

⁴⁸In updating Item 402, the adopting release noted that the summary compensation table is “designed to disclose all compensation.” The release further provides that “[n]arrative disclosure will follow the two [compensation] tables, providing disclosure of material information necessary to an understanding of the information disclosed in the tables.” Executive Compensation and Related Person Disclosure, Rel. No. 33-8732A (Aug. 29, 2006). In other words, materiality functions to add supplemental narrative information to the metrics disclosed, not to limit them.

⁴⁹See Dawn Lim, *Index Funds Are the New Kings of Wall Street*, Wall Street Journal (Sept. 18, 2019).

⁵⁰See Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC* (Mar. 15, 2021); Allison Herren Lee, *Big Business’s Undisclosed Climate Crisis Plans*, New York Times (Sept. 27, 2020).

⁵¹SEC Staff Accounting Bulletin No. 99 (Aug. 12, 1999).

⁵²See, e.g., Bank of America, 2020 Annual Report (“As our Global Research team has found, companies that pay close attention to environmental, social and governance (ESG) priorities are much less likely to fail than companies that do not, giving investors a significant opportunity to build investment portfolios for the long-term. And—through research and our own lived experience—we know that ESG commitments can translate into a better brand, more client favorability and a better place for our teammates to work.”); State Street Global Advisors, *The ESG Data Challenge* (Mar. 2019) (“Asset owners and their investment managers seek solutions to the challenges posed by a lack of consistent, comparable, and material information. Investors increasingly view material ESG factors as being critical drivers of a company’s ability to generate sustainable long-term performance. In turn, ESG data has increasing importance for investors’ ability to allocate capital most effectively.”); Fitch Ratings, *Fitch Ratings Launches ESG Relevance Scores to Show Impact of ESG on Credit* (Jan. 7, 2019); Morningstar, *Morningstar Formally Integrates ESG into Its Analysis of Stocks, Funds, and Asset Managers* (Nov. 17, 2020).

⁵³See, e.g., *Climate Action 100+*, representing \$54 trillion in assets; Blackrock, *Toward a Common Language for Sustainable Investment* (Jan. 2020) (“Our investment conviction is that sustainability-

integrated portfolios—composed of more sustainable building-block products—can provide better risk-adjusted returns to investors. With the impact of sustainability on investment returns increasing, we believe that sustainable investment will be a critical foundation for client portfolios going forward.”).

SEC UPDATE: SEC ESG TASKFORCE UPDATE: COMMISSIONER LEE DOUBLES DOWN, AND EXAMINATION DIVISION ISSUES ESG RISK ALERT; EASTMAN KODAK PREPARING TO DEFEND INSIDER-TRADING LAWSUIT; THE HOUSE OF REPRESENTATIVES PASSES THE INSIDER TRADING PROHIBITION ACT

By John A. Elofson and Philip D. Nickerson

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SEC ESG Taskforce Update: Commissioner Lee Doubles Down, and Examination Division Issues ESG Risk Alert

As demand for investment options incorporating climate and other environmental, social, and governance (“ESG”) factors has increased in recent years, financial market regulators’ efforts to mitigate future climate-related financial vulnerabilities have picked up steam. Regulators increasingly believe that the economic uncertainty and financial risks of climate

change, and the imperfect and non-uniform information around climate risks and ESG initiatives, result in the mispricing of assets.¹ The Securities and Exchange Commission (“SEC”) has taken the brunt of the responsibility to ensure that disclosure requirements appropriately encompass ESG concerns. On March 4, 2021, then-acting Chair Allison Herren Lee announced the creation of an ESG Task Force (“Task Force”) in the Division of Enforcement.² The SEC tasked the 22-member Task Force with:

- identifying material gaps or misstatements in issuers’ disclosure of climate risks and ESG strategies under existing rules;
- developing initiatives to proactively identify ESG-related misconduct;
- coordinating use of the Enforcement Division’s sophisticated data mining and assessment tools; and
- evaluating and pursuing tips, referrals, and whistleblower complaints on ESG-related issues.³

Commissioner Lee recently underscored the importance of the Task Force’s work in a keynote address at the 2021 ESG Disclosure Priorities Event on May 24, 2021.⁴ Lee’s comments followed recent legislator and lobbyist questions about the efficacy of ESG reporting requirements. She took direct aim at what she called the “myth” that there is “a duty to disclose climate and ESG matters [and that] we can rest assured that such disclosures are being made.”⁵

Commissioner Lee challenged the notion that under the current regulatory framework, companies are already making adequate disclosures about ESG matters. She argued that a principles-based disclosure standard that encompasses a “broad-based concept of materiality” will not elicit material information relevant to the “reasonable investor” as

defined in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988). But Lee argued that company management often views materiality differently than investors do, and that “lawyers, accountants, and auditors” often get materiality determinations wrong, making a more prescriptive framework practicable.

Commissioner Lee also pushed back on the belief that the SEC’s disclosure rulemaking authority is limited to requiring the disclosure of material information. Instead, she said, Section 7 of the Securities Act of 1933 grants the SEC authority to mandate broader disclosures “appropriate in the public interest or for the protection of investors.” She stated that investors—“the arbiters of materiality”—have demonstrated that climate risk is material to their investment and voting decisions.

The SEC has been busy assessing the state of ESG disclosures. On April 9, 2021, the Division of Examinations (“EXAMS”) (previously, the Office of Compliance Inspections and Examinations) of the SEC released its ESG Risk Alert.⁶ The alert provided a non-exhaustive list of examination priorities for investment advisers and funds claiming to engage in ESG investing that includes:

- *Portfolio management.* Examinations will include a review of the firm’s policies, procedures, and practices related to ESG and its use of ESG-related terminology; due diligence and other processes for selecting, investing in, and monitoring investments in view of the firm’s disclosed ESG investing approaches; and whether proxy voting decision-making processes are consistent with ESG disclosures and marketing materials.
- *Performance advertising and marketing.* Examinations will include a review of the firm’s regulatory filings; websites; reports to spon-

sors of global ESG frameworks, to the extent the firm has communicated to clients and potential clients a commitment to follow such frameworks; client presentations; and responses to due diligence questionnaires, requests for proposals, and client/investor-facing documents, including marketing materials.

- Compliance programs. Examinations will include a review of the firm’s written policies and procedures and their implementation, compliance oversight, and review of ESG investing practices and disclosures.⁷

EXAM’s investigations of advisers and private funds engaged in ESG investing revealed “some instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks.” The staff provided insight into some areas of concern, stating:

- Portfolio management practices were inconsistent with disclosures about ESG approaches. The staff observed portfolio management practices that differed from client disclosures in required disclosure documents (e.g., Form ADV Part 2A) and other client/investor-facing documents (e.g., advisory agreements, offering materials, responses to requests for proposals, and due diligence questionnaires). For example, the staff noted lack of adherence to global ESG frameworks where firms claimed such adherence, and also observed fund holdings predominated by issuers with low ESG scores—as measured, for example, by a sub-adviser’s proprietary internal scoring system—where such predominance appeared inconsistent with those firms’ stated approaches.
- Controls were inadequate to maintain, monitor, and update clients’ ESG-related investing

guidelines, mandates, and restrictions. The staff noted weaknesses in policies and procedures governing implementation and monitoring of the advisers’ clients’ or funds’ ESG-related directives. For example, the staff observed that advisers did not have adequate controls around implementation and monitoring of clients’ negative screens (e.g., prohibitions on investments in certain industries, such as alcohol, tobacco, or firearms), especially if the directives were ill-defined, vague, or inconsistent. Nor did advisers have adequate systems to consistently and reasonably track and update clients’ negative screens leading to the risk that prohibited securities could be included in client portfolios. The staff also noted that client preferences to favor certain industries or issuers had not yet been effectuated because of challenges with implementation and monitoring, despite contrary marketing claims touting processes for implementing clients’ positive screens.

- Proxy voting may have contravened advisers’ stated approaches. The staff observed inconsistencies between public ESG-related proxy voting claims and internal proxy voting policies and practices. For example, the staff observed public statements that ESG-related proxy proposals would be independently evaluated internally on a case-by-case basis to maximize value, while internal guidelines generally did not provide for such case-by-case analysis. The staff also noted public claims regarding clients’ ability to vote separately on ESG-related proxy proposals, but clients were never provided such opportunities, and no policies concerning these practices existed.
- Unsubstantiated or otherwise potentially misleading claims regarding ESG approaches. The staff observed unsubstantiated or other-

wise potentially misleading claims regarding ESG investing in a variety of contexts. For instance, the staff noted marketing materials for some ESG-oriented funds that touted favorable risk, return, and correlation metrics related to ESG investing without disclosing material facts regarding the significant expense reimbursement they received from the fund-sponsor, which inflated returns for those ESG-oriented funds. The staff also observed unsubstantiated claims by advisers regarding their substantial contributions to the development of specific ESG products, when, in fact, their roles were very limited or inconsequential.

- Inadequate controls to ensure that ESG-related disclosures and marketing are consistent with the firm's practices. The staff observed inconsistencies between actual firm practices and ESG-related disclosures and marketing materials because of a weakness in controls over public disclosures and client/investor-facing statements. For example, the staff observed a lack of adherence to global ESG frameworks despite claims to the contrary, unsubstantiated claims regarding investment practices (e.g., only investing in companies with “high employee satisfaction”), and a lack of documentation of ESG investing decisions and issuer engagement efforts. In addition, the staff observed failures to update marketing materials timely (e.g., an adviser continuing to advertise an ESG investment product or service it no longer offered).
- Compliance programs did not adequately address relevant ESG issues. The staff observed that some firms substantially engaged in ESG investing lacked policies and procedures addressing their ESG investing analyses, decision-making processes, or compliance review and oversight. For instance, the staff

identified compliance programs that did not address adherence to global ESG frameworks to which the firms claimed to be adhering. The staff also noted a lack of policies and procedures to ensure firms obtained reasonable support for ESG-related marketing claims, and observed inadequate policies and procedures regarding oversight of ESG-focused sub-advisers. Firms also had difficulties in substantiating adherence to stated investment processes, such as supporting claims made to clients that each fund investment had received a high score for each separate component of ESG (i.e., environmental, social, and governance), when relying instead on composite ESG scores provided by a sub-adviser.

- The staff also observed that compliance programs were less effective when compliance personnel had limited knowledge of relevant ESG-investment analyses or oversight over ESG-related disclosures and marketing decisions. For example, compliance controls and oversight for reporting to sponsors of global ESG frameworks and responses to requests for proposals and due diligence questionnaires appeared to be ineffective. In addition, the staff noted weaknesses in compliance controls regarding performance metrics included in marketing materials (such as risk, returns, and correlation metrics), and a lack of compliance review of the data underlying those measures.⁸

The Risk Alert closed by noting some examples of good disclosure practices and by encouraging market participants “promoting ESG investing to clients, prospective clients, investors, and prospective investors to evaluate whether their disclosures, marketing claims, and other public statements related to ESG investing are accurate and consistent with internal firm practices. Additionally, firms

should ensure that their approaches to ESG investing are implemented consistently throughout the firm where relevant and are adequately addressed in the firm's policies and procedures and subject to appropriate oversight by compliance personnel. Lastly, firms should also consider taking steps to document and maintain records relating to important stages of the ESG investing process."⁹

Eastman Kodak Preparing to Defend Insider-Trading Lawsuit

In July 2020, the U.S. International Development Finance Corporation ("DFC") announced the signing of a non-binding letter of interest to provide Eastman Kodak ("Kodak") with a \$765 million loan ("DFC Loan") to support the launch of Kodak Pharmaceuticals.¹⁰ The DFC Loan would assist Kodak's plans to establish a new division, Kodak Pharmaceuticals, that would manufacture pharmaceutical ingredients for essential generic drugs (the "DFC Pharmaceutical Project").¹¹ Kodak's shares closed around \$2.62 on July 27, the day before the DFC Loan was announced. By July 29, the day after the announcement, Kodak's stock price soared over 1,000% and, at one point, reached \$60 before closing at \$33.20.¹² The shares later fell after the DFC halted the loan application process amid scrutiny of trading surrounding the announcement.¹³ Kodak has since indicated that it no longer expects to receive the DFC Loan. Still, the stock's rollercoaster triggered investigations from congressional committees and securities regulators.

According to recent Kodak disclosures, the DFC announcement of the potential DFC Loan and DFC Pharmaceutical Project birthed allegations of federal and state securities and fiduciary law violations by investors, and congressional and regulatory investigations.¹⁴ Of particular note is the insider-trading litigation threatened by the New York attorney general's office ("NY AG"). The NY AG is

investigating the purchase by Kodak's Chief Executive Officer, Jim Continenza, of 46,737 Kodak shares weeks before the DFC Loan announcement as potentially constituting unlawful insider trading.¹⁵

Kodak hired outside counsel to conduct an independent investigation into the stock purchase. According to Kodak, the investigation revealed that Continenza purchased the stock during an "open window" period and in compliance with Kodak's insider trading policy, and received pre-approval from its general counsel. His purchases were made at a weighted average price of \$2.22 per share, and Continenza never profited from the stock purchase by selling the 46,737 shares.¹⁶ The outside firm found Continenza viewed Kodak's chances of receiving the loan as uncertain when he bought the shares.¹⁷ That view was shared by Kodak's general counsel, who believed predicting the market's reaction to the company taking on the \$765 million DFC Loan was too difficult, leading him to conclude that Continenza did not possess material nonpublic information at the time of the purchase.

The NY AG's case, according to Kodak, is grounded in New York's Martin Act, the state law authorizing the NY AG to investigate and bring financial fraud cases without proving intent or knowledge of wrongdoing. This legal leeway has been emphasized by the NY AG during its investigation, notwithstanding the more onerous requirements to prove unlawful insider trading under federal law. Kodak, in its statement, called the attorney general's approach a "novel application of insider trading law that seeks to impose liability in the absence of evidence of intent."¹⁸

The company said the contemplated lawsuit would create a policy that discourages executives from investing in good faith alongside other shareholders due to fear that trades approved by internal lawyers could be second-guessed as unlawful.¹⁹

House of Representatives Passes Insider Trading Prohibition Act

One of the peculiarities of the law of insider trading in the United States is that it is largely based on the general antifraud provisions of Rule 10b-5 under the Securities Exchange Act of 1934 rather than a statute or regulation that addresses insider trading specifically. That will change if the “Insider Trading Prohibition Act” (the “ITPA”), which was recently approved by the U.S. House of Representatives by a 350-75 vote, becomes law.²⁰ The ITPA would clarify, and in some respects modestly expand, the scope of current insider trading law under Rule 10b-5. However, the majority of its provisions would merely codify existing law.

The ITPA would add a new Section 16A to the Exchange Act with Subsections (a) through (e). Subsection (a) would prohibit trading while in possession of material nonpublic information if the trader knows or recklessly disregards the fact that such information has been obtained “wrongfully” or if the transaction would constitute a wrongful use of the information. Subsection (b) would prohibit a person whose own trading would violate Subsection (a) from wrongfully tipping another person who then trades on the information (or tips a third person who then trades).

A key question under the ITPA—which is also the source of much confusion and complexity under current law²¹—is when trading while in possession of material nonpublic information is considered “wrongful.” Subsection (c) addresses this issue by specifying four categories of wrongful conduct:

- theft, bribery, misrepresentation or espionage;
- a violation of Federal law protecting computer data or the privacy of computer users;
- conversion, misappropriation or other unau-

thorized and deceptive taking of such information; or

- a breach of fiduciary duty, a contract, a code of conduct or ethics policy, or any personal or other relationship of trust or confidence for a direct or indirect personal benefit.

Subsection (c) broadly parallels existing law, which prohibits trading on material nonpublic information in violation of a duty (such as the fiduciary duty owed by a corporation’s officers and directors to its shareholders) or when the information was misappropriated (*e.g.*, in violation of a confidentiality or similar agreement). However, it would expand existing law modestly in some respects, in particular by clarifying that insider trading via computer hacking would always be considered “wrongful,” and therefore unlawful, regardless of whether the hack involved deceptive conduct.²² Further, Subsection (c) would also make clear in cases of remote tipping that trading may be considered wrongful even if the trader did not know the specific means by which the inside information was obtained, or whether any personal benefit was provided, so long as he or she was aware, consciously avoided being aware, or recklessly disregarded the fact that the information was wrongfully obtained, improperly used or wrongfully communicated.

In some respects, these provisions may create, rather than reduce, ambiguity. For example, under current law, trading in breach of a code of ethics policy would not itself be unlawful unless it also constituted a breach of a duty or misappropriation as defined under applicable case law. The ITPA, however, would effectively make all personal trading in violation of an ethics policy unlawful—giving companies’ ethics policies the force of law as a practical matter, even though they are often drafted in a broad and somewhat ambiguous manner.

It is not certain when, or if, the Senate will take

action on the ITPA, but bipartisan support for the bill in the House presumably makes passage more likely. In the absence of a clear policy goal that is inconsistent with current case law, however, the legislation appears likely to affect only incremental substantive changes in the law even if enacted.

ENDNOTES:

¹See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FINANCIAL STABILITY REPORT, 58-59 (November 2020); see also International Organization of Securities Commissions, IOSCO sees an urgent need for globally consistent, comparable, and reliable sustainability disclosure standards and announces its priorities and vision for the Sustainability Standards Board under the IFRS Foundation (Feb. 24, 2021), available at: <https://www.iosco.org/news/pdf/IOSCONEWS594.pdf>.

² Press Re. No. 2021-42 (Mar. 4, 2021), available at: <https://www.sec.gov/news/press-release/2021-42>.

³Press Re. No. 2021-42.

⁴Allison Herren Lee, Living in a Material World: Myths and Misconceptions about “Materiality,” U.S. Securities Exchange Commission (May 24, 2021), available at: <https://www.sec.gov/news/speech/lee-living-material-world-052421>.

⁵Al Barbarino, SEC’s Lee Rebukes “Myths” Related to ESG Disclosures, Law360 (May 24, 2021), available at: <https://www.law360.com/articles/1387831/sec-s-lee-rebukes-myths-related-to-esg-disclosures>.

⁶SECURITIES EXCHANGE COMMISSION, DIVISION OF EXAMINATIONS, RISK ALERT: THE DIVISION OF EXAMINATION’S REVIEW OF ESG INVESTING, at 2 (Apr. 9, 2021) [hereinafter, RISK ALERT], available at: <https://www.sec.gov/files/esg-risk-alert.pdf>.

⁷RISK ALERT at p. 2-3 (internal footnotes omitted).

⁸RISK ALERT at 4-5 (internal footnotes omitted).

⁹RISK ALERT at 7.

¹⁰See Jeanne Whalen, Kodak to produce pharmaceutical ingredients with U.S. government loan,

THE WASHINGTON POST (July 28, 2021), available at: <https://www.washingtonpost.com/business/2020/07/28/kodak-produce-pharmaceutical-ingredients/>.

¹¹Whalen.

¹²See Mike Spector, Eastman Kodak say New York preparing insider-trading lawsuit, REUTERS (May 17, 2021), available at: <https://www.reuters.com/business/eastman-kodak-says-new-york-preparing-insider-trading-lawsuit-2021-05-17/>.

¹³Spector, REUTERS.

¹⁴See Eastman Kodak Company, Form 10-Q (May 17, 2021), available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/31235/000156459021028398/kodk-10q_20210331.htm#ITEM 1 LEGAL PROCEEDINGS.

¹⁵Eastman Kodak Company.

¹⁶Eastman Kodak Company.

¹⁷Eastman Kodak Company.

¹⁸See Spector, REUTERS, available at: <https://www.reuters.com/business/eastman-kodak-says-new-york-preparing-insider-trading-lawsuit-2021-05-17/>.

¹⁹Spector, REUTERS.

²⁰See Insider Trading Prohibition Act, H.R. 2655, 117th Cong. (2021).

²¹*Salman v. U.S.*, 137 S. Ct. 420, 196 L. Ed. 2d 351, Fed. Sec. L. Rep. (CCH) P 99469 (2016); *Dirks v. S.E.C.*, 463 U.S. 646, 103 S. Ct. 3255, 77 L. Ed. 2d 911, Fed. Sec. L. Rep. (CCH) P 99255 (1983); *United States v. Martoma*, 894 F.3d 64, Fed. Sec. L. Rep. (CCH) P 100213 (2d Cir. 2017), cert. denied, 139 S. Ct. 2665, 204 L. Ed. 2d 1068 (2019); *U.S. v. Newman*, 773 F.3d 438, Fed. Sec. L. Rep. (CCH) P 98592 (2d Cir. 2014) (abrogated by, *Salman v. U.S.*, 137 S. Ct. 420, 196 L. Ed. 2d 351, Fed. Sec. L. Rep. (CCH) P 99469 (2016)).

²²*Compare S.E.C. v. Dorozhko*, 574 F.3d 42, Fed. Sec. L. Rep. (CCH) P 95296 (2d Cir. 2009).

FROM THE EDITOR

Future Battlegrounds: Transparency and Cryptocurrency

“I think transparency is at the heart of efficient markets,” said SEC Chairman Gary Gensler in his first testimony to Congress in early May. Gensler was speaking to the House Committee on Financial Services on the topic of the GameStop stock price mania earlier this year, and how the SEC intends to respond to future versions of that scenario.

Expect the SEC to release a report this summer that will address GameStop-related issues, Gensler said, adding that it’s possible new rules will be needed for brokerage apps—if so, essentially the SEC will be trying to referee the “gamification” of stocks. “Through gamification you are using psychological props to get people to trade more,” Gensler said in his testimony. He added that the SEC plans to be more vigilant on traders, brokers, and other market players using social media posts, such as on Twitter or Reddit, to try to manipulate stock prices.

Another topic addressed in Gensler’s talk to Congress was one of 2021’s hottest—the continued growth of cryptocurrency and whether the SEC and Congress can devise a workable strategy to better regulate it.

Crypto industry players are hiring scads of lobbyists to prepare for future Capitol Hill battles. “There is a tectonic shift underway,” Perianne Boring, the president of the Chamber of Digital Commerce, a

cryptocurrency lobbying group, said in April, as per the *New York Times*. “If we don’t start planning and taking action soon, we have everything to risk.”

In terms of future crypto regulations, battles will center on two primary areas—regulation of cryptocurrencies themselves, such as Bitcoin, and of trading/exchange platforms like Ripple and Coinbase.

Many eyes are on the SEC’s ongoing lawsuit with Ripple. The SEC’s contention is that each sale of Ripple’s XRP digital asset should be considered the equivalent of a stock or bond trade. Ripple in turn argues that XRP is a currency, which can be bought and sold without SEC intervention. As Daniel Payne, a securities and cryptocurrency attorney at Murphy & McGonigle said, what’s interesting is that the case isn’t just focused on the initial offering of XRP, but “current ongoing secondary market sales of XRP eight years after the initial offering, when, according to some of the filings in the case, there are people buying XRP who haven’t ever heard of Ripple.”

Because of this, “it’s a completely different playing field from what we’ve seen before. . . . It raises a lot of issues that were not present in the other cases. I view this case as significant because of the number of new legal issues that could be decided that haven’t been presented to any court.”

Chris O’Leary, Managing Editor

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