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SEC Commissioner Pierce Criticizes Proposed ESG Regulations: Mintz Levin

Yesterday, SEC Commissioner Pierce–one of two Republicans serving as an SEC Commissioner–delivered a speech criticizing the "potential ESG rulemaking."

Specifically, Commissioner Pierce propounded ten theses questioning the SEC's focus on this issue:

"I. ESG as a category of topics is ill-suited, and perhaps inherently antithetical, to the establishment of clear boundaries and internal cohesion.

II. Many ESG issues lack a clear tie to financial materiality and therefore do not warrant inclusion in SEC-mandated disclosure.

III. The biggest ESG advocates are not investors, but stakeholders.

IV. ESG rulemaking is high-stakes because so many people stand to gain from it.

V. "Good" in ESG is subjective, so writing a rule to highlight the good, the bad, and the ugly will be hard.

VI. An ESG rulemaking cannot resolve the many debates around ESG models, methodologies, and metrics.

VII. Emotions around ESG issues may push us to write rules outside our area of authority.

VIII. ESG issues are inherently political, which means than an ESG rulemaking could drag the SEC and issuers into territory that is best left to political and civil society institutions.

IX. ESG disclosure requirements may direct capital flows to favored industries in a way that runs counter to our historically agnostic approach.

X. An ESG rulemaking could play a role in undermining financial and economic stability."

Notably, many of these critiques–which are explored in depth in her speech–identify potential legal flaws with the SEC's approach to ESG rulemaking (e.g., "many ESG items may not be material to the issuer making the disclosure . . . ."), which could provide a roadmap to future challenges to any such regulations. The venue of the speech is also noteworthy–Commissioner Pierce delivered it at the Brookings Institution, a respected think tank that is generally perceived as non-partisan, indicating that this issue is seen as worthy of debate, and not merely where each side retreats to its partisan corner.

This speech is merely the latest volley in a longstanding war of words between the Republican and Democratic SEC Commissioners concerning whether the SEC should promulgate rules concerning ESG disclosures, and, if it does so, the nature of such disclosures. The particular significance of this speech is twofold. First, Commissioner Pierce identifies legal theories that could be used to challenge this SEC rulemaking (e.g., that the SEC acted ultra vires) should the ESG disclosure regulations be enacted. Second, Commissioner Pierce has continued to challenge the propriety (as well as the extent) of this potential ESG rulemaking by the SEC even after the SEC requested public comment on the proposal and Chairman Gensler identified ESG financial disclosures as a top priority for the Biden Administration's SEC. In other words, Commissioner Pierce's continued dissent indicates that this regulatory arena will continue to be the site of frequent battles between these opposing viewpoints.

> Rather than embarking on a prescriptive ESG rule that departs from and undermines our agency's limited, but important, role, we could work within our existing regulatory framework. We could put out updated guidance to help issuers think through how the existing disclosure regime already reaches many ESG topics and to address frequently asked questions that arise in connection with the application of the existing disclosure regime.[61] We also might consider whether we can give any Commission-level comfort about forward-looking statements along the lines of what former Chairman Clayton, Corporation Finance Director Bill Hinman, and Office of Municipal Disclosure Director Rebecca Olsen did in connection with COVID-19.[62] Finally, we can work with investment advisers using ESG strategies and products to ensure that investors understand what that adviser's brand of ESG means in theory and practice.[63]

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