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WHAT WILL HAPPEN WHEN THE SEC MINORITY BECOMES THE MAJORITY?

KEY POINTS RAISED BY DISSENTING COMMISSIONERS

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Many of the actions by the SEC over the past few years came following closely divided 3-to-2 votes. The split arose concerning both rulemaking by the Commission as well as enforcement actions. With the change in Administrations, there is a significant chance that the views of the dissenting commissioners will become those of the majority. To understand what a Trump Administration SEC would look like, it may be instructive to consider some of the key themes voiced in published dissents by commissioners during some of the more contentious debates of the past few years.

TAKEAWAYS

Consistent with Republican themes generally, recurring criticisms of proposed SEC rules by dissenting Commissioners have included the following:

- In the context of rulemakings, claims of:
  - Overly prescriptive requirements
  - *De facto* merits regulation without statutory authority
  - Failures to mitigate undue costs or impracticalities
  - Failures in economic or other analyses
  - Lack of need for rulemaking

- In the context of enforcement proceedings, arguments of:
  - Failure to establish materiality, or investor harm
  - Straying outside SEC lane

- Inappropriately expanding regulation through enforcement
- Ambiguous and unfair approach to crypto

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RULEMAKINGS

Overly prescriptive requirements

- Climate-Related Disclosure Rules (2024). Commissioner Hester Peirce, in her remarks entitled Green Regs and Spam, criticized the rules as overly prescriptive, burying investors with excessive, granular disclosures, and failing to use the existing principles-based approach to climate risk.
- Cybersecurity Disclosure Rules (2023).Peirce contended that overly prescriptive requirements had the potential to help bad actors by providing a roadmap for attacks, while diverting company resources better spent on combatting or responding to threats.
- Expanded Share Repurchase Disclosure Rules (2023)(later invalidated). Peirce argued that disclosure of daily repurchase information will "bury [investors] in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking," citing the Supreme Court in *TSC Indus. v. Northway*(1976).
- Pay-versus-Performance Disclosure Rules (2022). Peirce said the SEC "should engage in principles-based rulemaking to efficiently implement Congress's directive without unnecessary additions. Rather than following the statute to craft a workable, practical rule, the Commission instead adopts an unnecessarily complicated rule."

De facto merit regulation without statutory authority

- New Rules for SPACs (2024). Commissioner (and now Acting Chair) MarkUyeda stated: "The [SEC] lacks statutory authority to outright ban making investments in SPACs or becoming a reporting company via a de-SPAC transaction. Instead, it has resorted to promulgating rules aimed at significantly increasing the costs and decreasing the attractiveness of being associated with SPACs, to the extent that few rational actors would even attempt such an offering. Today's recommendation effectively constitutes a form *of de facto*merit regulation."

Failure to mitigate undue costs or impracticalities

- Climate-Related Disclosure Rules (2024). Peirce said the law enforcement exception for delayed 8-K filings was too narrow and could be difficult to obtain within the four business day window.

- Executive Officer Incentive Compensation Clawback rules (2022). Peirceviewed the rules as impractical, in that they(1) did not provide for a de minimis threshold; (2) subjected lower level officers to recoupment, regardless of amounts involved; and (3) covered "little r" restatements that would require recoupment analysis and efforts, despite lower potential dollar amounts due to their immateriality.

  Further, she stated, litigation risk arises out of the inclusion of trigger dates based on when the board "reasonably should have concluded" a restatement was needed and the requirement for companies to act "reasonably promptly," which could discourage cost mitigation practices such as netting or setting-off.

- Pay-versus-Performance Disclosure Rules (2022). Peirce said the rules failed to provide meaningful benefits, while resulting in undue costs for public companies.

Failures in economic or other analysis

- Pay-versus-Performance Disclosure Rules (2022). Uyeda faulted the majority for failing to update its seven-year old economic analysis, including stale rates for professional fees.

- Reversal of 2020 amendments to rules for ISS, Glass Lewis and other proxy advisors (2022). Peirce and Uyeda criticized the majority for reversing recently adopted rules without new evidence and the "needlessly compressed" comment period.

Lack of need for rulemaking

- Private Funds Rule (2023) (later invalidated). Peirce, in a fiery dissent, declared the rule "ahistorical, unjustified, unlawful, impractical, confusing and harmful."

- Cybersecurity Disclosure Rules (2023). Peirceand Uyeda said the majority failed to explain why the new rules were needed, in light of existing SEC guidance.

- New Rules for SPACs (2024). Peirce stated: "The [SEC] has failed to identify a problem in need of a regulatory solution. To the contrary, the rule will exacerbate a problem—the shrinking pool of public companies—by closing down one road into the public markets."

ENFORCEMENT ACTIONS

Failure to establish materiality

- SEC roasts Keurig for claims regarding recycling of K-Cup pods. Peirce dissented from SEC charges alleging misleading product disclosures. She contended that the challenged statements were accurate and, in addition, that the SEC had failed to establish their materiality. See Not so Fast: Statement on In the Matter of Keurig Dr Pepper Inc.

- Statement Regarding Administrative Proceedings Against SolarWinds Customers. Peirce and Uyeda dissented from the SEC charges against four public companies for allegedly making misleading disclosures about cybersecurity risks and intrusions: "Rather than focusing on whether the companies' disclosure provided material information to investors, the Commission engages in a hindsight review to second-guess the disclosure and cites immaterial, undisclosed details to support its charges."

- Dissenting Statement Regarding Recent SPAC Cases. Uyeda criticized recent cases against SPACs and/or their sponsor alleging false and misleading statements regarding details of their communications with potential target companies. He said the alleged misstatements and omissions are not material and that the majority erred by treating disclosure of potential merger discussions by SPACs as if made by an operating company.

Failure to demonstrate harm

- Dissenting Statement Regarding Recent SPAC Cases. Uyeda's dissent also criticized the majority because, in his view, the charges did not include facts demonstrating that investors were financially harmed.

- SEC penalizes company with good disclosures for insufficient controls. Peirce dissented from SEC charges alleging the company failed to maintain adequate disclosure controls and procedures. She said the SEC "contort[ed] the securities laws to reach for a nexus" where it alleged "no fraud, misrepresentations, omissions, or investor harm." See The SEC Levels Up: Statement on In re Activision Blizzard.

Straying outside SEC lane

- SEC penalizes company with good disclosures for insufficient controls. In the same dissent, Peirce stated: "If accurate, the reported widespread workplace harassment at Activision Blizzard is deeply concerning, but it is not *our* concern." See The SEC Levels Up: Statement on In re Activision Blizzard.

Inappropriately expanding regulation through enforcement

- The SEC's Swiss Army Statute: Dissenting Statement Peirce and Uyeda criticized SEC charges alleging internal control violations related to a public company's Rule 10b5-1 repurchase program. "The Commission in recent years has taken to using Securities Exchange Act Section 13(b)(2)(B) as its own Swiss Army statute—a multi-use tool handy for compelling companies to adopt and adhere to policies and procedures that the Commission deems good corporate practice. We do not have the authority to tell companies how to run themselves, but we now routinely use Section 13(b)(2)(B) to do just that. [This] is the latest example of the Commission's unmooring of Section 13(b)(2)(B) from its statutory text and context to extend the reach of its jurisdiction."

- Hey, look, there's a hoof cleaner! Statement on R.R. Donnelley & Sons, Co. Peirce and Uyeda criticized SEC charges alleging internal control violations based on cyber attacks on Donnelley's computer system. "Identifying a link between the Commission's preferred policies and procedures and accounting controls seems a collateral concern, if it is a concern at all. In today's settled administrative proceeding against R.R. Donnelly & Sons, Co. ("RRD"), the Commission finds and uses a novel attachment on its multi-use tool—'a system of cybersecurity-related internal accounting controls.'"

Ambiguous and unfair approach to crypto

- On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG. Peirce and Uyeda criticized SEC charges alleging ShapeShift should have registered as a securities dealer. "[T]he [SEC], nearly ten years after ShapeShift's platform started trading and more than three years after it changed its business model, now contends that some unidentified number of the 79 crypto assets it traded between 2014 and 2021 were investment contracts without explaining why. . . . It is entirely unclear how ShapeShift was to discern that the Commission would consider crypto assets generally—and any crypto asset in particular—a security in the form of an investment contract. Even now, ten years on, it is hardly more discernable."

- Omakase: Statement on In the Matter of Flyfish Club, LLC. Peirce and Uyeda criticized SEC charges alleging Flyfish Club should have registered NFT membership interests in a yet-to-be-built restaurant as securities transactions. "Leaving crypto to be addressed in an endless series of misguided and overreaching cases has been and continues to be a consequential mistake. . . . The securities laws are not needed here, and their application is harmful both in the present case and as future precedent. . . . NFTs offer a promising way to allow creative people—such as chefs, musicians, or visual artists—to monetize their talent and a potentially efficient way for selling access to experiences and communities. Experiments like Flyfish Club are not a threat to the American investor. Creative people should be able to experiment with NFTs without having to consult a high-priced tea-leaf reader—ahem, lawyer."

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