

MEMO# 33607

June 22, 2021

SEC Commissioner Roisman Speech on ESG-Related Rulemaking

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TO: ICI Members
ESG Advisory Group
ESG Task Force SUBJECTS: Disclosure
ESG
Financial Stability RE: SEC Commissioner Roisman Speech on ESG-Related Rulemaking

Commissioner Roisman gave a speech today on the steps necessary for the Commission to take in advance of any climate change and human capital-related rulemaking for the rules to stand the test of time and fit into the SEC's historic frameworks.[\[1\]](#) His remarks are summarized below.

Commissioner Roisman focused on three questions:

1. What precise items of "E," "S," and "G" information are investors not getting that are material to making informed investment decisions?
2. If we were able to identify the information investors need, how would the SEC come up with "E" and "S" disclosure requirements—now, and on an ongoing basis? What expertise do we need?
3. If the SEC were to incorporate the work of external standard-setters with respect to new ESG disclosure requirements: how would the agency oversee them—in terms of governance, funding, and substantive work product—on an ongoing basis? And what kind of new infrastructure would be required inside the SEC and at the standard-setters themselves?

Commissioner Roisman stated that "it is not clear...that investors have yet settled on an agreed list of information that they want from companies. Instead, ...there is an evolution in companies' [disclosure] practices." He therefore worries that if the Commission promulgates rules, the rules will "displace...private sector engagement and freeze disclosures in place prematurely. It is not clear...that we have certainty about what is, and crucially, will continue to be material information for new line-item ESG disclosures." He notes that "if the problem is one of standardization rather than content, we must similarly understand the contours of the disclosures investors need before we establish our own

template from the many already in existence."

Commissioner Roisman also emphasized that as the Commission considers new disclosure requirements, it should use materiality as its touchstone and that under the materiality standard, a "reasonable investor" is one whose interest is in "financial return on an investment." This means that the Commission "should assess the merits of any potential disclosure requirements against the question of whether a reasonable *investor* would consider them *material*—that is, to a company's financial value."

He also commented on the Commission's authority for promulgating ESG rules, noting that:

[I]legislative bodies in other countries have taken different approaches, intentionally motivating asset managers or businesses operating there to pursue explicitly societal goals, including environmental sustainability. These actions have contributed to the creation of international ESG disclosure frameworks that many U.S. financial market participants are now following. But, we must remember that *the SEC has no legislative mandate* to make rules for the U.S. financial markets to further these same societal objectives. ...[Therefore,] when the Commission considers what to require in its own ESG rules, we should not merely copy the requirements of the international standards, given the different mandates.

Commissioner Roisman also remarked on the interests of "actual" or "true" investors who beneficially own investments often being conflated with those of institutional investors and asset managers. He stated that:

[i]n the context of advocating for SEC-mandated ESG disclosures, asset managers in particular have certain conflicts of interest. For example, many are subject to European requirements to report on how securities they hold in their investment portfolios impact certain ESG factors, including climate-related issues and others. Of course increased comparability in U.S. companies' ESG reporting would make it easier for asset managers to fulfill those regulatory obligations. But, I'm not sure that this benefit to asset managers would be relevant to the true investors in our markets; and the costs of imposing prescriptive disclosure requirements on U.S. companies, in order to yield the kind of comparable information asset managers are searching for, would be borne by *all* U.S. companies and their true investors (not just asset managers themselves).

Commissioner Roisman also pointed out that "[t]o the extent that investors' objectives are unrelated to risk/return, it is hard to see how the information relevant to those strategies could be considered material, per the SEC's historical understanding of the term."

Finally, Commissioner Roisman stated that the Commission must consider how it will acquire and maintain the expertise to develop and oversee an "E" and "S" disclosure regime and the challenges the Commission will face overseeing any standard setter designated to maintain ESG standards.

endnotes

[1] Commissioner Elad L. Roisman, Can the SEC Make ESG Rules that are Sustainable? (June 22, 2021), *available at* https://www.sec.gov/news/speech/can-the-sec-make-esg-rules-that-are-sustainable?utm_medium=email&utm_source=govdelivery. The memorandum omits footnotes and retains any points of emphasis that appear in the speech.

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