Securities Regulation Daily Wrap Up, ESG NEWS—Commissioner Uyeda suggests climate rule re-proposal, (Nov 8, 2023)

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As recently as two weeks ago, SEC Chair Gary Gensler suggested SEC staff were still trying to tweak the climate risk disclosure proposal to withstand legal challenges.

SEC Commissioner Mark Uyeda floated the possibility of the SEC re-proposing its March 2022 climate risk disclosure proposal in light of the many anticipated tweaks to the rule as it moves towards adoption. Uyeda made the suggestion in remarks to an audience at the Practising Law Institute's 55th Annual Institute on Securities Regulation. The fact that a sitting commissioner would comment at this stage of the rulemaking process could imply that Commission action on the climate risk disclosure proposal may be forthcoming. Just two weeks ago, however, SEC Chair Gary Gensler, in a fireside chat with members of the U.S. Chamber of Commerce, and without tipping a specific time frame for finalizing the climate regulation, said that staff were still working to harden the final version to stand up to expected legal challenges.

After several delays during the public comment process, the SEC had indicated in its Regulatory Flex Agenda that the target date for releasing the final version of the rule was October 2023. A re-proposal could increase the risk that Congress may seek to disapprove a final climate risk disclosure rule under the Congressional Review Act.

Uyeda's speech was a wide-ranging excursus on how he believes the Commission should conduct complex rulemakings. According to Uyeda, the Commission should do more to take into consideration issues of purpose, scale, and cumulative costs.

He often cited the Commission's pay versus performance rulemaking, which was one of several executive compensation rules mandated by the Dodd-Frank Act. Uyeda noted that it took seven years for the rule to be proposed and then finalized, with one reopening of the comment period for 30 days, albeit without an updated economic analysis. Uyeda said the final pay versus performance rule significantly changed the calculation of "compensation actually paid" and resulted in early filings under the rule stating negative numbers for many principal executive officers' "compensation actually paid" in at least one of the years that were to be reported under the rule.

But Uyeda perhaps leveled his strongest criticism of the Commission at its tendency to not re-propose rules in light of changed circumstances due to lapsed time or other considerations that may suggest the need to dramatically alter the final version of a regulation from what was proposed. With respect to lapsed time, Uyeda said the SEC staff's practice was to recommend a re-proposal of a rule after more than five years have passed without a final version being adopted.

"The Commission does not always get the original proposal right and sometimes must contemplate making significant changes to the proposal—a version 2.0 so to speak," said Uyeda. "In this situation, an important decision to make is whether to re-propose a rule and provide a revised economic analysis. Re-proposing a rule is also appropriate when significant time has passed since the original proposal. However, the Commission has rarely re-proposed rules in recent years, even when both conditions were present" (footnote omitted).

In the case of the Commission's climate risk disclosure proposal, Uyeda observed that there was an unusually high number of public comments, which despite that high number, still had not addressed every possible aspect of the proposal. According to Uyeda, the climate risk disclosure proposal could be a prime candidate for a re-proposal.

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“Before the Commission adopts any final rule that significantly deviates from the proposal, it should seriously consider re-proposing the rule with revised rule text and an updated economic analysis,” said Uyeda. “Doing so would provide the public with an opportunity to focus on aspects of the proposal that they did not initially consider, and perhaps more importantly, submit feedback on any revised requirements.”

Uyeda also took issue with one of Gensler’s oft-repeated justifications for the climate risk disclosure proposal—that shareholders want information about how public companies are addressing climate risk. In Uyeda’s view, Gensler’s theory raises free rider issues because not all stakeholders want the same information and, if the rationale is extended across industries and economic sectors, not all shareholders in all industries and sectors want the same information. That means that a rule mandating certain disclosures on a topic that is of interest to only a small number of shareholders may generate costs that are borne equally by all shareholders, even those who do not want the mandated information.

Said Uyeda: “The question should *not* merely be whether investors want the information, but rather to what extent are investors willing to pay for that information” (emphasis in original).

Uyeda also took a second jab at one facet of Gensler’s theory that shareholders want climate risk information. Here, Uyeda posited that when one looks across demographics such as industries, sectors, business models, or regulatory environments, the free rider problem becomes worse if the information sought to be disclosed must be “consistent and comparable,” something Gensler has said is a stated goal of the climate risk disclosure regulation.

In the October fireside chat with members of the U.S. Chamber of Commerce, Gensler suggested that SEC staff could mull economic baselines given developments in California and Europe and that a federal climate risk disclosure rule that could be upheld in court would be a good outcome for U.S. public companies who then might not have to adhere to a foreign jurisdiction’s climate risk disclosure rules.

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