INVESTMENT COMPANY INSTITUTE

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# SEC Commissioner Uyeda Speech on Financial Regulation

[34398]

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TO: ICI Members
ICI Global Members
ESG Advisory Group
ESG Task Force
SEC Rules Committee SUBJECTS: Disclosure
ESG
Financial Stability
International/Global RE: SEC Commissioner Uyeda Speech on Financial Regulation

SEC Commissioner Mark Uyeda delivered remarks at a recent Cato Institute conference focusing on the rise of environmental, social, and governance (ESG) investing and the future of financial regulation.[1] His remarks are summarized below.

Commissioner Uyeda observed that the asset management industry has excelled in recent years in attracting fund flows to ESG-themed investment products and questioned whether on the corporate disclosure side, a specific E, S, or G factor will remain relevant in the future.

He noted the lack of consensus on the meaning of ESG, including among the rating agencies and that despite the lack of consensus, "one aspect seems certain - there will be increased costs and these costs will be ultimately borne by investors. Today, some persons, including non-investor ESG stakeholders, are focused on climate and GHG emissions. However, in the next few years, that focus could shift to other disclosures, such as water-related metrics or other topics that are not currently contemplated. This ever-changing focus of ESG, combined with a lack of consensus on what constitutes ESG, could make it difficult for companies to decrease compliance costs over time."

He then commented on asset managers' description of stewardship on their websites, noting that "mentions of ESG seem ubiquitous, from voting guidelines to engagements statistics. The information on these websites often document how an asset manager (1) establishes its expectations for ESG matters, (2) engages with companies that aren't meeting its expectations, and (3) may vote against one or more incumbent directors if those companies do not continue to meet expectations."

Commissioner Uyeda then went on to describe the differences between Schedules 13D and 13G reporting and questioning whether, with respect to stewardship, an asset manager truly lacks control intent, the necessary prerequisite for an asset manager to file on Schedule 13G. He noted that the SEC staff has provided guidance that "an asset manager's engagement with a company's management on social or public interest issues, including environmental policies, without more, would not preclude the asset manager from filing on Schedule 13G so long as the engagement is not undertaken with the purpose or effect of changing or influencing control of the company."

He went on to state that this guidance does not answer whether the asset manager lacks a control intent but, rather, "merely reiterates that the asset manager cannot take any action with the purpose or effect of changing or influencing control. If an asset manager (1) develops ESG policies, (2) meets with companies to discuss how they are not following such policies, and (3) then votes against directors because the company's ESG practices do not match the asset manager's policies, has that asset manager done more than simply engage?"

Commissioner Uyeda then observed that because of change from plurality to majority voting for directors, and addition of withhold option to for and against, the consequences of a company's engagement with asset managers are very different today than in 1998, as an asset manager's voting decision can be much more consequential. He ended by noting that "ESG investing has been a trending topic for the past several years. As with any new trend, market participants should evaluate how their activities within this space are consistent with their legal obligations, including any applicable fiduciary duties. Additionally, the Commission should consider whether current rules capture the activities and behavior associated with the new trend, particularly with the efforts of significant shareholders to change or influence the management and policies of public companies. If so, the Commission should enforce those rules, and if not, then the Commission should evaluate whether an update to those rules is needed."

Dorothy M. Donohue
Deputy General Counsel - Securities Regulation

**Notes**

[1] Commissioner Mark Uyeda, Remarks at the 2022 Cato Summit on Financial Regulation (November 17, 2022), https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722.