



## White House Transition

# Biden's SEC May Target ESG, Proxies, Reg BI: Lawyers

By David Isenberg November 11, 2020

A left-leaning Securities and Exchange Commission is expected to standardize ESG disclosures, reform proxy-voting rules and tweak Regulation Best Interest, lawyers and SEC watchers say.

President-elect Joe Biden has stated that climate change will be a top priority for his administration, and has publicly declared that the U.S. will rejoin the Paris Agreement. That has led some lawyers to believe that his administration will be a boon to ESG investing.

And depending on whom he appoints to be SEC chair, the agency may pass rules that require ESG disclosures to be standardized. Last week, Democratic commissioner Allison Herren Lee called for such standards for issuers and financial firm disclosures.

Biden is also expected to sign an executive order on the first day of his administration that will require public companies to disclose climate-related financial risks, as well as data regarding greenhouse gas emissions, *The New York Times* reported this weekend.

This would be a significant retreat from the current SEC's stance on ESG, lawyers say.

The industry is likely to back an ESG rule, says John Baker, of counsel at Stradley Ronon.

### **Proxy Voting**

A Democratic SEC may also revisit recent regulations that impact proxy voting, says Robert Plaze, former deputy director of the SEC's Division of Investment Management, now a partner at Proskauer Rose. It may roll back a rule that was enacted over the summer that will require proxy advisory firms to disclose more data to issuers and shareholders.

The SEC's current Democratic commissioners have hinted that a left-leaning SEC would favor asset managers over corporate managers, Plaze says.

Though there may be "strong interest in turning that around," says Barbara Roper, director of investor protection at the Consumer Federation of America, that rule will be hard to undo because it went into effect earlier this month.

The SEC's recent attempt to raise the minimum shareholder threshold for filing proxy votes may also die on the vine, Roper adds.

## Reg BI

Biden's SEC may also tackle Reg BI, lawyers say.

"I would not expect Regulation BI to be a day one issue. But it likely would come up for review under a new administration," Stradley Ronon's Baker says.

Though formal rulemaking is unlikely, the SEC could issue guidance that defines explicitly what the best interest standard is, and how it should be used to protect investors, Roper says. The agency may also further clarify how distributors should reduce their conflicts of interest, or even ban certain practices outright, she adds.

"I think they'll have to do a complete overhaul of Form CRS," Roper adds. "It's terrible."

However, Reg BI may be hard to undo, in part because procedural law makes it difficult for a new administration to undo certain rules strictly for political reasons, says John Grady, a partner at Practus.

## Private Markets

Biden's SEC may also scrap some of the initiatives that aim to expand private market access for retail investors either through registered wrappers, product creation or direct, conditional investment, lawyers say.

Democratic commissioners Lee and Caroline Crenshaw have consistently voted against most private-market-related proposals, and are expected to continue doing so, Roper says. As a result, a Biden-appointed SEC chair would have to deviate from the commissioners in his or her own party in order to push through such initiatives.

This summer, the SEC passed a rule expanding who may be considered an accredited investor, giving less wealthy investors access to hedge funds and other private equity investments. Lee and Crenshaw opposed it.

"This administration has so aggressively pushed the expansion of private market exemptions and expand[ed] the marketing of private markets to retail investors," Roper says. "At the very least, I would expect a Biden administration to stop digging."

However, Practus's Grady isn't sure that the SEC or other financial regulators such as the Department of Labor will cease or reverse their expansions of private-markets access.

"That discussion is not politically motivated," he says. "There are those who believe that retirement savers should have more options."

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## Other Priorities

A Democrat-heavy SEC may also tackle money market funds and leveraged ETFs, Proskauer Rose's Plaze said.

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## Biden to Pick Ex-CFTC Chair to Review SEC

A proposed sales practice rule for leveraged and inverse ETFs was dropped from the SEC's recent derivatives rule. This initiative could potentially be revisited, lawyers says.

Biden's SEC may also revisit and finalize the advertising rule, says Amy Lynch, a former SEC examiner and founder of Frontline Compliance. They may add clarity to its "reasonableness" standard, which states that an advisor must have a "reasonable" basis for believing that the third-party advertiser or solicitor has complied with the rules.

### Stricter Enforcement?

Regardless of which rules are passed, a Biden SEC will be a stricter regulator and enforcer than the current administration, the lawyers say. They will be more likely to go after mutual fund shops and big firms, in contrast with SEC chair Jay Clayton's reduced enforcement numbers, Baker says.

One signal for that was the appointment of Gary Gensler to lead the Biden transition team's review of financial regulators. Gensler, the former Commodity Futures Trading Commission chair, has a reputation for being an aggressive regulator.

Democrat-led SECs tend to produce tougher and more frequent rules and enforcement actions than Republican ones, Lynch says. While the current team has been productive in cranking out rules, most of those regulations modernize and update existing practices, she adds.

She expects Biden's administration to provide more funding to financial regulators, end the SEC's hiring freeze, and provide more coordination and communication.

However, Biden's moderate influence may foster a less partisan agenda than prior Democratic presidents have pushed, Grady says.

Lawyers hope that the new commission will continue to be transparent and to communicate their initiatives through risk alerts and guidance.

"The SEC has really gone out of its way to be more communicative, and to engage with various parties that it regulates and provide a lot more communication to those regulated parties," says John Mahon, a partner at Schulte Roth & Zabel.

### Next Chair?

The top priorities will depend most on who Biden taps as the SEC's chair.

He is expected to pick someone from outside the commission, following in the footsteps of recent presidents.

“Presidents seem to want to make a splash with someone who sends a strong message,” says Nick Morgan, a partner at Paul Hastings and former SEC staff attorney.

If Biden wanted to send a more enforcement-heavy message to the industry, as former President Barack Obama did when he appointed Mary Jo White, he might choose someone like Valerie Caproni, a U.S. district judge for the Southern District of New York, Morgan says. Another option could be Preet Bharara, who held Mary Jo White’s position as U.S. attorney for the SDNY, he adds.

If Biden wants to appoint a more activist, political commissioner, Morgan says, he might choose Rep. Katie Porter, a Democrat from California and former law professor who sits on the House Financial Services Committee.

Sen. Elizabeth Warren has also been floated as a potential SEC chair, but her interests might instead lie with the secretary of Treasury role, according to *The New York Times*.

Biden should appoint a person of color to the chairmanship, says Frontline Compliance’s Lynch.

The Biden campaign has promised to increase diversity in his administration.

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