Client Alert

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Leadership Change at the SEC: What Activists Could Expect from Gary Gensler and the Biden Administration

President Biden to Nominate Former CFTC Chair Gary Gensler to Lead the SEC

The Biden administration confirmed this week that Gary Gensler, who led the Commodity Futures Trading Commission (the "CFTC") from 2009 to 2014, will be nominated to head the Securities and Exchange Commission (the "SEC"). A veteran regulator and former Goldman Sachs partner, Mr. Gensler is expected to toughen the previous administration's approach to regulation and enforcement, much like he did during his prolific and sometimes controversial tenure at the CFTC. As we expect that Mr. Gensler's upcoming nomination hearings will put a spotlight on his philosophy and the priorities of the new administration, we highlight three areas to which shareholder activists should pay particular attention:

1. Proxy Advisor Regulation. Under its previous Chair Jay Clayton, the SEC promulgated a sweeping set of new rules governing proxy advisory firms. Among other things, the new rules conditioned the availability of certain existing exemptions from information and filing requirements of the proxy rules upon compliance with additional disclosure and procedural requirements, forcing proxy advisors to disclose conflicts of interest to their clients and give simultaneous notice to issuers and clients of their voting recommendations. Unimpeded, these rules would impact the important role that proxy advisory firms have historically played as neutral arbiters in proxy contests, transactions subject to shareholder approval and the annual meeting process, potentially to the detriment of shareholder activists. Furthermore, the new rules clarified the SEC's view that proxy voting advice is generally considered to be a solicitation under Rule 14a-1(l) of the Securities Exchange Act of 1934 (the "Exchange Act") and thus subject to federal proxy rules. Institutional Shareholder Services ("ISS") has sued the SEC in federal court to block the implementation of the new rules.

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What to watch for: Compliance with the new rules, which were approved on a party-line vote without support of Democratic commissioners, will not be required until the 2022 proxy season. This provides an opportunity for the SEC under Mr. Gensler to retract or revise the rules and avoid diminishing the important role played by proxy advisors. As the U.S. District Court for the District of Columbia is expected to rule on the matter in early 2021, watch for a quick settlement as an early indication of what the SEC is thinking.

2. ESG. Corporate environmental, social and governance practices have recently come into full focus throughout the investment community. With states mandating board diversity and large institutional investors threatening to withhold support for management and boards of companies without robust climate impact and human capital disclosure, activists have increasingly sensed opportunity and extended their focus on governance to include environmental and social issues. For the first time, the 2021 proxy season is expected to include numerous high-impact activist campaigns where these issues will be front and center. This trend gained momentum in spite of actions by the last administration that discouraged ESG activism by large institutional investors. For example, the SEC suggested that fiduciaries such as investment advisers were not required to vote their funds' shares, while the Department of Labor adopted a rule to prohibit pension plan managers from voting portfolio companies' shares contrary to the sole interest of and for the exclusive purpose of providing plan benefits to plan participants, including with respect to ESG proposals.

   What to watch for: With the Biden administration anticipated to pursue progressive climate policies and racial and gender diversity initiatives, we expect the SEC to be one of the levers it uses to promote its agenda. This may mean increased SEC oversight and scrutiny of the use of ESG metrics by issuers, funds, institutional investors and proxy advisors – already a discernable trend during Mr. Clayton's tenure – or, perhaps, more robust mandatory ESG disclosure for companies. While many activists are already ahead of the curve on these issues, others may quickly find that environmental and social considerations will be increasingly difficult to ignore.

3. Section 13(d) Reform. At the CFTC, Mr. Gensler demonstrated an ability to balance progressive political pressures with competing industry interests. Should he take a similarly pragmatic approach if confirmed to lead the SEC, one of the areas where a coalition can be brokered between different interest groups is reform of Section 13(d) of the Exchange Act. Adopted in 1968 as part of the

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Williams Act, Section 13(d) instituted a rigorous beneficial ownership disclosure regime that requires stockholders to promptly notify issuers if they accumulate significant stock positions. Ever since, corporations and their advisors have agitated for increasingly stringent investor reporting obligations. Likewise, progressives skeptical of hedge funds and activism in general have also trained their sights on parts of Section 13(d). As a testament to the appeal of this sentiment to both the business community and progressives, legislation (the "Brokaw Act") was introduced in the Senate in 2017 to intensify oversight of activist hedge funds through Section 13(d) reform by Senator Tammy Baldwin (D-WI) and former Senator David Perdue (R-GA), each a member of the peripheral wing of their respective party.

What to watch for: First, corporate interest groups and progressives are likely to once again put pressure on the SEC to shorten the disclosure window for initial Schedule 13D filings – the Brokaw Act called for a reduction from 10 days to 4 business days, although more radical arguments have been made, including for just 1 business day. Second, expect renewed efforts by the defense bar urging the SEC to use its rulemaking ability to tighten the definition of "group" aimed at chilling otherwise legitimate communications by and among shareholders. Third, Mr. Gensler, who began his career as a swaps trader and took an aggressive approach to derivatives trading regulation during his time at the CFTC, may again face calls to rewrite the definition of beneficial ownership to explicitly make a wide range of derivative instruments reportable under Section 13(d), including instruments that are not subject to settlement in the underlying security.

One thing that critics and admirers of Mr. Gensler agree on is that he was ruthlessly efficient as Chair of the CFTC, wasting no time to implement wide-ranging rules at a breakneck pace. At the SEC, given the scope of its jurisdiction, a similar tempo could mean a tumultuous year – and with it, challenges and opportunities – for activists.

We will closely monitor all developments with the forthcoming leadership changes at the SEC and update our activist investor clients on key developments.

Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you would like to discuss further or have questions.

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