

Possible SEC Proxy/Whistleblower Rule U- Turns? Could Reverse Trump-Era Actions

September 16, 2021

The SEC, in an unusual move, is reconsidering certain significant proxy rules that it adopted just last year.

An SEC announcement of Chair Gary Gensler's rulemaking agenda states that the Division of Corporation Finance "is considering recommending that the Commission propose rule amendments regarding shareholder proposals" and "governing proxy voting advice."

The announcement can be read as signaling Gensler's intent to reverse or limit the 2020 rules that the SEC adopted under his predecessor Jay Clayton during the Trump administration. The rules raise the eligibility requirements for shareholders submitting proposals and impose conditions on firms providing proxy voting advice.

The Commission adopted the rules over the objections of the two Democratic commissioners, Allison Herren Lee and Caroline Crenshaw. The SEC's two Republican commissioners, Hester Peirce and Elad Roisman, have reacted negatively to the chairman's agenda, calling it a "regrettable" "game of seesaw with our rulebook." They said that the listing was "reopening large swathes of work that was just completed without new evidence to warrant reopening" and "undermin[ing] the Commission's reputation as a steady regulatory hand."

Calls to revisit last year's proxy revisions have come from several sources. For example, the SEC's Investor Advocate has argued that the rule on shareholder proposals should be "overturned or reversed" by Congress or the new SEC leadership. In an extraordinary accusation, the Investor Advocate has reported to Congress that the SEC's adoption was "in contravention" of the Securities Exchange Act and "at the very least, the spirit of the Administrative Procedure Act." The Investor

Advocate also told Congress that “the economic analysis in this rulemaking was fundamentally flawed” and “in contravention of the Commission’s internal policies for full and objective economic analysis.”

Moreover, the SEC’s Division of Corporation Finance has taken the remarkable step of announcing that “it will not recommend enforcement action to the Commission ... during the period in which the Commission is considering further regulatory action” regarding the rules on proxy advisory firms. It is highly unusual for the SEC staff to announce this type of sweeping no-action position concerning enforcement of a major rule that the Commission has recently adopted and no court has invalidated.

The Commission is following a similar controversial path in reconsidering whistleblower rules that it adopted last year. Gensler’s rulemaking agenda states that the Commission “is considering additional amendments to the rules governing the [Commission’s] Whistleblower Program.” Gensler has explained, in a recent public statement, that “[v]arious members of the whistleblower community, as well as Commissioners Lee and Crenshaw, have expressed concern that two of these amendments could discourage whistleblowers from coming forward.” The Commission then issued a release announcing that, “[w]hile the staff is preparing and the Commission is considering potential additional rulemaking,” the Commission will be following “interim procedures” that effectively reestablish the original whistleblower rules.

Commissioners Peirce and Roisman objected, in a public statement, that “[t]his effectively nullifies standing Commission rules under the guise of changes to ‘agency procedures.’” They argued that “[a]bandonment of duly-adopted rules without notice and request for comment raises the prospect that the rules that the Commission adopts in compliance with the Administrative Procedure Act may be interim at best, and transitory at worst.” They called Gensler’s course of action “unwise” and continuing “a troubling and counterproductive precedent.”

Authored By



Gary O. Cohen

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