their own director candidates in the contest to solicit holders of a minimum of 67 percent of the voting power of shares entitled to vote in the election;
- Mandate that "against" and "abstain" voting options be provided on a proxy card where such options have legal effect under state law;
- Require disclosure in the proxy statement about the effect of all voting options provided.

The rules become effective January 31, 2022 and have a compliance date of August 31, 2022 for the universal proxy card requirements. The rules do not apply to registered investment companies and business development companies.

The SEC also proposed two additional sets of amendments related to proxies. First, amendments proposed in September would finalize one of the last parts of mandated rulemaking under the Dodd-Frank Act of 2010. The proposed rules would require fund managers to report their "say-on-pay" votes on executive compensation matters to investors on Form N-PX. The proposal would also standardize information reported on Form N-PX and require it to be machine-readable, making it easier to analyze electronically. Comments on the proposal are due December 14, 2021.

Second, the SEC proposed to rescind portions of Clayton-era rules imposing requirements on proxy advisory firms. The proposal would remove conditions on exemptions from the proxy rules' information and filing requirements that proxy advisory firms often rely on, including a condition that proxy advisory firms make their advice available to companies for review before providing the advice to their clients. The proposal would also eliminate Note (e) of Rule 14a-9, which added examples of material misstatements or omissions related to proxy voting advice. Investors and others expressed concern that Note (e) may increase proxy advisory firms' litigation risks, which could impair the independence and quality of their proxy voting advice. Comments on the proposal are due December 27, 2021.

Executive compensation clawbacks. In a separate proposal, the SEC reopened comment on proposed rules that would require executives to give back incentive-based pay earned based on financials that are later restated. The proposal would implement Section 10D of the Exchange Act, as added by the Dodd-Frank Act, to require securities exchanges to prohibit the listing of securities of an issuer that does not adopt and comply with a written compensation recovery policy that complies with the applicable listing standard.

Section 10D provides for a strict liability regime. That is, the rule would cover restatements due to mere errors, rather than being limited to restatements arising from misconduct. Section 10D also contains certain specific provisions, including a three-year lookback period and an enumerated category of company officers subject to the rule. Due to these "baked-in" provisions of Section 10D, the SEC's proposed rules have somewhat limited discretion as to what restatements would be covered, timing of the lookback, and what officers are covered.

Comment letters on the proposal give a preview of what aspects will be debated in the discussions to come. Many comments advocated for either broader or narrower applicability on elements of the proposed rules. For example, a comment letter by Davis Polk stated the view that the rule should not cover restatements that correct errors that are not material to previously issued financial statements. A comment letter by the Society for Corporate Governance similarly advocated that the final rules should only be triggered by so-called "Big R" restatements, not "Little r" restatements. In contrast, Better Markets urged the SEC to extend the clawback provision to all accounting restatements.

Stock buybacks. In a controversial proposal issued December 15, the Commission voted 3-2 to propose a new Form SR to report stock buybacks within one business day.

Currently, issuers typically disclose the repurchase plans themselves when the board authorizes them, but not the dates on which they will buy back shares under the plan. As a result, the public generally learns of the actual buybacks in the issuer's periodic reports long after the trades are executed. The new Form SR would require issuers to identify the class of securities purchased, the total amount purchased, the average price paid, and the aggregate amount purchased on the open market in reliance on the safe harbor of Exchange Act Rule 10b-18 or under a 10b5-1 trading plan.

The amendments would also require an issuer to disclose the objective or rationale for the buybacks and any policies and procedures relating to insiders' purchases and sales during a repurchase program. Finally, the issuer would have to check a box if any officer or director subject to Section 16(a) reporting requirements bought or sold shares within 10 business days before or after the buyback announcement.

Lee emphasized that the proposal does not prescribe how or why companies buy back their stock, but rather requires disclosures to let investors evaluate how, why, and to what effect companies are engaging in buybacks.

Peirce disagreed, however, again calling the disclosure "indirect regulation of corporate activity" and objecting that concerns about informational asymmetries could be addressed through more tailored means. She and Roisman both highlighted an SEC study, mentioned in a footnote to the proposal, concluding that the firms that repurchased the most stock generally did not have compensation targets linked to earnings per share or considered the impact of repurchases when setting the targets or determining if targets were met. Roisman said that a better approach would be for companies to disclose in their Form 8-K that they intend to repurchase shares, and file a new 8-K if their plans change. This would communicate information without the daily reporting burden or the risk of discouraging buybacks, he said.

While Crenshaw supported the proposal, she agreed with Roisman's point that the buyback rules should be read in conjunction with the proposal on insider trading plans. Gensler also took up this point and said he is glad that the Commission is proposing the two sets of amendments on the same day, giving the public a sense of the agency's thinking and enabling them to comment within a similar time frame.

Rule 10b5-1 plans. Finally, with an eye to curbing insider trading, on December 5 the SEC issued proposed rules that would impose restrictions on 10b5-1 trading plans.

In June, SEC Chair Gary Gensler announced that staff was preparing recommendations to close some gaps in Rule 10b5-1, which provides an affirmative defense to insider trading for officers and directors who trade stock under plans entered into in good faith and before learning of material information. Gensler said then that there has been broad bipartisan support for the idea, telegraphing the result of today's vote, which saw all five commissioners agree to propose rules requiring a cooling-off period and limiting overlapping and one-off plans. While joining their Democratic colleagues, Peirce and Roisman nevertheless expressed reservations about some aspects of the proposal.

Under current rules, traders can adopt a trading plan and then execute a trade the same day, leading to concerns that insiders can capitalize on material nonpublic information. The amendments to Rule 10b5-1 would impose cooling-off periods delaying transactions under the trading plan for 120 days (for officers and directors) and 30 days (for issuers structuring a share repurchase plan under the rule). The 120-day period for individuals was designed to span an entire quarter, so that no trading could occur under a plan until the financial results associated with that quarter are public.

The amendments would also prohibit overlapping trading plans and limit single-trade plans to one in any consecutive 12-month period. Officers and directors entering into a 12b5-1 plan would also have to certify to the issuer that they are not aware of any material nonpublic information and are adopting the plan in good faith.

The proposed amendments would also require new disclosures. A new table would report any options granted within 14 days of the release of material nonpublic information and the market price of the underlying securities the day before and after that disclosure. Forms 4 and 5 would include checkboxes about the applicability of a 10b5-1 or other plan, and gifts of securities previously reported on Form 5 would be required under Form 4.

Peirce said she had been prepared to dissent from the proposal but that the staff ultimately won her over. She said the cooling-off periods and restrictions on overlapping plans are reasonable and that the once-a-year allowance for one-off plans is narrowly tailored. However, she expressed concerns about the certification requirement and the condition that the plan be "operated" in good faith, as well as what she called the "indirect regulation of corporate activity through our disclosure rules."

Outlook for proposed rules. As with the human capital proposal, with the 3-2 Commission split in favor of Democrats, it is likely that the Commission will be able to finalize the proposed rules in 2022, so long as no Democratic commissioners depart. However, if finalized it is possible the more controversial proposals might end up challenged in court.

Change in exclusion of shareholder proposals. Finally, staff issued a new legal bulletin that rescinded three Clayton-era legal bulletins, giving staff greater discretion to decline to allow companies to exclude shareholder proposals. Staff Legal Bulletin 14L (SLB14L) restates the staff's approach to significant social policies under the Rule 14a-8 ordinary business and micromanagement exceptions. Specifically, SLB 14L rescinds Staff Legal Bulletins 14I (November 2017), 14J (October 2018), and 14K (October 2019).

Under the new approach to the "ordinary business" exception, staff will no longer focus on determining the nexus between a policy issue and the company. Instead, staff will consider the social policy significance of the issue that is the subject of the shareholder proposal.

For example, a proposal that raises human capital management issues with a broad societal impact would not be subject to exclusion under paragraph (i)(7) solely because the proponent did not demonstrate that the human capital management issue was significant to the company.

SLB 14L also eliminates the expectation that a company will include a board analysis as part of demonstrating that the proposal may be omitted under the ordinary business exclusion.

Regarding micromanagement, the staff's new position is that proposals seeking detail or wanting to promote timeframes or methods do not automatically constitute micromanagement. Rather, staff will focus on the level of granularity sought in the proposal and whether, and to what extent it inappropriately limits discretion of the board or management.

For example, staff cited its March 2021 letter to ConocoPhillips, in which staff denied relief for a proposal requesting that the company set targets covering the greenhouse gas emissions of the company's operations and products. In concluding that the Conoco proposal did not constitute micromanagement, staff noted that the proposal requested that the company set emission reduction targets but did not impose a specific method for doing so. Under the new approach, staff will not concur in the exclusion of even proposals that suggest targets or timelines, as long as the proposals give management discretion to as to how to achieve the goals.

Finally, SLB 14L also addressed the economic relevance exception in Rule 14a-8(i)(5). Staff announced it has decided to return to its prior approach to this exception. Specifically, proposals that raise issues of broad social or ethical concern related to the company's business may no longer be excluded, even if the relevant business falls below the (i)(5) economic thresholds.

Implications. The new staff guidance is expected to reduce the ability of companies to exclude shareholder proposals with which they do not agree. Proposals on issues deemed to have broad societal impact will be significantly less excludable—even if the issue does not have high economic impact for a particular company. Further, shareholders will be able to demand specific quantitative targets—significantly decreasing wiggle room for companies to argue they have already met the demanded goals.

Together with the expected forthcoming proposed rules on human capital and climate change disclosures—widely expected to require the disclosure of specific quantitative metrics—it is likely the new staff guidance will act as a significant "force multiplier" for shareholder efforts to drive change in the areas of environmental, social, and governance goals.

ESG Enforcement

Then-Acting Chair Allison Herren Lee put the SEC on a path toward looking more closely at ESG issues before the permanent Chair was confirmed in April. Since becoming Chair, Gary Gensler has begun to publicly explain what that path may look like, while Gensler's Enforcement Director, Gurbir Grewal, has likewise begun to explain what ESG enforcement may look like.

In a June 2021 speech, Gensler announced that he had asked SEC staff to prepare recommendations for the Commission on climate risk and human capital. Gensler indicated that the climate risk recommendation would likely focus on governance, strategy, and risk management as well as metrics on topics such as greenhouse gas emissions. With respect to human capital, the recommendations can be expected to address workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety. In both instances, the recommendations would appear to address topics already identified in proposed legislation introduced in Congress and partially addressed by existing SEC regulations.

Grewal likewise gave a speech in November 2021 in which he emphatically denied that the SEC, by enforcing its existing laws and regulations, had engaged in "regulation by enforcement." With respect to ESG, Grewal said: "As with any investigation, we look to make sure our current rules and laws are being followed. For issuers, this means that we apply long standing principles of materiality and disclosure. If an issuer chooses to speak on climate or ESG – whether in an SEC filing or elsewhere – it must ensure that its statements are not materially false or misleading, or misleading because they omit material information – just as it would when disclosing information in its income statement, balance sheet, or cash flow statement."

Grewal's speech also mentioned two matters discussed in detail below—Fiat Chrysler Automobiles N.V.'s 2021 settlement with the SEC of disclosure violations over auto emissions and the SEC's 2008 settlement with Pax World Management Corp. over its claims to investors that it met certain benchmarks for "socially responsible investing." Grewal, however, did not mention several pending matters, which are also discussed below.

Division of Enforcement. In March 2021, the SEC took a major step toward emphasizing ESG enforcement when it created the Climate and ESG Task Force to be housed within its Division of Enforcement. The press release announcing the task force suggested a sizeable effort (i.e., a "[d]ivision-wide effort, with 22 members drawn from the SEC's headquarters, regional offices, and Enforcement specialized units") geared toward "proactively" rooting out misconduct related to ESG. As part of this effort, the task force was charged with serving as a coordinator of Enforcement Division resources that includes using "sophisticated data analysis to mine and assess information across registrants, to identify potential violations." The task force also will coordinate with the SEC's Senior Policy Advisor for Climate and ESG.

The Climate and ESG Task Force has as its initial goals several tasks; the first two tasks are described as the task force's "initial focus," while the second two tasks area additional items the task force will handle:

- Identify material gaps or misstatements in issuers' disclosure of climate risks under existing rules.
- Analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.
- Evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues.
- Provide expertise and insight to teams working on ESG-related matters across the Division.

The Climate and ESG Task Force was created during Lee's tenure as the SEC's acting chair. Lee also had tasked the SEC's Division of Corporation Finance with placing a "enhanced focus" on how companies apply the SEC's existing guidance to their disclosures about climate change. According to a statement issued by Lee, the purpose of the enhanced focus is to engage with public companies in preparation for an update to the SEC's 2010 climate change disclosure guidance. Commissioners Hester Peirce and Elad Roisman would later jointly reply to Lee that it was unclear what "enhanced focus" would mean in light of the fact that the Commission has not issued any new ESG guidance or any new ESG regulations. Both Peirce and Roisman viewed the "enhanced focus" more as a "re-framing of the ongoing work" while also emphasizing that the SEC must "review any alleged securities violations in light of the regulations and guidance in existence at the time of the conduct in question."

Aside from the creation of the Enforcement Division task force, there were two other division-level events and one attempt at investor education that, collectively, provide additional hints of what the SEC staff may be looking for as they implement an "enhanced focus" on ESG.

Division of Corporation Finance. The Division of Corporation Finance published a "Sample Letter to Companies Regarding Climate Change Disclosures" on September 22, 2021. Specifically, the sample letter notes that disclosure may be required regarding a company's description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations. The sample letter also reiterated the general admonition that disclosures must contain "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."

Commission guidance issued in 2010 provides even more specific recommendations for climate change disclosures. In addition to required Regulation S-K disclosures, a company may need to disclose information about: (1) the impact of legislation and regulations; (2) international accords; (3) indirect consequences of regulations or business trends (e.g. reputation risk); and (4) the physical impacts of climate change (Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106, February 2, 2010, 75 F.R. 6290, February 8, 2010; SEC Codification of Financial Reporting Policies 501.15 (largely restating the Commission's guidance).

Although a specific company's circumstances and the industry in which it conducts business may lead to more refined staff inquiries, the sample letter suggests the following areas of concern:

- ***General comment.*** A company should explain whether it considered providing the same type of climate-related disclosure in its SEC filings and its social responsibility report (CSR), especially if the CSR report was more expansive than the company's SEC filings.
- ***Risk factors.*** A company should consider disclosure of the material effects of transition risks related to climate change, including policy and regulatory changes, market trends, credit risks, or technological changes. A company also should consider disclosure regarding material litigation risks.
- ***Management's Discussion and Analysis.*** The MD&A section of the sample letter addressed multiple topics: (1) material effects of material pending or existing climate change-related legislation, regulations, and international accords; (2) identification and quantification of any material past and/or future capital expenditures for climate-related projects; (3) the indirect consequences of climate-related regulation or business trends (e.g., market demands for goods or services

with lower greenhouse gas (GHG) emissions, the demand for alternative energy sources, and reputational risks arising from operations or products that produce material GHG emissions); (4) physical effects of climate change on your operations and results (e.g., the impact of extreme weather conditions generally and more specifically on agricultural production and on the cost or availability of insurance); (5) quantification of material increased compliance costs; and (6) disclosure about material purchases or sales of carbon credits or offsets.

Division of Examinations. In March 2021, the Division of Examinations announced its 2021 examination priorities would include reviewing products offered by registered investment advisers (RIAs) that purport to focus on sustainability, social responsibility, and ESG. Then-Director Pete Driscoll suggested via a press release accompanying the 2021 exam priorities that while the division focuses on many new topics its core focus is compliance and investor protection. Said Driscoll: “Our priorities reflect the complicated, diverse, and evolving nature of the risks to investors and the markets, including climate and ESG. In this unprecedented time, the Division is committed to continuing to adapt examination processes and find innovative ways to enhance the effectiveness of examinations and our risk-based approach.”

Specifically, the division said its 2021 reviews with respect to ESG would target widely available products offered by open-end funds and ETFs and other offerings made to accredited investors via qualified opportunity funds.

According to the Division of Examinations it will review RIAs for four specific items:

- The consistency and adequacy of disclosures to clients;
- Whether RIAs’ processes and practices match their disclosures;
- Whether fund advertising contains false or misleading statements; and
- Whether proxy voting policies and procedures align with fund strategies.

In discussing its role in informing SEC policy, the Division of Examinations explained that it gathers information about a range of topics, including ESG, from its observations of examinations, the tracking of “risk themes” in examinations, and other more targeted national and local initiatives. In April 2021, the division published a Risk Alert titled “The Division of Examinations’ Review of ESG Investing,” in which it reviewed investment advisers, registered investment companies, and private funds (“firms” in the division’s vernacular) that offer ESG products and services. Overall, the division observed the following behaviors by firms:

- potentially misleading statements (including how the firm follows global ESG frameworks)
- a lack of policies and procedures related to ESG investing;
- policies and procedures that did not appear to be reasonably designed to prevent violations of law, or that were not implemented;
- documentation of ESG-related investment decisions that was weak or unclear; and
- compliance programs that did not appear to be reasonably designed to guard against inaccurate ESG-related disclosures and marketing materials.

Investor bulletin. The SEC's Office of Investor Education and Advocacy periodically issues Investor Alerts on various topics, often repeating some version of the most basic investing advice: (1) independently verify all investment opportunities; (2) review SEC filings for companies and firms soliciting investments; (3) check SEC and FINRA resources to ensure that your broker is registered and to view your broker's discipline record; and (4) avoid investments that appear to be too good to be true. The Office of Investor Education and Advocacy most recently mentioned ESG investing in connection with World Investor Week, for which it issued an Investor Bulletin in which it briefly addressed ESG and multiple other topics. Previously, the Office of Investor Education and Advocacy issued Investor Bulletins regarding topics related to the "environmental" aspect of ESG investing, including California wildfires (October 17, 2017 and November 29, 2018), and for other natural disasters (Hurricane Ida; Hurricanes Laura and Sally, and West Coast wildfires; and Hurricanes Florence and Michael). Those Investor Bulletins focused on frauds related to lump sum insurance payouts to those who sustained property losses due to natural disasters. Yet another recent Investor Bulletin addresses the potential that fraudsters may exploit "national crises and periods of uncertainty" associated with the COVID-19 pandemic.

However, the Office of Investor Education and Advocacy's most extensive statement on ESG investing appears in a document titled "Environmental, Social and Governance (ESG) Funds – Investor Bulletin" (February 26, 2021). The Investor Bulletin explained that ESG investing can mean many different things depending on a fund's specific emphasis. For example, ESG investing may include sustainable investing, socially responsible investing, and impact investing. Moreover, ESG funds may weight their investments to focus on one or more or all of the "ESG" components; funds that invest in only one or two of the components may not match an investor's overall ESG goals—for example, a fund could emphasize companies that follow best practices for corporate governance but which otherwise do not meet investors' expectations regarding the environmental or social components of ESG.

As a result, the Investor Bulletin suggested that investors conduct whatever due diligence they can before making an investment in an ESG fund. Specifically, the Investor Bulletin said investors should: (1) read a fund's prospectus and most recent shareholder report; (2) understand the fees and expenses to be paid for the fund and compare those fees to other investment options; (3) consider whether the fund's investment strategy is consistent with your investment goals; and (4) ask lots of questions (the Investor Bulletin suggests eight specific questions as a starting point).

Enforcement preview: automobiles, social investing, and cheesecake. What might SEC enforcement look like given the recent regulatory developments discussed above? It is plausible that the SEC's ESG enforcement framework will look much like cases in other enforcement areas but with an ESG emphasis. Also, it seems likely that the SEC, at least initially, would pursue what it might view as the worst offenders rather than pursuing edge cases. Such an approach could look like the enforcement proceedings brought against Volkswagen AG and Fiat Chrysler Automobiles N.V. regarding the "Dieselgate" and related emissions cheating scandals and the enforcement proceeding brought against The Cheesecake Factory Incorporated regarding its disclosures about the impact of the COVID-19 pandemic on the sustainability of its business operations and financial condition. Although perhaps none of these matters is a perfect analog for the types of cases the SEC may eventually bring under its "enhanced focus" on ESG, all three cases do emphasize environmental, climate change, and sustainability issues that are at the core of ESG disclosure. If and when the SEC adopts final ESG regulations, those regulations will further shape how the agency approaches enforcement in the ESG space.

The SEC brought a case in federal court against Volkswagen Aktiengesellschaft (Volkswagen AG), former Volkswagen AG CEO Martin Winterkorn, Volkswagen Group of America Finance, LLC, and VW Credit, Inc. for violations of the antifraud provisions of federal securities laws based on the company's efforts to induce investors to buy inflated corporate bonds and asset-backed securities that were to help finance the company's "clean diesel" cars, which the "Dieselgate" defeat device scandal revealed to be a fraud. Specifically, the SEC charged that: (1) Volkswagen AG, Winterkorn, and Volkswagen Group of America Finance violated Exchange Act Section 10(b) and Rule 10b-5; (2) Volkswagen AG and Volkswagen Group of America Finance violated Securities Act Section 17(a)(2), while Winterkorn aided and abetted these violations; (3) VW Credit, Inc. violated Securities Act Sections 17(a)(2) and 17(a)(3); and (4) Volkswagen AG and Winterkorn were controlling persons under Exchange Act Section 20(a). The SEC's lawsuit seeks permanent injunctions, disgorgement, and civil penalties against Volkswagen AG and other named corporate defendants, plus injunctions, civil penalties, and an officer and-director bar against then- Volkswagen AG CEO Martin Winterkorn.

In a press release announcing the SEC's complaint, then-Co-Director of the Division of Enforcement, Stephanie Avakian, said: "Issuers availing themselves of American capital markets must provide investors with accurate and complete information. As we allege, Volkswagen hid its decade-long emissions scheme while it was selling billions of dollars of its bonds to investors at inflated prices."

The Volkswagen AG suit, however, has been mired by a series of discovery disputes and the court has dismissed a portion of the case that addressed claims about bond offerings that were premised on Volkswagen AG 's risk factor disclosures. The court also dismissed all claims against VW Credit, Inc. The SEC has filed an amended complaint deleting language regarding ABS claims but re-alleging all of the claims made in the agency's original complaint, while noting that Count V, dealing with VW Credit, Inc., was included to preserve that claim for a later appeal (*SEC v. Volkswagen Aktiengesellschaft*, March 14, 2019 (original complaint); *SEC v. Volkswagen Aktiengesellschaft*, September 4, 2020 (amended complaint); *SEC v. Volkswagen Aktiengesellschaft*, September 4, 2020 (redline version of original and amended complaints).

While the SEC's case against Volkswagen AG remains ongoing, Volkswagen AG found itself in yet another embarrassing situation in April 2021 in which it had to pull back a purported "April Fool's Day" corporate announcement stating that the company, in order to promote its electric vehicles, would change its name to "Voltswagen." At least one private lawsuit has been filed over the name scandal. The SEC has not taken any formal regulatory action, although media reports shortly after the Volkswagen AG public relations stunt indicated the SEC may be investigating the matter.

In related news, could another public relations effort involving Hertz and Tesla, Inc. draw SEC scrutiny? Hertz had announced in an October 25, 2021 press release suggesting that it would buy 100,000 electric vehicles from Tesla by the end of 2022 for its EV rental fleet. However, Tesla CEO Elon Musk, no stranger to SEC enforcement actions over his tweets, remarking on the change in

Tesla's share price upon the Hertz announcement via a November 1, 2021 tweet (which appears to have been subsequently removed) said: "You're welcome! If any of this is based on Hertz, I'd like to emphasize that no contract has been signed yet. Tesla has far more demand than production, therefore we will only sell cars to Hertz for the same margin as to consumers. Hertz deal has zero effect on our economics." Musk was referring to a run-up in Tesla's stock price after the Hertz announcement. Regardless of whether the Hertz-Tesla statements will draw the same SEC scrutiny that the Volkswagen AG April Fool's stunt reportedly has remains to be seen, but the takeaway should be that words do matter, especially those spoken by a company's top executives. Given the SEC's enhanced focus on ESG disclosures, companies will need to ensure the accuracy of any public statements on topics that touch ESG.

In the Fiat Chrysler matter, the SEC alleged that the company, spurred by the Volkswagen revelations, conducted an internal review to determine if any of its automobiles had been fitted with defeat devices. The SEC's order said the company had issued a press release and annual report asserting that its automobiles complied with U.S. emissions regulations but that these statements were nevertheless misleading because they failed to disclose that the narrow purpose of the internal review was to identify defeat devices rather than to determine compliance with U.S. emissions regulations more broadly. The Company settled charges brought by the DOJ and California regulators that Fiat Chrysler's Ram 1500 and Jeep Grand Cherokee vehicles for model years 2014-2016 had auxiliary emission control devices (AECDs) that defeat engine control systems to allow higher nitrogen oxide (NOx) emissions during road driving conditions. The company also settled the SEC's charges by agreeing to stop violating Exchange Act Section 13(a) and Rules 12b-20 and 13a-16 while also agreeing to pay $9.5 million. Fiat Chrysler neither admitted nor denied the SEC's findings. Joel R. Levin, then-Regional Director of the SEC's Chicago Regional Office, said of the settlement: "This case demonstrates the importance of public companies providing accurate and complete information to investors. At a time of heightened scrutiny of automakers' regulatory compliance, FCA provided misleading assurances to investors by not disclosing the limitations of its internal audit." (*In the Matter of Fiat Chrysler Automobiles N.V.*, Release No. 34-90031, September 28, 2020).

ESG investing has been around in one form or another for decades, often going under the moniker "socially responsible investing." In 2008, the SEC charged that Pax World Management Corp. violated Investment Advisers Act Section 206(2) and Investment Company Act Sections 13(a)(3) and 34(b) by failing to adhere to its internal "socially responsible investing" (SRI) screens, which prohibited it from advising funds in its portfolio to acquire or hold securities of companies whose business is weapons, alcohol, tobacco, or gambling. Pax World also had a requirement to divest securities of companies that had been acquired by other companies who securities would trigger the SRI screens. The SEC alleged that the funds advised by Pax World held at least one prohibited security during the period 2001 to 2006. At the time of the SEC's order, Pax World had been registered with the Commission as an investment adviser for 36 years and had advised four funds that also were registered as investment companies. Pax World agreed to cease and desist from engaging in future violations, was censured, and agreed to pay a civil money penalty of $500,000. The SEC said it had considered remedial steps taken by Pax World as well as the adviser's cooperation in the matter. Pax World agreed to the settlement without admitting or denying the SEC's findings (*In the Matter of Pax World Management Corp.*, Release No. IA-2761, July 30, 2008).

Remarks by SEC officials on the Pax World matter appeared to place great emphasis on the special goals of socially responsible investment funds. Then-SEC Enforcement Director Linda Chatman Thomsen explained: "Advisers simply cannot tell investors they are going to do one thing with their funds and then not follow through on those promises. This is particularly true with socially responsible mutual funds because their stated investment restrictions are likely the primary reason an investor chooses to invest in these funds in the first place." David Bergers, then-Director of the SEC's Boston Regional Office, added: "Mutual fund companies marketing socially responsible funds should take care that their representations to investors match their investments. Like all investment advisers, advisers to socially responsible funds must have adequate procedures and internal controls to ensure compliance with the funds' stated investment restrictions" (SEC press release, July 30, 2008).

And in one last recent enforcement matter, The Cheesecake Factory Incorporated agreed to settle claims by the SEC that it materially misstated its business operations and financial condition regarding the impact of the COVID-19 pandemic in press releases attached to two Forms 8-K furnished to the SEC. Although the Cheesecake Factory matter is not an ESG enforcement action per se (it would tend toward the governance side of ESG but could also be considered a social or employee matter when companies respond to COVID-19 with layoffs or otherwise alter employee working conditions), it does suggest the SEC's expectations about public company disclosures in the context of a rapidly changing external business environment. In the ESG context, such changes could result from extreme weather events, fuel and energy shortages, national social awakenings such as the events that followed the killing of George Floyd by a Minneapolis police officer, or other major events that may challenge the viability of a company's existing business model.

In the Cheesecake Factory matter, the company had in its public statements and in SEC filings presented a rosier picture of its immediate business prospects than was painted by internal discussions in which the company had decided not to pay rent on many of its restaurant locations and was internally acknowledging a negative cash flow rate of $6 million week. As a result, the SEC charged Cheesecake Factory with violating Exchange Act Section 13(a) and Rules 12b-20 and 13a-11. Cheesecake Factory agreed to cease and desist from engaging in future violations and to pay a civil money penalty of $125,000 without admitting or denying the SEC's findings (*In the Matter of The Cheesecake Factory Incorporated*, Release No. 34-90565, December 4, 2020; SEC press release, December 4, 2020 ("The action is the SEC's first charging a public company for misleading investors about the financial effects of the pandemic.")).

The CFTC's Sustainability and ESG activities in 2021 and a look ahead

A year of some talk, leadership departures, and little action. The CFTC has been in a holding pattern in 2021 with respect to sustainability and ESG policy matters. The Commission was fully staffed at the beginning of 2021, with Chairman Heath Tarbert at the helm, but its ranks shrunk as the year proceeded. With the inauguration of President Joe Biden in January, Tarbert, a Republican, stepped down from the chairmanship, and handed the leadership reins to Democratic Commissioner Rostin Behnam on an acting basis. Behnam continued in that capacity until December 15, 2021 when the Senate finally confirmed him as the agency's chairman.

Tarbert eventually left the agency as a commissioner in March, and former Commissioner Brian Quintenz, also a Republican, followed suit in August. In September, President Biden announced his intent to nominate Behnam as the permanent CFTC Chairman, and a confirmation hearing was held before the Senate Committee on Agriculture, Nutrition, and Forestry on October 27, 2021. Also in October, Dan Berkovitz stepped down as a commissioner to become the general counsel at the SEC.

Given the absence of a permanent chairman and the raft of ensuing commissioner vacancies, policy-making initiatives at the CFTC have largely been in a state of limbo in 2021. There was little activity in the sustainability and ESG realms. Moreover, given the uncertainties surrounding the CFTC chairmanship in 2021, Behnam's public comments which specifically addressed sustainability and ESG issues and initiatives during the year, were kept to a bare minimum.

Behnam shares views on climate risks and ESG issues in Senate testimony. Some insight into Behnam's thinking on sustainability and ESG can be gleaned from his testimony before Senate Agricultural Committee as part of the confirmation process to become CFTC Chairman. In a prepared statement, Behnam chose his words carefully, noting:

> "The pandemic has taught us much about the importance of preparing for extreme but plausible events. In March, I formed the Climate Risk Unit, to explore the CFTC's role in managing climate related financial market risk, and supporting an orderly transition. Derivatives will play a key role in market-based solutions. While focusing on the risks climate change poses is imperative, I do not want to lose sight of the opportunities endemic to a transition. I believe the CFTC must play a role in this market growth if the larger transition goals are to be met."

In responding to questions from committee members, Behnam expressed views supportive of the CFTC playing an important role in addressing climate risk issues but was careful not to elicit ire or rancor from Republican senators. Nonetheless, some of those exchanges reveal where Behnam might stand on these issues.

When asked by Ranking Member John Boozman (R-Ark) to speak to the risk of transitioning to a clean climate plan, Behnam stated that transition risk requires moving forward towards carbon neutrality without upsetting the balance of the energy markets. He noted that consumer demands for clean energy must also be met, and he fears that weather events will become more frequent and more severe, which could cause crises for the financial system.

In responding to Senator Tommy Tuberville (R-Ala) about his view of the CFTC's role in climate change Behnam indicated the CFTC's role as a risk management agency that has looked at weather for decades as a predictor of crop yields and transition risks. He noted that the agency must support market-based solutions of innovative futures and derivative products that can hedge risk.

Senator Roger Marshall (R-Kan) asked Behnam how he sees carbon taxes and the carbon market interact with derivatives. Behnam responded that we are seeing carbon offset products, natural resource scarcity markets, and far more innovation. He noted that the CFTC can play an important role in empowering these markets through risk mitigation. When asked what the agency can do about natural disasters affecting commodities, Behnam responded that the CFTC is always looking at market disruption events. He added that although the Commission is not a price-setting agency, it does have fraud and manipulation authority, and that this becomes important if there is suspicion of violation in a natural disaster.

Senator John Hoeven (R-ND) queried the role the CFTC can play in a market-based approach to providing carbon credits for agriculture. Behnam responded by pointing to the CFTC's decades of experience in regulating commodity markets, and that it can always contribute by means of price transparency, risk management, and the structure of an operationally well-run market.

Democratic members also had some questions for Behnam about climate and ESG. Committee Chairwoman Debbie Stabenow (D-Mich) asked him what role the CFTC should play in the emerging voluntary climate markets. In response, Behnam stated that regulators must be a part of the market formation conversation to address core components of pre- and post-trade transparency, clearing, settlement, and best practices.

Senator Kirsten Gillibrand (D-NY) asked Behnam about his plans to implement challenges of climate change into risk evaluation. He responded by indicating that risk can be compounded with long-term weather patterns such as droughts and natural disasters like wildfires and hurricanes.

Senator Sherrod Brown (D-Ohio) was the only committee member who had a purely ESG-related question for Behnam, asking what he has been able to do about improving diversity at the CFTC. Behnam responded by noting that the agency had expanded positions for diverse recruitment at all levels in the organization. While admitting that the agency was behind on diversity, Behnam indicated he was looking to expand the agency's hiring pool to represent a fuller picture of America.

CFTC creates Climate Risk Unit though status unclear. In March, with some flourish and a degree of urgency, Behnam announced the creation of the Climate Risk Unit (CRU), a new interdivisional group designed to help the agency move forward in its ongoing efforts to address climate-related risks and a transition to a low-carbon economy. Behnam proclaimed, "I believe we must move urgently and assertively in utilizing our wide-ranging and flexible authorities to address emerging risks. The CFTC's unique mission focused on risk mitigation and price discovery puts us on the front lines of this effort." He added, "Leveraging the CFTC's personnel and expertise demonstrates our commitment to taking thoughtful and deliberate next steps toward building a climate-resilient financial system."

In an agency press release, the CRU was described as the CFTC's next step in response to a global call to action on tackling climate change. It was further noted that the CRU would look to accelerate the CFTC's early engagement in support of industry-led and market-driven processes in the climate, as well as the larger ESG space. Towards that end, the release noted that CRU would consider the following:

- An active and ongoing dialogue with the exchanges, clearinghouses, industry groups, and market participants, regarding new and emerging risks related to climate change and the impact of extreme and increasingly frequent and severe weather events and how such climate-related market risks are being or ought to be addressed in a fair and equitable way.
- The pursuit of a better and more complete understanding within the CFTC of the derivatives and related products being developed to address climate-related market risks and to facilitate the transition to a net-zero economy, and how such products fit within and interact with the CFTC's regulatory and supervisory framework.
- Increased participation in domestic and international fora aimed at building consensus for consistent standards, taxonomies, disclosures, and practices across derivatives products and markets, as well as related clarity on regulatory, capital, and accounting standards.
- Coordinating efforts to support the development of relevant and reliable climate-related market risk data resources.

Nonetheless, since the creation of the CRU in March, the CFTC has not provided any public updates regarding the unit's staffing, undertakings during the year, or specific actions contemplated in the future.

Further acclaim for the landmark CFTC MRAC climate risk report. In September 2020, the Climate-Related Market Risk Subcommittee of the CFTC's Market Risk Advisory Committee (MRAC) released its Managing Climate Risk in the U.S. Financial System report, considered by many to be the blueprint for U.S. regulators with respect to climate-risk undertakings. At an MRAC meeting in February, Subcommittee Chairman Bob Litterman issued a briefing report that expanded on the landmark climate report. Litterman underscored the report's central message "that U.S. financial regulators must recognize that climate change poses serious risks to the U.S. financial system, and they should move urgently and decisively to measure, understand, and address these risks as well as help to increase the flow of capital toward building the net-zero economy of the future." Litterman observed that the report has been widely read and well received, and noted the accolades it received from former SEC Chairman Mary Schapiro, who described it as a "superb roadmap."

For her part, Commissioner Dawn Stump, a Republican, stated concerns regarding the CFTC's misunderstood role in the climate risk arena, especially regarding carbon emission controls. She stated, "I often worry that as the CFTC's public profile expanded, our role may be increasingly misunderstood—a concern that is demonstrated by press accounts and social media entries suggesting that the CFTC is promoting such things as bitcoin or carbon emission controls." She added, "The public should understand that the CFTC simply monitors developments in these areas because they are important factors in the proper functioning of the derivatives markets. We do not regulate them, and we certainly aren't in the business of promoting these things."

Litterman also took the opportunity to highlight the report's number one recommendation which calls for putting an effective price on carbon. He described that as the root of the climate problem. In advocating for a carbon tax, Litterman stated that we must create strong incentives now to protect future generations.

Commissioner Stump weighs in on climate and ESG matters. In November, Commissioner Stump came to Chicago to deliver keynote remarks at the FIA Expo even though that role has traditionally been reserved for the CFTC's chairman. In that speech, Commissioner Stump provided some of her views on climate change as well as ESG matters, which provides some window on the minority party's perspective.

With respect to climate and carbon markets, Stump underscored the crucial importance of balancing the interests of investors and consumers. Specifically, she noted the potential for stranded assets, changes in asset prices, credit risks, supply disruptions, stating, "Investors should work with those that provide our economy with essential goods and services to determine how best to balance carbon reduction efforts against these new risks during the transition they seek. It would be unfortunate for the government to be the source of such new risks."

In Stump's view, the CFTC can be of the greatest assistance in the climate space by lending its expertise in facilitating the use of derivatives and risk management tools, regardless of whether these climate-related risks are driven by government mandates or consumer and investment demand.

With regard to a broader discussion of ESG factors, Stump pointed to the difficult questions surrounding how to value a company's ESG standing, the wide variety of opinions on this score, and how reliable data is often hard to come by in this area. Nonetheless, with respect to the governance factor, Stump set forth her own belief that encouraging a diverse set of views yields alternative ways of considering challenges and broadens the options for solving problems. In her view, such diversity of views is a benefit to any decision-making body, public company, government agency, or otherwise. Stump also stated that the way in which these underlying standards develop will impact the ability to realize well-functioning derivatives markets in this area.

A look ahead to 2022. With Rostin Behnam's recent Senate confirmation as CFTC Chairman, along with the distinct possibility of filling existing commissioner vacancies and the return to a fully staffed Commission, the likelihood that the CFTC will consider or embrace policies in the sustainability and ESG arenas in 2022 has greatly increased.

While Commissioner Dawn Stump announced in early December that she will not be seeking another five-year appointment at the conclusion of her current term in April of 2022, President Biden recently indicated his intent to nominate Summer Mersinger and Caroline Pham, both Republicans, to serve as commissioners. Mersinger most recently served as Commissioner Stump's chief of staff, and Pham is a managing director with Citigroup Inc., and previously served at the CFTC as a policy adviser to former Republican Commissioner Scott O'Malia.

Along with these appointments, in September, President Biden also announced his intent to nominate Kristin Johnson and Christy Goldsmith Romero, both Democrats, as commissioners. Johnson currently is a professor at Emory University School of Law where she works on financial markets risk management law and policy. Romero currently serves as the Special Inspector General for the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

All four commissioner nominees will be subject to Senate hearings and confirmation. Those hearings have not yet been scheduled. However, once a full CFTC leadership team in confirmed and put into place, there are high expectations that climate risk and ESG issues and policymaking will once again become center stage at the Commission.

A review of ESG bills in the 117th Congress

ESG disclosure is receiving a second look by the Biden Administration's SEC and CFTC. Both the SEC and the CFTC took small, modest steps in the direction of ESG disclosures during the last four years, with the SEC revising the environmental disclosures required under Regulation S-K and adding disclosures on human capital issues in that same rulemaking, while a CFTC advisory subcommittee issued a significant report on climate change.

The following mini-primer focuses on legislation that would require public companies to potentially make disclosures on a variety of ESG topics. Although many of the bills noted are unlikely to become law, a few of them have significant bipartisan backing and they collectively may signal to the SEC the direction some lawmakers believe the agency should take with respect to ESG disclosure regulations. While many of the bills would expand the SEC's remit, a few bills would curb SEC authority to regulate ESG disclosures. The mini-primer covers the last two Congresses, a period in which a significant number of ESG bills were introduced. It is expected that any bills from the 116th Congress that have not already been reintroduced likely will be reintroduced in the second session of the 117th Congress in 2022.

This mini-primer also employs former Delaware Supreme Court Chief Justice Leo Strine's "EESG" framework, which stands for "employees" (the added "E"), "environmental," "social," and "governance." This framework was chosen because the bills introduced in Congress generally fit the "EESG" formula, although some bills can be difficult to categorize because of the overlap between ESG or EESG topics. The use of the "EESG" framework is neither an endorsement of nor is it a critique of that framework and has been employed here for organizational purposes only.

Employees. In August 2020, the SEC adopted revisions to Regulation S-K that, among other things, mandate disclosure, to the extent material to understanding a company's business as a whole, information about human capital resources, including the measures or objectives the company uses to manage the business. The revision was a significant development but one that many lawmakers believe may not go far enough given the number of bills that have been introduced regarding disclosures about employees. Recent bills cover a wide range of employee-oriented topics:

- ***Accountable Capitalism Act*** (S. 3215; H.R. 6056), sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Ben Ray Lujan (D-NM)—The bill would require large companies to allow employees to elect 40 percent of a company's board.
- ***Reward Work Act*** (S. 915; S. 3540; H.R. 3355), sponsored by Sen. Tammy Baldwin (D-Wis) and Jesus "Chuy" Garcia (D-Ill). The bill would require that a company allow its employees to elect one-third (33 percent) of the company's directors. A later version of the bill would impose the same requirement on companies receiving COVID-19 aid and making a certain amount of share buybacks within a five-year period.

- ***Outsourcing Accountability Act*** (S. 1843; H.R. 3624), sponsored by Sen. Gary Peters (D-Mich) and Rep. Cynthia Axne (D-Iowa). The bill would add Exchange Act disclosures regarding public company outsourcing of jobs (excluding emerging growth companies). The House version passed the House on October 18, 2019 by a vote of 226-184.
- ***Greater Accountability in Pay Act*** (H.R. 1888), sponsored by Rep. Nydia Velasquez (D-NY). The bill would add Exchange Act pay ratio-style disclosure for pay increases of executives as compared to the median of all employees. The bill was reported by the House FSC on May 12, 2021 by a vote of 29-23.
- ***H.R. 6360***, sponsored by Alexandria Ocasio-Cortez (D-NY). The bill would require extensive workforce disclosures for public companies receiving COVID-19 aid.
- ***Take Responsibility for Workers and Families Act*** (H.R. 6379), sponsored by Rep. Nita Lowey (D-NY). Recipients of COVID-19 aid would have to adhere to human capital and other workforce disclosure provisions.
- ***Protections and Transparency in the Workplace Act*** (H.R. 562), sponsored by Rep. Ted Lieu (D-Calif). The bill addresses a wide range of discriminatory behaviors (including race, sex, and LGBTQ discrimination). The bill would require annual and quarterly disclosure regarding: (1) claims; (2) claims under investigation; (3) number of settlements; (4) number of court judgments; (5) aggregate amount of payments (including third-parties and insurance); (6) outcomes of adjudicated cases—presumably "adjudicated" means courts and administrative cases; (7) repeat settlements; (8) remedial efforts (e.g., employee training and prevention); and (9) the average time to resolve claims.
- ***Workforce Investment Disclosure Act*** (S. 1815; H.R. 3471), sponsored by Sen. Mark Warner (D-Va) and Rep. Cynthia Axne (D-Iowa). The bill would require a range of workforce disclosures similar to other bills. A prior version of the bill was reported on party lines by the House FSC on February 28, 2020 by a vote of 33-25. The current version was included in Title VI of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187), which passed the House on June 16, 2021 by a vote of 215-214.
- ***Employee Profit-Sharing Encouragement Act*** (H.R. 1665), sponsored by Rep. Bonnie Watson Coleman (D-NJ). The bill would deny a company a deduction under IRC Section 162(m) unless the company made qualified profit-sharing distributions to full and part-time employees who were employed with the company for at least one year on the date of distribution.
- ***H. Con. Res. 24***, sponsored by Rep. Lois Frankel (D-Fla). The resolution would recognize the significance of equal pay and the disparity between wages paid to men and women.
- ***Diversity and Inclusion Data Accountability and Transparency Act*** (H.R. 2123), sponsored by Rep. Joyce Beaty (D-Ohio). The bill would require regulated entities to provide information necessary for the Offices of Women and Minority Inclusion (OMWIs) at federal agencies to carry out their duties. The bill was reported by the House FSC on April 21, 2021 by a vote of 30-23.

- ***Encouraging More Proxy voting by Organized Workers, Employees, and Retirement Savers (EMPOWERS) Act*** (S. 1677; H.R. 3308), sponsored by Sen. Tammy Baldwin (D-Wis) and Rep. Pramila Jayapal (D-Wash). The bill would give employees greater say in how ERISA plans vote their proxies.
- ***Corporate Governance Improvement and Investor Protection Act*** (H.R. 1187), sponsored by Rep. Juan Vargas (D-Calif). The bill would address multiple ESG issues and includes in Title III the Greater Accountability in Pay Act, which previously was introduced by Rep. Nydia Velasquez (D-NY) as a stand-alone bill and would require pay ratio-style disclosures for pay increases of executives as compared to the median of all employees. The bill also includes in Title VI the Workforce Investment Disclosure Act, which has been previously introduced as a stand-alone bill sponsored by Sen. Mark Warner (D-Va) and Rep. Cynthia Axne (D-Iowa). Title VII of the bill, titled "Preventing and Responding to Workplace Harassment," would require the SEC to issue a regulation mandating that public companies disclose data about workplace harassment and sexual harassment complaints annually in their Forms 10-K (Title VII is similar to the Protections and Transparency in the Workplace Act (H.R. 562), sponsored by Rep. Ted Lieu (D-Calif)). The bill passed the House on June 16, 2021 by a vote of 215-214.

Environmental. Environmental disclosure can likewise address a wide range of topics, including climate change. Any future SEC disclosure requirements would likely be keyed, at least in part, to overarching federal policy as set by the Biden Administration. The Infrastructure Investment and Jobs Act (PL 117-58), signed into law on November 15, 2021, contains numerous environmental provisions, as does the proposed Build Back Better Act (H.R. 5376), which, as of publication, awaits action by the Senate (The text of the BBBA consists of the November 3, 2021 House Rules Committee Print, the manager's amendment dated November 4, 2021, and the manager's amendment dated November 18, 2021. A section-by-section summary provides additional information, although some section numbers no longer match the underlying bill text because of later amendments to the bill).

Public company disclosure of climate change risks is a main feature of many of the several environmental-themed bills introduced during the two most recent sessions of Congress. Senator Warren, for example, introduced her own bill on the topic while also calling on the SEC to adopt regulations mandating climate change disclosures. BlackRock Chairman & CEO, Larry Fink, has said that "[d]isclosure should be a means to achieving a more sustainable and inclusive capitalism" in a letter urging CEOs to do more regarding climate change and sustainability. The Investment Company Institute in December 2020 called on public companies to follow recommendations made by the Task Force on Climate-Related Financial Disclosures (TCFD) and the Sustainability Accounting Standards Board (SASB).

The debate within the SEC in recent years on climate change disclosure—and ESG more generally—has centered on principles-based versus prescriptive rules. This debate recently was brought into the open during a colloquy between Commissioners Allison Herren Lee and Hester Peirce during an open meeting to adopt revisions to Regulation S-K. Also at the SEC, the Asset Management

Advisory Committee's ESG Subcommittee had issued a draft recommendation to the full AMAC that the SEC not alter existing ESG-related requirements that companies make material disclosures, but the subcommittee did recommend that the SEC adopt mandatory standards to achieve "consistent, comparable, complete, and meaningful disclosure." A key concern for the subcommittee was the potential for misuse of ESG in labeling financial products. Moreover, the SEC's Investor Advisory Committee's Investor-as-Owner Subcommittee in May 2020 had recommended that the SEC revise its reporting requirements to add "material, decision-useful, ESG factors."

Existing SEC disclosure requirements for climate change and other environmental issues center on a small number of provisions in Regulation S-K. Item 101(c)(2)(i), for example, requires disclosure of "the material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period." A similar provision contained in Item 101(h)(4)(xi) provides for scaled disclosures by smaller reporting companies. Items 103, 105, and 303 of Regulation S-K also may require climate change or other environmental disclosures regarding legal proceedings, risk factors, and Management's Discussion and Analysis, respectively (See, Modernization of Regulation S–K Items 101, 103, and 105, Release No. 33–10825, August 26, 2020, 85 F.R. 63726, October 8, 2020 (effective November 9, 2020)).

Commission guidance issued in 2010 also provides recommendations for climate change disclosures. Specifically, in addition to required Regulation S-K disclosures, a company may need to disclose information about: (1) the impact of legislation and regulations; (2) international accords; (3) indirect consequences of regulations or business trends (e.g. reputation risk); and (4) the physical impacts of climate change (Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106, February 2, 2010, 75 F.R. 6290, February 8, 2010; SEC Codification of Financial Reporting Policies 501.15 (largely restating the Commission's guidance).

Other guidance applies to shareholder proposals and plain English requirements. (See: Shareholder Proposals: Staff Legal Bulletin No. 14K (CF), October 16, 2019; Shareholder Proposals: Staff Legal Bulletin No. 14J (CF), October 23, 2018; Shareholder Proposals: Staff Legal Bulletin No. 14C (CF), June 28, 2005; Staff Legal Bulletin No. 7A, June 7, 1999 (sample risk factor language includes the example of a REIT's acquisition of properties with environmental risks or the need to clean up properties that have environmental damage); Compliance and Disclosure Interpretation (C&DI)—Question 301.01 (shareholder proposal description that would not satisfy Rule 14a-4(a)(3)).With some regulatory background in mind, it is clear that legislation introduced in the 116th and 117th Congresses generally tracks the Commission's 2010 guidance but often with more prescriptive disclosure requirements. Bills include the following:

- ***ESG Disclosure Simplification Act*** (H.R. 4329), sponsored by Rep. Juan Vargas (D-Cal). The bill would require the SEC to amend Regulation S-X to define ESG metrics and mandate that public companies make related disclosures about links between ESG metrics and long-term impact on its business and about the process the company used to determine that impact. The bill was previously reported on party lines by the House FSC September 20, 2019 by a vote of 31-22. More recently, the bill was included in Title I of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187), which passed the House on June 16, 2021 by a vote of 215-214.

- ***Climate Change Financial Risk Act*** (S. 1876; H.R. 3571), sponsored by Sen. Brian Schatz (D-Hawaii) and Rep. Sean Casten (D-Ill). The bill would require the Fed to impose climate change rules on certain banks; the SEC and the CFTC would be involved only as FSOC members regarding a proposed subcommittee.
- ***Climate Risk Disclosure Act*** (S. 1217; H.R. 2570), sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Sean Casten (D-Ill). The bill addresses: (1) physical risks; (2) transition risks; (3) corporate governance processes and structures to identify, assess, and manage climate-related risks; (4) specific actions that the covered issuer is taking to mitigate identified risks; (5) the resilience of any strategy for addressing climate risks when differing climate scenarios are taken into consideration; and (6) how climate risk is incorporated into the overall risk management strategy of the covered issuer. The bill was previously reported on party lines by the House FSC July 16, 2019 by a vote of 34-25 and reported again by the House FSC on May 12, 2021 by a vote of 28-24. The bill also was included in Title IV of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187), which passed the House on June 16, 2021 by a vote of 215-214. The bill also was included in Sections 851-853 of the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act (H.R. 1512), sponsored by Rep. Frank Pallone (D-NJ).
- ***Systemic Risk Mitigation Act*** (H.R. 6501), sponsored by Jesus "Chuy" Garcia (D-Ill). The bill, proposed during the last session of Congress, would create an FSOC climate change subcommittee. The FSOC was created by the Dodd-Frank Act to monitor systemic financial risks and its members are the Treasury Secretary, the heads of the federal banking regulators, and the chairs of the SEC and the CFTC. The proposed subcommittee would include the Fed, Treasury, OCC, FDIC, SEC, CFTC, and other agencies the FSOC deems appropriate. The subcommittee would submit an annual report to Congress, in consultation with the Office of Financial Research, regarding the risks posed by climate change to the efficiency, competitiveness, and stability of the United States financial system.
- ***H.R. 6360***, sponsored by Alexandria Ocasio-Cortez (D-NY). The bill would require public companies to make climate disclosures consistent with recommendations made by the Task Force on Climate-Related Financial Disclosures of the Financial Stability Board as reported in June 2017.
- ***Take Responsibility for Workers and Families Act*** (H.R. 6379 (Section 407)), sponsored by Rep. Nita Lowey (D-NY). The bill would require recipients of COVID-19 aid to make climate disclosures consistent with recommendations of the Task Force on Climate-related Financial Disclosures of the Financial Stability Board as reported in June 2017.
- ***H. Res. 109 (Green New Deal)***, Rep. Alexandria Ocasio-Cortez (D-NY). The resolution recognizes the challenge of climate change and seeks economic security against harm resulting from climate change.

- ***S.J. Res. 8* (Green New Deal)**. The resolution was called for a vote by Sen. Mitch McConnell (R-Ky) but failed to obtain cloture by vote of 0-57. All but three Democrats voted present, while Sen. Doug Jones (D-Ala) (who lost reelection in 2020), Sen. Manchin (D-WVa), Sen. Kyrsten Sinema (D-Ariz), and Sen. Angus King (I-Me) voted with Republicans. Senator Edward Markey (D-Mass) had sponsored a similar resolution (S.J. Res. 59)).
- ***Paris Climate Agreement Disclosure Act*** (H.R. 1780), sponsored by Rep. Nydia Velázquez (D-NY), would require public companies to make disclosures related to the Paris Climate Agreement.
- ***Oil and Minerals Corruption Prevention Act*** (discussion draft), proposed by Rep. Brad Sherman (D-Calif). The bill would provide specific legislative authority for the SEC's resource extraction issuers rule which had previously been disapproved.
- ***Restructuring Environmentally Sound Pensions in Order to Negate Disaster (RESPOND) Act*** (H.R. 1618), sponsored by Rep. Emanuel Cleaver (D-Mo). The bill would require the Fed and the SEC to report annually to Congress regarding the costs of climate change.
- ***Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act*** (H.R. 1512), sponsored by Rep. Frank Pallone (D-NJ). The bill would implement a wide-ranging domestic climate change regime, including provisions contained in the Climate Risk Disclosure Act (S 1876; H.R. 3571), sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Sean Casten (D-Ill) (See, supra.).
- ***Financial Factors in Selecting Retirement Plan Investments Act*** (S. 1762; H.R. 3387), sponsored by Sen. Tina Smith (D-Minn) and Rep. Susan DelBene (D-Wash). The bill would reverse a Trump-era Department of Labor regulation that limited ESG investing by ERISA fiduciaries.
- ***Sustainable Investment Policies Act*** (H.R. 3605), sponsored by Rep. Andy Levin (D-Mich). The bill would require disclosures and transparency regarding sustainable investment policies of large asset managers who also must engage an auditor to test the asset manager's compliance with its sustainable investment policy filed with the Commission.
- ***Corporate Governance Improvement and Investor Protection Act*** (H.R. 1187), sponsored by Rep. Juan Vargas (D-Calif). The bill would address multiple ESG issues and includes in Title I the ESG Disclosure Simplification Act, which Rep. Vargas has previously introduced as a standalone bill, and which would require the SEC to define "ESG metrics," mandate public company disclosures of their ESG metrics while also declaring ESG metrics disclosures to be deemed de facto material; the bill also would require the SEC to create the Sustainable Finance Advisory Committee. The bill also includes in Title IV the Climate Risk Disclosure Act, sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Sean Casten (D-Ill). The bill passed the House on June 16, 2021 by a vote of 215-214.

Social. The "social" component of ESG or EESG also covers a range of issues. SEC Commissioner Allison Herron Lee has spoken about why diversity is important and in doing so quoted the adage "what gets measured gets managed" (Allison Herron Lee, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference, September 22, 2020). The adage is often employed across the ESG/EESG spectrum and many of the legislative proposals on diversity are about empowering individuals to publicly assert their identities so that diversity can be better measured. The following discussion briefly reviews some of the SEC's attempts to encourage diversity followed by summaries of proposed bills on diversity and other social topics:

- ***Diversity, equity, and inclusion***—The SEC has issued Compliance and Disclosure Interpretations (C&DIs) regarding Items 401 and 407 of Regulation S-K (Questions 116.11 and 133.13, February 6, 2019) allowing companies to disclose board members' and board nominees' diversity characteristics (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background), but only if the member or nominee self-identifies as having such characteristic and then consents to the disclosure. Several bills in Congress would address the issue of board diversity, equity, and inclusion:
- ***Improving Corporate Governance Through Diversity Act*** (S. 374; H.R. 1277), sponsored by Sen. Bob Menendez (D-NJ) and Rep. Gregory Meeks (D-NY). The bill would require an issuer to disclose in a proxy statement and in any information statement related to the election of directors filed with the Commission three things: (1) data on the racial, ethnic, and gender composition of the issuer's board, board nominees, and executive officers; (2) the veteran status of any board member, board nominee, or executive officer; and (3) whether, as of the date the issuer makes the required disclosures, the issuer's board or a board committee has adopted any policy, plan, or strategy to promote racial, ethnic, and gender diversity among the issuer's board members, board nominees, and executive officers. Data called for by items 1 and 2 would be based on voluntary self-identification. The bill was reported by the House FSC on April 21, 2021 by voice vote. The bill also appears in Title IX of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187), which passed the House on June 16, 2021 by a vote of 215-214.
- ***Diversity in Corporate Leadership Act*** (S. 3367; H.R. 3279), sponsored by Sen. Catherine Cortez Masto (D-Nev) and Rep. Carolyn Maloney (D-NY). The bill would require companies to disclosure the gender, racial, and ethnic composition of their board members and board nominees. The House FSC favorably reported an amended version of the bill by a vote of 52-6 in July 2019.
- ***H.R. 8566***, sponsored by Rep. Gregory Meeks (D-NY). The bill would require the Fed and the SEC to study racial gaps in stock ownership.
- Diverse Asset Managers Act, proposed by Rep. Joyce Beatty (D-Ohio), Chairwoman of the House FSC's Subcommittee on Diversity and Inclusion. The discussion draft would require the Fed and the SEC, and companies registering securities with the SEC, to consider at least one diverse asset manager when contracting for management services.
- ***H.R. 4257***, sponsored by Rep. David Scott (D-Ga). The bill would fix a Dodd-Frank Act oversight by formally establishing and Office of Minority and Women Inclusion (OMWI) at the CFTC which has, in the absence of a legislative requirement, established an OMWI. The bill also directs the CFTC to create an internship program within the OMWI. A similar provision appeared in previously proposed CFTC reauthorization legislation. "Through this scholarship program, some of our brightest and most promising young scholars will gain valuable experience that will continue to serve them throughout their careers," said Rep. Scott via press release.

- ***Corporate Governance Improvement and Investor Protection Act*** (H.R. 1187), sponsored by Rep. Juan Vargas (D-Calif), would address multiple ESG issues and includes in Title IX the Improving Corporate Governance Through Diversity Act (S. 360; H.R. 5084), sponsored by Sen. Bob Menendez (D-NJ) and Rep. Gregory Meeks (D-NY). The bill passed the House on June 16, 2021 by a vote of 215-214.
- ***Mind Your Own Business Act*** (S. 2829), sponsored by Sen. Marco Rubio (R-Fla). The bill would potentially make it easier for shareholders to sue company boards for breach of fiduciary duty regarding a company's adoption of "woke" social policies. Senator Rubio said via press release: "Patriotic Americans who love their country and the opportunity it provides should be able to fight back against the growing tyranny of the woke elites running corporate America. These are often nationless corporations that amass fortunes divorced from the fate of our great country while pushing socially destructive, far left policies like boycotts and cancel crusades at home."
- ***Supply chain risks, political and human rights abuses***—Legislation also would require disclosure by companies of their operations in countries where human rights abuses have been alleged to be occurring. Many of these bills emphasize China and are functionally adjuncts to the Holding Foreign Companies Accountable Act, which became law in December 2020 and authorizes the SEC to delist foreign companies from U.S. exchanges if their home country regulators deny the PACOB the ability to inspect those companies' audit work papers:
- ***Uyghur Forced Labor Disclosure Act*** (H.R. 2072), sponsored by Rep. Jennifer Wexton (D-Va). The bill would impact public companies' business in the Xinjiang Uyghur Autonomous Region (XUAR) in China. Specifically, it would require public companies to disclose in their annual reports or proxy statements: (1) whether the company engages with an entity that imports certain manufactured goods or imports manufactured goods that contain materials that originated or are sourced in the XUAR (this provision would appear to require disclosure for goods, such as electronics, food products, textiles, shoes, and teas, that would be excepted from the SEC disclosure provision in a related sanctions bill); (2) whether goods and materials subject to the disclosure requirement originated in forced labor camps; and (3) a description of the commercial activity, gross revenues, and net profits regarding the goods or materials, and whether the company intends to continue importing the goods or materials. The bill passed the House in the last Congress in September 2020 by a vote of 253-163. The bill also has been included in Title X of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187), which passed the House on June 16, 2021 by a vote of 215-214.
- ***Uyghur Forced Labor Prevention Act*** (S. 65; H.R. 1155), sponsored by Sen. Marco Rubio (R-Fla) and Rep. James McGovern (D-Mass). The bill would prohibit the importation by U.S. companies of certain goods made in the XUAR, create an enforcement regime, require the State Department to make certain findings about the XUAR and to create a strategy regarding the XUAR, and implement a sanctions regime. The House version of the bill also contains a securities disclosure provision that resembles the existing Iran sanctions disclosure notice provision contained in Exchange Act Section 13(r). The bill passed the Senate by voice vote in July 2021 and passed the House in December 2021 by a vote of 428-1. Although the House and senate bills are similar, there are some important differences, such as the effective date of the general ban on

imports of goods produced in the XUAR with the Senate version becoming effective 300 days after enactment and the House version becoming effective 120 days after enactment.

- ***H.R. 6375***, sponsored by Rep. Nydia Velazquez (D-NY). The bill would require public companies to disclose supply chain disruption risks, such as geographic concentrations, shipping risks, and risks from armed conflict (See also the related bills H.R. 6321 and H.R. 6379).
- ***Corporate Governance Improvement and Investor Protection Act*** (H.R. 1187), sponsored by Rep. Juan Vargas (D-Calif). The bill would address multiple ESG issues and includes in Title X the Uyghur Forced Labor Disclosure Act (H.R. 2072), sponsored by Rep. Jennifer Wexton (D-Va). The bill passed the House on June 16, 2021 by a vote of 215-214.
- ***American Financial Markets Integrity and Security Act*** (S. 570; H.R. 1562), sponsored by Sen. Marco Rubio (R-Fla) and Rep. Mike Gallagher (R-Wis). The bill would bar the trading of securities of Communist Chinese military companies on national securities exchanges.
- ***No IPOs for Unaccountable Actors Act*** (S. 1914), sponsored by Sen. Marco Rubio (R-Fla). The bill would require the SEC to bar IPOs of companies from jurisdictions that do not allow PCAOB inspections of public company auditors. The bill is similar to the Holding Foreign Companies Accountable Act, which became law in December 2020.
- ***S. 2184***, sponsored by Sen. John Kennedy (R-La). The bill would shorten the compliance period threshold in the Holding Foreign Companies Accountable Act from three to two years. In other words, if the Commission determines that a covered issuer has two (instead of three) consecutive non-inspection years (i.e., the PCAOB cannot inspect the company's auditors), the Commission must prohibit the securities of the covered issuer from being traded on a national securities exchange or via other modes of trading such as over-the-counter markets. The bill passed the senate by unanimous consent on June 22, 2021.
- ***Exposing China's Belt and Road Investment in America Act*** (S. 3038; H.R. 5806), sponsored by Sen. John Kennedy (R-La) and Rep. Chris Stewart (R-Utah). The bill would amend the Defense Production Act to mandate that The Committee on Foreign Investment in the United States (CFIUS) review "greenfield" investments in the U.S. by Chinese companies. If enacted, the bill would represent the second significant revision to CFIUS's governing statute in three years; the last major revision, the Foreign Investment Risk Review Modernization Act of 2018, was enacted via the John S. McCain National Defense Authorization Act for Fiscal Year 2019.
- ***LGBTQ status—***The Data Inclusion Act (S. 2287; H.R. 4176), sponsored by Sen. Tammy Baldwin (D-Wis) and Rep. Raul Grijalva (D-Ariz). The bill would apply to agencies' collection of data on LGBTQ status when conducting surveys; the bill would impact SEC and CFTC via the Administrative Procedure Act's definition of "agency."
- ***Wealth status—***The Ultra-Millionaire Tax Act of 2021 (S. 510; H.R. 1459), sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Pramila Jayapal (D-Wash). The bill would impose a 2 percent annual tax on the net worth of households and trusts between $50 million and $1 billion and a 1 percent annual surtax (3 percent tax overall) on the net worth of households and trusts above $1 billion. Similar provisions would apply to high net worth individuals under the

proposed Build Back Better Act (The text of the BBBA consists of the November 3, 2021 House Rules Committee Print, the manager's amendment dated November 4, 2021, and the manager's amendment dated November 18, 2021. A section-by-section summary provides additional information, although some section numbers no longer match the underlying bill text because of later amendments to the bill).

Governance. With respect to governance matters, federal legislation can become a bit tricky because of federalism concerns and the general delegation of the regulation of the internal affairs of companies to state laws, despite the overlap between federal and state laws, for example, regarding the proxy process. Nevertheless, federal legislation introduced in the two most recent sessions of Congress would address a range of issues, including a federal corporate charter, stock buybacks, executive compensation, and political donations.

- ***Stock buy backs***—Exchange Act Rule 10b-18 allows stock buybacks as an exception to the general securities law ban on manipulation subject to a number of requirements. Over the course of the last two Congresses, three approaches to curbing corporate buybacks have emerged: (1) Senator Tammy Baldwin (D-Wis) and Rep. Jesus "Chuy" Garcia (D-Ill) would ban buybacks altogether (S. 3540; H.R. 3355); (2) Senators Bernie Sanders (I-Vt) and Rep. Ro Khanna (D-Calif) would ban public company buybacks unless workers receive increased pay and benefits; the bill was largely targeted at Walmart Inc., which has since asserted that it has made at least some changes to worker rewards and paid time off (S. 3640; H.R. 7145, 115th Congress); and (3) Senator Elizabeth Warren's (D-Mass) and then-Rep. Ben Ray Lujan's (now Senator) Accountable Capitalism Act would require a public benefit company-style charter for large public companies and would require company executives to have skin in the game by imposing a 3-year holding period on selling company shares after a company stock buyback (S. 3215; H.R. 6056). The Build Back Better Act, consisting of the November 3, 2021 House Rules Committee Print, the manager's amendment dated November 4, 2021, and the manager's amendment dated November 18, 2021 (a section-by-section summary provides additional information, although some section numbers no longer match the underlying bill text because of later amendments to the bill) would impose a one percent excise tax on stock repurchases by corporations whose stock is traded on established securities markets; an earlier stand-alone version of this provision would have imposed a two percent excise tax.
- ***Stop Wall Street Looting Act*** (S. 3022; H.R. 5648), sponsored by Sen. Elizabeth Warren (D-Mass) and Rep. Mark Pocan (D-Wis). The bill covers many topics, including curbing share buybacks and closing the carried interest loophole.
- ***Ending Too Big to Jail Act*** (S. 1005), sponsored by Sen. Elizabeth Warren (D-Mass). The bill would address criminal accountability by financial institution executives.
- ***Accountable Capitalism Act*** (S. 3215; H.R. 6056), sponsored by Sen. Elizabeth Warren (D-Mass) and then-Rep. Ben Ray Lujan (now Senator). The bill would bar corporate political donations unless approved by 75 percent of a company's directors and shareholders.
- ***Transparency in Corporate Political Spending Act*** (H.R. 1176), sponsored by Rep. Andy Levin (D-Mich). The bill would repeal the policy rider contained in recent appropriations legislation banning the SEC from adopting regulations addressing corporate political donations (See Public

Law No. 115-245, Division C, Section 101(4), incorporating by reference Public Law No. 115-141, Section 631; and Pub L. No. 116-260 (Section 631)).

- ***Shareholders United Act*** (H.R. 936), sponsored by Rep. Jamie Raskin (D-Md). The title of the bill is a play on words invoking the Supreme Court's landmark opinion *Citizens United*. The bill would allow corporate political donations only if a company has in place a procedure to assess the preferences of its shareholders.
- ***Corporate Governance Improvement and Investor Protection Act*** (H.R. 1187), sponsored by Rep. Juan Vargas (D-Calif), would address multiple ESG issues and includes in Title II the Shareholder Political Transparency Act, which would require public companies to describe their political contributions in quarterly and annual reports. Title V of the bill contains the Disclosure of Tax Havens and Offshoring Act, which would require the SEC to issue regulations for public companies to make detailed disclosures about their taxing jurisdictions. The Disclosure of Tax Havens and Offshoring Act (S. 1545; H.R. 3007), sponsored by Sen. Chris Van Hollen (D-Md) and Rep. Cynthia Axne (D-Iowa), was previously introduced as a stand-alone bill. Title VIII of the bill contains the Cybersecurity Disclosure Act (S. 808), sponsored by Sen. Jack Reed (D-RI), who has previously introduced the bill as a stand-alone bill, and which would require a public company to explain whether it has a board member with cybersecurity expertise. Title XI would require the SEC, in coordination with the Director of the Offices of the Advocate for Small Business Capital Formation and the Investor Advocate, to study and report to Congress on the issues small businesses face regarding compliance with disclosure requirements related to environmental, social, and governance metrics. The Corporate Governance Improvement and Investor Protection Act passed the House on June 16, 2021 by a vote of 215-214.
- ***Shell Company Abuse Act*** (H.R. 1279), sponsored by Rep. Colin Allred (D-Texas). The bill would prohibit establishment of corporations for the purpose of concealing election contributions and donations made by foreign nationals.
- ***Shareholder Protection Act*** (S. 530), sponsored by Sen. Bob Menendez (D-NJ). The bill would require public company shareholders to pre-approve corporate political donations. The bill is essentially identical to the Shareholder Political Transparency Act (discussed below).
- ***Shareholder Political Transparency Act*** (H.R. 1087), sponsored by Rep. Bill Foster (D-Ill). The bill would require disclosure of corporate political donations. The bill also is included as Title II of the Corporate Governance Improvement and Investor Protection Act (H.R. 1187). The Corporate Governance Improvement and Investor Protection Act passed the House on June 16, 2021 by a vote of 215-214. The bill also is essentially identical to the Shareholder Protection Act (discussed above).
- ***Openness in Political Expenditures Now (OPEN) Act*** (H.R. 4359), sponsored by Rep. Matt Cartwright (D-Pa). The bill would amend the Federal Election Campaign Act to mandate corporate political spending disclosures.
- ***Stronger Enforcement of Civil Penalties Act*** (S. 2147), sponsored by Sen. Jack Reed (D-RI). The bill would increase fines for violations of federal securities laws.

- ***The Promoting Transparent Standards for Corporate Insiders Act*** (S. 2211; H.R. 1528), sponsored by House Financial Services Committee Chair Maxine Waters (D-Calif) and Sen. Chris Van Hollen (D-Md), would require the SEC to study the misuse of Rule 10b5-1 trading plans by corporate executives, including limits on the use of multiple trading plans, requiring a delay between adoption of a trading plan and the execution of the first trade under the plan, and requiring greater board oversight of trading plans. The SEC would have to issue a report within one year after enactment and then amend applicable regulations to implement the recommendations set forth in the report. The bill passed the House with ease for the second time in April 2021 by a vote of 355-69 as part of an en bloc package of bills, some unrelated to securities law. The bill previously passed the House in the last Congress as a stand-alone bill by a vote of 413-3. A prior version of the bill was included as title XXII of the JOBS and Investor Confidence Act of 2018 (S. 488), a comprehensive investor protection bill that consisted of a House amendment to a Senate bill which passed the House by a vote of 406-4 in July 2018.

International developments. While the Biden Administration works to implement the energy and environmental provisions contained in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), seeks to enact further environmental reforms via the Build Back Better Act (See, November 3, 2021 House Rules Committee Print, the manager's amendment dated November 4, 2021, and the manager's amendment dated November 18, 2021), and the SEC's staff prepares a recommendation on public company ESG disclosures for the Commission to mull, it may be New Zealand, focusing on a singular aspect of ESG, that becomes the first country in the world to enact legislation creating a climate risk disclosure regime for public companies.

The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-1), sponsored by Commerce and Consumer Affairs Minister David Clark (Dunedin, Labour Party), MP in Charge, proposes amendments to New Zealand's Financial Markets Conduct Act 2013, Financial Reporting Act 2013, and Public Audit Act 2001, that would create a climate risk disclosure mandate for a wide variety of financial firms.

According to an FAQ accompanying the announcement of the bill, the disclosure requirement would apply to:

- Banks and similar institutions (more than $1 billion in total assets);
- Registered investment schemes (more than $1 billion total assets under management (AUM));
- Licensed insurers (more than $1 billion total AUM or more than $250 million in premium income); and
- Companies listed on NZX.

As part of the country's legislative process, the Economic Development, Science and Innovation Committee in August 2021 made several recommendations to lawmakers for amendments to the bill as it continues on a path to becoming law:

- Exclude small, listed issuers and growth markets (the amendment would define large, listed issuers as firms with more than $60 million NZD market capitalization);

- Amend the two-year period that prevents small entities from suddenly becoming climate reporting entities (CREs) to clarify that large entities that merge with other entities could not claim the two-year period;
- Retain the requirement that CREs prepare climate-related disclosures within one year after Royal assent, but delay when CREs must engage assurance practitioners to independently verify disclosures regarding greenhouse gas (GHG) emission statements until three years after Royal assent;
- Remove provisions dealing with assurance practitioner licensing and accreditation;
- Add a provision creating a criminal offence that penalizes an assurance practitioner for deviating from assurance standards that carries a potential fine of up to $50,000 NZD;
- Remove provisions that require a company to disclose-or-explain why it is not impacted instead of preparing a climate statement; and
- Remove provisions that require a CRE to explain why certain climate-related information is immaterial (the report further explained that such information would be of little value to users and the proposed External Reporting Board (XRB) could address materiality).

Environmental Sustainability Reporting Standards

Why sustainability reporting matters. In explaining the reasons for the SEC recently ramping up its focus on climate-related risk disclosures, Chairman Gary Gensler noted, “Large and small investors, representing literally tens of trillions of dollars, are looking for this information to determine whether to invest, sell, or make a voting decision one way or another.” This is where the need for comprehensive, consistent, and harmonized sustainability reporting standards enters the picture for the financial markets.

Gensler’s pro-investor sentiments were echoed by actions taken by accounting standards setter IFRS Foundation in November 2021, when it formed the International Sustainability Standards Board (ISSB) to develop a comprehensive global baseline of high-quality sustainability disclosure standards to meet investors’ information needs.

The IFRS Foundation indicated that financial markets need to assess the risks and opportunities facing individual companies arising from ESG issues, as these affect enterprise value and drive demand for high-quality information. The foundation also noted that voluntary reporting frameworks and guidance, while having prompted innovation and action, have resulted in fragmentation and increased costs and complexity for investors, companies, and regulators. The foundation concluded that investors and other providers of capital want global sustainability disclosure standards that meet their information needs.

The ISSB, which was formed in public interest, is also intended to benefit a constellation of other stakeholders including lenders, employees, governments, regulators, rating agencies, customers, and suppliers.

The creation and role of the ISSB. As world leaders met in Glasgow in November 2021 for COP26, the UN global summit to address the critical and urgent issues surrounding climate change, the IFRS Foundation announced three significant developments to provide the global financial markets with high-quality disclosures on climate and other sustainability issues which included:

- The formation of the ISSB which will oversee the development of a global baseline of high-quality sustainability disclosure standards, and a new reporting framework covering environmental, social, and governance issues. These standards will aim to meet investor demands for "transparent and comparable information" on firms' climate risks and opportunities and act as a shield against 'greenwashing'.
- Gaining a commitment by leading investor-focused sustainability disclosure organizations to consolidate into the new board, and increasing other consolidation efforts by standard setters. Specifically, the IFRS Foundation Trustees indicated that it will complete the consolidation of the Climate Disclosure Standards Board and the Value Reporting Foundation (VRF), which houses the Integrated Reporting Framework and the SASB Standards, by June 2022.
- The publication of prototype climate and general disclosure requirements developed by the Technical Readiness Working Group (TRWG), a group formed by the IFRS Foundation Trustees to undertake preparatory work for the ISSB.

Taken together, these developments are intended to create the necessary institutional arrangements and lay the technical groundwork for a global sustainability disclosure standard-setter for the financial markets.

The sustainability disclosure standards to be developed by the ISSB will also include disclosure requirements that address companies' impacts on sustainability matters relevant to assessing enterprise value and making investment decisions. The ISSB's standards will be intended to enable companies to provide comprehensive sustainability information for the global financial markets. The standards will be developed to facilitate compatibility with requirements that are jurisdiction specific or aimed at a wider group of stakeholders.

To have teeth, the agreed-on ISSB standards would have to be incorporated in a particular country's regulatory frameworks so that businesses are required to use them. The ISSB's draft climate standards are scheduled to be put out for public consultation in 2022.

A closer look at the consolidation of sustainability standard setters and related cooperative ventures. The ISSB will absorb two bodies dedicated to climate- and sustainability-related disclosures to advance its efforts: the Climate Disclosure Standards Board (CDSB) and the Value Reporting Framework (VRF). Each organization currently presides over its own voluntary sustainability reporting framework, though both the VRF—the result of a merger of the International Integrated Reporting Council and Sustainability Accounting Standards Board—and the CDSB, along with other standard-setters.

The ISSB will sit alongside and work in close cooperation with the International Accounting Standards Board, ensuring connectivity and compatibility between IFRS Accounting Standards and the ISSB's sustainability disclosure standards. The ISSB and the IASB will be independent, and their standards will complement each other to provide comprehensive information to investors and other providers of capital.

The ISSB climate-related disclosure prototypes. The Technical Readiness Working Group (TRWG), which is comprised of representatives from the leading standard setter organizations such as the CDSB, Task Force on Climate-related Financial Disclosures (TCFD), IASB, VRF and the World Economic Forum, was formed to provide recommendations to the ISSB. The TRWG concluded work on two prototype documents, one that sets out general sustainability disclosures. That prototype provides that companies should disclose absolute gross Scope 1, Scope 2 and Scope 3 emissions, and the amount and percentage of assets or business activities vulnerable to climate-related transition and physical risks. The other prototype builds on the TCFD's recommendations and includes industry-specific disclosures.

The prototypes were developed to provide the ISSB with a solid foundation on which to begin its work and are considered to be part of ISSB's initial work program. As such, the prototypes themselves are not deemed to be standards, but rather as recommendations subject formal consultations and ISSB due process.

Next steps for the ISSB and a look to the future. The ISSB is in its early days, and the following next steps and undertakings are contemplated as the organization continues to get up and running:

- The Appointment of a Chair, Vice Chairs, and the recruitment of the remaining ISSB board members bringing that to a full complement of 14 members.
- Public consultations in connection with proposed climate and general disclosure standards, work plan and future priorities, all of which are part of the organizational due process.
- Finalize advisory group structure.
- Complete consolidation with CDSB and the Value Reporting Foundation.
- Implement a multi-location approach to achieve a global footprint.

The ISSB's work is expected to commence as soon as the Chair and Vice-Chair(s) have been appointed and to begin with public consultations to inform the ISSB's work plan and on proposals informed by recommendations from the TRWG. Following these consultations, the ISSB's work will follow the IFRS Foundation's rigorous due process, including public discussions by the ISSB of feedback received to the consultations and possible improvements to the proposals prior to their finalization standards.

A closer look at two major sustainability standard setters—The TCFD and SASB. It is worthwhile to further examine the TCFD and SASB, two the most influential global sustainability standard setters and whose disclosure frameworks played major roles in the creation of the ISSB climate-related disclosure protype. In particular, the ISSB prototype incorporated the four pillars of the TCFD's recommended disclosures: governance, strategy, risk management, metrics, and targets. The prototype was further enhanced by climate-related industry-specific metrics derived from the SASB's 77 industry-specific standards.

The TCFD consists of 32 members across the G-20 and includes experts from banks, asset managers, insurers, and other non-financial sectors. It was established by the Financial Stability Board (FSB) to develop recommendations for the reporting of clear, comparable and consistent information on companies' climate-related risks and opportunities. The FSB is an international body that monitors and makes recommendations about the global financial system. The TCFD is chaired by Michael R. Bloomberg.

In 2017, the TCFD released climate-related financial disclosure recommendations designed to help companies provide better information to support informed capital allocation by centering around the four pillars recommended disclosures. These thematic areas are intended to interlink and inform each other. TCFD is currently engaged in helping companies implement its recommendations and promoting advancements in the availability and quality of climate-related disclosure.

For its part, SASB is an independent, nonprofit organization established in 2011 to set standards for companies to use when disclosing sustainability or ESG information to investors and other providers of financial capital. In November 2020, and in response to global market demand for convergence among sustainability standard setters and framework providers, SASB and the International Integrated Reporting Council (IIRC) announced their intention to merge into a unified organization, the Value Reporting Foundation. Furthering the reach of SASB Standards will remain core to the new organization's mission and contemplated activities.

SASB Standards have been developed for 77 industries, each of which includes disclosure topics and performance metrics for the sustainability risks and opportunities reasonably likely to materially affect a company's financial condition/balance sheet, operating performance/income statement, or risk profile/market valuation and cost of capital. By providing transparency into how companies are managing the sustainability risks and opportunities most closely tied to the creation of enterprise value, SASB Standards are intended to help companies provide the ESG information investors require to effectively meet their risk and return objectives.

Third-party ESG standard setter. Generally, if one wants to get a sense of what SEC ESG regulations might look like, it is instructive to not just mull the several ESG standards established by private sector and quasi-governmental bodies, but also to mull the way the SEC framed its conflict minerals and resource extraction issuer regulations. The latter rulemakings required the SEC staff to consider international standards and then integrate aspects of those standards into its conflict minerals and resource extraction issuer regulations. The SEC can be expected to do much the same for ESG.

Perhaps one of the more challenging issues the Commission will face in the ESG space is the prospect of creating ESG metrics. ESG metrics taken as a whole can cross multiple subjects and may require fine calibration depending on the precise topic being addressed. For now, it appears that the Commission may focus it near-term evolution of ESG regulations on climate change and human capital, but even limiting itself to only two pieces of the ESG framework will require policy decisions about the scope and content of metrics to be included in any regulations. The complexity of establishing ESG metrics begs the question of whether the SEC could establish an independent standard setting body for ESG metrics under its existing authorities, or whether the Commission may need additional authorities for the ESG space. Other questions may arise regarding whether the Commission would even consider the creation of an ESG standard setting body and whether the Commission has sufficient staff, expertise, and other resources to address ESG metrics with or without a separate standard-setting body.

John Coates, then-Acting Director of the Division of Corporation Finance framed the metrics issue in a March 2021 public statement: “As such, there is no one set of metrics that properly covers all ESG issues for all companies.” At a later point in the statement, Coates noted the inherent tension between “principles and metrics,” an issue that has divided members of the Commission over last several years (see, e.g., the colloquy between Commissioners Allison Herren Lee and Hester Peirce regarding adoption of Regulation S-K amendments and the difference between principles-based and prescriptive regulations).

For comparison, in the accounting space, the Commission has authority under Securities Act Section 19(a) and Exchange Act Section 13(b)(1) to prescribe the form and contents of financial reports included in SEC filings. Moreover, Section 108 of the Sarbanes-Oxley Act provides that the Commission may recognize, as “generally accepted” (for purposes of the securities laws) any accounting principles established by a standard setting body that meets certain requirements, including for its organizational structure, independence, funding, and the currency of its standards. The Commission also must determine that the standard setting body has the capacity to assist the Commission in fulfilling the requirements of Securities Act Section 19(a) and Exchange Act Section 13(b)(1), because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws. The Commission has confirmed the Financial Standards Accounting Board (FASB) to be one such accounting standard setting body (See, Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release No. 33-8221, April 25, 2003).

Could the Commission eventually create a similar standard setter for ESG that follows the FASB model? The SEC’s Asset Management Advisory Committee’s “Recommendations for ESG” (July 7, 2021) suggests that the Commission move in that direction. Overall, the AMAC recommendation seeks Commission action to require meaningful, consistent, and comparable material ESG disclosures by issuers. Moreover, the AMAC recommended that the Commission study third-party ESG disclosure frameworks and increase the agency’s subject matter expertise on ESG matters. The AMAC then concluded: “We believe this action would provide a roadmap for potential establishment of a standard setting body to develop ESG disclosure standards. Consistent applications of those standards by issuers can be enforced by the SEC, like the enforcement of U.S GAAP accounting standards developed by the FASB.”

The “Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure” (May 14, 2020) also made several general recommendations about ESG disclosure but did not explicitly address a FASB-like standard setter. However, dissenting subcommittee member Stephen Holmes suggested that U.S. GAAP could be at risk if ESG issues become mixed with accounting standards. Said Holmes: “I also strongly support the protection of

FASB from these proposed ESG disclosure efforts. We have the highest quality accounting standards in the world and these should not be inadvertently diluted."

In March 2021, then Acting Chair Lee issued a request for public comments regarding ESG disclosures, especially climate change disclosures. Among the 15 questions asked were several that inquired about third-party standard setters, including a sub-question asking, "Should the Commission designate a climate or ESG disclosure standard setter?" The request for comment also asked about the pros and cons of leveraging existing frameworks, such as those published by the TCFD, SASB, and Climate Disclosure Standards Board (CDSB). Lee further asked what characteristics a standard setter should have and whether the Commission should consider any existing standard setters.

Susan S. Coffey, CPA, CGMA, Chief Executive Officer – Public Accounting at the American Institute of CPAs (AICPA), suggested in a June 11, 2021 comment that third-party standards may play an important role in crafting an ESG disclosure regime. "Use of a third-party standard setter that satisfies independence and other essential criteria for standard-setting, as expected by the market, would provide for responsive and responsible decisions on evolving best practices while still allowing the SEC to require specific disclosures, where appropriate," said Coffey.

A May 19, 2021 comment submitted by Janine Guillot, CEO of the Sustainability Accounting Standards Board (SASB) suggested a role for the SEC in overseeing a third-party ESG standard setter: "While the COSO and FASB precedents make clear that the SEC has the authority to refer to third-party standards for certain purposes, we believe that the SEC should consider assuming an oversight role relative to any third-party standard setter for sustainability disclosure. There are several oversight models the SEC could consider, including its current role relative to the FAF or its role on the Monitoring Board of the IFRS Foundation. Oversight by the SEC could provide the needed institutional ballast and heft necessary to sustain the confidence of issuers and investors in a third-party standard setter."

The SASB comment went on to suggest the benefits of having a third-party standard setter for ESG disclosures, including: (1) allowing the SEC to focus on implementation, evaluation, and enforcement of ESG standards; and (2) use of existing standards that already have buy-in from market participants, thus allowing for private ordering to play a role. SASB emphasized that the SEC could still adopt rules for specific situations. SASB also listed the qualities a third-party standard setter should have, including: (1) independence; (2) due process and public comment procedures; (3) diverse expertise; (4) diverse funding sources; (5) an oversight body; and (6) reasonably complete standards that are reasonably consistent and comparable both qualitatively and quantitatively. It should not be surprising that SASB suggested itself as one such entity possessing these qualities (at the conclusion of the comment letter's section discussing the benefits and qualities of a third-party standard setter, the letter stated: "We believe that SASB meets these criteria, as may other existing organizations.").

A partial list of SEC actions taken on ESG in 2021

Date	Action
2/24/2021	Then-Acting Chair Allison Herren Lee issued a statement that directed the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings
2/25/2021	A subcommittee of the House Committee on Financial Services held a hearing on ESG issues, focusing on disclosures
2/26/2021	SEC issued a bulletin to caution and educate investors about ESG funds
3/3/2021	The Division of Examinations announced its 2021 examination priorities, including enhanced focus on climate-related risks
3/4/2021	SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement to proactively identify ESG-related misconduct
3/11/2021	Then-Acting Corp Fin Director John Coates issued a statement discussing the possible creation of a global ESG reporting framework
3/15/2021	Then-Acting Chair Lee issued a request for public input on climate disclosure
3/19/2021	In an SEC advisory committee meeting, asset managers urged the SEC to adopt a standardized but flexible method for ESG disclosures by drawing on standards developed by the Task Force on Climate-Related Financial Disclosures (TCFD) and SASB
3/22/2021	CorpFin denied no-action requests by Occidental Petroleum and ConocoPhillips seeking to exclude shareholder proposals on greenhouse gas emissions
4/9/2021	The Division of Examinations issued a Risk Alert to highlight observations from recent exams of investment advisers, registered investment companies, and private funds offering ESG products and services.
4/14/2021	Commissioner Peirce issued a statement opposing the creation of a common set of ESG metrics
4/20/2021	A Congressional Research Service report surveys impact of SEC’s 2010 climate guidance, whether climate risk is materially important to investors, and how useful current disclosures of climate change risks have been to investors
5/26/2021	Chair Gensler discussed SEC priorities on ESG in a House oversight hearing
6/1/2021	CorpFin announces it will not enforce 2020 rules imposing new restrictions on proxy advice firms
7/1/2021	Commissioner Peirce issued statement opposing IFRS’ proposed creation of an International Sustainability Standards Board
7/28/2021	In a speech before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar, Chair Gensler announces an aggressive timeline for rulemaking and signals what the proposed rules on climate disclosures will contain
9/22/2021	CorpFin releases illustrative letter containing sample comments that CorpFin may issue to companies regarding their climate-related disclosure or the absence of such disclosure
9/29/2021	SEC proposes to enhance proxy voting disclosure by investment funds and require disclosure of “Say-On-Pay” votes for institutional investment managers
10/14/2021	SEC reopened the comment period for listing standards for clawbacks of erroneously awarded compensation
11/3/2021	New Staff Legal Bulletin 14L restates the staff’s approach to significant social policies under the Rule 14a-8 ordinary business and micromanagement exceptions
11/17/2021	New Universal Proxy rules will apply to shareholder meetings featuring election contests held after August 31, 2022
11/17/2021	The SEC proposed to rescind two rules adopted in 2020 that restricted proxy advisory firms