

A NEW ADMINISTRATION - WHAT TO EXPECT AT THE SEC AND CFTC

SEC CHAIR. President Biden recently appointed Gary Gensler as Chair of the SEC, and we expect that the newly Democratic-controlled Senate will confirm his appointment. President Biden also named current Commissioner Allison Herren Lee, a Democrat, to serve as Acting SEC Chair until Gensler is confirmed, which will ensure a smooth transition. The SEC's Chair sets the agenda for its 4,500 staff, and Gensler will prove a very forceful and experienced leader. Highlights of his impressive resume include Wharton MBA with honors, 18 years at Goldman Sachs (partner at age 30), leadership positions at Treasury and as CFTC Chair, more recently professor at MIT's business school, and head of the Biden review team for financial services agencies. He is a hard-driving workaholic committed to getting good policy outcomes delivered in a streamlined manner. Demanding of his staff, he has in the past proven ready to face off against opponents on the Hill, in the business community or elsewhere to push his agenda.

LEGISLATION. The climate for the SEC in Congress is presently favorable. The SEC recently found bipartisan support for its enforcement work in legislation that confirmed its authority to sue for disgorgement of illegal profits, and that extended the statute of limitations for intentional and reckless fraud offenses from 5 years to 10 years. And several months ago, again with bipartisan support, the SEC almost obtained legislation to define the offense of insider trading more precisely and thereby make it arguably easier to prosecute. We expect a similar insider trading bill to be raised again in the new Congress, and we believe passage would be likely.

RULEMAKING. The SEC is a 5-person commission that by statute may not have more than 3 members of the same party. That usually results in a 3-2 makeup with the President's party in charge, though some previous commissioners have claimed to be "independent." With Democrats assuming control, we may see a course change in SEC rulemaking. In recent years, the SEC commissioners have split along party lines over a number of important regulatory topics, for example in holding brokers to a "best interest" standard in dealing with clients instead of a full fiduciary standard. Likewise, commissioners have split over softening standards for "accredited" investors – those allowed to invest with lighter disclosures, and over standards for auditor independence. A Democratic-controlled SEC, prompted by progressives, may revisit some of these regulatory issues, while pushing into new areas favored by progressives, including disclosure requirements for climate change impact, social and human capital initiatives, board diversity and other governance



Gary Gensler, appointed as Chair of the U.S. Securities and Exchange Commission by President Biden, is projected to be confirmed by the Senate. Setting the agenda for 4,500 staff, Gensler is expected to prove a forceful and experienced leader.

For more information,



STEPHEN CRIMMINS
202.661.7031
stephen.crimmins@mmlawus.com



ELIZABETH DAVIS
202.220.1933
edavis@mmlawus.com



JAMES GOLDFARB
212.880.3961
jgoldfarb@mmlawus.com

initiatives, and political contributions. Also key to watch will be whether the SEC changes its stance on blockchain and digital currencies, topics of keen interest to Gensler, who wrote on and taught the subject at MIT. However, any court challenges to SEC rulemaking will now be heard before a federal bench with a decidedly more conservative bent following years of Republican-driven judicial appointments.

ENFORCEMENT. About a third of the SEC's staff works on enforcement matters. The new SEC Chair will have the opportunity to appoint new leadership for the Enforcement Division, as both its director and deputy director have departed. We expect that the new enforcement leadership will have strong litigation credentials and will strive to be seen as committed to tough enforcement in the SEC's civil litigation and close liaison with criminal prosecutors. Enforcement efforts will increasingly focus on public companies and financial services firms, as demanded by progressive Democrats, who have in recent years complained that the SEC's focus on Main Street retail investors during the Trump administration has crowded out the brand of tough Wall Street enforcement seen in the past. Based upon Gensler's tenure as CFTC Chair, his SEC enforcement agenda will be aggressive, and processes will likely be streamlined to permit enforcement investigations to be conducted in a more efficient and expeditious manner.

The SEC's whistleblower program, started in 2010, has been a game changer in generating enforcement leads. Created under the 2010 Dodd-Frank Act, the program authorizes awards between 10 and 30 percent of what the SEC recovers on a tip. In recent years, some individual awards have reached the tens of millions. The SEC backed off a recently proposed rule change to reduce whistleblower awards at the upper end after the proposal generated a barrage of criticism from progressives. We expect that under new leadership the SEC will expand its reliance on whistleblowers by paying top dollar for tips on corporate and industry malfeasance.

BUDGET. The SEC's budget largely drives its activity level, and a significant boost is likely ahead under a Democratic President and Congress. Over the last decade, despite exponential growth in the matters and players it is charged with regulating, a resource-starved SEC suffered a multi-year hiring freeze and staff reductions by attrition. Despite recent modest increases, SEC funding still lags below \$2 billion, well below the \$2.5 billion that the 2010 Dodd-Frank Act had targeted the SEC to reach by 2015. We now expect SEC funding to finally reach that target, and it could go higher, particularly if the Democrats continue to hold Congress after the 2022 midterm elections. Unlike most other federal agencies, the money to run the SEC comes entirely from filing fees, with no use of tax dollars and no deficit impact, and this makes it easier for Congress to appropriate higher SEC funding levels.

WHAT TO EXPECT AT THE COMMODITY FUTURES TRADING COMMISSION

CFTC CHAIR. By unanimous vote of the CFTC commissioners, Commissioner Ross Benham will serve as acting Chair until a permanent Chair is named and confirmed. Media reports indicate that Chris Brummer, currently a Professor and Faculty Director of Georgetown University's Institute of International Law and a member of the Biden transition team, is the leading contender for the permanent role. Professor Brummer previously was nominated to serve as a CFTC commissioner by President Obama; however, that nomination was withdrawn by the Trump administration. Professor Brummer is well-known in the Fintech community, having conducted extensive research in digital technologies. He also published a paper regarding the scarcity of Black financial regulators, which attracted widespread attention.

Acting Chair Benham and current Commissioner Dan Berkovitz are also in the mix. Commissioner Berkovitz served as the CFTC's General Counsel when Gensler was CFTC Chair. Gensler was the head of the Biden review team for financial services agencies. Acting Chair Benham previously served as senior counsel to Senator Debbie Stabenow, who is expected to take the reins as Chair of the Senate Committee of Agriculture, Nutrition and Forestry, which oversees the CFTC. Acting Chair Benham also initiated the CFTC's Climate-Related Market Risk Subcommittee, which would be in line with the Biden's administration's environmental priorities. Commissioner Quintenz previously announced that he will be leaving the CFTC but will stay in his current role until a successor is appointed.

The new CFTC Chair will have the opportunity to fill a number of senior leadership roles across the agency, including its General Counsel, as well as new directors for the Enforcement Division, the newly created Division of Market Participants (previously named the Division of Swaps and Intermediary Oversight), and Office of Legislative and Intergovernmental Affairs. These offices will be led by experienced and established career employees until these roles are filled.

RULEMAKING. Like the SEC, the CFTC has five commissioners and cannot have more than three members of the same party. Both Chairman Tarbert and Commissioner Quintenz are Republicans. Their anticipated departures leave open the possibility for a 3-2 majority in favor of the Democrats, and the possibility that several key rules that were finalized under Chairman Tarbert may be rolled back. Those rules include the CFTC's cross-border rule applying certain swap dealer registration thresholds, swap dealer capital rule setting forth new capital and financial reporting requirements for swap dealers, and position limits rule on speculative position limits.

Should Professor Brummer be appointed to serve as CFTC Chair, taken together with President Biden's appointments of Gensler to serve as SEC Chair and Michael Barr (a onetime member of Ripple's board of advisors) as Comptroller of the Currency that increased Fintech regulation may be on the horizon. Participants in the Fintech space, such as electronic trading platforms utilizing smart contracts and entities transacting or holding virtual currencies, may expect increased regulatory scrutiny and further registration requirements. We also expect to see increased attention to ESG (Environmental, Social, and Governance) matters, including financial products such as climate-related derivatives.

ENFORCEMENT. We expect that the trend of selecting an enforcement director with strong litigation credentials and federal prosecutorial experience is likely. Enforcement will continue to be aggressive and robust, with investigations and civil litigation to be further bolstered by the division's increasingly close relationship with the Department of Justice's Commodities Fraud Task Force within DOJ's Criminal Fraud section.

Collaboration with international counterparts (England's FCA, Japan's FSA, etc.) in connection with enforcement actions likely will continue and possibly accelerate as the new administration seek to reengage globally. The Foreign Corrupt Practices Act, Bank Secrecy Act and anti-money laundering requirements are areas likely to see more scrutiny and activity. Market manipulation will continue to be an area of focus, as well as increasing scrutiny of corporate compliance and market surveillance programs. Given Professor Brummer's keen focus on cryptocurrencies and Fintech, the number of investigations and litigations relating to fraud and registration violations of the Commodity Exchange Act, are likely to increase significantly.

The CFTC's whistleblower program issued its first award in 2014 and has awarded more than \$120 million to whistleblowers. We expect to see the number and amount of whistleblower awards to continue to rise, as well as the number of awards given to those abroad. In turn, increased whistleblower activity will lead to more enforcement investigations.

BUDGET. Although Dodd-Frank gave the CFTC greater jurisdiction over swaps and derivatives, the CFTC has been chronically underfunded. Unlike the SEC, the CFTC's budget is based solely upon Congressionally appropriated funds. It is not permitted to collect user fees. With the priorities of the Biden administration being focused upon the pandemic and its economic impact, a significant increase to the CFTC's budget appears to be unlikely.



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