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Changing Winds on Disclosure: What to Expect from Increased ESG Disclosure Requirements

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The United States Securities and Exchange Commission ("SEC") recently proposed its Annual Regulatory Agenda, which recommends enhancing the rules requiring corporate disclosures of Environmental, Social and Governance ("ESG") related activities. Historically, SEC disclosure requirements have been based on the "materiality" of the disclosure as it relates to "reasonable investors." SEC Commissioner Allison Herren Lee appears to favor a broad definition of materiality, for which SEC Chair Gary Gensler has also signaled support. Commissioner Lee suggests that SEC disclosure requirements need not be strictly limited to material information. She references related party transactions, environmental proceedings, and share buybacks as disclosures that are required without reference to their materiality. Chair Gensler and Commissioner Lee have voiced their desires for more consistent and standard ESG disclosures that would apply to a wider range of companies.

On July 7, 2021, Chair Gensler, speaking before the Asset Management Advisory Committee, said that "investors should be able to drill down to see what's under the hood" of asset management funds. Chair Gensler alluded to a "holistic" approach to funds' naming conventions and the sustainability terms used, like "green" and "sustainable." This parallels Commissioner Lee's February 2021 directive, citing investor interest in the matter, for "the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings." Along with these likely focus points, Commissioner Lee has mentioned the concept of tying corporate executives' compensation to ESG metrics.

Chair Gensler's July 7th remarks emphasized diversity and inclusion, and focused on the underrepresentation of diverse candidates at the board and senior management levels within asset management firms. To effect change in this arena, Chair Gensler discussed requiring "disclosure of aggregated demographic information about an adviser's employees and owners," as well as the funds' "inclusion practices" in selecting other advisers.

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