FINANCIAL REGULATION AND THE CLIMATE—A CASE STUDY OF THE "WHOLE-OF-GOVERNMENT" APPROACH

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A fundamental challenge of every administration's first 100 days is incorporating broad policy priorities into the work that is done at various levels of the federal government. This essay highlights how one federal agency—the Securities and Exchange Commission (SEC)—has addressed one priority of the Biden administration—action on climate change. It considers what the SEC has done about climate change in these first 100 days and some of the questions that arise in response. It concludes by looking beyond the example of the SEC to highlight ways in which broader agendas translate into particular contexts, ultimately affecting how successful and sticky these priorities can be.

I. A "WHOLE-OF-GOVERNMENT" APPROACH TO CLIMATE CHANGE

On Inauguration Day, President Biden rejoined the Paris Agreement on behalf of the United States, formally signaling his administration's commitment to action on climate change. A week later, on January 27, the President issued an Executive Order on "tackling the climate crisis."

The January 27 Executive Order not only reiterated that climate change was a priority, but also outlined how the administration was going to structure its response. It announced the administration's "whole-of-government" approach that "organize[d] and deploy[ed] the full capacity of its agencies to combat the climate crisis." Climate might have once seemed irrelevant to some agencies because it was viewed as a specialized, cabined concern. But no longer. Breadth and coordination became key.

Some of what the administration announced was a centralized structure: a White House Office of Domestic Climate Policy and the appointment of a National Climate Advisor. But other pieces were more widespread, including the formation of a National Climate Task Force.

Financial and economic regulators are explicitly part of the government-wide approach. One practical indication is that the National Climate Task Force

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includes financial and economic authorities: the Secretary of the Treasury; the Secretary of Commerce; and the Assistant to the President for Economic Policy.

Early statements are bookended by the administration's Earth Day announcements on April 22, 2021—just shy of the 100-day mark. These statements specifically addressed financial regulators and the financial markets. An explicit aim of the Climate Finance Plan is to "[make] Capital Flows Consistent with Low-Emissions, Climate-Resilient Pathways." Or, in other words, it matters where the money goes.

II. CLIMATE CHANGE AT THE SEC

Given these directives, what has the SEC done about climate change during the roughly 100 days between Inauguration and Earth Day?

A. Agency Structure

The whole-of-government approach seems to be repeated in miniature, fractal-like, at the agency level. In February 2021, the SEC announced a new position of Senior Policy Advisor for Climate and ESG. In March 2021, the agency announced the creation of the Climate and Environmental, Social and Governance ("Climate and ESG") Task Force, led by the Acting Deputy Director of Enforcement. The task force reaches across the enforcement division, with representation from "headquarters, regional offices and Enforcement specialized units."

B. Disclosure

The new agency structures are charged with considering climate risk and sustainability. Mandating disclosure by public companies is at the heart of how the SEC performs its duties, so it is no surprise that disclosure is also at the heart of the agency's approach to climate change. In February 2021, then-SEC Acting Chair Allison Herren Lee released a statement directing the SEC's Division of Corporate Finance "to enhance its focus on climate-related disclosure in public company filings."

The agency's first move is to build on existing disclosure guidance and rules. In 2010, the agency issued climate-related disclosure guidance aimed at explaining to regulated companies how climate-related information should be disclosed under existing rules. More than a decade later, in the early days of the Biden Administration, the agency proposed revisiting that 2010 guidance. It has asked for comments to help it take stock of how corporations have responded over time.

Yet, while this move suggests the SEC's Climate and ESG policies are still in the discussion phase, other moves suggest the SEC is already preparing to address non-compliant corporations through enforcement of current rules. The Climate and ESG Task Force will identify "ESG-related misconduct" including "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." (SEC Press Release 2021-42) So, enforcement is used as an expression of policy.

The SEC's decision to step up enforcement of climate-related disclosure is contested. Specifically, two Commissioners questioned whether it is wise to ramp up enforcement activity while the SEC is still completing "its assessment of [its] existing rules relating to ESG disclosures to find out if they are unclear or in need of updating." The response is that the SEC is just engaged in business as usual. According to the head of the task force: "The requirements that issuers' disclosures be accurate and not misleading, and that funds and advisers adhere to their fiduciary duty, are not new and shouldn't surprise anyone . . . We'll investigate ESG no differently than we would any other area that's important to investors."

In contrast to immediate moves based on existing guidance and rules, the timeframe for imposing *new* disclosure requirements, if any, is certainly beyond the 100-day scope. Recent battles about expanded disclosures (about conflict minerals, etc.) may make the players shy. Changes to guidance and perhaps ultimately the underlying rules are at the brainstorming stage. The SEC is now welcoming public comments on questions concerning the direction Climate and ESG disclosure requirements should take.

C. Information Gathering

Mandatory disclosure is only one source of information that feeds into the SEC and enables it to police the market. As noted, enforcing existing disclosure rules is the agency's initial focus. While this focus may not be new, the tools used may be. In particular, the SEC points to the use of "sophisticated data analysis to mine and assess information" to identify potential violations relating to climate and ESG. (SEC Press Release 2021-42)

The SEC also applies old tools to new topics. Interestingly, the SEC's public releases about the climate priorities explicitly solicit whistleblower tips about ESG and climate-related issues. They directly link to the SEC's whistleblower tip reporting site.

III. IMPLICATIONS FOR OTHER AGENCIES

One of the tricky things about a "whole-of-government" approach is the variation in structures and goals across different agencies and organizations. The example of the SEC and the intersection of climate and financial regulation highlights how broader agendas get translated into particular and varied contexts.

A. Institutional Goals

As much as the SEC's actions acknowledge the Biden administration's focus on climate, they also reflect the SEC's continued adherence to established goals of its own, namely, to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." As then-SEC Acting Chair Lee stated in her March 15 remarks, the difference "between what's good and what's profitable, between what's sustainable environmentally and what's sustainable economically, between acting in pursuit of the public interest and acting to maximize the bottom line—is increasingly diminished."

As with the SEC example, other agencies will likely articulate these centrally announced priorities in terms of other longstanding institutional goals. This is partly rhetoric, yes. But also the long-term success of these initiatives may depend on whether there is a strong case that climate considerations are integral to existing aims.

B. Politicization

Implementation of a particular administration's priorities is inherently political. What is more variable is whether the introduction of these goals is seen as politicizing an otherwise more neutral institution or activity.

An example of the "politicization" critique can be found in one of the comments received by the SEC on climate change disclosures. The West Virginia Attorney General promised legal action if the SEC does not reverse course on its climate and ESG efforts. The letter implored the SEC to "stick to its core mission of requiring statement on matters that are material to future financial performance—not statements on issues that drive a political agenda."

Despite this critique, built into the SEC's structure is the expectation that the Commission will shift with the new administration. The chair of the five-member Commission is of the President's party, with two additional commissioners from each party. There is, accordingly, some expectation of politicization.

The Treasury Department is an interesting foil because it relies on being seen as apolitical. It is too early to tell how this will influence policy implementation, but critiques of the Treasury Department's implementation of climate priorities have focused on this concern, with headlines pointing to the difficulties of balancing political independence with climate issues.

C. Novelty

The explicit central direction to consider climate is novel, as is the high-level attention to the role of climate in financial regulation. The Administration's Earth Day announcements even referenced some of the drivers of securities disclosure: the need to "improv[e] information on climate-related risks and opportunities" and the centrality of "climate-related financial risks."

Otherwise, however, the debate over the extent to which climate risks and other ESG issues should be disclosed under the securities laws is long-standing. See, for instance, Prof. Cynthia Williams' seminal 1999 Harvard Law Review article on "The Securities and Exchange Commission and Corporate Social Transparency."

Even the recent timeframe predates the Biden Administration. Remember that the 2021 call for re-examining climate disclosure is framed as a call for the agency to take stock of how corporations responded to *2010* SEC guidance. And some consideration of these standards took place over the course of 2020.

Looking beyond the SEC, the novelty of climate considerations may vary depending on the agency. How that ultimately influences policy implementation is an open question, and may interact with views about expertise and whether the newly articulated priority fits with the agency's existing aims. But it is worth remembering that the discussion of climate in any particular agency will not always be against the backdrop of a blank slate.

D. Constituencies

The last aspect that characterizes the SEC and that varies across the government is the constituency for attention to climate change. Interestingly, from the SEC's perspective, the need to evaluate companies using the Climate and ESG framework may be driven by investors as much as it is by the Biden administration. One reality is that financial products that advertise ESG aims have proliferated. The traditional focus on investor protection naturally includes analyzing disclosure and compliance issues that relate to investment advisors and companies that offer climate and ESG-focused investment strategies to investors.

Companies have also shown interest in climate and ESG, including taking steps to voluntarily report some relevant information. One question that the SEC opened for comment asks whether "disclosure standards mutually agreed" upon by "investors, registrants, and other industry participants" should satisfy the SEC's minimum disclosure requirements. The difficulty is that corporations are not uniform in their approach, leaving the SEC with a role in getting market participants to speak the same language with respect to climate and ESG.

Here, investors and regulated companies are both constituencies that pay increasing attention to climate change, even apart from political priorities. Each agency will confront a unique combination of momentum and resistance that the various constituencies create.

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A whole-of-government approach to the climate priority makes sense. It avoids single channels, including legislative channels, that may be blocked. It signals that climate change is not a specialized subject that can be siloed, but rather treats it as an existential threat that infuses all decisions. As the SEC example suggests, some of the challenges on the ground are that each agency confronts its own aims, politics, ongoing conversation, and various constituencies. This may be inherent in a decentralized approach. And it may be the case that not all the parts have to be the same, or even equally successful, to make the whole work.