‘The Direction of Our Policy Agenda Will Change’: SEC Commissioner Hester Peirce on Bringing Public Companies ‘Back to Normal’

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> “Capital markets should function in a way that is agnostic to the party in power. Of course, elections have consequences, and the will of the people must be reflected in government policy. Under the new administration, the direction of our policy agenda will change. Those excited by the possibilities of a new day on the securities regulatory world—and I include myself in those ranks—should work hard to ensure that the capital markets do not become a playground for politics of any stripe.”
>
> *—Republican SEC Commissioner Hester Peirce*

In keynote remarks delivered yesterday before the Northwestern Securities Regulation Institute, SEC Commissioner Hester Peirce offered a preview of the agency’s vision, direction and priorities in 2025 under a second Trump administration. When incoming SEC chair designee Paul Atkins is confirmed by the Senate (as is widely expected), he, current Acting Chair Mark Uyeda and Peirce will form a 3-1 Republican majority. Both Uyeda and Peirce served as counsel to Atkins during Atkins’s tenure as a Republican commissioner from 2002 to 2008 during the George W. Bush administration, and the trio are known to be experienced and effective collaborators in tight ideological alignment.

In her address, Peirce sympathized with public companies having to “navigat[e] the hazardous regulatory, political and societal landscape of today.” In her view, **public**

companies "are confronting a symptom of a larger societal malady—importing politics and contentious social issues into everything we do. The SEC, so-called stakeholders, and the burgeoning industry of advisers, consultants, accountants and attorneys peddling their costly wares to public companies, sometimes with the agreement of corporate executives, drag companies into social and political melees." Peirce urged us to remember, however, that "we do not need to invite our political disagreements into every corner of our lives" and, to that end, she proceeded to outline **seven steps she believes will help steer public companies away from polarizing public policy issues toward greater neutrality and "more level, predictable terrain."**

Step #1 — Recognize That Both Public Companies and the SEC Have Limited Missions

Public companies, according to Peirce, "should be at the beck and call of shareholders qua shareholders, not the ever-growing, never-satisfied set of stakeholders that brazenly grasp at company resources to do something other than maximize the value of the company. **Directors and executive officers serve shareholders and society best by keeping the companies they guide focused on maximizing long-term financial value**."

The SEC, for its part, should be singularly focused on facilitating the provision of disclosure necessary for investment decisions: that is, "getting readily available and in the most understandable form, relevant, material corporate information at the least expense and burden to the issuer-registrant into the hands of investors, while leaving decision-making to the investor." The role of the SEC should be limited to "ensur[ing] that investors have the information they need to channel funds to the companies that can put that money to the best use by delivering the products and services people demand."

Step #2 — Return to a Materiality-Based Disclosure Regime

Peirce observed that "[a]ttempts to co-opt the SEC's disclosure program to serve non-investor constituencies is not new but has gained steam in recent years. Conflict minerals disclosure and CEO pay ratios are examples from Dodd-Frank. More recently, efforts to expand public company climate disclosure serve not only constituencies that seek to lower greenhouse gas emissions but also sellers of climate consulting services to increasingly over-encumbered public companies. Labor interests seek expanded human capital disclosures. Proponents of higher corporate taxes seek more granular disclosures of how much tax companies pay in each jurisdiction. **If this trend continues, companies' securities disclosures will bury**

information material to investors in an unwieldy catalog of responses to special interest groups' demands."

Peirce believes that **the "best course is for all of us to retreat to a place where materiality from the perspective of the reasonable investor is the sine qua non for disclosures**. In this retreat, there is no shame. Materiality-based disclosure is one of the foundational strengths of the American securities regulatory regime. Although in some instances such disclosure may incidentally address the concerns of some special interest groups, **important societal concerns are better addressed by political institutions and civil society**. Europe, where sustainability disclosure requirements are unmoored from materiality and companies are losing focus on corporate value maximization, offers us a cautionary tale."

Step #3 — Stop Pressuring Asset Managers to Push Public Companies into Contentious Social and Political Issues

Since 2022, funds have to had to disclose votes by category (such as "environment or climate," "human rights or human capital/workforce" and "diversity, equity and inclusion"). In Peirce's view, "[t]hese disclosure requirements, while enabling fund shareholders to monitor fund voting, also **make asset managers sitting ducks for pressure campaigns from social and political activists and scrutiny by ESG rating providers. Fiduciary duty to the fund should be the only guiding principle for asset managers in deciding whether and how to exercise a vote**, but this public disclosure requirement elevates voting and exposes it to scrutiny by third parties in a way that could interfere with the proper exercise of fiduciary duty." She further criticized the SEC for "fail[ing] to ensure that asset managers think through whether active engagement with companies comports with fiduciary duty to funds that do not have an active investment objective."

Step #4 — Protect Investors from Shareholder Proposals Not Aimed at Maximizing Corporate Value

Peirce observed that, "[h]istorically, shareholder proposals were focused on governance topics that had a direct relationship to the financial prospects of a company," such as the removal of classified boards and the adoption of poison pills. "In the past decade, the number of shareholder proposals related to environmental and social issues has risen steadily. The increased volume of pro- and anti-environmental and social proposals should not be mistaken for popularity among voting shareholders. Sorting through the bluster is no small cost for companies…. **Not only does each shareholder proposal impose a significant monetary cost, but it also imposes a much larger opportunity cost as management and the board of directors divert their attention away from the day to day business of**

maximizing corporate value to deal with the often picayune issues at the heart of shareholder proposals. When one shareholder makes a proposal, all shareholders incur the costs borne by the company."

To combat this issue, Peirce recommended that the SEC:

- **Re-examine the ownership thresholds in Rule 14a-8 and other available tools "to ensure that a proponent has some meaningful economic stake or investment interest in a company**."
- **Take a fresh look at how Rule 14a-8's consideration of social significance under two bases of exclusion has affected the number, type and excludability of shareholder proposals**.

"As a practical matter," Peirce continued, "questions outside of securities issues are necessarily outside of the staff's expertise. As a logistical matter, arbitrating between companies and proponents is a tremendous drain on staff resources. As a constitutional matter, making decisions on highly contentious social and political matters outside of our securities laws usurps Congress."

Step #5 — Refrain from Using Enforcement Actions to Override Managerial Decision-Making

Peirce denounced what she described as **the Gensler-led SEC's predilection for "management through enforcement"**—i.e., bringing enforcement actions alleging deficient internal accounting controls or disclosure controls and procedures "as a subtle mechanism for the Commission to insinuate itself into corporate management" and "to nudge companies to manage themselves according to the metrics the SEC finds interesting at the moment."

She noted the prior SEC's "aggressively broad interpretation" of Exchange Act Section 13(b)(2)(B)'s internal accounting controls provision, to which she has repeatedly objected in written dissents. She also cited the 2023 enforcement action against Activision Blizzard where the SEC used Exchange Act Rule 13a-15(a), which requires companies to have disclosure controls and procedures, to penalize a company for "lacking controls and procedures…to collect or analyze employee complaints of workplace misconduct" given that it disclosed a risk factor "related to its workforce and how its ability to attract, retain and motivate skilled personnel might materially impact its business." The SEC did not charge the company with making misleading disclosures.

Peirce asserted that “**[r]estoring the internal accounting controls and disclosure controls and procedures requirements to their important, but limited, intended purposes is a change in the right direction to rein in the scope of enforcement actions**.”

Step #6 — Prioritize SEC Staff Engagement with Public Companies

Peirce advocated for staff in the agency’s Division of Corporation Finance and Office of the Chief Accountant to re-double efforts to provide guidance to companies about the many disclosure issues that arise in the normal course of business: “**In the registration statement review process, staff should communicate early and often so new and seasoned issuers alike can have increased confidence in offering timelines…. The Commission also should encourage the expert staff to engage with public companies and their lawyers and accountants on difficult questions about the application of new and existing rules. This engagement should be dynamic and interactive, not formulaic**.”

Step #7 — Affirm That the U.S. Capital Markets Are Designed to Serve All Americans, Regardless of Political Ideology

Peirce concluded her remarks with an appeal to “remember that we do not need to invite our political disagreements into every corner of our lives,” emphasizing her belief that “**[c]apital markets should function in a way that is agnostic to the party in power**. Of course, elections have consequences, and the will of the people must be reflected in government policy. Under the new administration, the direction of our policy agenda will change. Those excited by the possibilities of a new day on the securities regulatory world—and I include myself in those ranks—should work hard to **ensure that the capital markets do not become a playground for politics of any stripe**.”

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