

The SEC's Climate Proposal: Handicapping When/What Final Rule Might Look Like

With so many buried during the proxy season and unable to fully process the mind-blowing magnitude of the SEC's recent climate disclosure proposal, I thought I would address the top questions that we hear clients asking as they gradually come up for air.

Note that we have put together this 19-page guide entitled "[The SEC's Climate Disclosure Proposal: A Comprehensive Look](#)" to help you get quickly up-to-speed on what the SEC's proposal actually says – and you should join us on Tuesday, May 24th (from 3:00-4:00 pm eastern) for a video program – "[The SEC's Climate/Cyber Rulemakings: Your Action Items Now](#)" (go ahead and [register for this complimentary program now](#)).

Meanwhile, this blog tries to handicap the odds of the proposal's immediate future - this is just conjecture; one man's guess:

1. What are the odds of the deadline for comments on the SEC's climate disclosure rule being extended?

Pretty darn good because the SEC [extended the deadline](#) from May 20th to June 17th just yesterday. That's a 28-day extension. The initial deadline of May 20th was 61 days since the proposing release was first posted – and 39 days since it was published in the Federal Register.

A number of trade groups had requested an extension of the proposal's deadline, ranging from a 30-day extension to 180 days. The extension requests argued that the proposal is massive, complex and asks a lot of questions to be considered for comment – so that more time was necessary in order to provide a meaningful opportunity to comment.

My analysis: The SEC always considers comments submitted past a rule proposal's deadline – and the agency almost never adopts a rule soon after its comment period ends. Perhaps due to these factors, it's fairly rare for parties to seek an extension request, further illustrating the magnitude of this proposal.

However, there were unique circumstances at play. There is a real concern out there that the SEC might act faster than normal on this proposal, given the importance of the topic to SEC Chair Gary Gensler, as well as the Biden Administration. There's the urgency of the climate crisis overall.

I had thought there was a 2-1 chance the SEC would extend the deadline - so that was good money spent. And I was right that the agency would extend the deadline for only a short period of time. But I'm not convinced that the deadline extension will impact the eventual timing of when a final rule is adopted. Don't place too much stock in that.

And ironically, an extension may weaken the arguments that the SEC acted "arbitrarily and capriciously" when the inevitable slew of lawsuits are filed after a final rule is adopted.

2. What are the odds of a climate disclosure rule being adopted by the SEC this year – sometime by the end of 2022?

This is the #1 question that people are asking. On its face, it would seem ridiculous to believe that the SEC would adopt a final rule this year.

The proposal itself didn't show up until March despite the SEC telegraphing for much of last year that they hoped to get the proposal out by New Year's Day. Reportedly, that timing didn't happen partly because there was internal dissension within the agency about what should be in the proposal, even amongst the Democratic Commissioners.

The proposal's scope truly is historic. An astonishing new disclosure framework that is line-item focused. A framework that is challenging for those familiar with existing SEC disclosure regimes to comprehend – due to brand new environmental concepts to be digested – making it difficult to provide meaningful comment in a short period of time. Conversely, most of those well-versed in those environmental concepts don't have the appropriate experience with the federal securities laws to be capable of commenting meaningfully.

My analysis: Normally, this type of earth-shattering proposal would take a few years – maybe even longer than that – to wind its way to a final rule. But this proposal's situation isn't normal by any stretch of the imagination.

As I mentioned above, there is a good chance that the SEC intends to act sooner than it would ordinarily because of the importance of the topic to SEC Chair Gary Gensler and the Biden Administration. And the urgent nature of the climate crisis. So I'm putting this one at 50/50 – that there is a good chance that we'll see a final rule before 2022 is over, but we might not...

3. What are the odds of a final climate disclosure rule looking significantly different by the time its adopted by the SEC?

This is the question that some are afraid to ask. It would not be surprising for the SEC to receive a record number of unique comments on this proposal. "Unique" meaning that we're just counting those comments that are not "form comment letters."

There is overwhelming interest in the SEC's proposal – from all around the world – and there is much to comment on given the size and scope of the proposal. Throw in that the proposal has a number of first-time concepts for the securities laws and that's a recipe for heavy comments.

My analysis: In a sense, this question is tied to the question before it – "when will a final rule be adopted?" The sooner that a new rule is adopted, the less likely that it will look materially different than when it was proposed. In other words, rapid adoption is a harbinger that the SEC was happy with what it proposed and that the agency is sticking with it.

Undoubtably, there will be some changes to what was proposed. I would say that's a guarantee. It's just a matter of degree.

All of the comments submitted will be read and there are bound to be things that catch the SEC Chair's eye that improve the proposal from his perspective. There will be items where the SEC will listen to commentators and back off or soften. And there could be some negotiation among the three Democratic Commissioners to tinker with the contours of the proposal in order to secure the requisite three votes in favor of passage.

It is notable that Commissioner Allison Herron Lee will be departing the SEC soon – and her Democratic Commissioner replacement Jaime Lizárraga, who currently serves as a Senior Advisor to House Speaker Nancy Pelosi and is nominated but not yet confirmed as a Commissioner, could well have different views on the SEC's

proposal. Commissioner Lee is an advocate of robust climate disclosures.

Given statements delivered by Chair Gensler about this proposal – and the way he's acted so far in the Chair's job overall – I believe there's a higher likelihood that the SEC will adopt a rule that is more similar to the proposal than most would expect. Let's say 3-1 – so I'm not saying it's a certainty and I'm not even predicting it's more likely than not.

But that's still a "greater than expected" chance because if this was a normal situation, I would say the chances of a final rule looking like the proposal would be quite slim indeed.

4. What are the odds of outside forces stalling a final rule, like a court injunction or other maneuvers?

There is some conjecture that lawsuits might be filed before a final rule can be adopted to prevent the SEC from acting on the proposal. Or other sorts of maneuvering through backchannels to throw up a roadblock.

My analysis: I'd put this in the category of wishful thinking. So long as Congress – and the President – don't enact legislation stopping the SEC, it's highly unlikely that the agency can be stopped before it acts.

The composition of the SEC's Commission is what matters here – and so long as the three Democratic Commissioner remain aligned in favor of adoption, that's all it takes. That means that even if the GOP controls the Senate and the House as we get towards the end of this year, nothing can be done to stop the SEC.

Unless a judge goes rogue, it's highly unlikely that a party can obtain an injunction or a stay because the "irreparable harm" standard to obtain one doesn't seem to fit the circumstances.

I took an administrative law class in law school but that doesn't mean I'm qualified as an expert in this area. I will say if you follow the doings in DC as long as I have, you get a pretty good sense of whether someone can prevent a federal agency from adopting a rule by heading to the courts. I can't recall that ever happening – and there have been many rules written by the federal agencies that people would have loved to sue to stop in their tracks.

Now suing to stop a rule after its adopted? That's another story and one that we'll inevitably be addressing in this blog at some point...

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