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SEC ACTING CHAIR ANNOUNCES SWEEPING CLIMATE AND ESG INITIATIVES, NEW REGULATORY PRIORITIES AND POTENTIAL ROLLBACK OF RECENT RULE CHANGES

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In a speech on March 15, 2021, Allison Herren Lee, Acting Chair of the SEC, reported on the steps the SEC is taking to meet investors' growing demand for climate and ESG information, stating that "no single issue has been more pressing for me" and that "climate and ESG are front and center for the SEC." She observed that there has been a shift in capital towards ESG and sustainable investment strategies, and that ESG risks and metrics increasingly affect investment decision-making.

Lee indicated that the SEC will devote substantial resources to investor protection initiatives that extend beyond, but are mutually reinforcing of, the SEC's climate and ESG initiatives. She noted that these other initiatives include, among others, ensuring strong and clear standards for broker-dealers, taking a "hard look" at the effects of the continuing flow of capital away from the public markets and proceeding with equity market structure reforms. Reflecting the change in administration and SEC leadership, she noted that this may result in undoing some recently adopted rules and/or guidance.

Highlights of Acting Chair Lee's speech follow:

Improving Climate and ESG Disclosures. Lee noted that the SEC's fundamental role with respect to climate and ESG is helping ensure that material information gets into the market in a timely manner. She believes the SEC's current voluntary framework for climate and ESG disclosures neither ensures that result nor meets investor demands; as a result, the SEC has begun taking steps to create a mandatory and comprehensive ESG disclosure framework "aimed at producing the consistent, comparable, and reliable data that investors need." As discussed in our March 4, 2021 post, Lee recently issued a Public Statement announcing that she has directed the Division of Corporation Finance to enhance its focus on climate-related disclosures, including by reviewing the extent to which companies are complying with the SEC's 2010 climate change guidance. In her speech, Lee reiterated that the purpose of that exercise is to inform an update to the 2010 guidance, as well as future SEC policymaking.

She also noted that as part of that same exercise, she had released a Public Statement dated March 15, 2021 requesting public comment on climate disclosure matters from investors, registrants and other market participants. The Statement includes a detailed list of 15 multi-part questions, including (1) what climate and ESG data and metrics are most useful and cut across industries, (2) to what extent should there be an industry-specific approach to climate and ESG disclosures, (3) what can we learn from existing voluntary disclosure frameworks and (4) how can the SEC devise a climate disclosure regime that is sufficiently flexible to address market and scientific developments.

Lee also recognized the importance of other ESG issues, including human capital, board diversity and, in particular, political spending disclosures. While the SEC is currently prevented from finalizing any rules mandating political spending disclosures, she believes such rules are necessary for transparency and the protection of investors. She cited as examples (1) companies that purport to support climate-friendly initiatives but make substantial donations to candidates who do not have a climate-friendly voting record, as well as (2) investors' inability to determine whether companies have actually changed their political spending after making pledges to do so in response to racial justice protests.

Revamping the Shareholder Proposal Process. Lee announced that she has asked the Staff to develop proposals to revise guidance on the no-action process for shareholder proposals and even potentially to revise Rule 14a-8 itself. She criticized the 2020 amendments to Rule 14a-8 that, as discussed in our September 24, 2020 client alert, were adopted by a 3-2 vote, pointing out that the Staff's current work could address "last year's mistaken decision to bar proponents from working together and restricting their ability to act through experienced agents" and reaffirm that "proposals cannot be excluded if they concern socially significant issues, such as climate change, just because they may contain components that could be viewed as 'ordinary business'." Her goals include "increasing the number of ballot proposals that are well-designed for shareholder deliberation and voting and decreasing the number of those that are not."

Voting Rights Improvements. Lee reported that because of a concern that the SEC's August 2019 *Guidance Regarding Proxy Voting Responsibilities of Investment Advisers* (discussed in our October 2019 Newsletter) can discourage voting by fiduciaries, she has asked the Staff to enhance, supplement or replace that guidance. She also announced that she has asked the Staff to consider (1) making changes to improve disclosures of fund voting decisions and (2) whether the SEC should re-open its comment file on the 2016 universal proxy rule proposal and move toward finalizing the proposal, which "has been outstanding for far too long" and "represents a common-sense step forward in modernizing our proxy rules and protecting shareholder rights."

Role of SEC Divisions of Examinations and Enforcement. Lee believes the SEC must incorporate climate change and ESG into its examination and enforcement processes similar to cybersecurity and Fintech. She noted the March 2021 announcement by the Division of Examinations that its 2021 examination priorities include a greater focus on climate-related risks, as well as the SEC's March 2021 announcement that it has formed its first ever Climate and ESG Task Force within the

SEC's Division of Enforcement to, among other things, develop initiatives to proactively identify ESG-related misconduct. We covered these earlier announcements in our March 5, 2020 post, *Climate Disclosure in the Hot Seat*.

SEC Engagement Across Boundaries. Lee noted that ESG and climate risks do not observe jurisdictional boundaries and committed to close regulatory cooperation on both the domestic and international fronts.

Looking Ahead. In concluding, Lee observed she could not cover all of the areas in which climate and ESG intersect with the SEC's mission. She cited, by way of example, both the SEC's recent issuance of a bulletin to help investors understand ESG strategies that funds may pursue and the SEC's work towards enhanced transparency around proxy voting. She added that the SEC faces other challenges in enhancing the reliability of climate and ESG disclosures, including, among others, considering whether to require auditor attestation of current voluntary sustainability reporting and whether the PCAOB should develop better standards or guidance for addressing climate and ESG-related financial statement disclosures.

She also noted other investor protection issues that she believes the SEC should address, including "build[ing] strong and clear standards for broker-dealers under Regulation Best Interest," studying the effects on retail investors of the continued flow of capital away from public markets, and "proceeding with equity market structure reforms including a holistic review of the many factors that affect whether retail investors receive the best execution of their trades."

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