June 17, 2022

VIA ELECTRONIC SUBMISSION

Attn: Vanessa A. Countryman, Secretary, Securities and Exchange Commission

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)

Subj: Regulatory Precedents for the Proposed Rule

The Institute for Policy Integrity (Policy Integrity) at New York University School of Law,[1] Environmental Defense Fund (EDF), and Professor Madison Condon respectfully submit the following comments to the Securities and Exchange Commission (SEC) regarding The Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22) (Proposed Rule).[2]

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. One of the world's leading international nonprofit organizations, EDF creates transformational solutions to the most serious environmental problems. To do so, EDF links science, economics, law, and innovative private-sector partnerships. Professor Madison Condon joins these comments in her individual capacity. Professor Condon is an Associate Professor of Law at Boston University School of Law,[3] an Affiliated Scholar at Policy Integrity, and an Affiliate Scholar at the Initiative on Climate Risk and Resilience Law (ICRRL).[4] Her scholarship focuses on climate change and its relationship to corporate governance, market risk, and financial regulators.

In her dissent from the Proposed Rule, Commissioner Peirce describes the SEC as "discover[ing] in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" and impermissibly transforming its regulatory role into that of a "Securities and

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[1] This document does not purport to present the views, if any, of New York University School of Law.

[2] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) [hereinafter Proposed Rule].

[3] This document does not purport to present the views, if any, of Boston University School of Law.

[4] ICRRL is a joint initiative of Policy Integrity, EDF, Columbia Law School's Sabin Center for Climate Change Law, and Vanderbilt Law School, focused on legal efforts on climate risk and resilience, particularly at the intersection of practice and scholarship. This document does not necessarily represent the views of each ICRRL partner organization. For more information on ICRRL, see https://icrrl.org.

Environment Commission."[5] In this letter, we highlight regulatory precedents reaching back nearly sixty years that contradict these criticisms and lend support to the Proposed Rule's approach. This group of signatories has submitted three letters in total. The other two focus on the SEC's economic analysis and reasoned explanation for the Proposed Rule.

We begin by addressing the argument that the SEC is impermissibly reaching beyond acceptable "subject-matter boundaries" by focusing on climate-related information.[6] We show that the Commission has repeatedly used its authority under the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) to require the disclosure of non-financial information—including environmental information—where such information is relevant to an assessment of investment risk. We also rebut Commissioner Peirce's claim that the SEC has operated in certain well-known subject-matter areas—including executive compensation, governance, and others—only pursuant to subject-specific grants of disclosure authority from Congress.[7] In reality, the Commission has regulated disclosures on most of these topics using its general authority under the Securities and Exchange Acts.

Next, we respond to three criticisms from Commissioner Peirce and others as to the specific form and content of the Proposed Rule. First, Commissioner Peirce claims that the Proposed Rule exceeds the SEC's statutory authority by not strictly hewing to a materiality standard.[8] We find, however, that the Commission has a long history of adopting prescriptive disclosure requirements that encompass non-material information. Second, Commissioner Peirce suggests that the Proposed Rule's disclosure requirements regarding physical and transition risk require registrants to engage in prediction and speculation—including about the future actions of government actors and other third parties.[9] But the SEC has long mandated disclosures that require companies to consider a range of potential future outcomes, and the Commission has made clear, through guidance, that relevant considerations may include the future actions of third-party and government actors. Finally, Commissioner Peirce argues that the proposed governance disclosures are too detailed and impermissibly attempt to direct, substantively, board and managerial discussions.[10] Once again, however, our review of the Commission's past rulemaking demonstrates a long history, dating back to the 1970s, of detailed disclosure requirements on governance practices.

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[5] Commissioner Hester M. Peirce, *We Are Not the Securities and Environment Commission – At Least Not Yet*, SEC. & EXCH. COMM'N (Mar. 21, 2022), https://perma.cc/KD5D-226U (quoting Utility Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* Commissioner Peirce directs readers to her arguments regarding similar provisions in the SEC's proposed cybersecurity rule, *id.* at n.62, which she describes as "embody[ing] an unprecedented micromanagement by the Commission of the composition and functioning of both the boards of directors and management of public companies." Commissioner Hester M. Peirce, *Dissenting Statement on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure Proposal* (Mar. 9, 2022), https://perma.cc/XXP4-S4DB [hereinafter Peirce, *Cybersecurity*].

In sum, relevant precedents belie claims that the Proposed Rule strays into inappropriate subject-matter areas or that it is impermissibly novel because it takes a prescriptive approach to some disclosures; requires registrants to grapple with future, uncertain risks; and requires disclosure of detailed information on corporate governance practices. Regulatory history reveals instead that the Proposed Rule's requirements are consistent with the SEC's historical understanding of its disclosure authority under the Securities and Exchange Acts.

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I. The SEC has historically used its general disclosure authority to require the disclosure of non-financial information across a wide array of topics, and in specialized topic areas, without additional congressional direction.

Commissioner Peirce accuses the SEC as refashioning itself as the "Securities and Environment Commission" and argues that the Proposed Rule exceeds the "subject-matter boundaries" that Congress has imposed on the SEC.[11] In reality, the Proposed Rule encompasses environmental information only to the extent that such information is financially relevant for investors. Throughout its history, the SEC has repeatedly required disclosure of information that, while not financial on its face, is nevertheless relevant to investors' assessment of a registrant's future financial prospects. Since the 1970s, this has even included disclosures regarding environmental

[11] Peirce, *supra* note 5.

proceedings.[12] Further, while some critics suggest that the SEC has regulated on specialized topics like executive compensation and resource extraction only pursuant to "a clear directive from Congress,"[13] the SEC's regulatory history shows that the Commission regulated in these areas using its general disclosure authority under the Securities and Exchange Acts: the same authority undergirding the Proposed Rule.

A. The SEC has previously required the disclosure of non-financial information that is a proxy for other financial impacts.

The Proposed Rule requires the disclosure of information that is not facially financial, but nonetheless serves as a proxy for financial risk. For example, the Proposed Rule requires companies to disclose their Scope 1 and Scope 2 emissions—and, if material, their Scope 3 emissions.[14] The goal of this disclosure, as explained by the SEC, is not to force companies to reduce emissions or to pursue environmental aims, as Commissioner Peirce suggests,[15] but rather to provide investors with an indication of a registrant's potential exposure to transition risk—i.e., costs the company may experience "in the face of regulatory, policy, and market constraints" on greenhouse gas emissions.[16] Similarly, the Proposed Rule's disclosures on governance, strategy, and risk management are intended not to dictate registrant behavior in these areas but to inform investors' assessment of registrants' resilience both to the physical impacts of climate change and to climate-related market and policy shifts.

It is hardly unusual for the SEC to require disclosure of non-financial information that the Commission deems financially relevant for investors. In fact, Regulation S-K is replete with non-financial information; the SEC describes it as "the central repository for its non-financial statement disclosure requirements."[17] Nor is it out of the ordinary for the Commission to treat non-financial information—such as greenhouse gas emissions—as a proxy for other financial risks, as it does in the Proposed Rule. On the contrary, the SEC has justified past disclosure requirements regarding corporate governance, performance targets, access to raw materials, and environmental proceedings on such grounds.

1. Governance

Governance disclosures cover non-financial information that nevertheless enables investors to better understand the financial risk associated with an investment. In creating governance-related disclosure requirements, the SEC has expressly stated that it believes, "information reflecting on the integrity of management is material to investment and corporate suffrage decisionmaking"

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[12] 17 C.F.R. § 229.103.

[13] Peirce, *supra* note 5.

[14] Proposed Rule, *supra* note 2, at 21,468–69.

[15] Peirce, *supra* note 5 (describing the SEC as "using the disclosure framework to achieve objectives that are not ours to pursue.").

[16] Proposed Rule, *supra* note 2, at 21,374.

[17] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,917 (Apr. 22, 2016) [hereinafter 2016 Concept Release].

and that the "performance and background of management of the issuer is material to investment decisions."[18] In 1978, when issuing regulations requiring the disclosure of governance information, the SEC further explained that 54% of individual investors found that information on the "quality of management" was "extremely useful" in deciding whether to invest.[19] In line with these findings, the SEC began requiring companies to disclose whether directors, officers, or nominated directors, had been involved in certain types of legal proceedings.[20] The SEC explained that "these categories of information . . . are material" because this activity "represented factual indicia of past management performance in areas of investor concern."[21] In drafting the disclosures, however, the SEC required disclosure only when the event was, "material to an evaluation of the *ability or integrity* of any director, person nominated to become a director or executive officer."[22] The information, in other words, was intended to shed light on the quality, past performance, and integrity of management, as a proxy for future behavior and success.

2. Performance Targets and Compensation

In 2009, the SEC began requiring companies to disclose performance targets and goals tied to employee compensation, if there were a risk that the compensation structure could reasonably have a material adverse effect on the company.[23] The SEC identified particular situations where performance targets were more likely to cause material adverse effects, such as if bonuses are "awarded upon accomplishment of the task, while the income and risk to the company from the task extend over a significantly longer period of time."[24] The SEC concluded that understanding these incentive structures would allow investors to better understand the risk associated with their investments and to align their investment portfolio with their own "appetite for risk."[25]

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[18] Uniform and Integrated Reporting Requirements, 43 Fed. Reg. 34,402, 34,405 (Aug. 3, 1978); New Ventures; Meaningful Disclosures, 38 Fed. Reg. 17,202, 17,203 (June 29, 1973).

[19] Uniform and Integrated Reporting Requirements, 43 Fed. Reg. at 34,405 n.7.

[20] *See* 17 C.F.R. 229.401(f). The types of litigation at issue include bankruptcies against a company for which the person was an agent, criminal proceedings, current enjoinment from certain business activities, prior enjoinment from those activities, past violations of state or federal securities laws, or prior disciplinary actions by a self-regulatory organization, registered entity, or "any equivalent exchange, association, entity or organization that has disciplinary authority over its members." *Id.*

[21] Uniform and Integrated Reporting Requirements, 43 Fed. Reg. at 34,405.

[22] *Id.* at 34,408; 17 C.F.R. 229.401(f).

[23] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (codified at 17 C.F.R. § 229.402).

[24] *Id.* at 68,337.

[25] *Id.* at 68,354 ("They would also benefit from the ability to use this additional information in allocating capital across companies, towards companies where employee incentives appear better aligned with operational success and the investors' appetite for risk."). A similar logic supports the proposed disclosures for decarbonization targets or internal carbon pricing. *See* Proposed Rule, *supra* note 2, at 21,467, 21,471. Investors need to understand internal metrics that drive company decisionmaking, because that decisionmaking may shift the balance of risk and reward in a given investment. Indeed, Commissioner Peirce even notes in her dissent that, "Holding companies accountable for material pledges they have made on transition from carbon may make sense." Peirce, *supra* note 5, at n.36.

3. Raw Materials and Extractive Resources

The SEC also requires the disclosure of the "sources and availability of raw materials," to the extent the information is material to an understanding of the business as a whole.[26] The disclosure requirements have changed little since they were first instituted in 1973.[27] Despite the urging of some commenters that the requirements should be retired, the Commission explained in 2019 that "while not applicable to all registrants, raw materials are *fundamental* to businesses that depend on them."[28] In other words, whether or not a company has access to necessary materials can be a proxy for that company's very ability to function.[29] Similarly, the SEC has required that extractive resource companies disclose the extent of their reserves since at least 1964.[30] In these examples, information regarding resources or reserves serves as a proxy for the ongoing viability of the business.

4. Environmental Proceedings

Finally, since 1973, the SEC has required the disclosure of environmental actions against companies where the government is a party.[31] Although such actions might result in financial penalties, the SEC has justified requiring their disclosure not by claiming that the litigation itself is financially material, but on the theory that a company's shortcomings in environmental compliance could signal wider-spread financial risk. For example, in updating these disclosure requirements in 1975, the SEC explained that the obligation to disclose environmental enforcement actions "regardless of whether the amount of money involved is itself material" reflected the "far-reaching" financial impacts of environmental non-compliance.[32] In 1981, the

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[26] *See* 2016 Concept Release, *supra* note 17, at 23,932 (citing Hot Issues; Meaningful Disclosure, 37 Fed. Reg. 16,005 (Aug. 9, 1972)).

[27] The disclosure requirement has expanded slightly from its original formulation. *Compare* New Ventures; Meaningful Disclosure, 38 Fed. Reg. 17,202, 17,203, 17,205, 17,207 (June 29, 1973) ("the description shall include . . . the sources and availability of raw materials *essential* to the business") (emphasis added) *with* 17 C.F.R. § 229.101(c)(ii) ("only information material to the business taken as a whole is required. Disclosure may include . . . (iii) Resources material to a registrant's business, such as: (A) Sources and availability of raw materials").

[28] Proposed Rule: Modernization of Regulation S–K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,365 (Aug. 23, 2019). In the final rule, the SEC retained the requirement that businesses disclose raw materials, to the extent material to an understanding of the business as a whole.

[29] *See id.*, *see also* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,724 (Oct. 8, 2020) [hereinafter Modernization of Regulation S-K] (focusing on businesses "whose products or services depend on raw materials.").

[30] Guides for Preparation and Filing of Registration Statements, 29 Fed. Reg. 2490, 2492 (Feb. 15, 1964) ("Form S-1 requires that registrants engaged in extractive operations include in their prospectus, where appropriate, the quantitative amount of their reserves. If appropriate, the current market price per barrel of oil, m.c f. of gas, or the assay value per ton of ore may also be shown but it is deemed inappropriate to show a dollar amount equal to the market price multiplied by the number of barrels of oil, m.c f. of gas or tons of ore."). This guidance was issued under the SEC's authority under the Securities Act. *Id.* at 2490.

[31] *See* Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure, 41 Fed. Reg. 21,632, 21,635 (May 27, 1976); 17 C.F.R. § 229.103.

[32] Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure, 41 Fed. Reg. at 21,635

SEC again underscored the importance of environmental disclosures to understanding "the issuer's environmental compliance and its impact on operations," even when the action at hand did not involve substantial issuer assets.[33] More recently, in 2020, the SEC reiterated that governmental enforcement actions were important to investors because they "may be more indicative of possible illegality" and explained that its new disclosure benchmarks would, "continue to elicit information that is important to investors in assessing a registrant's environmental compliance."[34] In other words, the SEC's longstanding disclosure requirements on environmental proceedings that involve the government are not relevant only because of the financial information in the disclosures—which may or may not be material—but rather because environmental non-compliance serves as a proxy for other aspects of investment risk, just as climate information does.

As the above examples demonstrate, existing disclosure requirements elicit information about non-financial information that can serve as a proxy for financial risk. These disclosures allow investors to draw inferences about future performance from a director or manager's past performance; interpret whether compensation performance targets will change internal risk-taking behavior leading to heightened financial risks; estimate a company's viability based on its access to necessary materials; and assess risks associated with regulatory non-compliance. In line with this rich tradition of non-financial disclosures that proxy for risk, the Proposed Rule similarly allow investors to ascertain future transition risk from a company's greenhouse gas emissions.

B. The SEC has previously used its general disclosure authority to require disclosure on specialized topics.

The SEC has historically used its authority under the Securities and Exchange Acts to promulgate detailed disclosure requirements in specialized topic areas. Critics of the Proposed Rule argue that the Commission's general disclosure authority under the Securities and Exchange Acts is limited to purely financial information, and that any SEC rules requiring non-financial disclosures have been permissible only because of additional statutory action by Congress.[35] The prior Section addressed a number of instances where the SEC has required disclosure—under its general disclosure authority—of non-financial information as a proxy for risk or future performance.[36] This Section addresses, in particular, inaccurate assertions by critics that the SEC's actions in resource extraction, corporate responsibility and corporate governance, executive compensation, and conflict minerals were beyond these alleged boundaries and

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[33] Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, 46 Fed. Reg. 25,638, 25,641 (May 8, 1981).

[34] *See* Modernization of Regulation S-K, *supra* note 29, at 63,742 (citing Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, 46 Fed. Reg. 25,638 (May 8, 1981)).

[35] Peirce, *supra* note 5 (citing Andrew Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?* (Mercatus Policy Brief Series, Aug. 23, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3908560).

[36] *See supra* Section I.A.

possible only through later actions of Congress.[37] With the exception of conflict minerals disclosures, the SEC had acted in each of the aforementioned areas under the authority granted by the Securities and Exchange Acts, well before Congress directed additional disclosures.

Extractive Resources: The SEC has required disclosures on extractive resources since at least 1964.[38] While the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) directed the SEC to require companies to disclose extractive resource *payments* made to the federal government or foreign governments, other SEC disclosures in this area predate Dodd-Frank by nearly half a century.[39] In a similar vein, while some raw material disclosures may stem from recent congressional action, the SEC has required disclosures of a company's sources and amounts of raw materials since 1973, pursuant to its general disclosure authority under the Securities and Exchange Acts.[40]

Corporate Responsibility and Corporate Governance: As discussed at length in Section IV, the SEC has been active in corporate responsibility and governance disclosures since at least the early 1970s.[41] The SEC established these disclosure requirements—which address information such as directors' and officers' background and experience, familial relationships between and among board members and officers, director's ages, whether there have been certain legal proceedings against a director or one of their former companies, and the attendance policy for board members, among other items—under the SEC's general disclosure authority.[42] Since 1978, the SEC has also required the disclosure of the existence (or nonexistence) of certain board committees.[43] All of these disclosure requirements were made using the SEC's general disclosure authority under the Securities and Exchange Acts. Furthermore, while the SEC has indeed established additional governance-related disclosure requirements since the passage of the Sarbanes-Oxley Act of 2002,[44] many of these new disclosure requirements were promulgated

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[37] Peirce, *supra* note 5 (citing Vollmer, *supra* note 35). To support these claims, critics point to the 2016 Concept Release on Regulation S-K. Vollmer, *supra* note 35, at 9 & n.57–59. While the 2016 Concept Release acknowledges that Congress has issued certain statutory mandates for additional areas of disclosure, it does not characterize those mandates as having opened a door for the Commission to operate in new topic areas of disclosure. 2016 Concept Release, *supra* note 17, at 23,922.

[38] Guides for Preparation and Filing of Registration Statements, 29 Fed. Reg. 2490, 2492 (Feb. 15, 1964).

[39] *Id.*; *see also* 17 C.F.R. § 229.102 (2018); 17 C.F.R. §§ 229.102; 229.1202; 229.1303; Modernization of Property Disclosures for Mining Registrants, 83 Fed. Reg. 66,344, 66,444 (Dec. 26, 2018). It is worth noting that the 1964 extractive reserve form disclosure, which included oil, also predated the Energy Policy and Conservation Act (EPCA) of 1975, which directed the SEC to develop accounting standards for oil and gas. 42 U.S.C. § 6383.

[40] New Ventures; Meaningful Disclosure, 38 Fed. Reg. 17,202, 17,203, 17,205, 17,207 (June 29, 1973); 17 C.F.R. § 229.101(c)(ii).

[41] *See infra* Section IV.

[42] Schedule A of the Securities Act only requires the names and addresses of board members and officers. 15 U.S.C. § 77aa.

[43] Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. 58,522, 58,527 (Dec. 14, 1978).

[44] Sarbanes-Oxley created new disclosure requirements regarding a company's Code of Ethics for board members and whether the company's audit committee contained a financial expert. *See* Disclosure Required by Sections 406

only under the SEC's general disclosure authority. These included, for example, additional disclosures related to nominating committees and risk oversight practices.[45] It is inaccurate to describe the SEC as having expanded into the realm of corporate governance disclosures only due to congressional action.

Executive Compensation: The SEC first began requiring executive compensation disclosures in 1938 and, prior to Dodd-Frank, updated those disclosures in 1942, 1952, 1978, 1983, 1992, 2006, and 2009, using its general disclosure authority under the Securities and Exchange Acts.[46] While Schedule A of the Exchange Act expressly requires certain disclosures on the remuneration costs for officers, the SEC's rules on this subject have required disclosures outside the scope of that express mandate, and therefore under the SEC's general disclosure authority.[47] In 2006, for example, the SEC created a new section of disclosures entitled the Compensation and Disclosure Analysis (CD&A) which added narrative disclosures describing compensation policies.[48] In 2009, the SEC updated its executive compensation disclosure requirements to include disclosure of performance targets or goals that could raise a material risk to a company.[49] These disclosures were outside the remuneration costs expressly required by Schedule A, and therefore must have been justified by SEC's general disclosure authority.

As shown from the above, the SEC has used its general disclosure authority to require detailed disclosures across a variety of specialized topic areas, including extractive resources, corporate responsibility, and executive compensation, prior to and independent of congressional action in those spaces. It is therefore in line with regulatory precedent for the SEC to create climate-related financial risk disclosures.

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and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 4110 (Jan. 31, 2003). These Sarbanes-Oxley disclosures were initiated in 2003, decades after many of the disclosures discussed in Section IV. *Id.*

[45] Both rule releases point only to the Securities and Exchange Acts for authority, and do not point to the provisions of Sarbanes-Oxley that discuss additional disclosures, which are codified at 15 U.S.C. §§ 7264, 7265. *See* Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, 68 Fed. Reg. 66,992, 67,008 & n.220–33 (Nov. 28, 2003); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,361 (Dec. 23, 2009).

[46] Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,160 n.45 & n.46 (Sept. 8, 2006); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009).

[47] Schedule A requires only, "the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year." 15 U.S.C. § 77aa(14). Section 12(b) of the Exchange Act requires disclosure of, "(D) the directors, officers, and underwriters . . . their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;" and "(E) remuneration to others than directors and officers exceeding $20,000 per annum." 15 U.S.C. § 78l(b)(1).

[48] *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. at 53,178.

[49] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009).

II. The SEC has previously taken a prescriptive approach to disclosure, both in Regulation S-X and Regulation S-K, even when the covered information could not be deemed universally material.

Commissioner Peirce suggests that the SEC should only require climate risk disclosures that are "universally material," and that, "[t]he further afield we are from financial materiality, the more probable it is that we have exceeded our statutory authority."[50] But the SEC's disclosure regime has never been predicated on an assumption that every required disclosure is material for every company required to make that disclosure. On the contrary, the SEC has often established generally applicable disclosure requirements that, by the Commission's own admission, might sometimes obligate companies to disclose non-material information. In some cases, the SEC has done this by setting forth blanket disclosure requirements. In others, it has established bright-line thresholds for disclosure requirements, even while noting that exceeding the threshold was not, for every disclosing company, equivalent to passing a materiality test. The disclosure requirements in the Proposed Rule that apply to all companies, absent a materiality assessment, or that apply to all companies that exceed a particular threshold, again without a separate materiality assessment, are therefore in line with the SEC's prior uses of its statutory authority.

A. Blanket Disclosures

The Proposed Rule creates certain disclosure requirements that apply to all reporting companies. These include requirements to disclose certain governance-related information, Scope 1 and Scope 2 emissions, internal carbon pricing metrics, and climate-related targets or goals.[51] Such blanket disclosure requirements have ample precedent. The SEC has repeatedly promulgated disclosure requirements that apply to all companies, without an individualized materiality assessment. And it has often done so without contending that the information being disclosed was universally or categorically material.[52]

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[50] Peirce, *supra* note 5. Commissioner Peirce's dissent argues that the SEC should consider whether the climate-related financial risk disclosures are "universally material," but later admits that the SEC has "mandated immaterial disclosures in several other areas" and that these were "non-statutory immaterial disclosure mandates," meaning that Congress did not direct the SEC to promulgate them. *Id.* While Commissioner Peirce argues that these standards "might well merit recalibration with a materiality threshold," she does not, at any point, posit that these disclosure requirements were outside the scope of the SEC's authority. *Id.*

[51] *See generally* Proposed Rule, *supra* note 2.

[52] The SEC has occasionally created blanket disclosures that cover a topic the SEC has described as categorically material. For example, in justifying blanket disclosures on the background experience of officers and directors and other significant persons, the SEC determined that the "performance and background of management of the issuer is material to investment decisions." New Ventures; Meaningful Disclosures, 38 Fed. Reg. 17,202, 17,203 (June 29, 1973). That said, at this period in history, the SEC used a different, more lenient, definition of materiality. *See* 2016 Concept Release, *supra* note 17, at 23,925 & n.105. From 1937 until 1981, the SEC defined materiality as "those matters as to which an average prudent investor ought reasonably to be informed before buying or selling," Later, the SEC began applying the materiality test devised by the Supreme Court for fraud claims under 12b-5. *Id.* That test deems information material when there is 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." *Id.*; Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976)) (laying out a definition for fraudulent materiality).

The SEC requires all companies to provide copies of certain contracts and documents, without regard to materiality. While many of the requirements were expressly mandated by Schedule A of the Securities Act, others were not and were instead, like the Proposed Rule, imposed pursuant to the SEC's discretionary authority.[53] One longstanding discretionary requirement is that companies append certain correspondences from departing directors. Originally, companies were required to disclose "[a]ny letter from a former director which sets forth a description of a disagreement with the registrant that led to the director's resignation or refusal to stand for re-election and which requests that the matter be disclosed."[54] Today, the disclosure requirement is broader and reaches any correspondence, "concerning the circumstances surrounding the former director's retirement, resignation, [or] refusal to stand for re-election or removal."[55]

The SEC has also used its general disclosure authority to require disclosures about certain related party transactions—transactions that could call into question the independence of directors or executive officers—since 1942.[56] While the requirements to disclose the transactions themselves incorporate a materiality standard, the SEC in 2006 imposed blanket requirements for companies to disclose their *procedures* for the "review, approval or ratification of transactions with related persons."[57] The SEC justified this new requirement with the rationale that "this type of information *may* be material to investors."[58] In other words, the SEC did not anticipate that this information would necessarily be material in every case, but nonetheless created a uniform disclosure requirement.

The SEC also requires the disclosure of all stock buybacks, without reference to materiality.[59] In requiring the disclosure of stock buybacks, the SEC described the information as, "important to investors" and noted that stock buybacks often lead to an increase in stock price.[60] The Commission did not, however, describe the information as necessarily material.

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[53] *Compare* 17 C.F.R. § 229.601(b)(1) (requiring companies to include underwriting agreements as exhibits) *with* 15 U.S.C. § 77aa(28) (requiring the disclosure of any agreements with underwriters).

[54] Adoption of Integrated Disclosure System, 47 Fed. Reg.11,380, 11431 (Mar. 16, 1982).

[55] 17 C.F.R. § 229.601(b)(17); Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 69 Fed. Reg. 15,594, 15,605 (Mar. 25, 2004).

[56] *See* Disclosure of Certain Relationships and Transactions Involving Management, 47 Fed. Reg. 55,661, 55,662 (Dec. 13, 1982) (citing Securities and Exchange Commission Release Notice 417 (Release No. 3347) (Dec. 18, 1942)); *see* 17 C.F.R. § 229.404(a).

[57] Executive Compensation and Related Party Disclosure, 71 Fed. Reg. 53,158, 53,202 (Sept. 8, 2006) (relevant provision codified at 17 C.F.R. § 229.404(b)(1)).

[58] *Id.* (emphasis added).

[59] 17 C.F.R. § 229.703.

[60] Purchases of Certain Equity Securities by the Issuer and Others, 68 Fed. Reg. 64,952, 64,962–63 (Nov. 17, 2003) (codified at 17 C.F.R. 228 et seq.); Commissioner Allison Herren Lee, *Living in a Material World: Myths and Misconceptions about "Materiality"*, SEC. & EXCH. COMM'N (May 24, 2021), https://perma.cc/2VAN-2GTQ.

Additionally, since 1973, under its general disclosure authority, the SEC has required companies to disclose their number of employees.[61] Today, this is codified under Item 101 of Regulation S-K.[62] When justifying the retention of this blanket requirement in 2020, the SEC explained that knowing the number of employees of a firm "can help investors assess the size and scale of a registrant's operation" and that the agency believed "this disclosure will complement, and could provide essential context to, any discussion of a registrant's human capital management."[63] Commissioner Peirce, however, described this information as "material for some companies, but not for others" and argued that switching to a materiality standard might be preferable.[64] Importantly, although Commissioner Peirce found this item undesirable as a policy matter, she did not suggest that it was beyond the Commission's authority to impose a requirement for a disclosure that is not material for every single company.[65]

Finally, blanket disclosure requirements are also common in the governance context.[66] Through its general disclosure authority, in 1978, the SEC began requiring all companies to disclose how many director meetings were held a year, the name of any directors who attended fewer than 75% of meetings, and whether the company had an attendance policy for annual board meetings.[67] In the same rule, the SEC also imposed a blanket requirement to disclose whether the company's board had nominating, audit, or compensation committees.[68] Although the SEC characterized the existence (or nonexistence) of a nominating committee as "material information," it made no such claim with respect to audit and compensation committees. Instead, it described information about the existence of such committees as merely allowing investors to "better assess" the relevant processes and oversight.[69] In 2003, the SEC created additional blanket disclosures surrounding nominating committees and described the covered information as "important" and "valuable . . . to security holders," rather than material.[70] In 2009, again, without invoking materiality, the SEC began requiring all companies to describe, "the extent of the board's role in the risk oversight of the registrant."[71]

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[61] *See* 2016 Concept Release, *supra* note 17, at 23,932; New Ventures, Meaningful Disclosures, 38 Fed. Reg. 17,202, 17,204, 17,206, 17,207, 17,209 (June 29, 1973).

[62] 17 C.F.R. § 229.101(c)(1)(xiii).

[63] Modernization of Regulation S-K, *supra* note 29, at 63,739.

[64] Commissioner Hester M. Peirce, *Statement at Open Meeting on Modernization of Regulation S-K 101, 103, and 105*, SEC. & EXCH. COMM'N (Aug. 26, 2020), https://perma.cc/93Q9-FK3T.

[65] *Id. See also* George Georgiev, *The SEC's Climate Disclosure Proposal: Critiquing the Critics* at 8 (Emory Legal Studies Rsch. Paper No. 22–8 Mar. 27, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068539.

[66] For additional detail on governance-related disclosures, see *infra* Section IV.

[67] *See* Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. 58,522 (Dec. 14, 1978); 17 C.F.R. § 229.407(b).

[68] Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. at 58,527.

[69] *Id.*

[70] *Id.*

[71] 17 C.F.R. § 229.407(h).

In sum, throughout the SEC's history, the agency has set forth prescriptive disclosure requirements that apply to all companies, even though the disclosed information may not be material for many of them.

B. Bright-Line Thresholds

The Proposed Rule requires companies to disclose realized physical and transition impacts, if the absolute value of those impacts exceeds 1% of a given line item.[72] Many prior SEC rules have similarly relied on bright-line thresholds to delineate when a company must make a particular disclosure. Furthermore, the Commission has never contended that the application of such thresholds is equivalent to a finding of materiality. In other words, contrary to Commissioner Peirce's suggestion that the SEC is authorized to require disclosure only of universally material climate-related information,[73] existing bright-line disclosure rules sometimes require the disclosure of immaterial information.

As the SEC discusses in the Proposed Rule,[74] Regulation S-X contains two provisions that specifically set thresholds at 1%. These include a threshold above which excise taxes must be included separately on a financial statement,[75] and a net asset value threshold above which open option contracts by management investment companies must be disclosed.[76] An additional 1% threshold can be found in Regulation S-K. Small reporting companies are required to disclose related-party transactions if the value exceeds $120,000 or 1% of the company's total assets, whichever is smaller.[77]

The SEC also routinely uses dollar, rather than percent, thresholds for disclosures. Such disclosures are even more clearly divorced from a materiality standard, as a dollar threshold evidently bears no relation to the size of the company. For example, companies must disclose perquisites and personal benefits given to executive officers and managers if the aggregate value

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[72] *See* Proposed Rule, *supra* note 2, at 21,464–65. While positive and negative impacts would be broken out separately, the SEC sets the disclosure threshold at the absolute value of those impacts. *Id.* at 21,366. The SEC has set thresholds based on absolute values before, including in 2020, when the SEC created an absolute value test to assess whether the equity and net income of subsidiaries was sufficient to mean the subsidiary counted as a "significant subsidiary," such that additional disclosure would be required. *See* Amendments to Financial Disclosures About Acquired and Disposed Businesses, 85 Fed. Reg. 54,002, 54,010 (Aug. 31, 2020); 17 C.F.R. 210.01–02(w)(1)(iii). In so doing, the SEC noted strong support for the shift to an absolute value metric among commenters and explained that the SEC expected the change "will mitigate the potential for misinterpretation that may result from inclusion of a negative amount in the computation." *Id.*

[73] Peirce, *supra* note 5.

[74] *See* Proposed Rule, *supra* note 2, at 21,366 n.347.

[75] 17 C.F.R. § 210.5-03.1.

[76] *Id.* § 210.12-13.

[77] *Id.* § 229.404(d)(1) ("Smaller reporting companies . . . must provide the following information in order to comply with this Item: (1) the information required by paragraph (a) of this Item for the period specified there for a transaction in which the amount involved exceeds the lesser of $120,000 or one percent of the average of the smaller reporting company's total assets at year end for the last two completed fiscal years.")

is greater than $10,000.[78] This threshold used to be higher; in 2006, the SEC lowered the threshold from either $50,000 or 10% of the officer or director's annual salary and bonus, to $10,000, because the SEC believed the prior threshold "allow[ed] omission of too much information that investors may consider material."[79] Similarly, from 1982 until 2020, the SEC required companies to disclose environmental proceedings where the government was a party and potential damages exceed $100,000.[80] When Regulation S-K was revised in 2020, the threshold was raised to $300,000, even as the SEC shifted to materiality-based requirements for other items in Regulation S–K.[81]

Notably, adopting a bright-line threshold for a disclosure requirement is not equivalent to finding that any action exceeding the threshold is necessarily material. The Supreme Court rejected the legitimacy of any such contention in *Basic Inc. v. Levinson*, explaining that "[a]ny approach that designates a single factor occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be over-or-underinclusive."[82] The SEC has echoed this view. In 1999, the SEC rejected efforts to define numerical "rules of thumb" for when a misstatement in financial reporting was material, explaining that a percentage deviation from a value is only one part of the "total mix" of information to determine the materiality of the misstatement, which "also includes the factual context."[83] In 2020, while maintaining a bright-line approach to environmental proceeding disclosures, the SEC explained that "a single numerical threshold may result in some disclosures that are not material."[84] A few paragraphs later, the SEC explains that it was nonetheless retaining a dollar threshold because "use of a materiality standard for environmental proceedings could result in large registrants providing less disclosure."[85] In other words, the requirement was expressly designed to result in more disclosure than a materiality standard would. The Commission believed that the potential over-inclusiveness of the threshold was justified by the greater clarity it provided to registrants

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[78] *Id.* § 229.402(c)(2)(ix)(A).

[79] *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,178 (Sept. 8, 2006).

[80] 17 C.F.R. § 229.103(c)(3) (2019); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,388–89 (Mar. 16, 1982). From 1973 to 1982, "all pending or contemplated environmental proceedings to which a governmental authority [was] a party" were required to be disclosed, without regard to materiality. Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, 46 Fed. Reg. 25,638, 25,639 (May 8, 1981).

[81] Modernization of Regulation S-K, *supra* note 29, at 63,743 (amending the disclosure threshold for environmental litigation in which a governmental authority is a party such that companies must disclose if the potential damages exceed $300,000 or, alternately, companies may choose their own disclosure threshold provided it is "reasonably designed to result in disclosure" of material proceedings, the threshold is disclosed, and the threshold does not exceed the lesser of $1 million or 1% of the company's assets).

[82] Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988).

[83] Sec. & Exch. Comm'n, Staff Accounting Bulletin No. 99 – Materiality (Aug. 12, 1999), https://perma.cc/4EMT-VYAB.

[84] Modernization of Regulation S-K, *supra* note 29, at 63,742.

[85] *Id.* at 63,742.

regarding their disclosure obligations. Unlike a materiality-based requirement, the threshold could "provide certainty about when disclosure is required."[86]

As these examples demonstrate, the Proposed Rule's prescriptive, threshold-based approach to certain disclosure requirements is consistent with historical regulatory practice at the SEC. The Commission has never interpreted its statutory authority as limiting it to requiring only disclosures that are material for every registrant in every period.

III. The SEC has previously required disclosures that reflect future, uncertain risk.

The Proposed Rule requires companies to describe future physical and transition risks, and to disclose greenhouse gas emissions as a proxy for transition risks. Commissioner Peirce argues that the consideration of physical risks is likely to be "entirely unreliable" and describes transition risks as "rooted in prophecies of coming governmental and market action."[87] As an initial matter, much transition risk stems not from the possibility of future government action, but from the legally binding commitments that governments have already made.[88] Regardless, it is not unprecedented for the SEC to expect companies to assess risks associated with future changes in policy or market changes, even when the precise nature and probability of those trends is unknown. Past disclosure rules have required companies to consider and disclose future risks that are not certain to be realized.

In line with the Proposed Rule's requirement that companies identify physical risks, the Management Discussion and Analysis (MD&A) requires companies to make assessments about "known trends, events, and uncertainties" that are material to a company's capital, or that could have a material effect on liquidity or operations.[89] Even if it is not possible to predict with

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[86] *Id.*

[87] Peirce, *supra* note 5 ("These transition assessments are rooted in prophecies of coming governmental and market action, but experience teaches us that such prophecies often do not come to fruition."). Commissioner Peirce is also skeptical of Scope 3 emissions disclosures on the ground that, "Scope 3 is really about what other people do." *See id*. However, in examining the SEC's prior guidance and legal bulletins, the SEC has previously required the consideration of third-party action, whether in assessing one's competitive standing based on potential future changes by competitors or analyzing disruptions to one's supply chain during a pandemic.

[88] Companies already face transition risk from policy risk, litigation risk, market risk, and reputational risk. *See* Condon et. al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 745, 757–61 (2022). Thirteen states have adopted market-based approaches to reduce greenhouse gas emissions, and twenty-one states, the District of Columbia, and Puerto Rico have zero emissions targets or carbon-neutral goals for their electricity sector by 2050. *See, e.g.*, *100% Clean Energy Collaborative – Table of 100% Clean Energy States*, CLEAN ENERGY STATES ALLIANCE (last visited May 19, 2022), https://perma.cc/T4BW-HTVW; *Market-Based State Policy*, CTR. FOR CLIMATE & ENERGY SOLUTIONS (last visited May 19, 2022), https://perma.cc/42H2-Q7Z8. This policy risk also extends internationally. For example, overseas manufacturing may be affected by policy in other countries. Forty countries are currently subject to either an emissions trading scheme or a carbon tax. *See Pricing Carbon*, WORLD BANK (last visited May 20, 2022), https://perma.cc/7XQE-GEWA. Exports may also be affected if the European Union implements a carbon tariff. *See* Kate Abnett, *EU Countries Support Plan for World-First Carbon Border Tariff*, REUTERS (Mar. 16, 2022), https://www.reuters.com/world/europe/eu-countries-back-plan-world-first-carbon-border-tariff-2022-03-15/.

[89] *See* 17 C.F.R. § 229.303.

precision the physical risks a company will face, the trends—such as increased flooding, heat, or severe weather risk—are known and the likely effects are able to be disclosed.[90]

Critics seek to differentiate transition risks from physical risks as reliant on uncertain, third-party behavior and therefore harder to predict. As noted above, however, transition risks are largely the result of existing, legally binding commitments.[91] In other words, the relevant third-party behavior has already occurred. Even if that were not the case, however, the SEC has previously required companies to provide information that necessarily entails judgments about the future behavior of government actors and other third parties. Since 1997, for example. the SEC has required companies "to provide investors with forward looking information about a registrant's potential exposures to market risk,"[92] such as "interest rate risk, foreign currency exchange rate risk, commodity pricing, and other relevant market risks."[93] In the preamble to the 1997 rule, the SEC recognized that companies would necessarily need to make assumptions and estimates about future market behavior when providing such information and that such modelling choices "will be different from what actually occurs in the future."[94] In addressing questions from companies, the SEC later explained that the risks required by the market risk disclosures include even those "that could result from *reasonably possible* market changes," in contrast to other risk disclosures that include only "*known* events, trends, or uncertainties that are *reasonably likely* to impact the registrant."[95] In essence, unlike other risk disclosures, where a trend or uncertainty must be known, market risk disclosures have gone a step further and asked companies to contemplate and disclose what is *possible*. Indeed, in order to complete these quantitative risk analyses, companies may either provide a detailed description of all market-sensitive instruments or contracts or engage in a forecasting exercise to predict their exposure to risk.[96] Just as businesses are required to predict potential market scenarios or interest rate changes, it is

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[90] *See, e.g.*, Sabin Ctr. for Climate Change L., Comments on Public Input on Climate Change Disclosure (June 11, 2021), https://perma.cc/EZ2J-P5XF.

[91] *See supra* note 88.

[92] Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information About Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments, and Derivative Commodity Instruments, 62 Fed. Reg. 6044, 6048 (Feb. 10, 1997).

[93] 17 C.F.R. § 229.305(a)(1).

[94] *Id.*

[95] Sec. & Exch. Comm'n, Off. of the Chief Accountant & Div. of Corp. Fin., Questions and Answers About the New "Market Risk" Disclosure Rules (July 31, 1997), https://perma.cc/8GVY-KVUL (emphasis in original). The second set of disclosures referenced in the provided quote are those required in the MD&A. *See* 17 C.F.R. § 229.303.

[96] In line with this approach, companies are given three options for how to disclose their quantitative market risk. One is to give a detailed description of each market sensitive instrument or contract. 17 C.F.R. § 229.305(a)(1)(i). The other two options both require modelling or projections by the company, regarding how changes in market scenarios could affect the bottom line. *Id.* § 229.305(a)(1)(ii)(A) (requiring a sensitivity analysis that assesses "one or more selected hypothetical changes in interest rates, commodity prices, and other relevant market rates."); *Id* § 229.406(a)(1)(iii) ("express the potential loss in future earnings, fair values, or cash flows of market risk sensitive instruments over a selected period of time, with a selected likelihood of occurrence, from changes in interest rates, foreign currency exchange rates, commodity prices, and other relevant market rates or prices").

precedented to ask businesses to assess what risks may arise from climate in the short, medium, and long term.[97]

The SEC has also issued guidance and published legal bulletins explaining how companies should expand their disclosures to account for economy-wide, future, uncertain risks, including those that rely on behavior by third-parties or government actors—the same type of "prophetical" assessment that Commissioner Peirce associates with transition risk. These have included disclosures on a company's risks and risk management strategies regarding the adoption of the Euro, Y2K, and COVID-19. The Euro adoption legal bulletin urged companies to disclose, among other items, how the adoption of the Euro may affect the company from a competitive standpoint, whether due to potential market consolidation by the issuer or by competitors, changes in consumer behavior, increased transition costs, or changes in the economies of competitive markets.[98] These considerations would have required a company to consider not only its own actions, but also possible future actions of its competitors. The Y2K legal bulletin focused on the adequacy of management's response to technological risks.[99] Most recently, the COVID-19 guidance asked companies to disclose a variety of risks, including some tied to governmental or third-party behavior, such as how border closures and travel restrictions could affect business goals, or anticipated supply-chain shocks.[100]

Through its disclosure rules on MD&A and market risk, and its guidance on Y2K, Euro adoption, and COVID-19, the SEC has been clear that issuers may be obligated to discuss uncertain future scenarios, and even to consider potential actions by third-parties, whether through travel restrictions, supply chain changes, or competitors seeking market consolidation. The Proposed Rule's requirement that companies analyze and disclose material physical and transition risks and disclose emissions as a proxy for transition risk, align with these previous actions.[101]

IV. The SEC has previously required detailed governance-related disclosure requirements.

The Proposed Rule's governance-related disclosure requirements are designed to provide investors with "additional insight into a board's and management's governance of climate-related risks."[102] This information would aid investors "in evaluating the extent to which a

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[97] *Compare* sources cited *supra* note 96 *with* Proposed Rule, *supra* note 2, at 21,467–68.

[98] Sec. & Exch. Comm'n, Div. of Corp. Fin. & Inv. Mgmt., Staff Legal Bulletin No. 6 (July 22, 1998), https://perma.cc/AWA8-BTAZ.

[99] *See* Sec. & Exch. Comm'n, Div. of Corp Fin. & Inv. Mgmt., Staff Legal Bulletin No. 5, (Jan. 12, 1998), https://perma.cc/5PZ8-RCXU.

[100] *See* Sec. & Exch. Comm'n, Div. of Corp. Fin., Coronavirus (COVID-19), (Mar. 25, 2020), https://perma.cc/7SDG-LZWF; Sec. & Exch. Comm'n, Div. of Corp. Fin., Coronavirus (COVID-19)—Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources (June 23, 2020), https://perma.cc/4NAQ-5BBL.

[101] *See* Proposed Rule, *supra* note 2, at 21,467–69.

[102] *Id.* at 21,359.

registrant is adequately addressing the material climate-related risks it faces, and whether those risks could reasonably affect the value of their investment."[103] Prior SEC rules have similarly required disclosures regarding the expertise and responsibilities of corporate officers and directors.

A. Background and Experience of Officers and Directors

The Proposed Rule requires companies to describe the expertise of any directors with climate-related risk experience, as well as the relevant expertise for "any management positions or committees . . . responsible for assessing and managing climate-related risks."[104] This requirement is in keeping with past SEC regulations requiring registrants to describe the expertise and background of officers and directors. These requirements reflect the Commission's longstanding view that the "performance and background of management of the issuer is material to investment decisions"[105]

The SEC's disclosures on officers and directors have ranged from past business experience to personal and detailed information. Since at least the 1970s, the SEC has required disclosures regarding the past five years of business experience of each director and officer.[106] For directors, companies must also, "briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure."[107] These disclosures were added in 2009.[108]

Disclosure requirements regarding employee backgrounds extend beyond officers and directors. The SEC, since 1973, has required companies to disclose the experience of "significant persons . . . who make or are expected to make significant contributions to the business of the registrant."[109] By requiring background on the directors, officers, or committees who are

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[103] *Id.*

[104] *Id.* at 21,467 ("(a)(1) Describe the board of director's oversight of climate-related risks. Include the following, as applicable: . . . (ii) Whether any member of the board of directors has expertise in climate-related risks, with disclosure in such detail as necessary to fully describe the nature of the expertise; . . . (b)(1) Describe management's role in assessing and managing climate-related risks. Include the following, as applicable: (i) Whether certain management positions or committees are responsible for assessing and managing climate-related risks and, if so, the identity of such positions or committees and the relevant expertise of the position holders or members in such detail as necessary to fully describe the nature of the expertise.").

[105] New Ventures; Meaningful Disclosures, 38 Fed. Reg. 17,202, 17,203 (June 29, 1973) (extending existing disclosures regarding litigation against directors under Form 10 and 10-k to apply to registrants filing Forms S-1 and S-2 and to cover executive officers").

[106] 17 C.F.R. 229.401(e)(1).

[107] *Id.*

[108] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,342–43 (Dec. 23, 2009).

[109] 17 C.F.R. 229.401(c). These disclosures date back to 1973. New Ventures; Meaningful Disclosures, 38 Fed. Reg. 17,202, 17,203 (June 29, 1973) (adopting requirements that registrants disclose "the experience of certain key persons such as research scientists and production and sales managers, who . . . are expected to make significant contributions to the business").

managing climate-related risk, the SEC is arguably merely restating these significant person disclosures in a new way: a person who manages climate risk is a "significant person" making a "significant contribution[]" to the business and, therefore, their experience in the matter should be disclosed.

Present disclosures also reach the personal information of directors and officers, which is arguably more removed from financial performance than is background experience in risk management. Such disclosures include the age of each director and the existence of any close familial relationships between or among directors and officers.[110] Other disclosures were partly justified because of their ability to give investors insight into "information reflecting on the *integrity* of management."[111] These disclosures include whether any director or officer has been engaged in certain types of legal proceedings in the past decade.[112]

The above examples show that governance-related disclosures regarding the background and experience of directors and officers are not novel and are consistent with the SEC's prior interpretation of its disclosure authority. While past disclosures have reached even the personal information of directors and officers, the Proposed Rule aims only to include relevant climate-related risk experience.

B. Governance Structures

The Proposed Rule also requires the disclosure of certain governance structures. These include, namely, who is responsible for overseeing climate risk—whether that comprises certain individuals or committees—and how those committees are overseen.[113] Critics argue that these disclosures impermissibly direct board and management's attention to climate issues.[114] But the SEC has a long history of creating governance disclosures designed to give insight into the machinations of the board and management and has recognized that, while in certain cases these disclosures could alter behavior, such secondary effects are not disqualifying. Many of these provisions exist in largely their original form today and request information that is similar to that required by the Proposed Rule.[115]

1. Board Committees

In 1978, the SEC began requiring disclosures of "the structure, composition and functioning of issuers' boards of directors."[116] In particular, the SEC created disclosure requirements for whether a company had audit, nominating, and compensation committees. In creating these

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110 17 C.F.R. § 229.401(a), (d).

111 Uniform and Integrated Reporting Requirements, 43 Fed. Reg. 34,402, 34,405 (Aug. 3, 1978) (emphasis added).

112 17 C.F.R. § 229.401(f).

113 Proposed Rule, *supra* note 2, at 21,467.

114 *See* Peirce, *supra* note 5, at n.62.

115 17 C.F.R. § 229.407(b).

116 Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. 58,522, 58,527 (Dec. 14, 1978).

disclosure requirements, the SEC noted that, "While the Commission recognizes that the adoption of this disclosure requirement in some instances may indirectly stimulate the establishment of audit, nominating and compensation committees, the Commission believes that disclosure of the nonexistence of the named committees serves a valid informational purpose."[117] Similarly, disclosure of the existence or non-existence of committees, directors, or officers engaged in climate risk may serve an important informational purpose; the SEC explains that this information will assist investors in evaluating a registrant's approach to climate-related risks.[118]

These disclosures have not been stagnant since the 1970s. Rather, revision has been common, particularly in recent years. For example, in 2003, the SEC created additional proxy disclosure requirements that discussed the independence of nominating committees, the nominating committee's policies in considering director candidates that had been recommended by security holders, and the process and minimum qualifications for selecting a new member of the board of directors, among others.[119] The SEC described these new disclosures as "important" and providing "valuable information to security holders" but did not specify that they were necessarily material.[120]

In 2009, the SEC began requiring companies to disclose how their nominating committees factored in diversity in considering potential board members.[121] The SEC described these disclosures as "useful for investors"[122] and explained that "Board diversity policy is an important factor in the voting decisions of some investors."[123] While not the purpose of the disclosures, the SEC noted that a potential co-benefit of the required disclosures was that disclosure, "may encourage boards to conduct broader director searches, evaluating a wider range of candidates, and potentially improving board quality."[124]

Commissioner Peirce argues that the governance disclosures "seem designed to cultivate board discussions of climate, rather than merely elicit whether such discussions are happening."[125] But, the SEC has a 44-year history of requiring the disclosure of particular committee structures, and

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[117] *Id*. It is worth noting that, although the SEC noted that the existence of a nominating committee may be material, it discussed the audit and compensation committees as only helping investors to assess management practices and compensation. *Id*.

[118] Proposed Rule, *supra* note 2, at 21,359.

[119] Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, 68 Fed. Reg. 66,992, 66,996 (Nov. 28, 2003) (codified at 17 C.F.R. § 240.14a-101). Additional disclosures were also created as part of Regulation S-K, specifically, companies must disclose if they make any material changes to the policies described under 17 C.F.R. § 240.14a-101. *Id.*; 17 C.F.R. § 229.401(j).

[120] Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, 68 Fed. Reg. at 66,996.

[121] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343–44, 68,355 (Dec. 23, 2009) (relevant section codified at 17 C.F.R. § 229.407(c)(2)(5)).

[122] *Id.* at 68,344.

[123] *Id.* at 68,355.

[124] *Id.*

[125] Peirce, *supra* note 5, at n.62.

the fact that some of these disclosures could inadvertently prompt a firm to adjust its behavior has never been disqualifying.[126]

2. Attendance Policies

Also in 1978, the SEC began requiring companies to disclose how many times the board of directors met in the past year, the name of any director who attended less than 75% of the meetings of committees of which they were a member, and the registrant's policy "with regard to board members' attendance at annual meetings of security holders and . . . the number of board members who attended the prior year's annual meeting."[127] Although many commenters argued that a director could be successful without attending all meetings, the SEC did not discuss the materiality of this disclosure, but rather justified it on the basis that "attendance is an indication of effective board and committee functioning and is relevant to an evaluation of directors."[128]

3. Board Risk Oversight Mechanisms

In 2009, during the Great Recession, the SEC added new disclosures requiring that registrants "disclose the extent of the board's role in the risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure."[129] The SEC explained that these provisions were motivated by the fact that "investors have increasingly focused on corporate accountability and have expressed the desire for

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[126] In fact, in creating the disclosures surrounding nominating, compensation, and audit committees in 1978, the SEC noted that many commenters argued, "the disclosure of the nonexistence of committees was intended to encourage companies to establish the named committees, rather than to provide useful information to shareholders." Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. 58,522, 58,527 (Dec. 14, 1978). These commenter arguments are similar to Commissioner Peirce's argument today. Peirce, *supra* note 5; Peirce, *Cybersecurity*, *supra* note 10. Just as the SEC justified these earlier committee disclosures by arguing they also served a "valid informational purpose," the climate-related governance disclosures are also justified by the informational benefits they provide to investors. Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. at 58,527; Proposed Rule, *supra* note 2, at 21,359 (explaining that these disclosures are "necessary to aid investors in evaluating the extent to which a registrant is adequately addressing the material climate-related risks it faces, and whether those risks could reasonably affect the value of their investment" and that are intended to provide investors with relevant information about a registrant's board, management, and principal committees.").

[127] 17 C.F.R. § 229.407(b)(2); *see* Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. at 58,527.

[128] Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, 43 Fed. Reg. at 58,528. Again, note that these attendance disclosures were not predicated on materiality, but merely relevance. *Id.*

[129] 17 C.F.R. § 229.407(h). Analogous to the Proposed Rule, in introducing this rule, the SEC also explained that, "Where relevant, companies may want to address whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from such individuals." Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,345 (Dec. 23, 2009). This aligns with the Proposed Rule's requirement that companies disclose how the committees report to the board. Proposed Rule, *supra* note 2, at 21,467.

additional information."[130] Without discussing materiality, the SEC justified the board risk oversight disclosures by saying:

> Expanded disclosure of the board's role in risk oversight may enable investors to better evaluate whether the board is exercising appropriate oversight of risk. Investors would be able to adjust their holdings, allocating more capital to companies in which they believe the board is adequately focused on risks. Improved capital allocation will also benefit the financial markets by increasing market efficiency.[131]

In this rule, the SEC drew attention to capital, liquidity, and operational risk.[132] In the Proposed Rule, the SEC instead draws attention to management of climate risk.

From attendance policies to committee structures to risk oversight, the SEC has a long history of affording investors the opportunity to peer into the structure and operations of a company in order to understand its resilience to risks. The Proposed Rule builds off this history. Since 1978, companies have been required to discuss the existence (or nonexistence) of certain committees, and as recently as 2009, the SEC has promulgated new requirements that strengthen investor's ability to understand how directors oversee and manage risks. Investors have signaled a particular interest in understanding how companies are managing climate-related risks in order to understand their own risk exposure.[133] The SEC—as it has in developing other risk oversight disclosures—is responding to that call.

V. Conclusion

As described above, the SEC has a long history of using its general disclosure authority under the Securities and Exchange Acts to require disclosure of a wide range of information—both specialized and general, financial and non-financial—with the goal of better informing investors about the financial risks associated with registrants' securities. These disclosure requirements have covered risks that, like climate change, are broad in scope and uncertain in magnitude—such as market risk, COVID-19, and the adoption of the Euro—and have encompassed both material and immaterial information.

In its final rule, the SEC should consider highlighting the regulatory precedents discussed above in order to allay concern that the Commission is "discover[ing] in a long-extant statute an unheralded power" and to reassure the public that the Proposed Rule is consistent with the SEC's historical understanding of its statutory authority.

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[130] Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,334.

[131] *Id.* at 68,356.

[132] *Id.* at 68,345.

[133] *See, e.g.*, Proposed Rule, *supra* note 2, at 21,359.

Respectfully,

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