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Client Alert

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Will ESG Disclosures be Mandated by Law? A Legislative Analysis.

INTRODUCTION

The chorus demanding that companies disclose information regarding their environmental, social and governance ("ESG") impact has gotten louder in recent years and with the change in administration. Underpinning those voices is the trend toward "socially responsible investing" – an investing strategy that considers how a company impacts social issues such as climate change or diversity as equally as whether the company will provide a return on investment. To effectuate this strategy, investors have called for the Securities and Exchange Commission (the "SEC") to explicitly require all companies to report on these social issues in quarterly and annual reports, proxy statements, and other public filings. These latest efforts have come directly from President Joe Biden, the SEC, and most recently, the U.S. House of Representatives (the "House").

On June 16, 2021, the House narrowly passed H.R. 1187, the "Corporate Governance Improvement and Investor Protection Act" (the "Act"), which was a collection of several different bills that would require companies to publicly disclose substantial ESG metrics in various issuer materials. Principally of note is the "ESG Disclosure Simplification Act of 2021" and the "Climate Risk Disclosure Act of 2021," both of which would amend the Securities Exchange Act of 1934 and direct the SEC to engage in rulemaking to set out the requirements for standardized ESG disclosures should H.R. 1187 become law.

This article looks at the background and substance of H.R. 1187, which now has been referred to the Senate Committee on Banking, Housing, and Urban Affairs, the likelihood H.R. 1187 or similar Congressional effort will become law, and the likelihood that efforts to push through SEC rulemaking, whether required by Congress or not, will succeed in the long-term.

A GROWING CHORUS TO ADDRESS ESG ISSUES

Investors are increasingly including ESG information in their investment decisions.[1] A recent survey by Harvard Business Review noted the following about this trend:

> In 2006, when the UN-backed Principles for Responsible Investment (PRI) was launched, 63 investment companies (asset owners, asset managers, and service providers) with $6.5 trillion in assets under management (AUM) signed a commitment to incorporate ESG issues into their investment decisions. By April 2018, the number of signatories had grown to 1,715 and represented $81.7 trillion in AUM. According to a 2018 global survey by FTSE Russell, more than half of global asset owners are currently implementing or evaluating ESG considerations in their investment strategy.[2]

The current administration has taken notice. On May 20, 2021, President Biden issued the Executive Order on Climate-Related Financial Risk. As part of the order, Treasury Security Janet Yellen and the Treasury's Financial Stability Oversight Council ("FSOC") must assess the risks climate change poses to the American financial system with a sight on future regulatory actions.[3] Additionally, in March 2021, the Commodities Futures Trading Commission ("CFTC") established its Climate Risk Unit. The Climate Risk Unit is focused "on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy" while addressing the "industry-led and market-driven processes in the climate—and the larger ESG—space."[4]

The SEC, under the leadership of Chair Gary Gensler, has also indicated a desire and willingness to respond to increased investor interest in this space. As noted in our March 2021 alert, the current SEC focus on ESG is not surprising.[5] In January 2021 then-SEC Acting Chair Allison Herren Lee created the position of Senior Policy Advisor for Climate and ESG within the Office of the Acting Chair.[6] In March 2021, the SEC formed the Climate and ESG Task Force within its Division of Enforcement.[7] While not explicit, the SEC press release anticipates future ESG rulemaking and the Task Force's role in enforcing those potential changes in disclosure requirements, a supposition supported by the SEC issuing a request for public comment on potential rulemaking in this area shortly after announcing the Task Force's formation.[8]

CORPORATE GOVERNANCE IMPROVEMENT AND INVESTOR PROTECTION ACT: HISTORY OF H.R. 1187

On February 18, 2021, Rep. Juan Vargas, Democrat from California, introduced H.R. 1187: the Corporate Governance Improvement and Investor Protection Act.[9] This Act brought forward several bills previously considered within the House Financial Services Committee, each under a separate title within the final bill voted on by the House at large.

In the Financial Services Committee hearing shortly before the bill's introduction, the majority staff of the Committee stated, "[t]here is growing evidence that climate change risk, as well as other ESG disclosures, are material to investors, but are not necessarily being disclosed by companies."[10] Additionally, as rationale for the need for these disclosures, staff cites the lack of supply chain transparency which "prevents shareholders and potential investors from adequately assessing a company's potential legal exposure and risk of reputational harm." According to majority staff, these disclosures will create clear criteria to measure corporate social accountability, which will allow companies to ascertain whether certain risks are material. The Act bundled seven ESG bills that the House Financial Services Committee approved in recent months.[11]

On June 16, 2021 the House narrowly passed H.R. 1187, largely along party lines. With only a one vote margin, 215-214, no Republicans voted for the bill while four Democrats voted against it.[12] Following its passage, the bill was received in the Senate and referred to the Committee on Banking, Housing, and Urban Affairs.

WHAT'S IN THE CORPORATE GOVERNANCE IMPROVEMENT AND INVESTOR PROTECTION ACT

The ambitious Act is wide ranging and includes eleven titles that address various areas of corporate disclosures including: ESG disclosures, shareholder political transparency, accountability in pay, climate risk disclosures, disclosure of tax havens and offshoring, workforce investment, preventing and responding to workplace harassment, cybersecurity disclosure, governance through diversity, disclosure of the use of forced labor, and other matters.[13]

This article focuses on Title I, the ESG Disclosure Simplification Act of 2021 and Title IV, the Climate Risk Disclosure Act of 2021.

A. Title I – The ESG Disclosure Simplification Act of 2021

In addition to requiring the SEC to engage in rulemaking to define exact ESG disclosure standards, the ESG Disclosure Simplification Act requires that public filers disclose "a clear description of the views of the issuer about the link between ESG metrics and the long-term business strategy of the issuer" and "a description of any process the issuer uses to determine the impact of ESG metrics on the long-term business strategy of the issuer." The Act then goes on to direct the SEC to define the "ESG metrics" that must be disclosed.

The Act also creates the Sustainable Finance Advisory Committee pursuant to section 4(k) of the Securities and Exchange Act of 1934, which would submit recommendations to the SEC about the ESG metrics the Commission should require issuers to disclose no later than after 180 days after an initial meeting.

The Act clarifies that the ESG metrics, as will be defined by the SEC, will be de facto material for the purposes of disclosures. The Act does not specific where companies will need to include ESG metrics in their filings, but states that ESC disclosures "may be included in the notes section of the filing." This suggests that the Act authorizes the SEC to require companies to include this information in the notes to their financial statements, which are audited.

The Act delays the requirements set out above for Small Issuers, as defined by 17 CFR § 240.0-10, issuers with total assets of $5 million or less — allowing for the SEC to use a "phased approach."

Additionally, the Act calls for the SEC to conduct a study on shareholder collective action, specifically, "the emergence, viability, and significance of coalitions of shareholders who wish to preserve and promote critical employment and ESG standards." The study would look into whether shareholder collective actions have implications for issuer filing requirements and whether there are anticompetitive activities associated with shareholder collective action. The SEC study would then be submitted to Congress with guidance on shareholder engagement activities that are not considered to involve questions of corporate control, as well as recommendations on regulatory safe harbors for portfolio companies that pursue socially responsible investing.

B. Title IV – The Climate Risk Disclosure Act of 2021

The Climate Risk Disclosure Act of 2021, in part, directs the SEC to promulgate climate-related risk disclosure rules that are "specialized for industries within specific sectors of the economy," and "include reporting standards for estimating and disclosing direct and indirect greenhouse gas emissions by a covered issuer, and any affiliates of the covered issuer." Title IV also lays out specific codified disclosure requirements including: the identification, evaluation, and risk-management strategies relating to the physical and transitional risks posed by climate change; a description of corporate governance processes and structures to identify, assess, and manage climate-related risks; the specific actions the

issuer is taking to mitigate climate-related risks; the resilience of any strategy the issuer has for addressing climate risks; and a description of how climate risk is incorporated into the issuer's overall risk-management strategy.

The Act specifically identifies the "sectors of finance, insurance, transportation, electric power, mining, and non-renewable energy" but also requires the SEC to promulgate rules for "any other sector determined appropriate by the Commission, in consultation with the appropriate climate principals." The level of detail suggested by Title IV would likely lead to an increase in costs for a variety of industries not currently quantifying their environmental impact, including the finance and potentially manufacturing industries.[14] While the details are yet to be finalized, the finance industry may have to account for all the companies for which it invests in or loans money to,[15] while the manufacturing industry may be compelled to assess vendors of supply chain materials in ways it has not to date.[16] Other industries may currently be more capable of quantifying their environmental impact but historically have been resistant to sharing that type of information with investors.

LIKELIHOOD THAT THE CORPORATE GOVERNANCE IMPROVEMENT AND INVESTOR PROTECTION ACT BECOMES LAW

Despite the ambitious efforts of the House evidenced by the breadth of the Act, it is very unlikely Democrats in the Senate will be able to pass the Act without using reconciliation (and therefore bypassing the filibuster and passing the Act by a simple majority vote). Republicans on the Senate Banking Committee have already expressed their opposition to further ESG disclosures in a public letter to the SEC. The letter in part argues, "[W]e do not believe that any further securities regulations to specifically address global warming are necessary or appropriate, and will only serve to further discourage firms from becoming publicly traded, thus denying significant investment opportunities to retail investors."[17]

Additionally, the fact that four Democrats in the House voted against the Act suggests that moderate Senate Democrats may raise concerns regarding the breadth of additional disclosures required by the House's version of the Act. This would eliminate the already unlikely option of using reconciliation to pass the Act.

Despite a low likelihood of passage, the Act certainly signals to the recently appointed SEC Chairman Gary Gensler the expectations of the majority in Congress. What follows in this article is an examination of potential steps the SEC may take, even if the Act does not pass, as well as the likelihood of success for any rulemaking in the absence of legislative support.

CAN THE SEC REQUIRE ESG DISCLOSURES EVEN WITHOUT CONGRESSIONAL ACTION?

Even if Congress does not pass the Act, there is mounting evidence that the SEC will unilaterally act to require issuers to include ESG data in public disclosures.

Whether the SEC has the authority to do so without explicit Congressional authorization is up for debate. Those who support unilateral SEC rulemaking argue that there is no need for an official delegation of Congressional authority in order for the SEC to expand disclosure obligations.[18] Rather, the SEC already can dictate what information issuers are required to disclose under the Securities Act of 1933 and the Securities Exchange Act of 1934. Proponents argue that these statutes grant the SEC broad authority to implement and enforce regulations as part of their mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.[19] Under Section 7 of the Securities Act, the SEC "may exercise its rulemaking authority to prescribe additional information . . . as it deems necessary or appropriate in the public interest or for the protection of investors."[20]

Opponents of unilateral SEC action, and ESG disclosures more broadly, argue that the SEC cannot require issuers to disclose such information without, at minimum, a congressional statute authorizing them to do so.[21] This is because such disclosure obligations "would be different from the kind of disclosure requirements Congress permitted the SEC to

write," which are limited to "the features of the company bearing on financial performance."[22] To the extent that companies disclose ESG concerns, they should only do so when those concerns have the potential to impact their financial performance.[23]

One point of contention between those who support SEC action on ESG issues and those who do not is the debate over whether such information is "material." In a frequently cited Supreme Court opinion *TSC Industries v. Northway*, Justice Thurgood Marshall defined material information as that which a reasonable investor would consider important to know in making an investment or voting decision.[24] Many who argue that the SEC should not, and cannot, adopt ESG disclosure requirements do so on the basis that such information is not "material." For example, in a speech before the National Investor Relations Institute on June 22, 2021, Commissioner Elad Roisman expressed skepticism that ESG information is "material" to investors:

> [T]o the extent that the Commission is, properly, looking to gauge investors' interest in ESG information as an indicator of materiality, we must be careful we are actually looking at the interests of true investors and remaining cognizant that others, who might claim to represent them, can have different concerns. Many have pointed to the increasing amounts of money that retail investors are allocating to funds labeled "ESG," "green," and the like as an indication that retail investors consider ESG issues important in investing. But, it is not clear to me that we understand these investors' objectives, which (as the SEC's Asset Management Advisory Committee has noted) may "fall outside risk/return alone." To the extent that investors' objectives are unrelated to risk/return, it is hard to see how the information relevant to those strategies could be considered material, per the SEC's historical understanding of the term.[25]

Supporters of unilateral SEC action counter that the SEC is not limited by the concept of "materiality" in dictating disclosure requirements,[26] but even if it was, information about a company's environmental impact, diversity, and political contributions is information that investors do find "financially material."[27]

The SEC certainly believes that it has the authority to unilaterally broaden reporting requirements to include ESG disclosures,[28] and recent events indicate that it intends to do so. First, the current SEC Chair Gary Gensler has made repeated public statements supporting new rulemaking requiring disclosure on climate risks,[29] as well as advocating for increased transparency surrounding sustainability and diversity claims by asset managers.[30] The SEC also requested public comments on whether current disclosure obligations "adequately inform investors about known material risks, uncertainties, impacts, and opportunities," or "whether greater consistency could be achieved."[31] Finally, in February of this year, the SEC announced the appointment of Satyam Khanna as the first Senior Policy Advisor for Climate and ESG, tasked with "advis[ing] the agency on environmental, social, and governance matters and advanc[ing] related new initiatives across its offices and divisions."[32]

ASSUMING ACTION BY THE SEC, WILL RULEMAKING EVEN BE SUCCESSFUL?

Even if the SEC successfully finishes the rulemaking process, it will likely be many years before issuers will have to disclose ESG information in their annual and quarterly reports. Any successful rulemaking will likely be met with a flurry of lawsuits, and may even fall victim to Congressional action.

Previous efforts by the SEC to effectuate politically sensitive rulemaking offers insights into what may await any new ESG disclosure requirements. In 2010, as part of the Dodd-Frank Act, Congress passed Section 1504 directing the SEC to issue rules requiring resource extraction issuers to disclose payments made to the United States or foreign governments for the commercial development of oil, natural gas, or minerals.[33] The SEC attempted to issue final rules

three times. Its first attempt in 2012 was opposed by industry groups, who challenged the rules in federal court.[34] In 2013, a U.S. District Court for the District of Columbia vacated the rules on the grounds that the SEC had “misread the statute on one point and acted arbitrarily on another.”[35] The SEC issued the rules a second time in 2016, but was again met with resistance, this time from Congress. Under the Congressional Review Act, federal agencies must submit final rules to Congress, which is entitled to disprove a rule within a certain amount of time.[36] On February 14, 2017, for only the second time under the CRA,[37] Congress disproved the rules by a joint resolution.[38] Finally, on December 16, 2020, the SEC voted for a third time to adopt final rules.[39]

The SEC’s tortuous path to comply with Section 1504 shows some of the pitfalls that may befall future efforts to issue rules governing ESG disclosures. Like Section 1504, H.R. 1187 faces strong partisan and industry opposition. Any rulemaking will be subject to lawsuits, and a change in Congressional leadership could result in the rules being subject to scrutiny under the Congressional Review Act. Further, the political scrutiny that the rules will face may result in disclosure obligations that fall short of the goals set by the Act and Chair Gensler. Indeed, critics argue that the SEC’s third attempt to pass rules for resource extraction issuers falls far short of meeting the transparency and anti-corruption goals that Section 1504 was enacted to achieve, and there are already calls for new appointees under President Biden to strengthen the newly passed rules.[40]

CONCLUSION

Past experience suggests that the road to final rules requiring ESG disclosures will be a long and difficult one, whether the impetus for such rulemaking comes from Congress or the Commission itself. Even without such rules, the evidence suggests that investors are increasingly moving away from issuers who do not publish this information or make ESG-related issues part of their governing mandate. As a result, it is increasingly likely that issuers will begin to disclose such information, either because they need to do so to raise new capital or because they have determined that the information is now material to investors. Without standardized definitions or disclosure obligations clearly outlining what information investors can expect to receive, however, it is unclear how effective such disclosures will be.

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[1] Robert Eccles & Svetlana Klimenko, *The Investor Revolution*, Harvard Business Review (May-June 2019), *available at* https://hbr.org/2019/05/the-investor-revolution; Imogen Tew, *How ESG-linked stock outperformed in 2020*, FT Adviser (Nov. 10, 2020), *available at* https://www.ftadviser.com/investments/2020/11/10/how-esg-linked-stocks-outperformed-in-2020/ ("ESG investing has boomed in popularity in recent years as fears over climate change have led investors to consider the impact of their money and as a growing number of millennials have begun investing.").
[2] Eccles & Klimenko, *supra* note 1.
[3] Press Release, The White House, Executive Order on Climate-Related Financial Risk (May 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/.
[4] Press Release, CFTC, CFTC Acting Chairman Behnam Establishes New Climate Risk Unit (Mar. 17, 2021), *available at* https://www.cftc.gov/PressRoom/PressReleases/8368-21.
[5] SEC Kicks Off 2021 Agenda With Intense Focus on ESG Disclosures, King & Spalding (March 19, 2021), *available at* https://www.kslaw.com/news-and-insights/sec-kicks-off-2021-agenda-with-intense-focus-on-esg-disclosures.
[6] Press Release, SEC, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021), *available at* https://www.sec.gov/news/press-release/2021-20.
[7] Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), *available at* https://www.sec.gov/news/press-release/2021-42.
[8] Public Statement, SEC, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
[9] H.R.1187 - 117th Congress, Congress.gov (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/1187.
[10] Memorandum from the FSC Majority Staff on February 25, 2021, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Hearing entitled, Climate Change and Social Responsibility: Helping Corporate Boards and Investors Make Decisions for a Sustainable World, Financialservices.house.gov (Feb. 22, 221), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-20210225-sd002.pdf.
[11] All Actions, H.R.1187 - 117th Congress, Congress.gov (2021-2022), *available at* https://www.congress.gov/bill/117th-congress/house-bill/1187/all-actions?overview=closed#tabs. Specifically, the bill incorporates H.R. 1187, "ESG Disclosure Simplification Act of 2021," H.R. 3623, "Climate Risk Disclosure Act," H.R. 5084, "Improving Corporate Governance Through Diversity Act of 2021," H.R. 1087, "Shareholder Political Transparency Act of 2021," H.R. 1188, "Greater Accountability in Pay Act of 2021," H.R. 3007, "Disclosure of Tax Havens and Offshoring Act," and H.R. 6270, "Uyghur Forced Labor Disclosure Act of 2020."
[12] Roll Call 169, Bill Number: H. R. 1187, 117th Congress, 1st Session, Office of the Clerk, U.S. House of Representatives (2021), *available at*, https://clerk.house.gov/Votes/2021169. The four Democrats who voted against the Corporate Governance Improvement and Investor Protection Act are: Rep. Henry Cuellar (TX-28), Rep. Lizzie Fletcher (TX-7), Rep. Susie Lee (NV-3), and Rep. Kurt Schrader (OR-5).
[13] H.R.1187 - 117th Congress, Congress.gov (2021-2022), *available at*, https://www.congress.gov/bill/117th-congress/house-bill/1187/text.
[14] *See* Press Release, National Association of Manufacturers, NAM Lays Out ESG Disclosure Priorities, https://www.nam.org/nam-lays-out-esg-disclosure-priorities-14022/?stream=policy-legal (last visited Sept. 16, 2021). The National Association of Manufactures submitted a comment in response to the SEC's March 2021 call for public input on potential rulemaking for an ESG disclosure framework.
[15] *See* John Coates, Acting Dir. Div. Corp. Fin. SEC, ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121.
[16] *See* National Association of Manufacturers, s*upra* note 14.
[17] Letter from Republicans of the United States Senate Committee on Banking Housing and Urban Affairs to Gary Gensler, Chair and Allison Herren Lee, Comm'r, U.S. Senate (Jun. 13, 2021), *available at* https://www.banking.senate.gov/imo/media/doc/banking_committee_republicans_letter_to_sec_on_climate_disclosures.pdf
[18] *See, e.g.*, Alexandra Thornton and Tyler Gellasch, *The SEC has Broad Authority to Require Climate and Other ESG Disclosures*, CENTER FOR AMERICAN PROGRESS (June 10, 2021), https://www.americanprogress.org/issues/economy/reports/2021/06/10/500352/sec-broad-authority-require-climate-esg-disclosures/.
[19] What We Do, SEC, *available at* https://www.sec.gov/about/what-we-do (last visited Aug. 26, 2021).
[20] Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064, 2016 WL 1458170, 22-27, 204-05 (Apr. 13, 2016), *citing 15 U.S.C. 77g.*
[21] Andrew N. Vollmer, Mandatory Disclosure Rules on Climate Change are a Job for Congress, not the SEC, The Hill (Jul. 31, 2021), https://thehill.com/opinion/finance/565782-mandatory-disclosure-rules-on-climate-change-are-a-job-for-congress-not-the
[22] Vollmer, *supra* note 21;; *see also*, Elad L. Roisman, Comm'r, SEC, Can the SEC make ESG Rules that are Sustainable? (Jun. 22, 2021), https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable ("[W]e must remember that the SEC has no legislative mandate to make rules for the U.S. financial markets to further these same societal objectives. If our Congress wishes to follow suit, it certainly can.").
[23] Roisman, *supra* note 22: "In carrying out its role as a federal securities regulator, that is where the Commission must continue to focus: it should assess the merits of any potential disclosure requirements against the question of whether a reasonable investor would consider them material—that is, to a company's financial value."
[24] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).
[25] Elad L. Roisman, Comm'r, SEC, Can the SEC Make ESG Rules that are Sustainable? (Jun. 22, 2021), https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable#_ftnref6.
[26] *See, e.g.*, Alexandra Thornton and Tyler Gellasch, *The SEC Has Broad Authority To Require Climate and Other ESG Disclosures,* CENTER FOR AMERICAN PROGRESS (June 10, 2021), https://www.americanprogress.org/issues/economy/reports/2021/06/10/500352/sec-broad-authority-require-climate-esg-disclosures/ ("Nowhere in the Securities Act of 1933, the Securities Exchange Act of 1934, their legislative histories, or case law is the SEC's authority to mandate disclosures limited to just information that is deemed material to investors. Indeed, to impose such a limit now would effectively repeal a significant and increasingly important part of U.S. federal securities laws that not only protects investors directly, but also provides

for more fair, orderly, and efficient markets, promotes capital formation, and in so doing, protects the public interest."); Letter from Heather Slavkin Corzo, Director, AFL-CIO, to Brett J. Fields, Secretary, SEC at 9 (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-305.pdf ("'Materiality,' the dominant principle in our disclosure regime, defines the floor below which reporting becomes fraudulent. It is the catchall, a backstop, the 'at a minimum' safety provision. It is *not* the driving force of our disclosure regime. The '33 and '34 Acts charge the Commission with establishing a disclosure regime to protect investors and our markets. It cannot achieve this by focusing merely on what would constitute fraud.").

[27] Letter from Securities Law specialists to Brett J. Fields, Secretary, SEC at 6 (Oct. 1, 2018), *available at* https://www.sec.gov/rules/petitions/2018/petn4-730.pdf.

[28] Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064, 2016 WL 1458170, 22-27, 204-05 (Apr. 13, 2016).

[29] Bob Pisani, *SEC Chair Gensler says investors want mandatory disclosure on climate risks*, CNBC (July 28, 2021), https://www.cnbc.com/2021/07/28/sec-chair-gensler-says-investors-want-mandatory-disclosure-on-climate-risks.html.

[30] Gary Gensler, Chair, SEC, Prepared Remarks Before the Asset Management Advisory Committee (July 7, 2021), *available at* https://www.sec.gov/news/public-statement/gensler-amac-2021-07-07.

[31] Allison Herren Lee, Acting Chair, SEC, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[32] Press Release, SEC, Satyam Khanna Named Senior Policy Advisor for Climate and ESG (Feb. 1, 2021), *available at* https://www.sec.gov/news/press-release/2021-20.

[33] Nicholas Grabar and Sandra L. Flow, *Congress Rolls Back SEC Resource Extraction Payments Rule*, Harvard Law School Forum on Corporate Governance (Feb. 16, 2017), https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Peter Rasmussen, *Analysis: SEC Tries to Solve CRA Conundrum on Resource Payments*, BLOOMBERG LAW (Jan. 7, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-sec-tries-to-solve-cra-conundrum-on-resource-payments.

[39] Press Release, SEC, SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020), *available at* https://www.sec.gov/news/press-release/2020-318. This third effort to pass final rules was not without internal opposition. In a recent speech before the Society for Corporate Governance, Chairman Roisman stated the following about the SEC rulemaking for resource extraction issuers:

While the Commission takes its statutory requirements seriously, I cannot plausibly say the rulemaking is central to the SEC's tripartite mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. As one Senator who co-sponsored the provision requiring this rulemaking stated, this rule will "help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues." Now, I am sure that members of Congress as well as those who work at the State Department and other agencies tasked with responding to corruption and violence in other countries are keenly aware of certain behavior and problems in those countries. And I hope they are thinking through ways to prevent and stop it. But I don't see myself as having special expertise in those matters, and I can't help but worry: If we adopt this rule and it indirectly forces companies to cease business operations in certain countries, will we have achieved the net benefit Congress was hoping for? Or, rather, will people in these communities lose their only available employment option? What type of mandated disclosure will help solve that problem? The point I am trying to make is that securities law regulators are not best equipped to understand (much less address) all of the potential negative effects that may result from us approaching these issues through mandated disclosures under the securities law framework.

Elad L. Roisman, SEC Commissioner Advocates ESG Disclosure for Asset Managers, Not Issuers, THE CLS BLUE SKY BLOG (Jul. 10, 2021), https://clsbluesky.law.columbia.edu/2020/07/10/sec-commissioners-advociates-esg-disclosure-for-asset-managers-not-issuers/.

[40] Andrew Ramonas, *Biden SEC Will Face Calls to Toughen Energy Payment Disclosures*, BLOOMBERG LAW (Dec. 17, 2020), https://news.bloomberglaw.com/energy/biden-sec-will-face-calls-to-toughen-energy-payment-disclosures?context=search&index=1