

Winter 2021 Edition, NABL Column Federal Securities Law

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Transition

Former SEC Chairman Jay Clayton's last day at the SEC was December 23, 2020.^[1] Commissioner Elad L. Roisman was designated Acting Chairman by then President Trump on December 23, 2020, effective December 24, 2020.^[2] President Biden designated Commissioner Allison Herren Lee as Acting Chair of the SEC on January 21, 2021.^[3]

On January 5, 2021 the citizens of Georgia elected the Democratic candidates in the runoff elections for Georgia's two Senate seats. The result, among other consequences, provided the narrowest of Senate majorities to President Biden's party. In so doing, it provided him with flexibility in the many nominations for positions in his administration subject to Senate confirmation, among them Chair of the Securities and Exchange Commission. Georgia quietly accreted additional influence over the SEC as its two new Senators, Jon Ossoff and Raphael Warnock, have been assigned to the Senate Committee on Banking, Housing, and Urban Affairs. Senator Warnock has been assigned to the Subcommittees on Financial Institutions and Consumer Protection (as Chair), Securities, Insurance, and Investment, and Housing, Transportation, and Community Development. Senator Ossoff has been assigned to the Subcommittees on National Security and International Trade and Finance, Economic Policy, and Housing, Transportation, and Community Development. As committee members, Senators Ossoff and Warnock (respectively, the senior and junior Senator from Georgia) will vote on nominees for Commissioner of the SEC and exercise oversight of the SEC. The influence on federal securities regulatory policy by the good citizens of the State of Georgia will extend beyond January 5, 2021.

On January 18, 2021, NPR reported that Gary Gensler, a faculty member at the MIT Sloan School of Management, would be nominated as SEC chair.^[4] As NPR reported:

Gensler is a top financial regulator known for taking on big banks and trading houses after the Dodd-Frank financial reforms enacted after the 2008 financial crisis.

A former Goldman Sachs executive, Gensler has an extensive career in government, serving as undersecretary of the treasury for domestic finance from 1999 to 2001 and assistant secretary of the treasury for financial markets from 1997 to 1999. He went on to serve in the Obama administration as the chairman of the U.S. Commodity Futures Trading Commission and was the CFO for Hillary Clinton's 2016 presidential campaign.^[5]

The Senate Banking Committee held Mr. Gensler’s confirmation hearing on March 2, 2021. In his prepared remarks, Mr. Gensler stated:

If confirmed as SEC chair, I will work with my fellow commissioners, the SEC’s exceptional staff, and the members of Congress to ensure our markets remain the world’s best. That means strengthening transparency and accountability in our markets, so people can invest with confidence, and be protected from fraud and manipulation.

It means promoting efficiency and competition, so our markets operate with lower costs to companies and higher returns to investors. It means making sure companies—incumbents and entrepreneurial startups alike—can raise needed capital to innovate, expand their operations, and contribute to economic growth. And above all, it means making sure our markets serve the needs of working families.^[6]

Mr. Gensler echoed these statements during his hearing. He did not face questions regarding municipal securities, the municipal market, or state and local government access to or participation in capital markets. Both sides of the aisle did ask questions about the SEC’s activities regarding political contribution and climate change disclosure. The Committee will receive additional written responses to questions raised during the hearing and then vote on Mr. Gensler’s nomination, following which the full Senate will consider his nomination. If confirmed, he will be sworn in as SEC Chair.

Regulation

The *Order Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors*^[7] (the “Order”) expired on December 31, 2020.^[8] However, SIFMA’s Petition for Review of the Order remains alive in the United States Court of Appeals for the District of Columbia Circuit.

In this column’s account of SIFMA’s challenge to the Order, published in *The Bond Lawyer* Fall 2020 edition, I described SIFMA’s initial brief, filed on November 30, 2020, as well as the briefing schedule. That schedule called for the SEC brief to be filed by December 30, 2020. Not described was SIFMA’s *Motion to Supplement the Administrative Record or For Judicial Notice*, also filed on November 30, 2020, which asked to supplement the record by adding to, or taking judicial notice of, the news articles cited by the SEC in the Order to support its finding of a market disruption and three subsequent articles from the same news sources, available to the SEC prior to issuing the Order, which allegedly contradicted the articles cited by the SEC.^[9]

The SEC did not file its brief on December 30, 2020. Rather, on December 10, 2020, the SEC filed a *Response in Opposition to the Motion to Supplement the Administrative Record or For Judicial Notice* together with a *Motion to Stay the Briefing Schedule*.^[10] The procedural wrangling had commenced. The SEC stated that SIFMA’s *Motion to Supplement*, “if granted, would compel an immediate, limited remand to the Commission for consideration of the articles in the first instance;” argued that “SIFMA’s *Motion to Supplement* should be denied;” and, that “while it would not oppose the Court taking judicial notice of SIFMA’s news articles merely as an illustration of the point [that the Commission’s order should have discussed the ongoing state of the trading markets]... the Court should hold SIFMA’s alternative request for judicial notice until these arguments are fully briefed on both sides and the relevance of the articles (or lack

thereof) is clear.”^[11]

The following day, December 11, 2020, the Clerk of the Court issued an order “on the court’s own motion, that the deadlines established in the court’s October 21, 2020 briefing order be suspended pending further order of the court.”^[12] Through the remainder of December, SIFMA filed its *Reply in Support of the Motion to Supplement the Administrative Record or for Judicial Notice*.^[13] and its *Opposition to the Commission’s Motion to Stay the Briefing Schedule*.^[14] and the SEC filed its *Reply in Support of Motion to Stay the Briefing Schedule*.^[15]

The Order, as noted above, expired December 31, 2020. On January 22, 2021, the SEC filed a *Motion to Dismiss the Petition for Review*.^[16] SIFMA filed its *Response in Opposition to Motion to Dismiss*.^[17] The SEC then filed its *Reply in Support of its Motion to Dismiss the Petition for Review*.^[18] On March 8, 2021, the Court issued an Order “that the motion to supplement the record and the motion to dismiss be referred to the merits panel” and directed the parties “to address in their remaining briefs the issues presented in the motions rather than incorporate those arguments by reference.”^[19] The Order further directed the Clerk to enter a new schedule for the filing of respondent’s brief and petitioner’s reply brief.”^[20] Stay tuned.

While the SEC pursued tactical motion practice in the U.S. Court of Appeals for the District of Columbia, on a policy level The Bond Buyer reported that former Chair Jay Clayton stated in a December 22, 2020 letter to Rep. French Hill, R-Ark., “At this time I do not expect the commission to extend this temporary relief.”^[21] In a letter to all five SEC Commissioners dated October 1, 2020 Congressman Hill, a Republican, and Congressman Vicente Gonzales, a Democrat, both members of the U.S. House Committee on Financial Services, asked “the Commission to withdraw the original proposed Exemptive Order.”^[22] The Congressmen closed their letter by asking “the Commission to let this temporary Order expire without extension on December 31, 2020. Further, if the Commission seeks additional action on this Order or the related proposed order, we urge any future action be taken in accordance with the APA process, thereby ensuring that market participants, regulatory agencies, the investing public and additional stakeholders have the opportunity to publicly provide comments and receive Commission feedback.”^[23] As of publication, the Commission has not withdrawn the proposed Exemptive Order and continues to receive comments.^[24]

Disclosure

In Mr. Gensler’s Senate confirmation hearing, both Democrats and Republicans pressed him on his views on climate change disclosure. In opening the hearing, Committee Chair Sherrrod Brown called for “upgrading climate risk disclosure requirements that are out of date.”^[25] Republican members pressed on adherence to materiality, particularly “economic materiality.”

Even before Mr. Gensler’s anticipated arrival, the SEC has been moving on several fronts on climate change matters. Acting Chair Allison Herren Lee preceded Senator Brown’s call by several days, when she announced that she was “directing the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings.” She elaborated as follows:

The Commission in 2010 provided guidance to public companies regarding existing disclosure requirements as they apply to climate change matters. As part of its enhanced focus in this area, the staff will review the extent to which public companies address the topics identified in

the 2010 guidance, assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and absorb critical lessons on how the market is currently managing climate-related risks. The staff will use insights from this work to begin updating the 2010 guidance to take into account developments in the last decade.^[26]

Acting Chair Lee had previously appointed Satyam Khanna as Senior Policy Advisor for Climate and ESG in the office of the Acting Chair to “advise the agency on environmental, social, and governance matters and advance related new initiatives across its offices and divisions.”^[27]

Most recently, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement, led by Kelly L. Gibson, the Acting Deputy Director of Enforcement, to oversee “a Division-wide effort, with 22 members drawn from the SEC’s headquarters, regional offices, and Enforcement specialized units.”^[28] According to the press release, “The initial focus will be to identify any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules. The task force will also analyze disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies. Its work will complement the agency’s other initiatives in this area, including the recent appointment of Satyam Khanna as a Senior Policy Advisor for Climate and ESG. As an integral component of the agency’s efforts to address these risks to investors, the task force will work closely with other SEC Divisions and Offices, including the Divisions of Corporation Finance, Investment Management, and Examinations.”^[29]

Nominees for SEC Commissioner customarily receive extensive preparation on recent and ongoing rulemaking, policy development, and critical issues as well as matters the nominee intends to pursue. Assuming nominee Gensler is confirmed, it’s reasonable to conclude that the SEC’s resource allocations and policy initiatives will remain largely in place and accelerated.

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^[1] <https://www.sec.gov/news/public-statement/clayton-2020-12-23>.

^[2] <https://www.sec.gov/biography/commissioner-elad-l-roisman>.

^[3] <https://www.sec.gov/news/press-release/2021-13>.

^[4] <https://www.npr.org/sections/biden-transition-updates/2021/01/18/958023670/biden-taps-veteran-financial-regulators-to-lead-sec-cfpb>.

^[5] *Id.*

^[6] <https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%203-21.pdf>.

^[7] <https://www.sec.gov/rules/exorders/2020/34-89074.pdf>.

^[8] *Id.*

^[9] General Docket United States Court of Appeals for District of Columbia Circuit, Court of Appeals Docket #: 20-1306 Docketed: 08/14/2020 *Securities Industry v. SEC*, Document #

1873481, 11/30/2020.

[\[10\]](#) *Securities Industry v. SEC*, Document #1875310, filed 12/10/2020.

[\[11\]](#) *Id.*

[\[12\]](#) *Id.*, Document #1875355, filed 12/11/2020.

[\[13\]](#) *Id.*, Document # 1876236, filed 12/17/2020. In its Reply, SIFMA added, “To eliminate any remaining uncertainty about the need for a remand, SIFMA withdraws its request to supplement the record only to the extent that a remand would be required.”

[\[14\]](#) *Id.*, Document # 1876238, filed 12/17/2020.

[\[15\]](#) *Id.*, Document # 1877209, filed 12/24/2020, arguing that “a stay remains warranted, however, while the Court considers whether to open the record for additional fact-finding, as SIFMA requests, or have the parties proceed based on the administrative record that was before the Commission.

[\[16\]](#) *Id.*, Document # 1881301, filed 01/22/2021, arguing there is no live case or controversy and, if there were, SIFMA lacks standing to bring it.

[\[17\]](#) *Id.*, Document # 1883137, filed 02/01/2021, stating SIFMA had shown in its original brief that the case was not moot, and that SIFMA had standing under the “competitor standing” doctrine.

[\[18\]](#) *Id.*, Document #1884288, filed 10/01/2021.

[\[19\]](#) *Id.*, Document # 1888904, filed 03/08/2021.

[\[20\]](#) *Id.*

[\[21\]](#) Sarah Wynn, *Muni advisor exemption won't be extended*, The Bond Buyer, (Dec. 22, 2020), available at: <https://www.bondbuyer.com/news/muni-advisor-exemption-wont-be-extended>.

[\[22\]](#) <https://www.sec.gov/rules/exorders/2019/34-87204.pdf>.

[\[23\]](#) Available at: <https://www.sec.gov/comments/s7-16-19/s71619-7940534-224747.pdf>.

[\[24\]](#) <https://www.sec.gov/comments/s7-16-19/s71619.htm>.

[\[25\]](#) <https://www.banking.senate.gov/download/brown-statement-3-2-21>.

[\[26\]](#) <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>.

[\[27\]](#) <https://www.sec.gov/news/press-release/2021-20>.

[28] SEC Press Release 2021-42, ***SEC Announces Enforcement Task Force Focused on Climate and ESG Issues,***

<https://www.sec.gov/news/press-release/2021-20>.

[29] *Id.*