

ESG – Is the SEC Ready to Lead?

Climate is a topic that has gone from largely ignored to most talked about by the Commission. Recently, for example, the SEC hired a climate expert to serve on the senior staff. The Acting Chair asked the Division of Corporation Finance to evaluate the 10 year old agency disclosure requirements in the area. The Division of Enforcement announced the formation of a Task Force that will investigation questions relating to ESG. The Division of Examinations announced its 2021 Exam Priorities in a release that focused in part on the issue.

As last week drew to a close the Acting Director of the Division of Corporation Finance, John Coates, and delivered remarks on the adoption of ESG standards at the Annual Tulane Corporate Law Institute. His remarks centered on questions and considerations which are the keys to an effective ESG disclosure system.

The SEC, Mr. Coates stated, “should help lead the creation of an effective ESG disclosure system so companies can provide investors with information they need in a cost-effective manner.” The creation of the applicable standards is not likely to be simple or quick, the Acting Director noted, citing a series of important questions. Those include: 1) What disclosures are most useful; 2) the proper balance between principles and metrics; 3) the degree of standardization across industries; 4) the best way to “verify or provide assurance” about disclosures; and 5) how to compare global disclosures.

Consideration of an ESG disclosure system might begin with an evaluation of the framework – should it be based on mandatory or voluntary standards – and if a single, global ESG reporting framework should be adopted, according to Mr. Coates. The former is not as simple as “an on/off switch between mandatory and voluntary disclosure.” The current disclosure system, for example, is more nuanced. It contains elements of each type of system. Currently issuers are required to disclose how the company board considers diversity in identifying director nominees. The system also permits what he called “significant differences” in how firms respond to a variety of

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mandatory disclosure requirements.

Finally, establishing a global framework is “complex and raises a number of considerations. . .” of a reliable disclosure system. “By seeking to address those considerations . . . the SEC can and should play a leading role in the development of a baseline global framework . . .” that all can use to build upon Mr. Coates concluded.

Comment

The repeated actions and directives of the Commission in recent weeks about climate and ESG suggest its readiness to discuss the question. Whether the agency is prepared to assume a leading role on these issues as Mr. Coates suggests is another question.

Presently regulators around the globe are moving forward with the kind of global framework Mr. Coates mentioned. The IOSCO, for example, as well as country regulators such as the Securities and Futures Commission of Hong Kong, are aggressively moving forward in this area. Until recently the U.S. SEC has not been a participant in those matters to any significant degree. Perhaps when Mr. Gensler arrives the agency will be ready to move forward on these critical issues.