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Blog: Former CFTC Chair Gary Gensler expected to be nominated as SEC Chair

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Reuters has reported that former CFTC Chair Gary Gensler will be President-elect Biden's choice for SEC Chair. According to the article, in light of his "reputation as a hard-nosed operator willing to stand up to powerful Wall Street interests"—notwithstanding his former life as an investment banker—the appointment is "likely to prompt concern" among some that he will promote "tougher regulation." The *NY Post* attributed his nomination to the most recent Democratic wins in the Senate, which allowed selection of "the more progressive candidate. Only two weeks ago, people close to the Biden transition team had penciled in centrist Robert Jackson Jr.…as the SEC frontrunner because he was seen as more likely to win confirmation by a GOP-controlled Senate." Jackson is a former Democratic SEC Commissioner appointed in 2017. Gensler is an MIT professor and has been leading the Biden transition planning for financial industry oversight.

The *WSJ* reported that "Mr. Gensler's nomination would please liberal Democrats who cheered the former regulator's tough approach to rule-making during the Obama administration, when he spearheaded the overhaul of derivatives markets mandated by the 2010 Dodd-Frank Act and oversaw enforcement actions against investment banks accused of manipulating benchmark interest rates." As head of the CFTC, he implemented extensive new swaps trading rules and, according to the *Washington Post*, "gained a reputation as a tough regulator by issuing hefty fines over the Libor currency manipulation scandal."

Commentators cited by the *WSJ* expressed hope that the SEC under Gensler would move quickly to undo recent policy changes, including the recent changes to the shareholder proposal rules and harmonization of private offering exemptions. (See this PubCo post.) The *WSJ* expects that, under an SEC with a Democratic majority, other priorities may "include requiring companies to disclose more information about risks related to climate change and about workforce diversity and political contributions." The *Washington Post* reported that representatives of conservative think tanks have already issued statements "urging the SEC under Gensler not to pursue new reporting standards on environmental, governance or other social questions."

According to *Reuters*, "Gensler is expected to take a tough line on enforcement, and to pursue rules that address Democratic policy priorities on such issues as climate change and social justice. In particular, policy experts expect Gensler will pursue new corporate disclosures on climate change related-risks, political spending, and the composition and treatment of their workforces. Democrats also are keen to reverse new investment advice protections which they say do more harm than good, to restore some shareholder rights, and complete post-crisis executive compensation curbs."

The *NYT* also identified standardized political spending disclosure as likely to be a high priority of the new administration. In addition, the *NYT* expects new rules about "stock buybacks, potentially by imposing preconditions or more disclosures"; requirements for more disclosure about board diversity, comparable perhaps to the recent Nasdaq proposal (see this PubCo post); mandatory climate risk disclosures and "clearer rules on cryptocurrencies and the blockchain, an issue that Mr. Gensler is uniquely qualified to address, having taught courses about digital money at M.I.T. the past few years."

Political spending disclosure shows up high on everyone's list of expected actions. That may be in part because issues regarding political donations have been thrown into sharp relief recently in light of the stands taken by a number of companies to pause or discontinue some or all political donations in response to the horrific events of last week. Keep in mind, however, that Section 631 of the most recent appropriations act, the "Consolidated Appropriations Act, 2021," prohibits the SEC from using any of the funds made available "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Similar provisions to that effect have been included in appropriations bill for several years— and have even been sticking points in negotiations. (See, *e.g.*, this PubCo post and this PubCo post.) Unless Congress acted, there could be a delay in adopting political spending disclosure requirements at least until the next round of appropriations.

> **SideBar**
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> Even before the events of last week, the recent political unrest and social upheaval has increased the drive for political spending disclosure. The nonpartisan Center for Political Accountability reported in its June newsletter that support for shareholder proposals in favor of political spending disclosure hit record highs this past proxy season. As we have seen over the last year—and as was highlighted this past week—one risk potentially arising out of political spending is reputational, which could fracture a company's relationship with its

employees, customers and shareholders. As companies and CEOs have increasingly offered welcome statements on important social issues such as climate change, democratic values and racial injustice, the current heated political climate has heightened sensitivity to any dissonance or conflict between those public statements and the company's political contributions. When a conflict between action in the form of political spending and publicly announced core values is brought to light, will companies be perceived to be merely virtue-signaling or even hypocritical? To borrow a phrase from asset manager BlackRock, if the public perceives that these companies are not actually *doing* "the right thing"—even as they may be *saying* the right thing—will they lose their "social license" to operate?

In its newest report, Conflicted Consequences, the CPA looked at corporate political spending through non-profit, tax-exempt "527" organizations, such as state party leadership and legislative campaign committees and the governors and attorneys general associations. These organizations accept "contributions from a variety of sources and then spend it to advance a broad political agenda." Once a company has contributed to a 527 group, the corporate and other funds are pooled and then channeled to state and local PACs and candidates, to "dark money" groups and to other national 527 groups. As a result, companies no longer control the use of their funds. The groups determine how the money is used, they control the message and decide which candidates or issues to support, regardless of the contributor's own goals and intentions.

The report suggests that donations to 527s appear to be particularly fraught with peril and merit special attention, precisely because once the contribution is made, the company essentially cedes control over the use of the funds. As discussed in CPA's 2018 Collision Course report, to address this heightened risk and avoid the potential embarrassment—or worse—of conflicting messages and other blowback, companies need to consider adopting "corporate governance safeguards to align their political activity with their brands, core values and positions." Few companies will be in agreement on all points with politicians to whom donations are made, but, the report advises, they need to perform a due diligence analysis of the risks associated with any donation, including how the funds will be used and with whom the company is being associated by virtue of the donation. (See this PubCo post.)

This DealBook column suggests that one safeguard that companies might consider is to follow the long-time policy of IBM, "one of only a handful of large companies in the United States that are not involved in direct political giving to candidates. It has no political action committee. Even when it gives money to trade groups, it restricts its money from being funneled to candidates." Instead of scrambling to pause political contributions, it suggests, a "genuine example of leadership would be to go even further and declare that they will get out of the business of political donations completely."