June 14, 2021

Re: Comments on Climate Change Disclosures

Dear Chair Gensler,

I appreciate this opportunity to submit a public comment on climate disclosure. I am an individual investor, as well as a former fiduciary, having spent nineteen years as an analyst, portfolio manager, director of research and chief investment officer, including eight years on the Executive Committee of AllianceBernstein, LP. I have published extensively on the utility of private ordering to advance public policy goals.[1] I am currently involved in an effort to engage with the Sustainability Accounting Standards Board to help improve their human capital management disclosure standards,[2] and with Climate Action 100+ to expand the draft climate justice indicator of their Net-Zero Company Benchmark.[3] I have collaborated with the As You Sow Foundation and the Shareholder Commons to strengthen private ordering with a series of successful shareholder resolutions.[4] In all of my work,

[1] See, generally, Paul Rissman and Diana Kearney, "Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility" (February 1, 2019). 49 ELR 10155 (2019) , *available at* SSRN: https://ssrn.com/abstract=3332813; Paul Rissman, "The year human rights advocates and investors became unexpected allies," May 6, 2021, *available at* https://www.openglobalrights.org/the-year-human-rights-advocates-and-investors-became-unexpected-allies/.

[2] Rights Colab, "Looking Back, Looking Ahead: A Summary Report On Our Project To Strengthen SASB," June 4, 2021, *available at* https://rightscolab.org/harnessing-big-data-year-1-report/.

[3] Joanne Bauer, Paul Rissman, and Marti Flacks, "Strengthening new investor just transition tool would be a gamechanger," March 11, 2021, *available at* https://www.business-humanrights.org/en/blog/strengthening-new-investor-just-transition-tool-would-be-a-gamechanger/.

[4] Paul Rissman and Andrew Behar, "A Successful Season for SASB-Based Shareholder Resolutions," June 12, 2020, *available at* https://corpgov.law.harvard.edu/2020/06/12/a-successful-season-for-sasb-based-shareholder-resolutions/; As You Sow, "98% of Shareholders Want GE to Take Climate Action," May 4, 2021, *available at* https://www.asyousow.org/press-releases/2021/5/4/shareholders-want-ge-take-climate-action; As You Sow, "Valero Aligns Executive Compensation With Climate Targets," March 9, 2021, *available at* https://www.asyousow.org/press-releases/2021/3/9/valero-aligns-executive-compensation-climate-targets; AMR Insights, "The Shareholder Commons Announces Withdrawal of Shareholder Proposal after Yum! Brands Commits to Disclose Systemic Costs of Antibiotic Use," March 5, 2021, *available at* https://www.amr-insights.eu/the-shareholder-commons-announces-withdrawal-of-shareholder-proposal-after-yum-brands-commits-to-disclose-systemic-costs-of-antibiotic-use/.

the concept of financial materiality as it is defined by the Supreme Court is paramount. I submit this comment in my personal capacity.

I wholeheartedly support the Commission's efforts to craft mandatory disclosure standards concerning climate risk. As the Commission has stated, "investment decisions essentially involve a choice between competing investment alternatives."[5] Competing investment alternatives can only be evaluated if disclosure is comparable. Current voluntary climate disclosure is not presented in a format that allows for comparison. For the reasonable investor who considers climate risk to be a material factor, therefore, the Commission's investor protection mandate demands that it promote standardized climate disclosure.

I generally support the comments submitted by Americans for Financial Reform/ Public Citizen, and have little to add. I do have a serious concern, however. While I believe that the Commission should be undertaking a mandatory climate risk disclosure project, it should not come at the expense of what should be a higher sustainability priority: promoting private ordering as it relates to sustainability topics, especially in light of the 2020 Commission roll-back of investors' capability to engage with their portfolio companies via shareholder proposals.

The Uncertain Promise of Mandatory Climate Risk Disclosure

Despite my enthusiasm for mandatory climate risk disclosure, as well as disclosure regarding other systemic risks such as economic inequality,[6] I believe the Commission must be clear-eyed regarding its practical ability to successfully formulate, in a timely manner, comprehensive mandatory disclosure standards. History is not kind in this regard: 1) The 2012 JOBS Act required the Commission to review Regulation S-K to determine how the rule could be updated to modernize and simplify the registration process. While Commission Staff produced a report in 2013, the Commission did not issue a proposal until 2019. 2) Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Commission to promulgate rules requiring issuers to disclose

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[5] 40 Fed. Reg. 51662 (Nov. 6, 1975).

[6] Delilah Rothenberg, Paul Rissman and Joanne Bauer, "It is time for a Taskforce on Inequality-related Financial Disclosures," May 5, 2020, *available at* https://www.responsible-investor.com/articles/it-is-time-for-a-taskforce-on-inequality-related-financial-disclosures.

whether minerals they utilize originated in the Democratic Republic of the Congo or an adjoining country. Eleven years later these rules have yet to be introduced in final form. 3) Section 1504 of the same Act, directing the Commission to formulate rules around payments to foreign governments by resource extraction issuers, has not been satisfied, either. These are Congressional mandates. Attempts to promulgate additional disclosure rules that are not even covered by such a mandate is legally fraught. The Commission must heed Attorney General Morrisey's warning to "see you in court."[7]

Moreover, the courts are not the only hurdle faced by this project. The Commission is well aware that it is prevented from implementing any rule regarding the disclosure of political contributions, contributions to tax exempt organizations, or trade association dues by Section 631 of the most recent appropriations act, a prohibition first enacted for FY 2016. Given the opposition of House Republicans to the current effort on climate disclosure,[8] there is a real risk that a similar prohibition could enter into law as early as 2023. The Commission must realize that formulating effective mandatory climate risk disclosure will be time-consuming, will expend resources, and may ultimately fail.

The Commission must first bolster private ordering

Yet, while the Commission faces a course ripe with potential for failure, progress on climate disclosure is racing ahead in the realm of private ordering. As one who has closely followed ESG private ordering since 2017, I myself am astonished by the rapidity of change. As of May 27th, of the 95 social and environmental proposals that have earned majority support in the last ten years, half of those votes came in 2020 and 2021.[9] Further, more than half of the resolutions voted so far this year have earned more than 30% support,[10] a level widely seen to trigger

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[7] Patrick Morrisey, "Re: March 15, 2021 Remarks for the Center for American Progress Regarding Compulsory Environmental, Social, and Governance Statements," March 30, 2021, *available at* https://www.sec.gov/comments/climate-disclosure/cll12-8563794-230748.pdf

[8] Letter to the Honorable Gary Gensler from French Hill, Member of Congress, et al. Filed June 3, 2021. *Available at* https://www.sec.gov/comments/climate-disclosure/cll12-8873201-240110.pdf

[9] Heidi Welsh, "Exxon's Shareholder Revolt Is a Warning for Boards Everywhere," May 27, 2021, *available at* https://www.barrons.com/articles/exxons-shareholder-revolt-is-a-warning-shot-for-boards-everywhere-51622143164.

[10] *Id.*

board attention.[11] As one example of the discontinuity that I have witnessed in less than twelve months, last October a shareholder climate risk proposal, asking Proctor and Gamble for a report assessing the corporation's efforts to eliminate deforestation and the degradation of intact forests in its supply chains, passed with 67% support. This was absolutely unprecedented for a shareholder resolution aimed at deforestation; since 2012, seventeen other deforestation resolutions have come to a vote, and none have received support levels greater than 33%.[12] But in 2021, a similar proposal at the restaurant holding company Bloomin' Brands received a 76% majority vote, and another at Bunge was actually supported by the board, and approved by 99% of shareholders.

As Curtis et al. state, "[n]otably when a shareholder proposal is included in the proxy statement, management virtually always recommends that shareholders vote against it."[13] Not so in 2021. Due to the success of private ordering, in addition to Bunge at least three other resolutions (GE, IBM, Wendy's) received a board recommendation, and all passed with more than 90% support.

The GE resolution requested that the company report on its climate change risks.[14] Other climate change resolutions, aimed at oil and gas companies, were also successful in a fashion never before observed. As of May 19th, average support for environmental proposals at oil and gas companies more than doubled from 11.4% in 2020 to 26.2% in 2021.[15] Climate-related proposals received majority support at all four of the largest U.S. oil and gas companies (ExxonMobil, Chevron, ConocoPhillips, and Phillips 66). Of course, the successful May 26th ExxonMobil board challenge grabbed the attention of the public, but it wasn't even the only successful climate-related board challenge at an oil and gas company in 2021. In March Ovintiv Inc. added a nominee of hedge fund Kimmeridge Energy Management to its board, ending a proxy fight. As part of the

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[11] Blackrock, "Our 2021 Stewardship Expectations," *available at* https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf

[12] Ceres Engagement Tracker, *available at* https://engagements.ceres.org/.

[13] Quinn Curtis, Jill E. Fisch and Adriana Robertson, "Do ESG Mutual Funds Deliver on Their Promises?" (June 8, 2021). Michigan Law Review, Forthcoming, U of Penn, Inst for Law & Econ Research Paper No. 21-17, European Corporate Governance Institute - Law Working Paper No. 586/2021, *available at* https://ssrn.com/abstract=3839785, at 42.

[14] As You Sow, "General Electric: Climate Change Risks," November 17, 2020, *available at* https://www.asyousow.org/resolutions/2020/11/17/general-electric-climate-change-risks.

[15] Email from Insightia, "Activism & Voting This Week | May 21." May 21, 2021.

settlement Ovintiv aligned its executive compensation with climate change related targets.[16]

As the Commission knows, proxy votes are a plan asset, which fiduciaries don't take lightly. Notions of what fiduciaries view as financially material are evolving with lightning speed. Even standard-setters are trying to keep up. SASB, for example, has launched thirteen separate updating projects since its standards were finalized in late 2018.[17] The Taskforce on Climate-related Financial Disclosures is currently considering forward-looking metrics in a proposed revision of its framework.[18]

The Commission therefore must not only formulate mandatory climate risk disclosure rules that will withstand the courts and potentially Congress, but it must also be flexible enough to revisit these rules on an ongoing basis. All of this is prior to a discussion of expanding disclosure to the social realm, which investors demand on an equal basis but which will be even more daunting.

The Commission has only a finite amount of resources. As it works to craft its climate risk disclosure, I recommend a parallel track: first pick the low-hanging fruit, by reversing the onerous conditions that the Commission imposed on private ordering that go into effect for the 2022 annual meeting season. These conditions threaten to stop all of the current progress of private ordering in its tracks.

Recommendations

1. **Roll back the Commission's 2020 14a-8 Rule:**

I filed a comment on the "Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8" in January, 2020.[19] In

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[16] Reuters, "UPDATE 2-Ovintiv adds investor Kimmeridge's nominee to board to settle proxy fight," March 4, 2021, *available at* https://finance.yahoo.com/news/1-ovintiv-settles-investor-kimmeridge-115102704.html.

[17] SASB, "Active Projects," *available at* https://www.sasb.org/standards/process/active-projects/.

[18] Task Force on Climate-related Financial Disclosures, "Forward-Looking Financial Sector Metrics," October 2020, *available at* https://www.fsb.org/wp-content/uploads/P291020-4.pdf#page5.

[19] Paul Rissman, "Comments on Proposed Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 [Release No. 34-87458; File No. S7-23-19]," January 15, 2020, *available at* https://www.sec.gov/comments/s7-23-19/s72319-6684994-205889.pdf.

that comment I argued that the Proposed Rule would choke off private ordering. I presented a model showing that the average Main Street shareholder, if prudently diversified, would be unable to file a shareholder resolution with <u>any</u> company in their portfolio owned for less than three years, and only with mega-cap stocks thereafter. I also drew from my own experience as a proponent to note that the asymmetric power relationships between Main Street investors and corporate management would be exacerbated by the Commission's shareholder engagement rule. Lastly, I stressed that the labyrinthine and chaotic rules around shareholder proposal submission, such as word count, and in addition the ambiguity of the no-action process, made shareholder representatives essential. Restricting filing by representatives to one proposal per meeting, instead of one proposal per proponent, would reduce private ordering even further. These rules must be reversed. In addition, resubmission thresholds should be adjusted to apply to the votes of independent shareholders only. The views of an entrenched management should not be allowed to determine whether a proposal survives to be resubmitted the following year, when notions of materiality are so rapidly changing.

Senator Sherrod Brown and Congressman Michael F.Q. San Nicolas introduced a Joint Resolution providing for Congressional disapproval of the 14a-8 rule submitted by the Commission.[20] It appears that the deadline to move the resolution has expired.[21] It is critical for the Commission's public policy goals that it now reverse its own work from last year.

2. **Provide clear guidance on the no-action process:**

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[20] S.J.Res.16 – "A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Securities and Exchange Commission relating to 'Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8'", *available at* https://www.congress.gov/bill/117th-congress/senate-joint-resolution/16/titles?q=%7B%22search%22%3A%5B%22S.J.+Res.+16%22%5D%7D&r=1&s=1.

[21] Karina Karakulova, "Shareholder Proposal Rule: Will Proponents Have the Votes in Time to Beat the CRA Clock?," April 23, 2021, *available at* https://blogs.cfainstitute.org/marketintegrity/2021/04/23/shareholder-proposal-rule-will-proponents-have-the-votes-in-time-to-beat-the-cra-clock/.

Another recommendation is that the Commission provide clear guidance as to when a no-action request citing ordinary business/micromanagement, or substantial implementation, will or will not succeed. The Commission provides little to no transparency on the topic and criteria seem to be ever-shifting. I support the recommendations of the "Briefing Paper for Biden Transition: Securities Regulation Agency Review Team on Shareholder Proposal Guidance and Decisions at Securities and Exchange Commission."[22]

According to Insightia, "[a]n increasing number of shareholder proposals, especially environmental and social resolutions, are being considered as material by the new SEC leadership, and therefore ineligible for exclusion. In 2020, 49.6% of 14a-8 no-action requests were approved by the regulator, compared to just 44.7% so far this year….Twenty-two proposals seeking climate change reporting were filed for exclusion with the SEC in the whole of 2020, 10 of which were accepted, compared to three of the 13 filed in the first five months of 2021. Similarly, eight proposals seeking political lobbying and contributions reporting were filed at the SEC for exclusion in 2020, four of which were accepted, two denied, and two withdrawn by proponents. In the first five months of 2021, nine no-action requests have been filed for proposals of this kind, zero of which have been approved."[23] While it appears that Professor Coates has shaken things up around the Division of Corporate Finance, proponents have no way of knowing. This uncertainty puts a serious damper on the efficacy of private ordering, and increases its cost to the proponent.

3. **Provide clear guidance on the 13D/13G distinction:**

Finally, more proponents should be encouraged to exercise their right to file shareholder resolutions. Proponents are a highly concentrated bunch; in 2020, eleven of them accounted for 70% of all proposals.[24] One reason for this concentration is that investment advisers rarely, if ever, file their own proposals, preferring to vote on those filed by this tiny group.[25] Investment advisers should

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[22] January 26, 2021, *available at* https://www.iccr.org/sites/default/files/resources_attachments/chair_lee_letter_0.pdf

[23] Email from Insightia, "Activism & Voting This Week | May 28." May 28, 2021.

[24] Sullivan & Cromwell, LLP, "2020 Proxy Season Review: Part 1," July 15, 2020, *available at* https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf.

[25] BNP Paribas Asset Management is one of the very few asset managers acting as their own proponent.

be encouraged to file on behalf of their fund customers, just as they must carefully vote proxies on behalf of the same customers. In this regard the Commission should use its influence to clarify its 13D and 13G provisions.[26]

When proponents engage with large asset managers and block holders, inquiring as to why these actors don't file environmental or social resolutions, they often receive a response related to a fear of transgressing 13D regulations. While the Commission in 1998 determined that a block holder or group owning more than 5% of an issuer's shares generally would not be required to file a 13D in connection with the submission of a social or environmental shareholder resolution,[27] investment advisers oftentimes fall back on the ambiguity of the rule to excuse their passivity. If the Commission wishes to bolster private ordering, then a clear understanding by all parties of the requirements of 13D vs. 13G filings as they apply to environmental and social shareholder resolutions would be very helpful.

4. **Ensure that the Commission's mandatory climate risk disclosure requirements do *__not__* preempt disclosure requested through private ordering**

Thank you for accepting these comments.

Sincerely,
Paul Rissman

[26] "The eligibility to use Schedule 13G by a shareholder who submits, supports, or engages in exempt soliciting activity in favor of a shareholder proposal submitted pursuant to Rule 14a-8, will depend on whether that activity was engaged in with the purpose or effect of changing or influencing control of the company. That determination normally would be based upon the specific facts and circumstances accompanying the solicitation and the vote. For that reason, the Commission is not able to provide extensive guidance on this issue." Securities And Exchange Commission, 17 CFR Part 240 [Release No. 34-39538; File No. S7-16-96 International Series - 1111], RIN 3235-AG81, "Amendments to Beneficial Ownership Reporting Requirements," at 23. *Available at* https://www.sec.gov/rules/final/34-39538.txt.
[27] "…most solicitations regarding social or public interest issues (e.g., environmental policies, apartheid, etc.) would not have the purpose or effect of changing or influencing control of the company." *Id.*