

SEC top six

What public companies,
boards and investors should
watch for in 2022

Introduction

The 2022 agenda for the US Securities and Exchange Commission (SEC) promises to be active and wide-ranging under the leadership of Chair Gary Gensler. Since being sworn into office in April 2021, Gensler has worked to fill key posts, actively engaged on issues of importance to the capital markets and the Biden administration, and demonstrated a willingness to leverage all the SEC's authorities to drive an agenda focused on investor protection, transparency and accountability. Gensler has [highlighted](#) two components shaping the SEC's agenda for 2022, which he suggests are to drive efficiency in the capital markets and modernize rules for today's economy and technologies.

As SEC Chair, Gensler has set a robust and high-profile [rulemaking agenda](#) for the Commission. Some of the items on the SEC's current rulemaking agenda signal a clear shift in regulatory approach from that of former SEC Chairman Jay Clayton, such as consideration of new climate-related disclosures. The agenda also includes reconsideration of certain rules [that](#) were only finalized late in Clayton's

tenure. The SEC rulemaking agenda also has drawn attention due to the relatively shorter deadlines for public comments. In response to concerns, Gensler recently agreed to longer minimum comment periods for new proposals, but highlighted the importance of both moving forward as well as receiving input.

In this document, we explore six SEC priorities for 2022 that may be of interest to investors, board members and issuers. The priorities covered are disclosures; Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or DFA) implementation; the proxy process; Holding Foreign Companies Accountable Act (HFCAA) implementation; digital assets; and enforcement priorities. We also offer insights on the possible timing and direction of Commission activity around these key focus areas. The SEC has various other important priorities on their agenda that are not covered below, including expected and pending rulemakings relating to market structure, money market funds, and private funds and companies.



1. Disclosures

The SEC disclosure regime is set to evolve under Gensler. Since his March 2021 Senate confirmation hearing to become SEC chair, Gensler has pointed to both investor protection and investor demand as key determinants of what the Commission should be considering for its disclosure regime. Gensler has [stated](#), “I believe the SEC should step in when there’s [a high] level of demand for information relevant to investors’ investment decisions.” While this quote referred to climate-related disclosures, Gensler has applied this philosophy more broadly across his disclosure agenda.

Expected action: rule proposal on climate-related disclosures and ongoing monitoring

Gensler has been vocal about his view of the need for consistent and comparable climate-related disclosures that help inform decisions in the public capital markets. In 2022, the SEC is expected to issue a rule proposal on climate-related disclosures. The proposal is expected to reflect input provided in response to a March 2021 [request for comment](#) issued by then-Acting SEC Chair Allison Herren Lee on whether current SEC disclosures adequately inform investors and market participants of climate change risks. In discussing the over 500 unique responses to that request for comment, Gensler [noted](#) that “[t]hree out of every four of these responses support mandatory climate disclosure rules.”

Gensler has [indicated](#) that the SEC staff is considering requiring quantitative and qualitative disclosures including data or metrics that companies may use to inform investors about how they are meeting any climate-related pledges and what the financial impacts of climate change are. Gensler also has discussed disclosure of greenhouse gas (GHG) emissions, including those in Scope 1 (direct

emissions from a company’s owned or controlled sources), Scope 2 (indirect emissions from a company’s purchased energy) and possibly Scope 3 (all other indirect emissions in a company’s value chain).¹ Consideration is also being given to where climate disclosures should be provided, such as in the Form 10-K or other documents furnished or filed with the SEC, which could impact factors including issuers’ potential legal liability for and timing of the disclosures.

In the meantime, Gensler and staff in the SEC’s Division of Corporation Finance have indicated that the division is paying close attention to companies’ current climate-related disclosures emphasizing the importance of complying with the [2010 Commission Guidance Regarding Disclosure Related to Climate Change](#). In September 2021, the division began sending [comment letters](#) to some companies, asking about their compliance with the 2010 guidance and climate-related disclosures. The responses to those comment letters likely will help inform the proposed rule as well.

Expected action: rule proposal on human capital disclosures

Gensler also has spoken extensively on investor interest in human capital disclosures and indicated that the SEC will [propose](#) a rule in 2022 focused on enhancing disclosures about companies’ human capital management. According to [Gensler](#), the SEC staff is considering disclosures on topics such as workforce turnover; skills and development training; compensation; benefits; and workforce demographics such as diversity, health and safety.

Expected action: rule proposal on corporate board diversity

The SEC’s rulemaking agenda [includes](#) a proposal to require disclosures on corporate board diversity. Notably, in 2021, the SEC approved a new [Nasdaq listing rule](#) on



board diversity, which requires Nasdaq-listed companies to disclose information about their board's diversity and have at least two board members who meet certain diversity requirements or explain why they don't have board members who meet such requirements.

Expected action: rule proposal on cybersecurity risk governance

The SEC has [listed](#) disclosures around cybersecurity risk governance on its regulatory agenda, with related rule proposals planned for spring 2022. Gensler has [indicated](#) that he has asked the staff to provide recommendations for cybersecurity disclosures relating to governance, risk management, strategy and incident reporting. This rulemaking is expected to go beyond the [interpretive guidance](#) on cybersecurity disclosures published in 2018.

Expected action: rule proposal on disclosures for special purpose acquisition companies

Another area to watch on the disclosure front is special purpose acquisition companies (SPACs). As the number of SPACs continues to grow, Gensler and other SEC officials have highlighted investor protection concerns relating to SPAC transactions, compared to traditional initial public offerings. Gensler has [indicated](#) that the SEC staff is drafting a proposal to improve disclosures relating to SPACs on topics such as conflicts of interest and share dilution. The proposal may also include new requirements relating to marketing for SPACs, as well as the obligations of SPAC transactions' gatekeepers, such as directors, accountants and SPAC sponsors.

Expected action: consideration of amendments to Rule 10b5-1 insider trading plan rules

The SEC is expected to consider responses to [proposed changes](#) to the rules governing its Rule 10b5-1 insider trading plans, which allow trades based on a written plan

adopted when an insider such as an officer, director or issuer was not aware of material nonpublic information, among other things. The proposed amendments would impose cooling-off periods before trading could commence under a trading plan and prohibit multiple overlapping trading arrangements. The amendments were proposed in December 2021.

Expected action: consideration of amendments to rules governing share repurchases

In 2022, the SEC staff is expected to consider responses to a [proposal](#) to place conditions on and require additional disclosures regarding share repurchases. The proposal, approved by the Commission in a 3-2 vote in December 2021, would require more detailed and frequent disclosure of share repurchases, including next-day reporting of the amount and price of the shares repurchased. Disclosure of the rationale for the repurchases would also have to be included in periodic reports. Commissioner Hester Peirce and then-Commissioner Elad Roisman² [opposed](#) the proposal because they believe it would be overly burdensome. In her [dissent statement](#), Peirce also noted that she could not support the proposal because she does not "support the indirect regulation of corporate activity through disclosure requirements."

2. Dodd-Frank Act implementation

Gensler has [indicated](#) that one of his priorities is to complete the rulemakings required by the Dodd-Frank Act. Most of these proposed rulemakings had been initiated under previous SEC chairs but were not completed in light of other priorities. DFA implementation had been a top priority for Gensler during his tenure (2009-14) as

Chairman of the Commodity Futures Trading Commission, a role he occupied when the Dodd-Frank Act was passed. The DFA rulemakings on the SEC's agenda generally seek to enhance transparency and accountability.

Expected action: consideration of comments on repropoed rule requiring disclosure of proxy votes by funds

The SEC has [repropoed](#) a rule required by the DFA that is intended to enhance the information that mutual funds, exchange-traded funds and certain other funds report about their proxy votes. The Commission's September 2021 proposal would make changes to existing reporting rules, including new requirements for institutional investment managers to disclose how they voted on executive compensation, or so-called "say-on-pay" matters. That proposal would also require use of structured data language to facilitate investor analysis of their proxy votes. The [original proposal](#) was issued in 2010.

Expected action: consideration of input from reopened clawback rule proposal

In October 2021, the SEC [reopened](#) the comment period for a proposed clawback rule. Initially proposed by the SEC in 2015, the DFA-mandated clawback rule proposal would direct the national securities exchanges – including the New York Stock Exchange and Nasdaq – to require listed companies to adopt policies to take back incentive-based compensation from current and former executives in certain circumstances when material errors are found in recent financial statements. When announcing the reopened comment period, the SEC sought input on expanding the circumstances that would merit clawbacks, among other topics. Since the DFA's passage, the SEC has [observed](#) an increase in the voluntary adoption of clawback policies – some of which may not align with what the proposed rule may require.

Expected action: consideration of input from reopened pay-versus-performance rule proposal

In January 2022, the SEC voted to reopen the comment period for another DFA mandate known as "[pay versus performance](#)," aimed at requiring the disclosure of information showing the relationship between executive compensation paid and the company's financial performance. Since the rule was originally [proposed](#) in



2015, many companies have provided disclosures linking executive pay and the respective company's financial performance. Among the reasons that companies provide this information voluntarily is that proxy advisory firms such as [Institutional Shareholder Services](#) consider it in developing their voting recommendations. The [reopened proposal](#) asks for comments on possible additional requirements in light of developments since the 2015 proposal, such as whether companies should be required to disclose additional performance measures beyond total shareholder return, which was included originally.

Expected action: repropoed rule on compensation that incentivizes risky behavior at financial institutions

By October 2022, the SEC plans to [repropose](#), together with other financial regulatory agencies, a rule that would restrict the ability of large financial institutions to provide compensation that encourages inappropriate risks, including through excessive pay. This would be the third attempt by the multiagency group to move the rule forward, following a [proposal](#) and [reproposal](#) in 2011 and 2016, respectively.



Expected action: proposed amendments to final rule regarding disclosures by resource extraction issuers

Gensler's agenda also includes possible amendments to a DFA-mandated [rule](#) that has already been finalized. This rule, which took effect in March 2021, requires resource extraction issuers to make annual disclosures about payments to foreign governments or the US federal government for the commercial development of oil, natural gas or minerals. It is not yet clear what changes to the rule may be under consideration. The SEC under former Chairman Clayton had voted to finalize this DFA-mandated rule in December 2020. Prior to that, the rulemaking had evolved over time, as Congress and courts overturned earlier versions of the rule.

3. Proxy process

The SEC is expected to review and potentially modify various aspects of the proxy process in 2022. SEC actions in this space have generated significant debate among capital market stakeholders in recent years, a dynamic that is expected to continue. Adding to the debate is that several SEC actions in this area could alter rules finalized as recently as 2020, drawing [criticism](#) from Peirce and Roisman.

Expected action: consideration of input on proposed changes to proxy advice rules

The SEC is considering comments received on a November 2021 [proposal](#) that would rescind certain amendments recently made to its proxy solicitation rules. These amendments, which were finalized in July 2020, include requirements for proxy advisory firms to take certain

actions to qualify for exemptions from the SEC's proxy solicitation rules upon which these firms typically rely, such as disclosure of specified conflicts of interest to shareholders. The July 2020 rule amendments would have taken effect on 1 December 2021. However, in June 2021, the Division of Corporation Finance [announced](#) that it would not recommend enforcement action against proxy advisors that do not comply with those amendments while the Commission is considering further action in this area.

Investor groups such as the [Council of Institutional Investors](#) have supported the decision to rescind the 2020 proxy advice rules, in part because they believe those rules increase the cost and reduce the timeliness of proxy voting advice. In contrast, various business groups, including the [US Chamber of Commerce](#) and [Business Roundtable](#), have expressed support for the 2020 rules, stating that they put forward reasonable disclosure and procedural requirements.

Expected action: proposed changes to shareholder proposal process

The SEC also is taking actions relating to the shareholder proposal process. One of these is an [expected rule proposal](#) in spring 2022 relating to Rule 14a-8, which lays out the eligibility of shareholder proposals to be included in proxy statements. The Commission previously had finalized [amendments](#) to Rule 14a-8 in September 2020. The 2020 amendments increased certain minimum thresholds for submitting shareholder proposals, including the percentage of votes a proposal must receive to be resubmitted for a future shareholder vote within specified time periods. The amendments also changed the criteria for submitting shareholder proposals to take into consideration both the number of shares held and length of time that a shareholder held them.

While it is not yet clear what types of additional changes the SEC plans to propose, prior to and since the 2020 amendments were adopted, shareholder advocacy groups have weighed in [against](#) the changes and have [urged](#) the SEC to re-examine them. Various [business associations](#) supported the 2020 amendments, citing [factors](#) such as the cost of including shareholder proposals in proxies that do not have much support from shareholders and the need to update the rule to reflect inflation and changes in the market.

Also relating to Rule 14a-8, in November 2021, the Division of Corporation Finance [issued](#) a new [staff legal bulletin](#) that rescinds staff legal bulletins adopted during Clayton's tenure. The new bulletin outlines SEC staff views on whether certain shareholder proposals can be excluded from proxy statements under the ordinary business and economic relevance exceptions under Rule 14a-8. Also marking a return to prior practices, the SEC announced in December 2021 that it would once again respond to each shareholder proposal no-action request with a written letter.

Universal proxy card rule takes effect for shareholder meetings after 31 August 2022

In November 2021, the SEC adopted [amendments](#) to its rules that require the use of universal proxy cards in all nonexempt solicitations involving contested elections of directors. The rules require that universal proxy cards include the names of candidates nominated by either the company or the dissident shareholders to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting, among other things. Companies will need to comply with the amended rules for a shareholder meeting involving a contested director election after 31 August 2022.

4. HFCOA implementation and additional disclosures for China-based companies

Like his predecessor, Clayton, Gensler has expressed concerns about possible risks to investors from mainland Chinese and Hong Kong companies that are publicly traded in the US. In 2022, the SEC is expected to take several steps to address these concerns.



Expected action: continued implementation of the HFCOA

The SEC and the Public Company Accounting Oversight Board (PCAOB) both are in the process of implementing the HFCOA, passed in December 2020. The HFCOA requires the SEC to identify non-US companies trading in US markets whose auditors cannot be inspected or investigated completely by the PCAOB because of legal restrictions in their home jurisdiction. Once identified, the companies must provide certain disclosures. In addition, if the PCAOB is unable to inspect the auditors for these companies for three consecutive years, the companies will be barred from trading in the US.

In 2021, the [SEC](#) and the [PCAOB](#) approved rules laying out how they will identify auditors and companies falling under the HFCOA's scope. The PCAOB also formally [determined](#) in December that it cannot inspect or investigate fully the audit firms registered with it that are located in mainland China and Hong Kong.



The next step in 2022 is for the SEC to look at 2021 annual reports to identify the issuers whose financial statements are audited by these mainland Chinese and Hong Kong audit firms. Once identified, these issuers will have to provide the disclosures required by the HFCAA in their 2022 annual reports. These disclosures include any ownership by governmental entities and the names of any Chinese Communist Party officials on the company's board of directors.

While the SEC and the PCAOB have begun to implement the HFCAA, there is still an opportunity for the PCAOB and its Chinese counterparts to reach an agreement to allow PCAOB inspections of audit firms located in mainland China and Hong Kong. We expect that discussions to resolve the impasse will be on the PCAOB's agenda in 2022.

Expected action: ongoing SEC staff scrutiny of disclosures by China-based issuers

[Gensler](#) and the SEC staff are expected to continue monitoring disclosures by China-based companies that are publicly traded in the US to assess whether the disclosures sufficiently capture the perceived risks of investing in those companies. Among other recent actions, the Division of Corporation Finance posted a [sample comment letter](#) on the SEC's website in December 2021 highlighting areas of disclosure that the staff expects China-based companies to provide. The staff included such risks as Chinese regulatory requirements that may impact a company's ability to trade securities in the US or impede its overall operations. Under another expected disclosure, the companies and their auditors would not be subject to SEC or PCAOB oversight and may be delisted in the US because of the HFCAA.

5. Digital assets

Digital or crypto assets are another area of focus for Gensler, in part because of the open questions regarding the appropriate regulatory treatment of these evolving instruments. While he has recognized the significant potential of this new financial asset class, Gensler also has [referred](#) to the market for digital assets as the "Wild West," asserting that it will not be sustainable unless it is brought under a regulatory umbrella. No digital asset-related rulemaking is currently listed on the SEC regulatory agenda, however.

Expected action: ongoing utilization of the SEC's existing rules and authority to pursue digital asset-related enforcement actions

Consistent with the approach taken by Clayton, Gensler has [expressed](#) the view that many digital assets are securities or investment contracts and thus within SEC jurisdiction. Accordingly, the SEC's enforcement agenda is expected to continue to prioritize companies that issue or trade digital assets to the extent that these do not comply with the SEC's registration and other rules. Read more on this in the "Enforcement" section below.



Expected action: continued debate and possible regulatory action on digital assets

The SEC also is expected to continue considering whether and how to bring the digital asset market further under the financial regulatory umbrella, including by collaborating with other financial regulators. In public remarks, Gensler has highlighted his [concerns](#) about the digital asset market. One of these concerns is the lack of protections for investors who trade on crypto asset trading platforms, unlike traditional securities exchanges. Gensler also has called out the lack of regulatory requirements applicable to digital assets that further other public policy goals, such as to promote financial stability and prevent money laundering, as another area of concern.

While Gensler has asserted SEC authority over many types of crypto asset-related activity, he and [other](#) financial regulators also have appealed to Congress [requesting](#) additional authority to regulate a broader

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The American public is buying, selling, and lending crypto on trading, lending, and decentralized finance (DeFi) platforms, where there are significant gaps in investor protection.

Chair Gensler,
[December 2021 SEC Investor Advisory Committee Meeting](#)

range of digital asset-related activity. Gensler is a member of the President's Working Group on Financial Markets, comprising the heads of the US financial regulatory bodies, which [issued](#) a report in November 2021 on stablecoins (crypto tokens that are linked to fiat currencies – that is, government-issued currency that is not backed by a commodity such as gold, an example of which is the US dollar). In its report, the group [recommended](#) that Congress enact legislation to subject stablecoins to federal prudential regulation.

6. Enforcement

Gensler has [stated](#) that he views vigorous enforcement as an important part of the SEC's mission, noting, “It is critical that our enforcement program have tremendous breadth, be nimble, and penalize bad actors so we discourage misconduct before it happens.” The SEC's 2021 enforcement [results](#) indicated a 7% increase in new enforcement actions over the prior year.

Gensler has [articulated](#) several principles to guide the SEC Enforcement Division as its staff investigate misconduct. According to some of the principles:

- ▶ Economic activities should be subject to “consistent regulation ... regardless of the entity, the technology or the business model.”
- ▶ Accountability is critical and the SEC “may seek admissions in certain cases where heightened accountability and acceptance of responsibility are in the public interest.”



- ▶ Pursuing “high-impact” cases is important because such prosecutions can have a deterrent effect on bad behavior and wrongdoing.
- ▶ Timeliness in bringing matters to resolution should be a goal because “justice delayed is justice denied.”

Since joining the SEC in late June 2021, SEC Division of Enforcement Director Gurbir Grewal has reinforced similar themes in his public remarks. He has [stated](#) his view that there is a lack of trust in institutions, including financial market participants, due in part to their tendency to push the limits of permissible behavior, creating the public perception that they will try to get away with as much as they can. To help address this, Grewal has indicated that the SEC will conduct robust enforcement “without fear or favor” and seek penalties that have both specific and general deterrent effects. This includes considering preventive and tailored remedies such as barring people from future appointments as officers and directors of public companies, as well as requiring admissions when settling cases, when appropriate.

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It is critical that our enforcement program have tremendous breadth, be nimble, and penalize bad actors so we discourage misconduct before it happens.

Chair Gensler, [Prepared Remarks at the Securities Enforcement Forum](#),” 4 November 2021

Selected areas of expected enforcement activity in 2022

Focus on gatekeepers

Both Gensler and Grewal have emphasized the important role of gatekeepers in the capital markets. Grewal also has [observed](#) the role of gatekeepers in restoring and maintaining trust in the financial markets. He views their role as “the first lines of defense,” especially when companies want to test the limits of rules.

COVID-19-related disclosures

Over the course of the COVID-19 pandemic, the SEC has charged [several companies](#) for making misleading disclosures about the impact of COVID-19 on their business and other violations. In [recent remarks](#), the SEC staff has emphasized that registrants should continue to consider the pandemic’s effects on financial reporting, internal controls over financial reporting (ICFR), and disclosure controls and procedures (DCPs). This includes modifications to internal controls due to the remote working environment and how management is considering this in its annual ICFR and DCP assessments.

Environmental, social and governance (ESG) disclosures

In March 2021, the SEC [announced](#) that, given investors’ increasing focus and reliance on climate disclosures, it had created the Climate and ESG Task Force in the Division of Enforcement. The task force’s goals are to “identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules” as well as “analyze disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies.” One area that the task force [reportedly](#) is monitoring is issuer statements regarding whether ESG targets have been met.



SPACs

Gensler has [communicated](#) that while the SEC staff is [considering](#) a rule proposal on SPACs, he also has asked the Enforcement Division “to continue to take all appropriate action, following the facts and the law, to protect investors in these vehicles” in the meantime. For example, in a July 2021 SEC [action](#), the agency settled charges against a SPAC, its sponsor, its proposed merger target and the CEO of the SPAC for making misleading claims about the target company and related risks associated with the founder and former CEO of the target company. Grewal also [highlighted](#) this matter as an example of the division’s intention to be proactive, as the enforcement action was brought before the merger between the SPAC and its target had taken place.

Crypto assets and initial coin offerings

As highlighted above, Gensler has signaled concerns about the market for crypto assets since early in his chairmanship, [noting](#) in one of his first appearances before Congress as SEC Chair, “There are many challenges and gaps for investor protection in these markets.” The Division of Enforcement’s Cyber Unit, established in 2017, [continues](#) to pursue actions against allegedly fraudulent and unregistered initial coin offerings. The SEC enforcement staff also is [scrutinizing](#) other digital asset market participants, such as [unregistered digital asset exchanges](#) and broker-dealers, for compliance with the securities laws. In 2021, the agency [brought](#) 19 crypto-related enforcement [actions](#). Active enforcement in this area is expected to continue.

Appointment of a new PCAOB

- ▶ One of the SEC’s responsibilities is to oversee the Public Company Accounting Oversight Board (PCAOB). The Commission [announced](#) the appointment of four new Board members in November 2021. [Erica Williams](#) assumed the role of Chair of the PCAOB in January 2022, joining other newly sworn-in Board Members [Christina Ho](#), former SEC Commissioner [Kara Stein](#) and [Anthony \(Tony\) Thompson](#), as well as Board Member Duane DesParte, who has been on the Board since 2018.
- ▶ When approving the PCAOB’s 2022 budget in December 2021, the SEC [requested](#) that the new Board perform an assessment of its current strategic plan by 30 June 2022 and provide Commission staff with a report detailing its results.
- ▶ With 2022 being the 20th anniversary of the Sarbanes-Oxley Act, which created the PCAOB, the new Board signals an opportunity to build on its strong foundation and continue to evolve its programs to respond to the changing nature of the audit and the audit environment.

1. Sources: Gregory Keoleian, “Scope 1,2,3 Emissions,” *University of Michigan Center for Sustainable Systems website*, 11 March 2019, <https://sustainability.umich.edu/media/files/Scope-1-2-3-Emissions-2019-03-11-PCCN-Meeting-Keoleian.pdf>; “Scope 1 and Scope 2 Inventory Guidance,” EPA Center for Corporate Climate Leadership, *EPA website*, <https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance>; “Scope 3 Inventory Guidance,” EPA Center for Corporate Climate Leadership, *EPA website*, <https://www.epa.gov/climateleadership/scope-3-inventory-guidance>.

2. Roisman stepped down from his role at the SEC in January 2022.

Conclusion

The Commission under Gensler has laid out an ambitious agenda and timeline for possible changes to the SEC's regulatory framework in 2022. The months ahead are expected to bring multiple proposals and other actions that could significantly shift regulatory requirements for issuers.

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US SCORE no. 15172-221US
2201-3962264
ED None

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