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June 15, 2021

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Via Email: rule-comments@sec.gov

Re: Request for Public Input on Climate Change Disclosures

Dear Chair Gensler,

We appreciate the opportunity to respond to then-Acting Chair Allison Herren Lee's March 15, 2021 request for public input regarding potential rulemaking or other actions by the U.S. Securities and Exchange Commission related to climate change disclosures.

Attached to this letter are two articles that we recently published in the *New York Law Journal* that were republished on the *Harvard Law School Forum on Corporate Governance*. The first article, "'Materiality' in America and Abroad," discusses the concept of materiality in securities law and regulation, with particular attention to the evolution of "materiality" in European climate change disclosure standards and regulation. The second, "SEC Regulation of ESG Disclosures," addresses important considerations in SEC regulation of environmental, social, and governance disclosures generally.

We hope that our input is helpful, and we thank you for your consideration. We look forward to ongoing public dialogue regarding these important issues. Should you wish to discuss our articles further, you are most welcome to contact either of us at [redacted].

Respectfully submitted,

David A. Katz
Partner
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Laura A. McIntosh
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cc:
The Honorable Caroline A. Crenshaw
The Honorable Allison Herren Lee
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
Mr. John C. Coates
Ms. Kristina S. Wyatt

The attached article, Corporate Governance Update: "Materiality" in America and Abroad, was published in the New York Law Journal on April 29, 2021

April 29, 2021

Corporate Governance Update: "Materiality" in America and Abroad

David A. Katz
and
Laura A. McIntosh*

The concept of materiality is a bedrock feature of American securities law and regulation. It informs the way investors think, talk, and transact, the way lawyers advise their clients, and the way legislators and regulators draft and enforce federal mandates. The working definition of materiality in the United States, which has served corporate America well for nearly nine decades, now finds itself facing significant pressures from a variety of sources. The European Union, the World Economic Forum, and other stakeholder- and EESG-oriented organizations are advocating for a broader definition and developing concepts of expanded materiality that go far beyond the traditional American approach in ways that threaten to undermine the usefulness of materiality as a guiding principle for disclosure.

In the current debate over materiality, two issues should remain distinct: the importance of stakeholder governance and EESG on the one hand, and the question of redefining the standard of materiality from a securities law and market perspective on the other. Institutional investors in the United States are increasingly focused on stakeholder governance and EESG issues, and corporate disclosure on these topics can and should be addressed within the American framework of materiality. If disclosure of immaterial information is required for non-financial reasons, it should be acknowledged as such and not swept into the concept of materiality. There are examples of such requirements under U.S. law, but though these disclosures are mandated, the information provided is not considered "material." In an article forthcoming in May, we will address the issues that would arise in connection with SEC-mandated EESG disclosures.

The SEC and the Supreme Court, in formulating the American definition of materiality in the securities law context, borrowed the "reasonable person" standard from tort law to create a concept that has stood the twin tests of time and an ever-changing world. The definition is fixed, yet adaptable to dynamic circumstances. To the extent that the emerging formulations from across the Atlantic explicitly incorporate a current perspective on stakeholder and environmental impacts, for example, the U.S. formulation accomplishes the same goal through the "reasonable investor" test, which is applied in the context of its time. It would be both unnecessary and misguided to revise the traditional American definition of materiality, whether explicitly or indirectly, to attempt to mirror the contemporary European approach.

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The American Definition of Materiality

The word "material" was first introduced in the U.S. Securities Act of 1933, and, at least since the 1940s, the SEC has defined "material information" in the context of financial statements as "those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered." That language was amended slightly in 1982 with the adoption of the modern version of Rule 405 of the Securities Act, but the SEC has hewed closely to the substance of the definition over the decades, stating in 1999 that "[a] matter is 'material' if there is a substantial likelihood that a reasonable person would consider it important."

The landmark judicial definition of the term was crafted by Justice Thurgood Marshall of the Supreme Court in 1976, when he wrote in *TSC Industries* v. *Northway* that a fact is "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote," or "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." In 1988, the Supreme Court expressly adopted this definition for the Rule 10b-5 securities fraud context in *Basic* v. *Levinson*. Notably, the Supreme Court observed in *Basic*, which involved a merger transaction, that "with respect to contingent or speculative information or events," materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event."

This longstanding American understanding of materiality is under pressure today from a variety of sources, and not for the first time. In 1978, then-SEC Commissioner Roberta Karmel spoke presciently of issues that have grown all the more pressing in the last half-century:

> "As greater numbers of Americans become owners of our large public corporations, whether individually or through institutional investors, and as corporations become subject to increasing government regulation, the dialogue between shareholders and their corporations becomes part of a larger political process. Nevertheless, and despite the legitimate concerns of ethical investors, I believe we should exercise caution in applying a non-economic standard of materiality to disclosure requirements…. Because some investors may want certain information in order to make an investment or voting decision does not mean that mandatory disclosure of such information would be necessary or appropriate in the public interest or for the protection of investors."

Former Commissioner Karmel's observations are as clear-eyed and trenchant now as they were in the 1970s. Today, the pressures to expand the American concept of materiality are sweeping, systemic, and stronger than ever.

Emerging European Concepts of Materiality

Although the U.S. Securities and Exchange Commission is currently considering EESG disclosure requirements, the European Union is the global leader in efforts to develop climate change and other EESG disclosure metrics. Its approach includes revising the working definition of materiality in the EU to include the concepts of "double materiality" and "dynamic materiality." "Double materiality," introduced in 2019, is the idea that materiality has two substantive prongs, the first being financial materiality and the second being environmental and social materiality; information and issues can be deemed material from either of these two perspectives. Therefore, "companies should disclose not only how sustainability issues may affect the company, but also how the company affects society and the environment." The philosophy behind double materiality, which underpins the EU's Non-Financial Reporting Directive, is that "[t]hese two risk perspectives already overlap in some cases and are increasingly likely to do so in the future."

The concept of "dynamic materiality" was described by the World Economic Forum in a 2020 white paper: "One area in which investors have begun initial explorations is anticipating how issues might become financially material either across an entire industry, or for a specific company. What is financially immaterial to a company or industry today can become material tomorrow, a process called 'dynamic materiality.'" The WEF released a second 2020 white paper recommending metrics-based EESG disclosures employing this concept, stating: "Our perspective is that the recommended metrics reflect not only financial impacts but 'pre-financial' information that may not be strictly material in the short term, but are material to society and planet and therefore may become material to financial performance over the medium or longer term. Materiality is a dynamic concept, in which issues once considered relevant only to social value can rapidly become financially material."

The Global Reporting Initiative (GRI), a prominent Netherlands-based proponent of standards for sustainability reporting, is in the process of revising its definition of materiality to include double materiality. In its 2020 exposure draft for comment on the proposed revisions, GRI took the position that material topics are those "that reflect the organization's most significant impacts on the economy, environment, and people, including impacts on human rights," on the theory that understanding those impacts "is necessary in order to identify financially material risks, opportunities, and impacts." GRI is not alone in following the lead of Europe and the WEF; the whole "Group of Five," which includes four other reporting standards organizations in addition to GRI — CDP, the Climate Disclosure Standards Board, the International Integrated Reporting Council (IIRC), and the Sustainability Accounting Standards Board (SASB) — released two papers in 2020 embracing the concept of dynamic materiality.

These European concepts already appear to be gaining traction in the United States. SASB, the only member of the Group of Five that is U.S.-based, is also in the process of revising its conceptual framework, including its definition of materiality. The proposed change adds the element of time horizons: "[I]nformation is financially material if omitting, misstating, or obscuring it could reasonably be expected to influence investment or lending decisions that users make on the basis of their assessments of short-, medium-, and long-term financial performance and enterprise value." This formulation, albeit phrased in terms of financial materiality, was revised by SASB explicitly "to more effectively communicate the global nature of the concept of financial materiality… [and] to align as much as reasonably possible with the definitions of 'materiality' used by the standard setters and other organizations who, like SASB, have a focus on the information needs of providers of capital, e.g., … the International Integrated Reporting Council." In other words, the incorporation of time horizons represents a deliberate step toward the concept of dynamic materiality, which, per the WEF, is viewed in Europe as a far more "forward-looking and proactive" approach than the traditional U.S. definition.

Disclosure Should Be Decision-Useful to Investors

The objective of mandatory material disclosure is to provide decision-useful information to the reasonable investor at a specific point in time. The central weakness of the European formulations of double materiality and dynamic materiality is that, once the universe of disclosure is expanded beyond financially material information, there is no clear limiting principle. Any investor may believe that specific non-financial issues are "material" to their investment decisions, yet these issues may not be relevant more broadly to other investors. There are other ways for investors who seek non-financial company information to obtain it, including analyst reports, company news releases, and direct engagement. Limiting the universe of mandatory disclosure to financially material information ensures that disclosures have broad applicability and clear utility to the average prudent investor. As Former Commissioner Karmel observed nearly a half-century ago, requiring disclosure of information that some investors — but not "average, prudent" investors — might deem important to their investment decisions would not be in the best interests of investors or the public interest. To the extent non-financial information disclosure is mandated for other reasons (such as ethical or environmental), a clear distinction should be made between the specific disclosure requirements themselves and what is "material" to investors. The Dodd-Frank Wall Street Reform and Consumer Protection Act took this approach, requiring public company disclosure of financially immaterial information including issuers' use of conflict minerals, issuers' payments to national governments for resource extraction, and the CEO pay ratio. Requiring the disclosure of immaterial information can be costly and of little use to investors, but it would be far worse if the information required were deemed "material" for securities law and enforcement purposes.

The genius of the "reasonable investor" definition of materiality is that the formulation already accomplishes the worthwhile aspects of the new concepts of double and dynamic materiality. If a reasonable investor today would consider the information encompassed in double materiality to be important to an investment decision, then it is, by definition, included. Justice Marshall saw clearly the dangers of over-inclusive disclosure, stating in *TSC* v. *Northway*: "Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good." Where materiality is over-inclusive, he observed, "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it to bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decision-making." SEC Commissioner Hester Peirce has pointed out that "[t]he European concept of 'double materiality' has no analogue in our regulatory scheme." The U.S. regulatory scheme would be weakened, not improved, by redefining materiality to explicitly include elements that are not already covered by the reasonable investor standard.

As to dynamic materiality, the Supreme Court in *Basic* v. *Levinson* explicitly addressed the importance of balancing probability and magnitude when evaluating distant or uncertain events: "Where … the event is contingent or speculative in nature, it is difficult to ascertain whether the 'reasonable investor' would have considered the omitted information significant at the time." The Supreme Court was correct in its judgment that contingent or speculative events should not be accorded the same treatment as nearer-term, more predictable ones. If the concept of dynamic materiality gains steam, it would not be a stretch for it to include speculation as to matters other than environmental impacts, such as social and political issues, and very quickly the universe of possible outcomes would grow too large to provide a meaningful basis for disclosure. Uncertainty and conjecture are antithetical to decision-useful disclosure for investors. There is no small irony in the fact that — in a most simplified version of the story — the stakeholder-governance movement arose from concerns that investors were harmed by short-term decision-making that was detrimental to long-term prosperity, and yet now the excessive long-termism of the dynamic materiality concept threatens to harm investors by undermining the utility of corporate disclosures.

It is worth noting that the American concept of materiality is already "dynamic" insofar, as the Business Roundtable correctly stated in 2015, as it "naturally evolves over time to address new issues and developments and takes into account the facts and circumstances that are relevant to each company." Over the years, material issues have encompassed unprecedented developments including, for example, Y2K, cybersecurity risk, global terrorism, and the COVID-19 pandemic. To the extent an issue becomes material — to a reasonable investor at that moment in time — it is already required to be disclosed. If it is not material, its disclosure is at best a distraction for investors and issuers and at worst a time-consuming, expensive, legally perilous activity that is potentially detrimental to shareholders, the markets, and the economy as a whole. Though there are indications that most major institutional investors still prefer to maintain the traditional definition, there is growing interest in the new European formulations, and the SEC will face increasing pressure to take some form of action in this direction.

In 1977, a Congressional committee wrote in a report to the SEC that "[t]he concept of materiality is the cornerstone of the disclosure system established by the federal securities laws." That statement remains true. Over the last century, the American definition of materiality has been a great gift to shareholders and issuers. It paved the way for a disclosure regime of real use and value to the financial market. It is to be hoped that U.S. regulators, lawmakers, and investors recognize that this cornerstone remains an essential piece of the foundation of corporate America, and refrain from chipping away at its substance.

WACHTELL, LIPTON, ROSEN & KATZ

The attached article, Corporate Governance Update: SEC Regulation of ESG Disclosures, was published in the New York Law Journal on May 27, 2021

May 27, 2021

Corporate Governance Update: SEC Regulation of ESG Disclosures

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The U.S. Securities and Exchange Commission has indicated that ESG disclosure regulation will be a central focus of recently confirmed SEC Chair Gary Gensler's tenure. At the top of the agenda is climate change disclosure, and the Commission is taking steps toward broader reform. Then-Acting Chair Allison Herren Lee announced in March that the SEC will be "working toward a comprehensive ESG disclosure framework" and pursuing initiatives such as "offering guidance on human capital disclosure to encourage the reporting of specific metrics like workforce diversity, and considering more specific guidance or rule making on board diversity." Acting Chair Lee also appointed Satyam Khanna as senior policy advisor for climate and ESG to oversee and coordinate the SEC's efforts: "Having a dedicated advisor on these issues will allow us to look broadly at how they intersect with our regulatory framework across our offices and divisions." And earlier this month, Bloomberg reported that John Coates, the SEC's Acting Director of the Division of Corporation Finance, indicated that new disclosure requirements would focus on three areas: diversity, equity and inclusion; climate change; and human capital management. The SEC appears to view its invitation for public input on climate change disclosure, which remains open until the middle of June, as the beginning of a potentially significant reconfiguration of corporate reporting on ESG matters in the near future.

While the SEC traditionally has required disclosure of financially material information, its new leaders are clearly considering requiring reporting of ESG-related information whether or not it is financially material. In Acting Chair Lee's statement requesting public input, she did not use the terms "financial" or "material" as qualifiers in describing the objective of possible new climate change disclosure requirements: "to provide more consistent, comparable, and reliable information for investors." This notable omission has led observers to speculate as to the SEC's goal in overhauling ESG disclosure, which has raised important questions: Should the SEC use ESG reporting requirements to drive societal or environmental reform or, more narrowly, to help investors create value in a rapidly evolving landscape of ESG risks and opportunities? Should the SEC maintain its traditional focus on requiring issuer reporting of financially material information, and, if not, should there be safe harbors for any financially immaterial information that ultimately may be required? As a trusted independent regulator, the SEC has the opportunity to encourage robust investor and issuer

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engagement on the future of ESG regulation, whether or not it proceeds with broad ESG disclosure reform. It may well be that the answers to the challenging ESG policy questions facing corporate America can best be achieved through the legislative process, with the SEC playing a prominent role in the national debate.

Proceeding With Caution

As we noted in an earlier article, there is a key distinction to be drawn between "important" information and "material" information. The SEC disclosure framework was designed to require reporting of information that is financially material to investors, not information that may be important at a societal level. Prof. Ann Lipton of Tulane University has observed that, in the United States, "corporate transparency is a function of the needs of the investing class. … Even if the public demands information about firms' environmental impact, their treatment of workers, their political activity, and their use of customer data, corporations are under no obligation to provide it absent a showing of relevance to an investor audience." Investors and the financial markets are the traditional audiences for SEC-mandated disclosure; the challenge for the Commission is how to facilitate access for the average investor to reliable, issuer-specific, financially material information that is generated in a cost-efficient way and provided in a useful format. Broad requirements for ESG reporting could be viewed as an attempt to shoehorn disclosures that may be relevant to society and stakeholders, but are financially immaterial to investors, into a system that was historically built for that narrower focus. It is unclear how much ESG-related information is financially material in the conventional sense, meaning that broad ESG disclosure requirements risk being seen as policymaking rather than content-neutral regulation. This carries significant risks both for the SEC and for market participants.

The SEC has a longstanding reputation as a fair and neutral regulator. This is fundamental to the successful execution of its tripartite mission—to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation—and key to the legitimacy of its actions. Procedurally, it stays close to its mandate by acting incrementally through the rulemaking process. Incremental rulemaking using the notice-and-comment process is doubly efficient from a procedural standpoint: first, it can be done relatively quickly, and second, it is a well-accepted regulatory path and thus less likely to generate controversy or legal challenge. Substantively, the mission of the SEC is viewed as politically neutral. Yet, as Prof. Virginia Harper Ho has observed, "disclosure is widely recognized as a soft form of regulation, incentivizing changes in corporate behavior where direct regulation may be difficult to achieve or enforce." As an institution, the SEC should consider whether it would be prudent to resist the pressure from some quarters, albeit well-intentioned, to approach large-scale public policy projects with the specialized tool of securities law reporting requirements and instead move incrementally to expand requirements for financially material ESG disclosure in a substantively neutral context.

Reshaping the existing framework of financial materiality to include non-financially material ESG disclosure would entail a significant regulatory shift. Vanderbilt law and business professor Amanda M. Rose observed in her SEC response submission: "Requesting that the SEC adopt a framework for companies to use to disclose information on a broad set of topics, without establishing that any one of those topics is in fact financially material, is an unusual foray into SEC rulemaking." Similarly, Commissioner Elad Roisman recently observed that "[some] proponents of this agency's intervention sometimes offer rationales for action that are entirely outside the realm of securities law. A letter recently arrived at my office advocating for mandatory ESG disclosures and ended by saying: 'There is no Planet B.'" The question, for now, is whether policy goals that may be considered important to society are beyond the SEC's current mandate absent legislative action, or whether such initiatives would be a natural progression consistent with recent developments in the prevailing view of corporate purpose. Whether they wish to preserve or expand it, both traditionalists and progressives agree that the existing disclosure framework was designed for a specific purpose and in its current form is ill-suited to the informational needs of stakeholders and society at large.

Within the scope of its mandate, the SEC has a responsibility to be deliberate and transparent in its ESG rulemaking to minimize the costs of regulatory risk. As outlined in SASB's recent SEC comment letter: "Climate risk … can be broken down into three broad categories: physical (e.g., extreme weather), transition (e.g., technological and market shifts), and regulatory (e.g., government imposition of carbon price or other regulation)." If the SEC intends to require broad ESG disclosure, it should be candid about its goals and provide a solid basis for any rulemaking initiatives, so that it does not exacerbate regulatory risk.

While public companies tend to adjust their behavior when forced to disclose information, they also adjust to those adjustments, potentially resulting in a range of downstream effects that are less likely in a regime of voluntary disclosure. If ESG disclosure is mandated for the purpose of driving changes in corporate behavior, then it may be likened to other types of regulation, such as taxes, that affect corporate behavior and require democratic legitimization. As a society, it is important to ask whether the SEC's reporting framework would be an effective or appropriate venue for shaping corporate policy and driving corporate activity, whether the repurposing of that framework would be a legitimate exercise of regulatory authority, and finally, whether all of these questions are more appropriately resolved through public discourse than by regulatory fiat.

SEC efforts to drive corporate policy also could implicate fundamental corporate law and governance issues. As Professor Rose has observed, "ESG topics veer far deeper into matters of traditional business judgment than the SEC has ever waded before." She argues that intervention on such matters potentially raises questions of federalism and runs the risk of undermining charter competition. Professor Rose points out that the European Union has taken a legislative approach to its far-reaching climate change regulation and disclosure: "The ESG disclosure mandates that have been imposed on listed companies in the EU since 2018 are explicitly tied to the EU's substantive policy embrace of the United Nation's Sustainable Development Goals. Moreover, they were promulgated pursuant to a call by the European Parliament to create disclosure requirements that 'take account of the multidimensional nature of corporate social responsibility (CSR) and the diversity of the CSR policies implemented by businesses matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society.'" In her view, "[t]he SEC would be acting, by contrast, without predicate acts by political bodies endorsing the substantive ends sought." In the current era of partisanship, SEC actions to adopt broad new requirements for policy purposes without a solid foundation of authority are likely to be swiftly challenged.

The Complexity of ESG Disclosures

Leaving aside the difficult questions that would arise from new reporting requirements for non-financially material ESG information, the SEC still faces a challenging task in creating new regulations for the disclosure of financially material ESG information. In March, Corporation Finance Director Coates acknowledged the challenges: "Part of the difficulty is in the fact that ESG is at the same time very broad, touching every company in some manner, but also quite specific in that the ESG issues companies face can vary significantly based on their industry, geographic location and other factors. As such, there is no one set of metrics that properly covers all ESG issues for all companies. Moreover, the landscape is changing rapidly so issues that yesterday were only peripheral today are taking on greater importance." Given the diversity of corporate America, it is highly unlikely for any particular ESG issue to be material, or even relevant, to all companies. This point is a matter of concern to issuers, as reflected in the comment letter submitted by Uber Technologies: "[W]e encourage the Commission to consider requiring that companies perform a company-specific materiality assessment to identify the ESG issues most relevant to their businesses. We believe that the most useful ESG disclosures will be grounded in the specific issues that are relevant to the particular company, as opposed to generic ESG disclosures that may or may not apply in a company's individual circumstances."

Any new required ESG reporting should include both qualitative standards and quantitative metrics. Metrics can become a de facto minimum without larger principles, while principles can yield little useful information without metrics. In key areas, both types of disclosures matter, as it is important for an investor to understand an issuer's principles and also have the ability to measure the results. Existing disclosure requirements for executive compensation are an example of a topic on which the SEC asks issuers to discuss philosophy as well as disclose numbers. It may be helpful for the SEC to begin by requiring principles-based disclosure while companies develop the internal workstreams necessary to generate and audit the data underlying ESG metrics. New ESG disclosure requirements will present a heavier burden for small-cap and mid-cap companies that may lack adequate resources to effectively address these issues.

The SEC could establish a temporary non-enforcement period during which companies can work on data collection, internal processes, and controls. Raising the quality of ESG disclosures to the point where they can be filed or furnished will be a daunting task for many issuers, and it may take years for companies to integrate and combine systems in order to generate certain types of data. It also would be important for any requirements to be scaled for company size. Furthermore, good faith estimates, assumptions, and predictions should be protected in order to maximize the decision-useful information provided to investors. Carefully designed safe harbors are likely to encourage issuers to provide more meaningful disclosures and to foster dialogue between issuers and investors to improve reporting. If the SEC ultimately does require reporting of ESG information that is not financially material, there should be no liability for issuers beyond SEC enforcement or federal prosecution of intentional fraud. ESG disclosures should not be deemed "material" under the federal securities laws even if required, and there should be no private right of action regarding such disclosures. Permitting such lawsuits likely would generate widespread event-driven securities litigation. Instead, any investor complaints regarding these disclosures should arise from, and be limited by, traditional materiality principles.

It is likely, too, that the SEC will consider whether private companies should also be required to make ESG disclosure requirements. While the SEC no doubt wishes to avoid driving more public companies to go private in reaction to ESG rulemaking, the implications of such an approach must be carefully considered.

The Importance of Public Debate

In her SEC climate change submission, Professor Rose observes that "[t]he questions raised [in SEC-mandated ESG disclosure] include some of the most contested in the field of corporate and securities law, such as the value of interjurisdictional competition for corporate charters, the right way to conceptualize the purpose of the corporation, the proper allocation of managerial power as between the board and shareholders, and the social desirability of fraud-on-the-market class actions."

If consequential new policy is to be made, or the mandate of the SEC expanded, there should be public debate regarding the need for predicate legislative action such as was taken in the European Union. Some U.S. legislators have recognized that political action may be necessary to effect major change, and there is already proposed legislation. The ESG Disclosure Simplification Act of 2021, introduced in the House in February, would require annual proxy statements to include "a clear description of the views of the issuer about the link between ESG metrics and the long-term business strategy of the issuer; and a description of any process the issuer uses to determine the impact of ESG metrics on the long-term business strategy of the issuer." The draft legislation would direct the SEC to require issuers "to disclose environmental, social, and governance metrics" in any filing that requires audited financial statements. The SEC would further be charged with defining "ESG metrics" and specifically authorized to "incorporate any internationally recognized, independent, multi-stakeholder environmental, social, and governance disclosure standards" in that definition if it sees fit to do so. Potential liability for ESG disclosures would be significant under the draft bill: "It is the sense of Congress that ESG metrics, as such term is defined by the Commission … are de facto material for purposes of disclosures under the Securities Exchange Act of 1934 and the Securities Act of 1933." As it is clearly incorrect that ESG metrics—no matter how they are ultimately defined—would "de facto" be material to all issuers under the federal securities laws, this last provision seems intended to create a vast new category of private rights of action. While portions of this draft bill are problematic, it illustrates the significance of some of the actions currently contemplated by the SEC and further suggests that the legislative process may be the proper forum for the large questions in this area to be considered and resolved.

The importance of debate on issues of such consequence should be a point of general agreement. Commissioner Roisman recently observed:

> I have heard from some, who feel inclined to question the propriety of SEC regulation in this area, that they fear the reputational risk of being painted as "anti-climate," "anti-social justice," or other shades of immoral if they express their critiques publicly. … It is entirely reasonable for a person to feel that climate change deserves immediate attention from lawmakers *and still question* whether the SEC mandating new disclosures from U.S. public companies is an appropriate step for the agency. In this forum, I feel confident that we all recognize the fundamental questions here are about the SEC's authority as a regulator and whether this agency's intervention is appropriate to address the problems people have identified *in our markets*. This is an entirely healthy and necessary conversation, and it will be critical for us to have the full spectrum of market participants engaged. If the only people who feel safe to comment are those who want the agency to join the fight against climate change and those whose business models would benefit from new regulation, we will miss hearing from those voices who can alert us to the hidden costs and unintended consequences of our actions.

There is unprecedented interest in ESG at the current moment. It is time for substantive public consideration of the best path forward for ESG regulation in the American economy, including but not limited to the proper scope of reporting requirements. Matters such as human capital management, diversity, and climate change are important to society and deserve full consideration and resolution through a process of democratic accountability. While the SEC can and should take incremental action to improve issuer disclosure of material ESG information, and while it has the capacity to be a leader in facilitating public engagement on these important topics, as an institution it would be well-served by preserving its credibility as a nonpartisan regulator. The policy decisions that must be made in the coming years regarding ESG and corporate America are of paramount importance and implicate fundamental issues of law and governance. While no outcome will satisfy all participants, it is essential that the decision-making process be viewed as legitimate by both the regulators and the regulated.